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 DEBTOR RESPONDENTS

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QUESTION PRESENTED

This Court stated the following question:

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

RULE 29.6 STATEMENT

Pursuant to this Court's Rule 29.6, the debtors in the underlying bankruptcy proceedings, respondents Purdue Pharma L.P. and its affiliates (collectively, the "Debtors"), disclose the following:

1. *Purdue Pharma L.P.*: Nondebtor Pharmaceutical Research Associates L.P. directly owns 100% of the ownership interests of Purdue Pharma L.P. ("PPLP"). Nondebtor PLP Associates Holdings L.P. directly owns approximately 99.5061% of the ownership interests of Pharmaceutical Research Associates L.P. Nondebtor BR Holdings Associates L.P. directly owns 100% of the ownership interests of PLP Associates Holdings L.P. Nondebtor Beacon Company and nondebtor Rosebay Medical Company L.P. each directly owns 50% of the ownership interests of BR Holdings Associates L.P. Nondebtor Heatheridge Trust Company Limited, as Trustee under Settlement dated December 31, 1993, directly owns 100% of the ownership interests of Beacon Company. Nondebtors Richard S. Sackler, M.D. and Cedar Cliff Fiduciary Management Inc., as Trustees under Trust Agreement dated November 5, 1974, directly own 98% of the ownership interests of Rosebay Medical Company L.P. To the best of the Debtors' knowledge and belief, none of these entities is publicly held, and no other person or entity directly or indirectly owns 10% or more of the ownership interests of PPLP.

2. *Purdue Pharma Inc.*: Nondebtor Banela Corporation directly owns 50% of the ownership interests of debtor Purdue Pharma Inc. ("PPI"); nondebtor Linarite Holdings LLC directly owns 25% of the ownership interests of PPI; and nondebtor Perthlite

Holdings LLC directly owns 25% of the ownership interests of PPI. Nondebtor Millborne Trust Company Limited, as Trustee of the Hercules Trust under Declaration of Trust dated March 2, 1999, directly owns 100% of the ownership interests of Banela Corporation. Nondebtor Data LLC, as Trustee under Trust Agreement dated December 23, 1989, directly owns 100% of the ownership interests of Linarite Holdings LLC. Nondebtor Cornice Fiduciary Management LLC, as Trustee under Trust Agreement dated December 23, 1989, directly owns 100% of the ownership interests of Perthlite Holdings LLC. To the best of the Debtors' knowledge and belief, none of these entities is publicly held, and no other person or entity directly or indirectly owns 10% or more of the ownership interests of PPI.

3. *Other debtors*: Each of the remaining debtors is wholly owned, directly or indirectly, by PPLP and/or PPI, as follows:

a. PPLP directly owns 100% of the ownership interests of debtors Purdue Transdermal Technologies L.P., Purdue Pharma Manufacturing L.P., Purdue Pharmaceuticals L.P., Imbrium Therapeutics L.P., Adlon Therapeutics L.P., Greenfield BioVentures L.P., Seven Seas Hill Corp., Ophir Green Corp., Purdue Products L.P. (f/k/a Avrio Health L.P.), Purdue Pharmaceutical Products L.P., Nayatt Cove Lifescience Inc., and Rhodes Associates L.P.

b. PPLP directly owns 99% of the ownership interests of debtor Purdue Neuroscience Company. PPI directly owns the remaining 1% of the ownership interests of Purdue Neuroscience Company.

c. Seven Seas Hill Corp. and Ophir Green Corp. each directly owns 50% of the ownership interests of debtor Purdue Pharma of Puerto Rico.

d. Rhodes Associates L.P. directly owns 100% of the ownership interests of debtors Paul Land Inc., Rhodes Pharmaceuticals L.P., and Rhodes Technologies.

e. Rhodes Technologies directly owns 100% of the ownership interests of debtors UDF LP and SVC Pharma Inc.

f. UDF LP directly owns 100% of the ownership interests of debtors Button Land L.P. and Quidnick Land L.P.

g. UDF LP directly owns 99% of the ownership interests of debtor SVC Pharma LP. SVC Pharma Inc. directly owns the remaining 1% of the ownership interests of SVC Pharma LP.

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INTRODUCTION

The first and most fundamental canon of statutory construction comes from a bankruptcy case: Congress "says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). Ultimately, the Trustee asks this Court to disregard that cardinal rule, rewrite the Bankruptcy Code to advance his own policy objectives, and strip courts of the flexibility Congress expressly granted them to take the steps necessary to craft successful reorganization plans.

On the text, this case is straightforward. In addition to specifying that Chapter 11 reorganization plans may provide for certain enumerated contingencies, Congress added a catchall: A plan may include "any other appropriate provision not inconsistent with the applicable provisions of this title." 11 U.S.C. § 1123(b)(6). The Trustee argues that § 1123(b)(6) cannot expressly authorize third-party releases because it does not specifically mention them. But in *United States v. Energy Resources Co.*, this Court rejected that very reading, holding that § 1123(b)(6) authorized a plan provision that was not specifically mentioned in § 1123, where it did not conflict with any other Code provision and was "necessary for the success of a reorganization plan." 495 U.S. 545, 546 (1990). Both are equally true here. The Trustee fails in his effort to generate a conflict with other provisions of the Code. And he has not challenged the bankruptcy court's finding that the releases at issue are necessary to the success of the plan. JA405.

The Trustee's case also depends on an incomplete and misleading portrayal of the releases at issue. The

Trustee repeatedly calls (at 2, 43) the releases "sweeping" in nature. But he glosses over that they are limited to claims against the Sacklers that legally and factually depend *on the Debtors' conduct*. JA397; *see* JA326 n.3. That restriction—honed by the bankruptcy court itself—means that the only claims subject to release are claims that "directly affect the *res* of the Debtors' estates." JA381. Without the releases, creditors could pursue claims against the Sacklers that—because they depend on the Debtors' conduct—would trigger indemnification and contribution claims against the Debtors and embroil them in litigation. In other words, the releases are needed to ensure that individual creditors, whose claims are in the trillions, cannot deplete the assets otherwise available for equitable distribution to all creditors by going through the back door. That explains why the *creditors themselves* insisted on the releases.

This key limitation also explains why the releases both protect the *res*—a core objective of the Code—*and* directly affect the creditor-debtor relationship. Allowing a few holdout creditors to jump the queue and pursue claims subject to the releases would imperil the recovery available to all creditors. Moreover, as the Trustee acknowledges (at 5), the releases were negotiated "[i]n exchange" for the settlement of the estates' claims against the Sacklers—by far the estates' biggest assets. The Code unquestionably grants power to settle the estates' own claims. § 1123(b)(3)(A). Resolving those claims to maximize the value of the estates for all creditors directly impacts the creditor-debtor relationship. Indeed, without the releases, there is no settlement, the Debtors likely would be forced into a Chapter 7 liquidation, and "unsecured creditors would probably recover

nothing from the Debtors' estates." JA405. Section 1123(b)(6) confers any residual authority necessary to effectuate the settlement of these claims.

The Trustee attempts to deflect from this statutory reality with a fictional narrative implying (at 44-45) that this is the Sacklers' plan. Nothing could be further from the truth. Indeed, the bankruptcy court found it "crystal clear" that "this is *not* the Sacklers plan," and that "anyone who contends to the contrary is . . . simply misleading the public." JA348. The plan was developed by, and for, the creditors, who overwhelmingly support it. As a group, creditors are uniquely interested in protecting their own interests, not in allowing "wealthy individuals" (Trustee Br. 44-45) to get away with abusing the system. And all this betrays a bigger problem for the Trustee: He repeatedly ignores the bankruptcy court's detailed factual findings. But the Trustee did not challenge those findings below, and it is far too late to challenge them now. The Trustee's attempt to make this case about the Sacklers just betrays the weakness of his position on the purely legal question presented.

With zero concrete stake in this bankruptcy, the Trustee has nothing to lose if he destroys the plan. But the individuals and entities with an actual stake in the outcome would lose everything. That is why the victims with the greatest reason to seek retribution against the Sacklers—including over a hundred thousand individuals and state and local government entities across the country—overwhelmingly support the plan. Indeed, countless lives will be helped—and literally saved—by the billions of dollars that will flow to communities nationwide under the plan. In asking the Court to nullify the plan and deny victims this re-

lief, the Trustee says (at 47) the releases are unnecessary. That is pure fantasy. As the bankruptcy court found, without the releases, the plan would "unravel" and victims would likely recover nothing. JA405.

Congress unambiguously gave courts the catchall authority to approve Chapter 11 plan provisions necessary to make reorganizations work in the infinitely varied world of complex bankruptcies. "[T]he whole value of a generally phrased residual clause" like § 1123(b)(6) "is that it serves as a catchall for matters not specifically contemplated." *Republic of Iraq v. Beaty*, 556 U.S. 848, 860 (2009). As § 524(g) underscores, if Congress wants to revisit or refine that authority, it can. But this Court should give effect to what Congress said—and meant.

STATEMENT OF THE CASE

A. Purdue, The Sacklers, And OxyContin

1. Purdue Pharma L.P. ("Purdue") is a privately held company. The Sacklers purchased Purdue's predecessor in 1952, and Sackler family members held positions as directors and senior officers at Purdue for decades. JA642-47. During this period, Purdue developed OxyContin, a controlled-release opioid analgesic. The FDA approved OxyContin for the management of moderate to severe pain in 1995. As OxyContin use increased, so did abuse. By the early 2000s, opioid addiction had become a national crisis. JA845-46.

2. In 2001, Purdue began to face product-liability lawsuits claiming it had improperly "downplay[ed]" OxyContin's addiction risks. JA846; *see* JA655-75. Years after those cases were resolved, beginning around 2017, Purdue was deluged by a second wave

of litigation seeking to hold Purdue liable for the opioid crisis. Many suits in this second wave also named the Sacklers and related entities as defendants, alleging that they were responsible for Purdue's tortious acts or that Purdue was their alter ego. JA669-74. Indeed, given the Sacklers' role in the company, there was often "no way for [plaintiffs] to pursue the allegations against [the Sacklers] without implicating Purdue, and vice versa." JA743 (citation omitted).

But even when plaintiffs pursued the Sacklers without also naming Purdue as a defendant, Purdue remained potentially liable given the Sacklers' role as directors and officers of Purdue. In 2004, long before any bankruptcy was contemplated, Purdue agreed to indemnify its directors and officers—including the Sacklers serving in those roles—against claims (and related defense costs) made in connection with their service to Purdue. JA846, 893. Purdue also faced liability based on contribution principles, and claims against the Sacklers could drain Purdue's insurance policies. JA381, 454, 857, 874-75.

3. Between 2008 and 2017, Purdue distributed $10.4 billion to trusts benefitting the Sacklers. JA681. Of that, $4.6 billion was distributed for taxes owed on the income generated by Purdue (which does not pay taxes at the entity level). *Id.* Much of the non-tax distributions was made to spendthrift trusts, created as far back as 1974, "that could not be reached in bankruptcy," as well as in "off-shore entities located in places like the Bailiwick of Jersey." JA637.

By 2019, "all Sacklers had stepped down from Purdue's Board." JA848. Since then, no Sackler has been involved "in any way" in running Purdue. JA348.

B. Purdue's Bankruptcy And Settlement Of The Estates' Claims Against The Sacklers

1. In September 2019, Purdue and certain affiliates—collectively, "the Debtors"—filed for Chapter 11 reorganization. JA634. From the beginning of the bankruptcy proceedings, creditors were extraordinarily well-represented. The Trustee appointed an Official Committee of Unsecured Creditors to represent the interests of all unsecured creditors. JA688. Multiple ad hoc creditors' groups were also formed by personal-injury victims; state, local, and other governmental entities; and other constituencies. JA688-90. As the bankruptcy court found, the proceedings were "driven as much, if not more, by the [creditors]," who "wanted more than anything to obtain as much value not only from the Debtors but also from the Sacklers." JA348-49.

2. Over the next two years, the Debtors and their creditors worked around-the-clock toward a negotiated resolution that would maximize the return to all creditors. During this process, there was "extensive discovery," including the production of "tens of millions of documents." JA890. Some of "the best mediators . . . in the world" then guided stakeholders through several rounds of hard-fought negotiations to resolve key intercreditor issues and to settle claims against the Sacklers. JA339-40. This intense, years-long process culminated in a series of interlocking agreements dependent on the multibillion-dollar settlement reached with the Sacklers. JA692-97.

As part of this process, Purdue and its creditors settled civil claims against the Sacklers for likely the "largest contribution" of its kind in history. JA895.

In all, the Sacklers agreed to contribute up to $6 billion as part of the settlement—at least 97% of the non-tax cash distributions made by Purdue between 2007 and 2019. JA894-95.[1] The releases at issue were indispensable to that settlement. As the bankruptcy court found, the Sacklers were "not going to agree to provide the [funds] without receiving" the releases "in return." JA400. And creditors themselves insisted on the releases to prevent any individual creditor from obtaining a recovery at the expense of other creditors or imperiling the Sacklers' ability to pay. *See* JA405-07; Debtors' Stay Opp. App. 351a:8-25, 356a:9-22.

The claims against the Sacklers, and the settlement thereof, are the biggest asset in the Debtors' estates, which include "all the [Debtors'] assets and rights" and is "the pot out of which creditors' claims are paid." *Mission Prod. Holdings, Inc. v. Tempnology, LLC*, 139 S. Ct. 1652, 1663-66 (2019).

3. Purdue and the United States separately entered a civil settlement and plea agreement. The United States obtained a $2 billion "superpriority" claim, but agreed to credit $1.775 billion of it for value distributed to state and local governments for opioid-crisis abatement. JA848-49. This settlement, too, "hinges on" the money flowing into the estates from the Sackler settlement. JA352. In seeking approval of this settlement, the United States touted the benefits of the abatement-centric settlements underlying the plan. Debtors' Stay Opp. App. 307a:4-16.

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[1] The Sackler payment in the confirmed plan was $4.325 billion. That amount was increased to $5.5 to $6 billion following an additional settlement. JA894-95.

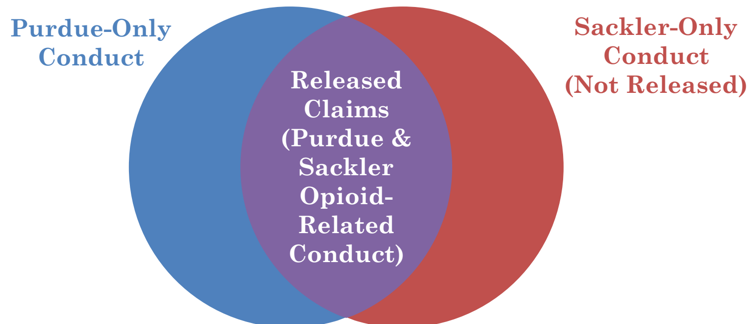
C. Bankruptcy Plan And Releases At Issue

1. The reorganization plan has several key pillars. *First*, it marshals the estates' funds—including the billions secured through the Sackler settlement—into trusts dedicated to victim compensation and public-health measures to battle the opioid crisis. JA700. When the plan takes effect, over $1.3 billion will be disbursed immediately; the remaining billions will follow in stages. *See* Debtors' Stay Opp. App. 442a-47a. *Second*, the plan dissolves Purdue and transfers its operating assets to a new company that will be owned by creditor trusts and dedicated to mitigating the opioid crisis, including by distributing novel opioid-overdose reversal medicines on a not-for-profit basis. JA701-02. And *third*, the plan secures valuable non-monetary relief, including the Sacklers' agreement to exit the opioid business worldwide and a public repository of Purdue's records to study the causes of the opioid crisis. JA108-12, 401, 818.

2. The plan also effectuates the settlement of the estates' claims against the Sacklers. Section 10.7(a) and Section 10.7(c) release the Sacklers from claims held by the Debtors and their estates, and vice-versa. JA272, 277. Section 10.7(b)—the "third-party release" provision at issue—releases the Sacklers from certain claims held by the Debtors' creditors, "including any derivative claims asserted or assertible . . . on behalf of the Debtors or their Estates," as well as claims that the Debtors' creditors could "assert in [their] own right" insofar as they relate to the "Debtors' Opioid-Related Activities." JA274-75. The releases do not "adjudicat[e]" these claims, JA382; an injunction channels them to creditor trusts for resolution under detailed procedures, *see, e.g.*, JA556-603.

While the releases cover an array of opioid-related claims held by creditors, including claims for fraud, they are limited in several critical respects. In particular, they encompass only claims for which the "conduct, omission or liability of any Debtor or any Estate is the legal cause or is otherwise a legally relevant factor." JA275. Thus, "[t]he 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" that were settled under the plan. JA375; *see* JA381. Any third-party claims against the Sacklers that are (a) not held by a creditor of the Debtors, (b) not opioid-related, or (c) opioid-related but *not* dependent on the Debtors' conduct (*e.g.*, "a claim against one of the Sacklers, some of whom are doctors, for negligently prescribing OxyContin"), are *not* subject to the releases. *See* JA198-99, 215, 274, 376, 396.

To illustrate this feature of the releases:



See JA891-92.[2]

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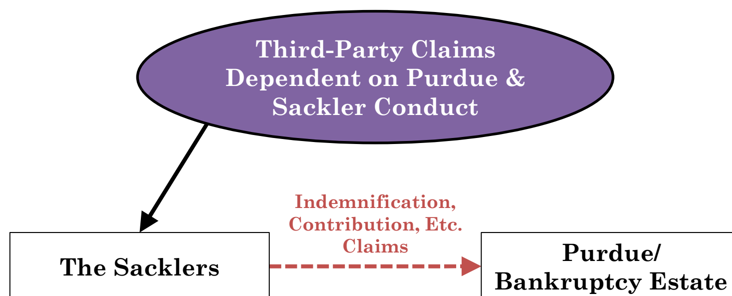
[2] The Trustee notes (at 6) that the releases extend to the Sackler family more broadly. But to be subject to the releases, any claim against any Sackler would have to depend on the Debtors' conduct, among other requirements.

Because third-party claims are released only if they depend on the Debtors' conduct, the bankruptcy court found that *all* the released claims "directly affect the *res* of the Debtors' estates." JA381. If such third-party claims were pursued, they would trigger claims by the Sacklers against the estates for indemnification, contribution, or insurance coverage—"likely deplet[ing] the *res*, no matter the ultimate outcome," due to the sheer cost of litigating them. JA892; *see* JA381, 454, 746, 857, 875.[3] To illustrate:



See JA381, 745, 875, 892.

There are other limitations on the releases as well. For example, the releases exclude all claims based on post-bankruptcy conduct, governmental claims for criminal or tax liability, and claims by the United States. JA198-99, 287-95. If the U.S. government or "any prosecutor wants to pursue [a criminal action] against [the Sacklers], they can." JA339.

3. Purdue undertook an "unprecedentedly broad" campaign to notify potential creditors of the plan's terms—including the releases—in "plain English."

[3] The indemnification agreement does not apply if a court determines the Sacklers "did not act in good faith." JA875 (citation omitted). But that issue was "hotly disputed" by the Sacklers. JA747.

JA302. This campaign reached nearly every U.S. adult multiple times. JA300. An "unprecedented number" of creditors (over 120,000) voted on the plan—orders of magnitude more than in most Chapter 11 cases. JA303. And creditors across "every voting class" voted "overwhelmingly" in favor of it: 95% of voters overall approved the plan, with personal-injury claimant classes ranging between 95.7% and 98% approval. *Id.* Nearly 5,000 state, local, and tribal government entities approved the plan at a rate of 97%. JA327; Debtors' Stay Opp. App. 322a. All 50 states now support or do not oppose the plan. *See* JA865-66.

D. Plan Confirmation

The bankruptcy court confirmed the plan after conducting "a six-day trial involving 41 witnesses and a courtroom full of exhibits." JA299. Its detailed factual findings remain undisputed. JA734 n.54; *see* D. Ct. Doc. 273, at 12:5-23 (Trustee's counsel acknowledging underlying facts were undisputed).

After scrutinizing the releases, the bankruptcy court required that Section 10.7(b) of the plan be "modified to state that a Debtor's conduct, or a claim asserted against a Debtor, must be a legal cause of the released claim, or a legally relevant factor to the third-party cause of action against the [Sacklers]." JA397. Due to this "causal legal dependence on [a] Debtor's conduct," JA396, the court found that the claims subject to the releases would "directly affect the *res* of the Debtors' estates, including insurance rights, the [Sacklers'] rights to indemnification and contribution, and the Debtors' ability to pursue the estates' own closely related, indeed fundamentally overlapping, claims." JA381.

The bankruptcy court also found that the releases were not only necessary to the reorganization but in the "best interests of" creditors. JA460. It found that the plan would likely "unravel[]" without the releases, forcing Purdue into a Chapter 7 liquidation where opioid victims and other tort claimants would "most likely" recover nothing from the estates. JA365; *see* JA400. As part of that analysis, the court concluded that, even if claimants obtained favorable judgments against the Sacklers, they would face "serious collection issues" since the Sacklers "are a large family," many of them "live outside the territorial jurisdiction of the United States," and their assets are "widely scattered" and held in "offshore trusts." JA361, 404. Ultimately, the court found that "the Sacklers are paying a substantial and, under the circumstances of this case, justifiable amount." JA374.

The bankruptcy court rejected the Trustee's claim that creditors received nothing on account of their claims against the Sacklers, calling it "clearly wrong." JA629. As the court explained, "the settlement of those third-party claims enables the entire plan and the distributions under the plan, without which [creditors] would receive . . . literally no recovery" due to the United States' superpriority claim and the free-for-all that would ensue absent the plan. *Id.*

Applying longstanding precedent from the Second Circuit and other courts, the bankruptcy court concluded that § 1123(b)(3)(A) and (b)(6) authorized the releases as narrowed. JA442. It explained that those provisions permit resolution of the Debtors' "enormous claims" against the Sacklers, as well as the "very closely related claims that are separately asserted by third parties who are also creditors of the Debtors." JA299. Whether the released claims are

"derivative" or "direct," the court held that it is the substantive "effect" of the claims on the estates that matters. JA382. And, here, the court found, all the released claims "directly affect the *res* of the Debtors' estates," and the reorganization would be impossible without resolving them. JA381; *see* JA400, 457.

E. Decisions Below

On appeal, the district court held that, because the Bankruptcy Code does not specifically refer to nonconsensual third-party releases outside the asbestos context, it does not authorize the releases at issue here. JA753-58, 771, 796. Recognizing that its resolution of the issue was contestable and warranted immediate review, however, the court granted permission to file an interlocutory appeal.[4]

The Second Circuit reversed. It held that the authority to approve third-party releases "is rooted" in §§ 105(a) and 1123(b)(6). JA876. As the court explained, "§ 1123(b)(6) permits the inclusion of 'any other appropriate provision' in a plan so long as it is 'not inconsistent' with other sections of the Bankruptcy Code." JA877. The court looked to *Energy Resources*, where this Court held that § 1123(b)(6) confers a broad "residual authority" to approve appropriate plan provisions that is limited only "by what the Code expressly forbids, not what the Code explicitly allows." JA877-78 (emphasis and citation omitted). After considering the Code provisions cited by the Trustee—including § 524(e) and (g)—the court

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[4] The district court also held that, under *Stern v. Marshall*, a district court must approve any nonconsensual third-party releases. 564 U.S. 462 (2011); *see* JA728-34. The Second Circuit affirmed that ruling. JA867-68. It is not challenged here.

could discern "no reason grounded in the text of the Bankruptcy Code to bar the inclusion of third-party releases in plans of reorganization." JA880.

The Second Circuit also stressed that courts must carefully review such releases to ensure they are warranted in the circumstances. JA886. The court identified several factors to guide this determination, against the "backdrop of equity." JA886-96. Applying them, the court stressed that the released claims here are "factually and legally intertwined" with the conduct of the Debtors and "directly affect the *res*." JA891; *see* JA852, 857-58, 870. Indeed, without the releases, the court explained, "the Debtors would, in all likelihood, be required to litigate indemnity and contribution claims brought against them by the Sacklers, which would likely deplete the *res*, no matter the outcome of those claims." JA892. The court thus concluded that "the [r]eleases are both needed for the distribution of the *res* and to ensure the fair distribution of any recovery for claimants." JA894.

SUMMARY OF ARGUMENT

The Second Circuit correctly held that the Bankruptcy Code authorizes nonconsensual third-party releases in appropriate circumstances.

I. Since its beginnings, the core function of bankruptcy has been to safeguard the bankruptcy estate—or *res*—and ensure its equitable distribution to all creditors. Bankruptcy law has always granted courts the authority and flexibility needed to achieve this objective. Section 1123(b)(6) reflects this tradition. After § 1123(b) identifies certain specific provisions a plan may include, paragraph (b)(6) states that a plan may include "any other appropriate provision not inconsistent with the applicable provisions of this title."

This catchall unambiguously covers third-party releases, as long as they are "appropriate" in the circumstances and "not inconsistent with" other provisions of the Code. The Trustee does not even try to challenge the Second Circuit's careful determination that the releases at issue are appropriate in the circumstances here. And the Trustee's attempt to generate a conflict with other provisions of Title 11 fails.

This commonsense reading of § 1123(b)(6) aligns with *Energy Resources*, in which this Court rejected the same flawed reading of § 1123(b)(6) the Trustee advances here. It is supported by the context of § 1123(b)(6), which follows a series of provisions that, among other things, authorize the "impair[ment]" of claims and the settlement of estate claims. § 1123(b)(1), (3)(A). It advances the purposes of the Code in protecting the estate and modifying creditor-debtor relationships. And it is grounded in historical practice showing that courts of equity have long exercised broad power to protect the estate, including by enjoining third parties. These considerations all support the conclusion that any reasonable person would reach if she were given § 1123(b)(6): Congress has authorized a court to approve a third-party release, among other plan provisions, where it determines the release is appropriate in the circumstances.

At the same time, there are important limits on when such releases are available. Under § 1123(b)(6), any plan provision—including third-party releases—must be appropriate in the circumstances. And as *Energy Resources* establishes, that means the provision must at least be necessary to the success of the reorganization. As with other plan provisions, releases also must be considered "against a backdrop of equity," JA890, keeping all relevant circumstances in

mind. That includes whether the releases are necessary to protect the *res* and are supported by creditors, the group with the most acute interest in maximizing recovery. And releases meeting these criteria must be approved not only by a bankruptcy court, but by an Article III court as well. These limitations sharply curtail the availability of such releases.

II. The Trustee's counterarguments fail. *First*, the Trustee mistakes § 1123(b)(6)'s unambiguous breadth for silence. But the whole point of a catchall like § 1123(b)(6) is to sweep *in* matters Congress did not specify. *Second*, there is no conflict with any applicable provision of the Code. Section 524(e) concerns only co-liability for a debtor's debts and the releases here do not provide anything close to the "full repose" of a discharge. Unable to claim a conflict, the Trustee attempts to draw a negative inference from § 524(g), but Congress forbade that very inference when it passed § 524(g). And 28 U.S.C. § 1411 is not an applicable provision of Title 11, and poses no conflict anyway. *Third*, the constitutional-avoidance canon does not apply because § 1123(b)(6) is unambiguous and there is no constitutional problem to avoid. The releases were approved only after unprecedented notice and process. And *fourth*, the Trustee's policy arguments are belied by the bankruptcy court's uncontested findings and must be directed to Congress.

III. Finally, the Trustee's position ultimately fails for an even more basic reason: Neither § 307 nor Article III confers standing on him to appeal the Second Circuit's decision to this Court, and none of the other respondents who have filed briefs can cure that fatal defect. The Trustee here is an interloper who has no standing—and no right—to destroy a plan that the actual victims crafted and overwhelmingly support.

Given this standing defect, the Court should dismiss the writ of certiorari as improvidently granted. But, if the Court reaches the merits, it should affirm.

ARGUMENT

Section 1123(b)(6) of the Bankruptcy Code states that a Chapter 11 reorganization plan may include "any . . . appropriate provision not inconsistent with the applicable provisions of this title." This case concerns whether that statutory grant encompasses a plan provision that releases claims held by nondebtors against other nondebtors, without their consent. The Trustee's position is that the answer to that question is no—and *always* no. No matter the threat to the bankruptcy estate, no matter whether the release is supported by 99.99% of the creditors, no matter whether victims would receive nothing without a plan, no matter whether a reorganization would be impossible without the release, and so on. The Second Circuit correctly rejected that extreme position.

I. SECTION 1123(b)(6) AUTHORIZES THIRD-PARTY RELEASES IN APPROPRIATE AND THUS LIMITED CIRCUMSTANCES

A. Congress Has Long Given Courts Wide Authority To Protect Bankruptcy Estates

Breadth and flexibility are indispensable features of bankruptcy. The scope of Congress's authority under the Bankruptcy Clause "is incapable of final definition." *Wright v. Union Cent. Life Ins. Co.*, 304 U.S. 502, 513 (1938). Exercising this authority, Congress has vested courts with the power to resolve the varied and unpredictable challenges that arise in connection with the administration of bankruptcy estates. As Justice Story observed in discussing one of the first

federal bankruptcy laws, "the purposes so essential to the just operation of the bankrupt[cy] system, could scarcely be accomplished except by clothing the courts of the United States sitting in bankruptcy with the most ample powers and jurisdiction to accomplish them." *Ex parte Christy*, 44 U.S. (3 How.) 292, 312 (1844); *see also, e.g.*, *Continental Ill. Nat'l Bank & Tr. Co. of Chi. v. Chicago, Rock Island & Pac. Ry. Co.*, 294 U.S. 648, 671 (1935) (discussing the "striking" flexibility inherent in the bankruptcy laws).

At the core of courts' exercise of the bankruptcy power is their "*in rem* jurisdiction." *Central Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 369 (2006). The irreducible "features of every bankruptcy proceeding are the exercise of exclusive jurisdiction over all of the debtor's property" and its "equitable distribution" to the debtor's creditors. *Id.* at 363-64. But courts' authority has never been strictly limited to *in rem* adjudication of a debtor's property, since that cannot be effectuated without power to marshal estate assets and ensure that creditors abide by an equitable disposition of those assets. *See id.* at 370-71. And the "Framers would have understood that laws 'on the subject of Bankruptcies' included laws providing, in certain limited respects, for more than simple adjudications of rights in the res." *Id.* at 370.

The authority of bankruptcy courts thus extends beyond proceedings merely "involving the property of the debtor or the estate" to "'all matters connected with the [estate].'" *Celotex Corp. v. Edwards*, 514 U.S. 300, 308 (1995) (citation omitted). That is especially true in cases like this one that involve a "reorganization under Chapter 11, rather than a liquidation under Chapter 7." *Id.* at 310. As this Court has

explained, in Chapter 11 reorganizations, the complexity of the debtor's affairs, number of creditors, and clashing of interests frequently demand that courts act on matters that, while not strictly *in rem*, nevertheless have "a direct and substantial adverse effect on the [debtor's] ability to undergo a successful reorganization." *Id.* Exactly as happened here.

B. Section 1123(b)(6) Authorizes Third-Party Releases As "Appropriate" And Necessary

Section 1123(b)(6) embodies the flexibility necessary to accomplish these longstanding objectives. The plain language, surrounding context, purposes of bankruptcy law, and history all confirm that § 1123(b)(6) means what it says: A court may approve the release of third-party claims where the release is appropriate under the circumstances.[5]

1. Section 1123(b)(6) Unambiguously Covers Third-Party Releases

For a statutory-interpretation case, the Trustee's brief is surprisingly—and tellingly—light on interpretation of what all agree is the key statutory provision at issue, § 1123(b)(6). *See* Trustee Br. 22-24.

To start, § 1123 governs the contents of a reorganization plan under Chapter 11, which allows a business to restructure while continuing to operate, rather than ceasing operations and selling off assets (as under Chapter 7). Subsection (a) provides a list of

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[5] The Second Circuit relied on both §§ 105(a) and 1123(b)(6). Section 105(a) grants broad power to "carry out" other provisions of the Code. § 105(a). Here, as the Second Circuit recognized, § 105(a) is used to carry out § 1123(b)(6). JA877. Accordingly, we focus on explaining why § 1123(b)(6) authorizes third-party releases in appropriate circumstances.

things that a plan "shall" do, such as designate classes of claims, specify their treatment, treat creditors in the same class uniformly, and "provide adequate means for the plan's implementation." § 1123(a)(1)-(5). Subsection (b), in turn, sets out another list of things a plan "may" do, such as "impair or leave unimpaired any class of claims," § 1123(b)(1); provide for "the settlement or adjustment of any claim or interest belonging to the debtor or to the estate," § 1123(b)(3)(A); and, finally, "include any other appropriate provision not inconsistent with the applicable provisions of this title," § 1123(b)(6).

Section 1123(b)(6)'s breadth is unambiguous. Congress authorized "*any* other . . . provision," as long as it is "appropriate" and "not inconsistent with the applicable provisions of [Title 11]." *Id.* (emphasis added). Congress's use of "any" demonstrates that it intended to confer the flexibility needed to include the provisions essential to forging successful reorganizations, assuming the other two prerequisites are met. *See Ali v. Federal Bureau of Prisons*, 552 U.S. 214, 221 (2008) ("Congress could not have chosen a more all-encompassing phrase than 'any other law enforcement officer' to express [its] intent."); *Department of Hous. & Urb. Dev. v. Rucker*, 535 U.S. 125, 131 (2002) ("[T]he word 'any' has an expansive meaning . . . ." (citation omitted)). That authority unambiguously sweeps *in* third-party releases, unless they flunk one of these statutory conditions (which, as explained below, they do not here). *See United States v. Monsanto*, 491 U.S. 600, 608-09 (1989) ("any property" "unambiguous[ly]" includes assets to be used for attorneys' fees, despite not mentioning such fees).

Indeed, the Trustee concedes (at 22-24) that § 1123(b)(6) is a "catchall." He nevertheless argues

(at 21-22) that § 1123(b)(6) "does not provide the requisite authority" for third-party releases because § 1123(b)(6) does not "specifically authorize[] a release of . . . claims against a nondebtor." But that argument fundamentally mistakes how statutory catchalls operate. As Justice Scalia explained, a "catchall" like § 1123(b)(6) is designed to be open-ended and to authorize "matters not specifically contemplated—known unknowns." *Republic of Iraq v. Beaty*, 556 U.S. 848, 860 (2009). That is the "whole value of a generally phrased residual clause." *Id.*

Congress's use of such a catchall in § 1123 is unsurprising. In Chapter 11, Congress "necessarily entrusted" bankruptcy courts "with broad equitable powers to balance the interests of the affected parties, guided by the overriding goal of ensuring the success of the reorganization." *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 389 (1993); *see Celotex*, 514 U.S. at 310. And, in *United States v. Energy Resources Co.,* this Court construed § 1123(b)(6) as a catchall authorizing bankruptcy courts to craft plan provisions that, while not specifically identified in the Code, are "necessary to the success" of the plan. 495 U.S. 545, 548-49 (1990).[6]

In *Energy Resources*, this Court considered a bankruptcy court's authority to order the IRS—pursuant to a reorganization plan and against the IRS's rules—to apply certain tax payments toward outstanding "trust fund" taxes before other taxes. *Id.* at 546-47. This plan provision in effect operated as a third-party release: It was included to reduce the po-

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[6] In *Energy Resources*, the provision now numbered as § 1123(b)(6) was numbered as § 1123(b)(5).

tential liability of a nondebtor (one of the debtor's officers, the Sackler of that case) to another nondebtor (the IRS) for the trust-fund taxes, in exchange for a contribution of money to the estate. *See Energy Resources* U.S. Br. 5 (No. 89-255), 1989 WL 428936. The government argued that the bankruptcy court lacked authority to include this plan provision, because "no provision in the Bankruptcy Code or elsewhere . . . expressly confers upon the bankruptcy court authority to direct the IRS to apply Chapter 11 priority tax payments first to trust fund liability." *Id.* at 28.

That argument—almost verbatim to the one the Trustee advances here in contending that the Code does not authorize third-party releases—was roundly rejected by the Court. Although the Court recognized that the Code "does not explicitly authorize the bankruptcy courts to approve reorganization plans designating tax payments as either trust fund or nontrust fund," it held that the "residual authority to approve reorganization plans" granted by § 1123(b)(6) authorized the approval of the tax-designation provision where it was "necessary to the success of a reorganization plan." *Energy Resources*, 495 U.S. at 548-49.

Unsurprisingly, it was Justice Scalia who asked the government's counsel, in response to an argument that "there is no provision in [the Code] that lets courts do this," "What do you do with § 1123(b)([6]), which says that the plan may include any other appropriate provision not inconsistent with the application provisions of this title?"[7] Section 1123(b)(6)

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[7] *Energy Resources* Oral Argument at 25:47-26:01 (No. 89-255), https://www.oyez.org/cases/1989/89-255.

became the crux of the decision. And the Court's construction of § 1123(b)(6) in *Energy Resources* has the full force of statutory stare decisis here.

2. Statutory Context Confirms This Reading Of § 1123(b)(6)

Statutory context bolsters the conclusion that § 1123(b)(6) authorizes third-party releases in appropriate circumstances. As the Trustee notes, the preceding paragraphs of § 1123(b) allow courts to settle claims held by a debtor and modify the rights of those who hold claims against the debtor. *See* Trustee Br. 23 (citing § 1123(b)(3)(A), (5)). Citing the *ejusdem generis* and general/specific canons, the Trustee argues (at 23-24) that § 1123(b)(6) "cannot be read" as authorizing "the involuntary settlement and adjustment of claims that nondebtors have against third parties." But he gets it backwards. These canons of construction support the Second Circuit's reading.

As this case illustrates, in authorizing the releases at issue, § 1123(b)(6) serves as a natural adjunct to other paragraphs of § 1123. Section 1123(b)(3)(A), for example, allows the plan to provide for the settlement of the estates' claims against the Sacklers. Without the releases, there is no settlement of those claims and no $6 billion. JA400. To the extent § 1123(b)(3)(A) does not itself authorize the releases, § 1123(b)(6) confers any additional authority needed to effectuate settlement of the estates' claims. That authority is bolstered by other paragraphs of § 1123 because (a) the claims subject to release factually and legally overlap with claims against the Debtors, which may be "impaired" or "modif[ied]," § 1123(b)(1), (5); (b) the plan must "provide adequate means for [its] implementation," § 1123(a)(5), and without the

releases there is no plan; and (c) the releases facilitate the ratable distribution of estate assets among similarly situated creditors, *see* § 1123(a)(4). Section 1123(b)(6) confers whatever residual authority is needed to approve plan provisions so closely related to the other powers enumerated in § 1123.

Section 1123(b)(6) also ensures similar treatment of inextricably intertwined claims. The Trustee himself conceded below that the Code permits the release of *derivative* claims held by Purdue's creditors against nondebtors.[8] Derivative claims—for example, a claim that Sackler board members improperly distributed funds to the Sackler trusts or that the Sacklers were acting as alter egos of the Debtors in undertaking other alleged wrongs, *cf.* JA870-71—belong to individual creditors under state law, just like direct claims. But upon the filing of bankruptcy, the estate secures the exclusive right to litigate or settle such claims for the benefit of all creditors. *See In re Tronox Inc.*, 855 F.3d 84, 100 (2d Cir. 2017); 2 Frank O. Loveland, *A Treatise on the Law and Proceedings in Bankruptcy* 1041 (4th ed. 1912) ("[T]he right which before the adjudication in bankruptcy belonged to the creditors was taken from them and given to the [estate].").

Direct claims subject to the releases at issue are functionally equivalent to such derivative claims, because—to fall within the releases—the claims must depend on the Debtors' own conduct, and thus directly affect the *res*. *Supra* at 8-10. Yet, a bankruptcy court cannot ensure the "same treatment" for those claims, § 1123(a)(4), or effectively provide for the "settlement

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[8] *See* CA2 Oral Argument at 01:28:20-39 (conceding that, as to "derivative releases," the "Trustee has not contested the propriety of that sort of release").

or adjustment" of the estates' own claims, § 1123(b)(3)(A), if holdout creditors could assert direct claims against nondebtors that inevitably affect the *res* and all creditors' overall recovery. Section 1123(b)(6) allows courts to prevent creditors from pursuing claims against nondebtors that would deplete or destroy the *res* and thus undermine the comprehensive relief offered to all creditors in bankruptcy. What matters is not the label placed on the claim—"direct" or "derivative"—but its effect on the estate.

3. This Reading Of § 1123(b)(6) Advances The Core Objectives Of Bankruptcy

The Trustee (at 36) reads into § 1123(b)(6) a limitation that a plan provision must be strictly limited to the creditor-debtor relationship. That limitation appears nowhere in the text. Moreover, in this case, the bankruptcy court found the releases indispensable to the success of the reorganization, JA405, and thus to the restructuring of the creditor-debtor relationship.

The Trustee rests on the premise that bankruptcy concerns the "subject of the relations between [a] . . . debtor and his creditors, extending to his and their relief." Trustee Br. 20 (alterations in original) (quoting *Wright*, 304 U.S. at 513-14). But as this case illustrates, third-party releases can, and do, bear directly on the creditor-debtor relationship. As discussed, the releases at issue apply only to claims held by the Debtors' creditors; cover only claims that depend on the Debtors' own conduct; are necessary to settle the Debtors' claims against the Sacklers; and are designed to protect the *bankruptcy estate* to maximize the "relief" available to all creditors. *Supra* at 8-13, 23-24. Without the releases, there would be no

reorganization and "unsecured creditors would probably recover nothing from the Debtors' estates." JA405. One can hardly imagine a more acute impact on the creditor-debtor relationship than that.

But contrary to the Trustee's insinuation (at 19-21, 28), the bankruptcy power is not confined solely to creditors and debtors, and Congress sensibly did not impose that limit in § 1123(b)(6). The bankruptcy power extends to "all matters connected with the bankruptcy estate." *Celotex*, 514 U.S. at 308 (citation omitted). As this Court held in *Wright*, courts' power over the estate is plenary and may affect third parties (there, purchasers of estate property) who "enter into the radius of the bankruptcy power." 304 U.S. at 514. After all, as *Wright* further recognized, bankruptcy is not concerned only with "the relations between [a] . . . debtor[] and his creditors," but also with "*their relief*." *Id.* at 513-14 (emphasis added) (citation omitted). A core objective of bankruptcy is thus the protection of the *res* to maximize the relief available to creditors. *See, e.g.*, *Straton v. New*, 283 U.S. 318, 320-21 (1931).

As *Energy Resources* illustrates, this Court has recognized that courts' power over the estate includes granting relief that impacts claims or rights held by nondebtors against nondebtors. *Supra* at 21-22. Likewise, in *Van Huffel v. Harkelrode*, a bankruptcy court sold estate property "free of all incumbrances," including a lien for state taxes that had accrued pre-bankruptcy. 284 U.S. 225, 226 (1931). The Court, in an opinion by Justice Brandeis, held that, although the bankruptcy law at the time "contain[ed] no provision which in terms confer[red] upon bankruptcy courts the power to sell property of the bankrupt free from incumbrances," "the power was granted by implication." *Id.* at 227. As a result, in *Van Huffel*, a

county treasurer (a nondebtor) could not foreclose on the lien or otherwise collect the accrued taxes from the purchaser (also a nondebtor).

Here, the connection to bankruptcy's objective in protecting the estate is direct because the releases at issue cover only claims that "directly affect the *res* of the Debtors' estates." JA381. Without the releases, the estates will likely be exhausted in the ensuing free-for-all. JA405. This would not just leave creditors with nothing, but defeat the "fundamental purpose of reorganization"—"to prevent a debtor from going into liquidation, with an attendant loss of jobs and possible misuse of economic resources." *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 528 (1984).

4. This Reading Of § 1123(b)(6) Is Supported By Historical Practice

This reading of § 1123(b)(6) is also grounded in traditional equity practice. Historically, courts of equity exercised unquestionably broad powers in cases analogous to modern bankruptcy. Equity developed the "composition," a precursor to modern cramdown, through which creditors would receive a fractional recovery on their debts. Courts of equity could extract consent through "all extreamitie that maie be used," including imprisonment of recalcitrant creditors if necessary. John C. McCoid, II, *Discharge: The Most Important Development in Bankruptcy History*, 70 Am. Bankr. L.J. 163, 175 (1996) (citation omitted). Later, through "bills of conformity," courts of equity could achieve a composition of the estate—despite the presence of holdouts—by enjoining common-law suits to collect debts. *See id.* at 176.

Equity could—and did—enjoin claims held by creditors of the debtor against third parties. In *Tiffin*

v. Hart, for example, a father died insolvent and his sons and certain third parties were sureties on his debts. *See Tiffin v. Hart* (1618-19), *in* John Ritchie, *Reports of Cases Decided by Francis Bacon* 161, 161 (London 1932). A supermajority of the creditors agreed to a composition through which they would receive nearly all the assets of the father and the sons. *See id.* at 162. But a few creditors dissented. The Chancellor nonetheless ratified this composition—and enjoined the dissenting creditors from suing not only the father's estate and the sons, but the third-party sureties as well. *See id.* at 164. The Trustee's assertion that the releases at issue here lack any analogue in traditional equity practice is thus wrong.

The Trustee's alternative description (at 37-38) of "traditional equity practice" rests on two false premises. *First*, this case does not involve an "injunction" that "control[s] the rights of *non-parties*." Trustee Br. 37 (emphasis added). Everybody who is bound by the releases at issue is a party to the bankruptcy by virtue of being a creditor of Purdue. *See* JA215, 274. And *second*, the Trustee himself recognizes (at 38) that equity developed an "exception to the principle against resolving third parties' rights" in the context of "limited fund[s]." The channeling injunction here was entered to protect the bankruptcy *res*—a quintessential example of a limited fund. *See* JA892; *cf. Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 860 n.34 (1999).

Touting a case he never cited in multiple rounds of briefing below, the Trustee argues that this Court rejected third-party releases under pre-Code bankruptcy law. Trustee Br. 41-42 (discussing *Callaway v. Benton*, 336 U.S. 132 (1949)). But the Trustee's *Callaway* epiphany fails. The *Callaway* district court

did not "permanently enjoin[] the dissenting shareholders" of the debtor's lessor from enforcing a state-law voting requirement to advance "an important element of [the debtor's] proposed reorganization." Trustee Br. 31. Rather, the district court defied the ICC-approved reorganization plan by extinguishing voting rights that the plan preserved. *See Callaway*, 336 U.S. at 136-38. And any discussion of the ICC's authority under the Bankruptcy Act of 1898 "to require acceptance by a lessor not in reorganization of an offer for the purchase of its property" was dicta, because—as the Court stated in the next clause of the sentence—"no such power ha[d] been asserted by the [ICC] in this case." *Id*. at 141.

Nor was the *Callaway* district court's order "the equivalent" of the releases here. Trustee Br. 31. The *Callaway* order enjoined a voting claim that arose only because the plan extended the lessor an offer to sell its assets to the post-bankruptcy debtor. *See Callaway*, 336 U.S. at 134-38. Such an injunction is unlike a release of pre-bankruptcy claims that "directly affect the *res* of the Debtors' estates" and, if not resolved, would make reorganization impossible. JA381; *see* JA400, 457. Indeed, *Callaway* itself confirmed that "[t]he bankruptcy power unquestionably gives the [ICC] and court . . . full and complete power not only over the debtor and its property, but also, as a corollary, over any rights that may be asserted against it," which "may be altered in any way thought necessary to achieve sound financial and operating conditions for the reorganized company." 336 U.S. at 147. This broad power naturally covers third-party releases, like those here, adopted to protect the *res*.

C. The Authority To Approve Nonconsensual Third-Party Releases Is Nevertheless Limited In Important Respects

While § 1123(b)(6) unambiguously encompasses third-party releases, courts' authority to approve such releases is carefully circumscribed in several ways.

First, any third-party release must be "appropriate" in the circumstances of the plan. § 1123(b)(6). *Second*, as the Court concluded in *Energy Resources*, to be appropriate, a plan provision must at least be "necessary to the success of a reorganization plan." 495 U.S. at 549. *Third*, "as with any term in a bankruptcy plan, a provision imposing releases of claims like that at issue here must be imposed against a backdrop of equity." JA890. And, *fourth*, as the lower courts held in this case, the release of any claims must be approved not only by a bankruptcy court but also by an Article III court. *Supra* at 13 n.4.

The Trustee chides the Second Circuit (at 40) for adopting a "multifactor test, entirely unmoored from the Code's text." But the factors identified by the court are moored in § 1123(b)(6)'s requirement that any plan provision be "appropriate" in the circumstances. *See Michigan v. EPA*, 576 U.S. 743, 752 (2015) ("appropriate" "naturally and traditionally includes consideration of all the relevant factors" (citation omitted)). Moreover, bankruptcy is a creature of equity. The consideration of case-specific factors is a ubiquitous and time-honored feature—not a flaw—of traditional equity practice. *See, e.g.*, *Equitable Life Assurance Soc'y of the U.S. v. Brown*, 213 U.S. 25, 42 (1909). And that inquiry will readily screen the sort of extreme hypotheticals the Trustee has raised, just

as a court of equity would have centuries ago. *See, e.g.*, Trustee Br. 46-47; Stay Appl. 22, 28-29.

Accordingly, third-party releases are hardly a "'nuclear weapon' of the law." Trustee Br. 38 (quoting *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 332 (1999)). Indeed, decades of experience confirms that third-party releases are rarely used and approved only where necessary to facilitate reorganizations that would otherwise be impossible. Notably, the Trustee has not challenged the Second Circuit's conclusion that this is a case where third-party releases are appropriate, assuming statutory authority exists. And the Second Circuit's discussion of the factors supporting these releases underscores the limited reach of its ruling. JA891-96. There is no basis to deprive courts of a tool that unambiguously falls within § 1123(b)(6)'s express grant based on the Trustee's unfounded claim that courts are incapable of responsibly exercising that power.

II. THE TRUSTEE'S COUNTERARGUMENTS LACK MERIT

The Trustee's various attempts to circumvent the unambiguous terms of § 1123(b)(6) fail.

A. The Trustee Mistakes Breadth For Silence

The Trustee's case is built largely on the premise that the Code is "silen[t]" on third-party releases. Trustee Br. 28 (citation omitted). But the Code is not silent. Section 1123(b)(6) is *explicit* that a Chapter 11 plan may include "*any* other provision" as long as it meets the statutory conditions. (Emphasis added.)

The Trustee's error is in mistaking breadth for silence. It is up to Congress to decide "whether a statute should sweep broadly or narrowly." *United States v. Rodgers*, 466 U.S. 475, 484 (1984). And when, as

here, Congress enacts unmistakably broad statutory language, that language is not *silent* as to matters within its scope. It *covers* those matters—"[e]ven if Congress did not foresee" all possible applications. *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1143 (2018); *see, e.g.*, *Pennsylvania Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212 (1998) ("[T]he fact that a statute can be 'applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.'" (citation omitted)).

To the extent the Trustee implies (*e.g.*, at 21) that locating authority for third-party releases in § 1123(b)(6) is akin to "hid[ing] elephants in mouseholes," *Whitman v. American Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001), he is doubly wrong. There is no "mousehole" because § 1123(b)(6) unambiguously grants bankruptcy courts broad power to fashion relief that is "necessary for a reorganization's success." *Energy Resources*, 495 U.S. at 551; *cf. Atlantic Richfield Co. v. Christian*, 140 S. Ct. 1335, 1355 (2020). And there is no "elephant," because § 1123(b)(6) limits the circumstances in which third-party releases may be approved. *See supra* at 30-31.

The operative principle is not "elephants in mouseholes," but the lack of "any such thing as a 'canon of donut holes.'" *Bostock v. Clayton County*, 140 S. Ct. 1731, 1747 (2020). "Congress's failure to speak directly to a specific case that falls within a more general statutory rule" does not "create[] a tacit exception." *Id.* As the Court has admonished, "[i]t would be dangerous in the extreme to infer . . . that a case for which the words of an instrument expressly provide, shall be exempted from its operation." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992) (omission in original) (citation omitted). When

Congress speaks broadly, as it did in § 1123(b)(6), courts must "apply the broad rule." *Bostock*, 140 S. Ct. at 1747; *see Rodgers*, 466 U.S. at 484.

The Trustee's attempt to turn § 1123(b)(6)'s unambiguously broad grant into a problem thus fails.

B. The Trustee's Attempt To Identify A Conflicting Code Provision Fails

The Trustee's attempt to generate a conflict with other provisions of the Bankruptcy Code also fizzles.

1. Discharge/Sections 523 And 524(e)

The Trustee's core argument (at 25-27) is that the releases are inconsistent with § 524(e) and other discharge-related provisions because, he contends, they "authorize[] the functional equivalent of a discharge" without requiring the Sacklers to bear the burdens that come with "declaring bankruptcy." The Second Circuit correctly rejected this argument. JA880. The releases do not provide the Sacklers with anything close to the discharge available to individuals or entities declaring bankruptcy, so there is no basis for the Trustee's related objection (at 45) that the Sacklers are taking advantage of bankruptcy's "*quid pro quo*" without suffering the burdens of bankruptcy.

Emergence from bankruptcy grants a debtor a sweeping discharge from its debts. A Chapter 11 debtor receives a discharge "from *any debt* that arose before the date of" the "order confirming the plan." § 1141(d)(1)(A) (emphasis added). A Chapter 7 debtor receives a discharge "from *all debts* that arose before the date of the order for relief." § 727(b) (emphasis added). And so on. *See* §§ 944(b), 1192, 1228(c), 1328(c). To this end, the Trustee repeatedly claims (at 2, 12, 26, 45) that the releases grant the Sacklers "full repose." But that is manifestly wrong.

As the Second Circuit explained, the third-party releases do not give the Sacklers the "umbrella protection" of a discharge. JA872. They extend only to certain opioid-related claims preceding confirmation and, even then, only to claims held by a creditor of the Debtors for which the Debtors' conduct "is the legal cause or is otherwise a legally relevant factor." JA275. The Sacklers thus remain subject to non-opioid-related claims, opioid-related claims that do not depend on the Debtors' conduct, and claims held by anyone who is not a creditor of the Debtors. *Supra* at 8-10. This is not remotely "full repose."

Nor is there any conflict with the text of § 524(e). Section 524(e) states that a "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." This simply clarifies that a discharge affects only the *debtor's* personal liability for a debt, and not a co-obligor's liability. The reference to "such debt"—*i.e.*, the debtor's debt—confirms this reading. *See In re Airadigm Commc'ns, Inc.*, 519 F.3d 640, 656 (7th Cir. 2008) (§ 524(e) "preserves rights that might otherwise be construed as lost" by making clear that "a creditor can still seek to collect a debt from a co-debtor who did not participate in the reorganization").[9] "The natural reading of this provision does not foreclose a third-party release from a creditor's claims" under another

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[9] The statutory history of § 524(e) bolsters this interpretation. Section 524(e)'s predecessor stated: "The liability of a person who is a co-debtor with . . . a bankrupt *shall not* be altered by the discharge of such bankrupt." 11 U.S.C. § 34 (1976) (emphasis added). Congress's change from "'shall'" to "the definitional term 'does'" further evidences that § 524(e) is no bar to third-party releases. *Airadigm*, 519 F.3d at 656 & n.4.

Code provision. *Id.*; *see* American Coll. of Bankr. Br. 6 n.3 (§ 524(e) "is agnostic as to third-party releases").

The Trustee's reliance on the exceptions from an individual debtor's discharge for fraud and other claims is also misplaced. *See* Trustee Br. 27 (citing § 523(a)(2), (4), and (6)). Not only are the Sacklers not receiving a discharge, but the individual debtor fraud exceptions cited by the Trustee are not "applicable" in a corporate Chapter 11 case, as expressly required by § 1123(b)(6). Chapter 11 has different aims—namely, "preserving going concerns and maximizing property available to satisfy creditors"—than individual bankruptcy provisions, and does not contain an exception for claims based on fraud. *Bank of Am. Nat'l Tr. & Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 453 (1999). And releasing fraud claims that depend on the Debtors' conduct—the only such claims released, *supra* at 8-10—serves Chapter 11's aims here. Like the other claims subject to the releases, allowing those fraud claims to proceed would deplete the *res* and diminish creditors' recovery.[10]

2. Asbestos Releases/Section 524(g)

The Trustee also points (at 33-35) to § 524(g). Section 524(g) is not applicable to this *non*-asbestos bankruptcy and the Trustee does not even allege a *conflict* with that provision. Rather, he reasons that, because Congress enacted a specific provision governing third-party releases in the asbestos context, the authority to adopt such releases is limited to that context.

[10] The Trustee's suggestion (at 27) that § 523(a) "forbid[s]" the discharge of fraud claims is inaccurate. Fraud claims are automatically extinguished unless a claimant takes affirmative steps to preserve them. *See* § 523(c)(1).

Drawing a negative inference about general authority from a specific provision like § 524(g) is hazardous in any case. *See Mission Prod. Holdings, Inc. v. Tempnology, LLC*, 139 S. Ct. 1652, 1663-66 (2019). Here, the inference is foreclosed by plain statutory text.

When Congress enacted § 524(g), it included a "Rule of Construction" stating that "[n]othing" in § 524(g) "shall be construed to modify, impair, or supersede any other authority the court has to issue injunctions in connection with an order confirming a plan of reorganization." Pub. L. No. 103-394, § 111(b), 108 Stat. 4106, 4117 (1994). This is part of the statute and must be respected as such. *See Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 406-07 (2004). Yet, while the Trustee acknowledges this statutory prohibition (at 35), his entire § 524(g) argument is a wink and nod to ignore it.

The importance of this rule is even more evident given the backdrop against which Congress passed § 524(g). When Congress enacted § 524(g) in 1994, courts had been using their power under the Code to authorize third-party releases in certain asbestos and non-asbestos cases. *See, e.g.*, *In re Johns-Manville Corp.*, 837 F.2d 89, 92-94 (2d Cir.) (asbestos), *cert. denied*, 488 U.S. 868 (1988); *In re A.H. Robins Co.*, 880 F.2d 694, 700-02 (4th Cir.) (Dalkon Shield), *cert. denied*, 493 U.S. 959 (1989). The rule of construction makes crystal clear that Congress did not want § 524(g) to be construed as suggesting that courts did not *already* have the authority to approve third-party releases. *See* 140 Cong. Rec. 27692 (Oct. 4, 1994) (§ 524(g) "is not intended to alter any authority bankruptcy courts may already have to issue injunctions in connection with a plan of reorganization"). Rather, in enacting § 524(g),

Congress simply wanted to establish special rules for asbestos bankruptcies, given unique considerations.

For example, the special rules in § 524(g) account for the fact that asbestos-related diseases have a "long latency period," which could affect future claimants. Trustee Br. 34 n.2 (quoting H.R. Rep. No. 103-835, at 40 (1994)); *see* § 524(g)(4)(B)(i) (future claimants representative). Congress also sought to provide "greater certitude" to approved asbestos plans to increase the value of the stock used to fund the plans. H.R. Rep. No. 103-835, at 41; *see* § 524(g)(2)(B)(i)(II) (requiring creation of a trust "to be funded in whole or in part by the securities of 1 or more debtors"); § 524(h) (extending § 524(g) to prior asbestos plans).[11]

The Trustee (at 33) notes that § 524(g) contains a "[n]otwithstanding" clause cross-referencing § 524(e), which, as noted, states that a discharge of a debtor does not automatically affect a co-obligor's personal liability for the same debt. § 524(g)(4)(A)(ii); *see supra* at 34-35. From that cross-reference, the Trustee infers (at 33-35) that third-party releases are unavailable outside § 524(g). That inference is wrong. This "notwithstanding" clause merely contemplates the *possibility* of a conflict. *See NLRB v. SW Gen., Inc.*, 580 U.S. 288, 302 (2017). And that makes sense. When § 524(g) was enacted, some courts had (erroneously, in our view) concluded that § 524(e) may bear on the availability of third-party releases. *See*

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[11] The Trustee errs (at 33-34) in arguing that the releases covered by § 524(g) are fundamentally different from those at issue here. Among other similarities, the releases here cover only claims that arise out of the Sacklers' "ownership of a financial interest in the debtor" and/or their "involvement in the management of the debtor." § 524(g)(4)(A)(ii)(I)-(II).

Debtors' Stay Opp. 26-28 (discussing case law). To provide "greater certitude," H.R. Rep. No. 103-835, at 41, Congress made clear that § 524(g) "prevails in the event of a clash," *SW Gen.*, 580 U.S. at 301 (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 126-27 (2012)).

In the end, the Trustee misses the most obvious import of § 524(g). The Trustee claims that third-party releases are antithetical to bankruptcy law and the Code itself. Yet Congress reticulated a scheme for such releases in asbestos bankruptcies and put it in the Code. And when it did so, Congress did not hint, let alone say, *and don't do this anywhere else*. Instead, Congress enacted a rule of construction saying, *don't infer from § 524(g) that the authority to approve such releases doesn't otherwise exist*. The very existence of § 524(g) and its rule of construction eviscerates the central premise of the Trustee's argument.

3. Jury Trial/Section 1411(a)

Finally, the Trustee (at 27-28) asserts a conflict with 28 U.S.C. § 1411. But § 1411 is in Title 28. It therefore is not an "applicable provision[] of this title," *i.e.*, Title 11, as § 1123(b)(6) requires. The Trustee's argument also proves too much. Were the Trustee right that § 1411 always entitles bankruptcy claimants to a jury trial, then personal-injury and wrongful-death claims against the Debtors could not be released without preserving the right to a jury trial. Nor could the derivative claims that the Trustee concedes can be released here. Nor could the asbestos-related personal-injury and wrongful-death claims against debtors and third parties covered by § 524(g).

Nevertheless, there is no conflict. Section 1411—a "notoriously ambiguous" and "strictly procedural"

provision—"come[s] into play only when a right to trial is established." *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 40 n.3 (1989); *In re Dow Corning Corp.*, 215 B.R. 346, 360 (Bankr. E.D. Mich. 1997). Even the most generous reading of the statute merely preserves the right to a jury trial in district court when there is "a judicial determination of [the] value" of an individual's personal-injury or wrongful-death claim. *Dow Corning*, 215 B.R. at 360; *see In re Clay*, 35 F.3d 190, 197 (5th Cir. 1994). It does not limit bankruptcy courts' powers to allow, disallow, or approve the release of claims affecting the *res*—which powers do not involve any adjudication of the claims and have always been exercised in equity, where no jury-trial right exists. *See, e.g.*, *Langenkamp v. Culp*, 498 U.S. 42, 44-45 (1990) (per curiam).

Section 1411 thus presents no conflict either.[12]

4. *Jevic*, *Law*, and *RadLAX*

The Trustee's invocation (at 28-29) of *Czyzewski v. Jevic Holding Corp.*, 580 U.S. 451 (2017), *Law v. Siegel*, 571 U.S. 415 (2014), and *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639 (2012), fails for the same basic reason: In each of these cases, the Court simply rejected relief that *was* inconsistent with the applicable Code provisions.

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[12] The Trustee concedes (at 12-13, 27-28) that the trust distribution procedures give personal-injury claimants the option to have their claims against the Debtors adjudicated in the tort system "before a jury." But he omits that this option covers *any* claims channeled to the trusts, including released claims against the Sacklers, "regarding the same injuries." JA592; *see* Bankr. Ct. Doc. 3412-1, at 14 (describing the "tort system litigation process"). That alone disposes of the Trustee's § 1411 objection.

RadLAX held that auction procedures that allowed "for the sale of collateral free and clear of [a] Bank's lien" were governed by § 1129(b)(2)(A) and violated its express terms because they did not "permit the Bank to credit-bid at the sale." 566 U.S. at 649. In *Law*, the Court held that the court had violated "§ 522's express terms" by "surcharg[ing]" the homestead exemption protected by § 522(k). 571 U.S. at 422. And, in *Jevic*, the court authorized a "structured dismissal" of a Chapter 11 case that violated the Code's "ordinary priority rules" codified in numerous provisions of the Code. 580 U.S. at 458-61.

To the extent the Trustee (at 29) argues that the cases turned on a conflict with the supposed "structure," "purposes," or *gestalt* of the Code, he is wrong. In any event, § 1123(b)(6) requires an actual conflict with an applicable Code provision. None exists here.

C. The Trustee's Constitutional-Avoidance Argument Fails

Nor is there any reason to ignore the plain meaning of § 1123(b)(6) in the name of constitutional avoidance. Trustee Br. 41-44. The constitutional-avoidance canon "enters in only 'where a statute is susceptible of two constructions.'" *Yeskey*, 524 U.S. at 212 (citation omitted). Because § 1123(b)(6) unambiguously grants authority to approve appropriate third-party releases, the canon has no application here. *See id.*; *Monsanto*, 491 U.S. at 611. That disposes of the Trustee's constitutional-avoidance argument. He does not argue that the releases actually violate the Constitution. And any argument that § 1123(b)(6) is unconstitutional insofar as it authorizes third-party releases is outside the question presented. *See, e.g.*,

Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367, 379 n.5 (1996); Trustee Br. i.

In any event, there is no constitutional problem. The Trustee alleges (at 41) due process concerns because the releases supposedly "extinguish[] third parties' causes of action." In fact, the claims are *channeled* to the creditor trusts—through which claimants receive substantial compensation for their injuries—not extinguished. *Supra* at 8.[13] But either way, in the "special remedial scheme" of bankruptcy, "preexisting rights" may be "terminate[d]" as long as doing so is "otherwise consistent with due process." *Martin v. Wilks*, 490 U.S. 755, 762 n.2 (1989). That means notice and an opportunity to be heard—both of which were provided to a nearly unprecedented degree, and neither of which is contested by the Trustee here. JA896-99; *see Mullane v. Central Hanover Bank & Tr. Co.*, 339 U.S. 306, 313 (1950); *supra* at 10-11.

The Trustee's reliance (at 43-44) on § 524(g)—which he admits has "effects on nondebtors' property rights"—underscores the lack of any constitutional problem. Like claims released under § 524(g), the claims subject to release here closely relate to the Debtors' conduct and claims held by or against the Debtors. *See supra* at 37 n.11. And, as under § 524(g), all the claims subject to release are "channel[ed]" into trusts designed to provide value to all claimants. Trustee Br. 43; *see* JA279. The releases at

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[13] As the bankruptcy court found, the Trustee's assertion (*e.g.*, at 39) that claims against the Sacklers are released without value is "clearly wrong." JA629. The plan compensates victims for their *injuries*, regardless of whether a plaintiff seeks recovery for that injury from the Debtors or the Sacklers, where the claim depends on their intertwined conduct. *See, e.g.*, JA574 & n.18.

issue here cannot suffer from a constitutional problem if the releases covered by § 524(g) do not. The same goes for the derivative claims that the Trustee concedes may be released. *Supra* at 24-25.

Finally, because the Trustee does not make an as-applied challenge to the authority to approve the third-party releases here, he would have to show that third-party releases are unconstitutional in *every* iteration, no matter what notice and process is provided. He does not even try to make that showing.

D. The Trustee's Policy Arguments Fail

At bottom, the Trustee's complaint boils down to a policy objection to third-party releases that ignores the bankruptcy court's unchallenged factual findings and shrugs off decades of experience showing that third-party releases have been carefully limited, albeit indispensable in some of the most complex mass-tort bankruptcies this nation has seen.

The Trustee attacks (at 44-45) the releases as a sweetheart deal for the Sacklers. But he ignores the facts. The bankruptcy court found that it is "crystal clear" that "this is *not* the Sacklers' plan," "and anyone who contends to the contrary is . . . simply misleading the public." JA348. Sadly, that includes the Trustee here. The governmental and private creditors—who mediated, negotiated, and overwhelmingly voted in favor of the plan—"insisted on a [r]elease of all claims against the Sacklers with no opt-outs, thereby preventing holdout litigants from jumping the line, depleting the *res*, and imperiling payments due under the Plan." Official Comm. Stay Opp. 4.

The Trustee relatedly asserts (at 47) that plan proponents have not "presented a compelling need for [the] releases." But again, the bankruptcy court

found the opposite: Without the releases, the plan would "unravel" and "unsecured creditors would probably recover nothing." JA405. That would harm creditors and the public interest, as nearly 5,000 state, local, and tribal governments understand. This also explains the bankruptcy court's finding that the releases were necessary to the success of the reorganization, *id.*, notwithstanding the Trustee's unsupported assertion (at 47) to the contrary.

The Trustee's suggestion (at 39, 44-45) that the decision below provides a "roadmap for corporations and wealthy individuals to misuse the bankruptcy system" is unfounded, too. As commentators have recognized, "[g]oing forward, nonconsensual third-party releases will only be approved in extremely rare circumstances and there is no room for abuse." Edward Neiger & Jennifer Christian, *Despite Its Plan Objections, UST Also Won in Purdue Ch. 11*, Law360 (June 12, 2023), https://www.law360.com/articles/1687439. The Second Circuit's stringent multifactor test is highly sensitive to the "potential for abuse," JA886 (citation omitted); calls for an evaluation of third-party releases "against the backdrop of equity," JA890; and mandates an extensive factual record supporting the releases, *id.* These requirements provide a robust check against any alleged abuse.

The Trustee's hyperbolic account (at 44-47) of the threat posed by third-party releases is also deeply unfair to lower courts and at odds with decades' worth of real-world experience. Third-party releases have been sparingly used by courts for decades, reserved primarily for well-known mass-tort cases, including those involving asbestos, the Dalkon Shield, and silicone breast implants. Debtors' Stay Opp. 23-24. The Second Circuit, other courts of appeals, and lower

courts have carefully scrutinized third-party releases, rejecting them often and approving them only in exceptional circumstances. *See, e.g.*, *In re Metromedia Fiber Network, Inc.*, 416 F.3d 136, 143 (2d Cir. 2005).

The Trustee's attempt (at 47-48) to lump the releases at issue with *other* practices he deems abusive, and to suggest that criminal claims are or could be released by the plan, is baseless. Bankruptcy jurisdiction is limited to civil claims and could not extend to criminal claims. *See Travelers Indem. Co. v. Bailey*, 557 U.S. 137, 153 n.6 (2009). As the bankruptcy court made clear, "[i]f any prosecutor wants to pursue such a claim against [the Sacklers], they can." JA339.

In any event, policy arguments are for Congress. As § 524(g) shows, if Congress wishes to revisit or refine this authority it is capable of doing so.

III. THE TRUSTEE LACKS STANDING

The Trustee's position suffers from an even more fundamental flaw: He lacks standing to act as a party in this case—a fatal deficiency that no other respondent can cure. Accordingly, the writ of certiorari should be dismissed as improvidently granted.[14]

A. The general rule, of course, is "[n]o concrete harm, no standing." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2200 (2021). Here, it is undisputed that the Trustee cannot show any concrete harm: He has no claim subject to the releases, the United States is

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[14] The Trustee claims (at 15) that this argument was "forfeited" below. But in the Second Circuit there were other appellants with standing. Moreover, objections to standing "cannot be waived or forfeited." *Virginia House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1951 (2019). And here, the Trustee himself concedes (at 19) that his statutory and Article III arguments for standing are inextricably intertwined.

carved out of them, and their legality does not impact the Trustee's discharge of his duties in any way. The Trustee, in his "watchdog" role, is free to file a brief presenting his views on third-party releases in a case otherwise properly before the Court. Yet, he has improperly arrogated to himself the far greater power of acting as a party to bring this case to this Court. He lacks standing to take on that party role.

The Trustee (at 15-16) invokes § 307. But once again, the Trustee ignores plain meaning. Section 307 allows the Trustee to "raise" and "appear and be heard" on issues in a case. That means he may "come . . . before" the court in a pre-existing case, "bring" issues "up for discussion," and present "argument" on those issues. *Appear*, *Webster's Third New International Dictionary* (1993); Trustee Br. 16. "Appear and be heard"—an amicus-type role—is a far cry from "commandeer and appeal." And courts have consistently held that language identical to § 307 does not permit an appeal unless the appellant has a "pecuniary interest" in the outcome. 7 *Collier on Bankruptcy* ¶ 1109.08 (16th ed. 2023); *see* § 1109(b).

The Trustee asks the Court (at 16) to draw a negative inference from the fact that §§ 1109(a) and 1164 specifically *deny* the SEC and certain other agencies the right to appeal. Such a negative inference is a weak tool of construction, and it is impotent here. *See, e.g.*, *Tempnology*, 139 S. Ct. at 1665. Sections 1109(a) and 1164 deny those agencies the right to appeal even where they have an interest that would otherwise permit them to appeal. They do not support inferring a right to appeal based on § 307 where, as here, the Trustee has no such interest.

Moreover, other provisions of the U.S. Code show that Congress knows how to grant an agency or

official standing to act as a party. *See Director v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 129-30 (1995) (citing examples). Section 307's "appear and be heard" language is fundamentally different. And, as this Court has held, "[a]gencies do not automatically have standing to sue for actions that frustrate the purposes of their statutes." *Id.* at 132.

The Trustee falls back on the broad notion (at 17) that a "suit by the United States is fundamentally different." But William K. Harrington, even when acting as Trustee, is not the United States. He is simply an agency official (Trustee Br. 2)—one who has not been nominated by the President or confirmed by the Senate. *See* 28 U.S.C. § 581(a)-(b). The Trustee's duties, spelled out by statute, *see id.* § 586, do not include representing the United States or enforcing U.S. law. He is not "the United States" any more than the postmaster of Walla Walla, Washington, is.

This Court has rejected attempts by government officials to invoke the power of the courts to resolve a question of federal law where they had "alleged no injury to themselves as individuals"—even where they had the explicit statutory authority to sue that the Trustee lacks. *Raines v. Byrd*, 521 U.S. 811, 829 (1997); *see id.* at 820 n.3 ("It is settled that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing."). There is no basis for a different conclusion here. Indeed, arming an agency official like the Trustee with the power to litigate as a party in the absence of a clear statutory authorization to do so would only further enlarge the heavy footprint of the administrative state.

Nor is *SEC v. United States Realty & Improvement Co.* to the contrary. 310 U.S. 434 (1940). There, the

Court held that the SEC—an agency with heads appointed by the President and confirmed by the Senate—could intervene and appeal when the debtor "improper[ly] resort[ed]" to a Chapter 11 proceeding because that would "thwart[]" the SEC's ability to perform its statutory duties as a regulator. *Id*. at 458-59. But the Trustee is not empowered to act as a regulator, and he has no claim that the releases at issue affect *him* or *his* ability to discharge the far more limited statutory duties he does have. He simply asserts (at 11) a generalized interest in "vindicating federal law." That sort of "abstract" interest is plainly insufficient to establish standing. *Summers v. Earth Island Inst.*, 555 U.S. 488, 494 (2009).

B. The tagalong respondents supporting the Trustee cannot solve this blatant standing defect.

The Canadian Creditors have waived the argument that there is no statutory authority for third-party releases. In the bankruptcy court, they accepted that third-party releases are allowed in some circumstances, did not argue that they are categorically prohibited, and made only targeted objections to the releases here that are outside the scope of the question presented. *See* Bankr. Ct. Doc. 3275, at 9-12. Moreover, they are not aggrieved in any concrete sense by the releases at issue either. The Canadian Creditors purport (at 9-10) to represent an uncertified class of Canadian creditors who *might* have claims that would be released due to wholly domestic conduct with effects that allegedly crossed the border.[15] But

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[15] As the Canadian Creditors describe their claims (at 49), they involve conduct of the Debtors and the Sacklers in the United States, directed to the United States, that somehow "permeated" into Canada. These claims are extraordinarily

in the end, the Canadian Creditors maintain (at 48) that their claims are not even subject to the releases. They are right about that (and only that): Any valid claims they may actually have are based on the conduct of Purdue Canada, a nondebtor, and are "fully preserved under the plan." JA321 n.2.

Ellen Isaacs, the only other topside respondent, also lacks a concrete interest in the question before the Court. Ms. Isaacs' only pre-confirmation filing sought injunctive relief and did not object either to the releases or to the plan, leading the bankruptcy court to find that she "had the opportunity to object to confirmation of the Plan and did not do so." Bankr. Ct. Doc. 3769, at 2; *see* Bankr. Ct. Doc. 3582. And in both this Court and the Second Circuit, she has not presented any legal argument bearing on the question presented. *See* Isaacs Br.; CA2 Doc. 573.

This case underscores why standing matters. The Trustee hijacked this case after the Second Circuit's decision, alone appealed it to this Court, and now asks the Court to invalidate a plan that was negotiated and overwhelmingly approved by the victims who *do* have a direct interest in this case. If the Trustee succeeds in this crusade, he will prevent billions of dollars from flowing to victims and their families to improve—and literally save—lives. The Trustee might chalk this up as a win, but victims would pay a terrible price. If the plan is destroyed, victims likely will be left with "nothing." JA405. Overlooking lack of standing here thus would be not only wrong, but tragic.

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attenuated, suffer from obvious causation problems, and would stretch public-nuisance doctrine beyond its limits.

CONCLUSION

The judgment of the court of appeals should be affirmed, or the writ of certiorari should be dismissed as improvidently granted.

Respectfully submitted,

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October 20, 2023

ADDENDUM

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11 U.S.C. § 105

§ 105. Power of court

(a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

* * *

11 U.S.C. § 307

§ 307. United States trustee

The United States trustee may raise and may appear and be heard on any issue in any case or proceeding under this title but may not file a plan pursuant to section 1121(c) of this title.

11 U.S.C. § 523

§ 523. Exceptions to discharge

(a) A discharge under section 727, 1141, 1192[1] 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt—

* * *

(2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by—

(A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition;

(B) use of a statement in writing—

(i) that is materially false;

(ii) respecting the debtor's or an insider's financial condition;

(iii) on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied; and

(iv) that the debtor caused to be made or published with intent to deceive; or

(C) (i) for purposes of subparagraph (A)—

(I) consumer debts owed to a single creditor and aggregating more than $500 for luxury goods or services incurred by an individual debtor on or within 90 days before the order for relief under this title are presumed to be nondischargeable; and

(II) cash advances aggregating more than $750 that are extensions of consumer credit under an open end credit plan obtained by an individual debtor on or within 70 days before the order for relief under this title, are presumed to be nondischargeable; and

(ii) for purposes of this subparagraph—

(I) the terms "consumer", "credit", and "open end credit plan" have the same meanings as in section 103 of the Truth in Lending Act; and

(II) the term "luxury goods or services" does not include goods or services reasonably necessary for the support or maintenance of the debtor or a dependent of the debtor;

* * *

(4) for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny;

* * *

(6) for willful and malicious injury by the debtor to another entity or to the property of another entity;

* * *

(c) (1) Except as provided in subsection (a)(3)(B) of this section, the debtor shall be discharged from a debt of a kind specified in paragraph (2), (4), or (6) of subsection (a) of this section, unless, on request of the creditor to whom such debt is owed, and after notice and a hearing, the court determines such debt to be excepted

from discharge under paragraph (2), (4), or (6), as the case may be, of subsection (a) of this section.

* * *

[1] So in original. Probably should be followed by a comma.

* * *

11 U.S.C. § 524

§ 524. Effect of discharge

* * *

(e) Except as provided in subsection (a)(3) of this section, 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.

* * *

(g) (1) (A) After notice and hearing, a court that enters an order confirming a plan of reorganization under chapter 11 may issue, in connection with such order, an injunction in accordance with this subsection to supplement the injunctive effect of a discharge under this section.

(B) An injunction may be issued under subparagraph (A) to enjoin entities from taking legal action for the purpose of directly or indirectly collecting, recovering, or receiving payment or recovery with respect to any claim or demand that, under a plan of reorganization, is to be paid in whole or in part by a trust described in paragraph (2)(B)(i), except such legal actions as are expressly allowed by the injunction, the confirmation order, or the plan of reorganization.

(2) (A) Subject to subsection (h), if the requirements of subparagraph (B) are met at the time an injunction described in paragraph (1) is entered, then after entry of such injunction, any proceeding that involves the

validity, application, construction, or modification of such injunction, or of this subsection with respect to such injunction, may be commenced only in the district court in which such injunction was entered, and such court shall have exclusive jurisdiction over any such proceeding without regard to the amount in controversy.

(B) The requirements of this subparagraph are that—

(i) the injunction is to be implemented in connection with a trust that, pursuant to the plan of reorganization—

(I) is to assume the liabilities of a debtor which at the time of entry of the order for relief has been named as a defendant in personal injury, wrongful death, or property-damage actions seeking recovery for damages allegedly caused by the presence of, or exposure to, asbestos or asbestos-containing products;

(II) is to be funded in whole or in part by the securities of 1 or more debtors involved in such plan and by the obligation of such debtor or debtors to make future payments, including dividends;

(III) is to own, or by the exercise of rights granted under such plan

would be entitled to own if specified contingencies occur, a majority of the voting shares of—

(aa) each such debtor;

(bb) the parent corporation of each such debtor; or

(cc) a subsidiary of each such debtor that is also a debtor; and

(IV) is to use its assets or income to pay claims and demands; and

(ii) subject to subsection (h), the court determines that—

(I) the debtor is likely to be subject to substantial future demands for payment arising out of the same or similar conduct or events that gave rise to the claims that are addressed by the injunction;

(II) the actual amounts, numbers, and timing of such future demands cannot be determined;

(III) pursuit of such demands outside the procedures prescribed by such plan is likely to threaten the plan's purpose to deal equitably with claims and future demands;

(IV) as part of the process of seeking confirmation of such plan—

(aa) the terms of the injunction proposed to be issued under paragraph (1)(A), including any provisions barring actions against third parties

pursuant to paragraph (4)(A), are set out in such plan and in any disclosure statement supporting the plan; and

(bb) a separate class or classes of the claimants whose claims are to be addressed by a trust described in clause (i) is established and votes, by at least 75 percent of those voting, in favor of the plan; and

(V) subject to subsection (h), pursuant to court orders or otherwise, the trust will operate through mechanisms such as structured, periodic, or supplemental payments, pro rata distributions, matrices, or periodic review of estimates of the numbers and values of present claims and future demands, or other comparable mechanisms, that provide reasonable assurance that the trust will value, and be in a financial position to pay, present claims and future demands that involve similar claims in substantially the same manner.

(3) (A) If the requirements of paragraph (2)(B) are met and the order confirming the plan of reorganization was issued or affirmed by the district court that has jurisdiction over the reorganization case, then after

the time for appeal of the order that issues or affirms the plan—

(i) the injunction shall be valid and enforceable and may not be revoked or modified by any court except through appeal in accordance with paragraph (6);

(ii) no entity that pursuant to such plan or thereafter becomes a direct or indirect transferee of, or successor to any assets of, a debtor or trust that is the subject of the injunction shall be liable with respect to any claim or demand made against such entity by reason of its becoming such a transferee or successor; and

(iii) no entity that pursuant to such plan or thereafter makes a loan to such a debtor or trust or to such a successor or transferee shall, by reason of making the loan, be liable with respect to any claim or demand made against such entity, nor shall any pledge of assets made in connection with such a loan be upset or impaired for that reason;

(B) Subparagraph (A) shall not be construed to—

(i) imply that an entity described in subparagraph (A)(ii) or (iii) would, if this paragraph were not applicable, necessarily be liable to any entity by reason of any of the acts described in subparagraph (A);

(ii) relieve any such entity of the duty to comply with, or of liability under, any Federal or State law regarding the making of a fraudulent conveyance in a transaction described in subparagraph (A)(ii) or (iii); or

(iii) relieve a debtor of the debtor's obligation to comply with the terms of the plan of reorganization, or affect the power of the court to exercise its authority under sections 1141 and 1142 to compel the debtor to do so.

(4) (A) (i) Subject to subparagraph (B), an injunction described in paragraph (1) shall be valid and enforceable against all entities that it addresses.

(ii) Notwithstanding the provisions of section 524(e), such an injunction may bar any action directed against a third party who is identifiable from the terms of such injunction (by name or as part of an identifiable group) and is alleged to be directly or indirectly liable for the conduct of, claims against, or demands on the debtor to the extent such alleged liability of such third party arises by reason of—

(I) the third party's ownership of a financial interest in the debtor, a past or present affiliate of the debtor, or a predecessor in interest of the debtor;

(II) the third party's involvement in the management of the debtor or

a predecessor in interest of the debtor, or service as an officer, director or employee of the debtor or a related party;

(III) the third party's provision of insurance to the debtor or a related party; or

(IV) the third party's involvement in a transaction changing the corporate structure, or in a loan or other financial transaction affecting the financial condition, of the debtor or a related party, including but not limited to—

(aa) involvement in providing financing (debt or equity), or advice to an entity involved in such a transaction; or

(bb) acquiring or selling a financial interest in an entity as part of such a transaction.

(iii) As used in this subparagraph, the term "related party" means—

(I) a past or present affiliate of the debtor;

(II) a predecessor in interest of the debtor; or

(III) any entity that owned a financial interest in—

(aa) the debtor;

(bb) a past or present affiliate of the debtor; or

(cc) a predecessor in interest of the debtor.

(B) Subject to subsection (h), if, under a plan of reorganization, a kind of demand described in such plan is to be paid in whole or in part by a trust described in paragraph (2)(B)(i) in connection with which an injunction described in paragraph (1) is to be implemented, then such injunction shall be valid and enforceable with respect to a demand of such kind made, after such plan is confirmed, against the debtor or debtors involved, or against a third party described in subparagraph (A)(ii), if—

(i) as part of the proceedings leading to issuance of such injunction, the court appoints a legal representative for the purpose of protecting the rights of persons that might subsequently assert demands of such kind, and

(ii) the court determines, before entering the order confirming such plan, that identifying such debtor or debtors, or such third party (by name or as part of an identifiable group), in such injunction with respect to such demands for purposes of this subparagraph is fair and equitable with respect to the persons that might subsequently assert such demands, in light of the benefits provided, or to be provided, to such trust on behalf of such debtor or debtors or such third party.

(5) In this subsection, the term "demand" means a demand for payment, present or future, that—

(A) was not a claim during the proceedings leading to the confirmation of a plan of reorganization;

(B) arises out of the same or similar conduct or events that gave rise to the claims addressed by the injunction issued under paragraph (1); and

(C) pursuant to the plan, is to be paid by a trust described in paragraph (2)(B)(i).

(6) Paragraph (3)(A)(i) does not bar an action taken by or at the direction of an appellate court on appeal of an injunction issued under paragraph (1) or of the order of confirmation that relates to the injunction.

(7) This subsection does not affect the operation of section 1144 or the power of the district court to refer a proceeding under section 157 of title 28 or any reference of a proceeding made prior to the date of the enactment of this subsection.

(h) Application to Existing Injunctions.—For purposes of subsection (g)—

(1) subject to paragraph (2), if an injunction of the kind described in subsection (g)(1)(B) was issued before the date of the enactment of this Act, as part of a plan of reorganization confirmed by an order entered before such date, then the injunction shall be considered to meet the requirements of subsection (g)(2)(B) for purposes of subsection (g)(2)(A), and to satisfy subsection (g)(4)(A)(ii), if—

(A) the court determined at the time the plan was confirmed that the plan was fair and equitable in accordance with the requirements of section 1129(b);

(B) as part of the proceedings leading to issuance of such injunction and confirmation of such plan, the court had appointed a legal representative for the purpose of protecting the rights of persons that might subsequently assert demands described in subsection (g)(4)(B) with respect to such plan; and

(C) such legal representative did not object to confirmation of such plan or issuance of such injunction; and

(2) for purposes of paragraph (1), if a trust described in subsection (g)(2)(B)(i) is subject to a court order on the date of the enactment of this Act staying such trust from settling or paying further claims—

(A) the requirements of subsection (g)(2)(B)(ii)(V) shall not apply with respect to such trust until such stay is lifted or dissolved; and

(B) if such trust meets such requirements on the date such stay is lifted or dissolved, such trust shall be considered to have met such requirements continuously from the date of the enactment of this Act.

* * *

11 U.S.C. § 1123

§ 1123. Contents of plan

(a) Notwithstanding any otherwise applicable non-bankruptcy law, a plan shall—

(1) designate, subject to section 1122 of this title, classes of claims, other than claims of a kind specified in section 507(a)(2), 507(a)(3), or 507(a)(8) of this title, and classes of interests;

(2) specify any class of claims or interests that is not impaired under the plan;

(3) specify the treatment of any class of claims or interests that is impaired under the plan;

(4) provide the same treatment for each claim or interest of a particular class, unless the holder of a particular claim or interest agrees to a less favorable treatment of such particular claim or interest;

(5) provide adequate means for the plan's implementation, such as—

(A) retention by the debtor of all or any part of the property of the estate;

(B) transfer of all or any part of the property of the estate to one or more entities, whether organized before or after the confirmation of such plan;

(C) merger or consolidation of the debtor with one or more persons;

(D) sale of all or any part of the property of the estate, either subject to or free of any lien, or the distribution of all or any part of the property of the estate among those having an interest in such property of the estate;

(E) satisfaction or modification of any lien;

(F) cancellation or modification of any indenture or similar instrument;

(G) curing or waiving of any default;

(H) extension of a maturity date or a change in an interest rate or other term of outstanding securities;

(I) amendment of the debtor's charter; or

(J) issuance of securities of the debtor, or of any entity referred to in subparagraph (B) or (C) of this paragraph, for cash, for property, for existing securities, or in exchange for claims or interests, or for any other appropriate purpose;

(6) provide for the inclusion in the charter of the debtor, if the debtor is a corporation, or of any corporation referred to in paragraph (5)(B) or (5)(C) of this subsection, of a provision prohibiting the issuance of nonvoting equity securities, and providing, as to the several classes of securities possessing voting power, an appropriate distribution of such power among such classes, including, in the case of any class of equity securities having a preference over another class of equity securities with respect to dividends, adequate provisions for the election of directors representing such preferred class in the event of default in the payment of such dividends;

(7) contain only provisions that are consistent with the interests of creditors and equity security holders and with public policy with respect

to the manner of selection of any officer, director, or trustee under the plan and any successor to such officer, director, or trustee; and

(8) in a case in which the debtor is an individual, provide for the payment to creditors under the plan of all or such portion of earnings from personal services performed by the debtor after the commencement of the case or other future income of the debtor as is necessary for the execution of the plan.

(b) Subject to subsection (a) of this section, a plan may—

(1) impair or leave unimpaired any class of claims, secured or unsecured, or of interests;

(2) subject to section 365 of this title, provide for the assumption, rejection, or assignment of any executory contract or unexpired lease of the debtor not previously rejected under such section;

(3) provide for—

(A) the settlement or adjustment of any claim or interest belonging to the debtor or to the estate; or

(B) the retention and enforcement by the debtor, by the trustee, or by a representative of the estate appointed for such purpose, of any such claim or interest;

(4) provide for the sale of all or substantially all of the property of the estate, and the distribution of the proceeds of such sale among holders of claims or interests;

(5) modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's

principal residence, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims; and

(6) include any other appropriate provision not inconsistent with the applicable provisions of this title.

* * *

28 U.S.C. § 1411

§ 1411. Jury trials

(a) Except as provided in subsection (b) of this section, this chapter and title 11 do 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.

(b) The district court may order the issues arising under section 303 of title 11 to be tried without a jury.

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

An Act

* * *

SECTION 1. SHORT TITLE.

(a) SHORT TITLE.—This Act may be cited as the "Bankruptcy Reform Act of 1994".

* * *

SECTION 111. SUPPLEMENTAL INJUNCTIONS.

(a) SUPPLEMENTAL INJUNCTIONS.—Section 524 of title 11, United States Code, is amended by adding at the end the following:

* * *

(b) RULE OF CONSTRUCTION.—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.