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 OF RESPONDENT AD HOC COMMITTEE OF GOVERNMENTAL AND OTHER CONTINGENT LITIGATION CLAIMANTS

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CORPORATE DISCLOSURE STATEMENT

The Ad Hoc Committee of Governmental and Other Contingent Litigation Claimants ("**Ad Hoc Committee**") is composed of ten States, the court-appointed Plaintiffs' Executive Committee in the multi-district litigation captioned *In re National Prescription Opiate Litigation*, No. 17-md-02804 (N.D. Ohio), six counties, cities, parishes, or municipalities, and one federally recognized American Indian Tribe. As a creditor group formed in connection with the *Purdue Pharma* bankruptcy cases, the Ad Hoc Committee does not have a parent corporation and has no stock owned by any publicly traded company.

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INTRODUCTION

This case concerns the validity of what is known in bankruptcy as a nonconsensual third-party release. The provision at issue, approved as part of the Chapter 11 plan of Purdue Pharma L.P., releases certain members of, and entities connected to, the Sackler family from a limited universe of (non-criminal) creditor claims in exchange for their substantial contribution to Purdue's reorganization. The release is a critical feature of the plan, serving the interests of the creditors and the public alike.

Whether there was authority to include the release in Purdue's plan turns on a straightforward question of statutory construction: Does Section 1123(b)(6) of the Bankruptcy Code – which permits the inclusion in a plan of reorganization of (i) "any" (ii) "appropriate provision" that is (iii) "not inconsistent with the applicable provisions of" the Bankruptcy Code – ever authorize the compelled release of claims held by nondebtors against third parties? It does.

The word "any" is expansive. The court of appeals determined, on the basis of extensive findings (not challenged here) and in accordance with a rigorous test, that the third-party release in this case was "appropriate." And no "applicable" provision of the Code is "inconsistent" with that release. Accordingly, the release was properly approved.

That the Bankruptcy Code accommodates this result is unsurprising. Purdue and the Sacklers helped create and prolong the opioid epidemic, causing massive harm to the American public. The

Ad Hoc Committee – which comprises ten States, the court-appointed Plaintiffs' Executive Committee in the multi-district litigation captioned *In re National Prescription Opiate Litigation*, No. 17-md-02804 (N.D. Ohio), six municipalities, and one federally recognized American Indian Tribe – was formed to help ensure that Purdue and the Sacklers paid appropriate compensation for these harms.

Purdue's plan – which its creditors negotiated and overwhelmingly support – furthers that goal. Among its many benefits, the plan will establish and fund a series of creditor trusts dedicated to abatement of the opioid crisis and the compensation of individual victims. Those benefits are made possible through a comprehensive resolution of a series of interrelated disputes and by the Sacklers' substantial monetary contribution of between $5.5 and $6 billion, given in exchange for the release.

The release, insofar as it affects the rights of non-consenting claimants, is narrow. The most valuable claims against the Sacklers are those seeking to claw back $10.4 billion in transfers from Purdue to the Sacklers in the years before bankruptcy. Once Purdue filed for bankruptcy, those became *estate* claims that only Purdue itself could settle. Most of the creditors holding direct claims against the Sacklers – including the States, with their claims for violation of consumer protection and other laws – have consented to the release of their claims in connection with the overall settlement. Petitioner and the few other remaining plan objectors have been unable to identify *any* valuable direct third-party claims that will be released without consent.

The release, though narrow, is important. The Sacklers required closure in exchange for their

payments, and the creditors required certainty that they would receive the benefit of their bargain under the plan. Unless *all* creditors were precluded from continuing to sue the Sacklers, *no* creditor could have settled, lest the Sacklers' assets be attached or depleted by hold-outs before the distributions under the plan were complete.

The plan's benefits are widely acknowledged, even by the district court that overturned the plan and, grudgingly, petitioner U.S. Trustee ("Trustee"). Equally important, there is no alternative that would provide anything close to the benefits, monetary and otherwise, promised by the current plan.

Reversal of plan confirmation likely would result in the liquidation of Purdue, with most or all of its value going to satisfy claims of the federal government. It also would cause an uncoordinated, years-long, value-destructive, worldwide race among creditors to access the assets of the Sackler family members and entities, who are widely dispersed and in some cases bankruptcy-ineligible or -remote. As the bankruptcy court found: "if I denied confirmation of the plan, the objectors' aggregate net recovery on their claims against the Debtors and the shareholder released parties would be materially less than their recovery under the plan." 1JA406.

Substantial non-monetary benefits would also be lost. The plan requires States and municipalities to deploy their distributions for opioid abatement; it establishes a document repository that will provide public access to documents detailing Purdue's and the Sacklers' roles in the opioid crisis; it transfers Purdue's business to a "NewCo" for the benefit of the abatement trusts; and it requires the Sacklers to exit

the opioid business permanently. None of this would be achievable without the plan.

All this supports the release here, but what of future cases? Petitioner and his *amici* warn of abuse, but there is no reason to expect abuse. The Bankruptcy Code permits only "appropriate" plan provisions, and the court of appeals' test erects significant guardrails. Among other things, bad actors cannot unilaterally impose third-party releases on an unwilling creditor body, since the Circuit's test requires – at a "bare minimum" – the support of at least 75% of the voting creditors. 2JA889.

The Bankruptcy Code authorizes nonconsensual third-party releases, they are appropriate here, and the releases in this case overwhelmingly serve the public interest The judgment of the court of appeals should be affirmed.

STATEMENT

Purdue and its owners, the Sacklers, are widely acknowledged to have caused or contributed to the opioid epidemic – one of the worst public-health crises in this Nation's history. The damage they inflicted is nearly incalculable, and can never be fully undone. The plan is the surest way – the *only* way – to restructure the debtor-creditor relationship in this case and to maximize distributions to Purdue's creditors, for the benefit of individual victims, governmental entities (including Indian Tribes), and the public at large. The bankruptcy court so found through factual determinations that are not challenged as clearly erroneous, and the creditors voted overwhelmingly to support the plan. Every one of the organized creditor groups in the case – the

parties who have litigated against Purdue and the Sacklers for years and have the most comprehensive knowledge of their assets and their bad acts – has determined to support the plan. And it is why the Trustee, who holds *no* economic stake in the outcome of the case, stands nearly alone in opposing the plan.

1. The litigation against Purdue and the Sacklers arising out of their production and promoting of opioids dates back many years. Investigations and lawsuits concerning the company's conduct began as early as 2002, and the company and three of its executives pleaded guilty to criminal misbranding of OxyContin in 2007. CA2 JA6419-21. Around the same time, Purdue settled approximately 5,000 personal injury cases. CA2 JA6421. Nevertheless, Purdue's misconduct continued, and the opioid crisis grew and became an epidemic. *Ibid.*

A second round of litigation began in 2014, with the filing of complaints against Purdue by the Santa Clara County Counsel and Orange County District Attorney, and the City of Chicago. CA2 JA6427. Thereafter, almost every State sued Purdue, CA2 JA6415, as did thousands of cities, counties, municipalities, Tribes, and private claimants, CA2 JA6427. Many of those cases were consolidated in the National Prescription Opiate Litigation in the Northern District of Ohio. CA2 JA6428.

As of its bankruptcy filing in September 2019, Purdue was the subject of nearly 3,000 civil actions in state and federal courts. 2JA849. More than 400 of those suits also named one or more of the Sacklers. *Ibid.*; *see also* 2JA669.

"From 2008 to 2016, Purdue distributed a significant proportion of the company's revenue . . . to Sackler family trusts and holding companies."

2JA847-48. Of the $10.4 billion in distributions, some $4.6 billion was used to pay pass-through taxes. 2JA681. Some of the claims against the Sacklers – for fraudulent transfer or conveyance, unjust enrichment, and the like – sought claw-back of those transfers. *See, e.g.*, 2JA670-74. Other claims targeted individual Sackler family members for their conduct as officers and directors of Purdue. *Ibid.*

2. Negotiations among the parties proceeded in parallel with the prepetition litigation. CA2 JA6440-41. In August 2019, after months of negotiations, Purdue, the Sacklers, and a critical mass of plaintiffs reached agreement on the terms of a global resolution of the pending actions. Purdue would file for bankruptcy, and the Sacklers would relinquish their ownership of Purdue, sell their foreign pharmaceutical businesses, and make a multi-billion-dollar payment to Purdue's bankruptcy estate for distribution to its creditors. CA2 JA6410-11, 6428. Attorneys general for 24 States and 5 Territories supported this settlement framework, as did the Plaintiffs' Executive Committee and Co-Lead Counsel in the MDL. *Ibid.*

The settlement framework was a starting point. The parties recognized that they would need to garner further support for – and improve – the deal once Purdue filed for bankruptcy. CA2 JA6411-12. The Ad Hoc Committee was formed to represent the interests of the creditors that supported the prepetition deal and to serve as an organized group with which other case parties could negotiate.

3. Those negotiations were lengthy and contentious. The Ad Hoc Committee supported the prepetition settlement framework, but at first many other creditor constituencies did not. The initially opposed groups included the Official Committee of

Unsecured Creditors, a group of 25 nonconsenting States, and an ad hoc group of individual victims, among others.

The Official Committee led a comprehensive investigation of claims against the Sacklers. 1JA48-58. Besides the merits of the claims, the investigation considered the Sacklers' assets and liabilities and issues of collectability. 1JA48-49. In an "extensive discovery process," 1JA355, the Official Committee took discovery of Purdue, the Sacklers, more than 100 Sackler-owned entities worldwide, and various financial institutions (among others), obtaining more than 14 million documents in the process. 1JA49, 58. The "extraordinary disclosure" to which the Sacklers were subject was "at least as much, and often more, than would be reasonably expected if they themselves sought bankruptcy relief (which for many of the Sacklers and most of their related entities would not be under the U.S. Bankruptcy Code)." 1JA406.

Armed with the information obtained in discovery, the parties engaged in "an intensive months-long and multi-phase mediation." 2JA842. Phase I addressed the allocation of the bankruptcy estate's assets and settlement proceeds between groups of public claimants, on the one hand, and private claimants, on the other. 2JA850. Phases II and III focused principally on the size and terms of the Sacklers' proposed contribution to a Chapter 11 plan, concluding with the Sacklers' agreement to enhanced terms that garnered the support of the Official Committee and nearly every other major creditor group, including 15 of the 25 States that had not agreed to the prepetition framework. 2JA850-51.

The mediation preceding plan confirmation spanned nearly a year and a half, from March 2020

through July 2021. By the time this round of mediation ended, the Sacklers had agreed to increase their contribution from the $3 billion contemplated by the prepetition settlement framework to $4.325 billion. 2JA851; *see* 2JA685.

4. The Chapter 11 plan incorporating the terms agreed to in mediation obtained overwhelming creditor support. In bankruptcy, a class is deemed to accept a plan if members holding "at least two-thirds in amount and more than one-half in number" vote yes. 11 U.S.C. § 1126(c). Here, every one of the nine voting classes accepted the plan by margins exceeding 88%. 1JA303. More than 96% of the non-federal domestic governmental claims and Tribe claims, and more than 95% of each class of personal injury claims, accepted the plan. CA2 JA6258; *see also* 1JA303.

5. The widespread creditor support for Purdue's plan was attributable in no small part to the fact that it was the creditors themselves that drove the process. As the bankruptcy court found: "this is <u>not</u> the Sacklers' plan." 1JA348. The Ad Hoc Committee supported the plan for a number of compelling reasons.

a. The plan is structured to ensure that all distributions to non-federal domestic governmental creditors are used for abatement of the opioid crisis. 1JA334. This avoids the pitfalls of "prior national settlements such as the settlements with tobacco companies," in which funds were used for "miscellaneous governmental purposes." 1JA345; *see also* 1JA334. The allocation of plan recoveries among the non-federal domestic governmental creditors (on an inter- and intrastate basis), and the permitted uses of those funds, were left to the non-federal domestic governmental creditors themselves, which reached

agreement on these topics following extensive negotiations spanning several years. 1JA333, 345; *see also* CA2 JA6385-86, 6397-6409.

b. The plan favorably resolves a multi-billion-dollar superpriority administrative expense claim asserted by the U.S. Department of Justice. Of the $2 billion allowed amount of that claim, the DOJ agreed to waive recovery on $1.775 billion if (i) a like amount of funds are distributed for opioid abatement, and (ii) Purdue emerges from bankruptcy as a public-benefit or similar company. 1JA351-52; *see also* CA2 JA6365. Excluding its litigation claims, Purdue itself was valued at only $1.8 billion (midpoint value) as of confirmation. Therefore, it was only by virtue of the DOJ settlement that non-priority creditors – the States, municipalities, Tribes, and personal injury claimants – were able to receive *any* recovery from Purdue's current assets. 1JA365; 2JA892.

c. The plan effectuates an extraordinary degree of public accountability through its creation of a public document repository containing well over 100 million pages of documents detailing Purdue's and the Sacklers' roles in the opioid crisis. 1JA241, 415-16. The repository "provide[s] far more transparency to the conduct of Purdue and those it did business with . . . than would renewed litigation and any eventual trials against various members of the Sackler family." 1JA416.

d. The plan reforms Purdue's business by transferring it to NewCo for the benefit of the abatement trusts and subjecting it to an operating injunction, governance covenants, and the oversight of an independent monitor. The "NewCo governance provisions go beyond [federal law] where possible to ensure the safety or the safe use of the Debtors'

products." 1JA346-47. The plan also requires the Sacklers to exit the opioid business permanently, worldwide. CA2 JA3464, 3523-24.

6. The third-party release was essential to the plan.

a. The release unlocked value that was critical to resolution of a variety of inter-creditor disputes. "[T]he plan is not just a plan that settles the estates' claims and certain third party claims against the Sacklers." 1JA351. It also "contains several other settlements interrelated to those settlements that would not be achievable" without them. *Ibid.* Those other settlements include the resolution of the "extremely difficult private/public allocation issues," 1JA342, and Purdue's settlement with the DOJ. 1JA351-52. The bankruptcy court found as fact: "Without the $4.325 billion being paid by the Sacklers under the plan and the other elements of the Sackler settlements, those other elements of the plan would not happen." 1JA352; *see also* 2JA892; CA2 JA6413. Some of the briefs filed in this case by parties and *amici* argue otherwise, but none attempts to carry the heavy burden of showing that factual finding to be clearly erroneous.

b. The release caused the Sacklers to contribute more funds than they otherwise would have. The "uncontroverted" testimony of the Ad Hoc Committee's witnesses "describe[d] the hard-fought litigation and negotiation process leading to the settlement . . ., a settlement they support and one which [the Ad Hoc Committee's witness] testified reflects a 'settlement premium' paid to obtain a comprehensive result." 1JA341.

c. The release enabled the creditors to settle by solving the collective-action problem. The plan is

structured so that non-federal governmental claimants will receive distributions from the Sacklers over the course of many years. CA2 JA3490-91. The bankruptcy court found that the Sacklers are worth, in the aggregate, $11 billion. 1JA360. The claims filed against them and Purdue exceed $40 *trillion*. 2JA850. Accordingly, claimants could not have agreed to deferred payments under the plan if it was possible that hold-out creditors could sue the Sacklers and deplete their assets, impairing the negotiated stream of payments. CA2 JA6415.

7. The bankruptcy court held a hearing to consider confirmation of Purdue's plan in August 2021. After a six-day trial, 1JA299, the bankruptcy court entered a decision and accompanying order confirming the plan. 1JA297, 419.

"In the light of colloquy during the confirmation hearing," the final form of the third-party release in the plan was "substantially narrowed" from that which was originally proposed. 1JA375. Under the terms of the plan, the nonconsensual third-party release applies only to claims (i) that are opioid-related, and (ii) "as to which any conduct, omission or liability of any Debtor or any Estate is the legal cause or is otherwise a legally relevant factor." 1JA275; *see also* 1JA376.

In confirming the plan, the bankruptcy court found that it was far superior to any potential alternatives. "[W]ithout the releases the plan would unravel and the Debtors' cases would likely convert to cases under Chapter 7 of the Bankruptcy Code." 1JA405. In that scenario, contests among creditors "would be extraordinarily expensive and time-consuming," with the likely result that creditors would "not only receive zero from the Debtors' estates

but also, because of their collective size, only a small pro rata share of any recovery from the shareholder released parties." *Ibid*.

In fact, in applying the "best interests" test, 11 U.S.C. § 1129(a)(7), the bankruptcy court specifically found that each objector would receive *more* under the plan than in the event of a Chapter 7 liquidation for *both* their claims against the estate *and* their related third-party claims – "indeed materially more." 1JA408. The factual finding that no objector will suffer any injury from the nonconsensual third-party release has not been challenged as clearly erroneous and speaks resoundingly in favor of the settlement.

8. A small number of parties appealed the bankruptcy court's decision confirming the plan, including the Trustee and a group of eight States plus the District of Columbia (referred to as the "Nine"). The district court reversed confirmation of the plan. 2JA632. Purdue, the Official Committee, the Ad Hoc Committee, and other plan supporters appealed to the Second Circuit.

9. While the Second Circuit appeal was pending, the bankruptcy court ordered the Sacklers and the Nine to further mediation, which was successful. In exchange for the Nine withdrawing their opposition to the third-party release, the Sacklers agreed to provide "an additional \$1.175-\$1.675 billion in Sackler contributions (resulting in an aggregate \$5.5 to \$6.0 billion contribution to the Plan)." 2JA865-66.

The settlement with the Nine was conditioned on reversal of the district court opinion. Only upon entry of an order "permitting the consummation of the Plan" would the settlement become effective. Bankr. Dkt. No. 4503, ¶3.

10. With no State continuing to oppose the plan, "the main challenge" to the release was "not by the creditors, but by the [United States] Trustee – a government entity *without a financial stake in the litigation*." 2JA895 (emphasis added). The court of appeals ruled in favor of the proponents of the plan, reversing the district court's order and affirming the bankruptcy court's approval of the plan.

SUMMARY OF ARGUMENT

This case is governed by 11 U.S.C. § 1123(b)(6), which states that a Chapter 11 plan of reorganization may include "*any* other *appropriate* provision not inconsistent with the *applicable* provisions of this title." (Emphasis added). A settlement and release of direct claims held by creditors against a third party falls within "any other . . . provision," and the courts below determined that it is "appropriate" in this case. The remaining question is whether the release is "inconsistent with the applicable provisions of this title."

It is not. Comparison of Section 1123(b)(6) with other Code provisions shows that, to fail under that section, a provision must be incompatible with Code provisions *directly* implicated by the debtor's reorganization. It is not enough that the provision be (supposedly) in tension with a purported "bankruptcy *quid pro quo*." It is not enough that the provision be (supposedly) in tension with what would or would not be allowed in a hypothetical bankruptcy of the limited number of released Sackler parties that would be eligible for individual bankruptcy. A hypothetical Sackler bankruptcy is not relevant to the provisions "applicable" to Purdue's bankruptcy.

The Trustee tries to graft an atextual restriction onto Section 1123(b)(6) – specifically, that discretionary plan provisions may modify only creditor-debtor relationships. No such restriction exists, as we show in this brief, but it would be satisfied here in any event, as the briefs of other respondents demonstrate. As the record below proved, Purdue could not adjust its relationship with its own creditors without addressing the direct creditor claims that are the subject of the third-party release.

Nor does any applicable provision of the Code forbid nonconsensual third-party releases. Section 524(e) states that "discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt." This section merely limits the effect of the debtor's own discharge – it doesn't bar other appropriate terms from being included in a plan. Moreover, a settlement that includes a release (granted in exchange for substantial consideration) is not a "discharge."

Arguments drawing a negative inference from Section 524(g), which authorizes nonconsensual third-party releases in cases involving asbestos, collide with Congress's explicit command *not* to construe that section to modify any preexisting authority. 11 U.S.C. § 524 note. And Section 523(a), limiting the discharge of fraud claims, applies only to "individual debtor[s]," not corporations like Purdue, and thus is not an "applicable" Code provision. Moreover, Section 523(a) is not a blanket prohibition on discharge of fraud claims.

The plan's third-party release is in the public interest. It enjoys overwhelming creditor support. It incorporates monetary and non-monetary benefits –

not least its devotion of billions of dollars to abatement of the opioid crisis – that would not have been achievable without the release. The litigation alternative advocated by the Trustee would be far worse: As the bankruptcy court found, creditors would receive "materially less" from both Purdue and the Sacklers if the plan were to fail. 1JA406, 408; *see also* 1JA365.

Furthermore, the parties with the strongest claims against the Sacklers – including the States, and the Purdue bankruptcy estate, which controls the valuable fraudulent transfer claims against the Sacklers – are *consensually* releasing those claims. The opponents of the plan have yet to identify *any* actual third-party direct claims that are released without consent – much less show that any such claims would increase a creditor's total recovery beyond what the plan will pay.

Approval of the third-party release here poses no risk of abuse in future cases. The court of appeals' test requires a substantial showing, including, among other things, overwhelming creditor support. The settlement with the Nine does not show that creditors are better off in a world without releases. That settlement was conditioned on approval of a plan containing a third-party release, without which the entire deal would have collapsed. There is no moral hazard associated with the approval of such releases in appropriate circumstances – indeed, the court of appeals noted that releases would *not* be appropriate if they were the product of abusive conduct taken in contemplation of bankruptcy.

The third-party release comports with due process, which, in the case of a "special remedial scheme" such as bankruptcy, does not require that

claimants be given the right to opt out. Due process protections were ample here, given the bankruptcy court's findings regarding the extensive discovery process in the case, the lengthy and arm's-length negotiations and mediations that led to the formulation of the plan, the participation of a dozen or more well-represented creditor groups representing every conceivable interest, the unprecedently broad noticing program, and the similarly unprecedented level of creditor support for the plan. And, again, no creditor has been identified that is *harmed* by the third-party release.

The *amicus* briefs change nothing. Other than due process, any constitutional arguments they make are not properly before the Court, and all are in any event meritless. *Amici*'s public-policy arguments likewise are wrong for the reasons stated in this brief. And their statutory arguments suffer from the same flaw as the Trustee's: incompatibility with the text of Section 1123(b)(6).

ARGUMENT

I. THE BANKRUPTCY CODE AUTHORIZES NONCONSENSUAL THIRD-PARTY RELEASES AS PART OF CHAPTER 11 REORGANIZATION PLANS

A. Statutory text permits nonconsensual third-party releases in Chapter 11 plans

One might think that any analysis of the meaning of section 1123(b)(6) must begin with the text of that provision. "As always, we begin with the text." *Sw. Airlines Co. v. Saxon*, 596 U.S. 450, 457 (2022)

(unanimous Court); accord *Sebelius v. Cloer*, 569 U.S. 369, 376 (2013).

The Trustee takes a different approach.[1] The first 3 pages of the relevant portion of his brief assert that bankruptcy law "generally" does not address relations between nondebtors. Pet. Br. 19-21. Then he turns to what he calls "[t]he residual equitable powers in Sections 105(a) and 1123(b)(6)" for 4 pages. Pet. Br. 21-24. After an introductory paragraph and an analysis of Section 105(a) – which no one contends authorizes nonconsensual third-party releases by itself – he finally turns to the real issue, interpretation of Section 1123(b)(6). But even then, he waits until the end of a paragraph to quote the text at issue before immediately pivoting to "[t]he structure of Section 1123," not its text. Pet. Br. 23. The Trustee shows little appetite for actually engaging with Congress's relevant words.

Those words are as follows. A plan of reorganization may include:

> *any* other
> *appropriate* provision
> not inconsistent with the *applicable* provisions of this title.

11 U.S.C. § 1123(b)(6) (emphasis and line breaks added). The italicized words contain one standard – a judge must decide that the requested plan provision is "appropriate" – and two rules – "any" such provision

[1] The Trustee lacks standing, for reasons stated by other respondents. We do not repeat those arguments.

is allowed but it must be "not inconsistent with . . . applicable provisions."

1. To start, the word "any" means any. *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 219-20 (2008). As this Court has explained, "read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *Id.* at 219 (quoting *United States v. Gonzales,* 520 U.S. 1, 5 (1997), and *Webster's Third New International Dictionary* 97 (1976)). "In affirmative sentences it asserts concerning a being or thing of the sort named, without limitation as to which, and thus constructively of *every* one of them, since every one may in turn be taken as a representative." Any, *The Compact Edition of the Oxford English Dictionary* (1971); *see also* Any, *The Random House Dictionary of the English Language* (2d ed. 1987) ("4. every; all").

So Congress did not, in the language of the relevant section, exclude provisions that affect nondebtors or go beyond "debtor-creditor relations." It could easily have done so, but instead it wrote broadly: "any" other appropriate provision. *Cf. Abbott v. United States*, 562 U.S. 8, 27 (2010) ("any . . . provision" is so broad that "any other provision of law" may even include future federal statutes).

The debatable *textual* propositions then are whether and when nonconsensual third-party releases are (1) "appropriate" and (2) "not inconsistent with the applicable provisions of this title." Neither limitation prohibits third-party releases categorically.

2. The word "appropriate" – like many other adjectives found in the Code (including "reasonable," "fair," and "equitable") – prevents misuse of the powers granted by the Code. It obviously bars plan

provisions that are unreasonable in any circumstance: for example, an attempt to grant immunity from criminal prosecution. But it also is a boundary for courts evaluating more realistically conceivable provisions, because such provisions must be appropriate in the particular circumstances. Indeed, in the circuits – an overwhelming majority of which have held that the Code contains no categorical bar on nonconsensual third-party releases – fleshing out "appropriate" circumstances for their use has received much judicial attention.[2] Like any other standard, "appropriate" defies attempts at definition but is instead applied case by case.[3] That does not mean it lacks restraining power, only that its meaning is developed in the common-law tradition.[4]

But no reasonable construction of the word "appropriate" creates a *blanket* prohibition on third-party releases. "'[A]ppropriate' is the classic broad and all-encompassing term that naturally and traditionally includes consideration of all the relevant factors." *Michigan v. EPA*, 576 U.S. 743, 752 (2015)

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[2] *See, e.g.*, *Blixseth v. Credit Suisse*, 961 F.3d 1074, 1084-85 (9th Cir. 2020); *SE Prop. Holdings, LLC v. Seaside Eng'g & Surveying, Inc. (In re Seaside Eng'g & Surveying, Inc.)*, 780 F.3d 1070, 1079-81 (11th Cir. 2015); *Class Five Nev. Claimants v. Dow Corning Corp. (In re Dow Corning Corp.)*, 280 F.3d 648, 658-61 (6th Cir. 2002); *Deutsche Bank AG, London Branch v. Metromedia Fiber Network, Inc. (In re Metromedia Fiber Network, Inc.)*, 416 F.3d 136, 142 (2d Cir. 2005).

[3] *See generally* Kathleen M. Sullivan, *The Supreme Court 1991 Term—Foreword: The Justices of Rules and Standards*, 106 Harv. L. Rev. 22 (1992); Jamal Greene, *The Rule of Law as a Law of Standards*, 99 Geo. L.J. 1289 (2011).

[4] *See generally* Henry J. Friendly, *Indiscretion About Discretion*, 31 Emory L.J. 747 (1982).

(quotation marks omitted). *See also* Appropriate, *The Random House Dictionary of the English Language* (2d ed. 1987) ("1. suitable or fitting for a *particular* purpose, person, occasion, etc.") (emphasis added). The word "appropriate" does not, as a categorical matter, remove any realistically conceivable type of plan provision from the discretion afforded under Section 1123(b)(6). Rather, it invites the court to consider whether, in that particular reorganization, a given provision is suitable. That is what the court of appeals did below when it analyzed the "factors relevant to releasing direct third-party claims against non-debtors." 2JA886-90.

Nowhere in his opening brief does the Trustee attempt any *textual* explanation of the words "any" and "appropriate." Pending petitioner's reply brief, then, the foregoing textual analysis stands uncontested. Nowhere does the Trustee explicitly suggest that "any" be read to mean something less than any, or that "appropriate" is a *categorical* bar to all nonconsensual third-party releases. He does invoke canons of construction, which will be discussed below, but they are decoupled from specific text.

3.a. The closest thing to a textual argument about Section 1123(b)(6) that the Trustee makes are his assertions that "[n]onconsensual third-party releases conflict with other limits on powers under the Code" (Pet. Br. 24) and are "incompatible with the structure and purposes of the Code" (Pet. Br. 30). Presumably those formulations are his way of arguing that such releases are, in the words of Section 1123(b)(6), "inconsistent with the applicable provisions of this title." But his word choice betrays several problems with his analysis – which ultimately fails to identify

any *applicable* provisions with which third-party releases are always *inconsistent.*

The Trustee's failure to engage with the actual statutory language raises an eyebrow if not an alarm in view of the settled presumption that "a legislature says in a statute what it means and means in a statute what it says there." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992); accord *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000). This Court has stressed (in a case involving the words "inconsistent" and "applicable") that "'the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'" *Parker Drilling Mgmt. Servs., Ltd. v. Newton*, 139 S. Ct. 1881, 1888 (2019) (quoting *Roberts v. Sea-Land Servs., Inc.*, 566 U.S. 93, 101 (2012)). Here, the meanings of both "inconsistent" and "applicable" show that Section 1123(b)(6) does *not* bar nonconsensual third-party releases.

First, it is demonstrable that Congress intended Section 1123(b)(6) to prohibit only inconsistency with provisions that are specifically "applicable" in the circumstances, not any broad, general "limits on power" found anywhere in "the Code" – a construct that invites appeals to free-floating policy considerations.

Significantly, Sections 1222(b)(12) and 1322(b)(11) – which address discretionary plan provisions under Chapters 12 and 13 – state that the plan may "include any other appropriate provision not inconsistent with *this title*." (Emphasis added.) That formulation differs from Section 1123(b)(6), which bars only plan provisions "inconsistent with *the applicable provisions* of this title." (Emphasis added).

"[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (quotation marks omitted); *accord City of Chicago v. Env't Def. Fund*, 511 U.S. 328, 338 (1994). By prohibiting only plan provisions "not inconsistent with the applicable provisions of this title" in Section 1123(b)(6), rather than those "not inconsistent with this title," Congress afforded greater leeway to Chapter 11 plans than those under Chapters 12 and 13.

If the word "applicable" is not to be treated as meaningless surplusage in violation of the *Russello* principle, then "not inconsistent with the applicable provisions of this title" must mean that Section 1123(b)(6) prohibits plan provisions that are inconsistent with Code provisions *directly* implicated by the debtor's reorganization. *See United States v. Energy Res. Co.*, 495 U.S. 545, 549-50 (1990) (rejecting contention that plan provision was in "conflict with" inapplicable sections of the Code); *cf. Ransom v. FIA Card Servs., N.A.*, 562 U.S. 61, 69-70 (2011) (an "applicable" expense was one directly incurred by the particular debtor in that case).

Similarly, the Trustee's suggestion that provisions are unlawful that merely "conflict" or are "incompatible" with other Code provisions, rather than having to be "inconsistent," as the statute requires, invites invalidation for mere tension rather than outright inconsistency. Allowing that looser version of inconsistency to defeat application of Section 1123(b)(6) could cause a host of plan

provisions to be disqualified merely because of subjectively perceived tension with some Code provision somewhere, even if that provision has no relevance to a particular plan. That would drain Section 1123(b)(6) of the broad discretion that its text affords, and undercut "[t]he hallmark of chapter 11[,] flexibility." 7 *Collier on Bankruptcy* ¶ 1100.01.

b. Recognition that Section 1123(b)(6) disallows only "[in]appropriate" provisions and those forbidden by *directly applicable* Code sections defeats two of the Trustee's overarching arguments. First, the Trustee situates his entire brief against the backdrop of the "bankruptcy *quid pro quo*" that he claims is established by the Code as a general matter. Pet. Br. 19-21. Whatever the merits of that observation as a generality, Section 1123(b)(6) demands that there be specific conflicting "applicable provisions" to defeat the discretion it otherwise confers. A different result might obtain under Sections 1222 and 1322, which invite a more holistic review of "this title." But that is not this case.[5]

Relatedly, the Trustee advances numerous arguments against third-party releases based on his view of what would or would not be allowed in a hypothetical Sackler bankruptcy. But a hypothetical Sackler bankruptcy is not relevant to the provisions

[5] The Court has rejected such appeal to perceived underlying policy to override specific statutory language: "Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice – and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987) (per curiam).

"applicable" to Purdue's bankruptcy: Section 1123(b)(6) narrows the focus to only those provisions implicated by Purdue's own reorganization. To rely on arguments about what "would" happen if some inapplicable Code sections were applicable ignores the specific words that Congress chose to include in Section 1123(b)(6).

B. Section 1123(b)(6) is not limited to modifying debtor-creditor relationships

Misperceiving the structure of Section 1123(b) and misapplying the *ejusdem generis* canon, the Trustee tries to graft an atextual restriction onto Section 1123(b)(6) – specifically, that discretionary plan provisions may modify only "the relationship between the debtor and its creditors." Pet. Br. 24. The briefs of Purdue and the Official Committee demonstrate that this purported rule, if it exists, is satisfied here. But no such restriction exists.

First, read literally, the Trustee's broad rule cannot explain fraudulent transfer suits by debtors or trustees against parties who are not creditors of the estate. But the power to avoid fraudulent transfers is central to the Code, *see* 11 U.S.C. §§ 544, 548, and is wielded without regard to whether the target of the suit is a "creditor" of the debtor. "Fraudulent conveyances typically involve 'a transfer to a close relative, a secret transfer, a transfer of title without transfer of possession, or grossly inadequate consideration.'" *Husky Int'l Elecs., Inc. v. Ritz*, 578 U.S. 355, 361 (2016) (quoting *BFP v. Resolution Tr. Corp.*, 511 U.S. 531, 540-41 (1994)). They do not depend on whether the party against which the debtor

seeks recovery is a "creditor." Indeed, even subsequent transferees can be sued. 11 U.S.C. § 550(a)(2).

The Madoff Trustee, for example, has spent the last 14 years using the Code's avoidance provisions, as incorporated into the Securities Investor Protection Act, 15 U.S.C. § 78a *et seq.*, to claw back, for redistribution to Madoff creditors, billions of dollars from nondebtors who are, as net winners,[6] also non-creditors. *See generally* Brief for the United States as Amicus Curiae, *HSBC Holdings PLC v. Picard*, No. 19-277 (Apr. 10, 2020) (supporting this use of avoidance powers by the Trustee against numerous third parties, including foreign entities that were subsequent transferees).

This Court's most recent merits decision concerning the Code's avoidance provisions illustrates the same point. *Merit Mgmt. Grp., LP v. FTI Consulting, Inc.*, 138 S. Ct. 883 (2018). That case arose out of the Chapter 11 bankruptcy case of Valley View Downs, LP, and its parent company, Centaur, LLC. *Id.* at 891. Petitioner was (like the Sacklers here) a former shareholder of the debtors, and respondent was a litigation trustee that had sued petitioner to avoid and recover an allegedly fraudulent transfer. The details may differ from this case, but, if the Trustee is trying to create the fiction that the Code doesn't affect the liability of parties who are neither debtor nor creditor, it is easy to disprove.

Second, the Trustee's own proposed extratextual limitation (debtor-creditor relationships) is not even a

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[6] *In re Bernard L. Madoff Inv. Sec. LLC*, 654 F.3d 229, 232-33 (2d Cir. 2011).

consistent through line of paragraphs 1123(b)(1)-(5), if that limitation means what he seems to claim it does. Section 1123(b)(3) states that the plan may "provide for the settlement or adjustment of *any* claim or interest belonging to the debtor or to the estate" (emphasis added) – not just those asserted against creditors. As discussed above, such settlements may result from avoidance actions (or other claims of the estate), often brought on behalf of the estate against non-creditors. Those settlements specifically recognized in the very Code section at issue bind other parties who are neither debtors nor creditors.

Third, the *ejusdem generis* interpretive canon embodies the inference "'that Congress remained focused on [some] common attribute' shared by the preceding list of specific items 'when it used the catchall phrase.'" *Saxon*, 596 U.S. at 461-62 (quoting *Ali*, 552 U.S. at 225). It applies most clearly where there is "a list of specific items separated by commas and followed by a general or collective term." *Ali*, 552 U.S. at 225; *see also CSX Transp., Inc. v. Ala. Dep't of Revenue*, 562 U.S. 277, 294-95 (2011) (quoting Justice Scalia's example of "fishing rods, nets, hooks, bobbers, sinkers, and other equipment" as a paradigm) (quotation marks omitted).

In contrast, paragraphs (1)-(5) of Section 1123(b) are not a list of specific, alike items, but rather a widely varying series of differing matters that may be included in a plan, including resolution of *any* claim or interest of the estate (Section 1123(b)(3)) and the sale of all or substantially all of the assets of the estate (Section 1123(b)(4)). That these may all broadly relate to defining and maximizing the estate and resolving various types of claims hardly means that paragraph

(6) is limited in the manner the Trustee argues. Rather, Section 1123(b)(6) is a "broad catchall phrase." *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin*, 599 U.S. 382, 389 (2023). As this Court has held, it is a "broad" grant of authority. *Energy Res.*, 495 U.S. at 549. By its text, it is a specifically formulated grant of discretion and authority, with its own internal limitations. Application of the *ejusdem generis* canon is thus inappropriate.

Even crediting the Trustee's argument to the limited extent of reading Section 1123(b)(6) to authorize only plan provisions broadly affecting the bankruptcy *res* (a fairer reading of the scope of Sections 1123(b)(1)-(5)), the releases in this case are squarely within the power that Congress granted under that section. As the Debtors' and Official Committee's briefs explain, the Second Circuit did not authorize any and all third-party releases, but only ones where (as here) "there is an identity of interests between the debtors and released third parties" (Prong 1), "claims against the debtor and nondebtor are factually and legally intertwined" (Prong 2), and the "releases are essential to the reorganization" (Prong 4). 2JA887-88.

C. The decisions of this Court limiting the use of Section 105(a) or general powers do not limit the applicability of Section 1123(b)(6)

1. Only one decision of this Court has ever construed Section 1123(b)(6) (at the time numbered

1123(b)(5)). *United States v. Energy Res. Co.*, 495 U.S. 545 (1990). In that case, a nearly unanimous Court[7] rejected arguments from the federal government similar to the arguments the Trustee now makes. Because the Court held that Code Section 105(a) and Section 1123(b)(6) *both* authorized the bankruptcy court action at issue there, the Court had no need to parse the text of either provision, and it made sense to refer loosely to both as conferring "residual authority." *Id.* at 549. Nor was any party before the Court a nondebtor and noncreditor, so it made sense to refer to the traditional power of courts in bankruptcy "to modify creditor-debtor relationships." *Ibid.* Those observations were *sufficient* – not necessary – to defeat the government's argument in that case.

Now, as part of the Trustee's campaign to avoid seriously confronting the text of Section 1123(b)(6), the Trustee treats the phrases sensibly used in *Energy Resources* to describe Sections 105(a) and 1123(b)(5) *together* as if they were words of limitation on courts' power under *either* provision. But the Court did not use those words as words of limitation at all, nor can they substitute for analysis of statutory text.

And the text of Section 105(a) and that of Section 1123(b)(6) differ sharply from one another. As the Second Circuit correctly observed (2JA878), Section 1123(b)(6) – leaving aside the overarching and important standard that a court may approve only "appropriate" provisions – "is limited only by what the Code expressly forbids, not what the Code explicitly

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[7] Justice Blackmun dissented without opinion.

allows." The Trustee takes umbrage at that statement (Pet. Br. 35), but – as discussed at pp. 18-24 *supra* – it is simply what the *text* of Section 1123(b)(6) says.

The *text* of Section 105(a) is quite different: the "court may issue any order, process, or judgment that is necessary or appropriate *to carry out the provisions of this title*." 11 U.S.C. § 105(a) (emphasis added). This section is the obvious home for the residuum of equitable power conferred on the bankruptcy courts. Section 105 – a section aptly titled "Power of court" – is part of Chapter 1's General Provisions and applies across all chapters.

As a simple matter of non-redundancy, by including Section 1123(b)(6) in the Code in addition to Section 105(a), Congress must have intended that Section 1123(b)(6) mean something beyond whatever residual powers exist in Section 105(a). Indeed, it is widely accepted that a bankruptcy courts' powers under Section 105(a) can in most cases be exercised only if they are tethered to a specific provision of the Bankruptcy Code. *See* Douglas Baird, *The Elements of Bankruptcy* 6 (7th ed. 2022). The presumption is that a court cannot act under Section 105(a) unless the moving party invokes some other authorizing section of the Code.

But that presumption – that everything not expressly permitted is forbidden – applies only to a bankruptcy court's Section 105(a) powers. When the court acts to approve a Chapter 11 reorganization plan, the presumption is flipped: Every provision that is "appropriate" and not expressly forbidden is permitted. Again, by its plain text, Section 1123(b)(6) grants the court authority to include "any . . .

appropriate provision" in the plan, regardless of whether the provision in question is elsewhere authorized by the Code. The burden is then on the opposing party to identify a specific provision in the Code that limits the exercise of authority otherwise permitted by Section 1123(b)(6).

2. The foregoing points should be kept in mind when reading the decisions the Trustee relies on as having rejected particular actions by bankruptcy courts. Not one of them construed Section 1123(b)(6) or any comparable statutory text. All discussed either Section 105(a) or equitable authority not grounded in any specific Code grant.

In *Czyzewski v. Jevic Holding Corp.*, 580 U.S. 451 (2017), the Court observed at the outset that "Chapter 11 foresees three possible outcomes:" a confirmed plan of reorganization, conversion of the case to a Chapter 7 liquidation, or dismissal of the Chapter 11 case under 11 U.S.C. § 1112(b). *Id.* at 456. The result below had been a dismissal – specifically, a so-called "structured dismissal" – rather than a plan. *Ibid.* For that reason, the parties did not invoke and the Court had no occasion to discuss Section 1123, which applies *only* to the contents of a plan.

The Court proceeded to discuss various ways in which that structured dismissal violated "[t]he Code's priority system," which "constitutes a basic underpinning of business bankruptcy law." 580 U.S. at 464. The Court held that Section 349 of the Code provided no affirmative authority to violate the priority system. *Id.* at 466-467. With an outcome contrary to core Code principles, and no affirmative statutory grant of authority to the bankruptcy court like the ones in Section 1123, the Court held such an

outcome impermissible. The case has absolutely nothing to say, explicitly or implicitly, about the scope of and limits on powers under Section 1123(b)(6).

In *Law v. Siegel*, 571 U.S. 415 (2014), the debtor in a Chapter 7 bankruptcy had a statutory "homestead exemption" expressly granted by 11 U.S.C. § 522(b)(3)(A). This Court held that neither Section 105(a) nor "inherent powers" allowed the bankruptcy court to "contravene specific statutory provisions." 571 U.S. at 421. The case did not involve and could not have involved Section 1123(b)(6) because it was not a Chapter 11 case at all.

Even if Section 1123(b)(6) had somehow been applicable, the result would have been the same. The plain text of that section disallows plan provisions "inconsistent with the applicable provisions of this title," and Section 522(b)(3)(A) was a directly applicable provision. And this Court's observations about the limits of Section 105(a) tell us nothing about the very differently worded Section 1123(b)(6).

In *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639 (2012), this Court applied the specific-governs-the-general canon to hold that a plan could not rely on the more general clause (iii) of Section 1129(b)(2)(A) to sell property clear of liens because clause (ii) spoke directly to the requirements for selling property clear of liens. The debtor's proposed construction of the general term would have enabled precisely what the more specific term proscribed. *Id.* at 645. A comparable example under Section 1123(b) would be, for instance, if a plan tried to use Section 1123(b)(6) to assume contracts in a way that violated Section 365, even though Section 1123(b)(2) states that any assumption is "subject to

section 365 of this title." In such a case, *RadLAX* and the general/specific canon would govern. By contrast, reading Section 1123(b)(6) to permit third-party releases does not conflict with anything in Section 1123(b)(1)-(5).

The Trustee suggests (Pet. Br. 23) that this case, like *RadLAX*, can be resolved by application of this general/specific canon, but what he finds "specific" enough to invoke that canon is unclear. If he means to assert that paragraphs (1)-(5) are more specific in a relevant way than paragraph (6), the argument fails for the same reason as his *ejusdem generis* argument – they contain no specifics that limit the broad language of paragraph (6). If he means to argue that one of the Chapter 5 provisions he cites (such as Section 524(e)) is more specific, the argument is obviously wrong because it is Section 1123(b) that specifically addresses what provisions can be part of a Chapter 11 reorganization plan.

The Code consists of nine numbered chapters: 1 (General Provisions), 3 (Case Administration), 5 (Creditors, the Debtor, and the Estate), 7 (Liquidation), 9 (Adjustment of Debts of a Municipality), 11 (Reorganization), 12 (Adjustment of Debts of a Family Farmer or Fisherman with Regular Annual Income), 13 (Adjustment of Debts of an Individual with Regular Income), and 15 (Ancillary and Other Cross-Border Cases). The concept that a Chapter 5 provision more "specifically" addresses the content of a Chapter 11 plan than Chapter 11 itself, including Sections 1123 and 1129 and their detailed subsections, is inconsistent with this reticulated structure.

D. Nonconsensual third-party releases are "not inconsistent with the applicable provisions of this title" under Section 1123(b)(6)

As already discussed at length, Section 1123(b)(6) permits "any" "appropriate" plan provision that is "not inconsistent with the applicable provisions" of the Code. The Trustee searches in vain for Code sections that are inconsistent with third-party releases. None exists.

1. The Trustee starts by flagging sections of the Code that pertain to the debtor's discharge, arguing that "[i]nterpreting Section 1123(b)(6) to authorize third-party releases circumvents the Code's express discharge provisions." Pet. Br. 25. Note the careful wording: "circumvents," not "violates" or "contradicts" or "is inconsistent with." That is enough to reject the argument.

Section 524(e) states that "discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt." 11 U.S.C. § 524(e). On its face, this section merely describes the effect of the debtor's discharge – it doesn't speak to what other relief may be granted under a plan. As the court cogently explained in *Airadigm Communications, Inc. v. FCC (In re Airadigm Communications, Inc.)*, 519 F.3d 640 (7th Cir. 2008), Section 524(e) is a "saving clause" to "preserve[] rights that might otherwise be construed as lost after the reorganization," *Id.* at 656. In other words, Section 524(e) simply establishes that, if the debtor and a nondebtor are both liable on the same debt, then the debtor and only the debtor benefits

from *the debtor's* discharge with respect to that debt. It does not itself bar any other party from receiving a discharge – much less a narrowly tailored release of only certain claims in connection with a valuable and essential settlement – a quintessential "appropriate" circumstance under Section 1123(b)(6).

Furthermore, as the same court pointed out, Section 524(e) says nothing about the *power* of a court approving a plan. 519 F.3d at 656. Congress knows how to restrict courts' powers in bankruptcy, but it used no such words in Section 524(e). *Ibid.* The effect of a discharge, once granted, is governed by Section 524(e), but it is other Code provisions that indicate when a discharge may be granted. Thus, even if it were true that the release at issue here is the functional equivalent of a discharge, it would not be forbidden by Section 524(e).

In any event, a narrowly tailored third-party release granted in connection with a valuable settlement that has overwhelming creditor support is not a discharge. "Discharge" refers to something very specific in bankruptcy: the two-part mechanism of (1) voiding the debtor's personal liability, and (2) enjoining creditors from pursuing further actions against the debtor on any claims arising from that debt. 11 U.S.C. § 524(a). As the Second Circuit has held for 35 years,[8] and reiterated in the opinion below (2JA872) without challenge from the concurrence in the judgment, a release differs from a discharge. *See also* Debtors' Br. 34-35.

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[8] *MacArthur Co. v. Johns-Manville Corp.*, 837 F.2d 89, 91 (2d Cir. 1988) (describing this issue as "the primary contention on appeal").

2. Congress's creation of the channeling injunction and release scheme under Section 524(g) for asbestos-related bankruptcies also does not cast doubt on the discretion afforded under Section 1123(b)(6) to include nonconsensual third-party releases in non-asbestos bankruptcies. Section 524(g) was added to the Bankruptcy Code by the Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106. Section 111 of that law consisted of subsections (a) and (b). Subsection (a), 108 Stat. 4113-4117, added the text of Section 524(g) to the Bankruptcy Code. Subsection (b), 108 Stat. 4117, *codified at* 11 U.S.C. § 524 note, in its entirety, read as follows:

> (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.[9]

The evident purpose of Congress was to leave pre-Section 524(g) law completely unaltered, neither approving nor disapproving of the use of other provisions of the Code to support channeling

[9] The Canadian respondents supporting petitioner erroneously refer to this section as "uncodified." Grande Prairie Br. 29. The district court was even more confused, referring to Section 111(b) of Public Law 103-394 as "Public Law 111" and stating that it "was not incorporated into the Bankruptcy Code." 2JA756-57. *See* 11 U.S.C. § 524 note (codifying Section 111(b) and incorporating it into the Bankruptcy Code).

injunctions and third-party releases. *See also Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 406-07 (2004) (construing identical words in a statute codified as a note to a provision of Title 47 of the U.S. Code not to alter preexisting but unsettled antitrust law). And Congress was well aware in 1994 that some bankruptcy courts were authorizing nondebtor injunctions under then-existing Code provisions.

Amicus NexPoint argues that it would have made no sense to include the phrase "[n]otwithstanding the provisions of section 524(e)" in Section 524(g) unless "Section 524(e) otherwise prohibits such injunctions." NexPoint Br. 9. Not so. By the time Congress added Section 524(g) in 1994, some courts were granting nonconsensual third-party releases but others were saying that Section 524(e) prohibited them. *E.g.*, *Landsing Diversified Props II v. First Nat'l Bank & Tr. Co. of Tulsa (In re W. Real Est. Fund Inc.)*, 922 F.2d 592, 600 (10th Cir. 1990) (per curiam). Congress chose to remain agnostic on courts' preexisting powers by coupling the "notwithstanding" language in new Section 524(g) with the new "rule of construction" codified as a note to Section 524. *See* Janet A. Flaccus, *A Potpourri of Bankr. Changes: 1994 Bankr. Amendments*, 47 Ark. L. Rev. 817, 846 (1994) (Congress left the law free to develop in other areas by ruling out "the negative implication" that Section 524(g) means the injunction-trust mechanism cannot be used for other types of mass torts).

3. Nor are releases inconsistent with Section 523(a), which the Trustee invokes to argue that the Sackler releases here provide broader repose than is otherwise attainable through discharge or through

the Sacklers' own hypothetical bankruptcy case. Pet. Br. 26-27. First, as explained above, a hypothetical Sackler bankruptcy does not limit the scope of authority and discretion afforded to the Court in approving provisions in Purdue's bankruptcy plan. That discretion is limited only by inconsistent *applicable* Code provisions, which are those directly implicated by Purdue's reorganization.

Second, the list of non-dischargeable debts in Section 523(a) applies only to "individual debtor[s]," 11 U.S.C. § 523(a), a category that does not describe Purdue, and applies to only a subset of the Sackler released parties. Thus, Section 523(a) is outside the scope of the "*applicable* provisions of this title" in this case.

Moreover, Section 523(a) is also not the blanket prohibition on discharge of fraud claims that the Trustee describes. Section 523 *allows* discharge of fraud-based claims *unless* the creditor holding the claim files a complaint in the bankruptcy court to initiate an adversary proceeding to determine the dischargeability of the debt. 11 U.S.C. § 523(c)(1); Fed. R. Bankr. P. 4007 advisory comm. notes (discussing rules for filing complaints under Section 523(c)(1) and noting that "[a] complaint filed under this rule initiates an adversary proceeding as provided in Rule 7003"). The Trustee has identified no creditor holding a direct fraud claim that has not consented to the plan. Even if there were such a claim, the creditors for whom the Trustee (incorrectly) purports to speak – many of whom did not even vote on Purdue's plan – could hardly be expected to commence and litigate to conclusion the adversary proceedings that would be

required to establish the nondischargeability of their claims in a Sackler bankruptcy.

II. THE PLAN'S THIRD-PARTY RELEASE IS IN THE PUBLIC INTEREST

Seeking to bolster his atextual reading of the Code, the Trustee claims that public interest considerations "weigh strongly" in favor of his position. Pet. Br. 44. That contention is demonstrably false in this case. Purdue's abatement-focused plan enjoys unprecedented and overwhelming creditor (including governmental) support. It promises wide-ranging societal benefits to public and private claimants alike. The Trustee's doomsday predictions concerning future plans are also unfounded, given the considerable safeguards built into the court of appeals' decision.

A. The plan is the best possible outcome and will accomplish much good

Any assessment of the public interest begins with the plan itself. The monetary and non-monetary benefits of the plan are, like many aspects of Purdue's bankruptcy, unprecedented. The plan (i) incorporates the Sackler contribution of between $5.5 and $6 billion; (ii) distributes to creditors the value of Purdue itself, which holds almost $1.5 billion in cash, *see* Bankr. Dkt. No. 5899, at 3; (iii) reflects the binding agreement of the States and other non-federal domestic governmental creditors to devote *all* of their plan recoveries to abatement of the opioid crisis; (iv) favorably resolves a DOJ superpriority claim that likely would have precluded other creditors from any recovery from Purdue's assets; (v) establishes a

repository containing an enormous trove of documents concerning Purdue's and the Sacklers' role in the opioid crisis for review and study by scholars and the public alike; and (vi) requires the Sacklers to exit the opioid business on a permanent and worldwide basis. None of those outcomes would have been readily achievable, or achievable at all, without the plan and its release. *See* 1JA299 ("It is clear after a lengthy evidentiary hearing that there is now no other reasonably conceivable means to achieve the result that would be accomplished by the Chapter 11 plan in addressing the problems presented by the Debtors' Chapter 11 cases.").

The Trustee does little to dispute these benefits. Any such argument would run headlong into pages of factual findings by the bankruptcy court, which have not been challenged as clearly erroneous (and are indisputably correct). The closest the Trustee comes to questioning the benefits of the plan is to suggest that the amounts paid to opioid victims are insufficient. Pet. Br. 5. But, in focusing solely on amounts payable directly to individual victims, the Trustee ignores the "unchallenged testimony" before the bankruptcy court concerning "the clear multiplier effect of dedicating the bulk of the value to be distributed under the plan, including from the shareholder released parties, to abatement." 1JA345. Furthermore, the individual victims appear before this Court, through their authorized representative, to *defend* the plan, not oppose it.

Equally important, the Trustee has not disputed, and *cannot* dispute, the bankruptcy court's findings concerning the litigation alternative advocated by petitioner. The bankruptcy court found, as fact, that creditors would receive "materially less" from Purdue

and the Sacklers collectively if the plan were to fail. 1JA406; *see also* 1JA365. As the court of appeals recognized, in a liquidation the United States' claim would completely consume the estate. Tort plaintiffs would recover zero and would have to chase the Sacklers' well-hidden assets to obtain *any* recovery. 2JA892.

Although the benefits of Purdue's plan are manifest, the Court need not speculate as to where the public interest lies, as the public itself has spoken. Purdue's creditors include nearly all of the Nation's States, Territories, municipalities, and Tribes, and thousands of individual victims. Indeed, the Ad Hoc Committee is composed of State Attorneys General and other public officials who are charged by the citizens of their States and local governments with making precisely these types of determinations regarding the public interest. Purdue's creditors – the entities with a concrete stake in the case – overwhelmingly support the plan, with each of the governmental and personal injury claimant classes having voted in favor of the plan by margins exceeding 95% (even before accounting for subsequent settlements). CA2 JA6258. The Office of the Trustee, "a government entity without a financial stake in the litigation," 2JA895, thus advocates a result that the "public" has resoundingly rejected.

B. The universe of third-party direct claims that are nonconsensually released is small

Petitioner complains of the "sweeping" effect of the plan's third-party release, Pet. Br. 2, but the reality belies that hyperbole. The parties with the strongest claims against the Sacklers are

consensually releasing those claims. This includes the States, which hold claims for such things as the violation of their consumer protection laws, and the Purdue bankruptcy estate, which controls the valuable fraudulent transfer claims against the Sacklers. The opponents of the plan have yet to identify *any* actual third-party direct claims that are released without consent.

1. The potential claims against the Sacklers that are released by the plan include "fraudulent transfer, constructive fraudulent transfer, deceptive marketing, public nuisance, unfair competition, fraudulent misrepresentation, violation of state consumer protection acts, civil conspiracy, negligence, and unjust enrichment." 2JA870-71. Before Purdue's bankruptcy, each of those claims against the Sacklers belonged to, or could have been asserted by, the creditors.

Bankruptcy changed this. Creditors retained their "direct" claims against the Sacklers, but the bankruptcy estate was vested with the authority to pursue a variety of "derivative" claims against the Sacklers that, before bankruptcy, the creditors themselves could have brought. *See* 2JA870 (distinguishing between direct and derivative claims in bankruptcy); *Tronox Inc. v. Kerr-McGee Corp. (In re Tronox Inc.)*, 855 F.3d 84, 106 (2d Cir. 2017) (explaining that in bankruptcy, "the trustee is conferred the right to recover for derivative, generalized claims").[10] Just as the estate could pursue those claims, it was also authorized to settle them in a plan, whether or not coupled with a settlement and

[10] A debtor in possession, like Purdue, has the rights and powers of a trustee. 11 U.S.C. § 1107(a).

release of third-party claims. 11 U.S.C. § 1123(b)(3)(A); *see* 2JA871.

Thus, although the plan releases both derivative and direct claims, only the latter are the subject of a *nonconsensual* third-party release (and the Trustee has not objected to the release of derivative claims).

2. Fraudulent transfer claims are the "paradigmatic example" of a derivative claim. *Tronox*, 855 F.3d at 106; *see* 2JA871. State laws give creditors the right to avoid such transfers, *see, e.g.*, N.Y. Debt. & Cred. Law §§ 270 *et seq.* (Uniform Voidable Transactions Act), but the Bankruptcy Code vests the power of avoidance in the estate, *see* 11 U.S.C. §§ 544(b)(1), 548(a)(1); *Merit Mgmt.*, 138 S. Ct. at 888 (describing avoiding powers).

Other claims that "arise from harm done to the estate and that seek relief against third parties that pushed the debtor into bankruptcy" are also derivative. *Tronox*, 855 F.3d at 99 (cleaned up and citations omitted); *see, e.g.*, *City Sanitation, LLC v. Allied Waste Servs. of Mass., LLC (In re American Cartage, Inc.)*, 656 F.3d 82, 90 (1st Cir. 2011) ("[W]hen the alleged injury to a creditor is indirect or derives solely from an injury to the debtor, the claim is general."). This includes claims against officers and directors for breaches of fiduciary duty. *See Pepper v. Litton*, 308 U.S. 295, 307 (1939) ("While normally that fiduciary obligation [of a director or controlling stockholder] is enforceable directly by the corporation, or through a stockholder's derivative action, it is, in the event of bankruptcy of the corporation, enforceable by the trustee.").

3. There is no doubt that the fraudulent transfer claims against the Sacklers are powerful. The bankruptcy court concluded that "the estates'

fraudulent transfer avoidance claims, which the third-party claimants clearly would not be able to pursue on their own behalf, probably would have the best chance of material success among all of the claims against the shareholder released parties." 1JA404. The Trustee bemoans the release of those claims. Pet. Br. 26. But, since those claims are derivative, they do not fall within the third-party release, and their settlement is not part of the question presented here.

The States also hold direct claims for, among other things, violations of their consumer protection laws. In fact, these are the only *direct* creditor claims identified by the courts below. *See* 2JA871 (court of appeals noting that "certain consumer protection act claims at a minimum constitute direct claims"), 2JA751 (district court referencing state unfair trade practice laws as an "example" of a direct claim). But, since the States have unanimously agreed to be bound by the plan, these claims are also not subject to *nonconsensual* release.

The foregoing claims aside, the record reflects *no* direct claims that are subject to nonconsensual release. The Ad Hoc Committee of Individual Victims, whose job is to advocate the interests of such victims, has disclaimed the existence of any direct claims. The district court agreed. Despite "months of . . . asking," no one could point her to any claims against Sackler family members that did not serve as officers or directors of Purdue, other than claims relating to the receipt of "money taken out of Purdue and up-streamed to the family trusts." 2JA744. But "any claims relating to those transfers rightfully belong to the Debtors." *Ibid.*

C. Approval of this third-party release will not lead to abuse

Affirmance of the court of appeals' decision will not risk abuse of the bankruptcy system, as Trustee and his *amici* contend. *See, e.g.*, Pet. Br. 44-47. The court of appeals' test requires a substantial showing, ensuring that releases will be approved only where "appropriate," as the statute requires.[11] The grab-bag of arguments to the contrary are unavailing.

1. Nonconsensual third-party releases do not "permit tortfeasors to choose what portion of their non-exempt assets to give up." Pet. Br. 45. That choice is subject to negotiations with the creditors, who must "overwhelmingly" approve a release – "by a minimum of 75% of voting creditors." 2JA889. This is the same threshold Congress adopted for approval of nonconsensual third-party releases in asbestos bankruptcies, see 11 U.S.C. § 524(g)(2)(B)(ii)(IV)(bb), and it was far exceeded here. 2JA895.

2. The settlement with the Nine does not show that creditors are better served by the unavailability of releases. Pet. Br. 45; Levitin Br. 22. Although that settlement was reached after the district court had reversed the plan, it was expressly conditioned on *reversal* of that decision and a future order confirming the plan. Bankr. Dkt. No. 4503, ¶ 3. Would the Sacklers have agreed to a settlement with the Nine alone for $1.175-1.675 billion, leaving *dozens*

[11] In a holding not challenged by any party or *amicus*, the Second Circuit also held (2JA867-68) that *Stern v. Marshall*, 564 U.S. 462 (2011), requires the bankruptcy court to submit proposed findings and conclusions to the district court, which enters final judgment. There is therefore no concern that a non-Article III judge will yield excessive, unchecked power.

of other States and *hundreds of thousands* of other creditors free to sue them? Of course not.

3. That *some* mass tort cases are successfully resolved without third-party releases does not show such releases to be unnecessary here. Pet. Br. 47. The bankruptcy court found that the release was necessary, and that the creditors would receive far less without it – indeed, zero from Purdue's current assets, given the United States' huge priority claim. 1JA406; *see also* 2JA892-94.

The *Aearo* case on which Trustee relies is inapposite. Pet. Br. 47. That settlement has not been consummated, and the settling third-party defendant (3M) can walk away if fewer than 98% of the claimants opt in. *In re 3M Combat Arms Earplug Prods. Liab. Litig.*, No. 3:19-MD-2885 (N.D. Fla.), Master Settlement Agreement, Art. 7.2, 6, 11. Bankruptcy was a poor choice in that case because the debtor (Aearo) was "financially healthy" with an "uncapped" guarantee from 3M usable "inside or outside of bankruptcy." *In re Aearo Techs. LLC*, No. 22-02896, 2023 WL 3938436, at *17-20 (Bankr. S.D. Ind. June 9, 2023). No value was "creat[ed] or preserv[ed]" within bankruptcy that was unavailable outside it. *Id.* at *20. Purdue, by contrast, is insolvent even with the Sacklers' financial contributions, and the bankruptcy process – and corresponding global settlement and release – preserved and created value. 2JA892-93.[12]

4. The limited availability of third-party releases does not create a "moral hazard." Levitin Br. 18. No

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[12] In fact, almost every mass tort crisis of the last 30 years – Dalkon Shield, breast implants, Boy Scouts, Diocese cases, to name a few – has been resolved through bankruptcy plans negotiated and supported by the victims and containing third-party releases.

tortfeasor can be assured that its creditors will vote by overwhelming margins to confer a release. Even if it were, inappropriate pre-bankruptcy maneuvering would itself be grounds for *denying* the release. 2JA893. To be sure, no shareholder should be free to "siphon out huge amounts of money from a company once it becomes clear that the company may be rendered insolvent." Levitin Br. 18. But it is the law of fraudulent transfer that exists precisely to protect against that risk. And, as noted above, the release of estate *derivative* claims like fraudulent transfer claims does not require a third-party release.

III. THE PLAN'S THIRD-PARTY RELEASE COMPORTS WITH DUE PROCESS

Urging constitutional avoidance, the Trustee contends that a construction of Section 1123(b)(6) that permits third-party releases, with no opportunity to opt out, collides with the "deep-rooted historic tradition that everyone should have his own day in court." Pet. Br. 41-42 (quoting *Martin v. Wilks*, 490 U.S. 755, 762 (1989)); *see also* Brubaker Br. 24-28. But the avoidance canon does not apply because there is no ambiguity in the statute.

In any event, this court has "stressed repeatedly" that due process "calls for such procedural protections as the particular situation demands." *Jennings v. Rodriguez*, 138 S. Ct. 830, 852 (2018) (quotation marks omitted). "[W]here a special remedial scheme exists expressly foreclosing successive litigation by nonlitigants, *as for example in bankruptcy* or probate, legal proceedings may terminate preexisting rights if the scheme is otherwise consistent with due process." *Wilks*, 490 U.S. at 762, n.2 (emphasis added).

It could hardly be otherwise. The Trustee's argument "would essentially call into question all releases through bankruptcy, including bankruptcy discharges (which are one of the most important features of bankruptcy)." 2JA899. Not just Section 524(g), but many other sections of the Bankruptcy Code would be subject to challenge if petitioner's view of due process prevailed. *See, e.g.*, 11 U.S.C. § 524(g) (authorizing nonconsensual third-party releases in asbestos bankruptcies), § 1126(c) (authorizing class-wide voting on a plan), § 1129(b) (authorizing the cram-down of a Chapter 11 plan over the vote of a dissenting class), § 1141(a) (binding effect of a Chapter 11 plan on all creditors including dissenting creditors).

The due process protections of bankruptcy were on full display here. As the bankruptcy court found, "the Sackler settlement was clearly and unmistakably the product of arm's-length bargaining conducted in two separate mediations by three outstanding mediators. It was preceded, moreover, by the most extensive discovery process that . . . any court in bankruptcy has ever seen." 1JA355. The interests of every conceivable creditor constituency were represented through an array of ad hoc groups, not to mention the Official Committee. 1JA348.

The plan itself, with its third-party release, was the subject of an "unprecedentedly broad" noticing program that, among other things, "reached roughly 98 percent of the adult population of the United States." 1JA300. And the release was imposed only after creditors had accepted it by an aggregate vote over "over 95 percent in favor of confirmation." 1JA303. After such extensive process, and given the massive value generated to fund the plan by the

Sackler's contributions (made possible only by a blanket release), it is not surprising that no creditor has come forward to identify specific direct claims it wishes to assert against the Sacklers. Nor has any creditor established that its total net recovery would be better if permitted to pursue the Sacklers' dispersed assets in separate litigation.

IV. *AMICI*'S ARGUMENTS SHOULD NOT CHANGE THE OUTCOME

The numerous *amicus* briefs filed in support of reversal should not change anything. (We do not address the *amicus* briefs filed in support of neither party.)

Some *amici* argue that nonconsensual third-party releases are unconstitutional. To the extent they so argue under the Due Process Clause,[13] their arguments are adequately answered in Part III above. To the extent they involve other provisions of the Constitution, the issues they raise are not properly before the Court. *See FTC v. Phoebe Putney Health Sys., Inc.*, 568 U.S. 216, 226 n.4 (2013) (declining to consider an argument raised only by an *amicus* "[b]ecause this argument was not raised by the parties or passed on by the lower courts"). Nor are they questions on which the Court granted certiorari.

The constitutional arguments are wrong in any event. We state the reasons only briefly and incompletely.

Some *amici* argue that nonconsensual third-party releases are outside the Bankruptcy Power

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[13] Levitin Br. 10-14; Texas Two-Step Br. 17-20; Peterson Br. 11-16.

(U.S. Const. art. I, § 8, cl. 4) because they affect the liability of nondebtors.[14] Those *amici* have no adequate answer to the frequent use of the avoidance provisions in the Code to affect parties who are neither debtor nor creditor. *See* pp. 24-26, *supra*. To hold that those provisions are unconstitutional would be revolutionary. Nor would it make any sense to hold that those provisions are merely grandfathered in, without any principled basis to separate the permitted from the forbidden, because they were used in England when the Constitution was ratified. Bienenstock Br. 26-27 n.76.

One *amicus* brief argues that nonconsensual third-party releases violate the Fifth Amendment's Takings Clause.[15] But this Court has never applied the Takings Clause to nullify bankruptcy's adjustment of rights except in cases involving *secured* creditors. *United States v. Sec. Ind. Bank*, 459 U.S. 70 (1982); *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935).

The *amicus* briefs also raise sundry policy arguments[16] and (often uninformed) case-specific arguments about why the releases were not proper.[17] But the policy arguments cannot alter the text of the statute, and the fact-bound question of whether *this* release was justified by the record is not what the Court granted certiorari to resolve.

Moreover, this brief, the briefs of other respondents, and the factual findings of the

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[14] Bienenstock Br. 6-19; Levitin Br. 3-9.

[15] Bienenstock Br. 25-27.

[16] Levitin Br. 18-27; Lipson Br. 22-25, 28-30; Texas Two-Step Br. 20-24; Brubaker Br. 31-32; Atlantic Basin Refining Br. *passim*.

[17] Wedoff Br. 32-33; Lipson Br. 17-25.

bankruptcy court (unchallenged on appeal, *see* 2JA734) amply demonstrate the critical need for a third-party release if this case is to be resolved and creditors paid anything. The overwhelming support for this release – support voiced by all groups of constituents with real interests at stake, representing a remarkable cross-section of American society – proves where the public interest lies, better than any *amicus curiae* or unaccountable government-appointed "watchdog" ever could.

Finally, some *amicus* briefs do address the question of statutory interpretation on which this Court granted certiorari.[18] But their arguments have all been refuted above. The release is not a discharge, contrary to the animating premise of two *amicus* briefs.[19] *See* pp. 34-35, *supra*. The plain language of Section 1123(b)(6) authorizes "any" appropriate provision not contrary to applicable provisions of the Code, not just traditional equity powers as one amicus contends.[20] *See* pp. 18-24, *supra*. The circuits that allow nonconsensual third-party releases are interpreting the statutory term "appropriate," not making federal common law as one *amicus* contends.[21] *See* note 2, *supra*.

* * * * *

We end the argument where it began. The text of Section 1123(b)(6) is clear in authorizing "any" provision in a plan of reorganization if it is "appropriate" and not contrary to an applicable provision of the Code. Third-party releases are, at

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[18] Wedoff Br. 20-28; Brubaker Br. 11-24.

[19] Lipson Br. 10-20; Brubaker Br. 4-8; *see also* Bienenstock Br. 4.

[20] Peterson Br. 5-11

[21] Brubaker Br. 8-11.

least some of the time, "appropriate," and no applicable Code provision bars them. "[I]n interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete." *Conn. Nat'l Bank*, 503 U.S. at 253-54 (cleaned up).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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