No. 23A87

In the Supreme Court of the United States

WILLIAM K. HARRINGTON, UNITED STATES TRUSTEE, REGION 2,

Applicant,

v.

PURDUE PHARMA L.P., *ET AL.*,

Respondents.

On Application for a Stay of the Mandate of the United States Court of Appeals for the Second Circuit Pending the Filing and Disposition of a Petition for a Writ of Certiorari

BRIEF IN OPPOSITION OF RESPONDENT THE MULTI-STATE GOVERNMENTAL ENTITIES GROUP

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RULE 29.6 STATEMENT

The Multi-State Govermental Entities Group ("**MSGE Group**") is comprised of approximately 1,300 cities, counties, tribal nations, hospital districts, independent school districts, and other local governmental entities.[1] The MSGE Group does not have a parent corporation and has no stock owned by any publicly traded company.

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

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INTRODUCTION

Respondent the MSGE Group,[1] by and through its undersigned counsel, hereby opposes the Application of the United States Trustee William K. Harrington ("**Trustee**") for a Stay of the Mandate of the United States Court of Appeals for the Second Circuit Pending the Filing and Disposition of a Petition for a Writ of Certiorari ("**Application**" or "**App.**").[2]

In his Application, the Trustee—who has no economic stake in the Debtors'[3] chapter 11 reorganization and no claims released under the Plan[4]—demands a stay that will further delay the distribution of billions of dollars of critically needed funds to opioid creditors while he fights to advance a minority interpretation of the Bankruptcy Code. Additionally, the Trustee requests that his Application be construed as a petition for a writ of certiorari, which the MSGE Group wholly endorses. App. at 7. Neither a stay nor a grant of certiorari is in the interest of opioid creditors, who have fought for years to hold the Debtors and the Sackler families[5]

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[1] The entities comprising the MSGE Group are set forth in the Rule 2019 Statement.

[2] *In re Purdue Pharma L.P.*, 22-110, ECF No. 1012 (2d Cir. Jul. 7, 2023).

[3] "**Debtors**" refers collectively to Purdue Pharma L.P., Purdue Pharma Inc., 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 Pharma of Puerto Rico, Avrio Health L.P., Purdue Pharmaceutical Products L.P., Purdue Neuroscience Company, Nayatt Cove Lifescience Inc., Button Land L.P., Rhodes Associates L.P., Paul Land Inc., Quidnick Land L.P., Rhodes Pharmaceuticals L.P., Rhodes Technologies, UDF L.P., SVC Pharma L.P. and SVC Pharma Inc.

[4] "**Plan**" refers to the Twelfth Amended Joint Chapter 11 Plan. C.A. SPA 789-941.

[5] Members of the Sackler families indirectly hold ownership interests in the Debtors.

accountable for their role in causing the opioid epidemic. To secure these funds for their intended use, and to prevent a value-destructive race to the courthouse, opioid creditors overwhelmingly voted in favor of the Plan that included the "nonconsensual" third-party releases that the Trustee seeks to challenge. These creditors have waited years without any distribution of funds that would abate the nationwide opioid scourge and compensate victims that the Debtors' opioid painkillers harmed. The Trustee argues that they should continue to wait even longer and, if he has his way, ultimately forfeit the majority—or all—of the funds under the Plan. This is untenable.

As a legal matter, the Trustee's arguments fail. The Court should not hear this case. The circuit split the Trustee relies on is not remotely as deep as he suggests, especially when it comes to bankruptcies involving mass-tort claims, which includes the *Purdue Pharma* chapter 11 reorganization. Nor is this the case in which the Court should review third-party releases, given the conflicting positions taken by the federal government on the importance of such releases and enormous risk to the public health that is a unique feature of this case. In addition, the opinion of the Second Circuit ("**Opinion**")[6] is well-founded as it is grounded in the text of the Bankruptcy Code.

Nor is a stay warranted. The Trustee cannot show a reasonable probability that four justices will vote to grant certiorari to review the Opinion. Nor can the

[6] *In re Purdue Pharma L.P.*, 22-110, ECF No. 978-1 (2d Cir. May 30, 2023); Stay App'x at 3-85.

Trustee show a fair prospect that five justices will vote to reverse or vacate the Opinion. The Trustee also cannot meet the high burden necessary to establish irreparable harm. The Trustee's concerns about equitable mootness are illusory, which makes a stay wholly unnecessary. Numerous steps must be taken, and numerous preconditions must be satisfied, before the Plan can become effective. All those steps and preconditions will not occur before this Court has ample opportunity to rule on the Trustee's petition. Nevertheless, the Plan's proponents should be free, and not impeded by a stay, to take the first few of those steps so that the Plan's eventual effective date and the distribution of much-needed funds thereunder are not delayed longer than necessary. The public interest strongly favors moving forward with the Plan.

STATEMENT OF THE CASE

The MSGE Group is composed of approximately 1,300 cities, counties, tribal nations, hospital districts, independent school districts, and other local governmental entities collectively representing a constituency of more than 60 million individuals across 38 States and territories of the United States.[7] Members of the MSGE Group are creditors of the Debtors, and many filed prebankruptcy lawsuits against them for their role in fostering the nationwide opioid crisis—an epidemic causing hundreds of deaths each day.[8] The MSGE Group actively participated throughout the Debtors'

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

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

chapter 11 cases—and opposite the Sacklers—to protect the interests of its constituents and maximize the recovery that will fund abatement of the opioid crisis.

On September 15, 2019, the Debtors petitioned for relief under chapter 11 of the Bankruptcy Code after numerous States, local governments, Native American tribes, and tort victims named the Debtors as defendants in thousands of lawsuits throughout the United States and sought damages arising from the Debtors' manufacture, marketing, and sale of their opioid-based pain relievers, including, most notably, OxyContin.[9]

After two years of intensive negotiations and mediation sessions between and among several creditor groups (including the MSGE Group) and the Debtors, numerous settlements of complex disputes were achieved and formed the basis of the Plan. These settlements would not have been possible without the settlement reached between the Debtors and the Sackler families ("**Shareholder Settlement**"). The Shareholder Settlement provides for the compromise and resolution of claims and causes of action held by the Debtors and their bankruptcy estates against the Sacklers and the entities they control[10] and, in exchange, for aggregate payments by the Sackler families totaling between $5.5 billion and $6 billion.[11] These settlement

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[9] C.A. JA-384 (Debtors' Info. Br. at 1 (Bankr. ECF. No. 17)).

[10] C.A. JA-3457-550 (JX-1625, Form of Settlement Agreement by and among the Master Disbursement Trust, Each of the Parties Listed on Exhibit A Hereto, Each of the Parties Listed on Exhibit B Hereto and PRA L.P., at 1-94 (Bankr. ECF No. 3547)).

[11] This includes the additional $1.175 billion to $1.675 billion the Sacklers agreed to provide during the pendency of these appeals. *See* C.A. JA-1537-74 (Motion of Debtors Pursuant to 11 U.S.C. § 105(a) and 363(b) for Entry of an Order Authorizing and Approving Term Sheet, *In re Purdue Pharma L.P.*, No. 19-23649 (Bankr.

dollars would be funneled to various trusts established under the Plan to abate the opioid scourge in communities across the nation and compensate eligible opioid victims.[12] Indeed, the amount of settlement dollars to be paid by the Sacklers under the Shareholder Settlement makes them the *principal* source of the funding that would be dedicated to opioid abatement under the Plan.[13]

In exchange for these substantial settlement payments and other consideration to be provided by the Sackler parties, section 10.7(b) of the Plan provides carefully constructed and tailored releases of various civil claims relating to the Debtors' opioid businesses against the Sacklers and the entities they control ("**Shareholder Releases**").[14] The Plan would effectuate the Shareholder Releases through a channeling injunction that would prohibit any party from commencing an action against the Sacklers and related entities on account of any claim released under section 10.7(b) of the Plan ("**Channeling Injunction**").[15]

While the billions of dollars in recoveries were only possible because of the work done by creditors of the Debtors, the recoveries pale in comparison to over $40 trillion in claims that have been asserted against the Debtors.[16] The Bankruptcy

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S.D.N.Y. Mar. 3, 2022), ECF No. 4410). The majority of these funds will be distributed to all governmental creditors, not just parties to the settlement. *Id.*

[12] C.A. SPA-874-76. The lion's share of the funding to be provided under the Plan and the Shareholder Settlement is dedicated to opioid abatement. C.A. SPA-204-05.

[13] C.A. JA-5915 (JX-2761, Am. Expert Report of Jesse DelConte ¶ 9 (Bankr. ECF No. 3411-1)).

[14] C.A. SPA-920-21.

[15] C.A. SPA-137.

[16] Stay App'x at 22.

Court determined, and the Second Circuit affirmed, that a similarly large sum of claims would be asserted against the Sacklers as well, that the funds or assets held by them around the world would be difficult to reach (including in any potential Sackler chapter 11 case), and that any attempt to do so would likely destroy substantial value that otherwise would be available to abate the opioid crisis and compensate victims.[17]

The Shareholder Releases and Channeling Injunction are necessary to ensure that the carefully calibrated allocation of funds among the creditors for opioid abatement is not disturbed.[18] Otherwise, claimants who could opt out of the Shareholder Settlement and bring and recover even a fraction of their claims against the Sacklers could win a race to the courthouse and drastically reduce or eliminate the abatement funds available for other creditors.[19] Allowing other creditors to cut in line and receive a far greater proportionate recovery than parties that participated in the Shareholder Settlement would lead to its unraveling.[20] For this reason, every major creditor group (including the MSGE Group) affirmed that they would ***not*** have supported the Plan had it ***not*** included the Shareholder Releases and Channeling Injunction.[21]

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17 *See* Stay App'x at 29; C.A. SPA-227.

18 C.A. SPA-277.

19 Hr'g. Tr., Aug. 23, 2021 at 118:10-120:22; C.A. JA-1256.

20 *Id.*

21 *Id.*

After these negotiations, an overwhelming majority of opioid creditors voted in favor of the Plan containing the Shareholder Releases. More than 120,000 creditors cast ballots on the Plan.[22] Over 95% of the aggregate creditor vote,[23] and 96.87% of the non-federal governmental vote,[24] accepted the Plan. And these votes were cast *before* the Bankruptcy Court narrowed the Shareholder Releases at issue and eight States and the District of Columbia (referred to as "the Nine") withdrew their objections.[25]

In its Opinion, the Second Circuit held that nonconsensual third-party releases are permissible in certain limited circumstances under the Bankruptcy Code and that, under the facts of this case, the Shareholder Releases were justified.[26] Judge Wesley filed a concurring opinion, noting that Second Circuit precedent compelled the result.[27] The Trustee then sought a stay of the mandate with the Second Circuit, which the court of appeals denied.[28]

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[22] Stay App'x at 24; C.A. SPA-150-51.

[23] C.A. SPA-224-25; C.A. SPA-321; C.A. JA-6258.

[24] C.A. SPA-182; C.A. JA-6258 (JX-3028, Final Decl. of Christina Pullo of Prime Clerk LLC Regarding the Solicitation of Votes and Tabulation of Ballots Cast on the Fifth Am. Ch. 11 Plan of Reorganization of Purdue Pharma L.P. and Its Affiliated Debtors Ex. A, at 1 (Bankr. ECF No. 3372)).

[25] C.A. SPA-246, 278; *see also* C.A. JA-532 (Order Approving (I) Disclosure Statement for Fifth Am. Ch. 11 Plan, (II) Solicitation and Voting Procedures, (III) Forms of Ballots, Notices and Notice Procedures in Connection Therewith, and (IV) Certain Dates with Respect Thereto ¶ 6 (Bankr. ECF No. 2988)) (setting voting deadline for June 16, 2021).

[26] Stay App'x at 52-77; *In re Purdue Pharma L.P.*, 22-110, ECF No. 978-1 (2d Cir. May 30, 2023) at 50-75;

[27] Stay App'x at 86; *In re Purdue Pharma L.P.*, 22-110, ECF No. 979 (2d Cir. May 30, 2023) at 1.

[28] Stay App'x at 2.

Now, nearly four years since the Debtors commenced their chapter 11 cases, the Trustee moves again for a stay of the mandate and also asks this Court to construe his Application as a petition for certiorari.[29] His Application comes after three separate courts below denied his first three stay requests.[30] For the reasons explained below, his Application should be denied in all respects.

REASONS FOR DENYING CERTIORARI

This Court should grant the Trustee's request to construe his Application as a petition for a writ of certiorari. The exigencies of the public health crisis caused by the opioid epidemic and the urgent need for the billions of abatement dollars at stake warrant resolution of this case as soon as possible. Moreover, the Court should deny certiorari because (1) the asserted circuit split is neither clear-cut nor well-developed, (2) the Trustee fails to show that this case presents an important question of law that the Court should address in this case, and (3) the Second Circuit's Opinion rests on a correct interpretation of the Bankruptcy Code.

I. The Extent of the Putative Circuit Split Is Overstated and Does Not Justify a Grant of Certiorari

The Trustee overstates the extent of the apparent circuit split over third-party releases, especially in the context of mass-tort bankruptcies. App. at 14-16. Because no clear-cut circuit split exists in mass-tort bankruptcies, the complexity of the issues presented warrants further development in the lower courts. *See Calvert v. Texas*,

[29] App. at 1, 7.

[30] C.A. JA-1421-22; *Harrington v. Purdue Pharma L.P. (In re Purdue Pharma L.P.)*, 634 B.R. 240, 249 (S.D.N.Y. 2021).

141 S. Ct. 1605, 1606 (2021) (Sotomayor, J.) (denying certiorari where "[t]he legal question . . . is complex and would benefit from further percolation in the lower courts").

A clear majority of circuits hold that nonconsensual third-party releases are permissible in rare or unusual circumstances. *See In re Millennium Lab Holdings II, LLC.*, 945 F.3d 126, 133 (3d Cir. 2019); *SE Prop. Holdings, LLC v. Seaside Eng'g & Surveying, Inc. (In re Seaside Eng'g & Surveying),* 780 F.3d 1070, 1076-79 (11th Cir. 2015); *Nat'l Heritage Found., Inc. v. Highbourne Found.*, 760 F.3d 344, 350 (4th Cir. 2014); *Airadigm Commc'ns, Inc. v. FCC (In re Airadigm Commc'ns, Inc.)*, 519 F.3d 640, 655-58 (7th Cir. 2008); *Deutsche Bank A.G. v. Metromedia Fiber Network, Inc. (In re Metromedia Fiber Network, Inc.)*, 416 F.3d 136, 141 (2d. Cir. 2005); *Class Five Nev. Claimants v. Dow Corning Corp. (In re Dow Corning Corp.)*, 280 F.3d 648, 656-58 (6th Cir. 2002); *Monarch Life Ins. Co. v. Ropes & Gray*, 65 F.3d 973, 984-85 (1st Cir. 1995); *In re AOV Indus., Inc.*, 792 F.2d 1140, 1153 (D.C. Cir. 1986).

Only three courts of appeals have rejected nonconsensual third-party releases in bankruptcy. *See Bank of N.Y. Tr. Co., NA v. Off. Unsecured Creditors' Comm. (In re Pac. Lumber Co.)*, 584 F.3d 229, 252-53 (5th Cir. 2009); *Resorts Int'l, Inc. v. Lowenschuss (In re Lowenschuss)*, 67 F.3d 1394, 1397 (9th Cir. 1995); *Am. Hardwoods, Inc. v. Deutsche Credit Corp. (In re Am. Hardwoods, Inc.*), 885 F.2d 621, 626 (9th Cir. 1989); *Landsing Diversified Properties-II v. The First Nat'l Bank & Tr. Co. of Tulsa (In re W. Real Estate Fund, Inc.)*, 922 F.2d 592, 600 (10th Cir. 1990). Importantly, *none* of the three circuit courts—the Fifth, Ninth, and Tenth—has

considered nonconsensual third-party releases in the context of mass-tort bankruptcies. A significant number of cases, including nearly all those from the Fifth Circuit, involved not the discharge or release of claims arising before the filing of the bankruptcy petition (*i.e.*, prepetition claims) but the validity of exculpation clauses shielding third parties from claims for negligent conduct that occurred *after* the bankruptcy filing.[31] And, even among the cases involving prepetition claims, the released claims are few in number and do not arise from personal-injury torts or wrongful death.[32] By contrast, every circuit to consider such releases in a mass-tort bankruptcy has concluded that they are permissible at least in that context.[33]

The Fifth Circuit and Ninth Circuit have both suggested that they may find third-party releases permissible in the context of a mass-tort bankruptcy. In *Pacific Lumber*, the Fifth Circuit observed that its own cases "seem broadly to foreclose non-

[31] *See, e.g.*, *NexPoint Advisors, L.P. v. Highland Cap. Mgmt., L.P. (In re Highland Capital Mgmt., L.P.)*, 48 F.4th 419, 436 (5th Cir. 2022) (holding that § 524(e) barred an exculpation clause for claims against nondebtors that related to negligent conduct occurring while the bankruptcy case was pending); *In re Pac. Lumber Co.*, 584 F.3d at 252 (same); *Feld v. Zale Corp. (In re Zale Corp.)*, 62 F.3d 746, 760 (5th Cir. 1995) (same).

[32] *In re Lowenschuss*, 67 F.3d at 1396-97, 1401-02 (holding that a release of stockholders' claims against third parties related to the bankrupt entity was barred by § 524(e)); *In re W. Real Estate Fund, Inc.*, 922 F.2d at 600 (holding that a third-party release of an attorney's prepetition fee claim and lien was not permissible); *In re Am. Hardwoods, Inc.*, 885 F.2d at 622 (holding the bankruptcy court could not enter a permanent injunction effectively discharging third parties from potential liability for a state-court judgment related to the financing of industrial machinery).

[33] *See In re Dow Corning Corp.*, 280 F.3d at 656–57 (holding that nonconsensual third-party releases were permissible in the context of a bankruptcy involving personal injury claims related to silicone breast implants); *Menard-Sanford v. Mabey (In re A.H. Robins Co.)*, 880 F.2d 694, 702 (4th Cir. 1989) (same for Dalkon Shield claims); *MacArthur Co. v. Johns-Manville Corp.*, 837 F.2d 89, 93 (2d Cir. 1988) (same for asbestos claims prior to the enactment of § 524(g)).

consensual non-debtor releases" but distinguished its cases from those of other circuits taking "a more lenient approach to non-debtor releases" on the basis that the latter "concerned global settlements of mass claims against the debtors and co-liable parties." 584 F.3d at 252 (citation and footnote omitted). In addition, the Fifth Circuit recognized that § 524(g) of the Bankruptcy Code, which "permits bankruptcy courts to enjoin third-party asbestos claims under certain circumstances, . . . suggests non-debtor releases are most appropriate as a method to channel mass claims toward a specific pool of assets." *Id.* at 252 (citations omitted).

Similarly, in *American Hardwoods*, the Ninth Circuit held that a nonconsensual third-party release was not permitted but factually distinguished the Fourth Circuit's decision in *A.H. Robins*, which granted a third-party injunction, on the ground that *Robins* involved an "avalanche of tort actions by some 195,000 persons for injuries . . . ." 885 F.2d at 626 (citing *In re A.H. Robins Co.*, 880 F.2d 694 (4th Cir. 1989)). Until these circuits hold that third-party releases are unavailable even in mass-tort bankruptcies, their decisions are distinguishable from, and therefore not in conflict with, the Second Circuit's Opinion, which involved "mass tort litigation against the debtor." Stay App'x at 11.

Both the Fifth and the Ninth Circuits have also shown flexibility instead of following a strict rule against nonconsensual third-party releases, under the right circumstances. In *In re Vitro S.A.B. de CV,* the Fifth Circuit held that nonconsensual third-party releases were available in some circumstances under chapter 15 of the Bankruptcy Code (recognition of foreign insolvency proceedings), despite the circuit's

own precedent having previously "firmly pronounced" opposition to such releases. 701 F.3d 1031, 1061-62 (5th Cir. 2012). And, in *Blixseth v. Credit Suisse*, the Ninth Circuit held that its decisions prohibiting releases in *Lowenschuss* and *American Hardwoods* applied only to the discharge of creditors' prepetition claims against nondebtors but did not prohibit the exculpation of acts and omissions by nondebtors that occurred while the bankruptcy case was pending or during consummation of the chapter 11 plan. 961 F.3d 1074, 1078-79, 1084 (9th Cir. 2020). Given their willingness to make exceptions to their general rule against third-party releases, the Fifth Circuit's and Ninth Circuit's prior rulings do not necessarily show that they would have reached a result different from the Second Circuit had *Purdue* or another mass-tort bankruptcy been before them. Accordingly, for the reasons explained above, the putative circuit split described by the Trustee is neither "entrenched" nor "deep." App. at 15.

In addition, the question of whether third-party releases are permissible under the Bankruptcy Code is statutory and not constitutional. This is irrefutably proven by 11 U.S.C. § 524(g), which authorizes such releases in the context of asbestos mass-tort bankruptcies. Thus, this Court is not the sole body that can resolve the putative circuit split; "Congress itself can eliminate a conflict concerning a statutory provision by making a clarifying amendment to the statute, and agencies can do the same with respect to regulations." *Braxton v. United States*, 500 U.S. 344, 347-48 (1991). To the extent there is any lingering doubt to dispel, this Court can allow Congress to expressly state that third-party releases outside the asbestos context are permissible

under the Bankruptcy Code. *Cf. id.* at 348-49 (choosing not to address a question presented "because the [U.S. Sentencing] Commission has already undertaken a proceeding that will eliminate circuit conflict . . . .").

II. The Trustee Fails to Show an Important Question of Law That This Court Should Address in This Case

The Trustee's assertion that the Shareholder Releases raise an important question of law is undercut by the failure of his counterpart in Delaware to appeal similar releases in other recent mass-tort cases, chiefly, the bankruptcies of Mallinckrodt plc (which faced similar opioid mass-tort claims) and the Boy Scouts of America.[34] And the Department of Justice recently argued that nonconsensual third-party releases are "permissible" so long as certain "legal and factual standards" are met.[35] If the federal government cannot take a consistent position on third-party releases, the issue of the Shareholder Releases is not sufficiently important to warrant this Court's review. *Cf. New York v. FERC*, 535 U.S. 1, 38 (2002) (taking contradictory positions warrants no deference to an agency) (Thomas, J. concurring); *Patriot Cinemas, Inc. v. Gen. Cinemas Corp.*, 834 F.2d 208, 214 (1st Cir. 1987) ("If

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[34] *See* The United States Trustee's Objection to Confirmation of the First Amended Joint Plan of Mallinckrodt PLC and Its Debtor Affiliates Under Chapter 11 of the Bankruptcy Code, *In re Mallinckrodt plc*, No. 20-12522 (Bankr. D. Del. Oct. 13, 2021), ECF No. 4718 at 2 (objecting on the basis of third-party releases); United States Trustee's Objection to Confirmation of the Second Modified Fifth Amended Plan of Reorganization for Boy Scouts of America and Delaware BSA, LLC, *In re Boy Scouts of Am.*, No. 20-10343 (Bankr. D. Del. Feb. 7, 2022) ECF No. 8710 at 2. In neither case did the Trustee appeal the plans that authorized the third-party releases.

[35] Brief of United States, *In re Exide Holdings*, *Inc.*, No. 1:20-cv-1402-RGA, 2021 WL 314561 (D. Del. Jul. 26, 221), ECF No. 59 at 23-27.

parties feel free to select contradictory positions before different tribunals to suit their ends, the integrity and efficacy of the courts will suffer.").

Moreover, if the Trustee is correct that the issue of third-party releases "arises with regularity" (App. at 16), then he will have the opportunity to present this issue for review when such review will not risk dire public health outcomes by potentially destroying billions of dollars in value slated to go towards opioid abatement. After all, the Bankruptcy Court's uncontested finding was that the most likely alternative to the Plan and the settlements embodied therein was *liquidation* of the Debtors, in which any recovery for opioid claimants would be extremely limited. Stay App'x at 29. The Trustee's arguments rely, at best, on a minority interpretation of the Bankruptcy Code, so given the urgency to abate the nationwide opioid epidemic, it is untenable that he chooses *this case* to challenge the use of third-party releases in all circumstances. Indeed, the Trustee identifies cases involving third-party releases currently working their way through the lower courts. App. at 29. For these reasons, this case is not the appropriate vehicle to seek a writ of certiorari on third-party releases.

III. The Second Circuit's Decision Is Correct on the Merits

A. The Bankruptcy Code Authorizes the Shareholder Releases

This case is improper for certiorari because the Second Circuit correctly interpreted the Bankruptcy Code based on a prior decision of this Court. Stay App'x at 63. In *United States v. Energy Resources Co.*,[36] this Court held that § 1123(b)(6) of

[36] 495 U.S. 545 (1990).

the Bankruptcy Code,[37] in tandem with § 105(a) of the Code,[38] "grants bankruptcy courts a '*residual authority*' consistent with 'the traditional understanding that bankruptcy courts, as courts of equity, have broad authority to modify creditor-debtor relationships.'" Stay App'x at 54 (quoting *Energy Res. Co.*, 495 U.S. at 549). *Energy Resources* involved the federal government's appeal of a bankruptcy-court order that compelled the IRS to treat payments by the debtor-corporations as payments of the "trust fund" taxes owed—*i.e.*, taxes for which the IRS could collect an equivalent sum directly from certain nondebtor employees if the debtors failed to pay those trust-fund taxes. 495 U.S. at 547-48. The effect of that bankruptcy-court order was to discharge or release the nondebtor employees from responsibility to pay the IRS. The IRS objected, arguing that it had the right to collect from the nondebtor employees and that, by applying the payments to the trust-fund taxes owed before the non-trust-fund taxes were paid, the IRS was at a risk of not collecting all the taxes owed if the debtors' reorganization failed. *Id.* at 549-51. Although the bankruptcy court's order was not expressly authorized under the Bankruptcy Code and had the effect of foreclosing the IRS's right to collect from nondebtors, the Court nevertheless found that the order was permissible under the "broad authority" supported by Bankruptcy Code §§ 105(a) and 1123(b)(5) (later recodified as § 1123(b)(6)). *Id.* at 549.

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[37] Section 1123(b)(6) provides that a chapter 11 plan may "include any other appropriate provision not inconsistent with the applicable provisions of this title." 11 U.S.C. § 1123(b)(6).

[38] Section 105(a) provides, in pertinent part, that "[t]he 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).

Similarly, here, the Shareholder Releases have the effect of foreclosing the pursuit and recovery of certain civil opioid claims against the nondebtor Sacklers, but the Releases are supported by the "broad authority" that this Court recognized in *Energy Resources*. As the Second Circuit observed, under *Energy Resources*, § 1123(b)(6) "is limited only by what the Code expressly forbids, not what the Code explicitly allows." Stay App'x at 55.

The Trustee's reliance on other decisions of this Court is unavailing because those decisions involved violations of express Bankruptcy Code provisions. *See* App. at 22-24; *see also Law v. Siegel*, 571 U.S. 415, 422 (2014) (rejecting payment of attorneys' fees from property exempted by the debtor's homestead exemption, in direct contravention of § 522(k) of the Bankruptcy Code, which provides that exempted property is "not liable for payment of any administrative expense") (quotations omitted); *Czyzewski v. Jevic Holdings Corp.*, 580 U.S. 451, 457-58, 468 (2017) (rejecting a so-called "structured dismissal" that would have dismissed the chapter 11 case while making final distributions to high-priority secured creditors and low-priority general unsecured creditors, but not to the mid-priority WARN Act creditors, in violation of the Bankruptcy Code's express priority scheme); *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012) (rejecting sale procedures that precluded a secured lender from credit bidding, contrary to § 1129(b)(2)(A)(ii) of the Bankruptcy Code).

The Trustee asserts that, if the Shareholder Releases remain in place, future chapter 11 plans could grant such extraordinary and undesirable outcomes as

"granting habeas relief to corporate officers in prison . . . or granting easements to the real property of the debtors' neighbors." App. at 22. But the Trustee's slippery-slope argument is unpersuasive. "Perhaps the best indication that the sky will not fall after [this Court's] decision is that it has not done so already." *Melendez-Diaz v. Massachusetts,* 129 S. Ct. 2527, 2540 (2009).[39] In the more than 30 years that courts have authorized third-party releases or equivalent channeling injunctions,[40] the Trustee's parade of horribles has yet to materialize. This Court has rejected such similarly improbable "parade of horribles" and "slippery slope" arguments and should do the same here. *See Buckley v. Am. Const. L. Found., Inc.*, 525 U.S. 182, 194 n.16 (1999) ("Judges and lawyers live on the slippery slope of analogies; they are not supposed to ski it to the bottom") (citation and quotation omitted); *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 852 (1986) ("[W]e decline to endorse an absolute prohibition on [pendent] jurisdiction [in an agency context] out of fear of where some hypothetical 'slippery slope' may deposit us.").

The Trustee's slippery-slope argument is further undermined by the Bankruptcy Court's narrowing of the Shareholder Releases to ensure that the only

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[39] *See also Atwater v. City of Lago Vista*, 532 U.S. 318, 353 n.25 (2001) ("Noticeably absent from the parade of horribles is any indication that the 'potential for abuse' has ever ripened into a reality.").

[40] *See SEC v. Drexel Burnham Lambert Grp. (In re Drexel Burnham Lambert Grp.)*, 960 F.2d 285, 293 (2d Cir. 1992) ("In bankruptcy cases, a court may enjoin a creditor from suing a third party, provided the injunction plays an important part in the debtor's reorganization plan."); Stay App'x at 58 ("For more than three decades, [the Second Circuit] has held that bankruptcy courts are authorized to enjoin and release third-party claims against non-debtors, as part of a plan of reorganization, in appropriate circumstances.") (quotations omitted).

claims subject to the Releases are those "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."[41] This required nexus or overlap between opioid claims against the Debtors and the opioid claims against the Sackler families underscores the tailored scope of the Shareholder Releases and certainly does not open the door to the habeas relief and easement-granting that the Trustee envisions.[42]

B. No Bankruptcy Code Provision Bars the Shareholder Releases

1. Section 524(e) of the Bankruptcy Code Does Not Bar the Shareholder Releases

The Trustee asserts that the Shareholder Releases violate § 524(e) of the Bankruptcy Code (App. at 20-21), but his argument fails because it is untethered from that section's plain text. Section 524(e) provides that the "discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt." 11 U.S.C. § 524(e). As the Second Circuit explained below, if § 524(e) limited the power of a court to release a claim against a nondebtor, Congress "would have used the mandatory terms 'shall' or 'will' rather than the definitional term 'does.'" Stay App'x at 57 (quoting *Airadigm Commc'ns*, 519 F.3d at 656). In other words, § 524(e) does not *automatically* discharge a nondebtor from a debt on which *it is co-liable with the debtor* (*e.g.*, the debt of a nondebtor guarantor or surety),

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[41] C.A. SPA-920 (Plan § 10.7(b)); Stay App'x at 45.

[42] Indeed, a bankruptcy court would have no constitutional authority to grant by final order the extraordinary relief that the Trustee contemplates because such relief would not be "integral to the restructuring of the debtor-creditor relationship." *See Stern v. Marshall*, 564 U.S. 462, 497 (2011).

which is not the type of debt that the Shareholder Releases are addressing. Thus, § 524(e) does not limit the bankruptcy courts' broad authority under Code §§ 105(a) and 1123(b)(6) to grant a release in exchange for settlement consideration that benefits the bankruptcy estate and its creditors, especially where such benefit is evidenced by the overwhelming support of the affected creditors.

2. The Shareholder Releases Are Narrowly Tailored and Do Not Conflict with Section 523(a) of the Bankruptcy Code

The Trustee asserts that the Shareholder Releases are unduly broad because they would shield Sacklers from opioid-related fraud and other claims that would be non-dischargeable if the Sackers were in bankruptcy. App. at 20-21. But the Code provision the Trustee cites in support of this argument is inapplicable. Section 523(a) of the Bankruptcy Code defines the contours and limits of a ***debtor's*** bankruptcy discharge. *See* 11 U.S.C. § 523(a) (providing that a bankruptcy discharge "does not discharge an individual *debtor*" from certain types of debt (emphasis added)). That does not prevent a bankruptcy trustee or debtor-in-possession from releasing the estate's claims against a nondebtor—and from causing the release of related third-party claims against the same nondebtor under certain circumstances—as part of settling the estate's claims against the nondebtor, including claims for fraud.[43]

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[43] *See, e.g.*, *In re Diplomat Constr., Inc.*, 454 B.R. 917, 919, 924 (Bankr. N.D. Ga. 2011) (approving chapter 7 trustee's proposed settlement of claims for alleged fraud and misappropriation of trade secrets); *In re SCBA Liquidation, Inc.*, 451 B.R. 747, 750, 752 n.3 (Bankr. W.D. Mich. 2011) (approving settlement that included release of estate-held claims, including those for fraud and misrepresentation).

Moreover, the Shareholder Releases are not releasing or discharging the Sacklers from all claims that would be dischargeable in their individual bankruptcies. Rather, as narrowed by the Bankruptcy Court, section 10.7(b) of the Plan would release only claims "as to which any conduct, omission or liability of any Debtor or any Estate is the legal cause or is otherwise a legally relevant factor."[44] As the Second Circuit found, these narrow releases "ensure[ ] sufficient overlap between claims against the Debtors and settled third-party claims." Stay App'x at 71.

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

The enactment of § 524(g) did not foreclose the use of channeling injunctions or third-party releases outside the asbestos mass-tort context, as the uncodified saving clause enacted with § 524(g) makes clear. The Trustee's arguments about § 524(g) thus ignore express statutory language enacted by Congress. App at 19-20.

When it added § 524(g) to the Bankruptcy Code, Congress also enacted a "Rule of Construction" or saving clause providing that § 524(g) was not to be read to abridge the existing authority of courts to grant permanent injunctions (or equivalent third-party releases) in connection with plan confirmation:

> RULE OF CONSTRUCTION.—Nothing in subsection (a) [the provision enacting § 524(g)] or in the amendments made by subsection (a), shall be construed to modify, impair, or supersede any other authority the court has to issue injunctions in connection with an order confirming a plan of reorganization.

[44] C.A. SPA-920 (Plan § 10.7(b)).

Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 111(b), 108 Stat. 4106 (Oct. 22, 1994). The saving clause in section 111(b) "was intended by Congress to avoid any conjecture that, absent cases involving asbestos, bankruptcy courts lacked the power to issue permanent injunctions." *In re Richard Potasky Jeweler, Inc.*, 222 B.R. 816, 827 n.19 (S.D. Ohio 1998) (citing 140 Cong. Rec. H10,766 (daily ed. Oct. 4, 1994) (statement of Rep. Brooks); 140 Cong. Rec. S14,461 (daily ed. Oct. 6, 1994) (statement of Sen. Heflin)). The saving clause makes clear that Congress did not intend for § 524(g) to alter or foreclose a bankruptcy court's existing authority to grant permanent injunctions or third-party releases in non-asbestos bankruptcies, as Congress wanted to ensure that bankruptcy courts continue to "have the widest degree of latitude in crafting responsible reorganizations that fit the specific needs of each case." 138 Cong. Rec. S8335-36 (daily ed. June 17, 1992) (statement of Sen. Sanford).

Indeed, when Congress enacted the saving clause, it did so knowing of at least *two* other non-asbestos bankruptcies that involved the injunction of nondebtor claims: (1) *In re Drexel Burnham Lambert Grp., Inc.*, 960 F.2d 285 (2d Cir. 1992) (involving securities litigation) and (2) *In re A.H. Robins Company*. In *A.H. Robins*, the Fourth Circuit upheld a chapter 11 plan that required "the injunction of suits that have connection to the Dalkon Shield, against certain entities other than [the debtors]." 880 F.2d at 700. In doing so, the Fourth Circuit specifically rejected the argument that § 524(e) "limits the equitable power of the bankruptcy court to enjoin the questioned suits." *Id.* at 702. Because Congress recognized the practice of approving

channeling injunctions and third-party releases outside the asbestos context, and left the door open for their continued approval through the saving clause, § 524(g) presents no obstacle to the Shareholder Releases here.

C. The Shareholder Releases Comply with Due Process

The Trustee asserts that the Shareholder Releases violate due process (App. at 25), but his arguments are unavailing. "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice *reasonably calculated*, *under all the circumstances*, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950) (emphasis added and citations omitted). As the Second Circuit noted, the Bankruptcy Court provided reasonable notice and an opportunity to present objections. Stay App'x at 78-81. Nothing more is required for due process.

The uncontroverted evidence showed, and the Bankruptcy Court found, that notice of the proposed confirmation of the Plan was "widespread through a variety of media and that direct notice was provided to any creditors of the Debtors (potential claimants here)." Stay App'x at 79. The Bankruptcy Court found that the "most widespread" of the Debtors' notices "were simple" and stated "in plain English that the plan contemplated a broad release of the Sacklers and their related entities . . . including claims against them held by third parties."[45] Moreover, the Bankruptcy Court found that the Debtors' notices reached 87% of all U.S. adults with an average

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[45] C.A. SPA-149.

frequency of message exposure of five times, served over 3.6 billion impressions online and resulted in over 3,400 news mentions around the world.[46]

Despite this unprecedented noticing program, the Trustee incorrectly suggests due process requires giving creditors a chance to opt out of the Shareholder Releases, as has been required in class actions App. at 25. But class actions are not an appropriate analog to determining due process requirements in bankruptcy cases because "bankruptcy law provides numerous safeguards not contained in class action procedures." *Findley v. Blinken (In re Joint E. & S. Dist. Asbestos Litig.)*, 982 F.2d 721, 736 (2d Cir. 1992), *op. modified on other grounds on reh'g*, 993 F.2d 7 (2d Cir. 1993). For instance, certain provisions in chapter 11 require a vote of all impaired classes on a proposed chapter 11 plan of reorganization, impose strict fairness standards before a "plan can be 'crammed down' over the objection of a dissenting class", and prohibit a plan from being imposed over the objection "of an impaired class that would fare better under liquidation . . . ." *Id.* And the Second Circuit requires supermajority support by the affected creditors. Stay App'x at 68.

"By contrast, [Federal Rule of Civil Procedure 23 governing class actions] is less elaborate in its protections, for example, permitting named representatives of a class, or subclass, to consent to a settlement that binds all the members of the class, or subclass, without a vote of the class or subclass members." *Joint E. & S. Dist. Asbestos Litig.,* 982 F.2d at 736. Because bankruptcy law provides numerous

[46] C.A. SPA-147.

protections and requirements not found in class actions, it is improper to analogize between class actions and bankruptcies.

These bankruptcy safeguards are part of the "special remedial scheme" that enables bankruptcy proceedings to foreclose "successive litigation by nonlitigants" and "terminate preexisting rights *if the scheme is otherwise consistent with due process*." *Martin v. Wilks*, 490 U.S. 755, 762 n.2 (1989) (emphasis added), *superseded by statute on other grounds*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 107. As the Second Circuit held, the Bankruptcy Court approved the Plan containing the Shareholder Releases consistent with due process. Stay App'x at 81.

D. The Shareholder Releases Carry Out Numerous Provisions of the Bankruptcy Code

While the Second Circuit focused only on Code §§ 105(a) and 1123(b)(6) as the statutory foundations for the Shareholder Releases, Stay App'x at 53-56, the Shareholder Releases are necessary to carry out numerous other provisions of the Bankruptcy Code. *See* 11 U.S.C. § 105(a) ("The court may issue any order, process, or judgment that is necessary to carry out the provisions of this title."). A debtor-in-possession has the same powers and duties of a trustee in bankruptcy. 11 U.S.C. § 1107(a). "The powers and duties of a bankruptcy trustee are extensive." *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 352 (1985). Those powers include the power to litigate claims on behalf of the debtor's estate and the trustee "has the duty to maximize the value of the estate . . . ." *Id.* To achieve settlements that are important to reorganizations and to maximize the value of such settlements, courts may look to their broad equitable powers under numerous

provisions of the Bankruptcy Code, including 11 U.S.C. §§ 323(b) (power to sue on estate-held claims), 363(b) (permitting trustee to "use"—and thus settle—estate causes of action outside the ordinary course of business), 704(a)(2) (holding trustee "accountable for all property received"), and 1123(b)(3)(A) (permitting a chapter 11 plan to "provide for . . . the settlement . . . of any claim . . . belonging to the debtor or to the estate").

The Shareholder Releases are necessary to carry out the settlement of the Debtors' claims against the Sacklers—a settlement that is essential to the success of the Plan and the intercreditor settlements embodied therein. Without the Shareholder Settlement, of which the Shareholder Releases are a crucial part, the Debtors and their creditors would encounter an insurmountable collective-action problem. As found by the courts below, without the Shareholder Settlement, the Debtors would be forced to pursue their claims against the Sackers in competition with third-party claims against the Sacklers.[47] This would lead to a "disorderly race to the courthouse . . . resulting in inefficiency as assets are dissipated in piecemeal and duplicative litigation" and "latecomers will be left empty-handed." *Zacarias v. Stanford Int'l Bank, Ltd.*, 945 F.3d 883, 896 (5th Cir. 2019) (describing collective-action problem in the context of bar orders entered to enjoin third-party claims as part of settlement of federal equity receiver's claims).[48] Indeed, the Bankruptcy Court

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[47] C.A. SPA-86, 231, 282.

[48] Bankruptcy and federal equity receiverships have a "shared legal heritage" as 'federal equity receiverships were the predecessor to Chapter 7 liquidations and Chapter 11 reorganizations.' *SEC v. Stanford Int'l Bank, Ltd.*, 927 F.3d 830, 841 (5th Cir. 2019) (citations and quotations omitted).

found that "substantial" litigation costs and delay would be inflicted on the Debtors' estates without the Shareholder Settlement "as it is reasonable to infer that the hundreds of prepetition lawsuits naming the Sacklers would resume and proceed alongside prosecution of the estates' claims against the Sacklers and related entities." SPA-231 (footnote omitted).

The Shareholder Releases are thus necessary to avoid the collective-action problem, the value destruction that would ensue as the Debtors' assets are consumed by litigation costs, and the risk that the Debtors would receive little to no recovery on their claims against the Sacklers. The Shareholder Releases are also necessary for the Debtors to realize a maximized "settlement premium" on their claims since, without protection from third-party claims against them, the Sacklers likely would be unwilling or unable to contribute between $5.5 and $6 billion to compensate opioid victims and abate the opioid crisis.[49] For these reasons, the Shareholder Releases are necessary to carry out a settlement of the Debtors' claims against the Sacklers—a settlement that would benefit *all* creditors and which enjoys nearly universal creditor support. The Shareholder Releases are therefore appropriately authorized under the Bankruptcy Code, and the Trustee's objections to them are without merit.

REASONS FOR DENYING THE STAY

To obtain a stay pending the filing and disposition of a petition for a writ of certiorari, an applicant must show (1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that

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[49] C.A. SPA-201.

a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay. *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010); *see also Teva Pharms. USA, Inc. v. Sandoz, Inc.*, 572 U.S. 1301 (Roberts, C.J., in chambers). Moreover, the Court may "balance the equities and weigh the relative harms to the applicant and to the respondent." *Hollingsworth*, 558 U.S. at 190.

I. The Trustee Has Failed to Demonstrate That His Certiorari Petition Is Likely to Be Granted or the Opinion Overturned

For the reasons explained above (pages 8-26), the Trustee has not shown a reasonable probability that four justices would vote to grant certiorari; nor is there a "fair prospect that a majority of the Court will vote" to overturn the Opinion. *Hollingsworth*, 558 U.S. at 190.

Additionally, this Court has repeatedly denied certiorari in cases where nonconsensual third-party releases have been challenged. *See In re Millennium Lab Holdings II, LLC.*, 945 F.3d 126, *cert. denied sub nom. ISL Loan Tr. v. Millennium Lab Holdings II, LLC*, 140 S. Ct. 2805 (2020); *In re Seaside Eng'g & Surveying, Inc.*, 780 F.3d at 1078, *cert. denied sub nom. Vision-Park Properties, LLC v. Seaside Eng'g & Surveying, Inc.*, 577 U.S. 823 (2015); *Nat'l Heritage Found.*, 760 F.3d 344, *cert. denied*, 574 U.S. 1076 (2015); *In re Dow Corning Corp.*, 280 F.3d 648 (involving mass-tort claims arising from silicone gel implants), *cert. denied*, 537 U.S. 816 (2002); *In re Lowenschuss*, 67 F.3d 1394, *cert. denied sub nom. Lowenschuss v. Resorts Int'l, Inc.*, 517 U.S. 1243 (1996); *In re Drexel Burnham Lambert Grp.*, 960 F.2d at 285, *cert. denied sub nom. Hart Holding Co. v. Drexel Burnham Lambert Grp, Inc.*, 506 U.S.

1088 (1993); *In re A.H. Robins Co.*, 880 F.2d 694 (involving mass-tort claims arising from the Dalkon Shield), *cert. denied*, 493 U.S. 959 (1989); *MacArthur Co. v. Johns-Manville Corp.*, 837 F.2d 89 (2d Cir. 1988) (involving asbestos mass-tort claims), *cert. denied*, 488 U.S. 868 (1988).

This Court should follow its previous example and deny certiorari here, especially when, as discussed above, the Fifth, Ninth, and Tenth Circuits have yet to weigh in on third-party releases in the context of mass-tort bankruptcies, and when the opioid epidemic is ongoing, is causing hundreds of deaths each day,[50] and needs to be abated through the billions of dollars that would be made available under the Shareholder Settlement.

II. The Trustee Cannot Establish a Likelihood of Irreparable Harm

An applicant must establish "a likelihood that irreparable harm will result from the denial of a stay." *Hollingsworth*, 558 U.S. at 190. Irreparable harm requires more than the mere "possibility of irreparable injury." *Nken v. Holder*, 556 U.S. 418, 434 (2009). The Trustee must show that the harm is "likely"; the mere 'possibility of some remote future injury' is insufficient. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008) (citation omitted). Moreover, '[a] stay is not a matter of right, even if irreparable injury might otherwise result.' *Ind. State Police Pension Tr. v. Chrysler LLC*, 556 U.S. 960, 961 (2009) (citation omitted).

As explained below, the Trustee has not met his burden of establishing that he would be irreparably harmed if a stay were not granted. On the other hand, opioid

[50] *See infra* note 54.

claimants would be harmed if the Plan's proponents were prevented from taking various steps needed to eventually make the Plan go effective, which, in turn, would further delay the distribution of much-needed abatement funds to opioid-ravaged communities across the country. Such a delay is not in the public interest.

A. There Is No Risk of Irreparable Harm from Equitable Mootness

To make the case for irreparable harm, the Trustee asserts that, if the Plan goes effective before this Court rules on his certiorari petition, the parties *could* argue that his challenge to the Shareholder Releases is equitably moot. App. at 25-27. The Bankruptcy Court, the District Court, and the Second Circuit rejected this very argument, finding that the alleged threat of equitable mootness was too remote.[51]

Even now, the threat of equitable mootness remains vanishingly remote, which makes a stay unnecessary. For equitable mootness to even be a possibility here, the Plan must first become effective and the initial distributions thereunder must commence. *See Beeman v. BGI Creditors' Liquidating Tr. (In re BGI, Inc.)*, 772 F.3d 102, 110 (2d Cir. 2014) (holding that equitable mootness occurred when distributions started to be made as of the effective date); *In re Purdue Pharma L.P.*, 634 B.R. at 246 (finding that no actions taken before the effective date could equitably moot this

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[51] *In re Purdue Pharma L.P.*, 634 B.R. at 248; *see* JX-4158 (Order Denying Mot. for Stay Pending Appeal (Nov. 29, 2021), Bankr. ECF. No. 4177 ("[T]he movants have failed to demonstrate a risk of irreparable harm absent a stay[.]")); Nov. 9, 2021 Hr'g Tr. at 269:14-18 ("[I]t is highly unlikely that the plan would permit any actions to be taken prior to the effective date that would come anywhere close to the types of transactions that give rise to equitable mootness under the law of the Second Circuit").

case).[52] And numerous steps must be taken in connection with this case, and certain preconditions must be satisfied, before the Plan can even become effective. First, after the Second Circuit issues the mandate (which occurred on July 31, 2023), the Debtors must obtain entry of one or more orders confirming the Plan and incorporating the enhancements authorized in March 2022. Under the court-approved plea agreement with the Department of Justice, Purdue's sentencing hearing cannot occur until at least 75 days after entry of the confirmation order, and the Plan cannot become effective until seven days after sentencing. Furthermore, according to the Debtors, many state and federal regulatory processes must be completed before the Plan can become effective. The Debtors estimate that the Plan could not go effective before January 2024, at the earliest.

All these steps will require several months to complete, thus giving the Court more than enough time to rule on the Trustee's certiorari petition. Under these circumstances, the threat of equitable mootness is neither actual nor imminent. Because the Trustee has failed to carry his burden on irreparable harm, the Court should deny his Application.

[52] *See also* William M. Collier *et al.*, 7 Collier on Bankruptcy ¶ 1101.02 (Alan N. Resnick & Henry J. Sommer, eds., 16th ed. 2009) (stating that the "substantial consummation" required to find equitable mootness is ordinarily tied to "distributions of property intended to be made at or about the time of the effective date of the plan").

B. Staying the Mandate Would Inflict More Prejudicial Delay in Providing Much-Needed Abatement Dollars to Opioid-Ravaged Communities, Which Is Contrary to the Public Interest

Staying the mandate will further delay the steps that need to be taken in order for the Plan to go effective and thus for critical abatement dollars to be distributed thereunder. Thus, even if the Trustee could establish equitable mootness as a realistic possibility (and he cannot), the strong public interest in releasing opioid abatement funds as soon as possible weighs heavily against a stay. *See Chrysler*, 556 U.S. at 961 (noting that a 'stay is not a matter of right, even if irreparable injury might otherwise result') (citation omitted). The tragic consequences of the opioid crisis are ongoing.[53] According to the Centers for Disease Control and Prevention, in the latest 12-month period for which data is available, more than 105,000 drug overdose deaths were reported, equating to almost 290 deaths a day.[54] Over 70% of those drug overdose deaths involve the use of opioids.[55] As the opioid crisis continues to grow, the harm from delay grows proportionally.

The Trustee claims to speak for the public interest. App. at 27-28. But, as a result of the settlement reached with "the Nine" last year, no state government objects to the Plan,[56] and the thousands of governmental creditors that participated

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[53] *See* C.A. JA-1361-62 (Decl. of Colin Jorgensen ¶ 19 ("**Jorgensen Decl.**") (Bankr. ECF No. 4016-1)).

[54] *Provisional Drug Overdose Death Counts*, Centers for Disease Control and Prevention: Nat'l Ctr. For Heath Stat., https://www.cdc.gov/nchs/nvss/vsrr/drug-overdose-data.htm.

[55] *Drug Overdose Deaths,* Centers for Disease Control and Prevention, https://www.cdc.gov/drugoverdose/deaths/index.html.

[56] The settlement does provide "the Nine" with the ability to file *amicus* briefs opposing the Shareholder Releases if this Court grants a petition for certiorari. But

in the Debtors' case voted by almost 97% in favor of the Plan.[57] The Trustee, myopically focused on his "watchdog" role, is blind to the real public interest that is clear to thousands of elected governments across the nation that have daily frontline responsibility for responding to the opioid crisis.

Governments lack adequate funding for abatement,[58] and funds made available under the Plan are necessary for targeted abatement programs that would save lives.[59] Funds distributed in accordance with the Plan will provide vital services that are not sufficiently available to many state and local governments, such as additional facilities and capacity for treatment for opioid-use disorder, naloxone for first responders, additional support services for treatment and recovery, creation of crisis stabilization units, drug courts and law enforcement addiction intervention programs, programs to prevent diversion and misuse, and expanded training for first responders.[60] Delay in implementing these life-saving programs is unjustified, especially where the Trustee has shown no actual and imminent irreparable harm.

The Trustee argues that the costs of any delay would be minor because the Shareholder Settlement payments under the Plan are staggered over years, and those payments already have been delayed while these appeals have been pending. App.

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any *amicus* brief must "note that the member of the Nine withdrew its objections to the Plan . . . and is not subject to a non-consensual release under the Plan." Ex. B. Term Sheet, *In re Purdue Pharma L.P.*, No. 19-23649 (Bankr. S.D.N.Y. Mar. 3, 2022), ECF No. 4410 at 32.

[57] *See* C.A. JA-6258.

[58] C.A. JA-1362 (Jorgensen Decl. ¶ 21).

[59] C.A. JA-1362-64 (Jorgensen Decl. ¶¶ 20-25).

[60] C.A. JA-1364 (Jorgensen Decl. ¶¶ 25-26).

at 30. This ignores entirely the cash from the Debtors slated for immediate distribution on the Plan's effective date.[61] Moreover, while the Trustee may consider the over $1 billion[62] that would flow to the creditor trusts on the effective date insubstantial, thousands of local governments across this country would beg to differ since they can find immediate uses for the funds to combat the opioid crisis.[63] The Trustee also ignores that the opioid crisis has only intensified while this case has been pending.[64] Deaths have grown and continue to compound.[65] The more money that can be spent on abatement and the sooner that money is spent, the more lives can be saved.[66] Funding from the Plan will help end the vicious cycle of governments being forced to spend more money on the immediate consequences of the opioid crisis, such as increased funding for hospitals and first responders to treat victims, which currently leaves little to no money available to abate the long-term causes of the crisis.[67] Simply put, a dollar spent today will go further than a dollar spent tomorrow.

Additionally, the public interest favors the settlement of claims and finality in these chapter 11 cases. *See McDermott, Inc. v. AmClyde*, 511 U.S. 202, 215 (1994)

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[61] *See* C.A. SPA-896.

[62] The Trustee incorrectly states that $300 million would flow to creditors on the Plan effective date, but this ignores the additional settlement and the cash from the Debtors. *See* C.A. JA-1570; C.A. SPA-896.

[63] C.A. JA-1362 (Jorgensen Decl. ¶ 24) (noting that "local government officials have been ready to get to work on abatement for years").

[64] *See Drug Overdose Deaths,* Centers for Disease Control and Prevention, https://www.cdc.gov/drugoverdose/deaths/index.html.

[65] *Id.*

[66] C.A. JA-1362 (Jorgensen Decl. ¶ 20).

[67] *Id.*

(noting that "public policy wisely encourages settlements"); *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 881 (1994) (stating that "public policy favor[s] voluntary resolution of disputes"). The Plan is the culmination of years of hard-fought negotiation and compromises reached among many stakeholders and provides for a resolution of the seemingly intractable problems posed by this case.

Moreover, the Trustee's argument that the public interest is harmed because claims, including criminal claims, of the federal government could be released in other cases is both incorrect and ignores the facts of the case before this Court. App. at 28-29. Here, the Trustee has no claim subject to the Shareholder Releases; indeed, unlike the other governmental entities supporting the Plan, he has no economic stake whatsoever in these cases. And the Shareholder Releases are narrowly tailored to cover only certain *civil claim*s against the Sacklers and the entities they control that relate to the Debtors' opioid business. Stay App'x at 45.

CONCLUSION

The Court should deny the Trustee's Application because he cannot meet the high burden required for a stay of the mandate. The Court should also treat the Application as a petition for a writ of certiorari and deny the petition. As explained above, in the context of non-asbestos mass-tort bankruptcies, the putative circuit split is underdeveloped and potentially non-existent. And, in light of the ongoing opioid epidemic, the lives being lost each day, and the dire need for abatement funding, this case is not the appropriate vehicle for resolving the putative circuit split. In addition, the Trustee has not demonstrated any actual and imminent harm, much less irreparable harm, that would result if his stay request were denied. On the other

hand, any stay granted here would impede the progress necessary to consummate the Plan, which, in turn, would further delay the distribution of critical opioid-abatement dollars to communities in need. Inaction only increases the harm done by the opioid crisis because abatement programs that could take immediate effect are starved of resources. A stay is not in the public interest. Accordingly, this Court should deny the Application in all respects.

Dated: August 4, 2023

Respectfully submitted,

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