No. 25-490

IN THE

Supreme Court of the United States

LUJAN CLAIMANTS,

Petitioner,

v.

BOY SCOUTS OF AMERICA, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

AMICI CURIAE BRIEF ON BEHALF OF THE HON. EUGENE WEDOFF (RET.) AND LAW PROFESSORS RALPH BRUBAKER, DIANE LOURDES DICK, PAMELA FOOHEY, CANDICE KLINE, GEORGE KUNEY, DAVID KUNEY, JONATHAN LIPSON, STEPHEN LUBBEN AND NANCY RAPOPORT IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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INTEREST OF THE *AMICI CURIAE*[1]

Amici are the following:

Hon. Eugene Wedoff (ret.), formerly Chief Judge of the Bankruptcy Court, Northern District of Illinois and former President of the American Bankruptcy Institute:

Ralph Brubaker (James H.M. Sprayregen Professor, University of Illinois College of Law):

Diane Lourdes Dick (Charles E. Floete Distinguished Professor of Law, University of Iowa College of Law):

Pamela Foohey (Allen Post Professor of Law, University of Georgia School of Law):

Candice Kline (Professor, University of Toledo College of Law):

George Kuney (Professor of Law Emeritus, University of Tennessee College of Law):[2]

David Kuney (Adjunct Professor, Georgetown University Law Center):

Jonathan Lipson (Harold E. Kohn Professor of Law, Temple University–Beasley School of Law):

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1. Pursuant to Sup. Ct. Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, and that no person other than amici or their counsel contributed any money to fund its preparation or submission.

2. No relation to counsel of record.

Stephen Lubben (Harvey Washington Wiley Chair in Corporate Governance & Business Ethics, Seton Hall University School of Law): and

Nancy Rapoport (UNVL Distinguished Professor and, Garman Turner Gordon Professor of Law, William S. Boyd School of Law, University of Nevada, Las Vegas).

Amici's interest in filing this brief is to urge this Court to grant review. The Petition identifies an important split among the courts concerning the correct application of Bankruptcy Code §§ 363(b) and 363(m), demonstrating as well that the decision below "evades this Court's holding" in *Harrington v. Purdue Pharma, L.P.*, 144 S. Ct. 2071 (2024). Pet. 2.

This brief further amplifies the attempt to evade *Purdue* and the resulting conflict between *Purdue* and the decision in *Boy Scouts*. Supreme Court Rule 10(c) provides that review by this Court on a writ of certiorari is appropriate where a United States Court of Appeals has decided an important question of federal law "that conflicts with relevant decisions of this Court." This is such a case.

Purdue held that "[a] bankruptcy court's powers are not limitless, and do not endow it with powers to extinguish without their consent claims held by nondebtors … against other nondebtors." 144 S. Ct. 2084. This Court's ruling was based on a textual analysis of Code § 1123(b)(6), which sets forth what a bankruptcy plan may contain, as well as foundational concepts that govern the process for confirmation of a plan of reorganization in Chapter 11 bankruptcy cases.

Despite this Court's ruling, the chapter 11 plan of reorganization of the Boy Scouts of America ("BSA"), confirmed by the U.S. bankruptcy court, contained precisely the kind of non-consensual third-party release that this Court said was beyond the power of a bankruptcy court. *In re Boy Scouts of America*, 137 F.4th 126 (3d Cir. 2025).

These efforts to evade *Purdue* through "work arounds" is most troublesome in the *Boy Scout* case because the consequences here are more dire. The *BSA* decision could well restrict appellate review by Article III courts over the bankruptcy system and lead to "illusory appellate review."[3] As Judge Rendell noted, the *BSA* decision is a "dangerous transactional precedent, one that will result in Article III courts not having the capacity to review Confirmation Orders if the parties agree to call key intra-plan transactions 'sales.' Indeed, today's decision relegates the Supreme Court's holding in *Purdue* to a mere plan-drafting guide." 137 F.4th 126, 174–75. (Rendell, J., concurring).

Timely review by this Court is urgent. The decision in *Purdue* was a milestone in bankruptcy jurisprudence and resolved the "great unsettled question" of bankruptcy law.[4] The need for further Court review and guidance, however, has now become apparent. A cottage industry has arisen in efforts to evade *Purdue*'s holding. One such case

3. *See* Adam J. Levitin, *Purdue's Poison Pill: The Breakdown of Chapter 11 Checks and Balances*, 100 Tex. L. Rev. 1079, 1121 (2022) (discussing impact of equitable mootness doctrine).

4. *In re Purdue Pharma, L.P.*, 635 B.R. 26, 37 (S.D.N.Y. 2021).

is now pending before this Court.[5] Without prompt review by this Court, years of new litigation will likely arise, each claiming to fall outside of *Purdue*'s foundational and statutory holding.

INTRODUCTION

This appeal "arises from the horrific history of sexual abuse in the Boy Scouts of America ranks. For decades, that abuse permeated scouting programs, ranging from single instances of harassment to serial offenses of sexual penetration." *In re Boy Scouts of America*, 137 F.4th 142. The petitioners are some of the victims of this sexual abuse.

In 2020, BSA filed for bankruptcy after "more and more brave victims of this abuse [came] forward and filed lawsuits against BSA. *Id.* at 142. BSA ultimately filed a plan of reorganization under Chapter 11 that included non-consensual third-party releases for certain "Protected Parties." Those Protected Parties included BSA, over 250 Local Councils (separate entities operating the scouting program) and over 300,000 Chartered Organizations (scouting sponsors) along with the Settling Insurers.[6]

The plan was to be funded "by the sale of certain assets and contributions from BSA and other nondebtors." 137

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5. *Highland Capital Management, L.P. v. NexPoint Advisors*, Petition for Writ of Certiorari, Case No. 25-119 (claiming use of "gatekeeping plan" "differs radically from *Purdue.*" Pet. 2.

6. Joint Brief of Appellants Dumas & Vaughn Claimants and Lujan Claimants Regarding Court's C.A.V. Inquiry, *Boy Scouts*, (March 8, 2024) ECF 186, p. 8.

F.4th 142. The purported sale was nested in a Settlement Agreement and Release[] (the "Settlement Agreements") with a group of insurers (the "Settling Insurers") who agreed to "buy back" their insurance policies,[7] although the payment was put in escrow and is being held pending a "Final Order."[8]

Lujan objected to confirmation of the plan and challenged the authority of a bankruptcy court to approve non-debtor releases. The bankruptcy court, however, entered a Confirmation Order on September 8, 2022,[9] and on March 28, 2023, the District Court affirmed the bankruptcy court.[10] Lujan timely noticed its appeal to the Third Circuit in March 2023. The Notice of Appeal specified that the appeal was from the District Court Opinion (ECF 150) and the order affirming the Confirmation Order (ECF 151).[11]

The motions to dismiss.

On October 27, 2023, BSA filed its motion to dismiss the appeal as moot, relying on both statutory mootness

7. *See In re Boy Scouts of America,* 642 B.R. 504, 538 (Bankr. D. Del. 2022).

8. *See* Appellees Settling Insurers' Supplemental Brief, *Boy Scouts,* 23-1664 (3d Cir., Aug. 7, 2024) ECF 198, pp. 5, 21 and 22.

9. Supplemental Findings of Fact and Conclusions of Law and Order Confirming the Third Modified Amended Chapter 11 Plan of Reorganization (with Technical Modifications) for Boy Scouts of America and Delaware BSA, LLC, 20-10343 (Bankr. D. Del., Sept. 8, 2022) ECF 10316 (the "Confirmation Order").

10. Order, 1:22-cv-01237, (March 28, 2023), ECF 151.

11. Notice of Appeal, No. 23-1664, (3d Cir.), ECF 1.

and equitable mootness. (ECF 124-1). BSA claimed that the buybacks and the plan were part of the "single integrated transaction"[12] and that, as an integrated transaction, § 363(m) applied and precluded review of the merits of the appeal. BSA thus sought to create a statutory bar to appeals from confirmation orders that involved an "integral" sale.

The Settling Insurers filed a separate motion to dismiss, arguing that the appeals should be dismissed as "the result of the absolute statutory bar set forth in Section 363(m)," (ECF 123), thus contradicting this Court's holding in *MOAC Mall Holdings LLC v. Transform*, 598 U.S. 288 (2023).

However, no one disputed that the Confirmation Order authorized the sale[13] and that Lujan's appeal was from the Confirmation Order, thus bringing this appeal squarely within the stated ambit of this Court's ruling in *Purdue*.

The effect of the *Purdue* decision on this appeal.

On June 27, 2024, while the appeal was pending at the Third Circuit, this Court ruled that nonconsensual third-party releases are not authorized under the Bankruptcy Code other than in 11 U.S.C. § 524. "[W]e hold only that the bankruptcy code does not authorize a release and injunction that, as part of a plan of reorganization under

12. Appellee's Motion to Dismiss Appeals as Moot, *Boy Scouts*, 23-1664, (3d Cir., Oct. 27, 2023), ECF 124-1, p. 11.

13. Appellees Settling Insurers' Motion to Dismiss Appeals of Dumas & Vaughn and Lujan Claimants, *Boy Scouts*, 23-1664 (3d Cir. Oct. 27, 2023) ECF 123, 15.

Chapter 11, effectively seeks to discharge claims against a nondebtor without the consent of affected claimants." *Purdue*, 144 S. Ct. 2071.

On July 8, 2024, the Third Circuit directed the parties to file supplemental briefs on the effect of this Court's ruling in *Purdue.* Lujan argued that the district court and bankruptcy court had improperly approved the BSA plan because the BSA Plan authorized nonconsensual third-party releases notwithstanding that this Court in *Purdue* held that identical non-debtor releases were impermissible and unauthorized by the Bankruptcy Code.[14]

BSA argued that its plan "starkly contrasts with *Purdue*'s plan."[15] The Settling Insurers argued that "Section 363(m) … operates independently of the substantive issues addressed in *Purdue* regarding the permissible contents of a Chapter 11 plan."[16]

The ruling below on the motions to dismiss.

On May 13, 2025, the Third Circuit Court of Appeals dismissed the appeal of Lujan and D&V as statutorily moot. It declined to rule on equitable mootness. "[O]ur analysis of the claims of the Lujan and D&V Claimants

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14. Joint Brief of Appellants Dumas & Vaughn Claimants and Lujan Claimants Regarding Court's C.A.V. Inquiry, *Boy Scouts*, (March 8, 2024) ECF 186, p.7.

15. Supplemental Brief of Appellees Boy Scouts of America, The Ad Hoc Committee of Local Councils and the Coalition of Abused Scouts for Justice, 23-1664, Aug. 7, 2024, ECF 206-1, p.9.

16. Appellees Settling Insurers' Supplemental Brief, *Boy Scouts*, 23-1664 (3d Cir. Aug. 7, 2024), ECF 198, 14.

should not be read, by negative implication or otherwise, to suggest that those claims are equitably moot."[17]

The Third Circuit Panel acknowledged the merits of the Lujan appeal and the unlawfulness of the BSA Plan. "If proposed today, the Plan would be unconfirmable in the wake of *Purdue* and the Lujan and D&V Claimants could not have their claims released without consent."[18] Further, "[s]o were the Plan proposed today, we harbor little doubt that the Bankruptcy Court would neither authorize the Insurance Policy BuyBack nor confirm the Plan with its impermissible releases."[19]

The Third Circuit decision relied entirely on statutory mootness under § 363(m).[20] The Third Circuit applied the statutory test for a sale under § 363(b), and held that because there was no stay, and because the relief could affect the validity of the sale, the appeal was moot. In applying § 363(b), the Third Circuit failed to address whether this Court's ruling in *Purdue* that third-party releases were not "authorized" under the Code likewise meant that any "sale" under § 363(b) that contained such releases was likewise not "authorized"—thereby removing the transaction from the operation of § 363(b) and § 363(m).

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17. *Boy Scouts,* 137 F.4th at 173.

18. *Boy Scouts*, 137 F.4th at 170.

19. *Boy Scouts,* 137 F.4th at 158, n. 19.

20. "The reversal or modification on appeal of an authorization under subsection (b) … does not affect the validity of a sale or lease under such subsection to an entity that purchased … in good faith … unless such authorization and such sale or lease were stayed pending appeal."

The decision drew a sharp rebuke from Judge Rendell whose 15-page concurrence identifies the "errors" of the majority in permitting §363(m) to function as a constraint on appellate review of a Chapter 11 plan.[21] "I see not only error, but mischief in the majority's approach."[22] "Taken to its logical conclusion, the majority's reasoning would allow § 363(m) to swallow Chapter 11's requirements, including those clarified in *Purdue*. … So long as a court authorizes an intra-plan sale under § 363, the other plan provisions are shielded from review, as they may have conceivably affected the purchase price."[23]

"What happened here goes far beyond what § 363 contemplates" wrote Judge Rendell. "Rather than merely protecting the purchaser's 'newly acquired property interest' … the majority shields from review the non-consensual third-party releases that the Supreme Court invalidated in *Purdue*. … Indeed, today's decision relegates the Supreme Court's holding in *Purdue* to a mere plan-drafting guide."[24]

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21. Judge Rendell concurred in the result only, saying she believed the case should have been resolved by an analysis of equitable mootness.

22. *Boy Scouts*, 137 F.4th at 177.

23. *Id.* at 174.

24. *Id.*

SUMMARY OF ARGUMENT

Review by this Court is warranted because the Third Circuit decision conflicts with this Court's ruling in *Purdue*. This Court held in *Purdue* that a Chapter 11 plan could not contain nonconsensual third-party releases. The BSA Plan contains precisely what this Court held was unauthorized by the Bankruptcy Code. "If proposed today, the Plan would be unconfirmable in the wake of *Purdue*, and the Lujan and D&V Claimants could not have their claims released without their consent." 137 F.4th 126, 170.

The Third Circuit decision also contravenes this Court's ruling in *Czyzewski v. Jevic Holding Corp.*, 580 U.S. 451 (2017). The decision below bypasses the requirements for plan confirmation and resurrects the forbidden use of *sub rosa* plans which this Court held to be unlawful in *Jevic* as well as in *Pension Benefit Guaranty Corp. v. Braniff Airways, Inc.*, 700 F.2d 935 (5th Cir. 1983).

The decision below is wrong as a matter of statutory interpretation. The Third Circuit committed legal error by relying on the Code's sale provisions as justification for engrafting a mootness provision onto the Code's confirmation standards, which do not contain any such provision. The Third Circuit erroneously ruled that a plan that contains a sales transaction that is supposedly "integral" to the plan is immune from appellate review under the so-called "mootness" section of 11 U.S.C. § 363(m), which governs sales, but which is not applicable to a sale *within* a plan.

The decision below is also wrong because the Third Circuit decision contravenes this Court's ruling in *Chafin*

v. Chafin, 568 U.S. 165, 172 (2013). A case "becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." Effective relief was available through excising the unauthorized releases for the Lujan claimants.

LEGAL ARGUMENT

I. This Court should grant the petition for certiorari because the decision by the Third Circuit contravenes this Court's ruling in *Purdue* by making an unlawful plan provision (a third party release) immune from appellate review under 11 U.S.C. § 363(m).

This Court should grant the petition for certiorari because the decision below contravenes *Purdue.* Without this Court's review and reversal, the *Purdue* decision will be readily evaded: "Indeed, today's decision relegates the Supreme Court's holding in *Purdue* to a mere plan-drafting guide."[25]

Purdue identified the statutory foundations that govern the confirmation process of a bankruptcy plan. These include the following: (a) a nondebtor, third-party release is effectively the same as the statutory discharge under the Bankruptcy Code; (b) the authority for a bankruptcy court to authorize a discharge in Chapter 11 lies solely within the Code's plan confirmation sections (11 U.S.C. §§ 1121 to 1146); (c) claims held by third parties—such as the tort victims here—are not property of the estate and sales or settlements of such property

25. *Boy Scouts*, 137 F.4th at 174 (Rendell, J., concurring).

cannot be authorized without consent of the parties; (d) nonconsensual third-party releases are inconsistent with the Code's confirmation standards; and (e) therefore "the bankruptcy code does not authorize a release and injunction that, as part of a plan under Chapter 11, effectively seeks to discharge claims against a nondebtor without the consent of the affected parties." *Purdue*, 144 S. Ct. 2088.

Purdue noted that when a debtor files for bankruptcy, the filing creates an "estate" that includes virtually all of the *debtor's assets*. 144 S. Ct. 2081 (emphasis added). A debtor can then work with its creditors to develop a reorganization plan that "governs the distribution of the *estate's assets*." *Id.* (emphasis added). As noted below, one of the fatal flaws here is that the BSA Plan and the Purdue Plan sought to extinguish or release *non*-estate assets (i.e., the claims of third parties).

Purdue further recognized that a release is effectively a "discharge," and that the power to discharge debts resides in § 1141(d)(1)(A)—and that this power generally pertains to the debtor only.

> Most relevant here, a bankruptcy court's order confirming a plan "discharges the debtor from any debt that arose before the date of such confirmation," except as provided in the plan, the confirmation order, or the code. § 1141(d)(1)(A). … Generally, however, a discharge operates only for the benefit of the debtor against its creditors and "does not affect the liability of any other entity." § 524(e)

> The Sacklers have not filed for bankruptcy … yet they seek what essentially amounts to a discharge.

Purdue, 144 S. Ct. 2071, 2081.

The permissible "contents of a plan" are found in § 1123. As this Court held in *Purdue*, this section deals primarily with the debtor and with "property of the estate." Section 1123 (b)(6) permits a plan to contain "any other appropriate provision not inconsistent with the applicable provisions of this title." *Purdue* held that this section "cannot be fairly read to endow a bankruptcy court with the 'radically different' power to discharge the debts of a nondebtor without the consent of affected nondebtor claimants." 144 S. Ct. 2071. "The plan proponents and the dissent's reading of § 1123(b)(6) would defy these rules by effectively affording to a nondebtor a discharge usually reserved for the debtor alone." 144 S. Ct. at 2085.

Nothing in this Court's ruling in *Purdue* suggested that a plan provision that contained an impermissible release would suddenly be valid if a sale was part of the plan. Indeed, the legal flaw is the same. A key reason that the nondebtor releases are invalid is that the claims being released and extinguished are not property of the estate, but rather are claims that "belong to their victims." 144 S. Ct. 2084. "Rather than seek to resolve claims that substantively belong to Purdue, it seeks to extinguish claims against the Sacklers that belong to the victims. And precisely nothing in § 1123(b) suggests those claims can be bargained away without the consent of those affected, as if the claims were somehow Purdue's own property." *Id*. at 2084. Likewise, § 1123(b)(3) permits the settlement

of a claim "belonging to the debtor or to the estate." 144 S. Ct. at 2083, but not claims belonging to non-debtors.

The same legal defect inheres in the BSA Plan. The Third Circuit found that BSA had effectively used the claims of the victims as part of the exchanged consideration in the insurance buy-back. ("[T]he releases form a portion of the consideration for the Insurance buy-back.") 137 F.4th at 154. This use of non-estate property for the sale takes the transaction well outside of § 363(b), as well as § 363(m).

While the Court in *Purdue* identified a limited set of issues that its decision did not address, none pertains here.[26]

First, the *Purdue* court did not address what qualifies as a consensual plan. However, BSA acknowledged that its plan contained nonconsensual third-party releases. ("BSA has an interest in this Court's decision because BSA's chapter 11 plan, *like that of respondent Purdue Pharma, L.P.* contains nonconsensual third-party releases."[27]

Second, BSA argued to this Court that the BSA plan "effectively guarantees full payment of allowed

26. "Nor we have occasion today to express a view on what qualifies as a consensual plan or pass upon a plan that provides for the full satisfaction of claims against a third-party nondebtor. Additionally … we do not address whether our reading of the bankruptcy code would justify unwinding reorganizations plans that have already become effective and been substantially consummated." 144 S. Ct at 2088.

27. Brief for the Boy Scouts of America as Amici Curiae in Support of Respondent, U.S. Sup. Ct. No. 23-124, p. 4 (emphasis added).

abuse claims."[28] Indeed, the issue of full pay was one of its dominant reasons for arguing that its plan was different from the *Purdue* plan. "BSA's plan fully and fairly compensates creditors,"[29] "the BSA Plan provides a mechanism for payment in full of all allowed claims,"[30] "it may be relevant that the plan provides for full payment of creditors' claims, as the BSA Plan does,"[31] "there is no risk of survivor-creditors receiving less than full compensation for their released claims,"[32] and "[t]he BSA Plan efficiently guarantees full payment of allowed abuse claims."[33]

However, the Trustee administering the Trust warned claimants on her website that "You may not receive payment of the full value that the Trustee assigns to our Abuse [claim]." "The Trust does not know how much Claimants will receive on allowed claims, but it *almost certainly will not be 100%* of the allowed amount."[34] Regardless, the Third Circuit declined to base its decision on any notion of full pay or full satisfaction.[35]

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28. *Id*. at 20.

29. *Id*. at 9.

30. *Id*. at 14.

31. *Id.* at 16.

32. *Id*.

33. *Id*. at 20.

34. *See* Dumas & Vaughn Claimants Response to Appellee's Motion to Dismiss, Case No. 23-1666, Third Circuit, ECF 153, p.5 (emphasis added) (quoting from the Trustee's website, https://tinyurl.com/3zvwsryb.)

35. "As we noted above, the Supreme Court in *Purdue* admonished that it was not deciding whether nonconsensual

The third major argument advanced by BSA below for distinguishing its plan from the *Purdue* plan, was that the BSA plan had become "effective" and "consummated." BSA made this consummation argument as part of its argument on the application of equitable mootness.[36] But the Third Circuit disavowed that its decision relied on any non-statutory theory of mootness, such as "equitable mootness."[37] Instead, the Third Circuit relied entirely on a theory of *statutory mootness*, despite the absence of any Code provision that can be fairly said to govern. Indeed, members of the Third Circuit have consistently questioned the validity of the judge-made equitable mootness theory.[38]

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third-party releases are permissible in plans that (1) fully satisfy third-party claims, or (2) are "effective and ... substantially consummated." *Purdue*, 603 U.S. at 226, 144 S. Ct. 2071. We need not decide when, in light of *Purdue*, nonconsensual third-party releases remain permissible in either scenario *because this case presents neither*." *Boy Scouts,* 137 F.4th 126, 169, n.29 (emphasis added).

36. Appellee's Motion to Dismiss Appeals as Moot, case 23-1664, ECF 124-1, pp. 9-14.

37. "To be clear, our omission of this analysis [of equitable mootness] for the claims of the Lujan and D&V Claimants should not be read, by negative implication or otherwise, to suggest that those claims are equitably moot." 137 F.4th 163-64, n. 24. The court noted the issue over the absence of justifiable reliance urged by Law Professor Amici "because the Settling Insurers placed nearly $1.5 billion of their total contribution to the Settlement Trust into escrow, thereby limiting their exposure to an adverse judgment and retaining an interest in the escrowed funds in case the Confirmation Order is reversed." *Id.*

38. *In re One2One Commc'ns., LLC*, 805 F.3d 428, 438 (3d Cir. 2015) (Krause, J., concurring): *In re Cont'l Airlines*, 91 F.3d 553, 572 (3d Cir. 1996) (Alito, J., dissenting).

Further, it is well-recognized that "substantial consummation" does not justify disregarding the federal standard of mootness (i.e., *Chafin v. Chafin*, 568 U.S. 165 (2013)). "Even if substantial consummation has occurred, a court must still consider all the circumstances of the case to decide whether it can grant effective relief." *In re Club Assocs.*, 956 F.2d at 1069." *In re Condec, Inc.*, 225 B.R. 800, 805 (M.D. Fla. 1998).

A key rationale for not using substantial consummation as a mootness test is that substantial consummation has been given various and contradictory meanings among the circuit courts, and is readily achieved through even minimal disbursements at the will of a debtor and sometimes within days or hours after an order of confirmation is entered.[39] Thus, the standard for substantial consummation has little or nothing to do with the actual legal concerns that underlie the issue of mootness in the context of confirmation orders: the availability of *any* effective relief. Congress, instead, limited the application of substantial consummation to the power to modify a plan. *See* 11 U.S.C. § 1127(b), but has never identified consummation as a test for statutory mootness.

There is no valid basis to hold that the plan in *BSA* falls outside of this Court's ruling in *Purdue*. Justice

39. Section 1101(2) defines substantial consummation as meaning the transfer of all or substantially all of the property proposed to be transferred, assumption by the debtor of management, and commencement of distribution. Some cases hold that a plan is substantially consummated when the debtor assumes management and cash distributions *begin. See, e.g.*, *In re Antiquities of Nevada, Inc.*, 173 B.R. 926 (B.A.P. 9th Cir 1994).

Kavanaugh said the prohibition against such releases was "categorical."[40] The Bankruptcy Court in *In re Smallwood, Inc.,* 665 B.R. 704, 709 (Bankr. D. Del. 2024) stated that non-consensual releases are now "per se unlawful." And, as noted, the Third Circuit stated that "[i]f proposed today, the Plan would be unconfirmable in the wake of *Purdue,* and the Lujan and D&V Claimants could not have their claims released without their consent." 137 F.4th at 170.

II. This Court should grant the petition because the Third Circuit decision impermissibly contravenes this Court's ruling in *Czyzewski v. Jevic*, which prohibits the use of a sale or settlement to bypass the requirements for plan confirmation.

The decision by the Third Circuit also contravenes this Court's ruling in *Jevic. Jevic* was this Court's recognition that the Bankruptcy Code's confirmation standards are foundational protections, and cannot be bypassed through structuring devices such as sales or settlements.

Yet bypassing the Code's confirmation standards was exactly what the BSA Plan tried to achieve. The Third Circuit apparently accepted the argument made by the Settling Insurers that the sale was "independent" of the requirements for a valid plan set forth in *Purdue.* "[S]ection 363(m) operates independently of the substantive issues

40. "But the Court now throws out the plan—and in doing so, categorically prohibits non-debtor releases." 144 S. Ct. 2071. *See also id.*, stating that "non-debtor releases [are] categorically prohibited."

addressed in *Purdue* regarding the permissible contents of a Chapter 11 Plan."[41]

This independence theory is nearly identical to the argument rejected by this Court in *Czyzewski v. Jevic Holding,* and the Fifth Circuit in *Pension Benefit Guaranty Corp. v. Braniff Airways*—each of which recognizes that the use of a sales transaction or a settlement cannot be used to "swallow up Chapter 11's safeguards."[42] That is, the sales and settlements are not independent of the confirmation standards, but subject to them.

Jevic involved a settlement distribution scheme that "failed to follow ordinary priority rules." *Jevic,* 580 U.S. at 461. The proposed payout, however, was to occur pursuant to a structured dismissal "rather than an approval of a chapter 11 plan." That is, the bankruptcy court treated the proposed distribution as being "independent" of the standards required for plan confirmation. The district court, which affirmed the bankruptcy court, held that the violation of the ordinary priority rules "was not a bar to the approval of the settlement as [the settlement] is not a reorganization plan." 580 U.S. at 461, citing *In re Jevic Holding Corp.,* 2014 WL 268613, *3 (D. Del. Jan. 24, 2014).

This Court reversed the Third Circuit for the same reasons that pertain here. "Rather, the distributions at issue here more closely resembles proposed transactions

41. Appellees Settling Insurers' Supplemental Brief, *In re Boy Scouts of America*, No. 23-1664 (3d Cir. Aug. 7, 2024) ECF 198, p. 14.

42. *Boy Scouts*, 137 F.4th at 155.

that lower courts have refused to allow on the ground that they circumvent the Code's procedural safeguards. *See, e.g.*, *In re Braniff Airlines, Inc.*, 700 F.2d 395, 940 (C.A. 5 1983) (prohibiting an attempt to "short circuit the requirements of Chapter 11 for confirmation of a reorganization plan by establishing the terms of the plan sub rosa in connection with a sale of assets")." *Jevic*, 580 U.S. at 468-69.[43]

The majority below expressly endorsed the *sub rosa* prohibition, 137 F.4th at 156, but said the doctrine did not apply because the debtor met this issue "head on." "Here, rather than attempting to skirt those protections, the Debtors faced them head-on and subjected the Insurance Policy Buyback to the Code's stringent confirmation requirements." 137 F.4th 126, 158. But the Boy Scouts Plan did not meet the *sub rosa* issue head on, and instead adopted a theory directly contrary to it—namely that § 363 operates independently of the plan confirmation requirements.

This "independence notion" contravenes this Court's ruling in *Jevic* and is sufficient grounds for granting the petition for writ of certiorari.

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43. This Court also cited *Lionel* with approval, "[A] Bankruptcy Court's approval of an asset sale [under § 363] does not 'gran[t] the bankruptcy judge *carte blanche*' or 'swallo[w] up Chapter 11's safeguards.'" *Jevic*, 580 U.S. at 469.

III. The Decision Below is Wrong.

A. The appeal is not moot and the Third Circuit erred by engrafting a mootness provision onto the Code's confirmation standards.

The Third Circuit's reliance on § 363(b) as the basis for dismissal of the appeal as moot was a statutory error, even aside from *Purdue*. Judge Rendell's concurring opinion stated that the "first fundamental flaw" in the majority's decision was its reliance on § 363(m), noting also that the appeal was "from the confirmation order:"

> The first fundamental flaw in the majority's resort to § 363(m) lies in the statute's clear indication that it does not apply to sales in reorganization plans as well as the common-sense observation that the non-consensual third-party releases were not accomplished by way of the purported § 363 authorization, but by way of plan confirmation. So this is an appeal from the confirmation order, not the sale. Moreover, the majority's opinion endorses an end run around Chapter 11's requirements, including the Supreme Court's holding in *Harrington v. Purdue Pharma L.P.*, that the Bankruptcy Code does not permit non-consensual third-party releases in a chapter 11 plan. 603 U.S. 204, 227, 144 S. Ct. 2071, 219 L.Ed.2d 721 (2024).

137 F.4th 126, 171.

Sales within a plan are governed by § 363(l) and not § 363(b) and thus, § 363(m), by its express terms does not apply.

> First, § 363 itself distinguishes between sales under § 363(b) and (c) and sales under a plan. Subsection § 363(l) applies to the "use sale, or lease of property" that occurs "under subsection (b) or (c) of [§ 363] *or a plan under chapter 11 ... of this title.*" 11 U.S.C. § 363(l) (emphasis added). By contrast, § 363(m) applies only to a sale or lease authorized "under subsection (b) or (c) of [§ 363]." 11 U.S.C.

137 F.4th 126, 171-72 (Rendell, J., concurring).

Section 363(l) contains two independent clauses joined by an "or" and a comma, with the comma signifying that each clause is independent.[44] Where a sentence contains two independent clauses joined by an "or" and a comma, each clause stands on its own and expresses a different but related thought.[45] "It is generally understood that limitations or qualifications in one independent clause do not apply to other independent clauses (noting that independent clauses have coordinate value and must be read separately)." *In re Owsley*, 384 B.R. 739, 748 (Bankr. N.D. Tex. 2008). These two distinct independent options under §363(l) dictate that a sale pursuant to chapter 11 plan is not a sale under §§ 363(b) or (c) and thus falls outside of the scope of §363(m).

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44. William Strunk, Jr. and E.B. White, The Elements of Style, 4th ed. p. 5. ("Place a comma before a conjunction introducing an independent clause.")

45. *Id.* at 5. *See also* The Chicago Manual of Style, 18th ed., ¶ 5.232, p. 309 (2024). ("An *independent clause* can stand alone as a sentence.") The "or" "joins words or groups of words of equal grammatical rank." *Id.*, at ¶ 5.204, p. 300.

Sales within a plan are governed by the provisions in subchapter 11, entitled "the Plan," including §1123(a)(5)(D) and § 1123(b)(6)—which contain no mootness provision. Equally important, § 1123 governs the permissible "contents of a plan." Section 1123(b)(3)(a) provides that a plan may provide for the settlement of any claim "belonging to the estate." But as already noted, the claims held by the Lujan claimants are not property of the estate.

Section 363 cannot be interpreted as an alternative path to obtaining a release in bankruptcy. A release functions as a discharge and has adjudicative and substantive impact. "[N]on-consensual releases … discharge the obligations of a nondebtor in precisely the same manner that confirmation of the plan discharges the debts of the debtor." Ralph Brubaker, *An Incipient Backlash Against Nondebtor Releases*? 42 No. 2 Bankr. Law Ltr. 2022. A release "essentially amounts to a discharge." *Purdue*, 144 S. Ct. at 2074.

As the concurrence recognized, "several courts have suggested that sales accomplished under plans do not fall within § 363(m)'s ambit." 137 F.4th at 172. The Eleventh Circuit stated that "[§363(m)] applies only to the sale of the debtor's property by the trustee pursuant to §363(b) or (c) […] not […] where the debtor's assets have been sold […] pursuant to a plan...[46]

The Fifth Circuit highlighted the "definite implication that [Section 363(b), (c) and (m)] concern the trustee's authority during the administration of the estate and

46. *Miami Ctr. Ltd. P'ship v. Bank of New York*, 838 F.2d 1547, 1553 (11th Cir. 1988).

not at the final disposition of the property of the estate pursuant to a plan of reorganization."[47]

In re Ditech Holding Corp., 606 B.R. 544, 593 (Bankr. S.D.N.Y. 2019) held that § 363 provisions are inapplicable to plans confirmed under Section 1129. The bankruptcy court held that because the sale was pursuant to a plan, "the sale is not under section 363, [and thus] section 363(f) is inapplicable." *Id.* at 592. *See also In re Bardos*, No. BAP CC-13-1316, 2014 WL 3703923, at *9 (Bankr. App. 9th Cir. July 25, 2014) (noting that "a sale of property made pursuant to a confirmed chapter 11 plan[… is] not subject to § 363, but [is] authorized by … § 1123(a)(5)[.]").

B. The appeal is not moot because effective relief is available.

A case "becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Chafin v. Chafin*, 568 U.S. 165, 172. *See also MOAC Mall Holdings, LLC. v. Transform Holdco, LLC.,* 143 S. Ct. 927, 929 (2023).

The Court made no determination on whether effective relief was available, but only whether the challenge affected the validity of the sale. 11 U.S.C. § 364(m). *Purdue,* however held that nonconsensual releases are *not authorized* in a Chapter 11 plan, and nothing in *Purdue* suggested that an identical unauthorized release would be permitted in a sale which is embedded within a plan. Further, as noted above, the appeal in this case was to the Confirmation Order. Indeed, there was no sale order.

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47. *In re Texas Extrusion Corp.*, 844 F.2d 1142, 1165 (5th Cir. 1988).

Given the ruling in *Purdue*, the Third Circuit should have considered excising the release provision. The Fifth Circuit recently held that, if unlawful provisions in a plan could not be excised then this bar "would effectively abolish appellate review of even clearly unlawful provisions in bankruptcy plans." *In re Serta Simmons Bedding, LLC.*, 125 F.4th 555, 588 (5th Cir. 2024). Continuing, "if we cannot excise specific provisions … then the appellate courts are effectively stripped of their jurisdiction, despite Congress's clear intent to the contrary." *Id.*

CONCLUSION

Accordingly, for the reasons set forth above, and in the Petition, we respectfully submit this Court should grant the Petition.

Respectfully submitted,

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