DISCHARGING EQUITY: *HARRINGTON V. PURDUE PHARMA L.P.* AND THE VALIDITY OF NONCONSENSUAL THIRD-PARTY RELEASES

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INTRODUCTION

Harrington v. Purdue Pharma L.P. presents an opportunity for the Court to determine whether the Bankruptcy Code allows for a court sitting in bankruptcy to impose nonconsensual third-party releases on creditors.[1] The Court will determine whether the Second Circuit erred in deciding that the Bankruptcy Code authorizes the employment of a third-party release provision in Purdue Pharma L.P.'s plan of reorganization.[2] Specifically, the Court will decide whether the release of members of and entities associated with the Sackler family from liability for opioid-related claims is authorized. Third-party releases are provisions in a Chapter 11 plan of reorganization which discharge creditors' claims against nondebtors. The use of such releases is unusual, generally limited to circumstances where a nondebtor associated with the debtor faces mass tort liability. But employing such releases in exchange for nondebtor contributions to the bankruptcy estate's assets can be the keystone of a successful reorganization effort. Nothing in the Bankruptcy Code expressly authorizes third-party releases. Rather, they are exercises of a bankruptcy court's equitable power. Therefore, the Court must determine whether a bankruptcy

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1. In re Purdue Pharma L.P., 69 F.4th 45 (2d Cir. 2023), *cert. granted sub nom.* Harrington v. Purdue Pharma L.P., No. 23-124 (U.S. argued Dec. 4, 2023).

2. *See generally* In re Purdue Pharma L.P. (*Purdue III*), 69 F.4th 45 (2d Cir. 2023) (holding that the bankruptcy court had authority under the Bankruptcy Code to impose nonconsensual third-party releases in a plan of reorganization).

court's equitable authority encompasses the discharge of creditors' claims against nondebtors to ascertain whether the Bankruptcy Code forecloses their use.

The Court should affirm the Second Circuit's decision permitting the utilization of third-party releases in Purdue's plan of reorganization, because their use conforms to a stringent, multi-factor analysis. Nothing in the Bankruptcy Code forecloses the use of nonconsensual third-party releases. Rather, their use falls within the bounds of 11 U.S.C. § 105(a) and 11 U.S.C. § 1123(b)(6), which allow a bankruptcy court to include in a plan of reorganization provisions that are "necessary" and "appropriate." This accords with historical exercises of equity. Allowing the use of nonconsensual third-party releases, subject to a double layer of review by a bankruptcy court and a district court, will ensure not only that their use is necessary and appropriate, but also that they are not abused. As Congress has codified more stringent procedures for the use of such releases in asbestos-related bankruptcies, Congress will have the final say on whether the Bankruptcy Code allows for a plan of reorganization to employ such a powerful tool.

I. FACTS

In 1995, Purdue introduced OxyContin, a controlled-release semisynthetic opioid analgesic.[3] Between 1996 and 2001, Purdue aggressively marketed OxyContin to patients and doctors while downplaying concerns regarding its addictiveness.[4] Even after the FDA required Purdue to remove from OxyContin's label the assertion that the substance had a low risk of addiction,[5] Purdue's profits were driven almost exclusively by its aggressive marketing of the drug.[6] The proliferation and over-prescription of OxyContin substantially contributed to the opioid epidemic—an explosion of opioid addiction in the United States over the past two decades.[7] And Purdue recognized the gravity of its conduct. Indeed, in a 2007 plea agreement with the United States, Purdue admitted that it had falsely marketed OxyContin as non-addictive and that it had submitted false claims for reimbursement of medically unnecessary opioid prescriptions.[8] In 2020,

3. *Id.* at 58.
4. *Id.*
5. *Id.*
6. In re Purdue Pharma L.P. (*Purdue II*), 635 B.R. 26, 34 (S.D.N.Y. 2021).
7. *Id.*
8. *Id.*

Purdue also admitted to its substantial wrongful conduct.[9]

The contribution of Purdue and its corporate affiliates (collectively, "Purdue") to the opioid epidemic gave rise to thousands of lawsuits brought by persons who had become addicted to OxyContin and by the estates of addicts who had overdosed.[10] Purdue faced a "veritable tsunami of litigation,"[11] including: federal, state, and local Medicare reimbursement claims;[12] false marketing claims brought under state consumer protection laws;[13] federal criminal and civil charges;[14] and Canadian class action claims.[15] The Sackler family had owned and operated Purdue for decades,[16] and it anticipated its potential liability in connection with OxyContin-related litigation.[17] In 2004, the Sackler-controlled company agreed to indemnify its directors and officers against claims made in connection with their service to the company.[18] And between 2008 and 2016, Purdue distributed approximately $11 billion to Sackler family trusts and holding companies.[19]

In September 2019, Purdue petitioned for bankruptcy.[20] By the time the bankruptcy court enjoined all litigation concerning OxyContin, Purdue and the Sackler family faced claims estimated to total more than $40 trillion.[21] Although neither members of the Sackler family nor any of the Sackler entities petitioned for bankruptcy, the bankruptcy court preliminarily enjoined actions against them.[22] The claims filed against Purdue in bankruptcy amounted to "roughly 618,000" and thus "involve[ed] likely the largest creditor body ever."[23]

9. *See id.* at 35 (discussing Purdue's plea agreement in the District Court for the District of New Jersey).

10. *Id.*at 34.

11. *Id.* at 35. *See also id.* at 44–55 (detailing the waves of litigation targeting Purdue and its affiliates).

12. *Id.* at 34.

13. *Id.* at 34–35.

14. In re Purdue Pharma L.P. (*Purdue III*), 69 F.4th 45, 59 (2d Cir. 2023).

15. *Purdue II*, 635 B.R. at 54.

16. *Purdue III*, 69 F.4th at 56, 58. Members of the Sackler family held director, executive, and officer positions throughout Purdue, particularly during the past three decades amidst the rise of the opioid epidemic. *Id.* at 58.

17. *See Purdue II*, 635 B.R. at 55–58 (describing how members of the Sackler family recognized Purdue's liabilities and took action to insulate the family against creditors).

18. *Purdue III*, 69 F.4th at 58.

19. *Id.* at 59.

20. *Id.* at 60.

21. *Id.*

22. *Purdue II*, 635 B.R. at 59–60. Purdue argued that enjoining all such litigation was necessary to facilitate a global settlement in the single forum of the bankruptcy court. *Id.* at 60.

23. In re Purdue Pharma L.P. (*Purdue I*), 633 B.R. 53, 58 (Bankr. S.D.N.Y. 2021).

As is typical in Chapter 11 bankruptcy proceedings, Purdue entered mediation alongside the Sacklers, Purdue's many creditors, and a variety of other groups.[24] After three phases of mediation, Purdue filed the first version of its plan of reorganization.[25] A supermajority of the votes cast by the members of each class of creditors approved this plan.[26] And, following multiple rounds of amendments, the Bankruptcy Court ruled that it would confirm the proposed plan.[27] Under the plan, most of Purdue's assets would be channeled toward opioid abatement efforts, compensation of personal injury claimants, and distributions to governmental entities.[28] Purdue would cease to exist, and a new pharmaceutical company would continue temporarily to manufacture medication and medical therapies—including opioid overdose reversal and addiction treatment medications delivered at little to no cost.[29] Most claims against Purdue and the Sacklers would be channeled to creditor trusts, to which the Sacklers would contribute billions of dollars.[30]

Most controversially, the plan set out terms whereby a thousand individuals and entities related to the Sackler family—who had not petitioned for bankruptcy relief—would be released and discharged from third-party claims related to Purdue, where Purdue's conduct was the legal cause or a legally relevant factor to such claims.[31] These third-party releases were nonconsensual—"[a]ll present and potential claims connected with OxyContin and other opioids would be covered by the [third-party releases]."[32] The U.S. Trustee and various other parties had objected to the plan, arguing, *inter alia*: the third-party releases violated the claimants' rights to due process; such releases were not permitted under the Bankruptcy Code; and the Bankruptcy Court lacked

24. *Purdue III*, 69 F.4th at 60. Parties that participated in mediation included unsecured creditors, governmental entities, states, municipal entities, Native American tribes, children born with neonatal abstinence syndrome, hospitals, public school districts, and the National Association for the Advancement of Colored People. *Id.* at 60 n.6; *Purdue II*, 635 B.R. at 60–61.

25. *See Purdue II*, 635 B.R. at 62–65 (describing the complex negotiation that resulted in the first version of the reorganization plan).

26. *Id.* at 35.

27. *See id.* at 65–66 (clarifying that the bankruptcy court would confirm the proposed plan provided that certain changes were made, including the modification of the shareholder release provision).

28. *Id.* at 66.

29. *Id.* at 66–67.

30. *Id.* at 67–68.

31. *Id.* at 67.

32. *Id.*

authority to approve the releases.[33] But the Bankruptcy Court confirmed the plan over these objections.[34]

II. PROCEDURAL BACKGROUND

The U.S. Trustee, eight states, the District of Columbia, certain Canadian municipalities and First Nations groups, and five pro se individuals appealed the order of the Bankruptcy Court confirming Purdue's plan of reorganization.[35] Before the District Court for the Southern District of New York, these appellants argued that the Bankruptcy Court did not have statutory authority to approve the nonconsensual release of third-party claims against nondebtors in connection with confirmation of a Chapter 11 plan of reorganization.[36] In its decision vacating the confirmation order,[37] the District Court noted that the Bankruptcy Court lacked constitutional authority to issue a final order approving such releases, absent the parties' consent, because they are "non-core" proceedings "related to" a Title 11 case.[38]

In turn, Purdue, members of the Sackler family, and various representatives of Purdue's creditors appealed the order of the District Court to the Court of Appeals for the Second Circuit.[39] While the appeal was pending, the eight states and the District of Columbia settled with Purdue and the Sacklers in exchange for the Sacklers contributing more assets to the plan of reorganization.[40] Before the Second Circuit, these appellants—initially appellees before the District Court—challenged the District Court's rejection of the plan of

33. *Id.* at 68. The objectors included eight states, the District of Columbia, the City of Seattle, four Canadian municipalities, two Canadian First Nations, and three pro se claimants. The U.S. Attorney's Office for the Southern District of New York also filed a statement of interest supporting these objectors. *Id.*

34. *See generally* In re Purdue Pharma L.P. (*Purdue I*), 633 B.R. 53 (Bankr. S.D.N.Y. 2021) (confirming Purdue's plan of reorganization notwithstanding the objectors' arguments).

35. *Purdue II*, 635 B.R. at 77.

36. *Id.* at 89. The appellants also argued that the Bankruptcy Court did not have subject matter jurisdiction to impose a release of nondebtor claims and that the Bankruptcy Court failed to provide equal treatment between the Canadian appellants and their domestic unsecured creditor counterparts. *Id.* at 78.

37. *Id.* at 11.

38. *Id.* at 79–82. Under 28 U.S.C. § 157(a), bankruptcy proceedings can "arise under" Title 11, "arise in" a Title 11 case, and be "related to" a Title 11 case. Proceedings "related to" a Title 11 case are considered "non-core." *Id.* at 80. A bankruptcy court lacks constitutional authority to enter a final judgment disposing of "non-core" proceedings. Stern v. Marshall, 564 U.S. 462, 484 (2011).

39. In re Purdue Pharma L.P. (*Purdue III*), 69 F.4th 45, 67 (2d Cir. 2023).

40. *Id.* The states and the District of Columbia agreed to withdraw their opposition to the plan of reorganization, including opposition to the third-party releases. *Id.* at 68.

reorganization.[41] The Second Circuit held, first, that under Second Circuit precedent, a bankruptcy court *could* impose nonconsensual third-party releases under two sections of the Bankruptcy Code—11 U.S.C § 105(a) and 11 U.S.C. § 1123(b)(6).[42] The Second Circuit then crafted a seven-factor test to determine whether a bankruptcy court *should* impose such releases, validating the Bankruptcy Court's approval of the third-party releases.[43] The Second Circuit thus reversed the District Court's order, affirmed the Bankruptcy Court's approval of the plan of reorganization, and remanded the case to the District Court for further proceedings.[44]

Appellee in the Second Circuit, now Petitioner, U.S. Trustee William K. Harrington, appealed to the Supreme Court.[45] Respondents now include both appellees and appellants in the Second Circuit—Purdue, the Sacklers, the Canadian municipalities and First Nations groups, the eight states and the District of Columbia, and individual claimants.[46]

III. LEGAL BACKGROUND

Under the modern Bankruptcy Code, bankruptcy courts have broad equitable power to take actions appropriate or necessary in aid of exercising their jurisdiction over a debtor's estate. Congress codified this principle in § 105 of the Code, which provides that a bankruptcy court "may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code]."[47] Commenting on this provision, the Supreme Court noted: "Th[is] statutory directive[] [is] consistent with the traditional understanding

41. *Id.* at 57.
42. *Id.* at 77.
43. *Id.* at 78–82. The seven factors are: (1) the identity of interests between debtors and released parties; (2) factual and legal overlap between claims against debtors and settled third-party claims; (3) the essentialness of the releases to the plan of reorganization; (4) the scope of the releases; (5) the contributions of the released parties to the plan of reorganization; (6) the magnitude by which creditors approve of the plan of reorganization; and (7) fairness in the payment of claims under the plan of reorganization. *See id.* (describing and applying these seven factors to Purdue's plan of reorganization).
44. *Id.* at 85. The Second Circuit also addressed whether the imposition of third-party releases comported with due process, whether the releases violated the sovereign immunity of the Canadian creditors, and whether the plan of reorganization treated the Canadian creditors equitably. *Id.* at 82–85. Here, the Second Circuit also affirmed the District Court's denial of the Canadian creditors' equitably cross-appeal. *Id.* at 85.
45. Brief for Petitioner at 1–2, Harrington v. Purdue Pharma L.P., No. 23-124 (U.S. argued Dec. 4, 2023) [hereinafter Brief for Petitioner].
46. *Id.* at II–III.
47. 11 U.S.C. § 105(a).

that bankruptcy courts, as courts of equity, have broad authority to modify creditor-debtor relationships."[48]

But the bounds of such "broad authority" are not clear. The legislative history of the section describes it as being "similar in effect to the All Writs Statute,"[49] which suggests a broad power to bankruptcy courts to address situations—such as the nonconsensual release of third-parties—for which no specific process has been provided by statute.[50] And the Court, when addressing § 105(a), has set down two underlying principles. First, according to Supreme Court precedent, "whatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code."[51] The Court further explained in a later case that "[i]t is hornbook law that § 105(a) 'does not allow the bankruptcy court to override explicit mandates of other sections of the Bankruptcy Code.'"[52] Second, the Court specified that "a bankruptcy court order might be inappropriate if it conflicted with another law that should have been taken into consideration in the exercise of the court's discretion."[53] Many circuits have further explained that the section does not authorize untethered exercises of a judge's equitable discretion.[54] The section, then, broadly gives "the bankruptcy court the power to fill in gaps and further the

48. United States v. Energy Res. Co., 495 U.S. 545, 549 (1990).

49. H.R. REP. NO. 95-595, at 316 (1977). *See* 28 U.S.C. § 1651(a) ("The Supreme Court and all courts established by Act of Congress may issue all writs *necessary or appropriate* in aid of their respective jurisdictions and agreeable to the usages and principles of law." (emphasis added)).

50. *See* 2 RICHARD LEVIN & HENRY J. SOMMER, COLLIER ON BANKRUPTCY ¶ 105.LH[2] (16th ed. 2013) (discussing the relationship between the All Writs Statute and 11 U.S.C. § 105(a)).

51. Norwest Bank Worthington v. Ahlers, 485 U.S. 197, 206 (1988).

52. Law v. Siegel, 571 U.S. 415, 421 (2014) (quoting 2 COLLIER ON BANKRUPTCY ¶ 105.01[2]).

53. *Energy Res.*, 495 U.S. at 550 (commenting on a potential conflict between a bankruptcy court order and a section of the Internal Revenue Code).

54. *See, e.g.*, Guerin v. Weil, Gotshal & Manges, 205 F.2d 302, 304 (2d Cir. 1953) ("Although it has been broadly stated that a bankruptcy court is a court of equity, the exercise of its equitable powers must be strictly confined within the prescribed limits of the Bankruptcy Act." (citation omitted)); Off. Comm. of Equity Sec. Holders v. Mabey, 832 F.2d 299, 302 (4th Cir. 1987) ("[T]hese equitable powers are not a license for a court to disregard the clear language and meaning of the bankruptcy statutes and rules."); United States v. Sutton, 786 F.2d 1305, 1308 (5th Cir. 1986) ("[T]he powers granted by [§ 105] may be exercised only in a manner consistent with the provisions of the Bankruptcy Code. That statute does not authorize the bankruptcy courts to create substantive rights that are otherwise unavailable under applicable law, or constitute a roving commission to do equity." (citations omitted)); In re Robinson Bros. Drilling, 97 B.R. 77, 82 (W.D. Okla. 1988), *aff'd*, 892 F.2d 850 (10th Cir. 1989) ("The equitable powers of the bankruptcy court under Section 105 to avoid strict construction of the Code is limited.") (citations omitted).

statutory mandates of Congress in an efficient manner."[55]

Such unclear bounds on the bankruptcy courts' equitable powers give little guidance to parties and courts as to the validity of nondebtor release provisions included in a debtor's plan of reorganization. Nondebtor releases enjoin actions against individuals and entities associated in some manner with the debtor's estate, commonly under the rationale that such actions would impair the debtor's reorganization efforts.[56] This might occur, for instance, when the debtor has indemnified a third-party against whom creditors have causes of action. In such case, the debtor may request an injunction against creditors' actions so as to maximize its estate for equitable distribution to the creditors. Similarly, releases might be employed where the third-party nondebtor contributes extensively to the debtor's reorganization, securing a discharge of the creditors' claims against the nondebtor in exchange for satisfying the creditors' claims against the debtor. A plan of reorganization would consequently bind such claimants, permanently enjoining them from litigating against the third-party.[57]

The inclusion of nondebtor releases in a plan of reorganization is not always controversial. Releases can be consensual on the creditors' part, in which case they do not differ from any other contract or settlement.[58] Certainly, questions arise concerning what constitutes a manifestation of consent in this context. Voting to accept a plan might constitute consent to release provisions therein.[59] Payment in full to the

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55. 2 COLLIER ON BANKRUPTCY ¶ 105.01[2].

56. *See, e.g.*, In re Saint Vincents Cath. Med. Ctrs. of N.Y., 449 B.R. 209, 217 (S.D.N.Y. 2011) ("Under Section 105, [b]ankruptcy courts may extend the automatic stay to enjoin suits by third parties against third parties if they threaten to thwart or frustrate the debtor's reorganization efforts." (alteration in original) (citation and internal quotation marks omitted)); Wysko Inv. Co. v. Great Am. Bank, 131 B.R. 146, 148 (D. Ariz. 1991) ("The fact that the injunction was necessary for reorganization is an unusual circumstance which justifies use of the Bankruptcy Court's Sec. 105 powers to enjoin a letter of credit."); In re A.H. Robins Co., 828 F.2d 1023, 1025 (4th Cir. 1987) ("11 U.S.C. § 105 . . . give[s] the court general equity power to stay litigation that could interfere with the reorganization of the debtor.").

57. *See* 11 U.S.C. § 1141(a) ("[T]he provisions of a confirmed plan bind . . . any creditor . . . whether or not the claim or interest of such creditor . . . is impaired under the plan and whether or not such creditor . . . has accepted the plan.").

58. *See, e.g.*, In re Indianapolis Downs, LLC, 486 B.R. 286, 305 (Bankr. D. Del. 2013) ("Courts in this jurisdiction have consistently held that a plan may provide for a release of third party claims against a non-debtor upon consent of the party affected."); In re Wool Growers Cent. Storage Co., 371 B.R. 768, 775 (Bankr. N.D. Tex. 2007) ("Most courts allow consensual [third-party] releases to be included in a plan.") (citing Joshua M. Silverstein, *Hiding in Plain View: A Neglected Supreme Court Decision Resolves the Debate over Non-Debtor Releases in Chapter 11 Reorganizations*, 23 EMORY BANKR. DEV. J. 13, 25 (2006)).

59. *See* In re Specialty Equip. Cos., Inc., 3 F.3d 1043, 1047 (7th Cir. 1993) (finding that creditors who accepted a plan of reorganization released their claims against third-party

claimants might also be considered consent to the releases.[60] But a radically different issue arises in the context of nonconsensual releases.

Various courts have crafted doctrines to address the inclusion of nonconsensual third-party release provisions in a plan of reorganization. The Bankruptcy Code itself provides for a subset of asbestos-related bankruptcies whereby claims are channeled to a separate fund, with nonconsensual releases in the plan barring claims against the source of the funding.[61] But even without the establishment of separate funds, nonconsensual releases may be permitted. The Eleventh Circuit, for instance, approves of nonconsensual releases that a bankruptcy court finds fair and equitable, when the liable party has provided funds for the estate but would not have done so in absence of the releases.[62] That court also noted that releases "should be reserved for those unusual cases in which such an order is necessary for the success of the reorganization."[63] Other circuits echo the prerequisite that the circumstances be unusual or exceptional.[64] Given the range of interests and fact-specific inquiries necessary to determine whether a bankruptcy court ought to approve such releases, multiple circuits have applied a multi-factor test.[65]

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nondebtors in contrast to creditors who abstained or voted to reject the plan).

60. *See* In re Spansion, Inc., 426 B.R. 114, 144 (Bankr. D. Del. 2010) (finding that creditors in unimpaired classes were paid in full and thus received adequate consideration for a third-party release).

61. *See* 11 U.S.C. § 524(g) (establishing a procedure to manage asbestos-related claims through which claimants gain access to a fund in exchange for which the funders are released from suit by the claimants).

62. In re Seaside Eng'g & Surveying, Inc., 780 F.3d 1070, 1078 (11th Cir. 2015).

63. *Id.*

64. *See, e.g.*, Nat'l Heritage Found., Inc. v. Highbourne Found., 760 F.3d 344, 351 (4th Cir. 2014) ("[W]e agree with the district court that NHF has failed to demonstrate that it faces exceptional circumstances justifying the enforcement of the Release Provision in its Reorganization Plan."); In re Cont'l Airlines, 203 F.3d 203, 212 (3d Cir. 2000) (describing the law in other circuits allowing nonconsensual releases as limited to "the context of extraordinary cases").

65. *See* In re Dow Corning Corp., 280 F.3d 648, 658 (6th Cir. 2002) (crafting a seven-factor test); *In re Seaside Eng'g & Surveying*, 780 F.3d at 1079 (11th Cir. 2015) (applying the *Dow Corning* test); Behrmann v. Nat'l Heritage Found., 663 F.3d 704, 712 (4th Cir. 2011) (applying the *Dow Corning* test); In re Purdue Pharma L.P. (*Purdue III*), 69 F.4th 45, at 78–79 (2d Cir. 2023) (crafting a multi-factor test with reference to the *Dow Corning* test). *But see* In re Metromedia Fiber Network, Inc., 416 F.3d 136, 142 (2d Cir. 2005) ("[T]his is not a matter of factors and prongs.").

The *Dow Corning* test's seven factors are: (1) there is an identity of interests between debtor and third-party; (2) the nondebtor contributed substantially to the reorganization; (3) an injunction is essential to the reorganization efforts; (4) the impacted classes have overwhelmingly voted to accept the plan of reorganization; (5) the plan of reorganization provides a manner of paying all or substantially all of the affected classes; (6) the plan of reorganization provides an opportunity for claimants who choose not to settle to recover in full; and (7) the bankruptcy court made a

Some of the courts approving of nondebtor releases also point to § 1123(b)(6) of the Bankruptcy Code as the statutory provision which activates a bankruptcy court's equitable power to permit nonconsensual third-party releases in plans of reorganization.[66] Section 1123(b)(6) provides that a plan of reorganization may "include any other appropriate provision not inconsistent with the applicable provisions of [the Bankruptcy Code]."[67] This signals that a "bankruptcy court is . . . able to exercise [its] broad equitable powers within the plans of reorganization themselves."[68] Of course, the inclusion of such releases must be "appropriate." But absent any final determination by the Supreme Court, the circuits have had to craft their own multi-factor balancing tests to ascertain the appropriateness of nonconsensual third-party releases in any individual case.[69]

Nevertheless, disagreement concerning the validity of such releases abounds in the circuits, some of which have ruled that the imposition of nonconsensual third-party releases in a plan of reorganization violates the Bankruptcy Code.[70] Section 524(e) of the Bankruptcy Code, for instance, states 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."[71] Because this section does not provide for the release of third-parties from liability, courts have read this section as implicitly limiting the breadth of discharges permitted in a plan of reorganization.[72] Therefore, arguendo, § 524(e) displaces a bankruptcy court's equitable powers under § 105(a) and forecloses any

record of factual findings that support its conclusions. *In re Dow Corning Corp.*, 280 F.3d at 658.

66. *See, e.g.*, *Dow Corning*, 280 F.3d at 656–57 (holding that a nonconsensual third-party release is authorized by § 1123(b)(6)); In re Airadigm Commc'ns, Inc., 519 F.3d 640, 657 (7th Cir. 2008) (holding that the interaction between § 105(a) and § 1123(b)(6) provides a bankruptcy court with authority to release third-parties from liability).

67. 11 U.S.C. § 1123(b)(6).

68. *Airadigm Commc'ns*, 519 F.3d at 657.

69. *See* cases cited *supra* note 64 and accompanying text (discussing the circuits' multi-factor tests).

70. *See, e.g.*, In re W. Real Est. Fund, 922 F.2d 592, 601–02 (10th Cir. 1990) ("[T]he stay may not be extended post-confirmation in the form of a permanent injunction that effectively relieves the nondebtor from its own liability to the creditor."); Resorts Int'l, Inc. v. Lowenschuss (In re Lowenschuss), 67 F.3d 1394, 1402 (9th Cir. 1995) ("[W]e explicitly rejected the argument . . . that the general equitable powers bestowed upon the bankruptcy court by 11 U.S.C. § 105(a) permit the bankruptcy court to discharge the liabilities of non-debtors."); In re Pacific Lumber Co., 584 F.3d 229, 252 (5th Cir. 2009) (doubting the validity of nonconsensual third-party releases outside "global settlements of mass claims against the debtors and co-liable parties").

71. 11 U.S.C. § 524(e).

72. *See Lowenschuss*, 67 F.3d at 1401 ("This court has repeatedly held, without exception, that § 524(e) precludes bankruptcy courts from discharging the liabilities of non-debtors." (citations omitted)).

discharge of creditors' claims against nondebtor third-parties.

Moreover, debtors receive the benefit of discharge because they submit themselves to bankruptcy proceedings for satisfaction of their creditors' claims.[73] Arguably, "Congress did not intend to extend such benefits to third-party bystanders."[74] Even in situations where the liability of the nondebtors overlapped with that of the debtor to some extent, prior bankruptcy schemes did not permit the debtor's discharge to include a release of creditors' claims against nondebtors.[75] This could suggest that the scope of a bankruptcy court's equitable authority is limited to the relationship between the debtor and its creditors, preventing bankruptcy courts from modifying the relationship between creditors and third-party nondebtors.

IV. PETITIONER'S ARGUMENT

After Petitioner in its brief puts forwards the argument that the U.S. Trustee has standing to appeal, it primarily argues that the Bankruptcy Code neither implicitly nor explicitly permits a bankruptcy court to authorize nonconsensual third-party releases. Such releases exceed the historical bounds of a bankruptcy court's equitable powers. Further, the doctrine of constitutional avoidance and various public interest considerations militate towards foreclosing the use of nonconsensual third-party releases.

A. The U.S. Trustee Has Standing to Bring this Appeal

Petitioner first argues, in response to Respondents' opposition to an issuance of a stay in these proceedings, that the U.S. Trustee has standing to bring this appeal.[76] As an initial matter, Petitioner notes that the Canadian creditors intended to file a brief on the merits in support of Petitioner.[77] The Canadian creditors noted they seek the same relief as Petitioner—vacatur of the order confirming the plan of reorganization.[78] Because one litigant has Article III standing to seek

73. *See W. Real Est. Fund*, 922 F.2d at 600 ("Obviously, it is the debtor, who has invoked and submitted to the bankruptcy process, that is entitled to its protections.").

74. *Id.* (citations omitted).

75. *See* Underhill v. Royal, 769 F.2d 1426, 1432 (9th Cir. 1985) (discussing the Bankruptcy Act of 1898 in relation to third-party releases).

76. Brief for Petitioner, *supra* note 45, at 14–15.

77. *Id.* at 15 (citing Resp. of the Canadian Resp'ts in Supp. of the Gov't's Appl. for a Stay of the Mandate of the U.S. Ct. of Appeals for the Second Cir. at 4, Harrington v. Purdue Pharma L.P., No. 23-124 (Aug. 4, 2023)).

78. *Id.*

the relief that Petitioner pursues, the Court need not address whether Petitioner has standing in his own right.[79]

Notwithstanding the Canadian creditors, Petitioner argues that Congress invested the U.S. Trustee with standing to appeal orders confirming plans of reorganization. Congress declared in the Bankruptcy Code that the U.S. Trustee "may raise . . . and be heard on any issue in any [bankruptcy] case or proceeding."[80] When Congress sought to provide a party with a right to "raise" and "be heard" on issues in bankruptcy without the right to appeal, it has explicitly said so.[81] Congress has made no such explicit statement in the Bankruptcy Code concerning the U.S. Trustee. Although the U.S. Trustee does not have a direct interest harmed by such a confirmation order, it is a "watchdog guard[ing] the interests of those for whom it watches,"[82] which Congress made "responsible for protecting the public interest and ensuring that bankruptcy cases are conducted according to law."[83] All courts of appeals considering the question have followed this position.[84]

Moreover, Article III authorizes statutory grants that provide standing to agents of the United States to sue, even where the harm cognized is a desire to properly apply the law.[85] Such suits, as a matter of the history and tradition which informs the types of cases that Article III empowers federal courts to consider, pass constitutional muster.[86] Indeed, the United States as a sovereign has an interest in ensuring that its own laws are followed,[87] and a sovereign may designate agents to

79. *Id.* (citing Biden v. Nebraska, 143 S. Ct. 2355, 2365 (2023)).

80. 11 U.S.C. § 307.

81. *See* 11 U.S.C. § 1109(a) ("The Securities and Exchange Commission may raise and may appear and be heard on any issue in a case . . . but the Securities and Exchange Commission may not appeal from any judgment, order, or decree"). *See also* 11 U.S.C. § 1164 (providing that other entities may "raise" and "be heard" on issues but "may not appeal").

82. In re Revco D.S., Inc., 898 F.2d 498, 500 (6th Cir. 1990).

83. *Id.* (internal quotations omitted).

84. *See, e.g.*, In re Plaza de Diego Shopping Ctr., Inc., 911 F.2d 820, 824 (1st Cir. 1990) (holding that the U.S. Trustee has standing to appeal); In re Zarnel, 619 F.3d 156, 162 (2d Cir. 2010) (same); In re Columbia Gas Sys. Inc., 33 F.3d 294, 299 (3d Cir. 1994) (same); In re Clark, 927 F.2d 793, 796 (4th Cir. 1991) (same); In re Donovan Corp., 215 F.3d 929, 930 (9th Cir. 2000) (same).

85. Brief for Petitioner, *supra* note 45, at 17.

86. *See* TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2204 (2021) (explaining that a harm allowing standing to sue may be tied for purposes of constitutional analysis to harms traditionally allowed as the basis for standing).

87. *See* Hollingsworth v. Perry, 570 U.S. 693, 709–10 (2013) (recognizing that a sovereign "has a cognizable interest in the continued enforceability of its laws that is harmed by a judicial decision" (citation and internal quotation marks omitted)).

represent it in federal court.[88] Consequently, both the SEC and the FTC had standing to sue to vindicate their interests in ensuring that parties properly follow federal laws.[89] The U.S. Trustee parallels the SEC and FTC in ensuring parties follow federal bankruptcy laws when confirming a plan of reorganization.[90] Thus, the United States, acting through the U.S. Trustee, has standing to "pursue the public's interest"[91] by appealing an order confirming a plan of reorganization "without infringing Article III of the Constitution."[92]

B. The Bankruptcy Code Does Not Authorize Third-Party Releases

No express authority permits the imposition of nonconsensual third-party releases. Bankruptcy is a powerful tool which allows modulation "of the relations between a[] . . . debtor and his creditors, extend[ing] to his and their relief."[93] It gives a debtor a "fresh start" while ensuring maximal "equitable distribution" to creditors.[94] This contemplates a quid pro quo between debtor and creditors, whereby the debtor is obliged to apply its assets to satisfy creditors' claims in exchange for the discharge of certain debts.[95] The Bankruptcy Code expressly contemplates discharge of claims within this framework by allowing discharges relating to the "personal liability of the debtor."[96] Because the Bankruptcy Code does not expressly provide for the discharge of claims against nondebtors, allowing nonconsensual third-party releases would apply the bankruptcy framework to nondebtors without express statutory authorization.

Nor does the Bankruptcy Code implicitly authorize a bankruptcy court to equitably modify the relations between creditors and nondebtors. Certainly, the Bankruptcy Code explicitly preserves the

88. *Id.* at 710 (citing Poindexter v. Greenhow, 114 U.S. 270, 288 (1885)).

89. *See* SEC v. U.S. Realty & Improvement Co., 310 U.S. 434, 459–60 (1940) (holding that the SEC had standing to appeal to vindicate "the public interests which the Commission was designated to represent"); FTC v. Dean Foods Co., 384 U.S. 597, 605 (1966) (holding that the court of appeals had jurisdiction over the FTC's request of an injunction to protect its ability to block a merger if that merger violated federal law).

90. *See* 28 U.S.C. § 586(a)(3)(B) ("Each United States trustee . . . shall . . . monitor[] plans and disclosure statements filed in cases under [the Bankruptcy Code]").

91. Dir., Off. of Workers' Comp. Programs v. Newport News Shipbuilding & Dry Dock Co., 514 U.S. 122, 132 (1995).

92. *Id.* at 133.

93. Wright v. Union Cent. Life Ins. Co., 304 U.S. 502, 513–14 (1938) (quoting In re Reiman, 20 F. Cas. 490, 496 (S.D.N.Y. 1874)).

94. Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356, 363–64 (2006).

95. Brief for Petitioner, *supra* note 45, at 20.

96. 11 U.S.C. § 524(a).

bankruptcy courts' residual equitable authority. A bankruptcy court may take "any action or mak[e] any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process."[97] This has been read to allow a bankruptcy court to act on the equities when relying on some other express statutory authority.[98] Here, the Bankruptcy Court pointed to § 1123 as the basis of exercising its equitable authority to impose nonconsensual third-party releases.[99]

Locating such authority in 11 U.S.C. § 1123, the statutory section setting forth what a plan of reorganization may include, is unavailing. Section 1123(b) establishes what a plan *may* do, and § 1123(b)(6) states that a plan may "include any other appropriate provision not inconsistent with the applicable provisions of [Title 11]."[100] This is a catch-all section that should be read in relation to the first five paragraphs of § 1123(b), all of which address the relations between debtors and parties with rights against the debtor. Reading § 1123(b)(6) as implicitly permitting a bankruptcy court to equitably modulate relations between nondebtors via third-party releases would transgress applicable canons of statutory interpretation. For instance, where a "general authorization and a more limited, specific authorization exist side-by-side," the "well established canon" is that "the specific governs the general" which prevents "a specific provision" from being "swallowed by the general one."[101] Moreover, the canon of *ejusdem generis* mandates that, "when a statute sets out a series of specific items ending with a general term, that general term is confined to covering subjects comparable to the specifics it follows."[102] The paragraphs preceding § 1123(b)(6) relate to the relations between creditors and debtors, not to relations between debtors and nondebtors. As such, § 1123(b)(6) cannot be read in conjunction with § 105(a) as implicitly allowing a bankruptcy court to forcibly change relations between debtors and nondebtors.

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97. 11 U.S.C. § 105(a).

98. *See* 2 RICHARD LEVIN & HENRY J. SOMMER, COLLIER ON BANKRUPTCY ¶ 105.01[1] (16th ed. 2023) ("The statutory language thus suggests that an exercise of section 105 power be tied to another Bankruptcy Code section and not merely to a general bankruptcy concept or objective."). *See also id.* at 105.01[2] ("[I]t should be universally recognized that the power granted to the bankruptcy courts under section 105 is not boundless and should not be employed as a panacea for all ills confronted in the bankruptcy case.").

99. In re Purdue Pharma L.P. (*Purdue I*), 633 B.R. 53, 102–03 (Bankr. S.D.N.Y. 2021).

100. 11 U.S.C. § 1123(b)(6).

101. RadLAX Gateway Hotel, LLC v. Amalgamated Bank, 566 U.S. 639, 645 (2012).

102. Hall St. Assocs., L.L.C. v. Mattel, Inc., 552 U.S. 576, 586 (2008).

Further, third-party releases conflict with the structure and purpose of the Bankruptcy Code. Even if § 105(a) and § 1123(b)(6) implicitly permitted a bankruptcy court to impose such releases, such action is "unauthorized if it contravene[s] a specific provision of the Code."[103] And the Bankruptcy Code only authorizes discharge of prepetition obligations of *the debtor*.[104] Because third-party releases authorize the discharge of prepetition obligations of nondebtors, allowing such releases would conflict with the explicit provisions in the Bankruptcy Code providing for discharges of debts.

Moreover, nonconsensual third-party releases conflict with limitations in the Bankruptcy Code regarding a debtor's bankruptcy. If the Sacklers had been debtors in bankruptcy, they would not have been able to shield billions of dollars in assets from creditors,[105] yet the releases in Purdue's plan of reorganization release the Sacklers from their liabilities in exchange for only a portion of the Sacklers' wealth. And any discharges of the Sacklers' obligations arising from fraud, breach of fiduciary duty, or willful and malicious injury would be non-dischargeable in bankruptcy if the Sacklers were debtors.[106] These underlying restrictions on discharges in bankruptcy foreclose what the Sacklers received, effectively providing greater latitude here to the nondebtor Sacklers than to the debtor Purdue. If such a departure from the authorized powers of a bankruptcy court were allowed, it would require "more than simple statutory silence."[107]

Finally, the provisions expressly allowing for modification of relations between nondebtors demonstrate an inability of the bankruptcy court to rely on general equitable power to discharge nondebtors' obligations. Section 524(g) of the Bankruptcy Code allows a bankruptcy court to enjoin nondebtors' claims against other

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103. Law v. Siegel, 571 U.S. 415, 422 (2014).

104. *See, e.g.*, 11 U.S.C. § 727(a) ("The court shall grant the debtor a discharge" under certain conditions); 11 U.S.C. § 727(b) ("a discharge under subsection (a) of this section discharges the debtor from all debts"); 11 U.S.C. § 1141(d)(1)(A) (stating an order confirming a plan of reorganization "discharges the debtor from any debt"); 11 U.S.C. § 1123(b)(3)(A) (providing for "the settlement or adjustment of any claim or interest belonging to the debtor or to the estate").

105. *See* 11 U.S.C. § 1129(a)(7)(A) (providing that a plan is confirmable if each claimant "will receive or retain under the plan . . . property of a value . . . that is not less than the amount that such [claimant] would so receive or retain if the debtor were liquidated").

106. *See* 11 U.S.C. § 523(a)(2), (4), (6) (identifying the circumstances under which the title does not discharge an individual debtor from debt). *See* Archer v. Warner, 538 U.S. 314, 321 (2003) ("[The Code] ensure[s] that all debts arising out of fraud are excepted from discharge…." (internal quotation marks omitted)).

107. Czyzewski v. Jevic Holding Corp., 580 U.S. 451, 464 (2017) (citing Whitman v. Am. Truck Ass'ns., Inc., 531 U.S. 457, 468 (2001).

nondebtors specifically in the context of asbestos claims.[108] This section is not only very specific to the types of dischargeable claims and the relationship between the released nondebtors and the debtor, but it also imposes substantive and procedural requirements for the protection of affected claimants.[109] The releases in the Purdue plan of reorganization maintain none of these protections and are broader than what § 524(g) would allow.[110] And when Congress codified § 524(g), it specifically commented that the section should not be read as ratifying a separate authority to enjoin third-party actions.[111] If Congress explicitly granted the bankruptcy courts authority to release third-party claims in a *specific* scenario when accompanied by *specific* safeguards, then it is insensible to rule that the bankruptcy court has an equitable power to release third-party claims in *any* scenario, untethered from such safeguards.

C. Third-Party Releases Exceed the Equitable Authority of Bankruptcy Courts

Bankruptcy courts do retain equitable authority,[112] but third-party releases transgress the historical bounds of a court's equitable powers in bankruptcy. For one, injunctions in traditional equity practice did not control the rights of non-parties.[113] And a court of equity in England did not possess unbounded jurisdiction to supersede the law and free itself from all regard to former rules and precedents, as that would transcend the limited powers of a judge.[114] More recently, the Court, considering a permanent injunction of a state-law suit brought by nondebtors, explained that exercising power over an entity not in reorganization requires "an extension of [a court's] traditional powers" in bankruptcy.[115] The releases at issue with Purdue's reorganization would extend beyond these historical understandings of a court's

108. *See* 11 U.S.C. § 524(g)(4)(A)(ii) ("[A]n injunction may bar any action directed against a third party who is . . . alleged to be directly or indirectly liable for the conduct of, claims against, or demands on the debtor").

109. Brief for Petitioner, *supra* note 45, at 33–34.

110. *See id.* (noting the substantial contrast between Section 524(g) and the extinguishing of all Purdue-related civil claims in the Sackler release).

111. Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, sec. 111(b), 108 Stat. 4117.

112. A court's equitable authority in bankruptcy "incorporate[s] the traditional standards in equity practice." Taggart v. Lorenzen, 139 S. Ct. 1795, 1801 (2019).

113. *See* Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417, 421 (2017) (discussing the bounds of injunctions).

114. 1 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 19, at 19 (14th ed. 1918).

115. Callaway v. Benton, 336 U.S. 132, 148 (1949).

equitable powers in bankruptcy by enjoining nondebtors from pursuing claims against nondebtors. Even the Second Circuit's seven-factor test cannot ameliorate this concern because that test's amorphous requirements do not impose substantive guardrails on a bankruptcy court's exercise of its equitable powers. If bankruptcy courts were to maintain such extraordinary power, they cannot divine it from the interstices of the Bankruptcy Code; Congress must authorize it explicitly.

D. Constitutional Avoidance Requires the Court to Disallow Third-Party Releases

Permitting third-party releases in this case would impair constitutional protections of property and due process. To avoid the resolution of such difficult constitutional issues, the Court should hold that the Bankruptcy Code does not permit such releases.[116]

First, resolving whether bankruptcy courts may wield the power to issue nonconsensual third-party releases raises constitutional questions concerning the government's power over private property, which could be avoided by reading the Bankruptcy Code as not expressly permitting such actions. The releases extinguish creditors' causes of action against third-parties, and a "cause of action is a species of property."[117] In effect, then, a bankruptcy court approving of third-party releases would wield governmental power to impair nondebtors' property rights. But neither § 105(a) nor § 1123(b)(6) contain clear language allowing a bankruptcy court to effect such an impairment. Indeed, if Congress "wishes to significantly alter . . . the power of the Government over private property," it must "enact exceedingly clear language" to do so.[118]

Second, the releases impair due process safeguards by extinguishing claims against nondebtors without the affirmative consent of the claimants and without a chance for the claimants to opt out. In other contexts where individual claims are aggregated to facilitate the resolution of those claims, such as class action suits, "due process requires at a minimum that an absent [claimant] be provided with an opportunity to remove himself from the class."[119] No such opportunity

116. The Court will not "construe the [Bankruptcy Code] in a manner that could in turn call upon the Court to resolve difficult and sensitive" constitutional questions if a construction that avoids these questions is "fairly possible." United States v. Sec. Indus. Bank, 459 U.S. 70, 78, 82 (1982) (citations omitted).

117. Logan v. Zimmerman Brush Co., 455 U.S. 422, 428 (1982).

118. U.S. Forest Serv. v. Cowpasture River Pres. Ass'n, 140 S. Ct. 1837, 1849–50 (2020).

119. Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 812 (1985).

was afforded to Purdue's creditors. And mere notice of a bankruptcy court's hearing about confirming a plan which extinguishes claims does not resolve this due process concern, as objecting claimants are presented with a "binding *fait accompli*, with the only recourse a likely futile objection at the . . . hearing."[120] The asbestos-related provision of 11 U.S.C. § 524(g), which allows third-party releases, accounts for such concerns by providing clear congressional authorization for what otherwise appears to be an impairment of due process. But a substantial constitutional question remains as to the impairment of due process outside of the context of asbestos-related claimants. By interpreting the Bankruptcy Code as not allowing for such claims, the Court can avoid deciding this sensitive constitutional question.

E. The Public Interest Weighs Against Allowing Third-Party Releases

Finally, Petitioner argues that public interest concerns weigh against allowing third-party releases. Nonconsensual releases enable mass tortfeasors to obtain legal immunity from their victims' claims that would not be dischargeable if the tortfeasors subjected themselves to bankruptcy proceedings.[121] This not only deprives victims of their day in court, but also erodes public confidence in the bankruptcy system. Moreover, such releases are unfair in allowing tortfeasors to be released from all liabilities without subjecting the tortfeasors to the quid pro quo bankruptcy framework.[122] Debtors are supposed to make their assets available to satisfy creditors to the maximum extent possible. Yet nondebtors, like the Sacklers, can avoid this tradeoff via resort to third-party releases. Finally, such releases authorize courts to extinguish rights in private property that is not part of the bankruptcy estate.[123] This authorization extends to private property of individuals *and* of the States, Tribes, and the federal government.[124] A ruling that approves of third-party releases would endow bankruptcy courts with massive power over the property rights of private parties and of sovereigns without reliance on any express statutory authority.

120. Ortiz v. Fibreboard Corp., 527 U.S. 815, 849 n.27 (1999) (quoting Samuel Issacharoff, *Class Action Conflicts*, 30 U.C.D. L. REV. 805, 822 (1997)) (emphasis in original).
121. Brief for Petitioner, *supra* note 45, at 45.
122. *Id.*
123. *Id.* at 46.
124. *See, e.g.*, In re Voyager Digit. Holdings, Inc., 649 B.R. 111 (Bankr. S.D.N.Y. 2023) (confirming a reorganization plan exculpating nondebtors from future civil and criminal claims belonging to the United States).

V. RESPONDENT'S ARGUMENT[125]

Respondent in its brief denies that the U.S. Trustee has standing under Article III to bring this appeal whatsoever. Notwithstanding this objection, Respondent explains in detail how the Bankruptcy Code implicitly and explicitly provides bankruptcy courts with authority to approve nonconsensual third-party releases in plans of reorganization. Such power neither exceeds the bounds of a court of equity's authority nor conflicts with any portion of the Bankruptcy Code. No constitutional doctrine impedes the Court from deciding in this manner, and public interest considerations necessitate doing so.

A. The U.S. Trustee Lacks Standing to Bring this Appeal

Petitioner lacks standing to bring this appeal because he has no concrete harm arising out of Purdue's plan of reorganization. Generally, standing doctrine under Article III adheres to the principle: "[n]o concrete harm, no standing."[126] Petitioner lacks any such harm because the U.S. Trustee only acts in a "watchdog" role through which it can be heard on issues in a preexisting case before a bankruptcy court.[127] This is "an amicus-type role," as courts have held that language identical to that in § 307, such as that in § 1109, does not permit an appeal unless the appellant has a pecuniary interest in the outcome.[128] Petitioner lacks any such pecuniary interest, so he lacks standing. Even if Petitioner had such an interest, the language in § 307 does not confer a right to appeal because its language fundamentally differs from the language in other statutes through which Congress granted standing to appeal.[129]

125. For sake of analytical simplicity, this commentary alters the order in which Respondent pursued its arguments to mirror the order of arguments in Petitioner's brief.

126. TransUnion LLC v. Ramirez, 594 U.S. 413, 417 (2021).

127. *See* In re Revco D.S., Inc., 898 F.2d 498, 500 (6th Cir. 1990) (describing the U.S. Trustee as a "watchdog guard[ing] the interests of those for whom it watches"); 11 U.S.C. § 307 ("The United States trustee may raise and may appear and be heard on any issue in any case or proceeding under [Title 11].").

128. *See* 11 U.S.C. § 1109(b) ("A party in interest . . . may raise and may appear and be heard on any issue in a case under this chapter."); 7 RICHARD LEVIN & HENRY J. SOMMER, COLLIER ON BANKRUPTCY ¶ 1109.08 (16th ed. 2023) ("Consistent with the basic purpose of section 1109(b), a party qualifies as a 'person aggrieved' if the decision in question adversely affects the party's pecuniary interest.").

129. *See* Dir., Off. of Workers' Comp. Programs v. Newport News Shipbuilding & Dry Dock Co., 514 U.S. 122, 129–30 (1995) (citing examples that depict the difference between language used in statutes where standing was granted and section 307).

And the fact that the Bankruptcy Code only explicitly denies the SEC and other agencies the right to appeal does not, by inference, authorize the U.S. Trustee to appeal. Sections 1109(a) and 1164 deny certain agencies the right to appeal where they otherwise would have qualifying interests.[130] Since the U.S. Trustee lacks a qualifying interest in the first place, Petitioner cannot infer an underlying right to appeal from the limitations imposed on other agencies.

Moreover, Petitioner's argument that he acts as a representative of the United States does not confer upon him standing to appeal. The U.S. Trustee is not the United States, but simply an agency official who has neither been nominated by the President nor confirmed by the Senate.[131] That position's duties, described in 28 U.S.C. § 586, do not include representing the United States or enforcing its laws. Petitioner simply asserts a generalized interest in vindicating federal law, which on its own is insufficient to establish standing.[132] The U.S. Trustee is not a regulator, so a plan of reorganization's employment of third-party releases does not harm it in a concrete manner by affecting its ability to discharge any regulatory duties.[133] Thus, even if the U.S. Trustee had a statutory right to appeal, the lack of any harm to Petitioner leaves unfulfilled Article III's standing requirements.[134]

Finally, the presence of Canadian creditors supporting Petitioner's appeal does not cure the defects in his arguments asserting standing. In the Bankruptcy Court, these creditors accepted that the third-party releases are allowed by the Bankruptcy Code.[135] Moreover, these creditors are not concretely harmed by the releases. They claim to represent an uncertified class of Canadian creditors who *might* have extinguishable claims due to conduct in America with effects that *may*

130. Brief for Respondents at 45, Harrington v. Purdue Pharma L.P., No. 23-124 (U.S. argued Dec. 4, 2023) [hereinafter Brief for Respondents].

131. *See* 28 U.S.C. § 581(a)–(b) (describing the appointment process for the U.S. Trustee).

132. *See* Summers v. Earth Island Inst., 555 U.S. 488, 497 (2009) (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 580–81 (1992) (Kennedy, J., concurring in part and concurring in judgment)) (requiring a party bringing suit to show that a challenged action injures the party in a concrete and personal way regardless of a purported statutory right to sue).

133. *Cf.* SEC v. U.S. Realty & Improvement Co., 310 U.S. 434, 458–59 (1940) (affirming the SEC's right to appeal in a Chapter 11 proceeding when that proceeding thwarted the SEC's ability to perform its regulatory duties).

134. Raines v. Byrd, 521 U.S. 811, 829 (1997); *see id.* at 820 n.3 ("It is settled that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing.").

135. *See* Brief for Respondents, *supra* note 130, at 47 (citations omitted) (describing the Canadian creditors' position before the Bankruptcy Court).

have crossed into Canada.[136] These claims are extremely attenuated and suffer from causation issues.[137] And putting such defects aside, any valid claims of this supposed class would be based on the conduct of a nondebtor, Purdue Canada, and thus be fully preserved under the plan of reorganization.[138]

B. The Bankruptcy Code Authorizes Bankruptcy Courts to Impose Nonconsensual Third-Party Releases

As an initial matter, Congress provides bankruptcy courts with broad authority to protect the estates of debtors in bankruptcy. Breadth and flexibility are "indispensable features of bankruptcy,"[139] and the scope of Congress' authority under the Bankruptcy Clause is thus "incapable of final definition."[140] Varied and unpredictable challenges arise in connection with administering bankruptcy estates, such that the function of a bankruptcy system cannot "be accomplished except by clothing the courts of the United States sitting in bankruptcy with the most ample powers and jurisdiction to accomplish them."[141] Such jurisdiction over a bankruptcy estate is effectuated by the bankruptcy court's power to marshal the estate's assets and ensure their equitable distribution among creditors.[142] Thus, a bankruptcy court's authority extends to "all matters connected with the [estate]."[143] This should extend to any matter that has "a direct and substantial adverse effect on the [debtor's] ability to undergo a successful reorganization,"[144] including third-party releases.

Section 1123(b)(6) codifies the flexibility necessary to manage affairs affecting the debtor's ability to undergo reorganization and unambiguously permits third-party releases. Section 1123 encompasses the contents of a plan of reorganization under Chapter 11, and subsection (b) provides what a plan *may* include.[145] Congress in

136. *Id.*
137. *Id.* at 47 n.15.
138. *Id.* at 47–48 (citations omitted).
139. Brief for Respondents, *supra* note 130, at 17.
140. Wright v. Union Cent. Life Ins. Co., 304 U.S. 502, 513 (1938).
141. Ex parte Christy, 44 U.S. (3 How.) 292, 312 (1845) (Story, J.).
142. *See* Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356, 364, 370–71 (2006) (discussing the purposes of and powers attendant to a bankruptcy court's *in rem* jurisdiction over a bankruptcy estate).
143. Celotex Corp. v. Edwards, 514 U.S. 300, 308 (1995) (quoting Pacor, Inc. v. Higgins 743 F.2d 984, 994 (3d Cir. 1984)).
144. *Id.* at 310.
145. *See* 11 U.S.C. § 1123(b) (stating "a plan may" include provisions described in paragraphs (b)(1) through (b)(6)).

paragraph (b)(6) codified a catch-all provision allowing a bankruptcy court to include "any other" provision in a plan of reorganization as along as it is "appropriate" and "not inconsistent" with the provisions of Title 11.[146] The use of "any" in statutory provisions has been given effect in line with the obvious breadth contemplated by the word,[147] and Congress thus designed the catch-all provision to authorize "matters not specifically contemplated—known unknowns."[148] Given the clear breadth of authority which the general language of § 1123(b)(6) provides, the statute authorizes extraordinary measures like nonconsensual third-party releases when "necessary to the success of a reorganization plan."[149]

The statutory context of § 1123(b)(6) confirms this broad reading of the section to allow third-party releases of the kind included in Purdue's plan of reorganization. Section 1123(b)(3)(A) allows a plan of reorganization to provide for "the settlement or adjustment of any claim or interest belonging to the debtor or to the estate." This expressly allows for the settlement of Purdue's claims against the Sacklers. But to effectuate such a settlement, the Sacklers must be released from their liability to Purdue's creditors.[150] Moreover, the claims subject to release factually and legally overlap with claims against Purdue, the latter of which may be impaired or modified under § 1123(b).[151] Nonconsensual releases imposed through § 1123(b)(6) thus accord with the category of allowed provisions which § 1123(b) encompasses. Further, such releases are necessary and appropriate because the release provision in Purdue's plan of reorganization provides adequate means for the implementation of the plan and facilitates the ratable distribution of Purdue's assets among similarly situated creditors.[152] Without the releases, there simply is no plan of

146. 11 U.S.C. § 1123(b)(6).

147. *See, e.g.*, Ali v. Fed. Bureau of Prisons, 552 U.S. 214, 221 (2008) ("Congress could not have chosen a more all-encompassing phrase than 'any other law enforcement officer' to express [its] intent."); United States v. Monsanto, 491 U.S. 600, 608–09 (1989) (stating "any property" "unambiguous[ly]" includes assets to be used for attorneys' fees despite not mentioning such fees).

148. Republic of Iraq v. Beaty, 556 U.S. 848, 860 (2009).

149. United States v. Energy Res. Co., 495 U.S. 545, 548–49 (1990).

150. *See* Brief for Respondents, *supra* note 130, at 23 ("Section 1123(b)(3)(A), for example, allows the plan to provide for the settlement of the estates' claims against the Sacklers. Without the releases, there is no settlement of those claims and no $6 billion.").

151. *See* 11 U.S.C. § 1123(b)(1) (stating a plan may "impair . . . any class of claims"). *See also* 11 U.S.C. § 1123(b)(5) (allowing a plan to "modify the rights of holders of secured claims . . . [or] of unsecured claims").

152. *See* 11 U.S.C. § 1123(a)(5) (mandating that a plan "provide adequate means for the plan's

reorganization.

This reading of § 1123(b)(6) advances the core objectives of bankruptcy despite Petitioner's presentation of bankruptcy as limited solely to relations between a debtor and its creditors. Although bankruptcy concerns the "subject of the relations between [a] . . . debtor and his creditors" it also "extend[s] to his and their relief."[153] In Purdue's case, third-party releases fall within this bankruptcy framework. The releases apply only to claims held by Purdue's creditors, cover only claims depending on Purdue's conduct, are necessary to settle Purdue's claims against the Sacklers, and are designed to protect the bankruptcy estate while providing maximal relief to creditors.[154] Because the releases are a necessary part of protecting the bankruptcy estate,[155] the Bankruptcy Court had the ability to affect Purdue's claimants who "enter[ed] into the radius of the bankruptcy power."[156] Indeed, the Court in *Van Huffel v. Harkelrode*[157] held that bankruptcy law, despite the lack of any express provision allowing a court to do so, allowed for the modification of relations between a county treasurer (a nondebtor) and a purchaser of encumbered property (also a nondebtor).[158] As such, interpreting § 1123(b)(6) to allow third-party releases accords with a bankruptcy court's prerogative to preserve the bankruptcy estate and successfully reorganize the debtor, even though such releases modulate relations between creditors and nondebtors.

C. Imposing Nonconsensual Third-Party Releases Falls Within the Equitable Authority of Bankruptcy Courts

Historically, courts of equity exercised broad powers in cases involving debtor-creditor relationships, which accords with the imposition of nonconsensual third-party releases. It must first be noted,

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implementation"); 11 U.S.C. § 1123(a)(4) (requiring a plan of reorganization "provide the same treatment for each claim or interest of a particular class" unless the holder of the claim or interest agrees to less favorable treatment).

153. Wright v. Union Cent. Life Ins. Co., 304 U.S. 502, 513–14 (1938) (quoting In re Reiman, 20 F. Cas. 490, 496 (S.D.N.Y. 1874)).

154. Brief for Respondents, *supra* note 130, at 25.

155. *See* Celotex Corp. v. Edwards, 514 U.S. 300, 308 (1995) (describing the bankruptcy power as extending to "all matters connected with the bankruptcy estate").

156. *Wright*, 304 U.S. at 514.

157. 284 U.S. 225 (1931).

158. *Id.* at 226–27 (holding that bankruptcy law allowed a bankruptcy court to sell a debtor's property free from encumbrances despite such action affecting relations between a creditor and a nondebtor).

however, that Purdue's plan of reorganization does not extend to non-parties, as all parties bound by the releases at issue are creditors of Purdue.[159] As such, the Bankruptcy Court's authority is bounded only by the historical practices of courts of equity over creditors. And those practices evince an extremely broad conception of equitable authority. For instance, courts of equity could obtain consent from creditors with impaired claims through extreme methods, including imprisonment.[160] Equity allowed a court to even enjoin claims held by creditors against third-parties.[161] Such an equitable function directly advances the resolution of third-party rights in context of a bankruptcy estate's limited assets.[162] Thus, third-party releases fall within the historical practices of courts of equity, even though they modulate the relations between creditors and nondebtors.

D. Third-Party Releases Do Not Conflict with the Bankruptcy Code

Although Petitioner claims nonconsensual third-party releases conflict with the Bankruptcy Code's discharge-related framework,[163] such releases do not provide the Sacklers with the degree of relief that would be available to them if they independently petitioned for bankruptcy. A Chapter 11 debtor receives a discharge "from any debt that arose before" an order confirming the plan.[164] A Chapter 7 debtor receives a discharge from "all debts that arose before the date of the order for relief."[165] But the Sacklers did not receive such broad discharges in Purdue's plan of reorganization. Instead, the releases extend only to claims preceding confirmation and which are held by a creditor for which the debtor's conduct is the legal cause or otherwise a legally relevant factor.[166] The Sacklers remain subject to non-opioid-related claims, claims that do not depend on Purdue's conduct, and

159. Brief for Respondents, *supra* note 130, at 28.

160. John C. McCoid, II, *Discharge: The Most Important Development in Bankruptcy History*, 70 AM. BANKR. L.J. 163, 175 (1996) (describing how historical courts of equity could obtain consent through "all extreamitie [sic] that maie [sic] be used") (citation omitted).

161. *See* Tiffin v. Hart (1618–19), *in* John Ritchie, REPORTS OF CASES DECIDED BY FRANCIS BACON 161, 161–64 (London 1932) (reporting a case where creditors of a decedent's estate were enjoined from suing third-parties who were children and sureties of the decedent).

162. *Cf.* 11 U.S.C. § 524(g)–(h) (permitting third-party releases in the context of asbestos-related claims when a debtor's limited assets are pooled into creditor trusts for equitable distribution to claimants).

163. Brief for Petitioner, *supra* note 45, at 25–27. *See also id.* at 45 (discussing the Code's quid pro quo framework governing a debtor's relief from its obligations).

164. 11 U.S.C. § 1141(d)(1)(A).

165. 11 U.S.C. § 727(b).

166. Brief for Respondents, *supra* note 130, at 34 (citation omitted).

claims held by non-creditors.

Nor does this limited discharge conflict with § 524(e). That subsection states 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."[167] This subsection means that discharge of a debtor's debts does not affect a co-obligor's liability for such debts.[168] Consequently, this provision cannot be read as prohibiting a third-party release.

Similarly, there is no conflict between the imposition of nonconsensual third-party releases under § 1123(b)(6) and the asbestos-related provisions of § 524(g). Petitioner argues that the availability of third-party discharges under § 524(g) evinces a negative inference about a bankruptcy court's general authority to discharge nondebtors in other circumstances.[169] However, it is hazardous to draw a negative inference about general authority from a specific provision.[170] Moreover, the congressional comment attached to § 524(g), which states that nothing in the subsection "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," actually supports the existent authority of bankruptcy courts to impose third-party releases.[171] The comment makes clear that Congress did not intend for the subsection to be construed as suggesting that courts did not already have authority to approve such releases.[172] The subsection simply addresses a particular congressional concern with asbestos-related claims and the potential conflicts courts might see between that provision and other provisions in the Bankruptcy Code.[173]

E. Constitutional Avoidance Does Not Require Disallowance of Third-

167. 11 U.S.C. § 524(e).

168. *See* In re Airadigm Commc'ns, Inc., 519 F. 3d 640, 656 (7th Cir. 2008) (clarifying that § 524(e) "preserves rights that might otherwise be construed as lost" by making clear that "a creditor can still seek to collect a debt from a co-debtor").

169. Brief for Petitioner, *supra* note 45, at 33–35.

170. *See* Mission Prod. Holdings, Inc. v. Tempnology, LLC, 139 S. Ct. 1652, 1663–66 (2019) (analyzing the legislative history of the Bankruptcy Code to show the danger of drawing a negative inference from a specific Code provision).

171. Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, sec. 111(b), 108 Stat. 4117.

172. *See* 140 Cong. Rec. H10752 (daily ed. Oct. 4 1994) ("[Section 524(g)] is not intended to alter any authority bankruptcy courts may already have to issue injunctions in connection with a plan or reorganization.").

173. *See* Brief for Respondents, *supra* note 130, at 37–38 (describing the unique circumstances of asbestos-related claims and legislative reasoning for the wording of § 524(g)).

Party Releases

The canon of constitutional avoidance does not require the Court to ignore the plain meaning of § 1123(b)(6). This canon "enters in only 'where a statute is susceptible of two constructions.'"[174] But § 1123(b)(6) is unambiguous in granting authority to approve appropriate third-party releases—it plainly allows "*any other* appropriate provision not inconsistent with the applicable provisions of [Title 11]."[175] Since nonconsensual third-party releases are included among "any other" provision, are appropriate for a plan of reorganization that resolves creditors' claims in an equitable manner, and are not inconsistent with other portions of the Bankruptcy Code, there is nothing for the Court to avoid.

Even if a constitutional avoidance problem arose, there are no sensitive constitutional questions concerning the extinguishment of property rights or of due process. Claimants' causes of action against the Sacklers are not extinguished, but rather are channeled to the creditor trusts established under the plan of reorganization.[176] Additionally, rights *can* be terminated in bankruptcy if doing so is otherwise consistent with due process.[177] The key aspects of due process when depriving persons of their claims are notice and an opportunity to be heard.[178] Both were provided here.[179] As such, no constitutional questions arise regarding the imposition of nonconsensual third-party releases in Purdue's plan of reorganization.

F. The Public Interest Weighs Toward Allowing Nonconsensual Third-Party Releases

Disallowing the use of third-party releases in circumstances of complex mass-tort bankruptcies would work against the interests of

174. Pa. Dept. of Corr. v. Yeskey, 524 U.S. 206, 212 (1998) (quoting United States ex rel. Att'y Gen. v. Del. & Hudson Co., 213 U.S. 366, 408 (1909)).

175. 11 U.S.C. § 1123(b)(6) (emphasis added).

176. *See* In re Purdue Pharma L.P. (*Purdue II*), 635 B.R. 26, 30 (2021) (describing the plan of reorganization's establishment of creditor trusts).

177. Martin v. Wilks, 490 U.S. 755, 762 n.2 (1989).

178. *See* Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 313 (1950) ("Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.").

179. *See* In re Purdue Pharma L.P. (*Purdue I*), 633 B.R. 53, 98–99 (2021) (describing the due process afforded to claimants whose claims would be extinguished under the plan of reorganization).

creditors seeking relief. A plan of reorganization in such circumstances requires careful negotiations among both governmental and private creditors, who must then vote in favor of the plan.[180] The use of third-party releases prevents depletion of the bankruptcy estate and ensures the payment of amounts due under the plan. Indeed, without the releases the plan would unravel, and unsecured creditors would recover nothing. Diminishing payment due to governmental bodies, as well as State, local, and Tribal governments would not align with the public interest. Rather, the use of releases ensures these payments, and limiting their use to exceptional circumstances while subjecting their approval to a multi-factor test (such as that which the Second Circuit crafted) resolves concerns about abuse of releases.[181]

VI. ORAL ARGUMENT

The Court previously granted Respondent's motion for a divided oral argument, allowing counselors for the United States Trustee, Purdue, and the Official Committee of Unsecured Creditors to present arguments.[182] The Justices raised a variety of issues during oral argument, such as the impact of their decision on other releases utilized in bankruptcy, due process concerns in obtaining nondebtor releases, statutory interpretation, and the practical result on the tort claimants' ability to obtain relief if Petitioner succeeded in obtaining a reversal.

A. Petitioner's Argument

Petitioner opened with a narrow argument that nondebtor releases in this case exceed the statutory authority of the Bankruptcy Code and conflict with the Code's framework by "grant[ing] the Sacklers the functional equivalent of a discharge" for claims that would otherwise be non-dischargeable in bankruptcy.[183] Such releases extinguish the personal property rights of third-parties without historical analogue in equity and raise constitutional questions that ought to be avoided.[184] Justice Thomas issued the first challenge to Petitioner: why are consensual releases of nondebtors acceptable under the Bankruptcy

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180. *See* Brief for Respondents, *supra* note 130, at 42 (describing the consummation of Purdue's plan of reorganization).

181. *Id.* at 43–44.

182. Harrington v. Purdue Pharma L.P., 144 S. Ct. 376 (Mem.) (2023).

183. Transcript of Oral Argument at 5, Harrington v. Purdue Pharma L.P., 2023 WL 5116031 (2023) (No. 23-124).

184. *Id.*

Code, but not nonconsensual releases of nondebtors?[185] While "from a due process standpoint," consent to deprivation of property distinguishes the two types of releases, Justice Thomas failed to see what provided a bankruptcy court with authority to enforce consensual releases in a plan of reorganization but not nonconsensual releases.[186]

Both Justice Thomas and Chief Justice Roberts then questioned Petitioner regarding the breadth of § 1123(b) of the Bankruptcy Code. Petitioner responded to Justice Thomas that § 1123(b)(6), which provides a generalized catch-all following five enumerated provisions, should be limited in scope to the listed items preceding it.[187] Chief Justice Roberts, however, inquired whether this calls for the application of the "major questions doctrine."[188] Petitioner did not directly answer the question, instead suggesting that "you can get there on regular statutory construction principles" without reaching the issues relating to the major questions doctrine in recent Supreme Court jurisprudence.[189]

Justices Alito and Sotomayor focused on the practicality of Petitioner's argument due to the form in which the Sacklers maintained their assets. The funds contributed to the bankruptcy estate were contained in overseas spendthrift trusts, which "just about everybody . . . in this litigation thinks . . . are unreachable" absent the Sacklers' willingness.[190] If a bankruptcy court could not make those assets available to tort claimants even in the case of the Sacklers' bankruptcy, then a deal relying on nonconsensual third-party releases is the best deal available for creditors.[191] Petitioner focused on the fact that the Sacklers initially provided only $4.2 billion as the "last best possible deal" necessitating nonconsensual releases, but then increased that number by $1.675 billion following further litigation.[192] Petitioner further argued that the Sacklers could make a deal with claimants providing some form of discharge if the Sacklers obtain consent from

185. *Id.* at 6.
186. *Id.* at 7.
187. *Id.* at 8–9.
188. *Id.* Under the major questions doctrine, an assertion—commonly by a federal agency—of broad authority that bears great economic and political significance requires clear congressional authorization for the claimed authority. *See* West Virginia. v. EPA, 597 U.S. 697, 721–24 (2022) (explaining the major questions doctrine).
189. Transcript of Oral Argument at 12, *Harrington*, 2023 WL 5116031 (No. 23-124).
190. *Id.*
191. *Id.*
192. *Id.* at 13–14.

the relevant creditors.[193] When Justice Sotomayor squarely asked what consent looks like in this case, Petitioner argued that opt-in consents are necessary for such a waiver of claimants' property rights.[194]

Justice Kavanaugh focused his inquiry on Petitioner's understanding of the statutory term "appropriate" in § 1123(b)(6).[195] Though Petitioner broadly stated that "it's not appropriate to simply take property rights that . . . aren't accessible to the estate in bankruptcy,"[196] Justice Kavanaugh reframed his question as why the federal government can argue the releases are not appropriate when an overwhelming majority of the claimants believe the deal with the Sacklers is appropriate.[197] Justice Kagan backed up Justice Kavanaugh. The support for the deal was overwhelming "among people who think that the Sacklers are pretty much the worst people on earth."[198] While Petitioner responded that the deal for the claimants became better after more negotiation and that a different process would allow the Sacklers to handle nonconsenting claimants "on the side," Justice Kagan commented that the federal government is standing in the way of the majority of claimants who decided that without such releases they will end up with nothing.[199] To this point, Justice Barrett pointed to the United States' superpriority claim that would—if the Court held for Petitioner and the Sacklers withdrew their offer to provide $6 billion to the bankruptcy estate—deplete much of Purdue's assets and deprive the claimants of recovery.[200]

Justice Jackson distinguished Petitioner's two arguments based on § 1123(b)(6)—that the releases at question are not appropriate and that they are not consistent with the overarching purposes of the Bankruptcy Code—to ask what makes something inconsistent with the Code.[201] Petitioner responded that that actions which the Code does not expressly prohibit may still not be sufficiently consistent for purposes of § 1123(b)(6).[202] This permitted Justice Thomas to again inquire as to consensual third-party releases and why those would be

193. *Id.* at 15.
194. *Id.*
195. 11 U.S.C. § 1123(b)(6) states that a plan may "include any other appropriate provision not inconsistent with the applicable provisions of [Title 11]."
196. Transcript of Oral Argument at 19, *Harrington*, 2023 WL 5116031 (No. 23-124).
197. *Id.* at 20–21.
198. *Id.* at 22.
199. *Id.* at 23–24.
200. *Id.* at 25.
201. *Id.* at 31–32.
202. *Id.* at 32.

consistent with the Bankruptcy Code when nonconsensual releases would be inconsistent.[203] Petitioner distinguished the two on the basis of the independent force of consensual releases—the bankruptcy court does not need to use its powers to extinguish property rights without consent in such case.[204]

Justice Thomas also raised the issue of the United States Trustee's role in these proceedings and its interest in attempting to undo the deal with the Sacklers, which Petitioner took as a question of its standing.[205] Petitioner argued that Congress gave the Trustee the power to raise and be heard on any issue in a bankruptcy case, and that generally it undertakes a watchdog role throughout bankruptcy proceedings as a "disinterested observer" who makes sure bankruptcy law is "enforced appropriately."[206] Petitioner argued that it represents the interests of both the claimants that disagreed with the Sacklers' plan and with victims that did not respond to or vote at all on the plan of reorganization that extinguished their claims.[207]

B. Respondent's Argument

Respondent initiated its argument by pointing to the broad statutory language of § 1123(b)(6), which indicates congressional approval of the "breadth and flexibility" of a bankruptcy court's power to fashion appropriate relief.[208] Moreover, nonconsensual third-party releases advanced the objectives of bankruptcy by channeling claimants toward creditor trusts rather than depleting the estate through suits against the Sacklers for injuries involving Purdue's conduct.[209] Furthermore, the use of such releases is founded in precedent.[210]

Justice Thomas again began by asking Respondent about the distinction between consensual and nonconsensual releases in bankruptcy proceedings.[211] Respondent disagreed with Petitioner as to what gives force to such releases, arguing that, regardless of the

203. *Id.* at 33.
204. *Id.* at 33–34.
205. *Id.* at 34.
206. *Id.* at 35–36.
207. *Id.* at 55–56.
208. *Id.* at 60.
209. *Id.* at 60–61.
210. *See id.* (discussing the use of nonconsensual releases over the lifetime of the current Bankruptcy Code and analogous practices in equity).
211. *Id.* at 62.

agreement of the parties, "there has to be statutory authority for the bankruptcy court to include" either release in a plan of reorganization.[212] The only authority for both categories of releases is § 1123(b)(6), which does not distinguish between a consensual or nonconsensual release.[213]

Justice Kagan then questioned Respondent as to "one of the government's stronger arguments" that bankruptcy law contemplates a fundamental bargain whereby a debtor obtains a discharge by offering its assets for division among creditors, which the Sacklers "didn't come anywhere close to doing."[214] If the Sacklers could "subvert this basic bargain" it would be "kind of [an] extraordinary thing."[215] Respondent denied that the Sacklers would get a discharge, which broadly immunizes a debtor, but would instead obtain a release "apply[ing] only to one set of claims."[216] Respondent further argued that Purdue's reorganization proceeding focused on maximizing the estate and equitably distributing it to all of the victims—a "core objective of bankruptcy" with which Petitioner's proposition "is fundamentally at odds."[217]

To this, Justice Jackson noted that many of the Sacklers' assets originated in Purdue, the extraction of which "started the set of circumstances in which the company now doesn't have enough money to pay the creditors."[218] Justice Jackson questioned why the Court should allow the plan of reorganization under such circumstances. After Respondent pointed to problems arising with victims collecting from such assets absent the deal with the Sacklers, which Justice Jackson noted is only due to the Sacklers' conduct,[219] Justice Barrett questioned whether bankruptcy of the Sacklers as individuals would even exempt these funds from collection under fraud exceptions.[220] Justice Gorsuch reframed this line of questioning by extensively pointing to background limits on the statutory term "appropriate" in § 1123(b)(6)—other statutes, historic equity practice, the Constitution, and the underlying mechanisms of bankruptcy—to question why it

212. *Id.*
213. *Id.* at 62–63.
214. *Id.* at 63.
215. *Id.* at 64.
216. *Id.* at 64–65.
217. *Id.* at 67.
218. *Id.*
219. *Id.* at 68.
220. *Id.* at 68–69.

would be appropriate for a powerful tool like nonconsensual third-party releases to benefit parties that were not themselves in bankruptcy.[221] Respondent pointed to other types of nondebtor property, in the form of claims, which bankruptcy law allows to be "taken away from the creditors" and satisfied through the estate or to be enjoined.[222] Moreover, Respondent argued that if such constitutional concerns are legitimate, then this case presents a risk of the Court "tak[ing] a wrecking ball to the [B]ankruptcy [C]ode given the situations in which bankruptcy courts are allowed to dispose of, eliminate, defeat, stand in the way of property interests."[223]

Justice Jackson again questioned Respondent, asking about the breadth of conditions the Sacklers could attach to its funding of Purdue's estate.[224] Because the statute would limit such conditions to those which are "necessary," Justice Jackson asked what "necessary" means in Respondent's view.[225] To this, Respondent argued that the bankruptcy court found the releases to be necessary to Purdue's reorganization and any relief flowing to the victims,[226] though Justice Jackson suggested that this is a tautological argument because "it's only necessary insofar as [the Sacklers] are requiring it."[227] Still, Respondent stated, a bankruptcy court's determinations about what is "necessary" are predicated on decades of evaluating nonconsensual releases under the Code.[228]

Justice Kavanaugh returned to statutory interpretation, asking why the Court should interpret § 1123(b)(6) in a broad manner when the Court's recent jurisprudence trends towards narrower readings.[229] Respondent disputed that this is a major questions doctrine issue, because the statutory term simply provides bankruptcy courts a common law role in accordance with what courts of equity "have been doing for centuries in this context."[230] Because the language is "written in broad terms purposely" to allow bankruptcy courts to employ

221. *See id.* at 69–74 (questioning Respondent as to the propriety of allowing nonconsensual third-party releases for the nondebtor's benefit).
222. *Id.* at 75–76.
223. *Id.* at 76–77.
224. *Id.* at 80–81.
225. *Id.* at 81.
226. *Id.*
227. *Id.* at 82.
228. *Id.* at 83–84.
229. *See id.* at 84–85 ("[W]e've been cautious, especially in recent years, about reading those [statutes] to give too much authority[;] major questions doctrine, elephants in mouseholes.").
230. *Id.* at 85–86.

mechanisms like nonconsensual third-party releases, the statute ought not be read narrowly to preclude such releases.[231]

Finally, Justice Kavanaugh asked whether the United States Trustee has standing to pursue this appeal.[232] Respondent asserted that the Trustee is "an interloper with absolutely no financial stake in this resolution" and therefore lacks standing on its own.[233] Any reliance of Petitioner on a claimant's standing is also in error because that claimant forfeited its challenge to the question presented in this case.[234]

C. The Official Committee of Unsecured Creditors' Argument

Arguing separately, counsel for the Official Committee of Unsecured Creditors (hereinafter "Official Committee") asserted that "[e]very one of the creditor constituencies in this case . . . harmed by Purdue overwhelmingly supports the plan [of reorganization]."[235] To avoid a "value-destroying victim-against-victim race to the courthouse," Purdue's creditors insisted on the nonconsensual releases at issue.[236] The creditors' demands and the findings of the bankruptcy court support reading § 1123(b)(6) as broadly allowing a bankruptcy court to include nonconsensual third-party releases as "essential to restructuring the debtor-creditor relationship in this case."[237]

Justice Thomas began questioning by asking the Official Committee what difference would result if the Sacklers had petitioned for bankruptcy and received a discharge, rather than seeking a release from Purdue's creditors in Purdue's bankruptcy.[238] The Official Committee emphasized the lack of clarity as to whether the Sacklers were even eligible for bankruptcy,[239] and added that any victims obtaining relief from such bankruptcy would "take years, probably decades if you talk to bankruptcy lawyers."[240] The Official Committee focused on the victims—Purdue's creditors—and how a bankruptcy process that maximizes Purdue's estate for fair and equitable

231. *Id.* at 86–87.
232. *Id.* at 87.
233. *Id.* at 88.
234. *Id.*
235. *Id.* at 93.
236. *Id.*
237. *Id.*
238. *Id.* at 94.
239. *See id.* at 95 (discussing how the Sacklers in this case refers to both individuals and trusts, raising difficulties about the effect of a bankruptcy discharge on any potential recovery from the Sacklers' assets as trusts cannot file for bankruptcy).
240. *Id.* at 94.

distribution to the victims should take precedence over anything else.[241] When Chief Justice Roberts asked whether commercial claimants could be forced into a bankruptcy settlement at the behest of the individual victims, the Official Committee deferred to the supermajority voting scheme through which bankruptcy courts have interpreted the Code's use of "appropriate" with reference to the releases at issue.[242] Petitioner has not challenged the multifactor test making use of supermajority approval of plans incorporating nonconsensual releases, which only arises in mass tort bankruptcies where "there is no other alternative to get meaningful . . . victim recovery."[243]

Justice Kagan then inquired as to Petitioner's argument that reversing the Second Circuit and denying the validity of nonconsensual third-party releases would provide the victims with greater leverage.[244] The Official Committee strongly responded that the Court should at the very least take away one thing from its argument: "[w]ithout the release, the plan will unravel, Chapter 7 liquidation will follow, and there will be no viable path to any victim recovery."[245] The District Court, without any objection from the United States Trustee, found that without the release, the Sacklers would not settle the estate claims due to the "tsunami of direct creditor claims" that would be litigated against the Sacklers.[246] Any Sackler money going to the victims via the plan of reorganization would be reserved for litigation.[247] Further, the United States' superpriority claim on $2 billion of Purdue's estate would "gobble up" anything remaining in Purdue's estate that could potentially go to victims.[248] Any claims of Purdue against the Sacklers would have to be litigated without any assets and in competition with victims' claims against the Sacklers.[249] If even one victim obtained a judgment, "that could wipe out all of the collectible Sackler assets."[250]

Justice Kavanaugh asked the Official Committee to expand on why individual suits against the Sacklers would not be viable.[251] There are

241. *Id.* at 94–95.
242. *Id.* at 96–98.
243. *Id.* at 99.
244. *Id.* at 100.
245. *Id.*
246. *Id.* at 101.
247. *Id.*
248. *Id.* at 102.
249. *Id.*
250. *Id.* at 103.
251. *Id.* at 108.

$40 trillion in estimated claims against the Sacklers, so one plaintiff's success will "wipe[] out the recovery or every other victim."[252] This explains why an overwhelming majority of victims agreed to the nonconsensual release.[253] Instead, billions will flow to life-saving abatement programs, which fifty state Attorneys General have signed onto contingent upon the release allowing for the Sacklers to provide billions to Purdue's estate.[254] It is "irresponsible for the Trustee now to suggest that there's some secret path to recovery" when the bankruptcy court found that the nonconsensual release was a necessary component of Purdue's plan of reorganization.[255] The Official Committee could not explain why Petitioner challenged the releases, but offered a legal argument that the language of § 1123(b)(6) allows such releases to be utilized where necessary.[256]

Justice Jackson then questioned why there could not be a settlement of such mass tort litigation when settlements have occurred in the circuits which disallow nonconsensual releases.[257] The Official Committee distinguished these other examples as comprising a smaller body of claimants or occurring outside bankruptcy, but that in "true mass tort bankruptcies where you have nothing near the funds available . . . those are only possible with third-party releases."[258] In response to a second question from Justice Jackson about victims' potential recovery, the Official Committee again noted that a single state claim going to judgment would result in "[z]ero dollars to victims if [the state] were successful."[259] Consent to the Sacklers' contribution of money to Purdue's estate relied on every single potential litigant being bound by the release agreement, without which the Sacklers would not contribute any money and there would be no "meaningful victim recovery."[260]

252. *Id.*
253. *Id.*
254. *Id.* at 109.
255. *Id.* at 110.
256. *Id.* at 110–12.
257. *Id.* at 113.
258. *Id.* at 114.
259. *Id.* at 117.
260. *Id.* at 118–19.

VII. LEGAL ANALYSIS

The Court should first hold that the U.S. Trustee has Article III standing to bring this appeal. The U.S. Trustee is endowed with the responsibility to protect the public interest, and its unique position with the constitutional scheme should provide it with standing in this appeal. The Court should then hold that the Bankruptcy Court does not foreclose nonconsensual third-party releases. Applying canons of statutory interpretation to the Bankruptcy Code shows that it provides bankruptcy courts with authority to approve of such releases. Doing so would not exceed the equitable authority of a court sitting in bankruptcy, nor do any policy concerns militate against allowing such releases.

A. The U.S. Trustee Has Standing to Bring this Appeal

Petitioner correctly surmises that the structure and language of the Bankruptcy Code provide the U.S. Trustee with a statutory right to appeal. Section 307 of the Bankruptcy Code declares that the "United States trustee may raise and may appear and be heard on any issue in any case or proceeding under [Title 11]."[261] While the words of this statute do not explicitly use the language of "appeal," the use of the same language in other portions of the Bankruptcy Code demonstrate that § 307 encompasses the right to appeal. Section 1109(a), for instance, employs the exact same language with regards to the SEC.[262] Section 1109(a), however, then follows the grant of this right with a limitation that the SEC "may not appeal from any judgment, order, or decree entered in the case."[263] The exact same language and restriction appears in § 1164 regarding railroad reorganizations.[264] "No such limitation, either in the words of the statute or in the legislative history, is placed on the right of the U.S. trustee to appeal."[265] Construing together such uses of the same language throughout Title 11 suggests that Congress did not intend to limit the U.S. Trustee's right to appeal.

Certainly, a statutory right to appeal does not suffice for standing.

261. 11 U.S.C. § 307.
262. 11 U.S.C. § 1109(a) ("The Securities and Exchange Commission may raise and may appear and be heard on any issue in a case.").
263. *Id.*
264. *See* 11 U.S.C. § 1164 ("The [Surface Transportation] Board, the Department of Transportation, and any State or local commission having regulatory jurisdiction over the debtor may raise and may appear and be heard on any issue in a case under this chapter, but may not appeal from any judgment, order, or decree entered in the case.").
265. In re Revco D.S., Inc., 898 F.2d 498, 500 (6th Cir. 1990).

Standing still requires the litigant show injury in fact and that the interest it seeks to vindicate be within the zone of interests which the statute in question protects.[266] While Respondents argue that such interest is limited in bankruptcy to pecuniary interests,[267] this follows an anachronistic interpretation of the congressional bankruptcy scheme. The "pecuniary interest test" was a judicial construction of § 39(c) of the 1898 Bankruptcy Code which limited appellate standing to "persons aggrieved" by a court's actions.[268] That section was repealed, and its language does not appear in § 307 of the current Bankruptcy Code, drawing the applicability of the test into doubt. Moreover, the Supreme Court has stated that a public interest may suffice for purposes of appellate standing, even where statutory language refers to a party that is "aggrieved."[269] The U.S. Trustee is an officer of the Executive branch, independent of direct court supervision.[270] As such, Congress endowed the position with a responsibility to "protect[] the public interest and ensur[e] that bankruptcy cases are conducted according to law."[271] This responsibility goes directly to the heart of Petitioner's interest here—ensuring that the interests of Purdue's many creditors are protected from and that bankruptcy law is not violated by the use of nonconsensual third-party releases.

Moreover, Respondents err in urging the Court to reject Petitioner's standing to appeal on the basis of an abstract, generalized interest.[272] Certainly, the Court has ruled that "[I]t would exceed [Article III's] limitations if, at the behest of Congress and in the absence of any showing of concrete injury, we were to entertain citizen suits to vindicate the public's nondiscrete interest in the proper

266. Dir., Off. of Workers' Comp. v. Newport News Shipbuilding & Dry Dock Co., 514 U.S. 122, 127 (1995) (quoting Ass'n of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 153 (1970)).

267. Brief for Respondents, *supra* note 130, at 45 (citing 7 RICHARD LEVIN & HENRY J. SOMMER, COLLIER ON BANKRUPTCY ¶ 1109.08 (16th ed. 2023)).

268. *See In re Revco*, 898 F.2d at 499 (discussing the legislative history of bankruptcy schemes); 11 U.S.C. § 67(c) (1976) (repealed 1978) ("A person aggrieved by an order of a referee may . . . file with the referee a petition for review of such order by a judge.").

269. *See* SEC v. U.S. Realty & Improvement Co., 310 U.S. 434, 460 (1940) (affirming the SEC had a valid interest providing it with the right to appeal). *See also Ass'n of Data Processing Serv. Orgs.*, 397 U.S. at 153 (recognizing standing in cases involving review of administrative action where a litigant has a public interest and is "'significantly involved to have standing to represent the public'") (quoting Ass'n of Data Processing Serv. Orgs., Inc. v. Camp, 406 F.2d 837, 842–43 (8th Cir. 1969)).

270. *See In re Revco*, 898 F.2d at 499–500 (discussing the role of the U.S. Trustee).

271. H.R. REP. NO. 95-595, at 109 (1977).

272. *See* Brief for Respondents, *supra* note 130, at 47 (arguing the U.S. Trustee only has a generalized interest insufficient to establish standing).

administration of the laws."[273] The U.S. Trustee, however, is not a private party attempting to ensure the proper administration of the laws. Instead, it is an officer of the Executive branch subject to removal by the Attorney General.[274] Thus, no constitutional conflict arises from Petitioner's attempt to ensure proper administration of bankruptcy law.[275] Because a sovereign clearly has standing to vindicate its own interest in ensuring its own laws are properly enforced by the judiciary,[276] Petitioner, as an officer of the United States responsible for monitoring bankruptcy proceedings and representing the public,[277] cannot be denied standing to appeal.

B. The Bankruptcy Code Does Not Foreclose Nonconsensual Third-Party Releases

On the merits, Respondents correctly assert that the Bankruptcy Code does not disallow nonconsensual third-party releases.

Section 105 of the Bankruptcy Code codifies the equitable powers of a court sitting in bankruptcy. That section provides that a bankruptcy court "may issue any order, process, or judgment that is necessary or appropriate to carry out the provision of [the Bankruptcy Code]."[278] According to the Court, this exercise of equitable authority must "be exercised within the confines of the Bankruptcy Code."[279] Generally, this requires tying the exercise of equitable power to another statute of the Code, meaning that § 105(a) "confers authority to 'carry out' the provisions of the Code."[280] This also forecloses actions that conflict with

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273. Summers v. Earth Island Inst., 555 U.S. 488, 497 (2009) (alteration in original) (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 580–81 (1992) (Kennedy, J., concurring in part and concurring in judgment)).

274. *See* 28 U.S.C. § 581 (setting forth the appointment and removal process for the U.S. Trustee).

275. *See* U.S. CONST. art. II, § 3 ("[The Executive] shall take Care that the Laws be faithfully executed.").

276. *See* Hollingsworth v. Perry, 570 U.S. 693, 709–10 (2013) (recognizing that a sovereign "has a cognizable interest in the continued enforceability of its laws that is harmed by a judicial decision" (internal quotation marks omitted)).

277. *See* In re Plaza de Diego Shopping Ctr., Inc., 911 F.2d 820, 824 (1st Cir. 1990) (recognizing "the U.S. Trustee's interest" in appealing as derived "from his statutory responsibility to represent and protect the public"); United Artists Theatre Co. v. Walton, 315 F.3d 217, 225 (3d Cir. 2003) ("U.S. Trustees are officers of the Department of Justice who protect the public interest by aiding bankruptcy judges in monitoring certain aspects of bankruptcy proceedings.") (citing In re Columbia Gas Sys. Inc, 33 F.3d 294, 295–96 (3d Cir. 1994)).

278. 11 U.S.C. § 105(a)

279. Norwest Bank Worthington v. Ahlers, 485 U.S. 197, 206 (1988).

280. Law v. Siegel, 571 U.S. 415, 421 (2014). *Accord* Marram v. Citizens Bank of Mass., 549 U.S. 365, 382 (2007) (Alito, J. dissenting) (quoting *Law*, 571 U.S. at 421). *See also Norwest Bank Worthington*, 485 U.S. at 207 (tying the equitable powers of the bankruptcy court to other

other laws.[281]

Here, the Bankruptcy Court's order confirming Purdue's plan of reorganization depends on § 1123(b)(6) of the Bankruptcy Code. That section provides that a plan of reorganization may "include any other appropriate provision not inconsistent with the applicable provisions of [the Bankruptcy Code]."[282] Certainly, the text of this statute is extremely broad. It utilizes the word "any" to sweep in the full range of provisions that a plan of reorganization may include, regardless of whether such provisions were contemplated at the time of the statute's codification. Unless otherwise delimited, this naturally includes nonconsensual third-party releases.

The Court has confirmed this interpretation of such broadly written statutes in the past. In *Ali v. Federal Bureau of Prisons*,[283] for instance, the petitioner—a federal prisoner—argued that the language of 28 U.S.C. § 2680, which carves out certain exceptions to the United States' waiver of sovereign immunity for torts committed by federal employees, did not cover Bureau of Prisons officers.[284] Because the statute applied to "any officer of customs or excise or any other law enforcement officer,"[285] the Court concluded that it encompassed "all law enforcement officers."[286] "Any" is "most naturally read to mean enforcement officers of whatever kind,"[287] unless "other circumstances . . . counteract[ed] the effect of expansive modifiers."[288] Those circumstances might include the use of a term of art, the presence of another term that could only be harmonized with the broad language under a narrow reading of the statute, and the risk that a broad reading would implicate sovereignty concerns.[289]

This same reasoning applies to § 1123(b)(6)'s use of the term "any." While Petitioner rightly points to the first five paragraphs of § 1123(b)

provisions of the Bankruptcy Code).

281. *Law*, 571 U.S. at 421 ("It is hornbook law that § 105(a) 'does not allow the bankruptcy court to override explicit mandates of other sections of the Bankruptcy Code.'") (quoting 2 RICHARD LEVIN & HENRY J. SOMMER, COLLIER ON BANKRUPTCY ¶ 105.01[2] (16th ed. 2013)). *Accord* SEC v. U.S. Realty & Improvement Co., 310 U.S. 434, 455 (1940) ("A bankruptcy court . . . is guided by equitable doctrines and principles except in so far as they are inconsistent with the Act." (citations omitted)).

282. 11 U.S.C. § 1123(b)(6).

283. 552 U.S. 214 (2008).

284. *Id.* at 215.

285. 28 U.S.C. § 2680(c).

286. *Ali*, 552 U.S. at 215.

287. *Id.* at 220.

288. *Id.* at 220 n.4.

289. *Id.*

as referring only to provisions in a plan of reorganization concerning creditors and debtors,[290] this does not dilute the breadth of the language which Congress included in § 1123(b)(6). There is no other term in § 1123(b)(6) that demands a narrow allowance of provisions limited to affecting only creditors and debtors, which would consequently exclude third-party releases. Nor does Petitioner's reliance on the Court's decision in *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*[291] for the "well established canon" that "the specific governs the general" prevent this reading.[292] In that case, the Court dealt with two clauses of 11 U.S.C. § 1129(b)(2)(A) in which the first clause imposed in detail a particular set of requirements for a sale of collateral, and the second clause consisted of a broadly worded provision saying nothing about a sale.[293] In order to give effect to both provisions, the second clause could not be read as encompassing what was contained in the first clause, which would override the first clause's requirements.[294]

Applying this rationale to § 1123(b), the first five paragraphs set out particular items that may be included in a plan of reorganization, and the sixth paragraph allows "any other appropriate provision."[295] Purdue's plan of reorganization did not attempt to override what is contained in the first five paragraphs via reliance on the sixth, but rather included something not mentioned in these five specific paragraphs by relying on the broad, catch-all language of the sixth paragraph. This reading of § 1123(b) as encompassing nonconsensual third-party releases—which are not otherwise mentioned in the first five paragraphs of § 1123(b)—actually accords with longstanding Supreme Court precedent: "where there is, in the same statute, a particular enactment, and also a general one . . . the particular enactment must be operative, and the general enactment must be taken to affect only such cases within its general language as are not within the provisions of the particular enactment."[296]

Moreover, no section of the Bankruptcy Code is inconsistent with the inclusion of a nonconsensual third-party release provision in a plan of reorganization. Petitioner points to § 524(e), which states that

290. Brief for Petitioner, *supra* note 45, at 23.
291. RadLAX Gateway Hotel, LLC v. Amalgamated Bank, 566 U.S. 639 (2012).
292. Brief for Petitioner, *supra* note 45, at 23 (quoting *RadLAX*, 566 U.S. at 645).
293. *RadLAX*, 566 U.S. at 646.
294. *Id.* at 647.
295. 11 U.S.C. § 1123(b).
296. United States v. Chase, 135 U.S. 255, 260 (1890) (citations and internal quotation marks omitted).

"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,"[297] as being inconsistent with such releases.[298] However, that subsection merely means that discharge of a debtor's debts does not affect a co-obligor's liability for such debts.[299] It "explains the effect of a debtor's discharge. It does not prohibit the release of a non-debtor."[300] Indeed, this statute cannot be sensibly applied to the situation of a nondebtor's debt, as it refers only to the consequences of discharging a debtor's debt. The scope of a debtor's discharge does not bear at all on the release of a nondebtor, nor does the section contain any language foreclosing third-party releases.

Further, a bankruptcy court's use of nonconsensual third-party releases would not exceed the historical equitable authority of a court sitting in bankruptcy. As an initial matter, where, as in Purdue's bankruptcy, the nondebtors are creditors of the debtor precisely due to the claims which the plan of reorganization would discharge, a bankruptcy court would not be extending its authority to uninvolved parties.[301] Even in situations where the third-parties are not creditors of the debtor, equity allowed a court to enjoin actions against those third-parties. Respondents, for instance, cite the case of *Tiffin v. Hart*,[302] where a father died insolvent and certain third-parties were sureties on his debts.[303] There, the Chancellor utilized his equitable powers to release third-parties from creditors objecting to the resolution of the case without the creditors' consent.[304] This exercise of equitable power goes directly to the purpose of bankruptcy—ensuring relief for debtors and creditors, even where a minority of creditors might hope to obtain more than in bankruptcy by haling related third-parties into court.

Of course, nonconsensual third-party releases are not and should not be widely available in bankruptcy proceedings. Sections 105(a) and

297. 11 U.S.C. § 524(e).

298. Brief for Petitioner, *supra* note 45, at 25.

299. *See Airadigm Commc'ns*, 519 F.3d 640, 656 (7th Cir. 2008) (clarifying that § 524(e) "preserves rights that might otherwise be construed as lost" by making clear that "a creditor can still seek to collect a debt from a co-debtor").

300. In re Dow Corning Corp., 280 F.3d 648, 657 (6th Cir. 2002).

301. *See* Brief for Respondents, *supra* note 130, at 28 (noting that all parties bound by the plan of reorganization are creditors of Purdue). *See also* In re Purdue Pharma L.P. (*Purdue III*), 69 F.4th 45, 58 (2d Cir. 2023) (discussing how Purdue indemnified the released nondebtors from liability for conduct which forms the basis for the released claims).

302. Tiffin v. Hart (1618–19), *in* John Ritchie, REPORTS OF CASES DECIDED BY FRANCIS BACON 161, 161–64 (London 1932).

303. *Id.*

304. *Id.*

1123(b)(6) impose two respective safeguards: the exercise of equitable authority to impose third-party releases must be "necessary" and "appropriate."[305] An "appropriate" requirement "naturally and traditionally includes consideration of all the relevant factors."[306] Indeed, a court sitting in equity is bound to "take[] all the facts into consideration, and the relative advantages and disadvantages of granting a relief which lies largely . . . in the discretion of the court."[307] The discretion of the court in assessing the particular facts and relationships giving rise to nonconsensual third-party releases determines whether such a provision is "necessary" and "appropriate" in the case before it. Thus, the Second Circuit's multi-factor test embodies a reasonable manner of assessing the validity of any such provision.[308]

A bankruptcy court should consequently lay out a detailed factual record assessing: (1) the identity of interests between debtors and released parties; (2) factual and legal overlap between claims against debtors and settled third-party claims; (3) the essentiality of the releases to the plan of reorganization; (4) the scope of the releases; (5) the contributions of the released parties to the plan of reorganization; (6) the magnitude by which creditors approve of the plan of reorganization; and (7) fairness in the payment of claims under the plan of reorganization.[309] An eighth factor should be added assessing the notice provided by the bankruptcy court to the creditors whose claims would be discharged, so as to ensure the constitutional "minimum" of "notice and opportunity for hearing appropriate to the nature of the case" are met.[310] And since the resolution of these third-party claims are "non-core" proceedings of the bankruptcy court,[311] requiring a district court to review the bankruptcy court's "proposed finds of fact

305. *See* 11 U.S.C. § 105(a) ("The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [Title 11]."); 11 U.S.C. § 1123(b)(6) (stating a plan may "include any other appropriate provision not inconsistent with the applicable provisions of [Title 11]").

306. Michigan v. EPA, 576 U.S. 743, 752 (2015) (internal quotation marks omitted).

307. Equitable Life Assur. Soc'y of U.S. v. Brown, 213 U.S. 25, 42 (1909).

308. *See* In re Purdue Pharma L.P. (*Purdue III*), 69 F.4th 45, 78–79 (2023) (describing the seven-factor test applied by the Second Circuit).

309. *Id.*

310. Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 313 (1950).

311. These are "non-core" proceedings because "the released claims at issue . . . do not stem from the bankruptcy itself, but are direct claims, arising under state law, against non-debtors held by third parties who have not sought to recover on those claims in bankruptcy, or otherwise consented to a bankruptcy court's adjudication of those claims." *Purdue III*, 69 F.4th at 68 (internal quotation marks and citations omitted).

and conclusions of law . . . for that court's de novo review and issuance of a final judgment" will impose an extra safeguard against the abuse of these releases.[312]

From a policy perspective, permitting the use of nonconsensual third-party releases ensures the purposes of a Chapter 11 reorganization may be met in the unusual circumstances which require them. Where a debtor's assets are at risk of depletion due to, for instance, indemnification obligations running to a nondebtor third-party, releasing the third-party from the indemnified claims ensures the debtor's estate can satisfy the greatest number of creditors in an equitable manner. Moreover, sensible uses of nonconsensual third-party releases would consider the exchange of the third-party's resources for release from creditors' claims, injecting a debtor's estate with additional assets for satisfaction of creditors. This preserves a form of quid pro quo such that the third-party cannot abuse the bankruptcy system to escape its claimants free and clear of any liabilities. While Petitioner paints such a framework as "a roadmap for corporations and wealthy individuals to misuse the bankruptcy system to avoid mass-tort liability,"[313] any abuse or misuse will be subject to a two-tiered process of review whereby a bankruptcy court develops a detailed factual record and weighs the facts via a multi-factor assessment, and then a district court reviews the bankruptcy court's determinations de novo.

Finally, the role of Congress in crafting the Bankruptcy Code to address novelties such as nonconsensual third-party will ensure that this ruling does not proliferate abusive corporate practices. Congress can easily amend the Bankruptcy Code at any time to clarify if such releases are allowed under § 105(a) and § 1123(b)(6), as well as how a bankruptcy court may impose such releases. Congress did exactly this in the case of asbestos-related bankruptcy proceedings.[314] Any decision from the Court construing the breadth of a bankruptcy court's equitable powers may be limited by Congress inserting a few words into the Bankruptcy Code. This would limit most concerns about the perpetuation of an unfair or abusive system that permits nonconsensual third-party releases.

312. Stern v. Marshall, 564 U.S. 462, 471 (2011).
313. Brief for Petitioner, *supra* note 45, at 44–45.
314. *See* 11 U.S.C. § 541(g) (creating a framework for third-party releases in asbestos-related bankruptcies).

CONCLUSION

The Court should hold that Petitioner has standing and affirm the Second Circuit's decision. The equitable powers of a bankruptcy court to satisfy creditors and reorganize the debtor are vast, but nothing within the bounds of the Bankruptcy Code precludes the use of nonconsensual third-party releases in plans of reorganization. The use of such a powerful tool is properly within the discretion of a bankruptcy court and is otherwise limited to "necessary" and "appropriate" circumstances. The Second Circuit developed a multi-factor test by which to ascertain whether nonconsensual third-party releases are "necessary" and "appropriate," which would be sufficient if it explicitly incorporated an analysis of the notice provided to creditors prior to channeling their claims to a creditors' trust arranged by the debtor and the third-party.[315] The addition of a district court's de novo review will impose another safeguard against the abuse of such releases. As nonconsensual third-party releases are critical in reorganizations involving mass torts, approving of their use will inure to the benefit of creditors and debtors undergoing Chapter 11 bankruptcy proceedings.

315. The Second Circuit did discuss the issue of notice provided to creditors, but it did not incorporate notice as a factor into its multi-factor test. *See Purdue III*, 69 F.4th at 82–83 (discussing notice); *id.* at 78–82 (setting forth and applying the Second Circuit's multi-factor test).