SUPREME COURT
OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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WILLIAM K. HARRINGTON,)

UNITED STATES TRUSTEE, REGION 2,)

Petitioner,)

v.) No. 23-124

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

Respondents.)

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3 WILLIAM K. HARRINGTON,)

4 UNITED STATES TRUSTEE, REGION 2,)

5 Petitioner,)

6 v.) No. 23-124

7 PURDUE PHARMA L.P., ET AL.,)

8 Respondents.)

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11 Washington, D.C.

12 Monday, December 4, 2023

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14 The above-entitled matter came on for

15 oral argument before the Supreme Court of the

16 United States at 10:12 a.m.

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1 APPEARANCES:

2 CURTIS E. GANNON, Deputy Solicitor General,

3 Department of Justice, Washington, D.C.; on behalf

4 of the Petitioner.

5 GREGORY G. GARRE, ESQUIRE, Washington, D.C.; on behalf

6 of Respondents Purdue Pharma L.P., et al.

7 PRATIK A. SHAH, ESQUIRE, Washington, D.C.; on behalf

8 of Respondents The Official Committee of Unsecured

9 Creditors of Purdue Pharma L.P., et al.

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1 P R O C E E D I N G S

2 (10:12 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear

4 argument this morning in Case 23-124, Harrington

5 versus Purdue Pharma.

6 Mr. Gannon.

7 ORAL ARGUMENT OF CURTIS E. GANNON

8 ON BEHALF OF THE PETITIONER

9 MR. GANNON: Mr. Chief Justice, and

10 may it please the Court.

11 The court of appeals approved a

12 Chapter 11 reorganization plan that will release

13 claims that Purdue Pharma's creditors have

14 against other nondebtors, principally, the

15 Sackler family members who took billions of

16 dollars from Purdue in the years before Purdue's

17 bankruptcy but have not filed for bankruptcy

18 protection themselves and have made only a

19 portion of their assets available to the estate

20 in Purdue's bankruptcy.

21 The court of appeals found authority

22 for that release in a catchall provision of

23 Chapter 11. Section 1123(b)(6) says a plan may

24 include any other appropriate provision not

25 inconsistent with the applicable provisions of

1 this title.
2 But this release goes beyond what the
3 statute authorizes as construed in its context,
4 and it also conflicts with the basic nuts and
5 bolts of the Bankruptcy Code's comprehensive
6 scheme. It permits the Sacklers to decide how
7 much they're going to contribute. It grants the
8 Sacklers the functional equivalent of a
9 discharge, what they might get if they
10 themselves were in bankruptcy, though even such
11 a discharge would not extend, as this one does,
12 to claims involving fraud and willful misconduct
13 and even though Section 524(e) expressly
14 provides that the discharge of a debtor does not
15 affect the liability of any other entity.
16 This release extinguishes personal
17 property rights, the creditors' state law chosen
18 said action, that do not belong to the
19 bankruptcy estate. That result is not supported
20 by any historical analogue in equity, and it
21 raises significant constitutional questions that
22 should be avoided in the absence of a clear
23 command from Congress.
24 This Court should hold that
25 nonconsensual third-party releases are not

1 authorized by the Bankruptcy Code.
2 I welcome the Court's questions.
3 JUSTICE THOMAS: Mr. Garre, under your
4 reading of these provisions of the Bankruptcy
5 Code, are consensual agreements or releases
6 acceptable?
7 MR. GANNON: We do think consensual
8 releases are acceptable.
9 JUSTICE THOMAS: What's the
10 difference -- on what provision in the code do
11 you rely for that?
12 MR. GANNON: We don't think there
13 needs to be authority in the code for that
14 because the authority for the release is coming
15 from the parties' agreement. There's no need to
16 use a bankruptcy power to forcibly resolve
17 claims that don't actually belong to the estate
18 or seek estate property, and -- and there
19 wouldn't be a need for an injunction at that
20 point.
21 JUSTICE THOMAS: So you're saying that
22 the mere fact that they consent gives the
23 bankruptcy court authority?
24 MR. GANNON: No -- well, we are saying
25 that the bankruptcy court can -- can acknowledge

1 the parties' agreement, but we're -- whether --
2 whether that goes in the plan I think is an
3 administrative question there. The force of the
4 release is coming from the parties' agreement.
5 JUSTICE THOMAS: Conceptually, though,
6 what's the difference between a consensual and a
7 nonconsensual release?
8 MR. GANNON: Conceptually, the
9 difference is that the party is surrendering its
10 property right with its consent, and, therefore,
11 it doesn't present the same problems that we
12 have with a nonconsensual release.
13 JUSTICE THOMAS: Well, I can see that
14 from a due process standpoint, but from the
15 standpoint of the bank -- bankruptcy court
16 resolving that, I don't see what the difference
17 is.
18 MR. GANNON: Well, the difference is
19 that, as I said at the beginning of this answer,
20 you don't need the forcible authority of the
21 Bankruptcy Code or the bankruptcy court to
22 extinguish the property right there. It's been
23 extinguished by virtue of the agreement of the
24 parties. And so, if the parties have agreed
25 that -- that -- that this is the terms of the

1 agreement, the plan may be contingent upon that
2 side agreement, but that doesn't mean that the
3 bankruptcy court needs to give its imprimatur to
4 that agreement in order for it to be
5 enforceable. It's already separately
6 enforceable.
7 JUSTICE THOMAS: Well, finally, the --
8 under (b)(6) -- (b)(6) seems pretty broad. How
9 do you -- how would you narrow that to your --
10 to reach your conclusion?
11 MR. GANNON: Well, we think that you
12 should construe it in context, and we think it's
13 important that the enumerated provisions at the
14 beginning of (b) are all limited to what this
15 Court has repeatedly said the Bankruptcy Code is
16 about, which is the relationship between
17 creditors and debtors.
18 If you look at the enumerated
19 provisions, (b)(2) talks about assumption,
20 rejection, and assignment of executory contracts
21 and leases of the debtor. (b)(3)(A), which is
22 particularly important here, talks about the
23 settlement of claims or interests belonging to
24 the debtor or to the estate. (b)(4) talks about
25 sale of property of the estate. And so, in

1 context, we think that it makes sense that, if
2 you can settle claims of the estate, it doesn't
3 mean that you can settle claims that are not of
4 the estate.
5 And we point out that this is
6 inconsistent with many other provisions in the
7 code. It's inconsistent with the scope of a
8 discharge with respect to who can get the
9 discharge and what can be discharged. We cite
10 multiple provisions that get to that. It's
11 inconsistent with the idea that the debtor's
12 supposed to be contributing all of its assets
13 with a, you know, a handful of exemptions to be
14 property of the estate, and that's not what the
15 Sacklers are doing here.
16 JUSTICE KAVANAUGH: Your --
17 CHIEF JUSTICE ROBERTS: Counsel, the
18 argument that you just described, which was the
19 same one you began with, which is you have a
20 series of provisions focused on particular
21 issues that arise in the context of the
22 bankruptcy and then you have a general catchall
23 talking about appropriate provisions not
24 inconsistent, it seems to me that that's a
25 fairly clear case for the application of what is

1 called our major questions doctrine.
2 In other words, whether or not the
3 bankruptcy court can reach beyond the bankruptcy
4 to bind people who are neither creditors nor
5 debtors in the bankruptcy on the basis of not
6 only -- it -- sort of -- you know, it's (b)(6),
7 after -- (1) through (5) are fairly focused, and
8 this one's sort of a general catchall, which
9 others are trying to -- to seek broad authority.
10 Why -- is there a reason you didn't
11 cite any of those precedents?
12 MR. GANNON: Well, I -- we don't think
13 that you need to look at it in those terms. If
14 you look at Czyzewski, the Court just used
15 regular principles of statutory construction.
16 It did cite the principle that -- that we don't
17 think that Congress hides elephants in mouse
18 holes. And so, to the extent that your impulse
19 is getting at that issue, we tend to agree with
20 it.
21 We think that this is a catchall
22 provision that needs to be construed in context,
23 and we think that this is more inconsistent with
24 other provisions in the code than the ones that
25 the Court -- than the -- than the adventures

1 that the Court disapproved --
2 CHIEF JUSTICE ROBERTS: Should we --
3 MR. GANNON: -- in cases like
4 Czyzewski and RadLAX.
5 CHIEF JUSTICE ROBERTS: -- should we
6 address or, in your view, is that appropriate to
7 address that issue in the context of the
8 precedents?
9 MR. GANNON: Well, I -- I -- I -- I'm
10 not going to --
11 CHIEF JUSTICE ROBERTS: Or -- or is it
12 appropriate for you to challenge your -- your
13 adversary's position on that basis?
14 MR. GANNON: Well, I -- I'm not going
15 to deny that this is a big deal for bankruptcy,
16 but the reason we think that we win is because
17 this departs from the Bankruptcy Code, not
18 because we think that it's of such inherent
19 significance that only Congress needs to be the
20 one to address it.
21 We think that, if Congress had a
22 catchall provision that were broad enough to
23 permit something like this, that may be okay.
24 We don't think we need that in this instance.
25 JUSTICE KAVANAUGH: Well, the --

1 MR. GANNON: We think that Czyzewski
2 shows us that you can -- you can get there on
3 regular statutory construction principles that
4 -- that don't deal with the -- with the
5 questions that the Court has been in -- using in
6 the major questions doctrine in its more recent
7 cases.
8 JUSTICE ALITO: But don't you think
9 that this is the sort of problem that should be
10 addressed by somebody, either by Congress or by
11 this Court? As a practical matter, let's
12 consider what's involved here.
13 As I understand it, the Sacklers, the
14 bankruptcy court, the creditors, Purdue, and
15 just about everybody else in this litigation
16 thinks that the Sacklers' funds in spendthrift
17 trusts overseas are unreachable. Do you agree
18 with that? And, if you do agree with that, is
19 this the best deal that's available for the
20 creditors?
21 MR. GANNON: Well, I -- I -- I don't
22 think we have a reason to think that spendthrift
23 trusts overseas might be unreachable. I do
24 think that the Sacklers think that they are --
25 are at -- at risk, and that's why they've

1 offered up $6 billion here. And I think, to the
2 extent that the other side is saying this is the
3 best possible deal, we think that that's a
4 reason why wide-scale consent is more likely to
5 be a viable solution here, and yet it's
6 appropriate for us as a watchdog for the
7 bankruptcy system to say that the court can't
8 exceed its statutory authority here and it can't
9 simply redistribute others' private property
10 rights because we think that that's the best
11 deal available and it would serve the greatest
12 good for the greatest number.
13 JUSTICE ALITO: You think they are
14 reachable?
15 MR. GANNON: I certainly think that --
16 JUSTICE ALITO: Or they may be
17 reachable?
18 MR. GANNON: -- that spendthrift -- I
19 think that the spendthrift trust assets in the
20 United States are reachable, but I think that
21 would be something that would be -- could be
22 explored if there were a bankruptcy with the
23 Sacklers.
24 But I think that it's important to
25 recognize here that $4.2 billion was the last

1 best possible deal when we were before the
2 bankruptcy court, and they said that that's --
3 that's take it or leave it, $4.2 billion is what
4 you get. We need a nonconsensual release in
5 order to get it.
6 But then, when the district court went
7 the other way, all of a sudden, they were able
8 to produce 39 percent more money, 1.675 extra
9 billion dollars.
10 JUSTICE ALITO: So what if a bank --
11 JUSTICE SOTOMAYOR: What does consent
12 -- I -- I'm sorry.
13 JUSTICE ALITO: Just one more
14 follow-up. What if a bankruptcy court were
15 faced with a situation where funds like this are
16 not reachable? Are -- you're saying that the --
17 the bankruptcy court is powerless to do
18 anything?
19 MR. GANNON: Well, I -- I am saying
20 that to the extent that we're talking about
21 property that is not property of the estate, it
22 is beyond what could be obtained in a fraudulent
23 conveyance action that the estate has, then --
24 then that's -- that's something that the
25 bankruptcy court can't dispose of. But, you

1 know, we think that that principle applies on
2 both sides of the deal.
3 If -- if the fraudulent conveyance
4 claims could reach those assets, they could be
5 brought in forcibly through the bankruptcy
6 procedure. To the extent that the Sacklers want
7 to have some of the benefits of bankruptcy
8 without fully participating, we think that they
9 need to get consent.
10 JUSTICE SOTOMAYOR: Counsel, what does
11 consent look like? I've been trying to imagine
12 that in a case like this. You -- you have the
13 states and so they could consent. They're an
14 identified party. But there's, I don't know,
15 thousands, if not hundreds of thousands, maybe
16 millions of personal injury claims.
17 Is an opt-out consent? How do you get
18 it?
19 MR. GANNON: Well, our -- our -- our
20 position, the U.S. Trustee's position, has been
21 that opt-in consents are necessary for the type
22 of independent force waiver of property rights
23 that I was discussing with Justice Thomas.
24 JUSTICE SOTOMAYOR: But not opt-out --
25 not opt-out provisions.

1 MR. GANNON: Not opt-out. I think
2 that those may be different with respect to the
3 constitutional concerns. But, with respect to
4 the question of -- of establishing that somebody
5 has actually waived their property rights here,
6 we've said opt-in is required. We think that
7 there should be affirmative consent. Of course,
8 here, there isn't any form of consent at all,
9 and -- and so, if -- if you were to say that --
10 JUSTICE SOTOMAYOR: So, basically,
11 you're telling Justice Alito that there really
12 is no way to do this in bankruptcy right now,
13 because I don't know how an opt-in process --
14 MR. GANNON: Well, I -- I wouldn't say
15 that there is no way to do this --
16 JUSTICE SOTOMAYOR: -- would actually
17 work.
18 MR. GANNON: -- in bankruptcy, Justice
19 Sotomayor. We cite the PG&E case, which is a
20 mass tort in California arising from wildfires.
21 That came in the Ninth Circuit, which doesn't
22 permit nonconsensual releases. And that has an
23 -- an opt-in term, and that was used to resolve
24 the claim there. And so --
25 JUSTICE SOTOMAYOR: Was that one of

1 the cases where there was a promise to pay all
2 claims? There were a couple of mass tort claims
3 where there was an agreement that all claims
4 would be paid in full.
5 MR. GANNON: Well, that -- that is --
6 that --
7 JUSTICE SOTOMAYOR: That -- that's not
8 going to happen here.
9 MR. GANNON: Well, I -- I -- I don't
10 think that that's -- the other side is telling
11 us that that's not going to happen with respect
12 to the money, the claims that exist against
13 Purdue, and -- and we -- we understand that.
14 That's what bankruptcy is for.
15 If Purdue is insolvent and its money
16 isn't going to go far enough to pay off all the
17 claims, that's -- that's why the bankruptcy
18 court and the -- and its powers can be used to
19 restructure the relationship between Purdue and
20 its creditors.
21 But that doesn't mean that somebody
22 else gets to say, well, we're going to create a
23 supplemental limited fund and take advantage of
24 the same procedures. And -- and so, we think
25 this is particularly inconsistent with Section

1 524(e) of the code, which says that a discharge
2 doesn't release any other entity.
3 If you think of somebody -- if you
4 think of a -- a regular case in which there's
5 co-tortfeasors who have joint and several
6 liability, the -- the first defendant goes into
7 bankruptcy and is going to pay 10 cents on the
8 dollar. The discharge of that defendant doesn't
9 relieve the second defendant of the need to pay
10 the other 90 cents.
11 JUSTICE KAVANAUGH: Can I ask --
12 MR. GANNON: And that doesn't change
13 if -- if the second defendant says, I'll chip in
14 five cents for every dollar in the -- in
15 Defendant 1's bankruptcy.
16 JUSTICE KAVANAUGH: Can I ask,
17 Mr. Gannon, about your understanding of the term
18 "appropriate," because that seems to be the key
19 statutory term here, "appropriate," which is a
20 word that's -- that's broad.
21 And in thinking about what's
22 appropriate, we have 30 years of bankruptcy
23 court practice that have approved releases of
24 this kind in certain narrow circumstances where
25 the parties are, for example, as here, officers

1 or directors of the company, where they're
2 indemnified, meaning that the claims against
3 them are in effect claims against the company,
4 where the -- where the directors and officers
5 have made contributions for distribution to the
6 creditors, and where -- you know, your -- your
7 opening never mentioned the opioid victims. The
8 opioid victims and their families overwhelmingly
9 approve this plan because they think it will
10 ensure prompt pay -- payment.
11 So, in those circumstances, those
12 narrow circumstances, bankruptcy courts for 30
13 years have been approving plans like this, and I
14 guess I'm trying to figure out, with all that
15 practice under the judiciary's belt, why we
16 would say it's categorically inappropriate when
17 the statutory term "appropriate" is one that
18 takes account usually of all the facts and
19 circumstances.
20 MR. GANNON: Well, I -- I take the
21 point that "appropriate" can -- can do a lot of
22 work there. We think that it's not appropriate
23 to simply take property rights that -- that
24 aren't accessible to the estate in bankruptcy.
25 And you mentioned the indemnification

1 agreements, the directors and officers. This
2 release sweeps much more broadly than that. It
3 isn't just people who are directors and
4 officers. They may be the main ones who need
5 the release, who would have the most liability.
6 But the indemnification claims don't cover
7 everything in here.
8 And there's an exception in the
9 indemnification agreement for good faith. So
10 it's not even clear that this indemnification
11 agreement --
12 JUSTICE KAVANAUGH: But I guess --
13 MR. GANNON: -- was going to be
14 enforceable in the context of this case.
15 JUSTICE KAVANAUGH: -- that's a
16 fair -- that's a fair point. But, more broadly,
17 I think what the opioid victims and their
18 families are saying is you, the federal
19 government, with no stake in this at all, are
20 coming in and telling the families, no, we're
21 not going to give you payment, prompt payment,
22 for what's happened to your family, and we're
23 not going to -- your -- the federal government's
24 not going to allow all this money go to the
25 states for prevention programs to prevent future

1 overdoses and future victims and in exchange,
2 really, for this somewhat theoretical idea that
3 they'll be able to recover money down the road
4 from the Sacklers themselves.
5 So I -- I guess, when thinking about
6 the term "appropriate," I guess I'm not sure why
7 we should cast aside that concern so readily.
8 MR. GANNON: I -- I -- I don't think
9 we're casting it aside. I think we are saying
10 that there are --
11 JUSTICE KAVANAUGH: Well, why are they
12 all opposed --
13 MR. GANNON: -- 2600 creditors --
14 personal injury victims who objected to this
15 plan, and we do think that --
16 JUSTICE KAGAN: I mean, it's 3
17 percent. You know, what if it were 1 percent,
18 .1 percent? And your -- your position would
19 still say, well, no, the Trustee can come in
20 here and blow up the deal and should blow up the
21 deal.
22 MR. GANNON: I -- our position is that
23 if you can get 99 percent, you're going to have
24 a deal. There -- there are going to be a
25 handful of outlying claims that you couldn't get

1 covered by consent.

2 JUSTICE KAGAN: That's about where we

3 are --

4 MR. GANNON: If they're small claims

5 --

6 JUSTICE KAGAN: -- Mr. Gannon.

7 MR. GANNON: -- if they're small

8 claims --

9 JUSTICE KAGAN: It's overwhelming, the

10 support for this deal, and among people who have

11 no love for the Sacklers, among people who think

12 that the Sacklers are pretty much the worst

13 people on earth, they've negotiated a deal which

14 they think is the best that they can get.

15 MR. GANNON: They -- they have

16 negotiated that deal. They think it's the best

17 they can get. The deal has evolved even over

18 the course of this case. It has gotten better,

19 notwithstanding the fact that they thought they

20 had the best deal --

21 JUSTICE KAGAN: Well, are you

22 contesting --

23 MR. GANNON: -- when they were in

24 bankruptcy court.

25 JUSTICE KAGAN: -- when you were

1 talking with Justice Alito, are you contesting
2 the finding that this provision was necessary
3 for the reorganization?
4 MR. GANNON: Well, I -- I -- I think
5 that that was falsified by the fact that it got
6 renegotiated as soon as the district court
7 ruled. And our point is that the -- we're not
8 casting aside the 3 percent. We're saying that,
9 if there are a handful of small outlying claims,
10 the Sacklers can deal with those on the side.
11 They can get consent that takes care of
12 everything else.
13 If there happen to be some large
14 outstanding claims for people who don't want to
15 consent, then we think it's a much bigger deal
16 then that that property right is being taken and
17 extinguished without those parties' consent.
18 JUSTICE KAGAN: I mean, your position
19 rests on a lot of sort of hifalutin principles
20 of bankruptcy law. But another hifalutin
21 principle of bankruptcy law is you're supposed
22 to maximize the estate, and you're supposed to
23 do things that will effectuate successful
24 reorganizations.
25 And it seems as though the federal

1 government is standing in the way of that as
2 against the huge, huge, huge majority of
3 claimants who have decided that, if this
4 provision goes under, they're going to end up
5 with nothing.
6 MR. GANNON: Well, we hope and expect
7 that there would still be a deal if this Court
8 says that consensual releases are okay, so we
9 don't think that they are likely to get nothing.
10 We do think that even if this had to go through
11 bankruptcy, that there -- the fraudulent
12 conveyance claims have value.
13 There's a reason why the Sacklers have
14 already been willing to offer $6 billion, and we
15 see this in other cases. In the Arrow case with
16 3M, when they were in bankruptcy and they wanted
17 a nonconsensual release, they were willing to
18 offer a billion dollars. When bankruptcy
19 fizzled, within two months, they negotiated a
20 settlement where they were paying up to $4.8
21 billion or more.
22 JUSTICE BARRETT: Mr. Gannon --
23 MR. GANNON: And --
24 JUSTICE BARRETT: Oh, sorry. Please
25 finish.

1 MR. GANNON: That's it.
2 JUSTICE BARRETT: I -- I was just
3 going to ask you what the United States'
4 position is going to be. Let's say that you win
5 and it goes back down. The Sacklers withdraw
6 their offer to contribute all these billions of
7 dollars. You have a superpriority claim that
8 would deplete most of what's on the table based
9 on Purdue's assets right now.
10 Would you assert that claim, or would
11 you withdraw that and allow the opioid victims
12 to recover some -- what's left in Purdue's
13 estate?
14 MR. GANNON: Right now, that claim is
15 part of the criminal guilty plea. It's a
16 forfeiture, it's a criminal forfeiture judgment
17 for $2 billion, which we've agreed to stand back
18 and allow the states and other governments to
19 take 1.775 billion of it if -- if it goes
20 forward. But this is contingent on the guilty
21 plea, which is contingent on the -- on the
22 confirmation of the plan.
23 And so Purdue, if the plan doesn't get
24 confirmed, doesn't need to go through with the
25 guilty plea. And we might not have the $2

1 billion judgment. And so we think that -- that
2 -- that this would be part of a negotiation on
3 remand to the extent that consent is possible.
4 Until there's plan confirmation, we don't have a
5 -- a finalization of the sentence and we don't
6 have the $2 billion judgment.
7 CHIEF JUSTICE ROBERTS: I don't --
8 JUSTICE JACKSON: Mr. --
9 JUSTICE KAVANAUGH: What if there's
10 just liquidation of the company, which is what
11 the other side raises the specter of? So
12 there's liquidation of a billion. There's no
13 contribution. And then everyone's left with a
14 lottery ticket to try to get something --
15 MR. GANNON: Well, I -- I --
16 JUSTICE KAVANAUGH: -- in litigation
17 years from now.
18 MR. GANNON: -- as I said before, I do
19 think that there is value to the fraudulent
20 conveyance claim that the estate has against the
21 Sacklers. It may not get to the spendthrift
22 trust overseas that Justice Alito was asking
23 about at the beginning.
24 But I also think that, you know, the
25 Sacklers are saying that they want global peace,

1 but I don't think that that means that they
2 wouldn't pay a lot for 97.5 percent peace.
3 And -- and so I -- I do think that
4 there's a very good chance that there is a deal
5 on the other side to this that this Court says
6 --
7 JUSTICE KAGAN: So do you --
8 CHIEF JUSTICE ROBERTS: Well, I don't
9 understand how -- maybe I'm misunderstanding
10 your -- your dialogue with Justice Kagan, but
11 are you saying that you shouldn't allow this
12 because there's going to be a better deal down
13 the road?
14 MR. GANNON: That is not what we're
15 saying. We're saying you shouldn't allow this
16 because it takes property that is not part of
17 the estate and disposes it as part of the
18 bankruptcy. And I'm saying to the argument that
19 this is necessary and bankruptcy courts should
20 just do the best they can, that we're not even
21 persuaded that this is necessarily going to be
22 the best deal because it --
23 CHIEF JUSTICE ROBERTS: Well, that's
24 what I'm wondering. You say you -- so if it's
25 -- your point is it's not going to be the best

1 deal, it might be a better deal.
2 MR. GANNON: Yeah, and -- but that --
3 that is a --
4 CHIEF JUSTICE ROBERTS: But, I mean,
5 your argument is -- is -- is based on a
6 principle that would apply if there were one --
7 MR. GANNON: That's --
8 CHIEF JUSTICE ROBERTS: -- remaining
9 --
10 MR. GANNON: -- that is correct,
11 Mr. Chief Justice. And I'm --
12 CHIEF JUSTICE ROBERTS: Okay. So you
13 would be here making the same argument if
14 everything was as -- the -- as way it is except
15 that in terms of the claimants who do not want
16 to be bound by the order of the bankruptcy
17 court, there was just one of them.
18 MR. GANNON: I would say that to the
19 extent that their claim is not property of the
20 estate, it can't be forcibly extinguished by the
21 bankruptcy court.
22 JUSTICE JACKSON: And, Mr. Gannon --
23 MR. GANNON: And if that's an outlier
24 --
25 JUSTICE JACKSON: Sorry. Go ahead.

1 MR. GANNON: And if that's an outlying
2 claim that couldn't be included in a consensual
3 agreement, then it can presumably be handled on
4 the side. And if -- if it turns out that there
5 are too many outlying claims and the Sacklers
6 end up being insolvent because of this, then,
7 you know, bankruptcy for them might be the
8 answer to that.
9 But, right now, a consensual -- a
10 nonconsensual deal or a single bankruptcy
11 proceeding just might not be the answer to this
12 situation.
13 JUSTICE JACKSON: And I had understood
14 that the reason why you're saying that is
15 because you're not necessarily hanging your
16 argument on the "appropriate" language of the
17 statute, but, instead, you're saying that it's
18 inconsistent with the Bankruptcy Code to allow
19 for this process. Am I right about that?
20 I mean, Justice Kavanaugh brought up
21 appropriateness, and I'm just trying to
22 understand if that's the hook that the
23 government is resting on or the government is
24 making the argument about inconsistency.
25 MR. GANNON: I think we're making both

1 arguments. We do think that this is
2 inconsistent with several provisions of the
3 code, the ones that talk about the scope of a
4 discharge, who's eligible for it, whether it
5 could include things like claims for fraud and
6 willful misconduct, whether you have to provide
7 all of your assets, because we do think that
8 this release with the injunction is the
9 equivalent -- the functional equivalent of a
10 discharge for the Sacklers, that that makes it
11 inconsistent with the way the Bankruptcy Code
12 operates.
13 JUSTICE JACKSON: Would those specific
14 --
15 MR. GANNON: I would also say that
16 that may make it inappropriate, and it's not
17 appropriate in light of the colloquy I had with
18 the Chief Justice about (b)(1) through (b)(6).
19 We just don't think that this is the sort of
20 thing that would be living in that catchall
21 provision at the end of that bit.
22 JUSTICE JACKSON: Right. I guess I'm
23 just a little worried about hanging it on
24 "appropriate" because I'm trying to understand
25 the standard by which you are evaluating that.

1 I mean, if we're just talking about
2 "appropriate" in the sort of general sense of
3 people agree with it and many people would like
4 it to happen, then I guess you don't get
5 "appropriate."
6 But, if we're talking -- if we're
7 looking at "appropriate" and "inconsistent"
8 relative to the overall purposes of the
9 Bankruptcy Code, the various provisions that
10 you've pointed out, then I suspect you do.
11 MR. GANNON: Yeah. And -- and I -- I
12 -- I think that we could win under either of
13 those rationales, and I think that in cases like
14 Energy Resources, the Court reached its
15 conclusion under the -- under -- when this
16 provision was located under (b)(5) by just
17 saying that -- that that -- that instance was
18 something where the provision was consistent
19 with the traditional understanding and it was
20 part of the bankruptcy court's authority to
21 modify creditor/debtor relationships.
22 And we don't have that here, and --
23 and so that's why we think that it doesn't fit
24 within either half of -- of the catchall
25 provision.

1 JUSTICE JACKSON: Can you speak to the
2 Respondents' suggestion that the only way that
3 something is inconsistent with the Bankruptcy
4 Code is if it directly contradicts a provision
5 of the code? Is that the government's
6 understanding of "inconsistent"?
7 MR. GANNON: No, and I don't think
8 that that was the way the Court had construed
9 other cases, like Czyzewski and RadLAX, where
10 the -- where the Court looked at provisions,
11 looked at things that bankruptcy courts were
12 trying to do, and said now this is something
13 that isn't expressly prohibited by any provision
14 of the code, but that doesn't mean that it isn't
15 sufficiently inconsistent with other parts of
16 the code that it -- that it's permissible.
17 And so, in RadLAX, the inability to
18 prevent a secured creditor from using credit
19 bidding when there was an auction for assets was
20 -- was permitted under -- you couldn't prevent a
21 creditor from using credit bidding in an auction
22 under one provision. And the Court said that
23 that means that you can't use another provision
24 to allow that.
25 And so, here, we would draw a similar

1 inference from the idea that in (b)(3)(A), you
2 can settle claims that belong to the estate.
3 That doesn't mean that you can settle claims
4 that don't belong to the estate.
5 CHIEF JUSTICE ROBERTS: Thank you,
6 counsel.
7 Justice Thomas?
8 JUSTICE THOMAS: Mr. Gannon, once
9 again, the -- just taking the position that
10 whether or not the analysis is consistent or
11 inconsistent with the code, would you again tell
12 me why a consensual agreement, a release, is
13 consistent with the code?
14 MR. GANNON: We think that it's
15 consistent because it is not extinguishing a
16 property right without the property owner's
17 consent. We think that all over the law, that
18 consent is a basis for parties to agree to waive
19 their rights. We cite the Lawyer against
20 Department of Justice case for that.
21 And because the court then does not
22 need to use the powers of the Bankruptcy Code to
23 extinguish the property right, that -- that
24 doesn't need to be part of the plan. The plan
25 doesn't need to say, I am hereby releasing this

1 claim. The claim has already been released by
2 the force of the parties' contractual agreement.
3 There doesn't need to be an injunction that
4 says, you can't enforce that claim that you
5 already waived in a contract because that
6 contract is going to be separately enforceable.
7 And so the -- the -- so the consensual
8 release doesn't need the force of the Bankruptcy
9 Code and the bankruptcy court in order to take
10 effect.
11 JUSTICE THOMAS: And what exactly is
12 the interest of the Trustee in doing that, in
13 undoing this?
14 MR. GANNON: Well, as I said before,
15 we think that we do have a watchdog role. And
16 I'm -- I'm not sure if you're asking a standing
17 question or --
18 JUSTICE THOMAS: Yeah. Well, in a
19 sense, I am because it seems as though -- and --
20 and there's been some discussion about that
21 virtually -- that the vast majority or
22 overwhelming majority of those who have claims
23 are interested in having this resolved.
24 But the Trustee has a separate role,
25 and I'm just wondering what exactly is that role

1 and why is it that you're able to come in and
2 undo something that has such overwhelming
3 agreement.
4 MR. GANNON: Well, we're able to come
5 in because Congress specifically said under
6 Section 307 that the Trustee can raise and
7 appear -- can -- can raise and may appear and be
8 heard on any issue in a case under the
9 Bankruptcy Code and be --
10 JUSTICE THOMAS: But, normally, you
11 see someone like the Attorney General has
12 separate authority to -- to regulate, specific
13 to enforce certain provisions, and it doesn't
14 seem that you have that here.
15 MR. GANNON: Well, we -- the Trustee
16 has been given this watchdog role and has been
17 told by Congress to participate in these
18 proceedings. The Trustee cannot initiate a
19 Chapter 11 proceeding but is expressly
20 authorized to raise issues in a Chapter 11
21 proceeding. And the Trustee does this in
22 hundreds of cases a year. We cite a statistic
23 in our opening brief.
24 And we were a party in -- in the
25 district court -- in the bankruptcy court, in

1 the district court, in the court of appeals, and
2 we -- we are doing that with Congress's
3 imprimatur that it is the Trustee's watchdog
4 role that helps ensure that there's a
5 disinterested observer who is able to ensure
6 that the bankruptcy courts are applying the
7 Bankruptcy Code appropriately. And so our
8 interest is in having the bankruptcy law as a
9 force -- enforced appropriately.
10 CHIEF JUSTICE ROBERTS: Justice Alito?
11 JUSTICE ALITO: You argue that we
12 should adopt your interpretation because it
13 avoids a difficult constitutional question. Are
14 you willing to express a view about whether this
15 is constitutional?
16 MR. GANNON: Well, I -- I -- I think
17 that the constitutional concerns, we haven't
18 raised it in this Court as a separate
19 constitutional question because we think that
20 constitutional avoidance is sufficient to get us
21 there. I -- but I think that the fact that
22 there's not even an opt-out release means that
23 there's a due process problem under -- under the
24 way this Court has dealt with class action cases
25 where the Court has said that plaintiffs have a

1 due process right to remove themself with --
2 from a class.
3 And there is enforceable
4 extinguishment of property rights. And the
5 other side says there's a hearing with respect
6 to that, but it's a hearing that didn't even
7 consider the merits of the claim. It
8 specifically said that you get nothing. That
9 doesn't even matter because I think that it's
10 just better enough that you're getting, you
11 know, more for the other claim.
12 And, as I said before, we don't think
13 that that's the right analysis if you had joint
14 and several liability for co-tortfeasors. It
15 certainly can't be the analysis when you have
16 claims that don't even overlap as much as those
17 claims do.
18 JUSTICE ALITO: Thank you.
19 CHIEF JUSTICE ROBERTS: Justice
20 Sotomayor?
21 JUSTICE SOTOMAYOR: We have a separate
22 petition in Highland Capital, and the amici
23 briefs argue that or suggest that your argument
24 here about nonconsensual third-party releases
25 affects the question of exculpation clauses for

1 professional services, firms that -- for firms
2 that work on a bankruptcy. Does it?
3 MR. GANNON: There --
4 JUSTICE SOTOMAYOR: And how do you get
5 around -- I -- I -- I don't -- I know you're not
6 arguing that case, but you are arguing that
7 third-party releases -- it appears you want a
8 broad ruling that all third-party releases,
9 unless they're consensual, are not permitted.
10 So how do we write this not to affect
11 that case or any others that have to do --
12 MR. GANNON: Well, yeah. We -- we
13 have responded to the Court's request for the
14 views of the Solicitor General in that
15 particular case and acknowledge that there's a
16 great deal of overlap between the question here
17 and the question in that case involving
18 exculpation provisions.
19 And so I -- I take the point in the
20 amicus briefs that third-party releases come in
21 lots of different flavors. As we've already
22 made it clear today, that we do think that
23 consensual ones we think are okay, even though
24 nonconsensual ones are not.
25 And we think that derivative claims

1 are okay, direct claims are not, because the
2 derivative claims are property of the estate.
3 Exculpation clauses, depending on how
4 they're written, may overlap a lot with this.
5 We think that there is -- there -- there are
6 similarities in the legal analysis.
7 The Court would go about the same type
8 of question, asking itself whether this is
9 something that is consistent with the text's
10 structure and traditional equitable authority
11 that bankruptcy courts had. There's also a
12 common law immunity doctrine floating around in
13 the context of exculpation clauses.
14 I think the Court could say you're
15 resolving a dispute like this, this is waiving,
16 you know, prepetition claims that are property
17 that is not property of the estate. That's --
18 that's the -- this most egregious form of a
19 nonconsensual release and leave that for another
20 day if you need to.
21 CHIEF JUSTICE ROBERTS: Justice Kagan?
22 JUSTICE KAGAN: Mr. Gannon, I take it
23 there's no amount that the Sacklers could have
24 put on the table that would alter your position,
25 is that right?

1 MR. GANNON: I -- I think, if they put
2 enough on the table to get people to consent and
3 have an agreement --
4 JUSTICE KAGAN: No, no, no, but, you
5 know --
6 MR. GANNON: -- but, here, I think
7 that that's right.
8 JUSTICE KAGAN: Yes.
9 MR. GANNON: This is not about whether
10 they --
11 JUSTICE KAGAN: Because the reason I
12 ask is one of the stronger arguments you make in
13 your brief is that this upsets the basic quid --
14 quid pro quo of bankruptcy law, which is you put
15 all your assets on the table and then you get a
16 discharge.
17 But suppose, in fact, that the
18 Sacklers had put all their assets on the table.
19 Why shouldn't that change the analysis under
20 your own theory?
21 MR. GANNON: Well, I -- I -- I suppose
22 that if -- if it really is that, and we know
23 that it's everything, even though we haven't had
24 all the safeguards of the bankruptcy process,
25 then -- then that would feel different.

1 I -- I still think that it's important
2 that they need to go through the same process
3 and -- and be subject -- that then they would
4 get the release. But I -- I think, if they were
5 willing to do that, then maybe they get consent.
6 JUSTICE KAGAN: Even -- even --
7 MR. GANNON: I'm not sure why --
8 JUSTICE KAGAN: Well --
9 MR. GANNON: -- they wouldn't want to
10 be in bankruptcy if they're really giving up --
11 JUSTICE KAGAN: I mean, it's --
12 MR. GANNON: -- all of their assets.
13 JUSTICE KAGAN: -- it's possibly, you
14 know, really a truly hypothetical hypothetical,
15 but -- but it seems that your basic position
16 would still apply if there was one kind of
17 nut-case holdout, and -- and -- and so I guess
18 I'm wondering why one nut-case holdout should
19 hold up something like this.
20 MR. GANNON: Well, and our -- our view
21 is that if -- if that person is making a claim
22 for an amount of money that they're never going
23 to be able to get, then they should go to trial
24 on that. They should settle it. They should do
25 whatever they need to do in order to deal with

1 that claim on the side.

2 If it's a significant claim and

3 somebody doesn't want to waive it, we think that

4 you don't have to consider that person a nut

5 case to say that it's their right to decide

6 whether or not they get to waive their personal

7 property rights.

8 JUSTICE KAGAN: Thank you.

9 CHIEF JUSTICE ROBERTS: Justice

10 Gorsuch?

11 JUSTICE GORSUCH: Even if they put all

12 their assets on the table, they still wouldn't

13 get a release for fraud, right?

14 MR. GANNON: That -- that's -- not if

15 somebody were willing to pursue that claim after

16 the bankruptcy.

17 JUSTICE GORSUCH: Right, right.

18 MR. GANNON: That's correct, Justice

19 Gorsuch.

20 JUSTICE GORSUCH: And so that their

21 assets not just in the past but in the future

22 would be potentially attachable by creditors,

23 correct?

24 MR. GANNON: That is absolutely

25 correct, Justice Gorsuch.

1 JUSTICE GORSUCH: Yeah.
2 MR. GANNON: And that may well be a
3 reason why it would still seem quite in --
4 inconsistent with the Bankruptcy Code for that
5 deal to be approved.
6 JUSTICE GORSUCH: Right. And then
7 your discussion with Justice Alito about
8 constitutional concerns, you mentioned due
9 process.
10 How about the Seventh Amendment, which
11 you just briefly alluded to in response to
12 Justice Kagan as well?
13 MR. GANNON: We've -- we've raised the
14 Seventh Amendment as a statutory argument in
15 light of the provision of Title 28 that says
16 nothing in the Bankruptcy Code will derogate
17 from that in the context of wrongful death and
18 personal injury claims. So we do think that
19 that's a significant issue here.
20 And it's notable that this plan
21 accounts for Seventh Amendment rights for people
22 who have claims against Purdue but not for those
23 who have claims against the Sacklers. And so
24 the amicus briefs discuss the Seventh Amendment
25 itself more -- more extensively.

1 JUSTICE GORSUCH: Yeah. I just wanted
2 to make sure you agreed with them and saw
3 nothing in them that was erroneous.
4 MR. GANNON: No, this is -- this is --
5 we think that there are private claims here that
6 the Seventh Amendment would apply to.
7 JUSTICE GORSUCH: Okay. Thank you.
8 CHIEF JUSTICE ROBERTS: Justice
9 Kavanaugh?
10 JUSTICE KAVANAUGH: Some of your
11 rhetoric as compared to your position, but some
12 of your rhetoric today has been that the
13 Sacklers just haven't put in enough and in
14 particular in your colloquy with Justice Kagan.
15 Your position's like there's no amount that they
16 could do, but your rhetoric's been they haven't
17 put in enough.
18 On that point, isn't the discovery
19 process that the bankruptcy court commissioned
20 and oversaw that was very thorough at least from
21 this perspective -- you may have critiques of it
22 -- designed to ensure that the amount
23 contributed by, in this case, the directors and
24 officers and the like is an appropriate amount
25 to increase the value of the res and therefore

1 help the ultimate creditors and victims?
2 MR. GANNON: I -- I take the point
3 that there was discovery into that. There's
4 more information about these assets than there
5 usually is for assets that aren't property of
6 the estate. I take -- I take that point.
7 Part of that was getting into the
8 question of what the value of the fraudulent
9 conveyance claims would be here. That's
10 important information that's been available to
11 the process, and the bankruptcy court had that
12 information before it.
13 But we still don't think that that's
14 the same thing as saying that the Sacklers have
15 actually made all of their assets available to
16 the estate, that that's the big distinction, is
17 that nothing in bankruptcy would let somebody
18 say, you know, I'm insolvent because I have
19 decided that only a certain portion of my assets
20 should be used to pay my debt.
21 The -- the deal isn't that.
22 JUSTICE KAVANAUGH: Right. But the --
23 MR. GANNON: You have to come in and
24 say that --
25 JUSTICE KAVANAUGH: Keep going.

1 MR. GANNON: -- to the extent that
2 things are property of the estate, this is what
3 I'm making available to satisfy claims against
4 me.
5 JUSTICE KAVANAUGH: I think the
6 problem and maybe the disconnect between you and
7 the opioid victims is you're implying or even
8 saying, oh, if you just can't -- reject this
9 plan, there's going to be more money available
10 down the road from the Sacklers.
11 And I don't think you're accounting
12 for the uncertainty of liability, first of all,
13 the uncertainty of the indemnification,
14 insurance, contribution claims, and the
15 uncertainty of recovery.
16 And so the point of this provision as
17 it's been applied for 30 years is to take into
18 account those uncertainties in thinking about
19 whether this is a appropriate settlement and
20 overall plan.
21 So what's your response to that?
22 MR. GANNON: Well, I -- I understand
23 that, and my -- my -- the main reason why what
24 you call my rhetoric today has been about how
25 they haven't put in enough has been in part in

1 response to questions about, you know, isn't
2 this the best deal. And I think that the record
3 shows that what the best deal is here depends in
4 large part on what negotiating leverage they
5 have.
6 And if the Court says that
7 nonconsensual releases aren't part of that, the
8 deal may change. I certainly take the point
9 that there's a lot of uncertainty, and all the
10 people on the other side of this table and lots
11 of other people have been involved in years of
12 conversations about what the best possible deal
13 could be.
14 JUSTICE KAVANAUGH: And the views of
15 the opioid victims and their families is -- is
16 not -- doesn't matter?
17 MR. GANNON: I'm not saying it doesn't
18 matter. I'm saying that there are --
19 JUSTICE KAVANAUGH: I think you are.
20 I think your position is saying it doesn't
21 matter.
22 MR. GANNON: Our position is saying
23 that there are other opioid victims with also
24 heart-breaking and tragic losses that are saying
25 we are not consenting to have our property

1 rights forcibly extinguished in this way. We
2 are not comfortable with being part of this
3 proceeding as you have designed it.
4 JUSTICE KAVANAUGH: One last question,
5 which is you made a distinction between
6 derivative claims and direct claims, which I
7 understand from your brief as well.
8 But I think the big theory of the
9 other side -- and I touched on this earlier --
10 is that the releases here combined with the
11 contributions to the res are helping the overall
12 res because the -- the indemnification
13 provisions would mean in essence that a suit
14 against the Sacklers would be a suit against
15 Purdue. And you -- you touched on that earlier,
16 but that's still a sticking point, so I just
17 want to make sure I have that down.
18 In other words, when they rope them
19 into this plan, in essence, they're helping to
20 protect the res because those suits would, if
21 indemnified, deplete the res.
22 MR. GANNON: Yes, I -- I -- I take the
23 point. I -- I want to do make it clear that
24 there is no doubt here that this plan does --
25 the release here does apply both to direct

1 claims and derivative claims. They're both
2 enumerated separately on page 274 --
3 JUSTICE KAVANAUGH: Right.
4 MR. GANNON: -- of the Joint Appendix.
5 And the -- the lower courts agreed about the
6 fact that there are some direct claims here.
7 The indemnification provision, as I
8 mentioned before, Justice Kavanaugh, it -- you
9 know, that's something that doesn't apply to all
10 of the claims that are at issue here. Even to
11 the extent that it does apply, there's a
12 good-faith exception, and, therefore, it may be
13 for naught.
14 Even apart from that, under Section
15 502, that it could be disallowed precisely
16 because it's contingent, or there could be
17 equitable subordination under Section 510, where
18 it could be said that this claim should stand
19 behind the claims of the victims, who should be
20 able to take before the Purdue -- before the
21 Sacklers can collect on whatever's left of their
22 indemnification claim, which will only apply to
23 some of these causes -- these claims against
24 them and -- and to the extent that the
25 good-faith exception hasn't been triggered.

1 JUSTICE KAVANAUGH: Thank you.
2 CHIEF JUSTICE ROBERTS: Justice
3 Barrett?
4 JUSTICE BARRETT: Mr. Gannon, explain
5 to me how that will work, because I had this
6 question about indemnification too, but it --
7 but it seems to me -- and maybe it's just I need
8 to get a handle on what the sequencing would be
9 here -- but let's say that the bankruptcy wraps
10 up, but because some people have not -- and --
11 and let's imagine you win. Let's imagine the
12 bankruptcy wraps up. Then people do go after
13 the Sacklers, and let's say they secure
14 judgments, and the Sacklers want to seek
15 indemnification from Purdue.
16 As I understand it, there's a division
17 of authority in the courts below about whether
18 these would be prepetition or post-petition
19 claims and so whether they would even be
20 allowed.
21 But I also am wondering, what's left
22 to get? So, if they're bringing these
23 indemnification claims, you know, and Purdue --
24 Purdue has been restructured, where are they
25 going to get money anyway? So I just don't

1 understand how it affects the res in the way
2 that the Respondents say.
3 MR. GANNON: Yeah. Frankly, I -- I'm
4 not sure where that would happen in this case,
5 in part because of the question you have about
6 whether these would be considered prepetition or
7 post-petition indemnification claims. I do
8 think that equitable subordination could still
9 be an answer here to the extent that any of them
10 were prepetition.
11 And, you know, I'm not sure how it
12 would be resolved against a reorganized Purdue
13 after the fact. If it's a post-petition claim,
14 then it -- it -- it may still be available
15 against them.
16 JUSTICE BARRETT: But what -- if it is
17 available against them, what assets are there to
18 get once Purdue is reorganized --
19 MR. GANNON: Well --
20 JUSTICE BARRETT: -- I guess is what
21 I'm saying.
22 MR. GANNON: -- I mean, I -- I think
23 they would be --
24 JUSTICE BARRETT: Not -- not much.
25 MR. GANNON: -- the assets of Purdue,

1 but I think that that's -- this is still
2 depending upon lots of other questions about how
3 much of the indemnification agree -- provision
4 applies and --
5 JUSTICE BARRETT: I understand that,
6 but I'm just saying, to the extent that they say
7 this affects the size of the res, it doesn't
8 really affect the size of the res that would be
9 distributed during the bankruptcy proceedings so
10 far as I can tell. And maybe Respondents can
11 address that when they get up.
12 MR. GANNON: May -- maybe so. I -- I
13 -- I do think that the -- the good-faith
14 exception is something that -- that plays into
15 the question of valuing how much the
16 indemnification claim would be to the extent
17 that it is a prepetition claim and it's being
18 estimated as part of the reorganization.
19 JUSTICE BARRETT: Okay. And then this
20 other question is about the ramifications of a
21 win for you. I mean, we're talking about this
22 in the particular context of the opioid
23 litigation, but, you know, this -- this question
24 about nonconsensual releases, nonconsensual
25 nondebtor releases, has come up in other

1 contexts like the Johnson & Johnson, you know,
2 talc litigation, et cetera.
3 If you win, I mean, it just seems to
4 me like this is a very complicated problem for a
5 lot of the reasons that -- you know, a lot of
6 the questions that people have been asking you
7 about, well, is this the best that we can do for
8 the victims? Lots of victims have agreed to it
9 for that reason, even though it seems like the
10 amount that these victims who have agreed to it
11 get, it's a pretty limited range.
12 But, in any event, this is a very
13 complicated problem in mass tort litigation that
14 involves bankruptcy. So what happens to those
15 other cases if you win? Does this have
16 ramifications for other victims of mass torts
17 that would be negative in cases like the
18 Johnson & Johnson litigation?
19 MR. GANNON: Well, I -- I think the
20 Johnson & Johnson issue is a slightly different
21 one. There is a brief about the --
22 JUSTICE BARRETT: The Texas two-step
23 thing? Yeah.
24 MR. GANNON: -- the so-called Texas
25 two-step there. The cases that are more on

1 point there are amicus briefs about involve the
2 Catholic Church --
3 JUSTICE BARRETT: Church.
4 MR. GANNON: -- and the Boy Scouts.
5 To the extent that a case is -- is -- there's a
6 final and nonappealable judgment, then -- then
7 that's -- that's -- that's -- that sticks. This
8 Court had addressed that in Travelers against
9 Bailey and specifically said that it was too
10 late to challenge the scope of a release
11 regardless of whether or not --
12 JUSTICE BARRETT: Well, I -- I --
13 MR. GANNON: -- it would have been
14 lawful in the first place.
15 JUSTICE BARRETT: -- I think I --
16 MR. GANNON: But your --
17 JUSTICE BARRETT: -- I haven't stated
18 my question correctly. I don't -- I don't mean
19 -- or in a way that's clear enough to you to
20 elicit the answer I want.
21 I'm not talking about the cases that
22 are actually pending. I'm saying, going
23 forward, depriving bankruptcy courts of this
24 tool, what will be the effect going forward on
25 other cases like this?

1 MR. GANNON: Yeah, I -- I take the
2 point. And I -- I would say that even in the
3 Catholic Church cases, there have been Catholic
4 diocese bankruptcies in the Fifth Circuit and
5 the Ninth Circuit, and so they have proceeded
6 without consensual releases.
7 And, ultimately, as I -- as I alluded
8 to before, there may not -- this may not be the
9 best solution for every mass tort. A single
10 bankruptcy in which there are participants on
11 the sidelines who are contributing may not be --
12 may not be the best solution. If Congress wants
13 to step in, as it did with 524(g), and create a
14 customized framework for some of these
15 individual case -- situations, it could do that
16 consistent with --
17 JUSTICE BARRETT: And maybe that would
18 be a good solution given the complexities, to
19 have Congress do it rather than bankruptcy
20 courts trying to stretch the code?
21 MR. GANNON: We never quarrel with the
22 idea that Congress has the authority --
23 JUSTICE BARRETT: That Congress --
24 MR. GANNON: -- to amend statutory
25 authority.

1 JUSTICE BARRETT: -- has an important
2 role. Okay. And then a question about the
3 victims for whom you are speaking or the -- the
4 -- those with claims who have not consented.
5 Are -- do you see yourself --you know, as
6 representing the Trustee here, do you see
7 yourself as speaking for those who did not
8 consent, you know, the -- the small percentage?
9 Or, you know, there were hundreds of thousands
10 of victims that didn't respond, that just -- is
11 -- are those the ones that you are concerned
12 about?
13 MR. GANNON: Well, I -- I think we're
14 concerned about --
15 JUSTICE BARRETT: About all. All.
16 MR. GANNON: Yeah. We're concerned --
17 JUSTICE BARRETT: But.
18 MR. GANNON: -- about the entire
19 process. We are concerned about the fact that
20 we don't think that there's meaningful consent
21 when somebody just didn't even vote. I
22 mentioned that --
23 JUSTICE BARRETT: Yeah.
24 MR. GANNON: -- less than 50 percent
25 of the personal injury claimants voted here.

1 And so the 97 percent in favor figure depends in
2 part on a high, you know, nonvoting percentage.
3 And -- but our -- our role is in
4 making sure that the process is working as it's
5 supposed to. And so we're -- we're not the
6 lawyers for these individual claimants. They --
7 they have their own lawyers, some of them,
8 before the case. But we're -- we're speaking
9 for the idea that if they have property rights
10 that are not property of the estate, then
11 that's beyond --
12 JUSTICE BARRETT: I understand that.
13 I guess what I'm saying is, when you're talking
14 about the property rights, you're referring writ
15 large to maybe what we might call like some of
16 the invisible debtors who just didn't vote, who
17 didn't respond.
18 MR. GANNON: Yeah -- yeah, and we
19 think that that's -- that's definitely not
20 consent in -- in a way that we think would make
21 the -- this waiver appropriate.
22 JUSTICE BARRETT: Thank you.
23 CHIEF JUSTICE ROBERTS: Justice
24 Jackson?
25 JUSTICE JACKSON: So Justice Kavanaugh

1 mentioned the couple of decades of practice of
2 bankruptcy courts approving these kinds of
3 things, and I'm just trying to understand where
4 the history leaves us, because I had understood
5 that, under the previous version of the code,
6 this Court in Callaway had said that this kind
7 of thing is not acceptable.
8 So can you just tell -- say a little
9 bit about the history and how we should be
10 thinking about that?
11 MR. GANNON: Well, yeah we are saying
12 that we think that this is a statutory
13 construction case under the code, and we think
14 it's inconsistent with the code for all the
15 reasons that you and I were previously
16 discussing.
17 But part of that is because there
18 isn't a strong historical analogue, and there's
19 a really small amount of history that's been put
20 on the table by the other side.
21 And we do think that the Callaway case
22 from this Court in 1949 certainly cuts strongly
23 in the other way. The other side says, well, in
24 part, that was for jurisdictional reasons rather
25 than -- than whether there was particular

1 authority. But it still meant that courts were
2 not doing this under the Bankruptcy Act with --
3 you know, the only other cases that have been
4 cited are a couple of district court cases that
5 we think are -- are relatively easily to --
6 relatively easy to distinguish from -- from a
7 third-party release.
8 JUSTICE JACKSON: All right. And,
9 just conceptually, I guess I'm trying to
10 understand why this would be laid at the feet of
11 the one nut-case holdout, as Justice Kagan puts
12 it.
13 I mean, I -- I thought -- and maybe
14 this is the argument that you're making -- that
15 even if you have a group of people who do not
16 consent, the Sacklers could still give the
17 money. They could still fund the victims who do
18 consent. And so it's not the holdouts. It's
19 the -- the Sacklers' insistence on getting
20 releases from every single person that's causing
21 this problem, correct?
22 MR. GANNON: That -- that's correct.
23 And, as -- as I said before, to the extent that
24 they say they want global peace, then I
25 understand that desire, but that doesn't mean

1 that they're not going to pay a lot for 97.5
2 percent peace.
3 JUSTICE JACKSON: And your only point
4 is that they may still, if the Court says no, go
5 ahead and settle with all of the people who are
6 willing or interested in doing this?
7 MR. GANNON: Yes. To the extent that
8 the vast majority of people are saying this is a
9 great deal, we want to be part of it, then that
10 much of the deal can go forward.
11 JUSTICE JACKSON: Thank you.
12 CHIEF JUSTICE ROBERTS: Thank you,
13 counsel.
14 Mr. Garre?
15 ORAL ARGUMENT OF GREGORY G. GARRE
16 ON BEHALF OF RESPONDENTS PURDUE PHARMA L.P., ET AL.
17 MR. GARRE: Thank you, Mr. Chief
18 Justice, and may it please the Court:
19 This Court should reject the Trustee's
20 argument that nonconsensual third-party releases
21 are categorically unauthorized by the code no
22 matter the circumstances.
23 I'd like to begin with three points.
24 First, the Trustee's position is irreconcilable
25 with the plain text of Section 1123(b)(6).

1 Congress's use of "any" and "appropriate," terms
2 of breadth and flexibility, refute the Trustee's
3 position that third-party releases are never
4 authorized in any circumstances.
5 Second, this case illustrates how
6 third-party releases can and do directly advance
7 the core objectives of bankruptcy in appropriate
8 and appropriately limited circumstances.
9 Because of the inextricable
10 relationship between Purdue and the Sackler
11 directors and officers of Purdue, victims have
12 filed identical claims against Purdue and the
13 Sacklers for the same injuries based on the same
14 conduct.
15 Everyone agrees that the claims
16 against Purdue can be channeled to the creditor
17 -- trusts. The releases simply prevent
18 creditors from jumping the line and depleting
19 the estate through the back door by suing the
20 Sacklers for the same injuries based on the same
21 exact conduct involving Purdue. That explains
22 why the creditors and victims themselves
23 insisted on and have overwhelmingly approved the
24 releases.
25 And, finally, third-party releases

1 have been used in limited circumstances for more
2 than three decades, nearly the life of the
3 current code, to resolve some of the most
4 important and complex bankruptcies.
5 Equity has likewise enjoined third
6 parties in analogous circumstances for
7 centuries. Adopting the Trustee's categorical
8 rule would radically disrupt that longstanding
9 practice to the detriment of victims.
10 If th Trustee succeeds here, the
11 billions of dollars that the plan allocates for
12 opioid abatement and compensation will
13 evaporate. Creditors and victims will be left
14 with nothing, and lives literally will be lost.
15 Nothing in the code commands that tragic result.
16 I welcome the Court's questions.
17 JUSTICE THOMAS: Mr. Garre, the -- the
18 government, the Trustee, treats consensual
19 agreements and nonconsensual releases
20 differently.
21 How would you respond to that or react
22 to that?
23 MR. GARRE: I think the most telling
24 point in my friend's response, Justice Thomas,
25 was that he didn't point to the text of Section

1 1123(b)(6) at all. In order for that to be a
2 component of the plan, it has to be approved by
3 the bankruptcy court, and although he talks
4 about the agreement of the parties, there has to
5 be statutory authority for the bankruptcy court
6 to include that.
7 The only basis for that authority
8 comes from 1123(b)(6), and that doesn't draw a
9 distinction between consensual and
10 nonconsensual.
11 So I think my friend's response shows
12 the -- the -- the difficulty with that position
13 for him.
14 JUSTICE THOMAS: If there were no --
15 if -- previous or prior indemnification
16 agreement, would -- would your argument be the
17 same with respect to the releases?
18 MR. GARRE: It would be, Your Honor,
19 because the -- for the simple fact that the
20 sheer litigation of these claims against the
21 Sacklers, because they must include on Purdue's
22 own conduct to be subject to the releases, would
23 inundate and overwhelm Purdue and deplete the
24 res, and that's -- that's the simple fact due to
25 the nature of these claims.

1 JUSTICE KAGAN: Mr. Garre, as I
2 suggested to Mr. Gannon, I thought that one of
3 the government's stronger arguments is this idea
4 that there's a fundamental bargain in bankruptcy
5 law, which is you get a discharge when you put
6 all your assets on the table to be divided up
7 among your creditors. And I think everybody
8 thinks that the Sacklers didn't come anywhere
9 close to doing that.
10 And the question is, why should they
11 get the discharge that usually goes to a
12 bankrupt person once they've put all their
13 assets on the table without having put all their
14 assets on the table?
15 MR. GARRE: Right. Well, let me first
16 say, Justice Kagan, that the point of this
17 proceeding is not to make the life as difficult
18 as possible for the Sacklers. It's to maximize
19 recovery and fairly and equitably distribute it
20 to the victims.
21 Second, I think the more --
22 JUSTICE KAGAN: Right. But I guess
23 what I'm suggesting is that this is a
24 fundamental principle of bankruptcy law, and
25 when we're trying to read this provision and

1 figure out what powers it gives to the
2 bankruptcy court and what not, it would be a
3 kind of extraordinary thing if we gave the power
4 to -- to basically subvert this basic bargain in
5 bankruptcy law.
6 MR. GARRE: Right. And -- and -- and
7 that goes to my second point, Justice Kagan,
8 which is that they're not getting a discharge.
9 They're getting a release. And there's a
10 fundamental difference between that.
11 A discharge under bankruptcy law is
12 essentially immunity from all claims except for
13 narrow exceptions, whereas the releases here
14 apply only to one set of claims, prepetition
15 claims by creditors based on the debtor's --
16 based on the debtor's own conduct.
17 JUSTICE KAGAN: I mean, in some ways
18 --
19 MR. GARRE: That is not a discharge.
20 JUSTICE KAGAN: -- in some ways,
21 they're getting a better deal than the usual
22 bankruptcy discharge because, as Justice Gorsuch
23 indicated, they're being protected from claims
24 of fraud and claims of willful misconduct.
25 So, yeah, in some ways, they're

1 getting not quite as much, but in some ways,
2 they're getting much more.
3 MR. GARRE: So I think that
4 underscores the --
5 JUSTICE KAGAN: And, again, without
6 putting what I take to be, you know, anything
7 near their entire pot of assets on the table.
8 MR. GARRE: So, as -- as to the
9 individual debtors, Your Honor, I think it
10 underscores the fundamental difference between
11 this reorganization proceeding and individual
12 debtor proceedings, that the discharge -- the
13 exception from discharge for fraud apply to
14 individuals, not corporate reorganizations. In
15 this case, everybody agrees that the many claims
16 for fraud against Purdue can be channeled to the
17 trusts.
18 And because -- and this -- that's
19 because, in this reorganization proceeding, the
20 focus is on maximizing the estate and equitably
21 distributing it to all of the victims. And what
22 the Trustee proposes here is fundamentally at
23 odds with that core objective of bankruptcy.
24 And, again, as Your Honor's
25 questioning pointed out, it doesn't matter how

1 much money the Sacklers would put into this.
2 Their position is the same: Nonconsensual
3 releases can never be authorized by the code.
4 JUSTICE JACKSON: But, even if they
5 could be authorized, Mr. Garre, as you said at
6 the beginning, why would this be an appropriate
7 situation to allow it?
8 So Justice Kagan says they're not
9 putting all of their assets on the table. But
10 my understanding is that not only are they not
11 doing that, but most of the assets we're talking
12 about were originally in the company and that
13 they actually took the assets from the company,
14 which started the set of circumstances in which
15 the company now doesn't have enough money to pay
16 the creditors.
17 So even if there was a world in which
18 categorically we -- we wouldn't say you can
19 never do these kinds of releases, why wouldn't
20 this be a clear situation in which we would not
21 allow it?
22 MR. GARRE: Well, first, the Trustee's
23 position is it doesn't matter on the
24 circumstances. But this case actually
25 illustrates exactly why these releases should be

1 allowed, Justice Jackson.
2 I mean, first of all, on the
3 transfers, most of that -- 40 percent of that
4 money went to paying taxes. Of what's left, 97
5 percent of that is in the $6 billion that's in
6 this settlement.
7 The -- the district -- the bankruptcy
8 court here made careful findings that without --
9 this -- this -- this contribution not only was
10 substantial and fair, but it was the best that
11 was available here for the victims.
12 And there are also serious collection
13 issues that the bankruptcy court found, Justice
14 Alito, that if this -- this settlement doesn't
15 go forward, then victims would -- would likely,
16 even if they prevailed on their claims, prevent
17 serious issues about being able to collect on
18 that at the end of the day.
19 JUSTICE JACKSON: Only because the
20 Sacklers are just -- have taken the money
21 offshore, right? I mean, it's not like -- it's
22 not like by operation of law it's necessary to
23 do this. It is necessary to do this because the
24 Sacklers have taken the money and are not
25 willing to give it back unless they have this

1 condition.

2 MR. GARRE: So there are --

3 JUSTICE BARRETT: And I'll add to that

4 if I could just piggyback on to what Justice

5 Jackson said, the money -- I mean, I -- I take

6 your point about 40 percent of the money that

7 they took from the corporation going to the

8 payment of taxes, but, as Justice Jackson

9 rightly points out, the -- the 97 percent of the

10 money after tax that they're contributing is all

11 money that they took out of the corporation.

12 And to your point to Justice Kagan

13 about, well, this is a corporate restructuring

14 and so the fraud provision doesn't apply, I take

15 Justice Kagan's point to be, but if --

16 JUSTICE GORSUCH: Individual.

17 JUSTICE BARRETT: -- the Sacklers went

18 into individual bankruptcy, which is what this

19 is saving them from, those fraud exceptions

20 would apply.

21 MR. GARRE: So I think, I mean, first,

22 on the question of individual bankruptcies, the

23 Sacklers are not an entity. Many of them live

24 overseas. Much of what we talk about the

25 Sacklers are actually trusts that aren't

1 amenable to the bankruptcy process, so we're
2 talking about, you know, a very small number of
3 individuals that even could declare bankruptcy.
4 Their net worth of the -- the -- the Sackler
5 directors and officers in the United States is
6 about 1.2 billion. The $6 billion obviously
7 exceeds that.
8 And, again, the Trustee acknowledged
9 below that their position would be the same if
10 the Sacklers were putting $10 billion into this
11 settlement.
12 JUSTICE GORSUCH: Mr. Garre, let me --
13 let me see if I can come at it this way. So
14 we're being asked to interpret 1123(b)(6), and
15 you'd agree that the term "appropriate" doesn't
16 mean anything goes, right?
17 MR. GARRE: Correct.
18 JUSTICE GORSUCH: It has some limits.
19 And we would normally look for those limits, for
20 example, in the structure of the Bankruptcy Code
21 and other surrounding provisions, right?
22 MR. GARRE: I -- I -- I --
23 JUSTICE GORSUCH: As a general
24 interpretive matter.
25 MR. GARRE: -- I don't want to say

1 structure in the broad sense because I don't
2 think just talking about --
3 JUSTICE GORSUCH: How about statutory
4 context? Can you --
5 MR. GARRE: But, certainly, you would
6 look at other provisions, Justice Gorsuch.
7 JUSTICE GORSUCH: Okay. All right.
8 And we might look at historic equity practice.
9 MR. GARRE: I think that could be
10 relevant, Your Honor.
11 JUSTICE GORSUCH: And we might look at
12 background constitutional concerns.
13 MR. GARRE: Yes, you would
14 interpreting any statute, Your Honor, but as --
15 JUSTICE GORSUCH: Okay. All right.
16 So we've got that --
17 MR. GARRE: -- with respect to
18 constitutional doubt, though, that wouldn't
19 apply where the statutory terms are.
20 JUSTICE GORSUCH: You'd look at -- but
21 you'd agree it wouldn't -- we wouldn't turn a
22 blind eye to the Constitution of the
23 United States when interpreting a statute?
24 MR. GARRE: Well, unless the statute
25 was unambiguous, Your Honor. And, here, I think

1 it's unambiguous. It applies to at least some
2 releases.
3 JUSTICE GORSUCH: I'll -- I'll --
4 I'll -- I'll -- I'll take that as good enough
5 for my purposes.
6 (Laughter.)
7 JUSTICE GORSUCH: When we look at the
8 background structure of the Bankruptcy Code, it
9 has a couple of important provisions, right?
10 One is you got to put everything on the table,
11 as we've been discussing, right?
12 MR. GARRE: Yes, when you're in doubt.
13 JUSTICE GORSUCH: And the other is
14 that at least with respect to individuals, you
15 don't get off the hook for fraud, right?
16 MR. GARRE: With respect to -- in
17 individual proceedings, Your Honor. Not in this
18 proceeding as to the corporate debtor.
19 JUSTICE GORSUCH: Okay. And then,
20 when we look at historic equity practice, I
21 think you got a couple of cases from the 1600s
22 and a couple of district court cases more
23 recently and pretty much nothing else.
24 MR. GARRE: So, I mean, I -- I'm
25 happy to address --

1 JUSTICE GORSUCH: There's a lot
2 running the other way, right?
3 MR. GARRE: -- all of those. I mean,
4 with respect to the statute itself, I think one
5 word that we haven't talked about today is
6 "applicable," and that's in --
7 JUSTICE GORSUCH: Well, I'm asking
8 about --
9 MR. GARRE: -- Section 1123(b)(6).
10 JUSTICE GORSUCH: -- equity practice.
11 MR. GARRE: Oh, with respect to equity
12 practice.
13 JUSTICE GORSUCH: You got a lot
14 running against you, don't you?
15 MR. GARRE: No, Your Honor, I don't
16 think so. I mean, we've -- we've cited cases.
17 It's the --
18 JUSTICE GORSUCH: What was that case
19 from the 1600s?
20 MR. GARRE: The Tiffin case from the
21 1600s --
22 JUSTICE GORSUCH: Tiffin. Tiffin.
23 That's right.
24 MR. GARRE: -- where the Court of --
25 of Chancery enjoined third parties --

1 JUSTICE GORSUCH: Yeah.
2 MR. GARRE: -- suits against third
3 parties.
4 JUSTICE GORSUCH: Okay.
5 MR. GARRE: We've got the limited fund
6 context that this Court has recognized in its
7 prior cases --
8 JUSTICE GORSUCH: And then, on the
9 constitutional question, we have serious
10 questions. We don't normally say that a
11 nonconsenting party can have its claim for
12 property eliminated in this fashion without
13 consent or any process of court other than, you
14 know, what -- what -- you know, the procedure
15 here. This would defy what we do in class
16 action contexts. It would raise serious due
17 process concerns and Seventh Amendment concerns,
18 as the government highlighted.
19 MR. GARRE: I -- I think --
20 JUSTICE GORSUCH: You're only entitled
21 to a jury.
22 MR. GARRE: Right. I -- I think, Your
23 Honor, bankruptcy is different for starters.
24 And -- and I think that, you know, one example I
25 can give you is the derivative claims. We're

1 talking about --

2 JUSTICE GORSUCH: But we're not in

3 bankruptcy. That's the whole point, is your

4 clients aren't in bankruptcy. If they were,

5 then equity would kick in, but, here --

6 MR. GARRE: Well, everybody here in

7 this case before this Court is part of this

8 bankruptcy proceeding. They've submitted proofs

9 of claim, and that's one of the reasons why they

10 don't have a Seventh Amendment objection here,

11 Your Honor. And the -- the plan itself

12 addresses the Seventh Amendment.

13 JUSTICE GORSUCH: With respect to a

14 debtor, that would be traditionally the case,

15 but we're talking about a nonconsensual claim

16 against a nondebtor.

17 MR. GARRE: Right, but --

18 JUSTICE GORSUCH: And that, normally,

19 we'd have serious due process and Seventh

20 Amendment concerns. What --

21 MR. GARRE: So I can give you several

22 examples of where the Court has recognized that

23 or where it's allowed generally. The derivative

24 claims, these are claims held by third parties,

25 intentional fraudulent transfer claims, alter

1 ego claims, veil-piercing claims, breaches of
2 fiduciary duty.
3 By virtue of bankruptcy law, those
4 claims are taken away from the creditors, the
5 third parties, put into states -- the estate and
6 settled, even though, if they had held those
7 claims, they would have gotten recovery
8 directly.
9 So that -- that history, no one
10 disputes that here, my friend acknowledged it
11 today, is fundamentally inconsistent with its
12 position.
13 Enjoining third-party litigation, this
14 Court in the Celotex case recognized that
15 bankruptcy courts can enjoin suits between
16 nondebtors, specifically citing third-party
17 releases in these sorts of cases. It cited the
18 Dalkon Shield case. The Energy Resources case,
19 Your Honor, this Court recognized that
20 1123(b)(6) applied in the context where what the
21 release did was discharge the liability of a
22 nondebtor, the officer of the company, to
23 another nondebtor, the IRS.
24 In fact, the -- the fact that
25 1123(b)(6) would -- would -- would allow a

1 bankruptcy court to tell the IRS how to allocate
2 its tax funds and discharge -- effectively
3 discharge the liability of someone from IRS
4 taxes is even more extraordinary than we're --
5 what we're talking about here.
6 524(g), Your Honor, a situation where
7 Congress specifically allowed these sorts of
8 releases, if these constitutional concerns are
9 real, then 524(g) is unconstitutional, and this
10 Court, frankly, is going to take a wrecking ball
11 to the bankruptcy code given the situations in
12 which bankruptcy courts are allowed to dispose
13 of, eliminate, defeat, stand in the way of
14 property interests that you don't see outside of
15 bankruptcy. There's no question about that.
16 And I think, with respect to a lot of
17 these constitutional questions, they really
18 ought to be dealt with on an as-applied basis.
19 The only issue before this Court is one of
20 statutory authority and it's --
21 JUSTICE SOTOMAYOR: Counsel --
22 counsel, can we talk a little bit about what is
23 direct and what's derivative?
24 MR. GARRE: Sure.
25 JUSTICE SOTOMAYOR: Not -- in some

1 ways, neither side has satisfied me in answering
2 that. I always thought that any release in
3 bankruptcy would stop suits for derivative
4 claims, correct? Fraudulent conveyance claims
5 are derivative claims that belong -- those
6 claims belong to Purdue and those can be settled
7 by Purdue, correct?
8 MR. GARRE: So that's right, Your
9 Honor, insofar as what the law does is take
10 those away from the third parties, their
11 property interests, just like the claims, the
12 direct claims, and the state takes them over and
13 can settle them. So that's correct.
14 JUSTICE SOTOMAYOR: And I -- and I
15 take it from the government's brief that the
16 settlement can include an extinguishment of all
17 derivative claims.
18 I haven't understood why the personal
19 injury claims are -- are not derivative claims
20 also because, generally, these pills were sold
21 by the corporation, not by the individuals. And
22 so I'm -- I'm a little lost as to why the
23 personal injury claims are considered
24 derivative -- I'm -- I'm sorry -- are considered
25 direct.

1 MR. GARRE: Right. I --
2 JUSTICE SOTOMAYOR: I do understand
3 that there's some consumer laws, state consumer
4 laws, that could be viewed as direct claims, but
5 I'm -- I'm sort of -- help me out.
6 MR. GARRE: So, Your Honor, I -- I
7 think one of the reasons why it's confusing is
8 that because any direct claims that are subject
9 to the releases here are functionally
10 indistinguishable from the derivative claims for
11 this reason. The releases, as carefully
12 narrowed by the bankruptcy court, only apply to
13 claims that are dependent on Purdue's own
14 conduct. So this -- these --
15 JUSTICE SOTOMAYOR: But that's not --
16 that's not a definition in my mind. I -- I -- I
17 --
18 MR. GARRE: So -- so the definition,
19 Your Honor, is that derivative claims apply to
20 conduct that's, you know, generalized as to
21 everyone. Any creditor could assert that claim.
22 So the claim that the Sacklers were involved in
23 -- with Purdue in mismarketing OxyContin or --
24 or selling it to the wrong people, those are
25 generalized claims.

1 The exception would be if you had a
2 claim that one of the Sacklers, some of whom are
3 doctors, say, sold OxyContin out of their dorm
4 room, that would be a particularized claim to
5 that consumer. That would be a direct claim.
6 But the claims here -- and I think what's
7 significant is the Trustee -- no --
8 JUSTICE SOTOMAYOR: But -- but that
9 just -- all you're arguing to me right now,
10 because you're still not helping me with a
11 definition, is that that issue has to be
12 resolved below, and it would be resolved in
13 future lawsuits as to whether or not the
14 bankruptcy agreement extinguished that
15 particular type of derivative.
16 MR. GARRE: Well, I -- I think that's
17 important insofar as no one has ever really
18 identified the -- the direct claim that's
19 dependent on Purdue's conduct that would be
20 released here.
21 I mean, there were consumer protection
22 claims. All of the states have now -- are no
23 longer opposing this settlement. So I think
24 you're right insofar as, in some sense, what
25 we're talking about here is -- is really sort of

1 hypothetical, and a particularly bad reason to
2 destroy this entire settlement is that they
3 agree that all of the derivative claims can be
4 released. And what we're talking about is the
5 extent to which the release applies to direct
6 claims that the Trustee hasn't actually
7 identified.
8 But I think the more important point
9 is that the Trustee's position is that any
10 release, no matter the circumstances, is not
11 allowed if it's nonconsensual, even in the case
12 --
13 JUSTICE JACKSON: Can we talk about
14 your position, though, on that?
15 MR. GARRE: Sure.
16 JUSTICE JACKSON: Because I guess I'm
17 trying to understand if it's your view that the
18 Sacklers could condition their funding of this
19 estate on anything that the code does not
20 expressly prohibit.
21 MR. GARRE: I -- I would say no
22 insofar as a bankruptcy court is going to look
23 carefully at this. And there are many
24 limitations. It has to be necessary to the
25 reorganization. It has to be appropriate --

1 JUSTICE JACKSON: But your -- but you
2 define "necessary," as I understand it, as
3 anything the Sacklers require in order to --
4 MR. GARRE: Oh, not at all. Not at
5 all, Your Honor.
6 JUSTICE JACKSON: Okay. So what does
7 "necessary" mean in your view?
8 MR. GARRE: Well, in this case, what
9 the bankruptcy court found was that without the
10 releases, without the settlement that came in,
11 the -- the company would liquidate and victims
12 would receive nothing.
13 JUSTICE JACKSON: Only because the
14 Sacklers wouldn't give the money back, right,
15 under those circumstances? They are -- they are
16 conditioning their willingness to fund this
17 estate on the releases.
18 MR. GARRE: That's correct, Your
19 Honor. I mean, this was a --
20 JUSTICE JACKSON: All right. So --
21 MR. GARRE: -- carefully negotiated --
22 JUSTICE JACKSON: -- so it's only
23 necessary insofar as they are requiring it.
24 MR. GARRE: That was an inquiry that
25 the bankruptcy court took. I mean, it -- what

1 he looked at is all the circumstances, including
2 all the arguments about the Sacklers, and it
3 looked to what was right to maximize the estate
4 here and whether this release was necessary for
5 the reorganization to avoid liquidation.
6 So, if you take one of the
7 hypotheticals in the U.S. Trustee's brief about
8 the painting, the Sacklers had insisted on the
9 reallocation of a painting or something like
10 that, there's no way a bankruptcy court would
11 approve that release. The releases --
12 JUSTICE JACKSON: I guess I don't
13 understand why. Why isn't -- since the linchpin
14 fact here, as you've just articulated it, is the
15 Sacklers' willingness to put money into the
16 estate, why can't they -- and that it's
17 necessary insofar as the Sacklers are demanding
18 it in this situation --
19 MR. GARRE: That's -- right.
20 JUSTICE JACKSON: -- why can't they
21 demand anything and -- and let that be
22 necessary? Why -- I don't understand why
23 there's a difference as to it being necessary,
24 you know, in a different way.
25 MR. GARRE: Right. Of course, in

1 theory, they could demand anything, Your Honor,
2 but you have a bankruptcy court that has to make
3 that determination. You have an Article I court
4 that has to make that determination. You have
5 over 30 years of experienced courts applying a
6 very carefully set of factors that limit the
7 availability of these releases.
8 In this case, they were necessary
9 because of the direct threat to the res posed by
10 these parallel exact same claims that would be
11 presented by the -- against Purdue would be
12 brought against Sackler and trigger
13 indemnification, contribution, and insurance
14 right, as well as inundate the company through
15 litigation.
16 They -- they -- the bankruptcy court
17 considered that without this funding, the
18 victims -- that the company would have to
19 liquidate. There is a $2 billion superpriority
20 loan, and I hope the government's response gave
21 you as much discomfort as -- as I did.
22 The fact is is that that priority
23 exists, and the possibility of negotiation
24 should give this Court a good sense that the
25 bankruptcy court was right that we will have a

1 liquidation with no one recovering anything.
2 CHIEF JUSTICE ROBERTS: Thank you,
3 counsel.
4 Justice Thomas? Anything?
5 Justice Alito?
6 Justice Sotomayor?
7 Justice Kagan?
8 Justice Gorsuch?
9 Justice Kavanaugh?
10 JUSTICE KAVANAUGH: A couple
11 questions. On the statutory point of the term
12 "appropriate," which, to me, is key, in
13 isolation, that's a broad term and really helps
14 you, but, as the Chief Justice said in his first
15 question, we, in interpreting statutes like that
16 that assign broad authority to usually
17 regulatory agencies, here, the bankruptcy court,
18 we've been cautious, especially in recent years,
19 about reading those to give too much authority,
20 major questions doctrine, elephants in mouse
21 holes.
22 And I'm curious why in this case that
23 those principles which go way back in -- in this
24 Court's jurisprudence as I see it wouldn't apply
25 here and say, yeah, "appropriate's" a broad

1 term, but we should read it narrowly because
2 that would be a question of great economic
3 significance that we won't assume Congress
4 lightly assigned.
5 MR. GARRE: Sure. So the major
6 questions doctrine is premised on
7 separation-of-powers principles that apply to
8 the delegation to executive agencies.
9 This is a provision that applies to
10 the courts, the Article III courts, an exercise
11 delegating authority by the bankruptcy courts.
12 "Appropriate" is a term of
13 classic breadth. It essentially gives the
14 courts a common law -- law role that while broad
15 is part and parcel of what bankruptcy courts and
16 equity courts have been doing for centuries in
17 this context.
18 And I think that also answers why this
19 isn't really a major questions problem. This
20 Court has never applied the major questions
21 doctrine to a catchall provision that stands
22 alone and has its own limitations --
23 JUSTICE KAVANAUGH: How --
24 MR. GARRE: -- and --
25 JUSTICE KAVANAUGH: Keep going.

1 MR. GARRE: And not giving effect to
2 that provision.
3 JUSTICE KAVANAUGH: How about just
4 elephants in mouse holes? We've used that more
5 -- more -- more generally.
6 MR. GARRE: Right. So -- so
7 1123(b)(6) is not a mouse hole, Your Honor.
8 It's written in broad terms purposely given the
9 history here, which was we want the courts to
10 have all the power they can to resolve this
11 bankruptcy.
12 And with respect, it's not an
13 elephant, particularly not when you consider the
14 fact that everyone agrees that the derivative
15 claims, including intentional fraud claims, can
16 be taken from third parties commandeered by the
17 estate and settled. It's -- it's -- it's
18 consistent with what courts have been doing in
19 enjoining suits between third parties for
20 decades. This Court in Celotex recognized that.
21 It's consistent with equity practice.
22 Justice Gorsuch said it was one case.
23 But we've cited a case. They've cited nothing.
24 The Callaway case is completely inapposite, that
25 the -- the sale at issue in that case was not

1 not necessary to the reorganization, which makes
2 this case completely different. It was under a
3 prior version of the code. This code has much
4 more authority.
5 JUSTICE KAVANAUGH: On -- on standing,
6 I take your point. This is somewhat of a side
7 point, but I want to get it out. The U.S.
8 Trustee doesn't have standing in your view, and
9 I -- I think that's a strong argument. But
10 Ellen Isaacs would have standing. So do we need
11 to get into the U.S. Trustee's standing given
12 that Ellen Isaacs would have standing?
13 MR. GARRE: So -- so we don't -- we --
14 think that she should -- she would, Your Honor,
15 because she hasn't identified the direct claim
16 that's dependent on Purdue's conduct that would
17 be released that she could or would bring. So
18 we don't think that she actually has established
19 standing, notwithstanding that she, like many
20 other victims, have suffered tragic
21 circumstances.
22 But I think that the real problem, the
23 other problem is is that what you're left with
24 is the U.S. Trustee, who comes in here as an
25 interloper with absolutely no financial stake in

1 this resolution, has -- lacks standing, and what
2 you're doing is relying on standing of parties
3 who have forfeited any challenge to the question
4 presented, which would be a very odd thing for
5 this Court to do to decide in this issue of
6 great public importance, particularly to the
7 families and individuals involved.
8 JUSTICE KAVANAUGH: Thank you.
9 CHIEF JUSTICE ROBERTS: Justice
10 Barrett?
11 JUSTICE BARRETT: Just one question,
12 Mr. Garre. So, if 1123(b)(6) is as broad as you
13 say, did Congress need to enact 524(g) to give
14 bankruptcy courts special authority to handle
15 these problems in the asbestos context?
16 MR. GARRE: Yes.
17 JUSTICE BARRETT: Was that just
18 clarifying, or was it necessary?
19 MR. GARRE: It was necessary, but --
20 because what Congress did is it acted against
21 the backdrop of courts allowing these sorts of
22 releases and it recognized that, and then it
23 says we need to have a further reticulated set
24 of rules for asbestos particularly because of
25 the unique problem presented there with respect

1 to future claimants, and so it enacted that
2 special set of rules.
3 And then it said in a separate act of
4 Congress, hey, don't infer from this special
5 scheme that the authority didn't already exist.
6 And I think that that one-two punch makes it all
7 the more important for this Court not to take
8 that away from Congress.
9 If Congress wants to establish a more
10 reticulated set of rules for this, it can, but
11 this Court shouldn't say, as Congress didn't in
12 1994, that the authority doesn't exist at all
13 given the plain text of 1123(b)(6).
14 CHIEF JUSTICE ROBERTS: Justice
15 Jackson?
16 JUSTICE JACKSON: A variation on
17 Justice Barrett's question. If (b)(6) is as
18 broad as you say it is, then what are (b)(1)
19 through (5) doing there? In other words, I
20 mean, right before we have a bunch of specific
21 grants of authority, and if (b)(6) means what
22 you -- said -- say, then why -- why did Congress
23 have to put those in?
24 MR. GARRE: Oh, sure. I mean, that --
25 that -- you could ask that question about any

1 catchall provision, Your Honor. The point is
2 that Congress said these are the things that we
3 want to say you can do, but we want to be extra
4 clear. We want to make clear the Court has all
5 the power to do the things it needs to do as
6 long as they're appropriate and not
7 inconsistent.
8 JUSTICE JACKSON: And have -- haven't
9 we normally said in our jurisprudence with
10 respect to statutory interpretation that a
11 catchall that ends after a list is sort of like
12 in the same nature of the list? It can't be
13 just a totally different, huge thing.
14 MR. GARRE: I think you would look to
15 the other provisions, but just to be clear, this
16 isn't like the fishing example that Justice
17 Scalia gave, rods, reels, and other equipment.
18 These are all things that grant authority, and
19 then you have this catchall that does it as
20 well.
21 And I want to be clear. The other
22 provisions of (b) work directly with (b)(6)
23 here. I mean, for example, (b)(3)(A) gives the
24 estate the authority to settle the estate's own
25 claims.

1 The releases here were necessary to
2 the settlement of those claims, the bankruptcy
3 court found at -- at JA 400. And same too for
4 (b)(5), which gives the authority of the
5 bankruptcy estate to modify the rights of
6 creditors.
7 JUSTICE JACKSON: Okay. One final
8 question. With respect to "inconsistent" in
9 (b)(6), what -- what is your view of the work of
10 "inconsistent"? I mean, can a plan provision
11 that conflicts with the principles underlying
12 the Bankruptcy Code be inconsistent, or is it
13 your view that it has to be inconsistent with a
14 particular provision?
15 MR. GARRE: I think the text answers
16 that, Your Honor. It says inconsistent with
17 applicable provisions. So you have to read all
18 that together. And I think, when you contrast
19 that with "appropriate," you can't read
20 "inconsistent" with such breadth that it
21 swallows "appropriate."
22 The "inconsistent" is doing a separate
23 thing. It's saying look to other provisions and
24 identify an applicable provision that this
25 conflicts with. And unlike RadLAX, Law, and

1 Jevic, you cannot identify that provision.
2 In fact, the only other provision of
3 the code that specifically addresses third-party
4 releases allows it while telling courts not to
5 infer from that that the authority doesn't
6 already exist.
7 JUSTICE JACKSON: Thank you.
8 CHIEF JUSTICE ROBERTS: Thank you,
9 counsel.
10 MR. GARRE: Thank you, Your Honors.
11 CHIEF JUSTICE ROBERTS: Mr. Shah?
12 ORAL ARGUMENT OF PRATIK A. SHAH
13 ON BEHALF OF RESPONDENTS THE OFFICIAL COMMITTEE OF
14 UNSECURED CREDITORS OF PURDUE PHARMA L.P., ET AL.
15 MR. SHAH: Mr. Chief Justice, and may
16 it please the Court:
17 The U.S. Trustee does not speak for
18 the victims of the opioid crisis. Quite the
19 opposite, the Trustee appointed the official
20 committee, my client, as the fiduciary
21 representing their interests. Every one of the
22 creditor constituencies in this case comprising
23 individual victims and public entities harmed by
24 Purdue overwhelmingly supports the plan.
25 Indeed, it was the creditors that

1 insisted on the release of the creditor claims
2 against the Sacklers for the same injuries to
3 avoid a value-destroying victim-against-victim
4 race to the courthouse that would result in no
5 recovery for virtually all except the
6 United States.
7 That unrebutted finding grounded in a
8 massive record built on years of creditor
9 victim-led efforts refutes the Trustee's
10 eleventh-hour speculation of some magic
11 alternative permitting an equitable victim
12 recovery.
13 That is why the fact-finder relied on
14 Section 1123(b)(6)'s broad terms to approve the
15 tailored release as essential to restructuring
16 the debtor-creditor relationship in this case on
17 which lives literally depend.
18 I welcome the Court's questions.
19 JUSTICE THOMAS: Mr. Shah, what would
20 be the difference between -- if -- if the
21 Sacklers had gone through bankruptcy and
22 discharged this or reached an agreement? How
23 would this agree -- how would it look different
24 from the release?
25 MR. SHAH: Well, Your Honor, I guess

1 -- I guess it's a hypothetical on multiple
2 levels because, one, it's not clear that the
3 Sacklers are eligible for bankruptcy.
4 But, if they did do that, there are a
5 lot of questions that would need to be answered,
6 including you would have dozens of different
7 bankruptcies and you would have a free-for-all
8 in competition of reconciling those assets.
9 It would take years, probably decades
10 if you talk to bankruptcy lawyers, for a victim
11 to see a cent from that hypothetical bankruptcy.
12 And I think this is important. The --
13 the focus under the code, the principles of the
14 code, isn't on a hypothetical Sackler
15 bankruptcy. Even the Trustee says the Sacklers
16 as nondebtors aren't even part of the code. The
17 focus should be on the victims, the creditors.
18 The Trustee tries to make this case
19 about the Sacklers. It is about the victims.
20 All mass tort third-party releases over the last
21 35 years -- the code has been in force for 45
22 years -- over the last 35 years, all of those
23 have involved wrongdoers, whether it's
24 contraceptive devices, breast implants, or
25 abuse.

1 But the point is that bankruptcy is
2 not to serve justice in some abstract sense.
3 It's to maximize the estate for fair and
4 equitable --
5 JUSTICE KAGAN: Mr. Gannon --
6 JUSTICE THOMAS: Well, let's -- let's
7 assume that the -- the Sacklers actually filed
8 for --
9 MR. SHAH: Yes.
10 JUSTICE THOMAS: -- bankruptcy. What
11 would it look like?
12 MR. SHAH: It's unclear what it would
13 look like, Your Honor -- Justice Thomas, and I'm
14 not trying to be difficult, but they're not even
15 individuals, a lot of these. These are trusts.
16 They can't file for bankruptcy.
17 If you took an individual Sackler that
18 did, the question is, what are their eligible --
19 bankruptcy-eligible assets? As Mr. Garre said,
20 the bankruptcy-eligible assets are about a
21 billion dollars of the Sacklers. That's far
22 less than the 6 billion that's put on the table.
23 And then there would be a question of
24 how to distribute those assets when the
25 estimated value of claims here is $40 trillion.

1 So how do you --
2 CHIEF JUSTICE ROBERTS: Counsel --
3 MR. SHAH: Yeah.
4 CHIEF JUSTICE ROBERTS: -- here, you
5 have basically the, what is it, 3 percent we're
6 talking about of the individual claimants. What
7 if you have a situation where the 97 percent is
8 a particular type of claimant, individual
9 claimants, but the 3 percent that is holding out
10 are different -- have different claims
11 altogether, commercial claims?
12 Could the individuals and the
13 bankruptcy court force the commercial claims
14 into the bankruptcy settlement?
15 MR. SHAH: Right. So, Your Honor, if
16 the release tried to get rid of everything, but
17 you had any class that didn't have a
18 supermajority, that would almost certainly fail
19 the Second Circuit's own test, which isn't
20 challenged here, because you need a
21 supermajority of the creditors, and as the cases
22 that we have over the last 35 years, it's going
23 to have to be of every class. Here, we have a
24 supermajority --
25 CHIEF JUSTICE ROBERTS: So that is say

1 --

2 MR. SHAH: -- of every class.

3 CHIEF JUSTICE ROBERTS: -- in terms of

4 --

5 MR. SHAH: Yeah.

6 CHIEF JUSTICE ROBERTS: -- you say in

7 the practice, but under the code, is there

8 something that requires --

9 MR. SHAH: Well --

10 CHIEF JUSTICE ROBERTS: -- it to be a

11 supermajority of every class?

12 MR. SHAH: -- only to this extent,

13 Your Honor. The code says "appropriate or

14 inconsistent with any applicable provision."

15 Courts for 35 years have given content to

16 "appropriate." One of the factors that

17 virtually all of the courts have pointed to is

18 supermajority approval of the creditors.

19 Remember, the only people giving up

20 claims here are the same creditors --

21 CHIEF JUSTICE ROBERTS: Well, but I

22 suppose in one --

23 MR. SHAH: -- of the debtor.

24 CHIEF JUSTICE ROBERTS: I'm sorry to

25 interrupt you.

1 MR. SHAH: Oh, yeah.
2 CHIEF JUSTICE ROBERTS: In -- in -- in
3 one sense, you do have different classes.
4 MR. SHAH: Yes.
5 CHIEF JUSTICE ROBERTS: You have a
6 class that recognizes the -- the need to have
7 recovery on an individual victim basis.
8 MR. SHAH: Yes.
9 CHIEF JUSTICE ROBERTS: But then you
10 have a class that prefers to see the claims go
11 forward, the money isn't enough or however you
12 want to phrase it. They have different
13 interests.
14 MR. SHAH: Well, Your Honor --
15 CHIEF JUSTICE ROBERTS: And yet you
16 have a supermajority of the one --
17 MR. SHAH: Your Honor, it's -- here,
18 the bankruptcy is divided into various classes.
19 There is a personal injury victim class.
20 Ninety-six percent, over 96 percent, of that
21 class voted to approve the plan.
22 Currently, there is only one objector
23 standing with the Trustee in this case. So, if
24 in a hypothetical case there was not a
25 supermajority, that would fail under the

1 appropriate factors that courts have done for 35
2 years.
3 CHIEF JUSTICE ROBERTS: Supermajority
4 of each class?
5 MR. SHAH: Of each class, yes, Your
6 Honor. That -- that -- again, the Trustee
7 hasn't challenged the stringent appropriate
8 factors that courts of appeals have done.
9 That's why you only have a handful of these in
10 mass tort bankruptcies, but they've been
11 incredibly important. Dalkon Shield
12 contraceptive, breast implants, abuses. This is
13 where the situation is there is no other
14 alternative to get meaningful --
15 JUSTICE KAGAN: Mr. Shah --
16 MR. SHAH: -- victim recovery.
17 JUSTICE KAGAN: -- Mr. Gannon suggests
18 that if we rule for him, it actually gives
19 victims greater leverage in this kind of
20 situation.
21 MR. SHAH: Yeah. Justice Kagan, thank
22 you. If there's one thing you take away from my
23 argument today, it is this, and let me be
24 crystal-clear: Without the release, the plan
25 will unravel, Chapter 7 liquidation will follow,

1 and there will be no viable path to any victim
2 recovery. The bankruptcy court --
3 JUSTICE KAGAN: Well, that sounded
4 very emphatic.
5 (Laughter.)
6 MR. SHAH: Yes. But -- but -- but --
7 but let me -- it's not just me being emphatic,
8 Justice Kagan.
9 JUSTICE KAGAN: But I really want to
10 know, like, you know, why?
11 MR. SHAH: Yes, why.
12 JUSTICE KAGAN: Because there's
13 something to what Mr. Gannon says. You rule for
14 him, then you have another tool in your toolbox
15 when -- when -- when the people that you
16 represent sit around the table with Purdue and
17 the Sacklers.
18 MR. SHAH: Here is why. And -- and
19 now I'm going to try to unpack the unrefuted and
20 unrebutted findings of the district court. You
21 can read what the district court -- or the
22 bankruptcy court said about it. It's at JA 352,
23 JA 365, JA 404, 405. The Trustee did not object
24 to any of those findings. That's at Footnote 40
25 -- 54 of the district court opinion.

1 This is the first time the Trustee is
2 objecting to those findings, so let me unpack
3 why -- I think it's time well spent -- why the
4 district -- bankruptcy court made those
5 unrebutted findings that there is no other --
6 forget a better deal -- there is no other deal.
7 Here's why. Point number one, without
8 the release, the Sacklers would not settle the
9 estate claims, Purdue's most valuable assets.
10 That's because of a classic collective action
11 problem. The Sacklers would face a tsunami of
12 direct creditor claims outside bankruptcy
13 without the release. Just the cost of
14 litigating those creditor claims would foreclose
15 any reasonable settlement because they would be
16 reserving for litigation of those. That's point
17 one.
18 Point two, without a settlement, the
19 U.S. would gobble up the $1.8 billion in the
20 estate right now with its $2 billion
21 superpriority claim. There would be zero
22 dollars to victims out of the estate.
23 Justice Barrett, you asked about that
24 $2 billion superpriority claim, and just as
25 Gannon gave a lot of answers how it's

1 contingent, let me be very clear, and you can
2 see this in the record, it is not contingent on
3 anything. That $2 billion superpriority claim
4 is an order of the court that is enforceable.
5 It will gobble up the entire estate. There is
6 no gray area about that. That leaves zero
7 dollars to victims from the estate.
8 So point number three, what does that
9 leave? That leaves a liquidation trustee to
10 litigate the estate claims, but he doesn't have
11 any assets to litigate with, and he has to
12 litigate that in competition with all those
13 direct creditor claims that the release isn't
14 preventing.
15 So just to recap so far, we have no
16 settlement, we have a Chapter 7 liquidation in
17 which the U -- U.S.'s $2 billion priority claim
18 eats up all assets, zero dollars for victims.
19 You have their estate claims being litigated by
20 a Chapter 7 liquidation trustee who has no
21 assets to litigate them against plaintiffs'
22 lawyers who are suing the Sacklers on all the
23 creditor direct claims.
24 Point number four: If even one of
25 those direct claims, creditor claims, gets to

1 judgment, that could wipe out all of the
2 collectible Sackler assets. These are billion
3 -- these are claims. States hold these,
4 consumer protection. These are 10-, 20-, $30
5 billion claims.
6 JUSTICE SOTOMAYOR: Could you please
7 --
8 MR. SHAH: If one of them --
9 JUSTICE SOTOMAYOR: -- slow down a
10 little bit?
11 MR. SHAH: Yes.
12 (Laughter.)
13 MR. SHAH: Those -- those are -- yes.
14 So this --
15 JUSTICE SOTOMAYOR: I -- I -- I -- I
16 --
17 MR. SHAH: -- this is on the point --
18 JUSTICE SOTOMAYOR: -- I -- I get -- I
19 get --
20 MR. SHAH: Sure.
21 JUSTICE SOTOMAYOR: -- confused
22 because --
23 MR. SHAH: Sure.
24 JUSTICE SOTOMAYOR: -- I know you're
25 making this very dramatic, but I read your

1 brief, and your brief says the -- in your brief,
2 you argue that all personal injury claims
3 against the Sacklers are derivative of claims
4 against Purdue, and so only a small subset of
5 claims fall into the consensual -- nonconsensual
6 third-party release of direct claims at issue in
7 this case.
8 MR. SHAH: Right. And --
9 JUSTICE SOTOMAYOR: That's your brief
10 at 54.
11 MR. SHAH: Sure.
12 JUSTICE SOTOMAYOR: So you're telling
13 me that most claims are -- are derivative and
14 that there's only a few direct claims. So, if
15 there's only a few --
16 MR. SHAH: Yeah.
17 JUSTICE SOTOMAYOR: -- direct claims,
18 how is that going to leave the estate?
19 MR. SHAH: So -- so, Your Honor, that
20 -- that's because the agreements to not bring
21 all the direct claims are contingent on the
22 release. This is a collective --
23 JUSTICE SOTOMAYOR: No. No, no, no,
24 no.
25 MR. SHAH: -- this is a collective

1 action --

2 JUSTICE SOTOMAYOR: Tell me what

3 direct claims exist that --

4 MR. SHAH: All of the ones by the

5 states, Your Honor, the consumer protection, the

6 --

7 JUSTICE SOTOMAYOR: Yeah, but the

8 states are all willing to settle --

9 MR. SHAH: No.

10 JUSTICE SOTOMAYOR: -- to -- to -- to

11 settle with you.

12 MR. SHAH: Only -- but, Your Honor,

13 this -- and this is absolutely critical, Justice

14 Sotomayor. Their agreement to settle is

15 contingent on there being a release because,

16 without a release, any one of them can defect.

17 If the plan doesn't have a built-in release --

18 they're trying to buy --

19 JUSTICE SOTOMAYOR: Well, the other

20 side is saying every -- whether we call it

21 opt-in or opt-out -- I'm still not sure why

22 opt-out is not okay -- but, if all the states

23 are saying consensually we're going to agree, so

24 we're not going to sue you, we're not states,

25 you're telling me that the individual claims are

1 mostly derivative --
2 MR. SHAH: Your Honor, whether the --
3 JUSTICE SOTOMAYOR: -- like personal
4 injury and others. We're talking -- by allowing
5 the -- you're talking about a small subset,
6 using your own words, of claims that are direct
7 will survive. How is that going to be an
8 inducement to the Sacklers to pull out of this
9 deal?
10 MR. SHAH: Because, Your Honor, the
11 large majority of direct claims are only being
12 consensually dropped on there being a release
13 that binds everyone. As soon as -- if this
14 Court were to accept the Trustee's position --
15 JUSTICE SOTOMAYOR: But who's left?
16 MR. SHAH: -- and disband --
17 JUSTICE SOTOMAYOR: I -- I'm sorry.
18 MR. SHAH: Okay.
19 JUSTICE SOTOMAYOR: You still haven't
20 answered me.
21 MR. SHAH: Okay. I'm sorry.
22 JUSTICE SOTOMAYOR: All the states are
23 going to say we won't sue you.
24 MR. SHAH: No.
25 JUSTICE SOTOMAYOR: All the states --

1 MR. SHAH: That's where -- if I could
2 stop you, respectfully, Justice Sotomayor,
3 that's contingent on there being the release in
4 this plan. Their settlement is black-and-white
5 contingent on that. As soon as the release goes
6 away, all their direct claims become alive.
7 JUSTICE SOTOMAYOR: Your -- your --
8 your --
9 CHIEF JUSTICE ROBERTS: Thank you,
10 counsel.
11 MR. SHAH: Okay.
12 CHIEF JUSTICE ROBERTS: Justice
13 Thomas, anything further?
14 Justice Alito?
15 Justice Sotomayor?
16 Justice Kagan?
17 Justice Gorsuch?
18 Justice Kavanaugh?
19 JUSTICE KAVANAUGH: What about
20 individual suits against the Sacklers that could
21 happen if you lose this case, there's a
22 liquidation, so you get nothing from the estate.
23 MR. SHAH: Correct.
24 JUSTICE KAVANAUGH: Individual suits
25 against the Sacklers, why is that not an

1 available path? Just -- I know you hit on this,
2 but I want you to finish that.
3 MR. SHAH: Yeah. So, yeah, so I -- I
4 think this is critically important. Whatever is
5 available from the Sacklers, whether that's
6 3 billion, 5 billion, 6 billion, 10 billion,
7 there are about $40 trillion in estimated
8 claims.
9 As soon as one plaintiff is
10 successful, that wipes out the recovery for
11 every other victim. That is why the victims
12 insisted on this release. As soon as one
13 plaintiff is successful, they get the recovery,
14 every other victim gets exactly zero dollars.
15 That is the most fundamental point I think to
16 understand. That is why 97 percent of the
17 victims agreed to this nonconsensual release.
18 They have no love lost for the Sacklers.
19 There is no body of victims, no one,
20 who would more like to have retribution against
21 the Sacklers. DOJ obviously can prosecute them,
22 hasn't, but the point is they can only get
23 life-saving abatement and recovery dollars if
24 there is a release, because, otherwise, the one
25 plaintiff that jumps the line, hits the jackpot

1 first, wipes it out for everyone else. That's
2 about as simple as I can say it.
3 JUSTICE KAVANAUGH: What about the
4 abatement programs? What -- can you talk about
5 those briefly?
6 MR. SHAH: Yes. The vast majority of
7 the $6 billion that the Sacklers have
8 contributed and the 1.8 that's in the Purdue
9 estate, $7-plus billion, the vast majority of
10 that is going to go to abatement.
11 Fifty state AGs signed on to this
12 plan, and the -- and the victims signed on to
13 the plan because of the multiplying effect of
14 abatement. It will fund abatement, save lives,
15 addiction, prevention. All of those things are
16 contingent on the release and the money that's
17 going to come through here.
18 As soon as the release goes away, for
19 all of the reasons that I've said, and perhaps I
20 was dramatic, but if you want an undramatic
21 reading, read the bankruptcy court's unrebutted
22 findings at the pages that I gave you. It lays
23 out exactly what I did. I was trying to give it
24 some color.
25 (Laughter.)

1 MR. SHAH: But that is what's going to
2 happen. That -- and -- and there isn't --
3 and -- and -- and -- and I say that jokingly,
4 but it's not only legally improper for the
5 Trustee to do that because it didn't object to
6 any of those bankruptcy findings and the
7 district court points out it didn't object to
8 those.
9 It's not only legally improper, but
10 it's irresponsible for the Trustee now to
11 suggest that there's some secret path to
12 recovery for the victims. It just isn't. It's
13 basic economics. It's collective action.
14 The creditors spent three years doing,
15 as the bankruptcy called, the most massive
16 investigation of the Sacklers that it's ever
17 seen in any case. Fifty state AGs, the Official
18 Committee, every other victim and creditor group
19 came together exploring every possible avenue
20 and said that conjecture is false.
21 There is no opportunity for a better
22 deal. You can ask Mr. Gannon on rebuttal to
23 point where is the evidence in the record that
24 shows there is a better deal to be had. It does
25 not exist. Every piece of evidence, every

1 factual finding contradicts it. Basic
2 economics, collective action contradict it. It
3 just doesn't exist. They are going to get zero
4 dollars.
5 JUSTICE KAVANAUGH: What explains in
6 your view then the United States' position given
7 that it's not like them to read the word
8 "appropriate" narrowly?
9 MR. SHAH: Right, Your Honor.
10 (Laughter.)
11 MR. SHAH: Well, we -- we've been
12 asking ourselves that question. Look, if they
13 have a legal -- they may have a legal objection
14 to third-party releases. That's fine. I think,
15 if you read 1123(b)(6), if textualism matters,
16 it says it has two limitations: It has to be
17 appropriate. It can't be inconsistent with
18 applicable provisions of the code.
19 It doesn't say inconsistent with some
20 hypothetical bankruptcy. It doesn't say
21 inconsistent with general principles of the
22 code. It could have said that. In fact,
23 Chapter 12 and 13 do say that. If you look at
24 page 21 of the Roy Englert brief, Chapter 12 and
25 13 has broader provisions.

1 Congress chose specific words here,
2 and those words are "inconsistent with an
3 applicable provision." They haven't pointed to
4 any applicable, specific provision that the
5 third-party release here conflicts with because
6 it doesn't.
7 Instead, they go right to general
8 principles of bankruptcy, this basic tradeoff
9 of -- of -- of a -- of a debtor committing all
10 its assets in exchange for a discharge.
11 We don't have an automatic discharge
12 here. We have a highly negotiated, tailored
13 release that victim needs to get -- the victims
14 need to get compensation that is safeguarded by
15 all the appropriateness factors that judges in a
16 common law fashion have done.
17 JUSTICE KAVANAUGH: Okay. Thank you.
18 MR. SHAH: Thank you.
19 CHIEF JUSTICE ROBERTS: Justice
20 Barrett?
21 Justice Jackson?
22 JUSTICE JACKSON: So my one nagging
23 concern about your --
24 MR. SHAH: Yeah.
25 JUSTICE JACKSON: -- emphatic

1 presentation is I'm thinking about those
2 circuits that do not permit third-party
3 nonconsensual releases.
4 MR. SHAH: Right.
5 JUSTICE JACKSON: And I think, if I
6 agree with you or if I believe your forecast
7 about what's supposed to happen or what might
8 happen in this situation --
9 MR. SHAH: Yes.
10 JUSTICE JACKSON: -- that there would
11 never be a settlement of mass tort cases arising
12 in those circuits, and the government has given
13 several examples here of situations in which,
14 once there's a rejection of a bankruptcy effort
15 to take care of this, parties settle in tort.
16 So how do you explain --
17 MR. SHAH: Right.
18 JUSTICE JACKSON: -- that if you're
19 right about --
20 MR. SHAH: Sure.
21 JUSTICE JACKSON: -- what's -- what's
22 likely to happen in this situation?
23 MR. SHAH: Sure. Two things, Justice
24 Jackson. One, it's not my forecast, it's the
25 bankruptcy's forecast. But let me answer your

1 question directly.

2 The -- the only example I heard today

3 was the P& -- PG&E example out of the Ninth

4 Circuit. That had a far, far, far smaller body

5 of claimants. If you look at the actual mass,

6 true mass tort bankruptcies where you have

7 nothing near the funds available, like here, we

8 have $1.8 billion in the estate, and we have

9 $40 trillion of claims, those Dalkon Shield

10 breast implants, those are only possible with

11 third-party releases. The other example they

12 give, Justice Jackson, is the Arrow bankruptcy.

13 That is not an insolvent -- or not a bankruptcy.

14 It was outside a bankruptcy. That is not a

15 solvent/insolvent entity.

16 JUSTICE JACKSON: But the -- nor --

17 MR. SHAH: That's backed by the VA.

18 JUSTICE JACKSON: -- are the Sacklers.

19 I mean, this is the problem that we're creating

20 here, that we have half of it inside the

21 bankruptcy, that's Purdue, and we have half of

22 it outside the bankruptcy, that's the Sacklers.

23 MR. SHAH: Right.

24 JUSTICE JACKSON: And what's troubling

25 me --

1 MR. SHAH: Right.
2 JUSTICE JACKSON: -- is the sort of
3 shifting between those two as we think about
4 what's going to happen.
5 You say in a suit against the
6 Sacklers, if -- if this gets blown up --
7 MR. SHAH: Yes.
8 JUSTICE JACKSON: -- and people are
9 suing the Sacklers --
10 MR. SHAH: Yes.
11 JUSTICE JACKSON: -- as soon as one
12 victim gets -- gets money, then it's wiped out
13 for everybody else.
14 MR. SHAH: Correct.
15 JUSTICE JACKSON: But I don't
16 understand why that's so, because the Sacklers
17 would not be in bankruptcy unless they file for
18 bankruptcy at that point.
19 Is that where your hypothetical is
20 going?
21 MR. SHAH: Yeah, right.
22 JUSTICE JACKSON: I mean, they have at
23 least $11 billion or something. And so why
24 would it be, unless a particular claimant gets
25 that amount of money, there wouldn't be anything

1 left for anyone else in suits against them?
2 MR. SHAH: Right. So -- so just to
3 give you an example, if any one of the state
4 claims succeeded -- and I think the -- the --
5 the -- if you look at the bankruptcy opinion, I
6 think most people would agree the strongest
7 direct claims by the creditors probably held by
8 the states, right?
9 Those are multibillion-dollar claims.
10 If one of those states were to win, any
11 collectible assets -- and the $11 billion figure
12 is their total assets, not -- and it includes
13 things that are held in overseas spendthrift
14 trusts --
15 JUSTICE JACKSON: But are we looking
16 at the -- are we looking at what is collectible
17 or not through the lens of bankruptcy? And
18 they're not --
19 MR. SHAH: No.
20 JUSTICE JACKSON: -- in bankruptcy, so
21 I don't understand how we know --
22 MR. SHAH: No, I'm not looking at it
23 through the lens of bankruptcy.
24 JUSTICE JACKSON: All right.
25 MR. SHAH: And I'll just -- I'll give

1 you this, Justice Jackson. Let's assume all 11
2 billion, contrary to all fact and the years of
3 investigation, let's assume all 11 billion is
4 somehow collectible -- by the way, that's false,
5 JA 629, 32, whatever.
6 Let's assume all 11 billion of it is
7 collectible. Any one of those state claims
8 would gobble it all up. Zero dollars to victims
9 if they were successful. It's just black and
10 white. It's -- it's in the -- it's in --
11 JUSTICE JACKSON: And your point is
12 that they wouldn't settle, that the Sacklers are
13 not going to settle if this -- this is blown up?
14 MR. SHAH: Your Honor, they can't --
15 without the release --
16 JUSTICE JACKSON: Yeah.
17 MR. SHAH: -- the reason they can't
18 settle is because there would be dozens,
19 hundreds, the bankruptcy court posits thousands
20 of these claims, because they were only --
21 everyone -- on this goes to Justice Sotomayor's
22 question -- everyone agreed not to bring them in
23 consent, only on the condition that nobody could
24 bring them because --
25 JUSTICE JACKSON: And you're saying

1 that same kind of agreement can't be made
2 outside of the bankruptcy court. That's what --
3 my only point is --
4 MR. SHAH: Exactly.
5 JUSTICE JACKSON: -- we all got
6 together and we agreed in the context of
7 bankruptcy, why couldn't that same kind of
8 agreement occur --
9 MR. SHAH: Be --
10 JUSTICE JACKSON: -- if there is no
11 bankruptcy --
12 MR. SHAH: The --
13 JUSTICE JACKSON: -- vis-à-vis the --
14 the claims against the Sacklers?
15 MR. SHAH: And that's the critical
16 question. And the reason is the linchpin of
17 that agreement, the consent from all 50 states
18 and all the rest, the 97 percent that agreed,
19 was that others couldn't jump ahead of the line
20 and recover, the third-party release. You can't
21 get the third-party release outside of
22 bankruptcy, which is why, for 35 years, courts
23 have been doing it in mass tort bankruptcies
24 like Dalkon Shield, like breast implants, like
25 the abuse cases, in order to make it happen.

1 Otherwise, you cannot get meaningful victim
2 recovery.
3 JUSTICE JACKSON: Thank you.
4 CHIEF JUSTICE ROBERTS: Thank you,
5 counsel.
6 MR. SHAH: Thank you.
7 CHIEF JUSTICE ROBERTS: Rebuttal,
8 Mr. Gannon?
9 REBUTTAL ARGUMENT OF CURTIS E. GANNON
10 ON BEHALF OF THE PETITIONER
11 MR. GANNON: Thank you, Mr. Chief
12 Justice. If I could just make four points.
13 First, Ms. Isaacs, Justice Kavanaugh,
14 has been objecting to this release since the
15 bankruptcy court, and she filed claims, to quote
16 from her question presented, "on behalf of
17 herself and her deceased son, whom she found
18 dead from an overdose on her bathroom floor."
19 All of her claims have been released. We think
20 that there is no doubt that she has standing
21 here. And this idea that she has to specify the
22 connection with this release is something that
23 we haven't heard from the other side before.
24 Second, Justice Sotomayor, that's not
25 a derivative claim. That's a direct claim. The

1 difference between a derivative claim and a
2 direct claim is whether it's a claim that is
3 being recovered on behalf of all of the -- on --
4 on behalf of the corporation as a whole. And so
5 that's why the fraudulent conveyance claims, if
6 anyone brought an individual fraudulent
7 conveyance action against the Sacklers here,
8 those all become property of the estate because
9 the benefit of bringing that asset back into the
10 estate goes to the entire corporation. So
11 Purdue takes over those claims.
12 Purdue doesn't take over personal
13 injury claims. Those are not brought on behalf
14 of the corporation. If somebody gets a money
15 judgment or some sort of relief for their
16 individual claim, that's not something that
17 accrues to every other creditor for the
18 corporation.
19 And, separately, I'd also say, you
20 mentioned the consumer protection claims, which
21 is what the Second Circuit said in Footnote 15
22 are, at a bare minimum, the nonderivative claims
23 here, there are individuals who also have state
24 consumer protection -- state law consumer
25 protection claims, and so those aren't all

1 included in the settlements with the 50 states.
2 And, third, I would -- my friend says
3 that this -- there's going to be this
4 victim-to-victim -- victim-against-victim race
5 to the courthouse which involves assets that are
6 not in the bankruptcy. But the solution to that
7 is not to say that everybody gets zero dollars
8 in that race. The court can't just do whatever
9 it takes to make this deal possible. The court
10 can't say, well -- if they could do that,
11 Justice Kavanaugh, then the court could say, you
12 know, what would be more appropriate, maybe more
13 money, money that would be helpful to -- to this
14 deal.
15 And, as we've said, we don't think
16 that the court can just say, you know, the
17 Sacklers, we think it would be better if you put
18 in $15 billion here if it's not money that is
19 otherwise part of the estate.
20 And so, finally, you know, we support
21 an abatement-centric plan here, and we have a
22 disagreement about whether there's a potential
23 deal on the other side of the reversal by this
24 Court. My friend on the other side says the
25 bankruptcy court made findings about this, that

1 this was the best possible deal, that this
2 release had to happen for that particular deal.
3 That was a $4.2 billion deal. That finding was
4 immediately falsified after the district court's
5 opinion here.
6 And with respect to the $2 billion,
7 that $2 billion judgment that we have is part of
8 a non-final plea that has not been finalized
9 because we're waiting for the end of the plan to
10 be confirmed here. When it was accepted as part
11 of a settlement before the bankruptcy court, it
12 was contingent upon both the finalization of the
13 criminal judgment and the confirmation of the
14 plan. And so we think it's speculative to say
15 that the $2 billion claim is going to eat up the
16 entire estate.
17 So, you know, we do hope that there is
18 another deal at the end of this because this is
19 something that needs to be worked out, but it
20 doesn't necessarily have to be a deal with
21 nonconsensual releases. It doesn't have to be
22 one bankruptcy. And we think the Court should
23 say that the dealing should not proceed on the
24 premise that nonconsensual releases are
25 permissible under the Bankruptcy Code.

1 We urge the Court to reverse the
2 judgment of the court of appeals.
3 CHIEF JUSTICE ROBERTS: Thank you,
4 counsel. Counsel.
5 The case is submitted.
6 (Whereupon, at 11:56 a.m., the case
7 was submitted.)
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