No. 23-124

In the Supreme Court of the United States

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

v.

PURDUE PHARMA L.P., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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TABLE OF CONTENTS

Page

I. The U.S. Trustee has standing 2

II. Plan proponents identify no statutory authority for nonconsensual third-party releases:

A. Plan proponents misconstrue Section 1123(b)(6) 4

1. Plan proponents cannot identify any power in Section 1123(b) similar to approving nonconsensual third-party releases 5

2. Section 1123(b)(6) does not confer authority beyond modifying creditor-debtor relationships 7

3. The power that plan proponents read into Section 1123(b)(6) has no historical foundation in equity 10

4. Plan proponents cannot reconcile the release with the Code's other limitations 11

5. Plan proponents' reading of Section 1123(b)(6) has no meaningful limits 15

B. Plan proponents cannot deflect the serious constitutional questions presented by the release 18

C. Plan proponents' arguments about necessity do not justify the Sackler release 20

TABLE OF AUTHORITIES

Cases:

Aegean Marine Petroleum Network Inc., *In re*, 599 B.R. 717 (Bankr. S.D.N.Y. 2019) 18

Arizona State Legislature v. *Arizona Indep. Redistricting Comm'n*, 576 U.S. 787 (2015) 2

Callaway v. *Benton*, 336 U.S. 132 (1949) 10

Cases—Continued: Page

Czyzewski v. *Jevic Holding Corp.*, 580 U.S. 451 (2017) 14, 18
Director v. *Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122 (1995) 3
Dunaway v. *Purdue Pharm. L.P.*, 619 B.R. 38 (S.D.N.Y. 2020) 17
Epic Sys. Corp. v. *Lewis*, 138 S. Ct. 1612 (2018) 4
G-I Holdings, Inc., *In re*, 323 B.R. 583 (Bankr. D.N.J. 2005) 14
Granfinanciera, S.A. v. *Nordberg*, 492 U.S. 33 (1989) 14
Hollingsworth v. *Perry*, 570 U.S. 693 (2013) 3, 4
Ingalls Shipbuilding, Inc. v. *Director*, 519 U.S. 248 (1997) 4
Lebron v. *National R.R. Passenger Corp.*, 513 U.S. 374 (1995) 3, 14
Louisville Joint Stock Land Bank v. *Radford*, 295 U.S. 555 (1935) 9
Martin v. *Wilks*, 490 U.S. 762 (1989) 20
Michigan v. *EPA*, 576 U.S. 743 (2015) 18
National Prescription Opiate Litig., *In re*, No. 17-md-2804, 2018 WL 6628898 (N.D. Ohio Dec. 18, 2018) 17
Ortiz v. *Fibreboard Corp.*, 527 U.S. 815 (1999) 11
RadLAX Gateway Hotel, LLC v. *Amalgamated Bank*, 566 U.S. 639 (2012) 5
Raines v. *Byrd*, 521 U.S. 811 (1997) 4
Raleigh v. *Illinois Dep't of Revenue*, 530 U.S. 15 (2000) 9
Taylor v. *Sturgell*, 563 U.S. 880 (2008) 19
Travelers Cas. & Sur. Co. of Am. v. *Pacific Gas & Elec. Co.*, 549 U.S. 443 (2007) 9

Cases—Continued: Page

Tronox Inc., *In re*, 855 F.3d 84 (2d Cir. 2017) 6
United States v. *Energy Resources Co.*,
495 U.S. 545 (1990) 7, 8, 10
Van Huffel v. *Harkelrode*, 284 U.S. 225 (1931) 8
W.R. Grace & Co., *In re*,
475 B.R. 34 (D. Del. 2012) 14

Constitution and statutes:

U.S. Const. Art. III 3
Bankruptcy Act of 1898, ch. 541,
§ 2(7), 30 Stat. 546 .... 8, 10
Bankruptcy Code:
Ch. 1, 11 U.S.C. 101 *et seq.*:
11 U.S.C. 105(a) 5
Ch. 3, 11 U.S.C. 301 *et seq.*:
11 U.S.C. 307 3
Ch. 5, 11 U.S.C. 501 *et seq.*:
11 U.S.C. 502(e)(1)(B) 16
11 U.S.C. 510(c)(1) 16
11 U.S.C. 523 12
11 U.S.C. 523(a) 12
11 U.S.C. 523(c)(1) 13
11 U.S.C. 524(a) 12
11 U.S.C. 524(a)(2) 12
11 U.S.C. 524(e) 11-13
11 U.S.C. 524(g) 14, 18
11 U.S.C. 541(a) 6
11 U.S.C. 548 9
Ch. 11, 11 U.S.C. 1101 *et seq.* 17, 20
11 U.S.C. 1109(b) 3
11 U.S.C. 1123(b) 5

Statutes—Continued: Page

11 U.S.C. 1123(b)(2) 5
11 U.S.C. 1123(b)(3) 6
11 U.S.C. 1123(b)(3)(A) 5
11 U.S.C. 1123(b)(6) 4, 5, 9-11, 14, 18
11 U.S.C. 1141(d)(6) 12
28 U.S.C. 516-519 4
28 U.S.C. 581(a) 4
28 U.S.C. 586(c) 4
28 U.S.C. 1334(b) 9
28 U.S.C. 1411 14
28 U.S.C. 1411(a) 14, 15
Tenn. Code Ann. § 29-38-112 17

Miscellaneous:

Kerry Breen, *Opioid Crisis Settlements Have Totaled Over $50 Billion. But How Is That Money Being Used?*, CBS News (Mar. 1, 2023), www.cbsnews.com/news/opioid-crisis-settlements-have-totaled-over-50-billion-how-is-that-money-being-used 17
John Ritchie, *Reports of Cases Decided by Francis Bacon* (London 1932) 10
Tiffin v. *Hart* (1618, 1619) (Verulam, L.C.) 10, 11

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The plan proponents' defenses of the Sackler release illustrate the radical nature of the power they would locate in a modest catchall provision of the Bankruptcy Code. The release here unequivocally involves direct claims against the Sacklers. Those claims are private property of those claimants, but the plan disposes of them as if they were property of the estate. The bankruptcy power to modify creditor-debtor relations does not include the nonconsensual restructuring of relations among nondebtors. Plan proponents make an equally fundamental error by conflating the subject-matter jurisdiction of courts sitting in bankruptcy—the authority to *hear* claims related to the estate—with the authority to deem those claims *resolved* for $0 regardless of their merits under applicable state law. Plan proponents invoke necessity, but necessity cannot justify taking what is not theirs. Nor do plan proponents have any meaningful response to the reality that their interpretation

swallows the Code's other requirements, effectively permitting the Sacklers to circumvent key limitations that would apply if they filed for bankruptcy to resolve their own liabilities for the opioid crisis. The release should be invalidated.

I. THE U.S. TRUSTEE HAS STANDING

The Court should reject the suggestions to dismiss the writ of certiorari as improvidently granted based on standing arguments that were aired at the petition and stay stage, were overcome by the participation of additional parties, and were always legally flawed. See, *e.g.*, Debtors Br. 17, 44; Official Committee of Unsecured Creditors (UCC) Br. 18-23.

a. As an initial matter, this Court has jurisdiction regardless of the U.S. Trustee's standing because other parties are participating as respondents in support of petitioner. See Isaacs Br. 21; Canadian Creditors Br. 52. Ellen Isaacs, an individual victim whose son died from opioid addiction, and whose claims against the Sacklers were extinguished without her consent, plainly has standing to challenge the plan containing that release. See Isaacs Br. i.

Debtors contend (Br. 48) that she "lacks a concrete interest" in getting the release invalidated because she purportedly forfeited her objection. But at each stage, she objected passionately and specifically to the Sackler release. See, *e.g.*, Isaacs C.A. Br. 5-6, 18 (contending that "[t]he bankruptcy court did not have the authority to deprive victims of the opioid crisis of their right to sue the Sackler family" and asking the court not to allow the Sacklers "to buy their way out of justice"). Even if she *had* forfeited her argument, that would go only to the merits of her claim, not standing. See *Arizona State Legislature* v. *Arizona Indep. Redistricting Comm'n*,

576 U.S. 787, 800 (2015). In any event, because the court of appeals "passed upon" the question, she may seek the Court's review. *Lebron* v. *National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) (citation omitted). The same is true of the Canadian Creditors. See Canadian Creditors Br. 47-51.

b. The arguments against the U.S. Trustee's own standing are also wrong.

Debtors dispute (Br. 45-46) the Trustee's statutory authority to appeal. But 11 U.S.C. 307 expressly authorizes the Trustee to "raise" and to "appear and be heard on any issue." Given the plain meaning of "raise," the Trustee may "bring up" issues, not just offer views on issues raised by others. See Gov't Br. 16 (citation omitted). Although debtors cite cases about potential limitations in provisions applicable to other parties, Debtors Br. 45, debtors ignore that *every* court of appeals to consider the question has held that Section 307 authorizes the U.S. Trustee to appeal as a sole appellant without a pecuniary interest. See Gov't Br. 17.[1]

Debtors contend (Br. 44-47) that Section 307 violates Article III, but it is "establish[ed]" that there is no Article III obstacle to congressional authorization for a federal officer or agency to "pursue the public's interest." *Director* v. *Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 132-133 (1995); see Gov't Br. 17-19. Debtors assert (Br. 46) that the U.S. Trustee "is not the United States." But a government "must be able to designate agents to represent it in federal court." *Hollingsworth* v. *Perry*, 570 U.S. 693, 710 (2013). The

[1] This Court is currently considering the validity of some judicially created limits on a private party's ability to object under 11 U.S.C. 1109(b). See *Truck Ins. Exch.* v. *Kaiser Gypsum Co.*, cert. granted, No. 22-1079 (Oct. 13, 2023).

U.S. Trustee is appointed by the Attorney General—the Executive's archetypal representative in the courts, 28 U.S.C. 516-519—and acts under the Attorney General's supervision. 28 U.S.C. 581(a), 586(c); see also *Ingalls Shipbuilding, Inc.* v. *Director*, 519 U.S. 248, 254, 264 (1997) ("Article III surely poses no bar" to an agency director's "standing" to "participat[e] in the appeal"). Nor does *Raines* v. *Byrd*, 521 U.S. 811 (1997), help debtors because the individual legislators in that case were not authorized to represent their governmental bodies. See *id.* at 829. By contrast, the U.S. Trustee is indisputably acting in his "official capacit[y]" to represent the Executive, *Hollingsworth*, 570 U.S. at 709, and therefore has standing to vindicate the public interest in the proper application of the Bankruptcy Code.

II. PLAN PROPONENTS IDENTIFY NO STATUTORY AUTHORITY FOR NONCONSENSUAL THIRD-PARTY RELEASES

A. Plan Proponents Misconstrue Section 1123(b)(6)

Plan proponents attempt to locate the authority to extinguish third-party claims against nondebtors in 11 U.S.C. 1123(b)(6), which, after addressing the estate's property and creditors' rights against the debtor, allows a reorganization plan to include "any *other* appropriate provision." 11 U.S.C. 1123(b)(6) (emphasis added). That interpretation untenably treats a catchall provision as granting a power of a fundamentally different character and scope than the enumerated provisions, though "there is no textually sound reason to suppose the final catchall term should bear such a radically different object." *Epic Sys. Corp.* v. *Lewis*, 138 S. Ct. 1612,

1625 (2018). It also swallows the Code's more limited and specific authorizations. See Gov't Br. 21-32.[2]

1. Plan proponents cannot identify any power in Section 1123(b) similar to approving nonconsensual third-party releases

a. Debtors first contend (Br. 23) that the power to approve nonconsensual releases is similar to other powers enumerated in Section 1123(b), asserting that it is a "natural adjunct" to the express authority to "settle[] or adjust[]" any claim "belonging to the debtor or to the estate." 11 U.S.C. 1123(b)(3)(A); see Sackler Br. 45 (relying on the Section 1123(b)(2) power to act on certain contracts or leases "of the debtor"). But those examples authorize the exercise of power over the debtor's *own property*. Reading Section 1123(b)(6) to grant the authority to forcibly "adjust[]" a claim *not* "belonging to the debtor or to the estate" violates the principle that the Code's general authorizations cannot swallow its "more limited, specific authorization[s]." *RadLAX Gateway Hotel, LLC* v. *Amalgamated Bank*, 566 U.S. 639, 645 (2012).

Debtors offer no support for the extraordinary proposition that the authority to settle the estate's own claims encompasses the ability to bargain away property rights that do not belong to the estate—here, claims that third parties hold against the Sacklers. That is akin to suggesting that if some of Purdue's creditors owned valuable paintings that the Sacklers de-

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[2] Some plan proponents, see, *e.g.*, Sackler Br. 19, attempt to get independent mileage from 11 U.S.C. 105(a). But as debtors and the court of appeals recognized, Section 105(a) authorizes orders that are needed "to carry out the provisions of [the Code]," 11 U.S.C. 105(a), and therefore cannot itself authorize the release. See Debtors Br. 19 n.5; J.A. 877; see also U.S. Br. 22.

sired, the estate could appropriate the paintings and give them to the Sacklers in exchange for an increased payment in resolution of Purdue's claims against the Sacklers. Debtors suggest that the release here is acceptable because the released claims *relate to* (or could have an effect on) estate property, but that does not alter debtors' fundamental mistake of appropriating and disposing of property that is not theirs.

b. Debtors suggest (Br. 24) that the claims that the Sacklers' victims hold against the Sacklers are similar to derivative claims. But derivative claims, which assert harm to the estate on behalf of all the creditors, belong to the estate, while direct claims, which assert plaintiffs' individual injuries on behalf of those plaintiffs, do not. See *In re Tronox Inc.*, 855 F.3d 84, 100, 104 (2d Cir. 2017). That difference is critical: A painting in a creditor's hands can be forcibly reclaimed and used as consideration in settling the debtor's claims if it actually belongs to the estate; a painting that belongs to the creditor cannot be. See 11 U.S.C. 1123(b)(3); 11 U.S.C. 541(a) (identifying property that composes the estate, "wherever located and by whomever held"). Even if the effect on the painting's possessor would be "functionally equivalent" in those scenarios, Debtors Br. 24, the power wielded to divest the painting differs greatly.

Some plan proponents incorrectly assert that all the claims held by the Sacklers' personal-injury victims are derivative, UCC Br. 54, while others sow confusion about which claims fall into which category, *e.g.*, Debtors Br. 24. The important point is that the Sackler release encompasses direct claims—that is, those that a claimant is "legally entitled to assert in its own right," J.A. 274. See J.A. 636. As the lower courts recognized, the dispute is whether releasing direct claims without

consent is permissible. J.A. 751-752; see J.A. 394, 872; see also J.A. 871 n.15 (rejecting plan proponent's argument that all released claims are derivative).

Plan proponents suggest (*e.g.*, Debtors Br. 27) that the claims against the Sacklers are in the penumbra of the estate's property because the debtors' own conduct is a "legally relevant factor" in those claims. J.A. 275. But whatever that vague requirement means, even the bankruptcy court recognized that it captures direct claims belonging to individual claimants if they overlap factually with claims that could be asserted against debtors. J.A. 394. In fact, many claims based on the Sacklers' own wrongdoing would likely involve, in a legally relevant way, Purdue's own conduct, either because Purdue's production of OxyContin would be part of a claimant's case or because the Sacklers could point to Purdue's actions (such as obtaining FDA approval for the OxyContin label) as a defense.

2. Section 1123(b)(6) does not confer authority beyond modifying creditor-debtor relationships

This Court has recognized that Section 1123(b)(6) grants courts "authority to modify creditor-debtor relationships." *United States* v. *Energy Resources Co.*, 495 U.S. 545, 549 (1990); Gov't Br. 24. Plan proponents, however, contend that the power sweeps far more broadly, authorizing courts sitting in bankruptcy to do anything that *affects* creditor-debtor relationships. See, *e.g.*, Debtors Br. 25-27. That leap is legally untenable and practically unworkable.

a. Plan proponents assert that *Energy Resources* effectively allowed "a third-party release." Debtors Br. 21-23; see, *e.g.*, UCC Br. 27-28; Sackler Br. 23-25. But the challenged plan provision at issue in *Energy Resources* specified the treatment of a debtor's payment

to the IRS, one of its creditors. See Gov't Br. 36. It directed that the payment would be applied first to the debtor's tax liability, for which its officers and employees were jointly liable. *Energy Resources*, 495 U.S. at 547. That adjustment of creditor-debtor relations affected third parties, but only because the treatment it specified for the debtor's payment to a creditor resulted in *satisfying* the obligation on a jointly held debt. The provision did not purport to modify or extinguish any nondebtor's obligation itself. To the contrary, the Court emphasized that the plan "d[id] not prevent the [IRS] from collecting" any remaining debt from the officers and employees. *Id.* at 550. By contrast, the Sackler release squarely prohibits claimants from collecting on their independent claims against the Sacklers. *Energy Resources* offers no support for that result.

Debtors rely (Br. 26) on *Van Huffel* v. *Harkelrode*, 284 U.S. 225 (1931). But that case also addressed only creditor-debtor relations, by allowing the interest of a lienholder (*i.e.*, a creditor) in the debtor's property to be transferred, without impairment, to the proceeds of that property's sale. The applicable Bankruptcy Act expressly authorized trustees to "cause the estates of bankrupts to be collected, reduced to money and distributed." Bankruptcy Act of 1898, ch. 541, § 2(7), 30 Stat. 546. That language granted "by implication" the power to sell the property "free from encumbrances," including "liens for state taxes." *Van Huffel*, 284 U.S. at 227-228. Again, however, even when addressing a creditor's rights against the debtor, the Court did not infer a power to extinguish the liens outright for the benefit of the estate. See *id.* at 226. Although the rights of the lienholder were "transferred to the proceeds of the sale," "there had been no suggestion [in *Van Huffel*]

that such a sale could be made to the prejudice of the lienor" or could "modif[y]" the lienholder's "substantive right." *Louisville Joint Stock Land Bank* v. *Radford*, 295 U.S. 555, 583-584 (1935).

Plan proponents' other examples fare no better. Contrary to the assertion of some, see, *e.g.*, Ad Hoc Comm. Br. 24, a fraudulent-conveyance suit—which the Code specifically authorizes, 11 U.S.C. 548—is a classic example of modifying creditor-debtor relations: It seeks to recapture property that rightfully belongs to the estate and would otherwise have been in the debtor's hands and available for distribution to creditors. And while the UCC contends (Br. 37) that the power to enter consensual releases of third-party claims illustrates that Section 1123(b)(6) reaches beyond creditor-debtor relations, the source of a court's authority to enter consensual releases instead comes from the parties' agreement. Gov't Br. 48.

b. Plan proponents also suggest that a court in bankruptcy has the power to resolve any claims that relate to the estate because it has jurisdiction over those matters under 28 U.S.C. 1334(b). See, *e.g.*, UCC Br. 24-26; Debtors Br. 25. That argument conflates a court's subject-matter jurisdiction to *hear* a dispute that relates to the bankruptcy proceeding with the statutory authority to *resolve* that dispute in any manner it wishes. Even where a court sitting in bankruptcy has jurisdiction over a claim related to the estate, it still must apply the law that would otherwise govern when resolving that claim. See *Travelers Cas. & Sur. Co. of Am.* v. *Pacific Gas & Elec. Co.*, 549 U.S. 443, 450 (2007); *Raleigh* v. *Illinois Dep't of Revenue*, 530 U.S. 15, 20 (2000). The court cannot—as the Sackler release requires—simply extinguish state-law claims held

against nondebtors without regard to the merits of those claims. Indeed, if a bankruptcy court could disregard the merits in that fashion, there is no reason to think it could not equally compel the Sacklers to pay the estate, say, $15 billion, to resolve those claims. But forcing innocent victims to accept a $0 resolution just because they also have claims against Purdue is no more "appropriate," 11 U.S.C. 1123(b)(6), than forcing a $15 billion payment that would provide creditors greater compensation.[3]

3. The power that plan proponents read into Section 1123(b)(6) has no historical foundation in equity

As *Energy Resources* makes clear, 495 U.S. at 549—and as debtors appear to accept, Br. 30—the authorization in Section 1123(b)(6) is limited by principles of equity. Gov't Br. 27. Although plan proponents attempt to identify an analogue at equity, they come up empty-handed.

Debtors discuss (Br. 27-28) *Tiffin* v. *Hart*, a 1619 decision by Francis Bacon as Lord Chancellor. See John Ritchie, *Reports of Cases Decided by Francis Bacon* 161 (London 1932). That decision was not reported until John Ritchie extracted Bacon's orders from Chancery documents and "ma[d]e short reports of them on the

[3] Plan proponents again conflate the extent of a court's jurisdiction with its power to act in their attempt to distinguish *Callaway* v. *Benton*, 336 U.S. 132 (1949), which held that the Bankruptcy Act of 1898 did not authorize a court sitting in bankruptcy to prevent suit by third-party shareholders to enjoin a transaction required by the plan. *Id.* at 141; see U.S. Br. 31. The *Callaway* Court also addressed limits on the court's jurisdiction, which the Bankruptcy Code has since expanded. See Debtors Br. 28-29; Sackler Br. 47. But the Code did not expand substantive authority over state-law claims between nondebtors. U.S. Br. 32 n.1.

lines of modern law reports" in 1932. *Id.* at xiv. It could hardly amount to an accepted, enduring practice. And its substance provides no authority for the Sackler release. The case addressed the debts of two sons as sureties of their deceased father. The sons offered the creditors "the whole of their father's estate" and "the whole of their own estates even to their very clothes to satisfy the creditors rateably." *Id.* at 162. The Chancellor ordered dissenting creditors to accept that offer as to those two sureties, while directing that additional sureties (who served as sureties for some but not all of the debts) remained liable for the "principal debt only." *Id.* at 164.

To the extent that debtors suggest (Br. 28) that *Tiffin* supports discharging the liability of a debtor's sureties, that proposition is flatly contrary to the Code. 11 U.S.C. 524(e). Even if it were not, the decision would only underscore a distinction at equity between extinguishing claims against those who devote their entire estates to payment and those—like the Sacklers—who do not offer their very clothes but instead keep billions.

Debtors' invocation (Br. 28) of equitable authority to distribute a "limited fund" fails for the same reason: The Sacklers retain much of their wealth under the proposed settlement, meaning that "the whole of the inadequate fund" is not "devoted to the overwhelming claims." *Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815, 839 (1999); see Gov't Br. 38.

4. Plan proponents cannot reconcile the release with the Code's other limitations

Nonconsensual third-party releases not only depart fundamentally from the powers enumerated before the catchall in Section 1123(b)(6) but also conflict with several express limitations under the Code.

a. A discharge under the Code "operates as an injunction against" any action to collect a "[discharged] debt," 11 U.S.C. 524(a)(2)—precisely what the Sackler release does as to debts based on the covered claims, J.A. 279. See Gov't Br. 26. But the Code repeatedly makes clear that a discharge is available to a *debtor* rather than to third parties. Gov't Br. 25-26.

Plan proponents nonetheless contend that the Sackler release comports with the Code, claiming that "the Sacklers [are] not receiving a discharge" because the release does not provide "'umbrella protection'" from all liability. Debtors Br. 34-35 (citation omitted). But a discharge need not be, and usually is not, universal. The Code often speaks about the discharge of "a debt" or "any debt." See, *e.g.*, 11 U.S.C. 523(a), 524(a) and (e). Certain debts are not eligible for discharge, meaning that both individual and corporate debtors undergoing bankruptcy often obtain discharges that fall short of full repose. See 11 U.S.C. 523, 1141(d)(6). And any distinction based on purported breadth is misplaced because the Sacklers are obtaining *broader* repose as to opioid-related liability than they would receive if they filed for bankruptcy. Gov't Br. 26.

For their part, the Sacklers emphasize (Br. 31) that a release differs from a discharge because it is a "contractual device." But that only underscores why it should not bind *nonconsenting* parties.

b. Plan proponents have no answer to the salient point that, had the Sacklers themselves filed for bankruptcy, they would (absent individual creditor consent) have been required to devote substantially all their assets to the payment of creditors. Gov't Br. 26. It does not comport with the Code's carefully calibrated framework, let alone with basic fairness, to force the Sacklers'

victims to give up their claims against the Sacklers without full compensation—indeed, without any compensation *at all*, Gov't Br. 33-34—when the Sacklers are not contributing what they would need to pay to obtain discharge of those debts in bankruptcy (assuming they could be discharged).

Plan proponents appear to suggest that this is acceptable because the Sacklers' victims are eligible for some compensation from debtors' estate for their separate claims against debtors. See, *e.g.*, Debtors Br. 41 n.13. But the victims who could satisfy the stringent requirements to receive a payment from debtors' estate will not receive much, even for the most catastrophic losses. See Gov't Br. 5-6. By necessity, that minimal compensation satisfies *debtors'* obligations. But as the Code expressly provides, such partial compensation does not satisfy anyone else's liability even on the *same* debt. 11 U.S.C. 524(e). Plan proponents disregard the basic operation of the Code by contending that the possibility of a partial payment from a debtor satisfies a non-debtor's *different* debt based on a distinct legal injury.

c. Nor can plan proponents justify the release of fraud and willful-misconduct claims that the Sacklers would not be able to discharge in their own bankruptcy over the objection of their creditors. Gov't Br. 27. Debtors point out (Br. 35) that the fraud exceptions do not apply to corporate debtors. But they do apply to individuals, and in this case *individuals*—the Sacklers (as well as hundreds of others)—are the ones obtaining relief from debts for claims involving fraud and willful misconduct. While the Sacklers' creditors would be free to preserve those claims if the Sacklers had entered bankruptcy, 11 U.S.C. 523(c)(1), they are powerless to preserve those claims under the Sackler release. That

workaround is yet another stark illustration of how, by reading Section 1123(b)(6) to authorize the release here, plan proponents impermissibly convert that provision into a "backdoor means to achieve the exact kind of non-consensual [results] that the Code prohibits" in other contexts. *Czyzewski* v. *Jevic Holding Corp.*, 580 U.S. 451, 465 (2017).

d. As to the circumvention of the jury-trial right preserved in 28 U.S.C. 1411, the Sacklers—but not debtors —assert that the argument is "forfeited." Br. 36. That is incorrect: The jury-trial provision is simply another example supporting the U.S. Trustee's consistent position that the release is broader than would be allowed if the Sacklers themselves were the debtors. See *Lebron*, 513 U.S. at 379.

Debtors, for their part, suggest (Br. 38) that the conflict with Section 1411 is irrelevant because that provision is not in Title 11. But Section 1411 expressly applies to "title 11," 28 U.S.C. 1411(a), and therefore cabins 11 U.S.C. 1123(b)(6). Debtors further contend (Br. 39) that Section 1411 is ambiguous. But the only ambiguity is about how far Section 1411 extends *beyond* the heartland application to "personal injury and wrongful death actions." *Granfinanciera, S.A.* v. *Nordberg*, 492 U.S. 33, 41 n.3 (1989).

The Sacklers contend (Br. 36) that Section 1411(a) cannot apply here, because that would suggest that it also applies to asbestos trusts established under 11 U.S.C. 524(g). But Section 1411(a) *does* apply to such asbestos trusts, again illustrating how much broader the Sackler release is than anything specifically authorized by Congress. See, *e.g.*, *In re W.R. Grace & Co.*, 475 B.R. 34, 172 (D. Del. 2012); *In re G-I Holdings, Inc.*, 323 B.R. 583, 616 (Bankr. D.N.J. 2005).

Plan proponents cannot explain why, under their view that Section 1411(a) is inapplicable, the plan makes sure to comply with that provision by guaranteeing a jury trial as to personal-injury claims *against the debtors*. Gov't Br. 27-28. And debtors misread their own trust documents when they suggest that the jury-trial option is preserved as to claims against the Sacklers. Instead, the saved right to "litigate in court" applies only to claims "held against one or more Debtors." J.A. 590; see also J.A. 203, 206, 209 (together defining a "PI Claim" as a "Claim against any Debtor"); J.A. 560 (limiting the right to litigate to "PI Claim[s]"); J.A. 593 (providing that a claimant may file a lawsuit "regarding only" claims against a debtor, and "including *no other parties as defendants*") (emphasis added).

Similarly, while the Ad Hoc Group of Individual Victims touts the fact that the trust preserves victims' ability to "voice their story concerning Purdue," Br. 46, the key point is that the victims have no ability to voice their story about *the Sacklers*. Thus, the Sacklers float above the fray, still "emphatically disput[ing] all allegations of wrongdoing against them" without the risk of facing their victims in court. Sackler Br. 6.

5. Plan proponents' reading of Section 1123(b)(6) has no meaningful limits

Debtors contend (Br. 30-31) that their approach is not limitless. But they identify no concrete limit that would prevent a court from entering a release where an estate is underfunded and someone offers to infuse money in exchange for a release of third-party claims—even if the estate is underfunded *because* the putative white knight had previously drained it of its assets in anticipation of the bankruptcy. See J.A. 848.

a. Plan proponents contend that, if held liable for the released claims, the Sacklers could conceivably bring indemnification and contribution claims against debtors. See, *e.g.*, Debtors Br. 9-10. But the court of appeals did not limit the release to such claims, and plan proponents overstate the effects that the released claims would have on the estate.

i. First, although some Sackler releasees have conceivable indemnification claims against the estate, debtors themselves admit (Br. 10 n.3) that the "indemnification agreement does not apply if a court determines the Sacklers 'did not act in good faith.'" And even where the agreement applies, the Code permits courts to address such claims directly. A court could disallow indemnification or contribution claims by the Sacklers under 11 U.S.C. 502(e)(1)(B). And it could equitably subordinate the Sacklers' claims against the estate, 11 U.S.C. 510(c)(1), which would ensure that the Sacklers, whose actions allegedly caused harms worth trillions of dollars, would not receive distribution ahead of their victims. Indeed, if, as plan proponents contend, courts sitting in bankruptcy are authorized to extinguish claims due to their potential downstream effect on the estate, it is unclear why a court would not be more justified in extinguishing the Sacklers' indemnification or contribution claims against the estate directly.

To the extent that plan proponents rely on a concern that lawsuits against the Sacklers by "holdout creditors" would deplete the Sacklers' funds and thereby endanger the Sacklers' future contributions to the estate, Debtors Br. 25, that risk exists only because debtors intertwined their fortune with the Sacklers by structuring their settlement as a stream of payments over nearly

two decades instead of an up-front payment of equal present value.

ii. Second, despite its claimed modesty, the authority to extinguish claims against third parties that could lead those third parties to sue the estate produces a power of startling breadth. Some opioid distributors and manufacturers have been sued on theories that expressly allege concerted conduct with Purdue. See, *e.g.*, *In re National Prescription Opiate Litig.*, No. 17-md-2804, 2018 WL 6628898, *3-*11 (N.D. Ohio Dec. 18, 2018). And some state laws broadly authorize contribution claims by any person found liable under the State's drug laws against other participants in the same market. See, *e.g.*, *Dunaway* v. *Purdue Pharm. L.P.*, 619 B.R. 38, 42 (S.D.N.Y. 2020) (citing Tenn. Code Ann. § 29-38-112). In fact, a large group of opioid distributors and manufacturers filed proofs of claim in this case, asserting indemnification and contribution claims against debtors. See Bankr. Ct. Doc. 3306, at 5-6 (July 22, 2021); *id.* at Ex. A. Under plan proponents' theory, if Walmart or CVS offered $6 billion to the Purdue estate in exchange for a release of claims by victims who were also Purdue's creditors, a court could approve that release as necessary to the confirmation of a Chapter 11 plan. That implication is particularly stark because suits against opioid manufacturers and distributors have led to settlements of over $50 billion to date. Kerry Breen, *Opioid Crisis Settlements Have Totaled Over $50 Billion. But How Is That Money Being Used?*, CBS News (Mar. 1, 2023), www.cbsnews.com/news/opioid-crisis-settlements-have-totaled-over-50-billion-how-is-that-money-being-used.

b. Nor can debtors mount any persuasive defense of the court of appeals' attempt to incorporate, in its multi-

factor test, aspects of the framework that Congress imposed in the one provision that authorizes injunctions of third-party claims, see 11 U.S.C. 524(g). Debtors seek support for that judicial freewheeling from *Michigan* v. *EPA*, 576 U.S. 743 (2015), but that decision cuts squarely against them, holding that Congress's authorization for an agency to issue "appropriate" regulations did not allow the agency to issue regulations that entirely disregarded costs. *Id.* at 752. In just the same way, the court of appeals lacked authority to devise a test that disregards third parties' property rights, as they are surely "an important aspect of the problem" at hand. *Ibid.* (citation omitted).

Debtors implausibly assert that third-party releases are "rarely used." Br. 31; see also, *e.g.*, UCC Br. 4. But see, *e.g.*, *In re Aegean Marine Petroleum Network Inc.*, 599 B.R. 717, 726 (Bankr. S.D.N.Y. 2019) ("Almost every proposed Chapter 11 Plan that [the court] receive[s] includes proposed releases."). In any event, this Court has already held that "Congress did not authorize a 'rare case' exception" to the Code's requirements. *Czyzewski*, 580 U.S. at 471; see Gov't Br. 40.

B. Plan Proponents Cannot Deflect The Serious Constitutional Questions Presented By The Release

Plan proponents have also failed to deflect the serious constitutional questions raised by their construction of Section 1123(b)(6). See Gov't Br. 41-44.

Debtors contend (Br. 8, 41) that claims against the Sacklers—which are undisputedly property rights of the claimants—would not be extinguished but merely "*channeled* to the creditor trusts" "for resolution under detailed procedures." But those detailed procedures provide no value for the claims against the Sacklers while deeming them satisfied in full. The trust proce-

dures specifically state that "[d]istributions * * * are determined only with consideration to" a claim against debtors "and not to any associated [claim] against a non-Debtor party." J.A. 562-563. Those distributions are then "*deemed* to be a distribution in satisfaction" of the claim against the Sacklers. J.A. 563 (emphasis added); see J.A. 205-206. Accordingly, the district court specifically found that the "purportedly channeled third-party claims" are "effectively being extinguished for nothing." J.A. 704-705; see also J.A. 867 (court of appeals recognizing that the claims against the Sacklers "are effectively finally resolved" by the release). The trust "channels" the claims against the Sacklers only in the sense of funneling them into an incinerator.

Debtors also suggest that all the claimants are parties to the proceeding by virtue of being Purdue's creditors. Bankruptcy allows creditors who do not participate to be bound as to their claims against a *res*. But the Sackler release binds claimants as to their *in personam* claims against nondebtors, with res judicata effect, J.A. 867, and without regard for whether they appeared or otherwise participated in the bankruptcy proceeding. The ability to bind claimants in their third-party claims on the theory that those interests are "close enough" to the claimants' interests in the estate, *Taylor* v. *Sturgell*, 553 U.S. 880, 898 (2008), raises serious questions of constitutionality. Gov't Br. 37, 41. Similarly, while debtors emphasize that a hearing preceded confirmation, Br. 41, that hearing neither addressed the merits of the extinguished claims, Bankr. Ct. Doc. 3572, at 68, 73 (Aug. 9, 2021), nor provided objecting claimants an opportunity to remove themselves from the class of released parties. See Gov't Br. 42.

Debtors (Br. 41) and the UCC (Br. 43) invoke the special remedial scheme of bankruptcy, which serves as an exception to certain due-process requirements. But bankruptcy provides an "express[]" remedial scheme, *Martin* v. *Wilks*, 490 U.S. 755, 762 n.2 (1989), for resolving creditors' claims against debtors, not for resolving claims between nondebtors. Creditors are bound as to their claims against the debtor, regardless of their consent, because the point of bankruptcy is to gather and equitably distribute the limited pool of a debtor's assets. But that rationale does not apply and the Code's extensive protections for creditors have no effect as to claims against third parties. See Wedoff Amicus Br. 24-28. And the fact that bankruptcy justifies deviations from normally applicable due-process requirements is all the more reason to proceed with caution before reading into the Code a novel power that extends beyond creditor-debtor relations, lest bankruptcy become an alternative justice system where substantive law and constitutional strictures do not apply to those who can generate some relationship to a creditor-debtor proceeding.

C. Plan Proponents' Arguments About Necessity Do Not Justify The Sackler Release

Although debtors purport to disclaim policy arguments (Br. 44), their main argument is an appeal to policy: The Sackler release, they argue, is necessary to the confirmation of a desirable and popular plan. That reasoning is legally mistaken and factually dubious. If a debtor lacks sufficient assets for a Chapter 11 reorganization, it does not get to augment the estate by claiming for itself and bargaining away others' property rights under cover of necessity.

As a factual matter, plan proponents' contention that the release is necessary gives short shrift to the value

of the estate's fraudulent-conveyance claims against the Sacklers. As the UCC explained in bankruptcy court, "[t]he Sacklers likely are liable to the Debtors (and thus to their creditors) in amounts far in excess of the Settlement Amount." J.A. 76; see J.A. 35. And debtors' assertion that the Sacklers' agreed contribution reflects "more than 97% of the non-tax distributions" that the Sacklers withdrew from Purdue in anticipation of bankruptcy, Br. 34, fails to account for the time value of money. Indeed, the Sacklers' payments under the plan are so drawn out that, even after they make all their payments, they will likely be worth billions *more* than before the bankruptcy. Gov't Br. 26.

The claim of necessity also disregards the potential that, if this Court reverses the Second Circuit, the stakeholders can still negotiate a plan that includes a release of direct third-party claims, as long as that release is consensual, binding only those claimants who opt in. See, *e.g.*, Bankruptcy Law Professors Amicus Br. 28-30 (explaining how the release here could have been made consensual with an opt-in requirement). Previous alterations to the plan's terms provide strong evidence that a renegotiation would be possible. Most conspicuously, plan proponents told the district court that a prior version of the plan was "the best available" to creditors "by a very wide margin." D. Ct. Doc. 151, at 21 (Nov. 15, 2021). But after the district court vacated the confirmation order, the Sacklers reached an agreement to pay an additional $1.675 billion—a 39% increase—in exchange for the affirmative consent of eight objecting States and the District of Columbia. Gov't Br. 7-8, 45. That additional settlement demonstrates that requiring consent is important leverage that can lead to better outcomes; and the fact that plan proponents have

already secured the consent of all fifty States, likely the holders of the most valuable direct claims against the Sacklers, illustrates that the vast majority of the release's value is secure.

Plan proponents deny (*e.g.*, Debtors Br. 42) that the release is a good deal for the Sacklers. But that blinks reality. Both sides of the Sackler family are urging this Court to uphold the plan. See Sackler Br. 1-50; Raymond Sackler Letter 1. They presumably think the agreed contribution of up to $6 billion is less costly than the litigation risk associated with the released claims. See Bankr. Ct. Doc. 3599, at 35 (Aug. 17, 2021) (testimony of David Sackler, describing "a release that is sufficient to get our goals accomplished" as an essential prerequisite to the Sacklers' "willing[ness] to pay to help abate the opioid crisis"). Given the Sacklers' previous responses in the face of that litigation risk, and their exposure to claims by the estate and by third parties, there is little reason to expect them to forgo a revised deal that would provide broader repose than they could obtain in their own bankruptcy, at far less cost, including a consensual release of claims by all fifty States and the District of Columbia for claims based on willful misconduct and fraud.

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The judgment of the court of appeals should be reversed.

Respectfully submitted.

ELIZABETH B. PRELOGAR
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