No. 22O151

IN THE

Supreme Court of the United States

STATE OF ARIZONA, EX REL. MARK BRNOVICH,

Plaintiff,

v.

RICHARD SACKLER, THERESA SACKLER, KATHE SACKLER, JONATHAN SACKLER, MORTIMER D.A. SACKLER, BEVERLY SACKLER, DAVID SACKLER, ILENE SACKLER LEFCOURT, PURDUE PHARMA, INC.; PURDUE PHARMA, L.P.; THE PURDUE FREDERICK COMPANY, INC., PURDUE HOLDINGS L.P., PLP ASSOCIATES HOLDINGS L.P., BR HOLDINGS ASSOCIATES L.P., ROSEBAY MEDICAL COMPANY L.P., AND BEACON COMPANY,

Defendants.

REPLY BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

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November 18, 2019

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INTRODUCTION

Purdue's Brief in Opposition ("BIO") raises a threshold constitutional question that this Court must confront. Arizona properly filed its Bill of Complaint here because "the Supreme Court shall have original jurisdiction" over "[c]ontroversies … between a State and Citizens of another State." U.S. CONST., art. III, § 2. Since the dawn of the Republic, this Court has confirmed that whatever "exceptions" and "regulations" Congress may impose on the Court's appellate jurisdiction, Congress is powerless to divest it of original jurisdiction, let alone to authorize an Article I tribunal to do so. *Marbury v. Madison*, 5 U.S. 137, 174 (1803). There is no "fraudulent transfer" or "bankruptcy" exception to that rule.

Nevertheless, Purdue maintains that the automatic stay provision of the Bankruptcy Code, 11 U.S.C. § 362(a), strips the Court of jurisdiction to decide this controversy. The bankruptcy court agrees, and has threatened to hold Arizona in contempt if the State continues to pursue this original action. Arizona is not pursuing mandamus relief only because the bankruptcy court last week issued an exceedingly narrow lift-stay order authorizing this reply—but *nothing* more. The threat of contempt thus remains should Arizona take *any* additional steps to litigate its original action.

Addressing and rejecting Purdue's threshold constitutional argument is both important and necessary. It is important because this Court has an institutional interest in jealously guarding its grant of

original jurisdiction. If the automatic stay provision purports to strip the Court of original jurisdiction, it is unconstitutional as applied. The Court should say so. Rejecting Purdue's argument is necessary because the automatic stay would *forbid* this Court from ruling on Arizona's Motion for Leave to File a Bill of Complaint. If this case is automatically stayed under the Bankruptcy Code, the Court *must* hold it until Purdue's bankruptcy action is resolved or the stay is lifted. Arizona's motion, on Purdue's view of the law, can neither be granted nor denied.

Before declaring the automatic stay unconstitutional as applied, the Court may wish to call for the views of the Solicitor General. Indeed, the United States has already acknowledged the unsettled constitutional question posed by the interplay between the automatic stay and this Court's original jurisdiction. And the Court cannot decide whether to grant or deny Arizona's motion—or to stay the motion indefinitely—without first addressing that threshold issue.

On the merits, the BIO offers no response to the argument that Article III *requires* this Court to exercise its original jurisdiction. Purdue just contends that existing precedent permits the Court to weigh "policy considerations" to decide whether to adjudicate this case. But Arizona has expressly requested that the Court overturn its erroneous precedent. Repeating those cases' holdings does not make them any more defensible as an original matter. Nor does Purdue dispute that the question presented is a recurring one. The Court should set the case for argument so that it

can consider the issue with the full benefit of merits briefing and oral advocacy.

But the Court need not reexamine precedent. The opioid crisis is an unprecedented public-health epidemic. A national resolution is needed to force the Sacklers to return the assets that were fraudulently transferred. And only this Court can enter a judgment that will be respected internationally when Arizona and other creditors inevitably pursue the assets that the Sacklers have stashed overseas. The Court should grant the Motion even assuming it has discretion not to hear this dispute.

BACKGROUND

On July 31, 2019, Arizona filed this original action against Purdue and the Sacklers. On September 15, Purdue filed for bankruptcy. Three days later, Purdue asked the bankruptcy court to enjoin cases (including this one) against the Sacklers. Motion for Preliminary Injunction, *Purdue Pharma L.P. et al. v. Commonwealth of Massachusetts et al.*, No. 19-08289-rdd (Bankr. S.D.N.Y. Sept. 18, 2019) (Doc. 2). Purdue also argued that 11 U.S.C. § 362(a) automatically stayed all actions against the debtors. Arizona opposed that motion because Congress and the bankruptcy court have no constitutional authority to stay an original action. Objection & Response at 4, *Purdue Pharma L.P. et al. v. Commonwealth of Massachusetts et al.*, No. 19-08289-rdd (Bankr. S.D.N.Y. Oct. 7, 2019) (Doc. 51).

The bankruptcy court granted Purdue's motion, stating that it was "enjoining the State of Arizona from violating Section 362(a) which enjoins them already," and would hold Arizona in contempt if it continued to pursue this case. Transcript of Hearing at 268, *Purdue Pharma L.P. et al. v. Commonwealth of Massachusetts et al.*, No. 19 08239-rdd (Bankr. S.D.N.Y. Oct. 11, 2019) (Doc. 87). That injunction, the court explained, included filing this reply brief.

On October 30, the Sacklers notified this Court that they would not file an opposition, given the bankruptcy court's order. Purdue, by contrast, filed the BIO.

Arizona renewed its objections to the bankruptcy court. Objection & Response at 6-15, *Purdue Pharma L.P. et al. v. Commonwealth of Massachusetts et al.*, No. 19-08289-rdd (Bankr. S.D.N.Y. Oct. 30, 2019) (Doc. 94). At a minimum, Arizona argued, the bankruptcy court should not enjoin it from filing this reply brief. *Id.* at 17.

Concurrently, Arizona sent a letter to the U.S. Attorney General and the U.S. Trustee notifying them that Arizona was challenging the constitutionality of 11 U.S.C. § 362(a) and 11 U.S.C. § 105(a) as applied to its original action. *Id.* at 11 n.3; *see* Fed. R. Civ. P. 5.1(a). On November 4, the United States filed a letter recommending that the bankruptcy court not enjoin Arizona from filing this reply. The United States also requested that the bankruptcy court defer resolving these issues for 60 days to "permit necessary governmental consultations and deliberation,

including by the Office of the Solicitor General." Statement of United States of America at 1, *Purdue Pharma L.P. et al. v. Commonwealth of Massachusetts et al.*, No. 19-08289-rdd (Bankr. S.D.N.Y. Nov. 4, 2019) (Doc. 96).

Purdue took a different approach. Despite filing its BIO, Purdue argued that this action is stayed under 11 U.S.C. § 362(a) and Arizona should be enjoined from filing this reply brief. Debtors' Statement at 7, *Purdue Pharma L.P. et al. v. Commonwealth of Massachusetts et al.*, No. 19-08289-rdd (Bankr. S.D.N.Y. Nov. 4, 2019) (Doc. 99). Just before a November 6 hearing, however, Purdue altered its position and informed Arizona that it would not oppose modifying the bankruptcy court's injunction solely to allow Arizona to file this reply brief. At the hearing, the bankruptcy court agreed to lift the automatic stay for the sole purpose of allowing Arizona to file a reply brief with this Court. According to the bankruptcy court, the stay otherwise remains in full force and effect.

ARGUMENT

I. This Court Has Original Jurisdiction to Hear this Dispute.

A. Congress Cannot Strip this Court of Its Original Jurisdiction.

According to Purdue, the Court cannot grant Arizona's motion because Section 362 of the Bankruptcy Code has "automatic[ally] stay[ed]" Arizona's original action. BIO 7. Purdue's position, in

other words, is that Congress has prohibited the Court from exercising jurisdiction over an original action. That argument flouts hundreds of years of this Court's jurisprudence.

Congress does not have the power to alter this Court's original jurisdiction. The Supreme Court has original jurisdiction "[i]n all Cases ... in which a State shall be a Party," including those "between two or more States" and "between a State and Citizens of another State." U.S. CONST., art. III, § 2, cl. 1-2. The Court's appellate jurisdiction is subject to alteration under "such Exceptions, and under such Regulations as the Congress shall make." *Id.* at cl. 2. Its original jurisdiction is not.

"The original jurisdiction of the Supreme Court is conferred not by the Congress but by the Constitution itself." *California v. Arizona*, 440 U.S. 59, 65 (1979). It is "self-executing, and needs no legislative implementation." *Id.* Therefore, "where original jurisdiction is given by the [C]onstitution to the Supreme Court, Congress cannot distribute any part of such original jurisdiction to an inferior federal tribunal." *Osborn v. Bank of U.S.*, 22 U.S. 738, 757 (1824) (citing *Marbury*, 5 U.S. at 174).

Congress may be empowered to stay "inferior" federal-court or state-court proceedings. But Congress has no power to alter or vitiate the Supreme Court's original jurisdiction. *See id.*; *see also California*, 440 U.S. at 65. If it could, it could easily "destroy the essential role of the Supreme Court in the constitutional plan." Henry M. Hart, Jr., *The Power of*

Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic, 66 Harv. L. Rev. 1362, 1365 (1953).

Yet Purdue claims Congress did precisely that. Under Section 362, a bankruptcy petition "operates as a stay [of] … the commencement or continuation ... of a judicial ... proceeding against the debtor that was ... commenced before the commencement of the [bankruptcy proceeding]." 11 U.S.C. § 362(a)(1). To the extent the statute reaches original actions, then, it is unconstitutional.

The Court cannot avoid the issue by denying Arizona's motion. If Purdue is right, and Section 362(a)'s automatic stay applies to the Court's original jurisdiction, then Arizona's motion *cannot* be denied. The Court instead *must* stay this action until the automatic stay is lifted or the bankruptcy case "is closed, … is dismissed, or … a discharge is granted or denied." 11 U.S.C. § 362(c)(1)-(2); *e.g., Martinez v. Allstar Fin. Servs., Inc.*, No. CV 14-04661, 2014 WL 12597333, at *5, *9 (C.D. Cal. Oct. 9, 2014) (explaining that the court "cannot dismiss [Plaintiff's] claims because an automatic stay under 11 U.S.C. § 362 is in effect"). Simply stated, the issue is whether Congress has the power to control this Court's original docket.

Even if the Court could avoid this issue, it should not. It is important that parties and lower courts fully respect the Court's original jurisdiction. Purdue has been forcefully arguing to a bankruptcy court that this Court had been ousted of its original jurisdiction. Yet Purdue never notified this Court of

its bankruptcy petition or the bankruptcy court's preliminary injunction. And after filing its BIO, Purdue continued to argue that the bankruptcy court should enjoin Arizona from filing this reply brief. This Court was spared an emergency mandamus petition seeking leave to file a reply brief only because Purdue switched its position at the November 6 hearing. Yet the bankruptcy court's threat of contempt remains should this case proceed further. The Court should assert control over its docket and make clear that its original jurisdiction may not be altered by Congress.

Before finding Section 362 unconstitutional as applied to original actions, the Court may wish to invite the Solicitor General to express the views of the United States. As Purdue concedes, Arizona's original action "raise[s] significant and unanswered questions" about the power of Congress to control actions under the Court's original jurisdiction. Debtors' Statement at 5, *Purdue Pharma L.P. et al. v. Commonwealth of Massachusetts et al.*, No. 19-08289-rdd (Bankr. S.D.N.Y. Nov. 4, 2019) (Doc. 99). The United States has expressed similar concerns; indeed, the United States takes the position that the Solicitor General should be consulted before these issues are resolved in bankruptcy court. *See supra* 4-5. That may be the prudent course here as well.

B. Without the Automatic Stay, Any Creditor Can Pursue a Fraudulent Conveyance Claim

In addition to its argument that the automatic stay binds this Court, Purdue argues that Arizona's

claims are "no longer within this Court's original jurisdiction" because the trustee or debtor has "exclusive authority to assert all fraudulent transfer claims[.]" BIO 4. That argument conflates the merits with jurisdiction and is mistaken in all events.

To begin, Purdue's argument has nothing to do with this Court's subject-matter jurisdiction; it concerns whether Arizona's fraudulent-transfer claim is preempted by the Bankruptcy Code. Article III's grant of original jurisdiction is dictated by the identity of the parties, not the type of claim one of the parties brings. *Cohens v. Virginia*, 19 U.S. 264, 378 (1821). It is undisputed that the Bill of Complaint involves a controversy "between a State and Citizens of another State." That is decisive.

Whether Arizona ultimately *wins* its case in the face of a defense that a federal law—the Bankruptcy Code—preempts state fraudulent transfer claims has no bearing on this Court's *power* to decide the case. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998). Preemption is an affirmative defense to liability, not a deprivation of subject-matter jurisdiction. The Court should not adjudicate Purdue's defense to liability before it has accepted the Bill of Complaint.

In any event, a bankrupt debtor does *not* have "exclusive authority" to assert all fraudulent transfer claims. None of the Bankruptcy Code provisions that Purdue relies on in the BIO provide otherwise; they simply authorize a debtor to bring a fraudulent transfer claim. *See* 11 U.S.C. § 544 (trustee can "avoid

any transfer of property of the debtor"); *id*. § 548 (trustee "may avoid any transfer … of an interest of the debtor in property" if certain factors are met).

The seminal case Purdue relies upon is in accord. *See In re Tribune Co. Fraudulent Conveyance Litig.*, 818 F.3d 98, 108-09 (2d Cir. 2016). The Second Circuit acknowledges that, once the automatic stay is lifted, a creditor can pursue its state fraudulent-conveyance claim. *See id*. If the stay is in effect, a bankrupt debtor may be the only party that can pursue a fraudulent-conveyance claim. But that is because the creditor's claim is *stayed*, not preempted or transferred to the debtor. Just as *lifting* the stay permits a creditor to proceed, so too can Arizona proceed when the automatic stay *cannot* constitutionally have effect. Thus, if the stay is unconstitutional, the Bankruptcy Code permits Arizona to pursue its claim. The Court cannot address Purdue's argument without first confronting that threshold issue.

II. The Court Must Grant Leave to File the Bill of Complaint.

Article III provides that "the Supreme Court shall have original jurisdiction" over "[c]ontroversies … between a State and Citizens of another State." Purdue never disputes that this case satisfies these requirements. That should be decisive. *See* Brief in Support ("Br.") 15-19. As an original matter, "the courts of the United States are bound to proceed to judgment and to afford redress to suitors before them in every case to which their jurisdiction extends. They

cannot abdicate their authority or duty in any case in favor of another jurisdiction." *Chicot County v. Sherwood*, 148 U.S. 529, 534 (1893) (citation omitted). More recent decisions to the contrary—including *Massachusetts v. Missouri*, 308 U.S. 1 (1939) and *Ohio v. Wyandotte Chems. Corp.*, 401 U.S. 493 (1971)—elevate policy objectives over the Constitution's text and original meaning. They should be overruled.

Purdue's BIO does nothing to contest Arizona's interpretation of the original meaning of Article III. It instead assumes the conclusion and contends that there are sound policy considerations for declining original jurisdiction. BIO 16-18. That says precisely nothing about Arizona's uncontested argument that the Court is constitutionally forbidden from declining original jurisdiction on the basis of policy.[1] Br. 15-19; *see also Amici* Brief of Ohio, *et al.* at 4-17. The Court should postpone jurisdiction, set the issue for argument, and decide this recurring question once and for all. Br. 19.

III. The Court Should Grant Leave to File the Bill of Complaint

Even if the Court concludes that its original jurisdiction is discretionary, it should nevertheless grant Arizona's motion. Purdue contends that the

[1] Justice Thomas's dissent in *Nebraska v. Colorado*, 136 S. Ct. 1034 (2016) is not distinguishable. Although the policy implications may be harsher when the Court's original jurisdiction is exclusive, the constitutional inability to consider policy considerations at all remains the same. Br. 15-19.

Court should deny the motion because Arizona has an alternative forum, as the bankruptcy court *must* hear the dispute. BIO 10-11. That argument is incorrect. *Supra* 9-10. Moreover, the bankruptcy court is not a better forum. Br. 19-24.

Purdue also claims that the Bill "presents a question of Arizona law that Arizona could have litigated in its own courts." BIO 11. But that is not necessarily true. As they have elsewhere, the Sacklers will likely contest personal jurisdiction if this case is pursued in Arizona courts. *See Massachusetts v. Purdue Pharma*, 2019 WL 5617817, at *4-8 (Mass. Sup. Ct. Oct. 8, 2019). This action guarantees Arizona access to "a tribunal competent to exercise jurisdiction over the acts of nonresidents[.]" *Wyandotte*, 401 U.S. at 500.

Purdue's argument that Arizona's complaint "places only Arizona's law at issue" is also misplaced. BIO 11 n.2. The Uniform Fraudulent Transfer Act, the Uniform Voidable Transactions Act, and the Uniform Fraudulent Conveyance Act are nearly identical substantively, and the few states that have yet to adopt them have common law rules or statutes that closely resemble these uniform statutes. Br. 13-14 & n.2. This Court's resolution of this action thus will be conclusive. Br. 20-22.

Purdue also wrongly contends that the case will "require significant factual development and expert testimony" that could take "weeks of trial time." BIO 14. Fraudulent transfer cases can be resolved on shorter timeframes. *See, e.g., D&KW Family, L.P. v.*

Rampart Capital Corp., 2002 WL 1585920, at *1 (Tex. App. July 18, 2002). Regardless, special masters regularly handle cases that are far more complex than this case could possibly be. *See Florida v. Georgia*, 138 S. Ct. 2502 (2018) (identifying 40 witnesses and over 2,000 exhibits). A special master would have no difficulty managing this case.

But if Purdue's policy-based arguments have merit, which they do not, that only means this case is an *ideal* vehicle to revisit whether the Court has discretion to deny Arizona's motion in the first place. After all, the only situations in which the question of duty versus discretion are relevant are where duty compels one course of action while discretion counsels another. Here, however, they happen to point in the same direction. The Court should accept jurisdiction of this nationally-important case.

CONCLUSION

The Court should grant the Motion for Leave to File a Bill of Complaint.

Respectfully submitted,

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