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.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR THE RESPONDENTS SUPPORTING PETITIONER

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INTRODUCTION

Congress has given bankruptcy courts one true superpower: the authority to "modify the debtor-creditor relationship." *United States* v. *Energy Resources Co.*, 495 U.S. 545, 549 (1990). This authority to go beyond the traditional judicial powers of adjudicating, fixing, and protecting rights in that legal relationship, and actually *changing* that relationship by breaking bargains, altering debts, erasing claims, and extinguishing property rights, is what sets bankruptcy courts apart. It is what makes it possible for bankruptcy courts to provide a "fresh start" for the "honest but unfortunate debtor." *Grogan* v. *Garner*, 498 U.S. 279, 286, 287 (1991) (internal quotation omitted).

Yet Congress has long recognized that this superpower must be fundamentally constrained, allowing modification of only one kind of legal relationship: that between debtor and creditor. And this Court held in *Energy Resources* that bankruptcy courts must exercise the "residual" equitable authority reposited in 11 U.S.C. 105(a) and 1123(b)(6) within the "traditional understanding" of those fundamental limits. 495 U.S. at 549.

No greater illustration exists of the dangers that arise when bankruptcy courts transgress those fundamental limits than the Sackler release, through which well-heeled billionaires have manipulated the bankruptcy process to avoid accountability for their role in fueling an opioid crisis that has killed millions and permanently altered the lives of even more—granting the Sacklers greater protection than if they had entered bankruptcy themselves. That obvious abuse makes the best possible case for reserving bankruptcy courts' superpower for the protection of the debtor alone and preventing bankruptcy courts from extending its benefit to nondebtors through nonconsensual third-party releases imposed through freewheeling exercises of residual equitable authority.

Every attempt that Respondents make to suggest otherwise only demonstrates why the traditional limits on bankruptcy courts' equitable authority should remain in place. Respondents insist that bankruptcy courts' superpower is not really a superpower, that the unprecedentedly broad Sackler release involves no exercise of it, and that no true boundaries exist on that rights-destroying superpower other than the limits of the bankruptcy court's jurisdiction and a bankruptcy judge's personal notions of equity.

That argument is wrong on every level. But the Canadian creditors will not attempt to catalog every one of the errors in this position, instead adopting the arguments raised in the Trustee's more comprehensive reply. The Canadian Creditors will instead focus on the most salient of the problems with Respondents' position and its fundamental incompatibility with the proper exercise of bankruptcy courts' superpower.

ARGUMENT

I. The Bankruptcy Code does not authorize nonconsensual third-party releases outside the asbestos context.

Respondents spill substantial ink attacking the Court's holding in *Energy Resources* and the commonsense, firmly rooted principle it recognizes that bankruptcy is exclusively reserved for debtors and creditors and the only "relationship" that can be forcibly modified through bankruptcy courts' bargain-breaking, debt-destroying, judgment-erasing, and claim-eliminating superpower is that between debtor and creditor.

Respondents instead prefer a rule of proximity. To them, the traditional rule that bankruptcy is devoted to the relations between a '"debtor and his creditors"' *Central Virginia Community College* v. *Katz*, 546 U.S. 356, 371 (2006) (quoting *Wright* v. *Union Central Life Insurance Co.*, 304 U.S. 502, 513-514 (1938)) imposes no fixed boundary, and allows bankruptcy courts to modify any relationship that finds its way into their jurisdiction so long as the relationship is "sufficiently closely related to the debtor" (M. Sackler Br. 21) and the adjustment "serves

Chapter 11's aims" in some amorphous sense, as measured against even more amorphous criteria, Debtors' Br. 35; see also UCC Br. 34; M. Sackler Br. 9, 11.

But *Energy Resources'* boundaries are not evaded so easily. And outside the conspicuous exception of asbestos cases, there is no degree of proximity that makes it possible for bankruptcy courts to modify nondebtors' relationships with other nondebtors, especially through bankruptcy courts' "residual power" as "courts of equity" embodied in 11 U.S.C. 105(a) and 1123(b)(6). 495 U.S. at 549.

A. Third-party releases violate fundamental bankruptcy principles.

1. Unlike the court of appeals, Respondents generally accept that *Energy Resources*' holding that bankruptcy courts may only modify "creditor-debtor relationships" was not merely dicta. See J.A. 877. Yet there is dissention among their ranks on how to deal with the fatal incompatibility between that holding and the Sackler release. Purdue and the Sacklers paradoxically suggest that *Energy Resources violates* its own holding—mischaracterizing the case's facts to suggest the Court approved a bankruptcy court's modification of the relationship between a "nondebtor" and "another nondebtor." Purdue Br. 21-22; see also M. Sackler Br. 24 (contending that *Energy Resources* involved a "release" of "third parties from claims by a non-debtor").

But the other Respondents are not willing to follow Purdue and the Sacklers off that ledge. Indeed, the Ad Hoc Group of Governmental and Other Contingent Litigation Claimants (GOCLC) *expressly* disagrees—admitting (at 28) that no party "before the Court" in *Energy Resources* was "a nondebtor" or "noncreditor." And that is because the *taxes* in *Energy Resources* may have been those of the debtors' "officers" (Purdue Br. 21-22), but the "tax debts" on those taxes unquestionably belonged to the debtors. 495 U.S. at 546-48. They were the portion of the officers' "personal income and social security taxes" that were "with[held]" by their employers," which the debtors held in "trust," making them "tax liabilities" of the debtors and making the IRS a creditor. 495 U.S. at 546, 547-48. Accordingly, when the bankruptcy court allowed the debtors to pay those trust fund liabilities before the debtors' non-trust tax debts in a manner inconsistent with IRS regulations, the Court recognized that action to fall comfortably within the bankruptcy court's power to modify "creditor-debtor relationships." *Id.* at 549.

The remaining Respondents fare no better in dealing with *Energy Resources*. Some Respondents omit discussion of the opinion's key holding entirely. Others, like the GOCLC, contend (at 28) that the holding was merely "sufficient" to explain the result, rather than "necessary" to support it—leaving some question as to how the Court might handle modification of "noncreditor" or "non-debtor" relationships. But nothing indicates that *Energy Resources* regarded the "traditional" boundaries on bankruptcy courts' "residual" equitable authority to be so pliant that they would move to accommodate relationships outside that between debtor and creditor. On the contrary, *Energy Resources* went out of its way to explain that the modification at issue fell within the bankruptcy courts' e "broad authority" to "modify creditor-debtor relationships" *only because* that is the only way the Court could approve a modification of that relationship. 495 U.S. at 549. Modifications of other relationships simply lie beyond reach of the bankruptcy court's superpower.

2.a. In any event, *Energy Resources* could hardly fail to recognize the "traditional understanding" of bankruptcy's fundamental limits, and the hard boundaries on bankruptcy courts' "residual" equitable power reposited in Sections 105 and 1123(b)(6). That traditional understanding merely reflects the boundaries Congress has long imposed in the Code (and within Section 1123(b) itself, see Canadian Creditors Br. 35-36), establishing that bankruptcy is devoted *solely* to the "subject of the relations between a *** debtor and his creditors." *Katz*, 546 U.S. at 371. Those boundaries are reflected in the sheer tonnage of Code provisions devoted to debtor protection, coupled with the complete absence of similar protections for nondebtors. See Canadian Creditors Br. 20-21; Trustee Br. 19-21. Those boundaries are likewise reflected in bankruptcy's basic *quid pro quo* requiring all those seeking to enjoy bankruptcy's debtor-protecting benefits to bear its creditor-protecting burdens. See Canadian Creditors Br. 3, 5-6; Trustee Br. 20-21. And those structural limitations deprive nondebtors of the benefit of the Code's debtor protections—including bankruptcy courts' superpower modifications of creditor-debtor relationships. These are statements of fundamental bankruptcy principle. Not mere statutory silence. And they cannot be overcome through invocation of the bankruptcy court's "residual" equitable power.

b. The sole exception to these otherwise-universal principles is Section 524(g)—the lone instance in which Congress has authorized bankruptcy courts to adjust nondebtors' legal relationships with other nondebtors. See Canadian Creditors Br. 26; Trustee Br. 33-35. And Section 524(g)'s singular exception merely proves the rule. The contrast between its express, detailed, and carefully drawn "requirements" for channeling injunctions in asbestos cases (11 U.S.C. 524(g)(2)(A) & (B)), combined with the complete absence of any remotely similar mechanism for non-asbestos cases, confirms that nonconsensual third-party releases cannot exist outside the asbestos context, see Canadian Creditors Br. 24-25; Trustee Br. 33-35.

c. Respondents seek to banish any mention of Section 524(g) from this case solely because of the "Rule of Construction" accompanying Section 524(g)'s enactment, which states that "[n]othing" in § 524(g) "shall be construed to modify, impair, or supersede any other authority the court has to issue injunctions in connection with an order confirming a plan of reorganization." Pub. L. No. 103-394, § 111(b), 108 Stat. 4106, 4117 (1994). Respondents insist that this interpretive aid for understanding Section 524(g) itself prohibits any kind of "negative inference" about the availability of third-party releases *outside* of Section 524(g). See Purdue Br. 16, 36; M. Sackler Br. 17-18, 37; GOCLC Br. 14; MSGEG Br. 33.

But Respondents dramatically overread the impact of this simple interpretive aid. Section 111(b)'s rule of construction speaks only of Congress's intent to preserve bankruptcy courts' powers to "issue injunctions" generally—as opposed to channeling injunctions or third-party releases specifically. 108 Stat. at 4117, § 111(b). It cannot be read as a declaration of intent by Congress to render the detailed statutory scheme it had just enacted obsolete and evadable at will. See Canadian Creditors Br. 29. Nor does it suggest even implicit endorsement of the "experimentation" with third-party releases outside the asbestos context that some courts had tried before Section 524(g)'s enactment in cases like *In re A.H. Robins Co.*, 880 F.2d 694 (4th Cir. 1989). See M. Sackler Br. 41 (quoting 140 Cong.

Rec. 27,692 (Oct. 4, 1994)); see also Purdue Br. 36; GOCLC Br. 36. After all, Congress pointedly declined to approve such experiments when it enacted Section 524(h), which ratified only injunctions before Section 524(g)'s enactment that had "previously been entered in *asbestos cases*," not "any other kind of case." *In re Purdue Pharma, L.P.*, 635 B.R. 26, 93 (S.D.N.Y. 2021) (emphasis added). See 11 U.S.C. 524(h) (providing that an "injunction of the kind described in subsection (g)(1)(B)," which refers to the trusts descried in "paragraph (2)(B)(i)"—*i.e.*, trusts to assume liability "caused by the presence of, or exposure to, asbestos or asbestos-containing products"—would be "considered to meet" Section 524(g)'s requirements).[1]

Indeed, Section 111(b)'s "Rule of Construction" does not even prohibit *all* "negative inferences" from Congress's enactment of Section 524(g). 108 Stat. at 4117, § 111(b). It prohibits only *one* specific inference, barring courts from concluding that enactment of Section 524(g) did anything to "modify, impair or supersede" other authority that bankruptcy courts might possess to impose

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[1] Indeed, the snippet of legislative history that Respondents use to suggest that Section 524(g)'s enactment constituted congressional endorsement of that "experimentation" goes on to clarify that the "Committee has decided to provide explicit authority [for channeling injunctions] in the asbestos area because of the singular magnitude of the claims involved" and it would use information about "how the new statutory mechanism works in the asbestos area" to judge "whether the concept should be extended into other areas." 140 Cong. Rec. 27,692. So when Congress enacted Section 524(g), it expected extensions of the channeling injunction concept to come not from judicial "experimentation" with third-party releases through use of "residual" equitable power, but from future authorization from Congress. That authorization never came, suggesting Congress has opted against extending the concept to non-asbestos cases.

injunctions in conjunction with a plan. *Ibid*. Section 111(b) therefore prohibits courts from interpreting Section 524(g) to *take away* authority Congress provided elsewhere in the Bankruptcy Code to issue injunctions generally or third-party releases specifically.

Yet that rule of construction for interpreting Section 524(g) itself imposes no prohibition against interpreting the remainder of the Code *in light* of Section 524(g)'s enactment. And that inquiry is devastating to Respondents' case. The express, detailed, and specific requirements Congress provided for channeling injunctions under Section 524(g) demonstrates the level of "specificity" it deemed necessary to authorize a "major departure" from the fundamental limits on bankruptcy courts' bargain-breaking superpower. *Czyzewski* v. *Jevic Holding Corp*., 580 U.S. 451, 465 (2017). Section 524(g)'s specificity also stands in marked contrast to the generality of the "residual" equitable authority reposited in Sections 105(a) and 1123(b)(6), suggesting that the latter cannot be interpreted to provide the same power as the former.

Section 524(g) also highlights the practical problems that Congress had to confront to enable channeling injunctions in the asbestos context and the specific statutory solutions it had to impose to address those problems. See Canadian Creditors Br. 24-26. Those detailed solutions to the practical problems of imposing channeling injunctions in the asbestos context suggests Congress would not allow anything similar in the non-asbestos context, where Section 524(g)'s specific requirements and controls are conspicuously absent.

Beyond calling attention to these practical barriers to the imposition of third-party releases, Section 524(g) also highlights the *statutory* obstacles that Congress had to confront when it sought to provide a similar authorization in asbestos cases. This includes the bar against nondebtor discharge in Section 524(e), because Congress had to lift that bar with the "notwithstanding" clause.

Furthermore, despite what Respondents insist, Section 111(b) does not prohibit the Court from considering the "inherently narrow nature" of the Section 524(g) trust mechanism, or its "conspicuous" departure from the remainder of the Code. M. Sackler Br. 38. And it certainly does not bar any mention of the reasons behind Congress's enactment of Section 524(g), which present an independent problem for Respondents. That is because Congress did not enact Section 524(g) merely to create "special rules for asbestos bankruptcies," as Purdue insists. Purdue Br. 37. Rather, Congress enacted Section 524(g) to overcome "lingering uncertainty" about whether third-party releases could "withstand [legal] challenges" in *any* context. M. Sackler Br. 40 (quoting H.R. Rep. No. 103-835 at 4 (1994)). Each of these inferences is entirely permissible and independently fatal to any attempt to identify authority to impose third-party releases outside the asbestos context—especially in the residual equitable authority provided in Sections 105(a) and 1123(b)(6).

3. By contrast, there is absolutely no support in the Code to suggest that mere *proximity* of nondebtors' relationship to the debtor triggers bankruptcy courts' superpower, permitting them to modify nondebtors' relationships with other nondebtors. Respondents fail to identify a single line of the Bankruptcy Code that even mentions the idea. And Respondents' purported examples of this supposed proximity phenomenon are anything but.

Respondents suggest that the breadth of bankruptcy courts' jurisdiction, which may encompass nondebtors' relationships with other nondebtors, suggests a power to modify those relationships. See UCC Br. 25-26. Not so. Certainly, Congress has provided bankruptcy courts with expansive jurisdiction, covering "all civil proceedings arising under title 11, or arising in or related to cases under title 11." 28 U.S.C. 1334(b); *id.* 157(a). And "the 'related to' language of [Section 1334(b)] must be read to give *** bankruptcy court *** jurisdiction over more than simple proceedings involving the property of the debtor or the estate." *Celotex Corp.* v. *Edwards*, 514 U.S. 300, 308 (1995). But that does not mean bankruptcy courts can modify every relationship that happens to wander within their jurisdictional reach. Bankruptcy courts may fix and define relationships to the extent of adjudicating claims and resolving them on their factual and legal merits, but they do not have the power to *modify* legal relationships by extinguishing claims that would otherwise exist under the law that created them and would survive outside bankruptcy. The bankruptcy court is not "a roving commission to do equity." *United States* v. *Sutton*, 786 F.2d 1305, 1308 (5th Cir. 1986). Rather, with regard to the majority of those relationships, bankruptcy courts can do no more than employ traditional juridical tools—adjudicating, fixing, and protecting the rights of those in them. But bankruptcy courts' superpower of forcible modification is reserved for those in the creditor-debtor relationship alone. Not those in mere proximity to the debtor.

Likewise, the fact that modifications to the creditor-debtor relationship, including dispositions of the debtor's property "free and clear" of liens under 11 U.S.C. 363(f), may sometimes have incidental effects on third parties does not mean that these incidental effects give the court power to dispose of third-parties' rights and modify their relationships any time doing so will "affect" the debtor. See UCC 36, 38. The permeability of those effects only goes one way. And despite what Respondents suggest, the bankruptcy trustee's assumption of creditors' "avoidance" rights does not involve modification of nondebtor-nondebtor relationships either. UCC Br. 38 (quoting *In re Tribune Co. Fraudulent Conv. Litig.*, 946 F.3d 66, 83 (2d Cir. 2019)). An avoidance action merely reclaims debtor property held by someone else because of a fraudulent transfer, so it does not have anything to do with destruction of third-party property rights. Accordingly, no relationship is modified when the creditors' avoidance claims "vest" in the trustee and the trustee's claim is "'dispos[ed].'" UCC Br. 38 (quoting 11 U.S.C. 544(b)(1)).

In the end, the only examples Respondents can locate in which bankruptcy courts routinely adjust nondebtors' relationships with each other by mere dint of those relationships' proximity to the debtor involve third-party releases themselves. See UCC Br. 36, 38-39; M. Sackler Br. 42. But third-party releases cannot justify themselves. And Respondents' circular logic cannot undermine the fundamental bankruptcy principle that bankruptcy is exclusively devoted to the relationship between a "debtor and his creditors." *Katz*, 546 U.S. at 371. Nor does it lend any support to Respondents' proximity rule. Close is simply not enough.

B. Third-party releases conflict with the Code's express terms.

But nonconsensual third-party releases like the Sackler release do not merely violate bankruptcy's fundamental boundaries—they also conflict directly with the Code's express terms. And Respondents' attempts to assuage those conflicts fall flat.

1. The first problem for Respondents comes from the multiple provisions of the Bankruptcy Code reserving bankruptcy courts' superpower of discharge for the "debtor"—and the debtor alone. 11 U.S.C. 727(a), 727(b), 1141(d)(1)(A), 1141(d)(3), 1123(b)(3)(A). And the Sackler release provides the "functional equivalent of a discharge." Trustee Br. 12, 25-26. Respondents rejoin by insisting that the Sackler release does not provide the "full repose" of a discharge. UCC Br. 38 (quoting Trustee Br. 25-26); see also Purdue Br. 33; M. Sackler Br. 33. But this "hyperliteral" argument is "contrary to common sense," *RadLAX Gateway Hotel, LLC* v. *Amalgamated Bank*, 566 U.S. 639, 645 (2012).

The Sackler release provides the same repose as a discharge. A discharge "releases" debtors from "personal liability with respect to any discharged debt." *Tenn. Student Assistance Corp*. v. *Hood*, 541 U.S. 440, 447 (2004). A discharge therefore *is* a release. And vice versa. The two provide the same repose. And the modification of rights involved to provide that repose is just as absolute, total, and permanent as the discharge a debtor obtains in bankruptcy. The Sackler release therefore unquestionably invokes the bankruptcy court's superpower—it just trains it in the wrong direction.

In contending otherwise, Respondents insist the Sackler release does not offer the same "umbrella protection" as a discharge. Purdue Br. 34 (quoting J.A. 872). But Respondents are simply incorrect. Their contention that the Sackler release applies to only a "specific set of claimants" rings hollow when the list of claimants includes every person, company, and community in the world. M. Sackler Br. 34. And while the Sackler Release applies to only a "specific set of claims" (*ibid.*), that too is no differentiating factor, because discharges *also* only pertain to specific sets of claims. Discharges may be framed in absolute terms. See Purdue Br. 33 (explaining that debtors under Chapter 11 receive a discharge "from any debt" and debtors under Chapter 7 receive a discharge "from all debts.") (quoting 11 U.S.C. 727(b), 1141(d)(1)(A)). But as bankruptcy expert amicus Adam Levitin has explained, these absolute-sounding discharges nonetheless contain numerous exceptions: "None of the various discharges offered by Chapter 7, 11, 12, and 13 offer umbrella protection against liability nor do they extinguish all claims." Levitin Br. 8-9 n.16 (citing 11 U.S.C. 523(a) (general discharge exceptions), 727(a) (Chapter 7 discharge exceptions), 1141(d)(6) (Chapter 11 discharge exceptions for corporate debtors), 1228 (Chapter 12 discharge exceptions), 1328 (Chapter 13 discharge exceptions)). So there is no functional difference between a release and a discharge.

2. Respondents' efforts to overcome Section 524(e)'s strict prohibition against nondebtor discharge are even less effective. Respondents insist that Section 524(e) merely describes that the discharge of one debtor does not extinguish other parties' "co-liability for the debtor's debts" and therefore does not prohibit bankruptcy courts from extinguishing nondebtor debts. Purdue Br. 33; see

also MSGEG Br. 28; UCC Br. 14, 33-34. Yet if Section 524(e) did no more than ensure that the debtor's discharge does not affect third-parties' liability on the same debt, then it would be entirely superfluous of the numerous Code provisions already making clear that the discharge affects only "the debtor." See Trustee Br. 25 (citing 11 U.S.C. 727(a), 727(b), 1123(b)(3)(A), 1141(d)(1)(A), 1141(d)(3)).

Respondents' entire textual argument for relegating Section 524(e) to complete redundancy hinges on the inapt suggestion that it might have been written differently. Building upon the Seventh Circuit's analysis in *In re Airadigm Communications, Inc.*, 519 F.3d 640 (2008), Respondents suggest that Section 524(e) *would* have limited bankruptcy courts' powers to grant nondebtor discharges if, instead of providing that the "discharge of a debt of the debtor does not affect the liability" of third parties, it stated that it "shall" not affect that liability. Purdue Br. 34 & n. 9; M. Sackler Br. 32; Englert Br. 34. That is because *Airadigm Communications* explains that the mandatory term "shall" places limits on court powers. 519 F.3d at 656-57. Yet Respondents admit (Purdue Br. 34 n.9) that Section 524(e)'s statutory predecessor *did* use the term "shall," providing: "[t]he liability of a person who is a co-debtor with, or guarantor or in any manner a surety for, a bankrupt *shall* not be altered by the discharge of such bankrupt." 11 U.S.C. 34 (repealed Oct. 1, 1979) (emphasis added).

That change from "shall" to "does" was not substantive. The recodification that created Section 524(e) did involve one substantive change over its predecessor: to remove any implication that only "co-debtors," "guarantors," and "sureties" were prohibited from obtaining a discharge, not other sorts of co-liable parties, and ensure that Section 524(e) is not given an unduly narrow reach. *Report of the Commission on the Bankruptcy Laws of the United State*s, House Document 93-137, Part II, at 142-143 (July 1973). But Section 524(e) otherwise "carried forward the provisions * * * of the existing Act." On HR 31 & 32, Bankr. 78-LH 11 (Oct. 3, 1975) (testimony of attorney Benjamin L. Zelenko). So the language on which Respondents' argument depends is entirely stylistic—an artifact of the drafting process.

3. Respondents' interpretation of Section 524(e) also conflicts with Congress's own interpretation of the term. Congress clearly interpreted Section 524(e) to prohibit bankruptcy courts from providing nondebtors with the functional equivalent of a discharge, which is why it found need to lift that prohibition with Section 524(g)'s "notwithstanding" clause to allow Section 524(g)'s obvious nondebtor discharge. Respondents insist that this "notwithstanding" clause "merely contemplates the *possibility* of a conflict" between Sections 524(e) and 524(g) without positively identifying one. Purdue Br. 37. But Congress's use of "notwithstanding" in Section 524(g) did not address the mere possibility of conflict—it identified one specifically. When Congress states one provision controls "notwithstanding" another, it "indicates" with certainty "that the main clause that it introduces or follows derogates from the provision to which it refers." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 126 (2012). The term acquires a tentative, "just-in-case" character only when used as a generic "catchall," such as "[n]otwithstanding anything herein to the contrary"—because no specific conflict is indicated, and

"there may be nothing contrary anywhere in the document." *Id.* at 127. But Section 524(g)'s "notwithstanding" clause is no catchall. It references Section 524(e) specifically and exclusively. Treating it as possessing a "just-in-case" uncertainty makes no sense. Respondents therefore cannot escape the conclusion that Congress itself has interpreted Section 524(e) as a barrier against nonconsensual third-party releases outside the asbestos context. And that interpretation is controlling.

C. The Sackler release expressly conflicts with the Code by discharging nondischargeable debts.

Yet even if the Code left some room for non-consensual third-party releases outside the asbestos context, releases like the Sackler release still cannot stand, because they discharge debts that Congress has deemed to be nondischargeable. The Sackler release covers all liabilities related to Purdue-manufactured opioids, making no exception for claims of fraud, malicious injury, or other claims that cannot be discharged in an individual bankruptcy. See Canadian Creditors Br. 28. That means the Sackler release provides the Sacklers more relief than if they had entered bankruptcy themselves. And the Respondents' attempts to dispel the legal problems and obvious inequity that result from such a broad release only make things worse.

Some Respondents note that the bar against discharging nondischargeable debts is not absolute, and parties must take "affirmative steps" by filing a "complaint" to prevent their discharge. Purdue Br. 35 n.10; Englert Br. 37. Other Respondents emphasize that the bar against nondischargeable debts is merely a "baseline" that parties can vary though "settlement." UCC Br. 39, 41; M. Sackler Br. 35. True enough. But a waivable requirement is still a requirement. And Respondents' insistence that the Sacklers' creditors would possess avenues to preserve fraud and similar claims only highlights that there is no complaint to file, no procedure to follow, and no potential settlement that allows claimants to get around the Sackler release. It is completely unavoidable.

Respondents cannot wave-away these problems with the too-cute-by-half assertion that the prohibition against discharge of nondischargeable debts in Section 523(a) is inapplicable in corporate bankruptcies, and therefore is not "inconsistent with *** applicable provisions" so as to narrow a bankruptcy court's options for equitable relief in this corporate bankruptcy. 11 U.S.C. 1123(b)(6); see Purdue Br. 35; Englert Br. 14. The Sacklers are individuals, not corporations, so the relevant question is whether the bar against nondebtor discharge would be "inconsistent with" the "applicable provisions" in any bankruptcy *they* would file. And the answer to that question is an unequivocal "Yes."

D. The constitutional concerns with third-party releases require their issuance to be confined to bankruptcy's fundamental limits.

Respondents also cannot dispel the constitutional problems demanding that third-party releases be confined to bankruptcy's fundamental limits. Respondents spend substantial time addressing the due process problems arising from nonconsensual third-party releases, which have been comprehensively addressed by the Trustee. But no Respondent even mentions, let alone overcomes, the sovereignty-based objections to such releases that the Canadian Creditors have raised, or the additional constitutional and jurisdictional barriers to imposition of third-party releases that amici have raised. See Canadian Creditors Br. 41-43; Brubaker, *et al*. Br. 4-33; "Texas Two-Step" Victims Br. 7-24. It should take the clearest possible authorization to suggest that Congress intended to provoke these serious concerns rather than avoid them. And that is yet another reason to conclude that Congress did not intend third-party releases to be imposed through free-wheeling application of the "residual" equitable authority Congress provided in Sections 105(a) and 1123(b)(6).

II. The Canadian Creditors have standing to challenge the Sackler release.

Finally, this Court has jurisdiction to hear this challenge to the Sackler release. The Trustee has standing. Ellen Isaacs has standing. The Canadian Creditors also have standing. And Respondents raise no persuasive argument to suggest otherwise.

1. Both the UCC and Purdue contend that the Canadian Creditors "waived" any argument that bankruptcy courts lack statutory authority to impose third-party releases. UCC Br. 21-23; Purdue Br. 47. Yet the Canadian Creditors expressly challenged the statutory validity of the Sackler release, "object[ing]" to Purdue's reorganization plan in the bankruptcy court and "reserv[ing] [their] rights" as to the "nonconsensual," "broad third-party" Sackler release for numerous reasons, including that it discharged "non-dischargeable debts." Bankr. Ct. Doc. 3275, at 2, 9, 11 (July 19, 2021) (capitalization omitted); see *id*. at 9-12. Despite what these Respondents insist, this a "categorical" objection (Purdue Br. 47) and is plainly more

than "sovereignty-focused," UCC Br. 21. And the Canadian Creditors have continue to assert this objection at every level of appeal.

Furthermore, any suggestion that the Canadian Creditors "forfeited a categorical objection" to the release because they "accepted that third-party releases are allowed in some circumstances" is completely off-base. UCC Br. 21 (internal quotation omitted); see also Debtor Br. 47. No one in this case suggests that third-party releases are categorically unavailable in all circumstances. At the very least, they are available in asbestos cases under Section 524(g) and by consent in other cases. And Second Circuit precedent that was binding in the lower courts suggested that third-party releases might be possible with "proper balancing." UCC Br. 21-22. Admitting these realities did not cause the Canadian Creditors to forfeit their otherwise-preserved objections to the Sackler Release, which is why the District Court included them among those who categorically objected to the Plan's "broad releases, not just of derivative, but of particularized or direct claims." *Purdue Pharma, LP*, 635 B.R. at 36. In any event, waiver would go only to the merits of the Canadian creditors' claims and has no bearing on their standing. See *Arizona State Legislature* v. *Arizona Indep. Redistricting Comm'n*, 576 U.S. 787, 800 (2015) ("[O]ne must not confuse weakness on the merits with absence of Article III standing.") (alteration, citation, and internal quotation marks omitted).

2. Respondents' contention that the Canadian Creditors are not "aggrieved in any concrete way" by the Sackler release is also meritless. Purdue Br. 3, 44, 47; see also UCC Br. 21. There are substantial questions about

whether, and to what extent, the Sackler release extinguishes the Canadian Creditors' claims. Respondents can contend otherwise only by ignoring the true bases for the Canadian Creditors' claims and the plain language of the release.

Both Purdue and the UCC contend that because the Canadian Creditors were injured by drugs sold in Canada by Purdue Canada, Purdue's non-bankrupt Canadian affiliate, their claims "arise[] out of or relate[]' solely to Purdue Canada" and therefore fall within the Sackler release's exception for Canadian claims. UCC Br. 22. These respondents simply ignore the release's recapture provision, which brings any claim back into the release if it is "based upon any Conduct of the Debtors." See Canadian Creditors Br. 48 (quoting C.A. JA-3457). These respondents likewise ignore that the Canadian Creditors have alleged that the Sacklers acted through Purdue U.S. to increase Canadian drug sales in numerous ways, including through corporate directives sent to multiple Purdue entities simultaneously and through misrepresentations made in the U.S. that reached Canada. See Canadian Creditors Br. 48-49. Through this selective reading, Purdue and the UCC entirely avoid confronting the difficult question of whether those claims have a close enough relationship to Purdue U.S. to be "based upon" its conduct, thereby falling within the recapture provision and becoming subject to the Sackler release. Accordingly, the selfserving assurances by Purdue and the UCC that the Canadian Creditors' claims survive the release are meaningless.[2]

Indeed, those assurances ring especially hollow in light of the fact that neither Purdue nor the UCC will be asserting the releases in litigation. That would be the Sacklers. And while the Sacklers have addressed several of the arguments raised in the Canadian Creditors' brief, they have declined to give the release's uncertain language any definite meaning. They have likewise pointedly declined to address the release's impact on the Canadian Creditors' claims and any resulting effects on their standing. That

[2] The Bankruptcy Court's findings are likewise unhelpful to Purdue and the UCC. *See* UCC Br. 23 (citing J.A. 321 n.2; J.A. 326 n. 3). Those findings pertain only to the complaint that the Canadian Creditors attached to their proofs of claim, which raises "claims" against the "Debtors," "non-Debtor Purdue Canada," and certain other "non-Debtors." J.A. 321 n.2. Those findings therefore do not address the Canadian Creditors' claims against any released parties, which had not been added, and could not be added, when Purdue declared bankruptcy. Canadian Creditor Br. 9-10. The findings are also limited in scope, providing only that Purdue's reorganization plan preserved the Canadian Creditors' claims against "Purdue Canada" directly, and claims concerning released-parties' "conduct" as it "related to the [named] non-Debtors." J.A. 321 n.2. The Bankruptcy Court never promised that the Canadian Creditors' claims against the Sacklers related to Purdue Canada or the Debtors—under any theory—would survive. And in any event, neither the district court nor the court of appeals gave deference to the bankruptcy courts' findings, instead subjected them to de novo review under *Stern* v. *Marshall*, 564 U.S 462 (U.S. 2011). J.A. 727-734, 867-868.

conspicuous silence can only mean that if the release survives this Court's review, the Sacklers will likely assert it as a basis to dismiss all of the Canadian Creditors' claims.

The Canadian Creditors certainly believe otherwise. But it does not really matter. The Canadian Creditors will inevitably be forced to expend considerable, time, effort, and money litigating the scope of that release to surmount this legal obstacle that the plan imposed on them over their objection. That is more than mere "conjectural fear of future harm." UCC Br. 22. It is tangible injury that is very likely to occur, and sufficient, at a minimum, to convey standing.

3. Finally, Respondents' sidelong attacks on the validity and significance of the Canadian Creditors' claims are both meritless and irrelevant. While Respondents lampoon the Canadian Creditors as a mere "handful of municipalities" and "First Nations proceeding on behalf of an uncertified class" (UCC Br. 4), they provide no reason to doubt the relative ease of obtaining class certification in Canada (see Canadian Creditors Br. 10) and identify no obstacle that could conceivably prevent class certification of the Canadian Creditors' claims. Those claims are substantial: the claim of Toronto alone—one of the putative class members, although not a named respondent—is worth $277 million alone. See Claim No. 14211. And those claims are strong. Contrary to what Purdue suggests (Purdue Br. 47), the Sacklers have never given up control of Purdue's operations—but have continued to direct Purdue's global enterprise even after stepping down from their positions as Purdue's officers and directors through their control of MNP. See Canadian Creditors Br. 6, 8, 48. And the Canadian Creditors can hold the Sacklers liable for the misconduct they have perpetrated through their

control of Purdue under the Canadian Competition Act along with theories of common-law nuisance.

Respondents offer no reason to believe otherwise. They allude to unspecified "causation" problems and insist that the Canadian Creditors' claims would "stretch public-nuisance doctrine beyond its limits" merely because the conduct originated in the United States. Purdue Br. 48 n.15. But cross-border nuisance claims are hardly unprecedented. See Michael I. Jeffrey, *Transboundary Pollution and Cross-Border Remedies*, 18 Canada-United States L. J. 173 (1992). And once again, the merits of the Canadian Creditors' claims have nothing to do with their standing to challenge a release that might extinguish those claims. See *Arizona State Legislature*, 576 U.S. at 800.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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