No. 23A87

IN THE SUPREME COURT OF THE UNITED STATES

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

v.

PURDUE PHARMA L.P., ET AL.

REPLY IN SUPPORT OF APPLICATION FOR A STAY OF THE MANDATE OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT PENDING THE FILING AND DISPOSITION OF A PETITION FOR A WRIT OF CERTIORARI

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The Chapter 11 reorganization plan approved by the court of appeals includes one of the most significant and expansive non-consensual releases of nondebtors' claims against other nondebtors in the history of our bankruptcy system. This Court should have the opportunity to resolve a longstanding disagreement in the circuits and decide whether that sweeping release of claims against the Sacklers and others is lawful. The plan's proponents do not seriously dispute that a stay is warranted if this Court grants certiorari. They do not deny that, in the absence of a stay, the Court could not issue a merits decision before the plan is substantially consummated. They do not disclaim a litigation strategy of invoking equitable mootness to keep the partly effectuated plan

in place regardless of its ultimate legality. Nor do they commit to pausing implementation of the plan if the Court grants review. Instead, they seek to begin plan implementation now, even though that would waste estate resources with no offsetting benefit in the likely event that this Court grants review and deems the non-consensual third-party release unlawful.

No respondent opposes the U.S. Trustee's suggestion (Appl. 7) that the Court construe the stay application as a petition for a writ of certiorari. To the contrary, debtors and several other plan proponents affirmatively ask the Court to make a certiorari decision without further briefing. Debtors Opp. 5-6, 69-70; Official Committee of Unsecured Creditors (UCC) Opp. 5, 18-19; Multi-State Gov'tal Entities Group (MSGE) Opp. 8, 34. So do the Canadian creditors, who agree with the government's position on the stay and on the merits and would participate as respondents supporting petitioner or as additional petitioners if there is further certiorari briefing. Canadian Creditors Resp. 3-4, 17.

Accordingly, the plan proponents spend a substantial portion of their filings -- including most of debtors' nearly 20,000-word opposition -- urging the Court to obviate the need for a stay by denying certiorari. But they have not established that further review is unwarranted given the significance of the issue, which has divided the courts of appeals. Nor have they identified any serious vehicle issue; some contest the U.S. Trustee's standing to challenge the plan unilaterally, but that presents no obstacle to

this Court's review because the Canadian creditors support the plan's vacatur and because Congress validly authorized the U.S. Trustee, as a representative of the United States, to oppose the plan on the ground that it is unlawful.

The government is also likely to succeed on the merits. The plan proponents invoke residual Bankruptcy Code provisions as the foothold for an extraordinary authority for bankruptcy courts to dictate relations between nondebtors and other nondebtors who are outside the bankruptcy system. But this case illustrates the danger of recognizing such broad bankruptcy authority based on so little. The court of appeals approved a release that extends to fraud-based claims that the Sacklers could not have had discharged even if they had submitted to bankruptcy and thereby surrendered their assets for distribution to their creditors. The plan instead permits the Sacklers, who would otherwise have faced claims valued in the trillions, to obtain full repose while keeping billions of dollars that they siphoned from Purdue in the years before these Chapter 11 proceedings.

The balance of the equities also supports a recall and stay of the court of appeals' mandate.[1] If the Court decides to grant certiorari, either now or after further briefing, a stay will ensure the Court can decide the merits without the need to consider

[1] Because the court of appeals has now released its mandate, this Court would need to recall that mandate before staying it. See Appl. 6-7; see also, e.g., Food Mktg. Inst. v. Argus Leader Media, 139 S. Ct. 5 (2018) (recalling and staying court of appeals' mandate pending disposition of a certiorari petition).

equitable mootness. A stay will also protect against wasteful efforts to implement a massive plan that would need to be renegotiated in the likely event the Court concludes that the nonconsensual third-party release is unlawful. A stay -- and merits review by this Court -- is amply warranted.

I. THIS COURT IS LIKELY TO GRANT CERTIORARI

This case presents a deep and acknowledged circuit split on a question of bankruptcy law that has great legal and practical significance. Respondents offer no persuasive reason for the Court to deny review.

A. Debtors contend (Opp. 36) that "the fact that the Trustee is the only party seeking this Court's review" raises difficult questions about standing. That is wrong as a matter of fact and law.

Factually, the Trustee is not the only party seeking this Court's review. If the Court grants review on the stay papers, the Canadian creditors "would then file a brief on the merits as a respondent in support of the petitioner" or, "if additional cert-stage briefing is required," they will file their own petition by August 28. Canadian Creditors Resp. 3. And, whether they participate as respondents or petitioners, they seek the same relief as the U.S. Trustee: vacatur of the confirmation order. See id. at 3-4. Those creditors, who seek to bring claims against the

Sacklers and object to the plan's nonconsensual extinguishment of that right, see id. at 6-7, clearly have standing to proceed.[2]

The existence of one litigant with standing to seek a particular form of relief satisfies Article III requirements. See Biden v. Nebraska, 143 S. Ct. 2355, 2365 (2023). Given the Canadian creditors' continued participation in this case -- either as respondents supporting the U.S. Trustee, or as petitioners -- the Court would have no need to address the U.S. Trustee's standing.

In any event, as a legal matter the U.S. Trustee plainly has standing to seek this Court's review of the lawfulness of the Sackler release. Debtors -- but not the UCC, see UCC Opp. 21-22 -- assert that the U.S. Trustee lacks statutory "standing to appeal." Debtors Opp. 4. That claim is meritless: Section 307 of the Bankruptcy Code specifically provides that "[t]he United States trustee may raise and may appear and be heard on any issue in any case or proceeding under [the Code] but may not file a [Chapter 11] plan." 11 U.S.C. 307. And U.S. Trustees -- who are

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[2] The UCC asserts (Opp. 22 n.5) that the Canadian creditors "have waived" their objections because they "did not challenge the Release in the bankruptcy court." That is incorrect: The Canadian creditors specifically "object[ed to]" and "reserv[ed] [their] rights" as to the "nonconsensual," "broad third-party releases" in the plan. Bankr. Ct. Doc. 3275, at 9 (July 19, 2021) (capitalization omitted); see id. at 9-12. But even if waiver were at issue, it would go only to the merits of the Canadian creditors' claims and have 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).

part of the Department of Justice -- regularly appear in bankruptcy proceedings to litigate the legal viability of Chapter 11 reorganization plans.[3]

It is well established that a U.S. Trustee's statutory authority to be heard on "'any issue' includes the right to appeal and the right to object to confirmation of the debtor's plan." 2 Collier on Bankruptcy ¶ 307.02, at 307-3 (Richard Levin & Henry J. Sommer eds., 16th ed.) (footnotes omitted); see H.R. Rep. No. 764, 99th Cong., 2d Sess. 27 (1986) ("[T]he U.S. Trustee is given the same right to be heard as a party in interest, but retains the discretion to decide when a matter of concern to the proper administration of the bankruptcy laws should be raised."); compare 11 U.S.C. 1109(a), 1164 (granting certain governmental entities rights to appear and be heard in bankruptcy cases, but not to appeal). As the Sixth Circuit explained, a U.S. Trustee had "standing to appeal" a bankruptcy-court decision that "had not affected his pecuniary interest" because Congress made him "responsible for 'protecting the public interest and ensuring that bankruptcy cases are conducted according to law.'" In re Revco D.S., Inc., 898 F.2d 498, 499-500 (1990) (citation omitted).

[3] Despite debtors' suggestion (Opp. 33) that U.S. Trustees principally perform administrative functions, the U.S. Trustee Program's "Mission and Responsibilities" also include its role as "a litigating component of the Department of Justice." U.S. Trustee Program's Annual Report Fiscal Year 2021, at 2 (2022), www.justice.gov/ust/page/file/1535521/download. In Fiscal Year 2021, U.S. Trustees sought relief in Chapter 11 plan confirmation proceedings 395 times. Id. at 13, Fig. 3.

Every other court of appeals to consider the question has likewise held that Section 307 grants U.S. Trustees standing to appeal regardless of the government's financial interest. See, e.g., In re Zarnel, 619 F.3d 156, 162 (2d Cir. 2010) ("[T]he U.S. Trustee's responsibility to represent and protect the public interest affords it a substantial interest in, and therefore standing to proceed with, this appeal."); In re Donovan Corp., 215 F.3d 929, 930 (9th Cir. 2000) ("The United States trustee may also intervene and appear at any level of the proceedings from the bankruptcy court on, as either a party or an amicus.") (citation and internal quotation marks omitted); In re Columbia Gas Sys. Inc., 33 F.3d 294, 299 (3d Cir. 1994) ("In light of the plain language of section 307, general policies of public interest standing, and the overwhelming weight of the case law, we hold that the U.S. Trustee has standing in this case."); In re Clark, 927 F.2d 793, 796 (4th Cir. 1991) ("[W]e hold that the [U.S. T]rustee has standing to appeal the bankruptcy court's decision."); In re Plaza de Diego Shopping Ctr., Inc., 911 F.2d 820, 824 (1st Cir. 1990) ("[T]he U.S. Trustee, who does not have a pecuniary interest in the Chapter 11 bankruptcy proceeding, has standing to appeal from, or otherwise to seek review of, the district court's order[.]"). Debtors do not -- and could not plausibly -- contend that the statute distinguishes between appeals to the lower courts and petitions that seek this Court's review.

Taking a different tack, some plan proponents contend that Article III may prohibit Congress's grant of statutory authority for the U.S. Trustee to raise any issue in a bankruptcy proceeding when the federal government's own financial interests are not directly affected. Debtors Opp. 34-35; UCC Opp. 21-22. But they err in relying on decisions about the limits on Congress's authority to create statutory standing for persons who have no concrete harm apart from a desire for proper application of the law. See Debtors Opp. 35; UCC Opp. 22. A statute authorizing suit by the United States is fundamentally different. As a matter of "history and tradition" informing "the types of cases that Article III empowers federal courts to consider," TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2204 (2021) (citation omitted), the United States has a long-recognized right to sue in appropriate circumstances to prevent injury to the general welfare. The United States regularly participates as a party in an array of cases -- most obviously criminal, but also civil -- to vindicate its sovereign interest in the enforcement of federal law, even in the absence of any pecuniary interest. Accordingly, this Court's cases "establish" that Congress may "confer[] standing upon" the United States, acting through a federal officer or agency, to "pursue the public's interest" "without infringing Article III of the Constitution." Director, Off. of Workers' Comp. Programs, Dep't of Lab. v. Newport News Shipbuilding & Dry Dock Co., 514 U.S. 122, 132-133 (1995). That is what Congress did when it enacted Section 307. As a

result, the U.S. Trustee has both statutory and Article III standing to challenge the lawfulness of the Sackler release.

B. Respondents seek to sow doubt about the existence and extent of a circuit conflict. But the conflict was acknowledged by all three members of the court of appeals panel. See Appl. App. 56a (majority opinion) (noting three "sister circuits that have held that the Bankruptcy Code does not support the imposition of nonconsensual third-party releases"), 98a (Wesley, J., concurring) (stating that the case involves "a weighty issue that, for too long, has split the courts of appeals"). And the conflict has been widely recognized, including by other courts of appeals, see Appl. 15-16, and legal commentators.[4]

Respondents' efforts to minimize the circuit conflict, or to deny it outright, are unavailing. Debtors first suggest that the

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[4] See, e.g., Lindsey D. Simon, Bankruptcy Grifters, 131 Yale L.J. 1154, 1160 (2022) (noting "ongoing circuit split" over nonconsensual third-party releases); Adam J. Levitin, Purdue's Poison Pill: The Breakdown of Chapter 11's Checks and Balances, 100 Tex. L. Rev. 1079, 1106–07 (2022) (identifying split between the circuits that "forbid [nonconsensual] third-party releases entirely" and others that "permit them" in some circumstances); Stephen W. Sather, The Controversial Role of Third-Party Releases in Bankruptcy, 31 Am. Bankr. Inst. L. Rev. 71, 93 (2023) (pointing out "a significant split among the circuits as to whether non-consensual third-party releases are permissible and under what circumstances"); Paul R. Hage, "The Great Unsettled Question": Nonconsensual Third-Party Releases Deemed Impermissible In Purdue, 41 Am. Bankr. Inst. J. 12 (2022) (discussing "deep circuit split" over nonconsensual third-party releases and observing that the issue "is likely destined for the U.S. Supreme Court"); Richard L. Epling, Third-Party Releases in Bankruptcy Cases: Should There Be Statutory Reform?, 75 Bus. Lawyer 1747, 1749, 1752 (2020) (noting "split in the federal circuits," which "can lead to inconsistent results and encourage forum shopping among the circuits").

Fifth Circuit has "recognized that third-party releases could be 'appropriate as a method to channel mass claims toward a specific pool of assets.'" Debtors Opp. 24 (citing In re Pacific Lumber Co., 584 F.3d 229, 252 (5th Cir. 2009)). That is incorrect. In Pacific Lumber the Fifth Circuit considered and rejected a request to adopt the "more lenient approach to non-debtor releases taken by" the circuits that permit them. 584 F.3d at 252. The court observed that because Section 524(g) "permits bankruptcy courts to enjoin third-party asbestos claims under certain circumstances," "non-debtor releases are most appropriate" -- where they are permitted in the first place -- "as a method to channel mass claims toward a specific pool of assets." Ibid. But the Fifth Circuit concluded that the request to adopt other courts' more lenient approach allowing non-consensual third-party releases "conflict[s]" with binding circuit precedent providing that the Code "only releases the debtor, not co-liable third parties." Ibid. (citing In re Zale Corp., 62 F.3d 746 (5th Cir. 1995)); see Zale, 62 F.3d at 760 (holding that "Section 524 prohibits the discharge of debts of nondebtors" and that "we must overturn a § 105 injunction if it effectively discharges a nondebtor"). Debtors' assertion that the Fifth Circuit might allow non-asbestos third-party releases in the mass-tort context contradicts what the Fifth Circuit itself said in Pacific Lumber and in Zale.

Debtors next attempt to inject uncertainty about the Ninth Circuit's rejection of third-party releases in In re Lowenschuss,

67 F.3d 1394, 1401-1402 (9th Cir. 1995), cert. denied, 517 U.S. 1243 (1996). Debtors rely on a decision that predates Lowenschuss, suggesting that the earlier decision "le[ft] open the possibility that the court could approve a third-party release in" circumstances similar to those at issue in the Fourth Circuit's decision in In re A.H. Robins Co., 880 F.2d 694, 701-702 (4th Cir. 1989). Debtors Opp. 26 (citing In re American Hardwoods, Inc., 885 F.2d 621, 626-627 (9th Cir. 1989)). But that earlier decision squarely concluded "that the specific provisions of section 524 displace the court's equitable powers under section 105," and only then noted, in the alternative, that "[e]ven if [the Ninth Circuit] adopted In re A.H. Robins Co. * * * , it would not dictate a different result" in light of factual differences. American Hardwoods, 885 F.2d at 626. And the Ninth Circuit later rejected an argument indistinguishable from the one that debtors press here, explaining that it had "expressly declined to adopt the approach set forth in In re A.H. Robins" based on "the clear language of American Hardwoods." Lowenschuss, 67 F.3d at 1402.[5]

[5] Debtors' effort to distinguish the Tenth Circuit's decision in In re Western Real Estate Fund, Inc., 922 F.2d 592, 600 (1990) (per curiam), fails for the same reason. That case expressly adopted Ninth Circuit precedent. Id. at 601-602 ("we follow the Ninth Circuit's lead in In re American Hardwoods"; "a permanent injunction that effectively relieves the nondebtor from its own liability to the creditor * * * improperly insulate[s] nondebtors in violation of section 524(e) * * * without any countervailing justification of debtor protection," given the discharge available to the debtor itself under Section 524(a)).

Debtors fare no better by invoking (Opp. 27) the Ninth Circuit's recent decision in Blixseth v. Credit Suisse, 961 F.3d 1074 (2020), cert. denied, 141 S. Ct. 1394 (2021). That decision specifically noted the "long-running circuit split" on the question whether bankruptcy courts can release nondebtor third parties. Id. at 1082 n.4. And it reaffirmed that American Hardwoods and Lowenschuss were correctly decided because they "involved sweeping nondebtor releases from creditors' claims on the debts discharged in the bankruptcy." Id. at 1083-1084. The Ninth Circuit then distinguished the provision at issue in Blixseth -- an exculpation clause that protects "participants in the plan development and approval process" from liability "for actions taken during those processes," as differentiated from a third-party release that extinguishes pre-petition claims. Id. at 1084. Blixseth thus adheres to the Ninth Circuit's holdings about third-party releases. In any event, debtors' contention that the Ninth Circuit's approval of an exculpation clause undermines its third-party-release decisions cannot be reconciled with their assertion, only two pages earlier, that the Fifth Circuit's recent decision invalidating an exculpation clause should be disregarded because it "involved an exculpation clause directed to post-petition liabilities." Debtors Opp. 25 n.6 (citing In re Highland Cap. Mgmt., L.P., 48 F.4th 419 (5th Cir. 2022), petitions for cert. pending, Nos. 22-631 and 22-669 (filed Jan. 5 and 16, 2023)).

Debtors next suggest (Opp. 29-30) that the conflict would benefit from "[f]urther [p]ercolation" because "the Fifth, Ninth, and Tenth Circuits[] should have the chance to consider the Second Circuit's decision." But it is unlikely that any one of those circuits will grant rehearing en banc and reverse position on this issue -- much less that all of them will do so. Even aside from the lower courts' starkly different interpretations of Section 524(e), see Appl. App. 57a, the Second Circuit's broad reading of the Code's residual provisions is fundamentally incompatible with the views of the Fifth, Ninth, and Tenth Circuits. See, e.g., Highland Cap. Mgmt., 48 F.4th at 437 (rejecting arguments that 11 U.S.C. 105(a) and 1123(b)(6) provide a basis for exculpation clauses and noting that the "same logic" applies to Section 1123(b)(6) as to Section 105); Lowenschuss, 67 F.3d at 1402 (declining to rely on "the court's equitable powers under section 105"); Western Real Estate Fund, Inc., 922 F.2d at 601 (declining to interpret "section 105(a)" to authorize third-party releases because "a bankruptcy court's supplementary equitable powers thereunder may not be exercised in a manner that is inconsistent with the other, more specific provisions of the Code"). Even if debtors seeking third-party releases file for bankruptcy in those circuits -- which is itself unlikely given most large debtors' ability to proceed in the Second Circuit, see Appl. 17 -- there is no realistic prospect that all three circuits will change posi-

tions, which is why the issue needs "nationwide resolution by the Supreme Court." Appl. App. 87a-88a (Wesley, J., concurring).

Finally, the plan proponents seek to diminish the circuit conflict because not all cases involve the mass-tort context. See, e.g., Debtors Opp. 29; MSGE Opp. 9-10. But the plan proponents do not cite a single decision from the Fifth, Ninth, or Tenth Circuits that reached a contrary result and upheld a third-party release in a mass-tort case. Indeed, the categorical reasoning of those courts admits of no such distinction. Nor have the plan proponents articulated any principled justification, textual or otherwise, for the suggestion that the Code permits third-party releases for mass torts but prohibits them in other circumstances. Just the opposite: Although Congress amended the Code to permit a narrow form of such releases in one subcategory of mass-tort cases related to asbestos, Congress has never authorized releases for any other mass-tort case. See 11 U.S.C. 524(g); see also Appl. 20.

Moreover, this Court has previously declined to adapt other legal provisions, such as those governing class actions, to provide a better means of compensating mass-tort victims when "Congress * * * has not adopted such a solution." Amchem Prod., Inc. v. Windsor, 521 U.S. 591, 629 (1997); see Ortiz v. Fibreboard Corp., 527 U.S. 815, 864 (1999). Nor is there a compelling need for special treatment for releases involving other mass torts; when mass-tort-related bankruptcies arise in circuits that do not per-mit nonconsensual nondebtor releases, debtors may obtain consent

for third-party releases. See, e.g., Bankr. Ct. Doc. 6353, at 34-35, In re PG&E Corp., No. 19-30088 (Bankr. N.D. Cal.) (Mar. 17, 2020) (providing for consensual releases from claim holders who opted in to granting releases to third parties).

C. Respondents contend that certiorari is unwarranted because this Court has rejected several previous petitions presenting similar or related questions. See, e.g., Debtors Opp. 39-40; UCC Opp. 23. But none of the cited cases from the last 25 years provided a clean opportunity to address the lawfulness of nonconsensual third-party releases because they involved exculpation clauses rather than third-party releases, required resolution of questions about equitable mootness, or raised other vehicle problems. See Blixseth v. Credit Suisse, 141 S. Ct. 1394 (2021) (exculpation clause); ISL Loan Trust v. Millennium Lab Holdings II, LLC, 140 S. Ct. 2805 (2020) (equitable mootness); Vision-Park Props., LLC v. Seaside Eng'g & Surveying, LLC, 577 U.S. 823 (2015) (exculpation clause); National Heritage Found., Inc. v. Highbourne Found., 574 U.S. 1076 (2015) (court of appeals that permits third-party releases rejected a particular release); Ad Hoc Comm. of Kenton County Bondholders v. Delta Air Lines, Inc., 558 U.S. 1007 (2009) (equitable mootness); Morley v. Ontos, Inc., 552 U.S. 823 (2007) (release only for claims that were the property of the estate); Class Five Nev. Claimants v. Dow Corning Corp., 537 U.S. 816 (2002) (interlocutory order remanding for further factual findings and requiring the released claims to be paid in full).

The fact that each of those cases failed to present a clean opportunity for review of the lawfulness of third-party releases -- despite their increasingly frequent use -- further illustrates why this case presents an especially suitable opportunity for this Court's review. If the Second Circuit's decision instead remains in place, such opportunities will become scarcer given most large debtors' ability to file in the Second Circuit and that court's expansive application of equitable mootness. See Appl. 17.

II. THE GOVERNMENT IS LIKELY TO SUCCEED ON THE MERITS

No provision of the Bankruptcy Code authorizes the sweeping power the court of appeals recognized to extinguish nonconsenting third parties' claims against nondebtors. Accordingly, there is "a fair prospect that the Court would reverse" the decision of the court of appeals. Merrill v. Milligan, 142 S. Ct. 879, 880 (2022) (Kavanaugh, J., concurring).

The plan proponents infer a "broad authority" for third-party releases, Debtors Opp. 49, from the Code's general authorization to "include any other appropriate provision not inconsistent with the applicable provisions of [the Code]," 11 U.S.C. 1123(b)(6). But that interpretation overrides all background considerations, including the cardinal principle that the subject of bankruptcy is the relations between a "debtor and his creditors." Wright v. Union Cent. Life Ins. Co., 304 U.S. 502, 513-514 (1938) (citation omitted). And the plan proponents' overly expansive reading of the Code's general provisions also contravenes the approach taken

in this Court's recent decisions. See Appl. 22-23 (discussing Czyzewski v. Jevic Holding Corp., 580 U.S. 451, 465 (2017); Law v. Siegel, 571 U.S. 415, 423-424 (2014); and RadLAX Gateway Hotel, LLC v. Amalgamated Bank, 566 U.S. 639, 645-646, 649 (2012)).

Notably, debtors have no meaningful response to the observation that the release approved here transgresses various limitations that would apply if the Sacklers underwent bankruptcy themselves, including the prohibition on discharging claims based on fraud. In response, debtors suggest (Opp. 54) only that a release is not identical to a discharge, so the letter of those contrary provisions would not apply -- but that overlooks the fundamental point that the Bankruptcy Code cannot reasonably be interpreted to authorize broader relief for the Sacklers than they could obtain if they sought repose through bankruptcy itself.[6]

The plan proponents invoke the traditional equitable authority of bankruptcy courts, as codified in 11 U.S.C. 105(a) and 1123(b)(6), but they identify no analogue in equity to the power they infer. See Appl. App. 97a (Wesley, J., concurring) ("The majority does not liken the equitable authority recognized today to anything traditionally recognized at equity. I too am at a

[6] Debtors separately contend (Opp. 58) that the U.S. Trustee "forfeited" any argument that the third-party release violates a provision preserving the Sackler claimants' jury-trial right. But the jury-trial provision simply serves as another example supporting the U.S. Trustee's consistent claim that the release is broader than what would be allowed against the Sacklers themselves. See Lebron v. National R.R. Passenger Corp., 513 U.S. 374, 379 (1995); Yee v. City of Escondido, 503 U.S. 519, 534 (1992).

loss."). And the startling breadth of the inferred power cuts against their reading. "Even when sitting as a court in equity, [courts] have no authority to craft a 'nuclear weapon' of the law." Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308, 332 (1999).

The plan proponents heavily rely (e.g., Debtors Opp. 42-47; UCC Opp. 19; Ad Hoc Comm. Opp. 4, 11-12; MSGE Opp. 14-16) on this Court's decision in United States v. Energy Resources Co., 495 U.S. 545 (1990), even describing it as a case that "involved a de facto release," Debtors Opp. 5. But they misread that decision. Energy Resources involved a plan provision that specified the treatment of payments the debtor made to the IRS (one of its creditors), directing that they be applied against the debtor's liabilities. 495 U.S. at 548. In determining that the Code authorized that plan provision, the Court explained that the residual powers codify a bankruptcy court's "broad authority to modify creditor-debtor relationships." Id. at 549 (emphasis added). The Court concluded that ordering the IRS as creditor to categorize the debtor's payment in a specific manner was "wholly consistent" with the Bankruptcy Code and applicable tax statutes and therefore did not "transgress[] any limitation on the[] broad power" to modify creditor-debtor relationships. Id. at 551. But the decision offers no support for the invocation of residual authority to alter relationships between nondebtors and other nondebtors, much less to do so in a way that conflicts with the Code's text, struc-

ture, purposes, and history -- including by terminating claims for fraud that could not be discharged had the Sacklers individually filed for bankruptcy.

The plan proponents suggest (e.g., Debtors Opp. 23) that third-party releases will be approved only in "limited circumstances." But they fail to acknowledge that the Second Circuit's seven-factor test lowers the standards set by other circuits that allow nonconsensual releases. See In re Dow Corning Corp., 280 F.3d 648, 656 (6th Cir. 2002) (permitting release when plan provides "for the full payment of all claims"); In re A.H. Robins, 880 F.2d at 701 (finding authority to issue nondebtor injunction when plan provides for claims' payment in full). The Second Circuit explicitly rejected a requirement that nondebtors be fully compensated for the released claims against the Sacklers. See Appl. App. 76a-77a (requiring "fair payment of claims" rather than payment in full); see Appl. 17-18 (noting the Purdue plan's failure to give any value to the released claims). More fundamentally, the court of appeals' need to cabin the third-party release power by concocting a multifactor test alongside the reticulated scheme of the Bankruptcy Code is evidence that the power should not be inferred from the Code in the first place. See Appl. 23-24.

As the government has explained (Appl. 24-25), the court of appeals' interpretation of the Code's residual provisions is also mistaken because it adopts, without the requisite clarity from Congress, an interpretation that raises serious constitutional

questions, including by extinguishing property rights with no opportunity for a claimant to opt in or out. Debtors respond (Opp. 58) that bankruptcy is an exception to the normal operation of due-process principles. But to obtain the benefit of bankruptcy's broad discharge of debts, the Sacklers should enter bankruptcy with its concomitant obligations. Because debtor-creditor relations are the subject of bankruptcy, see Appl. 18-19, 23, the pendency of a bankruptcy case is no carte blanche to extinguish, free of normal constitutional constraints, property rights that individuals hold against nondebtors.

Debtors also suggest (Opp. 57) that any constitutional-avoidance argument is defeated by 11 U.S.C. 524(g), which specifically authorizes a limited third-party release in a bankruptcy arising from the manufacture or sale of asbestos. But Section 524(g) sets out stringent requirements adopted by Congress, including provisions specifically designed to address third parties' due-process rights. See 11 U.S.C. 524(g)(2)(B)(ii)(IV), (2)(B)(V), (4)(A)(ii), (4)(B) and (5); see also 524(g)(4)(a)(ii) (allowing release only of third-party claims derivative of claims against the debtor). The existence of that tailored release power does not eliminate "substantial doubt" about the extinguishment of third-party rights without such protections in a far broader array of circumstances. United States v. Security Indus. Bank, 459 U.S. 70, 78 (1982).

III. THE EQUITIES STRONGLY FAVOR A STAY

A. Because certiorari is warranted, the equities strongly favor a stay. The plan proponents do not meaningfully dispute that recalling and staying the mandate would ensure this Court's ability to reach the merits of the question presented. None of the plan proponents has disavowed the litigation strategy of substantially consummating the plan as quickly as possible and then invoking the equitable-mootness doctrine to obstruct or complicate this Court's review. Although substantial consummation will take more than a month, respondents' varying submissions offer little reassurance about when sufficient steps will have occurred to support an invocation of equitable mootness. Compare Appl. 27 (citing plan proponents' various representations to the court of appeals last month that substantial consummation could occur as early as November or December), with, e.g., Debtors Opp. 63 (now asserting that substantial consummation would occur in "January 2024 at the earliest").

Nor have the plan proponents provided any reason why it would make sense, if the court grants certiorari, to allow the continued consummation of a massive and potentially unlawful plan. Indeed, they do not argue otherwise; instead, they apparently envision that there will need to be further stay briefing at the time the Court grants review. See UCC Opp. 17 ("Assuming certiorari is granted [this fall], the Court can consider a stay at that time."); Debtors Opp. 64 (contending that "the Court would have ample time

to act on a certiorari petition" before plan consummation in January 2024). But an additional round of briefing is unnecessary since the "reasonable probability" of review justifies a stay now. Merrill, 142 S. Ct. at 880 (Kavanaugh, J., concurring).

B. Debtors contend that the stay should be denied because the U.S. Trustee has not shown an irreparable harm to himself if this Court's review is thwarted. Debtors Opp. 62-66; see id. at 64 (arguing that the harm "is not personal to [the U.S. Trustee]"). But the interests of the government and the public "merge" in this context. Nken v. Holder, 556 U.S. 418, 435 (2009). The nonconsensual release of claims against the Sacklers not only threatens the public's interest in enforcing federal law, but also undermines the integrity of the bankruptcy system, hurts current and future tort victims, and harms tens of thousands of individuals who did not consent to release of their claims. See Appl. 25-31.

C. For the same reasons, the plan proponents are mistaken in contending that the Sackler release serves the public interest and so should not be subject to further review.

In touting broad support for the release among those who voted on the reorganization plan, the plan proponents disregard the interests of thousands of claimants who voted against the plan containing the release and the untold numbers of nonvoting claimants who oppose it. The UCC contends that it is irrelevant how many nonvoting claimants might oppose the release because "[w]hat counts in a bankruptcy are those who choose to make their voices

heard." UCC Opp. 13; accord Debtors Opp. 62 (addressing the views of "represented part[ies]"). But the provisions they cite concern only those who hold claims against the debtor. See 11 U.S.C. 1126(c), (d). And notice of the third-party release was provided only after the deadline for filing proofs of claim against Purdue. Compare C.A. J.A. 448-451 (setting July 30, 2020 deadline to file proofs of claim), with id. at 544 (order approving proposed notice on June 3, 2021). As a result, focusing on the voting creditors ignores those who could not vote on the release of their claims against the Sacklers because they had previously failed to assert claims against Purdue. See Fed. R. Bankr. P. 3003(c)(2).

The UCC contends (Opp. 11) that it would be "unfair and unjust" for this Court to review the release given the "small number of holdout creditors" who oppose it. But more than 2,600 personal-injury claimants voted against confirmation. Individual victims also objected to the plan and lamented the injustice of the release in comments such as the following:

- "the Sackler family is trying to keep their ill-gotten fortune off the backs of the heartbroken people who lost their loved ones";
- "[l]ook at the gulf between relief offered claimants and hurdles [to] filing a successful claim for a pittance and the value of [the Sacklers'] retained wealth, release from liability and avoidance of responsibility";
- "I'm pleading with you to not let the Sacklers gain immunity from any future lawsuits against them";
- "[o]ur system of justice demands that the allegations against the Sackler family be fully and fairly litigated

> in a public and open trial" and "judged by an impartial jury."

D. Ct. Doc. 94, at 13 (Oct. 25, 2021) (alterations and ellipsis omitted). Debtors are mistaken in asserting (Opp. 64) that those individuals are invariably, or even generally, "represented by their own counsel." Neither the UCC nor the other groups represent the objecting creditors. See, e.g., In re Kobra Properties, 406 B.R. 396, 403 (Bankr. E.D. Cal. 2009) ("[T]he representation of a creditors' committee does not entail representation of any specific creditor[.]"); Bankr. Ct. Doc. 3939, at 2 (Oct. 13, 2021) (asserting that the ad hoc group of individual victims represents 60,761 personal-injury claimants out of more than 136,000). In fact, several individuals filed objections pro se. See, e.g., Bankr. Ct. Doc. 442 (Nov. 5, 2019); Bankr. Ct. Doc. 443 (Nov. 7, 2019); Bankr. Ct. Doc. 3235 (July 16, 2021); Bankr. Ct. Doc. 3648 (Aug. 24, 2021). The public interest would be served by allowing this Court to review the substantial legal issues associated with the court of appeals' authorization of the nonconsensual third-party release.

D. The plan proponents contend that the release is necessary to avoid depleting the Sacklers' assets (e.g., UCC Opp. 4-5, 10-12; MSGE Opp. 5-6, 25-26), expressing concern about "massive damages awards" going to the first Sackler claimants to prevail in their suits, UCC Opp. 11. Those concerns about the distribution of the Sacklers' assets should be addressed in bankruptcy proceed-

ings for the Sacklers themselves -- which they could initiate if substantial awards to their claimants begin to mount. Absent such a filing, and the Sacklers' acceptance of the burdens accompanying it, courts have no authority to extinguish claims of some of the Sacklers' creditors to protect others, particularly while allowing the Sacklers to retain billions that could have been used to compensate claimants who are compelled to forgo the value of their claims.

Similarly, debtors contend (Opp. 38) that invalidating the plan "helps only the Sacklers," who hold much of their fortune overseas, including in spendthrift trusts that are not normally accessible in bankruptcy. See id. at 37-38. But "[s]pendthrift trusts * * * may be recovered from[] * * * if the transfers to such trusts are fraudulent." Appl. App. 28a n.9; see C.A. J.A. 6492 (statement of UCC acknowledging that, "[t]o the extent Sackler transfers could be shown to be the product of actual fraud based on the extensive evidence unearthed," the "obstacle[] to * * * creditor recovery (transfers to spendthrift trusts) would fall away"). And it blinks reality to suggest that invalidation of the release would benefit only the Sacklers; they agreed to contribute up to $6 billion, Appl. App. 40a, presumably based on perceived litigation risk for the released claims, not out of the goodness of their hearts. See Bankr. Ct. Doc. 3599, at 35 (Aug. 18, 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").

E. The plan proponents express concern about any loss of time associated with this Court's disposition of a certiorari petition, asserting that they could be taking steps to implement the plan in the interim. Specifically, they suggest that they could "set[] up the trusts and other structures necessary to effectuate the Plan," UCC Opp. 9, pursue "entry of a confirmation order from the district court," trigger a criminal sentencing hearing for Purdue, and proceed with "many State and federal regulatory processes (such as State licensure for the post-emergence public benefit company)," Debtors Opp. 63. But taking those steps will deplete estate resources and impose needless costs on many other entities if (as is likely) the Court ultimately reverses the decision below and holds the plan unlawful with the third-party releases in their current form.

In any event, the plan proponents' concerns about delay can be minimized if the Court grants certiorari at the same time as it recalls the mandate and issues a stay. The plan proponents do not object to -- and in fact several affirmatively endorse -- the U.S. Trustee's suggestion that the Court construe the application as a petition for a writ of certiorari. See, e.g., Debtors Opp. 69-70; UCC Opp. 18; MSGE Opp. 1, 8. A certiorari decision on the stay papers would minimize the expenditure of estate resources on

further certiorari briefing and remand proceedings and would speed the conclusion of proceedings in this Court.

Furthermore, the costs of delay from a stay during proceedings in this Court, including the time-value of money, can later be offset by the plan proponents, including by accelerating and increasing payments important to individual victims. Debtors contend (Opp. 67) that there is no evidence that the plan can be renegotiated. But they previously represented that the agreement "may be amended, modified[,] or supplemented from time to time by the Debtors in accordance with the Plan." Bankr. Doc. 3711, at 4 (Aug. 31, 2021); see ibid. (explaining that the documents "remain subject to continuing review and negotiation among the Debtors and interested parties" and "subject to material change" "at any time before the Effective Date of the Plan"); Appl. 30.

Previous alterations to the plan's terms provide strong evidence that a renegotiation would be possible. Most conspicuously, plan proponents argued in 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 a new agreement with debtors, eight objecting States, and the District of Columbia to pay up to an additional $1.675 billion in exchange for those objectors' agreement not to oppose the Sackler release in the court of appeals, at the certiorari stage, or in party briefs at the merits stage in this Court. See States of

California et al. Resp. 1. That additional settlement demonstrates that requiring consent is important leverage that can lead to better outcomes. For that reason, too, the public interest strongly supports this Court's review of the Sackler release -- which in turn justifies prompt issuance of a stay.

* * * * *

For the foregoing reasons and those stated in the stay application, the Court should recall and stay the court of appeals' mandate, pending further proceedings in this Court. The Court should also construe the application for a stay as a petition for a writ of certiorari and grant certiorari.

Respectfully submitted.

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Solicitor General

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