Nos. 08-295, 08-307

IN THE

Supreme Court of the United States

THE TRAVELERS INDEMNITY COMPANY, ET AL.,
Petitioners,

v.

PEARLIE BAILEY, ET AL.,
Respondents.

COMMON LAW SETTLEMENT COUNSEL,
Petitioners,

v.

PEARLIE BAILEY, ET AL.,
Respondents.

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

BRIEF FOR RESPONDENTS PEARLIE BAILEY, SHIRLEY MELVIN, GENERAL LEE COLE, ROBERT ALVIN GRIFFIN, VERNON WARNELL, LEE FLETCHER ANTHONY, AND THE CASCINO ASBESTOS CLAIMANTS

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QUESTION PRESENTED

1. May a federal court, consistent with the limited bankruptcy subject-matter jurisdiction of 28 U.S.C. § 1334, enjoin independent state court actions against parties not in bankruptcy that: a) do not affect the *res* of the estate of a debtor in bankruptcy; b) do not in any way seek to impose legal obligations on the debtor; and c) do not assert claims derivative of claims against the debtor?

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STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The principal statutory and constitutional provisions involved are set out in the Brief for the Travelers Petitioners,[1] with the conspicuous omission

[1] The various Travelers entities will be referred to as "Travelers" hereafter. "App." refers to the Petitioners Appendix.

of 28 U.S.C. § 1334(b), which provides that "the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11."

STATEMENT OF THE CASE

At issue is the scope of the federal bankruptcy power to enjoin state law actions that do not affect the debtor's estate. Historically, the bankruptcy power has been limited to control over the debtor's estate and the ability to give the debtor a fresh start. Control over the estate has so dominated the bankruptcy landscape that the Court long ago recognized that "[p]roceedings in bankruptcy are, generally speaking, in the nature of proceedings *in rem*." *Hanover Nat'l Bank v. Moyses,* 186 U.S. 181, 192 (1902). Other powers extending to the relation between creditors and the debtor are "ancillary" to the central concern over the estate. *Cent. Va. Cmty. College v. Katz*, 546 U.S. 356, 373 (2006). Accordingly "the restructuring of debtor-creditor relations, which is at the core of the federal bankruptcy power, must be distinguished from the adjudication of state-created private rights." *N. Pipeline Const. Co. v. Marathon Pipe Line Co*., 458 U.S. 50, 71 (1982) (plurality opinion).

This case stands alone in the annals of bankruptcy cases before the Court in not involving the debtor or its assets in any form. Rather, the underlying dispute turns on the potential liability of Travelers—a nondebtor, not in bankruptcy—under various state laws for its own allegedly wrongful conduct. Either

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"Resp. J.A." is the Respondents' Joint Appendix. "2d Cir. App" refers to the joint appendix in the Second Circuit.

by statute or, at least putatively, by common law, a number of states appear to have recognized independent legal duties for insurers to disclose knowledge of ongoing hazards and to refrain from unfair insurance trade and settlement practices. Regardless whether any plaintiffs ever prevail in such actions against Travelers, the critical fact remains that those actions are brought against Travelers for its own alleged misconduct, not the conduct of its formerly-bankrupt insured, Johns-Manville. Any recovery would come from Travelers and would have no effect on Travelers' long-since settled contractual insurance obligations to Manville. The state law claims against Travelers are not derivative of the conduct of Manville, nor would any such claims touch the assets of the bankruptcy estate. Any claims against Manville are handled separately by the Manville Trust, whose funding was set in 1986 by confirmation of the Manville bankruptcy plan.

To date, none of the Respondents has filed suit against Travelers for its own alleged misconduct. Yet they have been enjoined from doing so even though their claims could have no possible bearing on the long-since consummated reorganization of Manville itself.

The use of the bankruptcy power to give this form of relief to a nondebtor is unprecedented. Since the Bankruptcy Code was amended in 1984, the Court has heard 54 cases involving interpretation or application of the bankruptcy statutes, and not one has arisen in a context that did not implicate the estate of the debtor. Nor have the Courts of Appeals recognized jurisdiction over any claim in bankruptcy other than those implicating the debtor itself or its

administrative ability to proceed in bankruptcy, or those that are derivative from the debtor's actions.

The gravamen of Respondents' argument is that the absence of any bankruptcy cases reaching independent state-law actions against nondebtors is not an artifact of the litigation history of particular cases, but reflects well-established jurisdictional limitations on the power of federal courts in bankruptcy. The sole source of bankruptcy jurisdiction is found in 28 U.S.C. § 1334, and its "related to" powers under subsection (b) have never been held to reach beyond matters affecting the debtor. As explained by then-Chief Judge Posner, "[S]ection 1334(b) cannot possibly be applicable to this dispute between two nonparties to the bankruptcy proceeding. Its domain is limited to questions that arise during the bankruptcy proceeding and concern the administration of the bankrupt estate, such as whether to discharge a debtor." *Zerand-Bernal Group, Inc. v. Cox*, 23 F.3d 159, 162 (7th Cir. 1994).

Of course, the enjoined state law claims against Travelers would be factually linked to its relationship to Manville, something the bankruptcy and district courts deemed sufficient for injunctive relief. But the question, however, is not whether there is a factual nexus, but whether that factual nexus is legally sufficient for bankruptcy court jurisdiction under § 1334. For the Second Circuit, the fact that claims against Travelers as Manville's insurer and claims against Travelers for its own independent wrongdoing arise "from a common nucleus of operative facts involving Travelers and Manville...is of little significance from a jurisdictional standpoint." App. 32a. The Second Circuit held there was no subject-matter jurisdiction over independent, non-derivative claims

against Travelers and remanded the case for a determination of which claims were derivative from the actions of the insured and which were independent claims against Travelers. Finding the jurisdictional divide to fall between derivative and independent claims is consistent with the Bankruptcy Code, with the Court's rulings on bankruptcy jurisdiction, and with case law from the Circuits. The opinion below should be affirmed.

1. Constitutional and Statutory Framework. The federal bankruptcy power derives from the Bankruptcy Clause of the Constitution, which gives Congress power to establish "uniform Laws on the subject of Bankruptcies throughout the United States." U.S. CONST., art. I, § 8, cl. 4.

The modern statutory framework dates from the 1898 Bankruptcy Act, in which "federal district courts served as bankruptcy courts and employed a 'referee' system," *N. Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 53 (1982) (plurality opinion). That system proved incapable of handling the increase in consumer bankruptcies after the World War II period, and was replaced by the Bankruptcy Reform Act of 1978 (1978 Act), which created bankruptcy courts in each judicial district that served as adjuncts to the district courts. Bankruptcy Reform Act of 1978 § 201, Pub. L. No. 95-598, 92 Stat. 2549. The 1978 Act also extended district court jurisdiction to "all civil proceedings arising under title 11 or arising in or related to cases under title 11," *id.* § 241.

The Court held that granting jurisdiction over state-law claims to bankruptcy courts was unconstitutional in *Marathon Pipe Line*, 458 U.S. at 71. In response to *Marathon Pipe Line*, Congress passed the Bank-

ruptcy Amendments and Federal Judgeship Act of 1984 (1984 Act), which permitted district courts to refer "core proceedings" to bankruptcy courts. 28 U.S.C. § 157(b)(1). The district court also could refer "non-core matters" "related to" a case under title 11 to the bankruptcy court, and "any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected." *Id.* § 157(c)(1). Despite the structural changes in the 1984 Act, Congress did not alter the jurisdictional grant to district courts from the 1978 Act, replicating the text verbatim. 28 U.S.C. § 1334(b).

Ten years later, Congress passed the Bankruptcy Reform Act of 1994 (1994 Act). Section 524(g) of the 1994 Act created distinct procedures for relieving a debtor of future asbestos liability in bankruptcies involving significant present and future asbestos claims, which included a heightened standard for obtaining the approval of asbestos claimants. This provision codified the procedures used in the Johns-Manville reorganization, in which a federal court established a trust to assume liability for both present and future asbestos-related claims against the debtor. 140 CONG. REC. 27,692 (1994) (statement of Rep. Brooks). Section 524(g) effectuated this goal by allowing a channeling injunction to redirect all claims for asbestos personal injuries from the debtor to the newly-created bankruptcy trust. The channeling injunction could also apply to claims that were derivative of the debtor's liabilities for asbestos exposure, including claims against a debtor's insurance policy. More specifically, § 524(g), in stating the general rule in § 524(e) that the discharge of the

debtor "does not affect the liability of any other entity on ... such debt," included a provision "nothwitstanding" § 524(e) for relief for a third party who is "alleged to be directly or indirectly liable for the conduct of, claims against, or demands on the debtor to the extent such alleged liability of such third party arises by reason of the third party's provision of insurance to the debtor or a related party." 11 U.S.C. § 524(g)(4)(A)(ii)(III). Notably, § 524(g) *did not* include any additional grant of jurisdiction to federal courts and § 1334(b) remains the lone grant conferring jurisdiction over cases "arising under title 11, or arising in or related to cases under title 11." Thus, § 524(g) still reaches only liability "for the conduct of, claims against, or demands on the debtor."

2. Factual Background. Although the opinion below is captioned, *In re Johns-Manville Corporation,* App. 1a, this case involves neither Johns-Manville, a former bankrupt, nor the Manville Trust, a trust created to assume the asbestos liabilities of Johns-Manville in a manner now codified as 11 U.S.C. § 524(g). Rather, the case concerns the efforts of Manville's insurer to eradicate its own independent liabilities under various state laws under the rubric of the Manville Bankruptcy.

a. The Manville Bankruptcy. Travelers served as one of Manville's primary insurers for many years and contributed approximately $80 million into the creation of the 1986 Manville bankruptcy trust, obtaining in exchange a "full and final release of Manville-related claims." App. 9a. In total, Manville settled with all its insurance carriers for more than $700 million, which formed a significant part of the initial corpus of the Manville Trust. App. 213a-215a.

The original settlement in 1986 required that all "Policy Claims" be channeled into a bankruptcy trust that would assume all of Manville's asbestos liabilities, App. 297a, including claims against Travelers under its insurance policies. App. 445a. In its Order of December 18, 1986 (the "Settlement Approval Order"), which was incorporated into the Confirmation Order, the bankruptcy court described the "Policy Claims" that would be referred to the Trust:

> any and all claims, demands, allegations, duties, liabilities and obligations (whether or not presently known) which have been, or could have been, or might be, asserted by any Person against any or all members of the JM Group or against any or all members of the Settling Insurer Group based upon, arising out of or relating to any or all of the Policies.

App. 439a. The confirmation of the Manville plan, which is not at issue in this case, was subsequently affirmed by the Second Circuit. *MacArthur Co. v. Johns-Manville Corp.*, 837 F.2d 89 (2d Cir. 1988).

In addition to channeling the Policy Claims into the Manville Trust, the bankruptcy court also enjoined any new actions against the Settling Insurance Companies "for the purpose of, directly or indirectly, collecting, recovering or, receiving payment of, on or with respect to any Claim, Interest or Other Asbestos Obligation," other than those to enforce rights or obligations under the Reorganization Plan. App. 286a.

Even at the time of the original settlement, the bankruptcy court's orders distinguished between claims brought on the policies and those brought directly against the insurers for their own miscon-

duct. For example, with regard to claims filed prior to 1986, the bankruptcy court limited its injunction to exclude claims of "*bad faith or other insurer misconduct alleged in connection with the handling or disposition of claims*." App. 446a (emphasis added).

The distinction between claims derivative of Manville's liability and those arising from independent conduct of the insurer was consistent with the underlying settlement between Manville and its insurers as to the scope of the insurance contribution to the proposed Manville estate. This is set out clearly in a June 3, 1985 letter written by Lowell Gordon Harriss of Davis Polk & Wardwell, counsel for Manville, and sent to and confirmed by Peter Schlesinger of Simpson Thacher & Bartlett, counsel for Travelers. Resp. J.A. 11a. In that letter, the parties clarify the scope of the negotiated channeling injunction under the July 18, 1984 Settlement Agreement. The critical passage provides:

> The Court has *in rem* jurisdiction over the Policies and thus the power to enter appropriate orders to protect that jurisdiction. *The channeling order is intended only to channel claims against the res* to the Settlement Fund and the injunction is intended only to restrain claims against the *res* (*i.e.*, the Policies) which are or may be asserted against the Settling Insurers.

Resp. J.A. 13a-14a. (emphasis added). Travelers thereby directly accepted the limited scope of its bankruptcy release in the channeling order.

b. Current Claims Against Travelers. Many years after the bankruptcy court issued its 1986 Confirmation Order approving the settlement of Manville's

bankruptcy, various lawsuits were filed against Travelers. These suits alleged that Travelers was an independent tortfeasor, liable under state law for its own conduct independent of its insurance policies to Manville. In each of these lawsuits, the plaintiffs sought damages from Travelers' independent funds, not from Manville's insurance policy or from the Trust. *See* App. 10a-11a, 35a.

Although these actions were termed "Direct Actions," that term is misleading. Unlike direct actions that permit a tort claimant to sue the insurer directly without naming the insured, these are not suits to collect on the insurance policies. As the Second Circuit noted, a direct action by a tort claimant seeks recovery from the insurer under the policy, App. 5a n.4, while these actions "seek to recover directly from Travelers, a non-debtor insurer, for its own alleged misconduct." App. 23a.

The new claims fall into two basic categories. The first were "based on statutory regulation of insurance practices," and alleged that "Travelers conspired to violate state laws prohibiting unfair insurance trade and settlement practices," App. 44a, and that Travelers fraudulently coordinated a national effort to defend asbestos litigation through the "state of the art" defense. *See* App. 10a & n.10. For instance, in *Wise v. Travelers Indemnity Co.,* No. 01-C-599 (W. Va. Cir. Ct., Berkeley County, Oct. 25, 2001), App. 24a, the plaintiffs alleged, *inter alia*, that the insurance companies willfully misrepresented facts relating to the insurance coverage at issue. This conduct, plaintiffs alleged, constitutes a violation of W.V. CODE § 33-11-1 et seq., prohibiting unfair methods of competition and unfair or deceptive acts

or practices, for which there are independent sources of liability. 2d Cir. App. A-521-24.

The second category of claims involved plaintiffs who alleged that Travelers violated common law duties by failing to disclose its knowledge of asbestos hazards and that such knowledge was suppressed as a result of a conspiracy between Travelers and Manville. App. 11a. *Darden v. Combustion Engineering, Inc.*, No. 02-04150-B (117th Dist. Ct., Nueces County, Tex., Dec. 8, 2003), 2d Cir. App. A-1264, presents an example of the common law suits. The Darden plaintiffs alleged three causes of action against the insurance company defendants, including Travelers. The plaintiffs alleged that the insurance defendants had an independent duty to protect plaintiffs from the dangers of asbestos and violated that duty, *see* 2d Cir. App. A-1337-42; that the insurance defendants had fraudulently conspired to conceal information about the danger of asbestos, *see* 2d Cir. App. A-1337-42; and that the insurance defendants had acted in concert to misrepresent information about the danger of asbestos, *see* 2d Cir. App. A-1342-43.

Travelers ultimately agreed to settle both the statutory and common law claims for over $400 million. App. 150a-152a. There are two noteworthy features of this settlement. First, the money was not to be paid into the Manville Trust, such that the remedy was never intended to be part of the bankruptcy estate. *Id.* Instead, the money was to be paid into special funds for the current statutory claimants and unspecified common law claimants. *Id.* Second, notwithstanding the fact that the settlement provided a compensation order only for current claimants, the settlement was conditioned on the

bankruptcy court entering a "Clarifying Order" expanding its twenty-year-old confirmation order to bar future claims against Travelers. App. 152a; *see also* App. 13a-14a.

The bankruptcy court accommodated Travelers and entered a sweeping injunction that would cover all future claims against Travelers bearing any connection to asbestos:

> The commencement or prosecution of all actions and proceedings against Travelers that directly or indirectly are based upon, arise out of or relate to Travelers['] insurance relationship with Manville or Travelers['] knowledge or alleged knowledge concerning the hazards of asbestos, including but not limited to, any and all claims or demands relating to asbestos that now or in the future allege unfair competition, unfair or deceptive claims handling or trade practices, bad faith, failure to warn, breach of any duty to disclose information, negligent undertaking, negligent or intentional misrepresentation, negligent inspection or any theory or cause of action similar to the foregoing, under any statute or common law, and any claims for contribution or indemnity relating in any way to the foregoing, are permanently enjoined as against Travelers pursuant to the Confirmation Order.

App. 95a. The predicate for the bankruptcy court's action was not that the enjoined claims were related to attempts to collect for liabilities derived from Manville's conduct, but that those claims were "related to" Travelers' status as Manville's insurer. *See* App. 169a et seq. ("[T]he direct action claims against Travelers are inextricably intertwined with Travelers['] long relationship as Manville's insurer.").

In its evaluation of whether the claims were "related to" the insurance policies, the bankruptcy court asserted a "duty to look to the body of *facts* alleged—and not to the labels or legal theories—to ascertain whether a given claim has been settled, dismissed or enjoined," citing Second Circuit cases referring to tests for *res judicata*. App. 183a. The injunction's broad sweep was based on the bankruptcy court's prediction "that insurers would not contribute funds without receiving assurance that any liabilities arising from or relating to their insurance relationships with Manville would be fully and finally resolved." App. 170a-171a.

Included in the injunction are the current Respondents, none of whom have filed suit against Travelers and none of whom stands to recover from the settlement that was obtained by bartering away their interests. The Asbestos Personal Injury Plaintiffs are six asbestos personal injury claimants: Shirley Melvin for the Estate of Joyce Myers; Pearlie Bailey for the Estate of James Bailey; Lee Fletcher Anthony and General Lee Cole, each a claimant against the Manville Trust; and Robert Alvin Griffin and Vernon Warnell, who have claims against the Manville Trust that they have not yet submitted. The Cascino Asbestos Claimants are approximately 5,632 common law asbestos claimants from Illinois, Indiana, Wisconsin, and Texas, all of whom have settled claims against the Manville Trust but have filed no independent actions against Travelers. *See* 2d. Cir. App. A-60 (Docket No. 3652; ex. A).

Respondents appealed to the district court on the grounds that the bankruptcy court did not have jurisdiction over claims not affecting the estate of the bankrupt or the debtor. The district court rejected

the argument that there was no federal subject-matter jurisdiction because the claims fell outside § 1334(b); instead, it ruled that the bankruptcy court need not have "related to" jurisdiction under § 1334(b). *See* App. 52a. The court upheld the sweeping anti-suit injunction, resting jurisdiction not on any statutory grant but on the bankruptcy court "enforcing its own Orders" and thereby having jurisdiction derivative of its original jurisdiction. App. 52a-53a.

c. The Second Circuit Opinion. The Second Circuit unanimously reversed the district court. The court, per Judge Wesley, focused directly on the question of the source of federal subject-matter jurisdiction:

> [W]hile there is no doubt that the bankruptcy court had jurisdiction to clarify its prior orders, that clarification cannot be used as a predicate to enjoin claims over which it had no jurisdiction. Thus, the bedrock jurisdictional issue in this case requires a determination as to whether the bankruptcy court had jurisdiction over the disputed statutory and common law claims.

App. 18a. The appeals court held that § 1334(b) could not serve as the jurisdictional predicate for enjoining state-law actions that asserted independent claims against Travelers that were distinct from any claims derivative of liability of its insured, Manville. App. 28a-29a. Although the bankruptcy court would have "jurisdiction to enjoin third-party non-debtor claims that directly affect the *res* of the bankruptcy estate," App. 31a, the Second Circuit concluded that jurisdiction did not extend to claims that "seek to recover directly from Travelers for its own alleged misconduct." App. 35a.

The Second Circuit found that "the nature and extent of Travelers' duty to the Direct Action plaintiffs is a function of state law." App. 23a-24a. The bankruptcy and district courts had not examined the nature of the state-law actions because each had assumed that any factual nexus to Travelers having served as Manville's insurer was sufficient to confer jurisdiction for the challenged injunction. App. 23a. Despite an incomplete record below, the appellate panel examined the substance of the state law causes of action to determine the source of the duties owed by Travelers to the plaintiffs and concluded that at least some claims sounded in an independent duty. App. 24a-26a.

For example, under West Virginia law, the court noted, the "settlement of the underlying tort case against the tortfeasor does not preclude a separate and independent recovery against the tortfeasor's insurer arising out of its alleged bad faith insurance practices." App. 25a. Such actions "raise no claim against Manville's insurance coverage. They make no claim against an asset of the bankruptcy estate, nor do their actions affect the estate." App. 29a. As a result, "[t]he bankruptcy court had no jurisdiction to enjoin the Direct Action claims against Travelers." *Id.*

The Second Circuit consequently remanded the matter for the Bankruptcy Court to determine which claims were derivative of claims against Manville that had been discharged in bankruptcy—and could therefore be enjoined—and which were independent actions under state law. App. 35a-36a. Rather than awaiting disposition on remand, Petitioners sought review by certiorari.

SUMMARY OF ARGUMENT

This is a case about subject-matter jurisdiction. As the Second Circuit held, the bankruptcy court and district court had no subject-matter jurisdiction over the state claims that they enjoined.

The lower federal courts are "creatures of statute." *Bath County v. Amy,* 80 U.S. (13 Wall.) 244, 247-48 (1871). Their jurisdictional authority must have a statutory basis, "which is not to be expanded by judicial decree." *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994). That statutory limitation is all the more important when a bankruptcy court, acting as a delegate of the federal court's authority, attempts, as here, preclusively to preempt state-law causes of action.

Bankruptcy jurisdiction is defined by 28 U.S.C. § 1334. The Court has interpreted that statute to confer upon federal courts jurisdiction over claims that involve a debtor or a debtor's estate. However, the dispute below concerns neither the property of a debtor—the "core" of a bankruptcy discharge—nor the obligations of the debtor, nor the debtor-creditor relationship, so as to fall within the "related to" jurisdiction under § 1334(b). Under the pertinent statute and the Court's precedents, there is simply no statutory authorization for federal courts to exercise bankruptcy jurisdiction over claims against a nondebtor, such as Travelers, that do not affect either a debtor or the debtor's estate. This is confirmed not only by the Court's interpretation of the statute but by hundreds of years of experience with bankruptcy and insolvencies which, in turn, confine the federal Bankruptcy Power under the Constitution to the affairs of debtors and their estates.

The bankruptcy and district courts below claimed the ability to create their own ancillary jurisdiction based upon prior orders of the bankruptcy court. The Court has repeatedly—most recently in *Syngenta Crop Protection, Inc. v. Henson*, 537 U.S. 28, 33 (2002)—rejected such claims of inherent federal court jurisdictional authority based on equitable powers. Ancillary authority flows from a statutory grant of jurisdiction; it does not supplant the need for such a grant.

At bottom, the underlying dispute is not about the Manville bankruptcy at all. Rather, this case concerns the attempt of a nondebtor to turn to the Manville bankruptcy court to enjoin state court litigation making no claims on Manville. In exchange for a lump-sum payment to a finite group of claimants that already had filed suits, Travelers sought a one-time fix to any potential liabilities for all claims bearing any factual nexus to asbestos. Unfortunately for Travelers, the bankruptcy power does not include what may be likened to a sale of indulgences to nondebtors, even at a high price. The Court struck down similar attempts to buy wholesale litigational peace in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), each time protecting unrepresented parties against broad claims of the need for finality. Such a trade-off is equally impermissible whether it is run through the Bankruptcy Code or through a Rule 23 class action as in *Amchem* and *Ortiz*.

Accordingly, the Second Circuit properly vacated and remanded to determine which claims might implicate the debtor or derive from the debtor's liability and which do not. On remand, the bankruptcy court would limit its review to those claims

over which it could properly assert jurisdiction. That order was correct and should be affirmed.

ARGUMENT

I. THE BANKRUPTCY SUBJECT-MATTER JURISDICTION OF FEDERAL COURTS IS LIMITED BY STATUTE UNDER 28 U.S.C. SECTION 1334.

A. SECTION 1334 IS THE EXCLUSIVE GRANT OF SUBJECT-MATTER JURISDICTION FOR BANKRUPTCY CASES.

"Federal courts are not courts of general jurisdiction; they have only the power that is authorized by Article III of the Constitution and the statutes enacted by Congress pursuant thereto." *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986). Bankruptcy courts are no exception: "The jurisdiction of the bankruptcy courts, like that of other federal courts, is grounded in, and limited by, statute." *Celotex Corp. v. Edwards*, 514 U.S. 300, 307 (1995).

The contemporary grant of subject-matter jurisdiction over bankruptcy represents a careful effort to respect the limits of bankruptcy jurisdiction over state law claims as required by the Court's decision in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982). In that case, the Court held that the adjudication in a non-Article III bankruptcy court of a contract dispute brought by a debtor directly against a creditor violated Article III. *Id.* at 87-88. The plurality observed, "[t]he restructuring of debtor-creditor relations, which is at the core of the federal bankruptcy power, must be distinguished from the adjudication of state-created private

rights, such as the right to recover contract damages that is at issue in this case." *Id*. at 71 (opinion of Brennan, J.).

Following *Marathon*, Congress enacted 28 U.S.C. § 1334 to create bankruptcy jurisdiction in the District Courts and 28 U.S.C. § 157 to permit referral of most bankruptcy matters to the bankruptcy courts; *see also* 10 COLLIER ON BANKRUPTCY ¶ 7012.10[3], p. 7012-20 (15th ed. rev. 2006) ("Subject matter jurisdiction over bankruptcy cases is provided for in 28 U.S.C. § 1334."). Section 1334 reads in relevant part:

> (a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.
>
> (b) [T]he district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11....
>
> (e) The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction—
>
> > (1) of all the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate....

This grant of jurisdiction accomplishes two important tasks. First, it assures that the District Court hearing a case has exclusive jurisdiction over the *res* at the heart of bankruptcy proceedings, namely the "property...of the debtor." *Id.* § 1334(e)(1). Second, it confers upon the federal courts jurisdiction over the restructuring of debtor-creditor relationships under title 11 (*i.e.*, "cases under title 11"). This includes

jurisdiction over adversarial proceedings arising during the bankruptcy, whether such proceedings are part of the restructuring itself (*i.e.*, "arising under title 11") or implicate either the corpus of the estate or the debtor-creditor relationship (*i.e.*, "arising in or related to cases under title 11").[2] *See Zerand-Bernal Group, Inc. v. Cox*, 23 F.3d 159, 161 (7th Cir. 1994) (Posner, J.) ("The reference to cases related to bankruptcy cases is primarily intended to encompass tort, contract, and other legal claims by and against the debtor, claims that, were it not for bankruptcy, would be ordinary stand-alone lawsuits between the debtor and others....").

At the heart of any bankruptcy proceeding is the orderly distribution of the debtor's estate, which has led the Court to understand bankruptcy jurisdiction as "principally *in rem*." *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 369 (2006). This is a constant throughout the history of bankruptcy jurisdiction. The primary question in any bankruptcy case since the 1898 Act has been the appropriate allocation of the *res* of the bankrupt estate amongst the various claimants to the *res* (*i.e.*, creditors). *See generally* 1 COLLIER, *supra*, ¶ 1.01[1][a], p. 1-7 to 1-9 ("The Bankruptcy Act of 1898 established the modern concepts of debtor-creditor relations in providing a well-structured system for liquidation and distribution of a bankrupt's estate, while permitting an honest debtor a discharge from debts.").

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[2] Complementing § 1334, bankruptcy powers are divided between "core" and "non-core" proceedings under 28 U.S.C. § 157. This section permits bankruptcy courts to hear core proceedings concerning the bankrupt estate proper. In non-core matters, the bankruptcy court may only submit proposed findings of fact and conclusions of law to the district court for *de novo* review.

Accordingly, the Second Circuit, in remanding the present case to determine which claims derive from obligations of the debtor's estate, rightly concluded that any orders of the bankruptcy court "must be read to conform with the bankruptcy court's jurisdiction over the *res* of the Manville estate." App. 33a. This holding is perfectly in keeping with the Court's recognition that a bankruptcy court's jurisdiction "is premised on the debtor and his estate, and not on the creditors." *Tenn. Student Assistance Corp. v. Hood*, 541 U.S. 440, 447 (2004); *see also Katz,* 546 U.S. at 372 ("A court order mandating turnover of the property, although ancillary to and in furtherance of the court's *in rem* jurisdiction, might itself involve *in personam* process.").

But, the issue of whether a court has jurisdiction over the parties or property subject to suit (*i.e.*, *in personam* or *in rem* jurisdiction) is distinct from and cannot be confused with the separate question whether the category of claim in suit falls within the limited subject-matter jurisdiction of the federal courts. *Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 701-02 (1982). The former "flows not from Art. III, but from the Due Process Clause" and "recognizes and protects an individual liberty interest," while the latter "is an Art. III as well as a statutory requirement" and "functions as a restriction on federal power, and contributes to the characterization of the federal sovereign." *Id.* at 702. "Jurisdiction to resolve cases on the merits requires both authority over the category of claim in suit (subject-matter jurisdiction) and authority over the parties (personal jurisdiction), so that the court's decision will bind them." *Ruhrgas AG v. Marathon Oil Co.,* 526 U.S. 574, 577 (1999). *See also United States v. Morton*, 467 U.S. 822,

828 (1984) ("Subject-matter jurisdiction defines the court's authority to hear a given type of case, whereas personal jurisdiction protects the individual interest that is implicated when a nonresident defendant is haled into a distant and possibly inconvenient forum."); *Ins. Corp. of Ir., Ltd.,* 456 U.S. at 701 (1982) ("The concepts of subject-matter and personal jurisdiction, however, serve different purposes, and these different purposes affect the legal character of the two requirements"); 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 1063 (3d ed. 2002) ("The concepts of subject matter jurisdiction and venue should be distinguished from the principle that the court must have jurisdiction over the defendant's person, his property, or the res that is the subject of the suit.").

It is striking that in its Brief, Travelers does not address the question of subject-matter jurisdiction at all, despite the holding of the Second Circuit that "the district court lacked subject matter jurisdiction to enjoin claims against Travelers that were predicated, as a matter of state law, on Travelers' own alleged misconduct and were unrelated to Manville's insurance policy proceeds and the *res* of the Manville estate." App. 35a-36a. Travelers instead appears distracted by the inquiry of the Second Circuit as to the impact of any potential claim against Travelers on the Manville estate. The inquiry below is hardly surprising given that the animating concern of bankruptcy law is precisely the distribution of the *res,* and that the impact on the *res* in turn defines the subject-matter jurisdiction of a court in bankruptcy.

As a practical matter, the *res* does typically mark the outer bounds of a case or controversy in bank-

ruptcy. Thus, none of the 54 bankruptcy cases adjudicated by the Court since the passage of the 1984 Act extended bankruptcy jurisdiction to suits involving third-party nondebtors that do not affect the debtor or the bankruptcy estate.[3] Bluntly put, "bankruptcy courts have no jurisdiction over proceedings that have no effect on the debtor." *Celotex*, 514 U.S. at 308 n. 6. *See also Bd. of Governors of Fed. Reserve Sys. v. MCorp Fin., Inc.,* 502 U.S. 32, 40-41 (1991) (finding that Congress has vested bankruptcy courts with only "limited authority" where allegedly related action was unlikely to affect "jurisdiction over the property of the estate").

Contrary to Travelers' contentions, the Second Circuit ruling did not "revisit the propriety and scope of the confirmation order nearly a quarter century after the fact."[4] Br. at 44. Whatever may happen in state courts between Travelers and individual plaintiffs will have no bearing on Manville's discharge from bankruptcy or on the corpus of the estate, the critical elements of a confirmation order. Any finding of liability as to third parties would not "reopen" the confirmation proceeding, or call into question either the injunction granted in the confirmation order or the release of Travelers by Manville. Instead, the ruling by the Second Circuit recognizes that a confirmation does not (and cannot) release third

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[3] A list of the 54 cases is produced as the Appendix to this Brief.

[4] Petitioner Travelers and amici Resolute Management Inc. incorrectly characterize the appeal from the bankruptcy court's decision as a "collateral attack" on federal subject-matter jurisdiction. Respondents did not challenge the bankruptcy court's 1986 order which did not purport to restain them; rather, they directly appealed the 2004 Clarifying Order that expressly barred them from filing suit against Travelers. App. 41a.

parties who are not themselves subject to a bankruptcy discharge. *See Zerand-Bernal Group,* 23 F.3d at 163; *Underhill v. Royal,* 769 F.2d 1426, 1432 (9th Cir. 1985); 8 COLLIER, *supra*, ¶ 1141.02[4][a], pp. 1141-11 to 1141-13 (summarizing case law as holding that a "reorganization plan simply cannot release third parties and that such a provision in a plan is unenforceable in an action against a codebtor that does not itself receive a bankruptcy discharge").

In trying to demonstrate "the importance of bankruptcy court authority beyond the confines of a res," Travelers cites three cases that are supposedly analogous to the instant case. Br. at 29-33.; *In re Dow Corning Corp.*, 280 F.3d 648 (6th Cir. 2002); *In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285 (2d Cir. 1992); *In re A.H. Robins Co.*, 880 F.2d 694 (4th Cir. 1989). But none of these cases supports an extension of subject-matter jurisdiction beyond the debtor-creditor relationship.

All three cases turned critically on "an identity of interests between the debtor and the third party, usually an indemnity relationship, such that a suit against the non-debtor is, in essence, a suit against the debtor or will deplete the assets of the estate." *Dow Corning*, 280 F.3d at 657-58; *see also Drexel*, 960 F.2d at 293; *A.H. Robins*, 880 F.2d at 701. Thus, for example in *Drexel,* the district court justified enjoining claims against directors and officers as a way of ensuring "protection of the Debtors' estates from piecemeal dismemberment through claims over and other indemnity claims." *In re Drexel Burnham Lambert Group, Inc.*, 130 B.R. 910, 928 (S.D.N.Y. 1991).

The Second Circuit correctly found no such danger of dissipation of the assets of the Manville estate here

since the claims at issue "constitute independent tort actions." App. 25a. Manville's assets have already largely been distributed in bankruptcy to its creditors many years ago, save for the remaining funds in the Manville Trust. Travelers has failed to cite any case, either from the Court or in any Circuit, where a nondebtor has been covered by a channeling injunction in the absence of some impact on the debtor's estate.

B. THE "RELATED TO" JURISDICTION OF § 1334 DOES NOT ENCOMPASS ACTIONS UNCONNECTED TO THE BANKRUPTCY ESTATE.

Although Travelers does not address the jurisdictional basis for the challenged injunction, the "related to" provisions of § 1334(b) do not confer jurisdiction on the bankruptcy court to enjoin claims against insurers because of violations of their independent duties not derivative of claims against the debtors. The widely accepted test for whether a federal court can exercise "related to" jurisdiction was laid out in *Pacor, Inc. v. Higgins*, 743 F.2d 984 (3d Cir. 1984), and the Court, and all Circuit courts, have consistently applied this test to limit jurisdiction to claims affecting the bankrupt's estate. As set out by the Third Circuit, the critical question is,

> whether *the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy*.... An action is related to bankruptcy if the outcome could alter the debtor's rights, liabilities, options, or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankrupt estate.

Id. at 994 (emphasis in original; citations omitted).

Pacor draws an important jurisdictional line between claims that directly affect the debtor's estate and matters that happen to overlap factually with the bankruptcy. At issue in *Pacor* was the attempt of Pacor, a nondebtor defendant in an asbestos products liability suit, to remove the matter to federal court on the basis of a potential impleader claim against Johns-Manville, a party in bankruptcy. The Third Circuit remanded the third-party nondebtor suit against Pacor to the Pennsylvania state court because the suit "could not determine any rights, liabilities, or course of action of the debtor." *Id.* at 995. It held that "the mere fact that there may be common issues of fact between a civil proceeding and a controversy involving the bankruptcy estate" did not suffice to afford jurisdiction over the independent state law claim. *Id.* at 994. Absent a direct claim against the estate, the bankruptcy power could not extend to independent state-law actions not affecting the debtor.

In *Celotex Corp. v. Edwards*, 514 U.S. 300, 308 (1995), the Court adopted the Third Circuit's demarcation of the reach of bankruptcy subject-matter jurisdiction:

> We agree with the views expressed by the Court of Appeals [in *Pacor*] that "Congress intended to grant comprehensive jurisdiction to the bankruptcy courts so that they might deal efficiently and expeditiously with all matters connected with the bankruptcy estate".... We also agree with that court's observation that a bankruptcy court's "related to" jurisdiction cannot be limitless. (citing *Pacor,* 743 F.2d at 994).

Applying the *Pacor* test, the Court in *Celotex* found a bonded obligation of a debtor in bankruptcy to

be within the "related to" jurisdiction of § 1334(b) because immediate execution on the bond would have "a *direct and substantial* adverse effect on Celotex's ability to undergo a successful reorganization." *Id.* at 310 (emphasis added). In *Celotex*, the claims stemmed from a tort judgment *against the debtor*, and had the judgment creditors executed on the supersedeas bond, the sureties of that bond then would inevitably have attempted to exercise their contractual right to reach the debtor's assets.[5]

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[5] Travelers' exaggerated reading of *Katz* to reach beyond the *res* cannot withstand scrutiny. *Katz* involved whether to extend the *in rem* exception to sovereign immunity. However, the fact that the Court in *Katz* held that the immunity exception did extend to actions ancillary to the *res* does not in any way mean that the Court has held that any and all ancillary actions satisfy the jurisdictional definition of a bankruptcy under § 1334(b). On the contrary, the Court in *Celotex* affirmed the *Pacor* test for bankruptcy jurisdiction which limits jurisdiction to actions that affect "the debtor's rights, liabilities, options, or freedom of action." *Pacor*, 743 F.2d at 994.

In fact, *Katz* itself reinforces that jurisdictional definition. First, the Court held that "the subject of Bankruptcies" extended to ancillary actions only "in certain limited respects." 546 U.S. at 370. Second, the habeas actions the Court found important in the 1800 Bankruptcy Act quite literally affected the freedom of the debtor, s*ee id.* at 374-75—an analog to the fact that "bankruptcies were, in some cases, punishable with death by the laws of England." *Hanover Nat'l Bank v. Moyses*, 186 U.S. 181, 187 (1902) (quoting Roger Sherman at the Constitutional Convention). Third, *Katz,* like all 54 cases the Court has considered under the 1984 Act, *see* Appendix *infra*, involved the debtor-creditor relationship because it concerned an action by a debtor to recover a preferential transfer from a creditor. Conversely, in this case, Travelers asks for an injunction barring suits that would not at all affect the legal status of the relationship between Manville and its creditors.

As the Court further noted in *Celotex,* all of the Circuit courts, with slight variation, have adopted the *Pacor* test. *Id.* at 308 n.6. Most recently, Chief Judge Scirica, in *In re Combustion Engineering, Inc.*, 391 F.3d 190 (3d Cir. 2004), further refined *Pacor* in the context of an asbestos bankruptcy under § 524(g). The court there struck down a bankruptcy plan that would have immunized third parties from claims of independent liability: "§ 524(g) did not authorize a channeling injunction over the independent, non-derivative third-party actions against non-debtors...." *Id.* at 233. Or, as the Fifth Circuit expressed in a similar case:

> [A] third-party action does not create "related to" jurisdiction when the asset in question is not property of the estate and the dispute has no effect on the estate. Shared facts between the third-party action and a debtor-creditor conflict do not in and of themselves suffice to make the third-party action "related to" the bankruptcy.

In re Zale Corp., 62 F.3d 746, 753 (5th Cir. 1995); *see also Belcufine v. Aloe*, 112 F.3d 633, 636 (3d Cir. 1997) (applying *Pacor* and finding "related to" jurisdiction under § 1334(b) where "claims can have an effect on a bankruptcy estate").

Combustion Engineering expressly rejected the argument—advanced by both Petitioners here, as well as certain amici—that the scope of a bankruptcy court's jurisdiction could be expanded by third-party contributions to the estate: "If that were true, a debtor could create subject matter jurisdiction over any non-debtor third-party by structuring a plan in such a way that it depended upon third-party contributions." *Combustion Eng'g,* 391 F.3d at 228. To the contrary, as the Third Circuit recognized,

jurisdiction is conferred by statutory authority, not by agreement, "even in a plan of reorganization." *Id.* (quoting *In re Resorts Int'l, Inc.,* 372 F.3d 154, 161 (3d Cir. 2004)). Consequently, subject-matter jurisdiction does not exist over non-bankruptcy controversies with third parties "who are otherwise strangers to the civil proceeding and to the parent bankruptcy." *Pacor*, 743 F.2d at 994.

The Second Circuit in this case relied upon *Combustion Engineering* to conclude that "global finality is only as 'global' as the bankruptcy court's jurisdiction. A court's ability to provide finality to a third-party is defined by its jurisdiction, not its good intentions." App. 30a. The court below concluded in turn that "a bankruptcy court only has jurisdiction to enjoin third-party non-debtor claims that directly affect the *res* of the bankruptcy estate." App. 31a. That application of "related to" subject-matter jurisdiction is entirely consistent with *Celotex* and its adoption of the *Pacor* test.

Grounding "related to" jurisdiction in a manifest impact on the debtor's estate brings coherence to the reach of subject-matter jurisdiction under the Bankruptcy Code. It is impossible to read statutory language without regard to the underlying purposes of a statute. *See, e.g., Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141, 147 (2001) ("We have held that a state law relates to an ERISA plan 'if it has a connection with or reference to such a plan.'") (quoting *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 97 (1983)). The same rule of construction should apply for bankruptcy jurisdiction under § 1334(b).

C. SECTION 524(g) OF THE BANKRUPTCY CODE IS NOT A JURISDICTIONAL GRANT, NOR DOES IT GIVE THE DISTRICT COURT POWER TO ENJOIN THE CLAIMS AGAINST TRAVELERS.

Section 524(g) of the Bankruptcy Code, which Congress passed as part of the Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106, authorizes "a court that enters an order confirming a plan of reorganization" to issue "an injunction in accordance with this subsection to supplement the injunctive effect of a discharge under this section." 11 U.S.C. § 524(g)(1)(A). The purpose of an injunction under § 524(g) is to channel "asbestos-related claims to a personal injury trust [which] relieves the debtor of the uncertainty of future asbestos liabilities." *In re Combustion Eng'g,* 391 F.3d 190, 234 (3d Cir. 2004).

Yet nowhere in § 524(g) does the statute expand the jurisdiction of the federal courts in general or with regard to insurers. The pertinent section of the statute, § 524(g)(4)(A)(ii)(III), permits injunctions directed against third parties "alleged to be *directly or indirectly liable* for the conduct of, claims against, or demands on *the debtor*" and only then, "to the extent such alleged liability of such third party arises by reason of the third party's provision of insurance to the debtor or a related party." This language clearly states that actions against a third-party insurer who is not a debtor or creditor are only barred if the claims being enjoined are derivative of the liability of the debtor (being "directly or indirectly liable for the conduct of, claims against, or demands on the debtor") for which the third party provides insurance ("by reason of the ... provision of insurance

to the debtor"). No court has ever read the creation of a channeling injunction through § 524(g) to provide an independent source of jurisdiction beyond the scope of § 1334.[6]

Nor can the term "indirectly" be stretched to grant jurisdiction beyond any connection to the debtor or the estate.[7] The underlying state-law claims in this matter all stem from Travelers' allegedly having violated a duty owed to Respondents; they have

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[6] Courts have also uniformly refused to read a jurisdictional grant into 11 U.S.C. § 105(a), which provides that a "court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." As held by Judge Wallace, "[p]ower under section 105 is the scope and forms of relief the court may order in an action in which it has jurisdiction." *In re Am. Hardwoods, Inc.*, 885 F.2d 621, 624 (9th Cir. 1989); *see also In re Wolverine Radio Co.*, 930 F.2d 1132, 1140 n.13 (6th Cir. 1991) ("[E]ven were we to view this case solely as a proceeding to obtain an order pursuant to section 105(a), the power of the bankruptcy and district courts to hear this case is limited to the grant of jurisdiction in 28 U.S.C. § 1334.").

[7] Neither Petitioners nor amici Future Claims Representatives even address the issue whether the statutory requirements of § 524(g) would allow the injunction at issue here. Even third-party claims that can be enjoined require that at least 75 percent of claimants whose claims are to be addressed by the trust must vote in favor of the plan, § 524(g)(2)(B)(ii)(IV)(bb), and that extinguished future interests be presented for acceptance to "a legal representative [appointed] for the purpose of protecting the rights of persons that might subsequently assert demands of such kind," § 524(g)(4)(B)(i). Neither of these requirements was met here and the bankruptcy court record does not indicate any vote of approval by creditors nor any participation by a futures claims representative. *See* App. 150a (noting that "each such settlement was 'the product of good faith, arms-length negotiations' among the parties").

nothing to do with "the conduct of, claims against, or demands on the debtor," Manville.

Finally, the legislative history of § 524(g) does not evince any congressional intent to expand the scope of federal bankruptcy subject-matter jurisdiction. In his discussion of § 524(g), the sponsor of the 1994 Act in the House of Representatives, Representative Brooks, specifically referred to the object of the legislation as granting the full range of equitable power—not jurisdiction—to a court in bankruptcy. 140 CONG. REC. 27,692 (1994) (expressing "no opinion as to how much authority a bankruptcy court may generally have under its traditional equitable *powers* to issue an enforceable injunction of this kind" (emphasis added)). *See also* H.R. REP. NO. 103-835 (1994); 140 CONG. REC. 27,678-27,700, 28,355-28,359 (1994). This is entirely consistent with the object of § 524(g) to channel asbestos claims into a special trust, not to alter the grant of bankruptcy jurisdiction under § 1334(b). As explained by Senator Heflin,

> *[T]his statutory affirmation of the court's existing injunctive authority* is designed to help asbestos victims receive maximum value. It does so by assuring investors, lenders, and employees that *the reorganized debtor* has indeed emerged from Chapter 11 free and clear of all asbestos-related liabilities other than those defined in the confirmed plan of reorganization, and that all asbestos-related claims and demands must be made against the court-approved trust. This added certainty will ensure that the full value of such a trust's assets—the securities upon which it relies in order to generate resources to pay asbestos claims—can be realized.

140 CONG. REC. 28,358 (1994) (statement of Sen. Heflin) (emphasis added). Congress knew how to expand the jurisdiction of the bankruptcy courts if it intended to do so. For example, as part of the 1994 Bankruptcy Reform Act, Congress did amend a jurisdictional provision, 28 U.S.C. § 158, to add district court jurisdiction over interlocutory orders and decrees issued under 11 U.S.C. § 1121(d).

D. THE BANKRUPTCY COURT'S INHERENT POWER TO INTERPRET ITS OWN ORDERS CANNOT CONFER SUBJECT-MATTER JURISDICTION OVER CLAIMS NOT RELATED TO A BANKRUPTCY ACTION.

What then is the claimed source of subject-matter jurisdiction over the independent state law actions? Travelers chooses not to address the question of subject-matter jurisdiction at all. The Common Law Settlement Counsel Petitioners claim that because there was jurisdiction over the confirmation proceeding, "there was no reason for the Second Circuit to consider whether it also had jurisdiction over the Direct Actions." Br. at 11. Each Petitioner claims that once a court's equitable powers are invoked, that alone may suffice for federal court intervention. Neither confronts the long-established principle that "[a] court does not have the power, by judicial fiat, to extend its jurisdiction over matters beyond the scope of the authority granted to it by its creators." *Stoll v. Gottlieb,* 305 U.S. 165, 171 (1938).

Like the Petitioners here, the courts below were unable to identify any statutory source of jurisdiction for the injunctive orders. The bankruptcy court assumed that, once having issued an order concerning Manville, it could claim jurisdiction based upon

the statutory authorization of injunctive decrees and "the Court's inherent power to interpret and enforce its own orders." App. 162a. In its view, no specific statutory conferral of jurisdiction was needed because "the Court is enforcing its own Orders and thus its jurisdiction is derivative of the original jurisdiction." App. 163a.

The district court stated that it did not need to find "related to" jurisdiction in order to issue the injunctions. App. 52a. Instead, the district court, like the bankruptcy court, rested jurisdiction on the bankruptcy court's own prior orders, *id.,* and on the need to induce Travelers to contribute to the deal: "It is reasonable to interpret the 1986 Orders as giving Travelers such broad protection against Direct Action Suits to induce it to contribute funds to the Manville Trust, which was key to the confirmation of the Manville Plan." App. 57a.

However, like Antaeus, the giant of Greek mythology who lost power when not in contact with the Earth, federal courts cannot summon injunctive powers without their jurisdictional tethers. A court that would claim to base its ancillary jurisdiction on its injunctive decrees "must demonstrate that *original subject-matter jurisdiction* lies in [that court]." *Syngenta Crop Prot., Inc. v. Henson*, 537 U.S. 28, 33 (2002) (emphasis added). *Syngenta* concerned the All Writs Act, which also authorizes federal courts "to issue such commands...as may be necessary or appropriate to effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained." *United States v. N.Y. Tel. Co.*, 434 U.S. 159, 172 (1977). But the principle articulated in *Syngenta* extends much further than merely to the All Writs

Act setting and applies whenever courts purport to find inherent authority based upon judicial decree. *Kokkonen v. Guardian Life Ins. Co.,* 511 U.S. 375, 377 (1994).

Mere pragmatic necessity, whether to obtain consent for a settlement, as in *Syngenta*, or to obtain funds for a newly-created bankruptcy trust, cannot create jurisdiction. There was no dispute in *Syngenta* that "ancillary enforcement jurisdiction was necessary" under the facts of that case in order to vest settlement authority, through removal, in the federal court. 537 U.S. at 34. Rather, the Court rested its holding on the simple fact that jurisdiction is a creature of statute: "[I]nvocation of ancillary jurisdiction...does not dispense with the need for compliance with statutory requirements." *Id.*

That outcome is even more compelling in the current circumstances where a bankruptcy court was supervising a settlement outside the control of the bankruptcy process altogether. In this case, there was not even a claim that funds were being obtained for a bankruptcy trust, and in fact no funds were to be paid to the Manville Trust. App. 152a. Consistent with *Syngenta,* the Second Circuit likewise recognized the limitations of necessity: "The bankruptcy court's desire to facilitate global finality for Travelers may not be used as a jurisdictional bootstrap when no jurisdiction otherwise exists." App. 36a.

Travelers' reliance on *Local Loan Co. v. Hunt*, 292 U.S. 234 (1934) is also misplaced. In *Hunt*, the creditor had made a claim directly against the post-discharge wages of the debtor, *id.* at 238, thereby undermining a core function of bankruptcy in giving the debtor a fresh start. A court in that situation would have "jurisdiction over a supplemental and

ancillary bill to enjoin a creditor, after adjudication and discharge of the bankrupt, from prosecuting his claim in a state court." *Pepper v. Litton*, 308 U.S. 295, 304 n. 11 (1939) (citing *Hunt*, 292 U.S. at 240). *Hunt* does not address the question of the jurisdictional basis of an injunction that has nothing to do with the debtor or the debtor's estate. To the contrary, *Syngenta* illustrates the principle that "a 'court must have jurisdiction over a case or controversy before it may assert jurisdiction over ancillary claims.' Ancillary jurisdiction, therefore, *cannot provide the original jurisdiction*...." *Syngenta*, 537 U.S. at 34 (quoting *Peacock v. Thomas*, 516 U.S. 349, 355 (1996)) (emphasis added).

Accordingly, the Second Circuit properly reversed an injunction that had no connection to either the debtor in bankruptcy or the estate of the debtor. Without such a connection to the subject matter of bankruptcy, the bankruptcy court could not create its own jurisdiction by piggybacking off of its own injunctions. The bankruptcy court turned to itself as authority for the proposition that bankruptcy courts have inherent and ancillary jurisdiction once they have entered injunctions. App. 161a. That proposition cannot survive *Syngenta.*

II. CONGRESS'S POWER UNDER THE BANKRUPTCY CLAUSE DOES NOT REACH BEYOND THE ORDERLY DISPOSITION OF A DEBTOR'S ESTATE AND THE RESOLUTION OF DEBTOR-CREDITOR DISPUTES.

A. "THE SUBJECT OF BANKRUPTCIES" AT THE TIME OF THE CONVENTION WAS LIMITED TO THE DEBTOR-CREDITOR RELATIONSHIP, AND CONGRESS HAS NOT EXCEEDED THAT LIMIT

Congress derives its power to enact bankruptcy laws solely from the Bankruptcy Clause, U.S. CONST. Art. I, § 8, cl. 4, which gives it the power "[t]o establish...uniform Laws on the subject of Bankruptcies throughout the United States." The Framers adopted this language against the background of English bankruptcy laws going back to 1542, 34 & 35 Hen. 8, ch. 4 (1542-43) (Eng.), and 1570, 13 Eliz., ch. 7 (1570) (Eng.), which had defined their "subject" exclusively as proceedings affecting debtors. These laws simply did not touch parties outside the debtor-creditor relationship. Though only creditors could commence bankruptcy proceedings, those proceedings nevertheless were concerned exclusively with proceedings against debtors whom the statutes treated as "quasi-criminals." Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 7-8 (1995). In fact, the very existence of a bankruptcy depended on a debtor because creditors could petition the Lord Chancellor to appoint bankruptcy "commissioners" only after a merchant debtor committed an act of bankruptcy indicating he could not pay his debts. 13 Eliz., ch. 7,

§ 2. Parties outside the debtor-creditor relationship had no part in the process.

The English bankruptcy laws in effect at the time of the Constitutional Convention likewise reached no further than the affairs of the debtor. Bankruptcy law remained exclusively debtor-related under the 1705 Statute of Anne, 4 Anne, ch. 17 (1705) (Eng.), which enacted a dual regime that remained in effect through the drafting of the Constitution. *See* 5 Geo. 2, ch. 30 (1732). On the one hand, for the first time, the statute allowed bankruptcy commissioners to discharge cooperating debtors with the consent of their creditors, *see* 4 Anne, ch. 17, § 7, and allowed cooperating debtors to claim an allowance exempt from the bankruptcy state. *See* 5 Geo. 2, ch. 30, § 7; 4 Anne, ch. 17, §§ 7-8. On the other hand, however, the 1705 statute punished fraudulent debtors with the death penalty, *see* 4 Anne, ch. 17, §§ 1, 18, inaugurating strong protections against fraud in connection with bankruptcy that continue today in the form of a fraud exception to discharge. *See* 11 U.S.C. § 523(a)(2), (4), (11). *See also id.* § 523(a)(6) (exempting from discharge debts "for willful and malicious injury by the debtor to another entity or to the property of another entity").

Like their English forebears, bankruptcy laws in the American colonies were concerned exclusively with actions against debtors, though the statutes varied in their approach to discharge and the form of petitions. *See* BRUCE MANN, REPUBLIC OF DEBTORS: BANKRUPTCY IN THE AGE OF AMERICAN INDEPENDENCE 186 (2002); PETER J. COLEMAN, DEBTORS AND CREDITORS IN AMERICA: INSOLVENCY, IMPRISONMENT FOR DEBT, AND BANKRUPTCY 1607-1900 (1974); F. REGIS NOEL, HISTORY OF THE BANKRUPTCY LAW 33-66

(1919). Some colonies also had laws modeled on the English insolvency acts, which temporarily allowed imprisoned debtors to petition for release in exchange for liquidation and *pro rata* sale of their assets. *See* 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1111 (1851); *see also* Thomas Plank, *The Constitutional Limits of Bankruptcy*, 63 TENN. L. REV. 487, 513-17 (1996). Nevertheless, as the Court later concluded, insolvency laws fit the traditional definition of a bankruptcy because the laws conditioned release on the disposition of the debtor's debt. *See, e.g., Moyses*, 186 U.S. at 186; *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122 (1819).

The central constitutional concern leading to the Bankruptcy Clause was the inability to coordinate bankruptcy discharges among the states. Charles Pinckney first proposed the Bankruptcy Clause during a debate at the Convention in Philadelphia, which he proposed be included as part of the Full Faith and Credit Clause. JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 546–47 (Ohio Univ. Press 1966).

Importantly, the Convention understood that empowering Congress to enact national bankruptcy laws would ensure the uniform disposition of the debtor's estate and uniform treatment of the debtor necessary to give debtors a fresh start. The tie to the concern over full faith and credit is confirmed by Madison, who wrote in *Federalist No. 42* that "establishing uniform laws of bankruptcy...will prevent so many frauds where the parties or their property may lie or be removed into different states." THE FEDERALIST, NO. 42, at 241 (James Madison) (John C. Hamilton ed., 1869). Indeed, given that the Framers were

familiar with cases where debtors discharged in one state were imprisoned in another, *see Katz,* 546 U.S. at 366-67 (citing *James v. Allen*, 1 Dall. 188, (C.P. Phila. Cty. 1786)), "the Framers, in enacting the Bankruptcy Clause, plainly intended to give Congress the power to redress the rampant injustice resulting from States' refusal to respect one another's discharge orders." *Katz,* 546 U.S. at 377.

Congress has exercised its bankruptcy power consistent with this purpose and with the original understanding that "the subject of Bankruptcies" only includes laws governing the debtor-creditor relationship. Congress left bankruptcy law to the states until 1800, Act of Apr. 4, 1800, ch. 19, 2 Stat. 19 (repealed 1803), when it enacted legislation substantially similar to existing English law, 5 Geo. 2, ch. 30 (1732) (Eng.). As expressed by James A. Bayard of Delaware, a leading proponent of the Bankruptcy Act of 1800, the object of bankruptcy was to create a uniform system of "law regulating the relation of debtor and creditor...." 5th Cong., 3d sess. (Jan. 15, 1799), 9 ANNALS OF CONGRESS 2664 (quoted in Br. of Historian Bruce H. Mann, Amicus Curiae in Support of Resp't, *Cent. Va. Cmty. Coll v. Katz*, 546 U.S. 356 (2006) (No. 04-885), at 25). Consistent with this traditional understanding of bankruptcy law, the Act restricted bankruptcy to actions by creditors against merchant debtors upon proof of the debtor's commission of an act of bankruptcy. Ch. 19, § 1, 2 Stat. 19. The Act also conditioned discharge on the consent of two-thirds of creditors and certification by the bankruptcy commissioner to the district court that the debtor had cooperated. *Id.* § 36, 2 Stat. 31. Consistent with the Framers' intent to ensure that States respected each others' discharge orders, the 1800 Act also granted federal courts the power to

issue writs of habeas corpus to release discharged debtors from state prisons. *See id.* § 38, 2 Stat. 32. Though such actions would not involve the *res* of the estate, they quite literally affected the "debtor's rights, liabilities, options, or freedom of action." *Pacor,* 743 F.2d at 994.

While Congress passed several bankruptcy acts in the 19th century, the statutes differed only in the category of persons eligible for bankruptcy protection, not the fundamental role of bankruptcy as governing debtor-creditor relations. Justice Story noted that though the English bankrupt acts only applied to traders, extending them to other types of debtors "is a mere matter of policy, and by no means enters into the nature of such laws." 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION § 1113 (quoted in *Moyses*, 186 U.S. at 184-85). As a result, the "'subject of Bankruptcies' has remained stable, even as the means of addressing the subject of bankruptcies have changed." Plank, *supra*, at 500.

The Bankruptcy Act of 1898 was the first national bankruptcy law to have any permanence. Ch. 541, 30 Stat. 544 (repealed 1978). The 1898 Act abolished many of the prior restrictions on debtor discharge, including creditor consent, Ch. 541, 30 Stat. at 550, and allowed even solvent debtors, but not corporations, to petition for discharge. Ch. 541, 30 Stat. at 544 (1898); *see also* Tabb, *supra*, at 24-26. Even so, the purpose of the 1898 Act was to allocate the bankrupt estate—the *res*—amongst the various claimants. *See generally* 1 COLLIER ON BANKRUPTCY § 1.01[1][a] (15th ed. rev. 2006). Though these provisions initiated a more debtor-friendly attitude toward disposing of the debtor-creditor relationship,

like all preceding bankruptcy laws, they were concerned only with resolving that relationship.

B. THE COURT CONSISTENTLY HAS UNDERSTOOD THE "SUBJECT OF BANKRUPTCIES" TO BE LIMITED TO DEBTOR-CREDITOR DISPUTES.

Expanding bankruptcy jurisdiction beyond the debtor-creditor relationship would stretch the definition of bankruptcy beyond what was understood either by the delegates to the Convention or by Congress subsequently. It would also require a fundamental recasting of the power of Congress to enact a jurisdictional statute that defines bankruptcy more broadly than the Court has defined "the subject of Bankruptcies." Indeed, such a definition would expand bankruptcy jurisdiction beyond the limits of the Constitution.

Historically, the Court has defined the "subject of Bankruptcies" as "nothing less than 'the subject of the relations between an insolvent or nonpaying or fraudulent debtor, and his creditors, extending to his and their relief.'" *United States v. Bekins*, 304 U.S. 27, 47 (1938) (quoting *In re Reiman*, 20 F. Cas. 490 (S.D.N.Y. 1874) (No. 11, 673), *aff'd*, 20 F. Cas. 500 (C.C.S.D.N.Y. 1875) (No. 11, 675)). *See also Wright v. Union Cent. Life Ins. Co.*, 304 U.S. 502, 513-14 (1938); *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 588 n. 18 (1935) (using the same formulation); *Continental Ill. Nat'l Bank & Trust Co. v. Chicago, Rock Island & Pac. Ry., Co.,* 294 U.S. 648, 672-73 (1935); *Hanvover Nat'l Bank v. Moyses*, 186 U.S. 181, 187 (1902) (citing this definition).

This definition is nearly identical both to the language of the *Pacor* test, cited with approval in

Celotex, and to a definition formulated by Justice Story in 1833. Story rejected defining "the subject of bankruptcies" by reference to the kinds of procedures used to dispose of disputes between insolvent debtors and their creditors. Rather, Story defined "the subject of bankruptcies" by reference to that relationship itself: "Perhaps as satisfactory a description of a bankrupt law, as can be framed, is that it is a law for the benefit and relief of *creditors and their debtors*, in cases in which the latter are unable, or unwilling, to pay their debts." *See* 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 1111, 1113 (1851) (emphasis added).

In the following decades, Justices Catron and Blatchford, serving outside the Court, followed Story in formulating the definitions later cited with approval by the Court. Justice Catron, sitting on circuit in *In re Klein*, never considered that the bankruptcy power extended to third parties outside the creditor-debtor relationship. *See In re Klein*, 14 F. Cas. 716 (C.D.D. Mo. 1843) (No. 7865). Rather, he wrote that the bankruptcy power extended "to all cases where the law causes to be distributed, the property of the debtor among his creditors: this is its least limit. Its greatest, is a discharge of the debtor from his contracts." 14 F. Cas. at 718, *cited with approval* at *Radford*, 295 U.S. at 588 n. 18; *Moyses*, 186 U.S. at 186.

Following Story and Catron, then-Judge Blatchford agreed that the "subject of bankruptcies" was "not, properly, anything less than the subject of the relations between an insolvent or non-paying or fraudulent debtor, and his creditors, extending to his and their relief." *In re Reiman*, 20 F. Cas. 490

(S.D.N.Y. 1874) (No. 11, 673), *aff'd*, 20 F. Cas. 500 (C.C.S.D.N.Y. 1875) (No. 11, 675).

The Court later adopted this definition as its own in *Moyses,* 186 U.S. at 187,[8] and reaffirmed the debtor-creditor limitation to the federal bankruptcy power in *Continental Illinois National Bank & Trust Co. v. Chicago, Rock Island & Pacific Ry., Co.,* 294 U.S. 648, 671 (1935). In that case, the Court affirmed an interlocutory decree enjoining the sale of bonds held by petitioners—banks and a finance corporation—as security for collateral notes of the debtor railway company. The Court nevertheless quoted the opinion of Judge Cowen that "the subject of bankruptcies" was "any person's general inability to pay his debts." 294 U.S. at 670 (quoting *Kunzler v. Kohaus*, 5 Hill 317, 321 (N.Y. 1843) (cited with approval at *Moyses*, 186 U.S. at 187)). In addition, the Court again cited *In re Reiman* to the effect that

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[8] Though Travelers selectively cites *Moyses* for the proposition that "the Constitution...did not limit "[the subject of Bankruptcies"] to the language used," Br. at 23 (quoting *Moyses,* 186 U.S. at 187), that statement stands only for the proposition that "the subject of Bankruptcies" is broad enough to include both bankruptcy and insolvency laws. Indeed, the Court had held as much since the opinion of Chief Justice Marshall in *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122 (1819). Importantly, however, the reason the Court has not found any constitutional distinction between bankruptcy and insolvency laws is because those laws, whatever the differences between their technical mechanisms, both provide final resolution of the debtor-creditor relationship and therefore implicate the defining feature of bankruptcy law. Indeed, the Court has noted that "while it is true that the power of Congress under the bankruptcy clause is not to be limited by the English or Colonial law in force when the Constitution was adopted, it does not follow that the power has no limitations." *Continental Ill*., 294 U.S. at 679.

"the 'subject of bankruptcies' was nothing less than 'the subject of the relations between an insolvent or non-paying or fraudulent debtor, and his creditors, extending to his and their relief.'" 294 U.S. at 672-73.

That definition has never been as broad as the test for res judicata that is triggered by a "common nucleus of operative fact" and which the Second Circuit properly rejected. App. 32a. Bankruptcy has never been understood to guarantee resolution of all transactions at all connected with a debtor. Indeed, the injunctive relief sought by Travelers discharging all claims transactionally related to its provision of insurance to Manville is far broader than would historically have been available to a debtor in bankruptcy.

For example, the Court has confirmed that bankruptcy discharge does not extend to actions for fraud, even by the debtor himself. *See Wilmot v. Mudge*, 103 U.S. 217 (1880). In *Mudge*, corporate creditors sued a debtor for fraud in a Massachusetts court. *See* 103 U.S. at 217. The debtor defended on the ground that a composition agreement with his creditors had discharged all his liabilities. *See id.* To the contrary, the Court held that "[t]he provision that no debt created by a fraud shall be discharged by any proceedings in bankruptcy is a very positive and clear statement of a principle applicable as well to such proceedings authorized after as before [the 1874 composition agreement amendment] was enacted." 103 U.S. at 220. *See also Forsyth v. Vehmeyer*, 177 U.S. 177 (1900) (holding defendant could not use discharge as defense to judgment that rested on fraud); *McIntyre v. Kavanaugh*, 242 U.S. 138, 141 (1916) (denying discharge for brokerage that sold

client stocks without permission on the basis of a "willful and malicious injuries" exception). Current bankruptcy law has codified this principle by excepting actions for fraud from discharge for individual debtors. *See* 11 U.S.C. § 523(a). While corporations are allowed broader discharges through bankruptcy, even that is limited. Under 11 U.S.C. § 1141(d)(6), tax fraud and fraud debt due to either government actors or *qui tam* relators remain non-dischargeable, even for a company in bankruptcy.

Accordingly, to extend "related to" jurisdiction beyond the broad parameters of the test articulated in *Pacor* and adopted by the Court in *Celotex* would allow Congress to define jurisdiction over federal bankruptcies more expansively than the Court has ever construed Congress' power to establish "uniform Laws on the subject of Bankruptcies." As the Court has recognized, for over four centuries bankruptcy law in England and the United States has governed only the disposition of the relationship between a debtor and his or her creditors. While bankruptcy law has developed a variety of novel mechanisms to take account of new needs and policy preferences, the law has always done so within the parameters of the debtor-creditor relationship. The attempt to extend the bankruptcy power to provide plenary indulgences for nondebtors has no mooring in either the Constitution or any of the bankruptcy statutes.

III. THE BANKRUPTCY COURT PURPORTED TO ALLOW TRAVELERS TO EXPUNGE ITS OWN INDEPENDENT LIABILITIES WITHOUT REGARD TO ITS STATUS AS A NONDEBTOR.

In enjoining Respondents on the basis of language in the 1986 Confirmation Order, as the Second

Circuit recognized, the bankruptcy court "erred by subsequently interpreting those terms without reference to the court's jurisdictional limits." App. 31a. Instead of recognizing the constraints of subject-matter jurisdiction, the bankruptcy court engaged in a factual inquiry to determine the nature of the plaintiffs' claims, citing Second Circuit cases referring to tests for *res judicata*. App. 183a. Hence instead of asking whether Respondents' actions were "related to" the debtor's estate to allow it to exercise subject-matter jurisdiction under § 1334(b), the bankruptcy court asked whether those claims were "related to" Travelers' Manville insurance policies in a factual sense, as if that resolved the jurisdictional issue. *See* App. 169a et seq. ("[T]he direct action claims against Travelers are inextricably intertwined with Travelers['] long relationship as Manville's insurer.").

Travelers makes much of this misdirected factual inquiry by terming it "unrebutted," Br. at 17, "fundamental," *id.* at 18, and "affirmed by the district court *and* the court of appeals." *Id.* at 19. However, relying on the accuracy of this factual inquiry puts the factual cart before the jurisdictional horse, for this assumes that the bankruptcy court had subject-matter jurisdiction to conduct an inquiry into independent claims against Travelers in the first place. The existence of subject-matter jurisdiction and not transactional similarity is the fundamental question. *See Syngenta Crop Prot., Inc. v. Henson*, 537 U.S. 28, 33 (2002).

Nor can the lack of subject-matter jurisdiction be salvaged by claiming that the settlement of new state law claims against Travelers was part of the final workout of the Manville bankruptcy. For starters,

directly contrary to the structure of § 524(g), the over $400 million which Travelers agreed to pay pursuant to agreements concluded in 2004 was never to become part of the Manville Trust. App. 150a-152a. That money was directed to private purveyors of injunctive relief, not to the broad class of Manville claimants.

Further, the structure of the original settlement makes clear that Travelers was settling only its insurance liability in 1986. All parties to the original settlement agreement recognized that the channeling injunction was designed only to limit claims made against the policies and did not anticipate any release in bankruptcy of independent claims against Travelers—as confirmed by Travelers' counsel at the time. *See* Resp. J.A. 13a ("The channeling order is intended only to channel claims against the *res* to the Settlement Fund and the injunction is intended only to restrain claims against the *res* (i.*e*., the Policies)...."). The bankruptcy court's own orders at the time further distinguished the settled claims in the bankruptcy estate from "bad faith or other insurer misconduct alleged in connection with the handling or disposition of claims." App. 446a. By contrast, the bankruptcy court's present injunction is of such sweep that if a Travelers representative assaulted a plaintiff at a negotiating session, any state law assault suit would be enjoined since such claims "directly or indirectly are based upon, arise out of or relate to Travelers['] insurance relationship with Manville or Travelers['] knowledge or alleged knowledge concerning the hazards of asbestos." App. 95a.

There is an unseemly quality to the arguments put forward by Petitioner Common Law Settlement Counsel and amici Future Claimants Representa-

tives. At bottom, each argues that the returns to its constituents can be enhanced if the bankruptcy courts are able to trade off injunctive relief against unrepresented claimants for payments to those already at the table. Neither seems troubled by the fact that Travelers is seeking to close out its liabilities by paying off a subset of current asbestos tort claimants at the expense of other claimants, most notably the future claimants who have not yet filed suit.

It is doubtless true that being able to auction off the rights of unrepresented parties does make settlement easier. The risk of trading off the rights of the unrepresented has led the Court to strike down any preclusive effect on third parties who do not consent to a settlement. *See Martin v. Wilks,* 490 U.S. 755 (1989). The risks associated with preclusion against unrepresented parties are magnified when the rights at stake are those of future claimants whose interests may not yet be manifest. That inter-temporal trade-off is precisely what the Court struck down in *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999) (reversing certification of future asbestos claimants in Rule 23(b)(1) settlement class), and *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997) (same under Rule 23(b)(3)). It is no more acceptable to sell off the interests of the unrepresented just because a settlement is channeled through a bankruptcy court. *Cf. Begier v. IRS,* 496 U.S. 53, 58 (1990) ("Equality of distribution among creditors is a central policy of the Bankruptcy Code.").

As with the sweeping asbestos class action settlements of last decade, there is a grave risk of abuse if the bankruptcy power is allowed to be auctioned off

because of its injunctive reach. As now-Chief Judge Jacobs of the Second Circuit noted in a different case:

> [A] nondebtor release is a device that lends itself to abuse. By it, a nondebtor can shield itself from liability to third parties. In form, it is a release; in effect, it may operate as a bankruptcy discharge arranged without a filing and without the safeguards of the Code.

In re Metromedia Fiber Network, Inc., 416 F.3d 136, 142 (2d Cir. 2005).

IV. THE REMAND BELOW WAS PROPER.

The bankruptcy court did not examine the various potential state law claims against Travelers to determine which were premised on derivative liability from Manville. Rather, the only question asked by both the bankruptcy and district courts concerned whether the state-law claims related to the Manville insurance policies with Travelers in terms of the claims' factual overlap with exposure to Manville asbestos. Accordingly, the Bankruptcy Court did not distinguish between claims implicating the debtor's estate and the debtor-creditor relationship—over which it had subject-matter jurisdiction—and claims unrelated to the estate or the debtor-creditor relationship—over which it lacked subject-matter jurisdiction.

As the Second Circuit recognized—and as Travelers studiously ignores in its brief—the bankruptcy and district courts never properly established a source for their subject-matter jurisdiction. App. 35a-36a ("[T]he district court lacked subject matter jurisdiction to enjoin claims against Travelers that were predicated, as a matter of state law, on Travelers' own alleged misconduct and were unrelated to

Manville's insurance policy proceeds and the *res* of the Manville estate."); *see also* App. 32a (noting that fact that claims may arise "from a common nucleus of operative facts involving Travelers and Manville (*e.g.*, the Manville / Travelers insurance relationship) is of little significance from a jurisdictional standpoint").

The Second Circuit accordingly remanded this case for the bankruptcy court to measure the state-law claims against the jurisdictional line which Congress, the Court, and the centuries-old history of bankruptcy law have always drawn. Because the judgment of the Second Circuit rightly insisted on the traditional limits on bankruptcy jurisdiction and instructed the bankruptcy court to do the same on remand, that judgment should be affirmed.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the Second Circuit.

Respectfully submitted,

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APPENDIX

Supreme Court Bankruptcy Cases Since 1984

Since Congress passed the 1984 Act, every bankruptcy-related case that the Court has decided involved administration of the debtor's estate. Unless otherwise stated, all statutory references are to the Bankruptcy Code (11 U.S.C. et. seq.).

Jurisdiction over Proceedings Involving the Debtor's Estate: *Marshall v. Marshall*, 547 U.S. 293 (2006) (holding that probate exception does not prevent federal court from hearing interference tort claim brought by debtor); *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356 (2006) (refusing to extend sovereign immunity to bar proceeding brought by bankruptcy trustee against state agencies to recover alleged preferential transfers); *Tenn. Student Assistance Corp. v. Hood*, 541 U.S. 440 (2004) (holding that proceeding brought by debtor to discharge student loan debt does not implicate Eleventh Amendment immunity); *Celotex Corp. v. Edwards*, 514 U.S. 300 (1995) (holding that "related to" jurisdiction encompasses proceeding brought by third-party against surety on supersedeas bond, when bond stayed execution of judgment against debtor); *United States v. Nordic Village, Inc.*, 503 U.S. 30 (1992) (holding that § 106(c) does not waive United States' sovereign immunity from action by bankruptcy trustee seeking monetary recovery); *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989) (holding that suit brought by bankruptcy trustee does not override right to jury trial); *Hoffman v. Conn. Dep't of Income Maint.*, 492 U.S. 96 (1989) (plurality opinion) (holding that Congress did not abrogate Eleventh Amendment immunity of states with

§ 106(c) in adversarial proceeding brought by bankruptcy trustee).

Nondischargeability of Claims Against Debtor: *Archer v. Warner*, 538 U.S. 314 (2003) (holding that tort obligations for fraud may fall within nondischargeability rule of § 523(a)(2)(A)); *Young v. United States*, 535 U.S. 43 (2002) (holding that "lookback period" for tax obligations is tolled during pendency of prior bankruptcy petition); *Cohen v. de la Cruz*, 523 U.S. 213 (1998) (holding that treble damages awarded on account of debtor's fraud are nondischargeable under § 523(a)(2)(A)); *Kawaauhau v. Geiger*, 523 U.S. 57 (1998) (finding debt arising from medical malpractice judgment attributable to negligent or reckless conduct is dischargeable); *Field v. Mans*, 516 U.S. 59 (1995) (holding that creditor must justifiably rely on debtor's fraudulent misrepresentation for debt to be nondischargeable); *Grogan v. Garner*, 498 U.S. 279 (1991) (holding that creditor must demonstrate that discharge exception applies by preponderance of evidence); *Pa. Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552 (1990) (holding that restitution obligations of debtor are dischargeable under Chapter 13); *Kelly v. Robinson*, 479 U.S. 36 (1986) (exempting restitution obligations set by state criminal court from discharge in Chapter 7); *Ohio v. Kovacs*, 469 U.S. 274 (1985) (determining that debtor's environmental obligation is dischargeable debt).

Exemptions from Inclusion in Debtor's Estate: *Rousey v. Jacoway*, 544 U.S. 320 (2005) (allowing debtor to exempt assets in IRA from bankruptcy estate); *Patterson v. Shumate*, 504 U.S. 753 (1992) (holding that debtor's interest in pension plan can be excluded from bankruptcy estate); *Owen v. Owen*, 500 U.S. 305 (1991) (determining that judicial liens can be exempt from bankruptcy estate).

Priority of Claims Against Debtor's Estate: *Howard Delivery Serv., Inc. v. Zurich Am. Ins. Co.*, 547 U.S. 651 (2006) (holding insurer's claims for unpaid workers' compensation premiums outside statutory priority); *United States v. Reorganized CF & I Fabricators of Utah, Inc.*, 518 U.S. 213 (1996) (determining IRS payments not to be categorically subordinated to other unsecured creditors' claims); *United States v. Noland*, 517 U.S. 535 (1996) (addressing claim subordination under Code); *Nobelman v. Am. Sav. Bank*, 508 U.S. 324 (1993) (holding that Chapter 13 debtor cannot reduce valuation of undersecured homestead mortgage); *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197 (1988) (applying "absolute priority rule" to debtor's promise of future labor to reorganized enterprise).

Taxation of Debtor or Debtor's Estate: *Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc.*, 128 S.Ct. 2326 (2008) (holding tax exemption for debtor inapplicable to pre-confirmation transfers); *Raleigh v. Ill. Dep't of Revenue*, 530 U.S. 15 (2000) (holding that if substantive law places burden of proof on taxpayer, taxpayer also has burden of proof in bankruptcy court); *Begier v. IRS*, 496 U.S. 53 (1990) (holding that debtor's trust fund tax payments to IRS cannot be avoided as preferences); *United States v. Energy Res. Co.*, 495 U.S. 545 (1990) (holding that bankruptcy court has authority to treat tax payments made by Chapter 11 debtor as trust fund payments); *Cal. State Bd. of Equalization v. Sierra Summit, Inc.*, 490 U.S. 844 (1989) (holding no prohibition on state taxing bankruptcy liquidation sale).

Obligations of Trustee to Debtor's Estate: *Lamie v. U.S. Trustee*, 540 U.S. 526 (2004) (prohibiting debtors' attorneys from receiving estate funds

unless attorneys are employed by trustee and approved by court); *Taylor v. Freeland & Kronz*, 503 U.S. 638 (1992) (holding bankruptcy trustee's contest of property exemption time barred); *Holywell Corp. v. Smith*, 503 U.S. 47 (1992) (requiring bankruptcy trustee to pay income tax attributable to corporate debtors' property); *Union Bank v. Wolas*, 502 U.S. 151 (1991) (holding that payments on long-term debt can qualify for "ordinary course of business" exception to trustee's power to avoid preferential transfers); *Midlantic Nat'l Bank v. N.J. Dep't of Envtl. Prot.*, 474 U.S. 494 (1986) (forbidding trustee abandonment of property in contravention of state health or safety laws); *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343 (1985) (holding that bankruptcy trustee of corporation can waive corporation's attorney-client privilege with respect to pre-bankruptcy communications).

Miscellaneous Issues Involving Debtor or Claims Against Debtor's Estate: *Travelers Cas. & Sur. Co. v. Pac. Gas & Elec. Co.*, 549 U.S. 443 (2007) (permitting contract-based claim against debtor for attorney's fees); *Marrama v. Citizens Bank of Mass.*, 549 U.S. 365 (2007) (holding that debtor's fraudulent conduct can forfeit right to proceed under Chapter 13); *Kontrick v. Ryan*, 540 U.S. 443 (2004) (holding "time bar" defense waived if not raised by debtor); *FCC v. NextWave Pers. Commc'ns Inc.*, 537 U.S. 293 (2003) (forbidding FCC from revoking debtor's spectrum license); *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1 (2000) (preventing administrative claimant from seeking payment of claim from property encumbered by secured creditor's lien); *Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434 (1999) (barring debtor's pre-bankruptcy equity holders from

receiving ownership interests in reorganized entity); *Fidelity Fin. Servs., Inc. v. Fink*, 522 U.S. 211 (1998) (requiring creditor to satisfy state and federal perfection requirements); *Assocs. Commercial Corp. v. Rash*, 520 U.S. 953 (1997) (assessing value of creditor's security interest where debtor exercised "cram down" option under Chapter 13); *Citizens Bank of Md. v. Strumpf*, 516 U.S. 16 (1995) (determining that creditor bank's "administrative hold" on debtor's account was not "setoff"); *BFP v. Resolution Trust Corp.*, 511 U.S. 531 (1994) (determining if fraudulent transfer occurred based on "reasonably equivalent value" of property); *Rake v. Wade*, 508 U.S. 464 (1993) (holding creditor entitled to interest on mortgage instruments); *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380 (1993) (holding failure to file timely proof of claim can constitute "excusable neglect"); *Barnhill v. Johnson*, 503 U.S. 393 (1992) (holding debtor transfer deemed to occur when check honored); *Dewsnup v. Timm*, 502 U.S. 410 (1992) (determining "strip down" value of creditor's lien); *Toibb v. Radloff*, 501 U.S. 157 (1991) (holding individual debtors eligible for Chapter 11); *Johnson v. Home State Bank*, 501 U.S. 78 (1991) (holding mortgage lien subject to inclusion in Chapter 13 reorganization plan); *Farrey v. Sanderfoot*, 500 U.S. 291 (1991) (holding that debtor cannot avoid fixing of ex-spouse's lien on divorce decree award); *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235 (1989) (holding creditor entitled to post-petition interest on nonconsensual oversecured claim); *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365 (1988) (holding creditors not entitled to compensation for delay caused by automatic stay).