No. 08-295

IN THE

Supreme Court of the United States

THE TRAVELERS INDEMNITY COMPANY,
TRAVELERS CASUALTY AND SURETY COMPANY
and TRAVELERS PROPERTY CASUALTY CORP.,

Petitioners,

—v.—

PEARLIE BAILEY, SHIRLEY MELVIN, GENERAL LEE COLE,
ROBERT ALVIN GRIFFIN, VERNON WARNELL, LEE FLETCHER
ANTHONY, CHUBB INDEMNITY INSURANCE COMPANY,
ASBESTOS PERSONAL INJURY PLAINTIFFS,
and CASCINO ASBESTOS CLAIMANTS,

Respondents.

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

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Nothing in the more than 80 pages of opposition briefs obscures the extraordinary nature of this case, which concerns the scope of Congress's constitutional authority to enact "uniform Laws on the subject of Bankruptcies throughout the United States," U.S. Const. art. I, § 8, cl. 4, and the power of federal courts to render final, binding judgments.

This case is an ideal vehicle for resolving the Questions Presented. The decision below rests solely on the disputed jurisdictional question. And with a quarter-century of proceedings below, the case is nothing if not ripe for final resolution by the United States Supreme Court.

A. The Salient Facts Are Clear and Undisputed

Respondents imply that the Manville bankruptcy is too "unique," "unusual" or "esoteric" to warrant this Court's attention. *E.g.*, Chubb Opp'n at 18. In reality, the pertinent facts are straightforward and undisputed:

- In 1986, Bankruptcy Judge Burton R. Lifland entered a confirmation order barring "any Person" from commencing "any claims" "based upon, arising out of or related to" insurance policies that Travelers issued to Manville. (App. 439a, 446a). Judge Lifland's order was challenged on direct appeal as exceeding the subject matter jurisdiction of bankruptcy courts, but was affirmed *in toto* by the Second Circuit in 1988.

Co. v. Johns-Manville Corp., 837 F2d 89, 90 2d (2d cir. 1988) (App 190a–191a).

- In 2004, Judge Lifland found as a matter of fact that his injunction was being violated by a new species of asbestos-related lawsuits (referred to below as the "direct action" claims). Specifically, in a detailed set of Findings of Fact and Conclusions of Law, *see In re Johns-Manville Corp.*, 2004 WL 1876046 (Bankr. S.D.N.Y. 2004) (App. 101a–187a), Judge Lifland found that these new asbestos claims were part of a global strategy developed by the plaintiffs' bar to put Petitioners "in Manville's chair" and thereby hold Petitioners liable on account of their insurance relationship with Manville.
- In 2008, on appeal from the enforcement proceedings, the Second Circuit accepted Judge Lifland's factual finding that the direct action claims "arise out of" the insurance policies Travelers sold to Manville, and thus fall within the plain language of the 1986 confirmation order. *In re Johns-Manville Corp.*, 517 F.3d 52, 67 (2d Cir. 2008) (App. 33a). Yet rather than enforce the confirmation order as it was originally written, entered and affirmed, the court of appeals ruled that Judge Lifland had somehow exceeded the "subject matter jurisdiction" granted by the Judicial Code. The Second Circuit concluded that the bankruptcy court ***in 1986*** was "without power to enjoin all claims that literally 'arise out of' the insurance policies that

Manville purchased from Travelers." *Id.* at 67 n.24 (App 33a n.24).

These facts are undisputed. And the "facts" raised in the opposition briefs—including lengthy digressions into after-acquired affiliates of Petitioners, the particulars of legal briefing from the 1980s, and the nature of the state-law "direct action" claims—are irrelevant. What matters is that certain claims were enjoined in 1986; the injunction was affirmed on direct appeal; and twenty years later, a different panel of the same court of appeals refused to enforce the 1986 injunction as it was written.

B. The Legal Issues Are of Vital National Importance

The decision below is unprecedented. The court of appeals decided the case on the broadest ground possible, attempting to define "the outer reaches of a bankruptcy court's jurisdiction." *In re Johns-Manville Corp.*, 517 F.3d 52, 55 (2d Cir. 2008) (App. 6a). Then, approaching the case as though it was a direct appeal of the 1986 confirmation order, the Second Circuit effectively rewrote its own earlier affirmance of the Manville confirmation order and instead announced a new test for the scope of bankruptcy jurisdiction: "a bankruptcy court only has jurisdiction to enjoin third-party non-debtor claims that directly affect the *res* of the bankruptcy estate." *Id.* at 66 (App. 31a).

The Second Circuit's newly announced *res*-based test has no basis in the Constitution, the Judicial Code, the Bankruptcy Code, or the case law. No other court of appeals has adopted any-

thing like it. Nor has any other court held that the scope of *federal* bankruptcy jurisdiction is somehow tethered to *state* law. Indeed, the decision below is so far afield that all three of Respondents' opposition briefs attempt to minimize or obscure the actual holding of the court of appeals.

Chubb, for example, conspicuously ignores the court of appeals' use of state law to limit federal bankruptcy jurisdiction, and suggests that "[w]hile much of [the court of appeals'] opinion is couched in terms of jurisdictional limitations, the Second Circuit was actually reviewing the Bankruptcy Court's *interpretation* of its 1986 Injunctions." Chubb Opp'n at 12. The Cascino Asbestos Claimants also seek to reinterpret the decision below, yet their explanation is the opposite of Chubb's; "the order subject to [*sic*] this appeal is not the Confirmation Order which was entered over 20 years ago." Cascino Opp'n at 16.

The Second Circuit's ruling speaks for itself:

> In our view, the [bankruptcy] 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***.

In re Johns-Manville Corp., 517 F.3d at 68 (App. 35a–36a) (emphasis added). No Respondent attempts to defend or explain that manifestly incorrect holding, which will constitute binding

law in the Second Circuit unless and until this Court rules otherwise.

Even more so than other areas of the law, "Bankruptcy is an intensely practical affair." *In re Cooper Commons LLC*, 512 F.3d 533, 534 (9th Cir. 2008). The rules must be clear and uniform—and, once a confirmation order is entered and affirmed in full (as the Manville confirmation order was affirmed by the Second Circuit in 1988), parties must be able to rely on the enforcement of that order. The decision below serves none of these ends.

Here, Congress empowered the federal courts to provide injunctive relief to protect a limited class of non-debtors from claims "aris[ing] by reason of . . . the third party's provision of insurance to the debtor or a related party" in exchange for a "fair and equitable" contribution by the third party to a special trust for victims of asbestos exposure. 11 U.S.C. §§ 524(g)(4)(A)(ii) & (B)(ii) (App. 475a, 477a). The channeling injunction pioneered in the Manville bankruptcy and codified in Sections 524(g) and (h) of the Bankruptcy Code contains rigorous procedural safeguards that carefully balance the need to compensate future claimants with the necessity of providing certainty and repose to the insurance companies that contribute the bulk of the funds to these "524(g) trusts."

The decision below threatens drastically to reduce, if not eliminate, the incentive for insurers to contribute the monies necessary to make 524(g) trusts the vehicle for distribution of assets to asbestos victims. And by effectively rewriting a long-final confirmation order (at precisely the

time when its enforcement was necessary), the court of appeals gave enterprising plaintiffs' lawyers an "end run" around a final federal court judgment. Nothing in any of Respondents' opposition briefs rebuts these critical facts.

C. This Case is Ripe for Resolution

The Chapter 11 case in which these proceedings arise has been pending before the bankruptcy, district and circuit judges of the Second Circuit since 1982. The confirmation order enforced by the bankruptcy court was issued in 1986, and was affirmed on direct appeal in 1988. The enforcement proceedings vacated by the decision below were commenced in 2002 and resulted in a bankruptcy court ruling in 2004. The bankruptcy court's ruling was affirmed in substantial part by the district court in 2006. The district court's affirmance was vacated by the court of appeals in 2008. In light of this extensive procedural history, Respondents' claim that Travelers seeks to "short-circui[t] the ordinary course of the underlying proceedings" (Chubb Opp'n at 17) is untenable.

Certiorari should not be denied on the ground that the decision below is "interlocutory." The Second Circuit ruled that the bankruptcy court lacked "subject matter jurisdiction" in 1986 to "to enjoin claims against Travelers that were predicated, as a matter of state law, on Travelers' own alleged misconduct and were unrelated to ... the *res* of the Manville estate." *In re Johns-Manville Corp.*, 517 E.3d 52, 68 (2d Cir. 2008) (App. 35a–36a). Nothing on remand can alter or expand the scope of the bankruptcy court's sub-

ject matter jurisdiction as now circumscribed by the Second Circuit, an issue that has been finally adjudicated. The fact that the Second Circuit "vacated and remanded" instead of "reversed" is essentially, in this context, a distinction without a difference.

In any event, this Court unquestionably has the power to review even non-final judgments, *see* 28 U.S.C. § 1254(1), and has exercised that power where—as here—there is an important and clear-cut issue of law that is fundamental to the further conduct of the case and that would otherwise qualify as a basis for *certiorari*. *See, e.g.*, *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004) (vacating court of appeals' decision that, in turn, had reversed dismissal and remanded the case to the district court); *Mazurek v. Armstrong*, 520 U.S. 968 (1997).

Here, the issues are clear and have received the considered attention of five federal Judges over the past six years:

- The bankruptcy court held numerous hearings and issued a comprehensive set of Findings of Fact and Conclusions of Law;
- The district court heard oral argument on Respondents' appeal and issued a lengthy published opinion canvassing the issues and agreeing with Judge Lifland; and
- The court of appeals heard oral argument on Respondents' further appeal and also issued a lengthy published opinion.

Nothing is more fundamental to the further administration of the case than the court's erro-

neous conclusion that the Bankruptcy Clause does not authorize subject matter jurisdiction to reach beyond the *res* of the estate.

Finally, there already ***is*** a final judgment in this case—the bankruptcy court's original confirmation order, entered in 1986 and affirmed on direct appeal in 1988. Petitioners are seeking to avail themselves of the protections embodied in that confirmation order. The bankruptcy court agreed with Petitioners that a violation had been shown, and the district court affirmed that conclusion. The decision below by the court of appeals effectively unwinds the certainty and repose that otherwise inhere in a final federal court judgment. The time is ripe to reverse that decision.

CONCLUSION

The petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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