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

# PETITION FOR WRIT OF CERTIORARI

*Of Counsel*:
ELIZABETH A. WARREN
Leo Gottlieb Prof. of Law
HARVARD LAW SCHOOL
1563 Massachusetts Avenue
Cambridge, MA 02183

BARRY R. OSTRAGER
*Counsel of Record*
MYER O. SIGAL, JR.
ANDREW T. FRANKEL
ROBERT J. PFISTER
SIMPSON THACHER
& BARTLETT LLP
425 Lexington Avenue
New York, NY 10017
(212) 455-2000

*Attorneys for Petitioners*
*The Travelers Indemnity Company, Travelers Casualty & Surety Company and Travelers Property Casualty Corporation*

## QUESTION PRESENTED

In 1986, the U.S. Bankruptcy Court for the Southern District of New York (Lifland, J.) confirmed a landmark plan of reorganization for Johns-Manville Corporation that channeled hundreds of thousands of asbestos-related personal injury claims into a special trust fund for the benefit of injured workers and their families. The linchpin of this reorganization was the contribution of tens of millions of dollars by Petitioners and other insurers into a trust for payment of asbestos claims in exchange for protection from future claims against the insurers, all of which was intended to provide Petitioners with full and final protection from suits relating to, arising from or in connection with the Petitioners' insurance relationship with Johns-Manville. The Manville confirmation order was affirmed in a final judgment rendered by the Second Circuit in 1988.

The confirmation order in Manville was subsequently ratified by the U.S. Congress (*see* 11 U.S.C. 524(h)) and used as a model for Section 524(g) of the Bankruptcy Code. In the decades following the entry of the final judgment affirming the Manville plan of reorganization, and in reliance on the protections enacted by Congress, *tens of billions of dollars* have been paid into "524(g) trusts" for the benefit of hundreds of thousands of asbestos claimants. In 2002, Petitioners sought to enforce the court's orders when certain asbestos claimants tried to evade the confirmation order by suing Travelers directly in so-called "direct actions." The suits were enjoined by the bankruptcy court that fashioned the Manville plan of reorganization, which held that they

were proscribed by the 1986 confirmation order. The bankruptcy court's decision was affirmed by the District Court, but in February 2008, over two decades after the original orders became final, a different panel of the Second Circuit held that the bankruptcy court lacked authority in 1986 to enter a confirmation order that extended beyond the "*res*" of the debtor's estate, *i.e.*, insurance policy proceeds.

The question presented, therefore, is: Whether the court of appeals erred in categorically holding that bankruptcy courts do not have jurisdiction to enter confirmation orders that extend beyond the "*res*" of a debtor's estate, despite this Court's recent ruling that "[t]he Framers would have understood that laws 'on the subject of Bankruptcies' included laws providing, in certain respects, for more than simple adjudications of rights in the res," *Central Virginia Community College* v. *Katz*, 546 U.S. 356, 370 (2006), and whether the court of appeals compounded this error by:

(a) failing to apply as written a federal statute (11 USC §§ 524(g) and (h)), by limiting the scope of relief in a manner that is contrary to the express terms and purposes of that statute;

(b) failing to give effect to the Supremacy Clause and holdings of this Court that federal bankruptcy relief cannot be overridden by rights alleged to have been created under state law; and

(c) failing to respect important principles of finality and repose, and the express provisions of § 524(g), by failing to approve a federal court's enforcement of a confirmation order that was affirmed over two decades ago on direct appeal.

## PARTIES TO THE PROCEEDINGS BELOW

The Petitioners in this case are The Travelers Indemnity Company, Travelers Casualty and Surety Company and Travelers Property Casualty Corp.

In addition to Petitioners, other appellees below were Common Law Settlement Counsel, Statutory Settlement Counsel, and Hawaii Settlement Counsel.

The Respondents in this case (appellants below) are 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.

The Debtors in the Chapter 11 proceedings from which this petition arises are Johns-Manville Corporation, Manville Corporation, Manville International Corporation, Manville Export Corporation, Johns-Manville International Corporation, Manville Sales Corporation (f/k/a Johns-Manville Sales Corporation, successor by merger to Manville Buildings Materials Corporation, Manville Products Corporation, and Manville Service Corporation), Manville International Canada, Inc., Manville Canada, Inc., Manville Investment Corporation, Manville Properties Corporation, Allan-Deane Corporation, Ken-Caryl Ranch Corporation, Johns-Manville Idaho, Inc., Manville Canada Service, Inc., and Sunbelt Contractors, Inc.

## RULE 29.6 DISCLOSURE

The Travelers Indemnity Company is a wholly-owned subsidiary of Travelers Insurance Group Holdings, Inc., which is a wholly-owned subsidiary of Travelers Property Casualty Corp., which is a wholly-owned subsidiary of The Travelers Companies, Inc., a publicly traded company.

No publicly held corporation other than The Travelers Companies, Inc. owns 10% or more of the stock of The Travelers Indemnity Company.

Travelers Casualty and Surety Company is a wholly-owned subsidiary of Travelers Insurance Group Holdings, Inc., which is a wholly-owned subsidiary of Travelers Property Casualty Corp., which is a wholly-owned subsidiary of The Travelers Companies, Inc., a publicly traded company.

No publicly held corporation other than The Travelers Companies, Inc. owns 10% or more of the stock of Travelers Casualty and Surety Company.

Travelers Property Casualty Corp. is a wholly-owned subsidiary of The Travelers Companies, Inc., a publicly traded company.

No publicly held corporation other than The Travelers Companies, Inc. owns 10% or more of the stock of Travelers Property Casualty Corp.

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### Cases

**Federal Statutes**



**State Statutes**



**Statutes**



**Rules**

## Other Authorities

# In The Supreme Court of the United States

THE TRAVELERS INDEMNITY CO., ET AL., PETITIONERS

*v.*

PEARLIE BAILEY, ET AL., RESPONDENTS.

---

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

---

The Travelers Indemnity Company, Travelers Casualty and Surety Company, and Travelers Property Casualty Corp. (collectively, "Travelers" or "Petitioners") respectfully petition for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

## OPINIONS BELOW

The Second Circuit's opinion (App. 1a) is reported at 517 F.3d 52. The district court's opinion (App. 37a) is reported at 340 B.R. 49. The bankruptcy court's order (App 86a) and findings of fact and conclusions of law (App. 101a) are not officially reported, but are available at 2004 WL 1876046 and 2004 Bankr. Lexis 2519.

The bankruptcy court's original insurance settlement order (App. 210a) and confirmation order (App. 261a) are unreported, but were immediately preceded by an opinion (App. 297a) reported at 68

B.R. 618. The district court's opinion affirming the original insurance settlement order and confirmation order (App. 204a) is reported at 78 B.R. 407. The Second Circuit's opinion affirming the original insurance settlement order and confirmation order (App. 188a) is reported at 837 F.2d 89.

## JURISDICTION

The court of appeals entered its judgment on February 15, 2008 (App. 463a), and denied a timely petition for rehearing and/or rehearing *en banc* on May 8, 2008 (App. 457a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). On July 21, 2008, Travelers submitted an application to Justice Ginsburg for a 30-day extension in which to file a petition for writ of *certiorari* pursuant to Supreme Court Rule 13.5. Justice Ginsburg granted the 30-day extension.

## RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Article I, Section 8, Clause 4 of the U.S. Constitution provides that "Congress shall have Power . . . To establish . . . uniform Laws on the subject of Bankruptcies throughout the United States."

Section 105(a) of the Bankruptcy Code provides, in pertinent part, that bankruptcy courts "may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title."

Section 524(e) of the Bankruptcy Code provides, in pertinent part, that "discharge of a debt

of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt."

Section 524(g)(4)(A)(ii) of the Bankruptcy Code provides that in asbestos-related bankruptcies, "[n]otwithstanding the provisions of section 524(e)," a bankruptcy court may bar "any action directed against 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."

Section 524(h)(1) of the Bankruptcy Code provides, in pertinent part, that "if an injunction of the kind described in subsection (g)(1)(B) was issued before the date of the enactment of this Act, as part of a plan of reorganization confirmed by an order entered before such date, then the injunction shall be considered . . . to satisfy subsection (g)(4)(A)(ii) . . . ."

The complete text of Section 524 of the Bankruptcy Code is set out in the Appendix (App. 466a).

## STATEMENT OF THE CASE

This case presents several issues of vital importance to the administration of the Nation's bankruptcy laws. The court of appeals eroded the finality of federal bankruptcy confirmation orders underlying resolution of *hundreds of thousands of potential individual lawsuits and tens of billions of dollars* in trust funds held for the benefit of asbestos claimants by ignoring the plain language of Sections 524(g) and (h) of the Bankruptcy Code and substantially rewriting the landmark Manville confirmation order upon which Sections 524(g) and (h) are based—twenty years after that order was issued and affirmed on direct appeal. In so holding, the court of appeals gave asbestos plaintiffs' lawyers an "end run" around a final federal court judgment by allowing them to do indirectly (by suing a bankrupt debtor's insurer) what they could not do directly.

If left to stand, the decision below would create substantial uncertainty on issues of vital importance to the orderly administration of the Nation's bankruptcy laws. Until the Second Circuit revisited the issue of whether the federal courts could enjoin the claims at issue here, the federal bankruptcy courts uniformly applied the statutory scheme enacted by Congress in §§ 524(g) and (h) based upon the final judgment rendered by the Manville bankruptcy court as affirmed by the Second Circuit in 1988. This Court should review the decision below to provide guidance to the bankruptcy courts and other federal courts on an issue of profound significance to asbestos personal injury claimants

and every other constituency involved in asbestos related and non-asbestos related bankruptcies.

Exercising its broad authority "To establish . . . uniform Laws on the subject of Bankruptcies throughout the United States," U.S. Const., art. I, § 8, cl. 4, Congress authorized plans of reorganizations containing provisions, subject to numerous high standards, including the approval of two federal judges, to protect insurance companies from claims that "aris[e] by reason of [the insurer's] provision of insurance to the debtor or a related party." 11 U.S.C. § 524(g)(4)(A)(ii) (App. 476a-77a). The decision below is erroneous and would cause great uncertainty in a vitally important area of the law.

***First***, the court of appeals failed to apply the plain text of Sections 524(g) and (h) by holding that the injunction contained in the Manville confirmation order "must be read to conform with the bankruptcy court's jurisdiction over the *res* of the Manville estate." 517 F.3d at 67 (App 33a). There is no basis for circumscribing bankruptcy jurisdiction in this manner, given this Court's conclusion in *Central Virginia Community College* v. *Katz*, 546 U.S. 356, 370 (2006), that the "Framers would have understood that laws 'on the subject of Bankruptcies' included laws providing, in certain limited respects, for more than simple adjudications of rights in the *res*."

***Second***, the court of appeals ruled that the power of bankruptcy courts to release and channel claims pursuant to this *federal* statute is subject to rights allegedly created under the statutory or common laws of individual states. This holding is

directly contrary to the Supremacy Clause, U.S. Const. art. VI, cl. 2 (federal law is "the supreme Law of the Land . . . [,] any Thing in the Constitution or laws of any State to the Contrary notwithstanding"), and allows the laws of the States to "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Perez* v. *Campbell*, 402 U.S. 637, 649 (1971).

***Third***, the court of appeals refused to enforce as written a final bankruptcy court confirmation order as it was entered and affirmed decades ago (and after Petitioners made payment of tens of millions of dollars in reliance on that confirmation order). The judicial system cannot function without finality. Nowhere is that principle more important than in the context of asbestos bankruptcies—which is why Congress explicitly provided that these confirmation orders "shall be valid and enforceable and may not be revoked or modified by any court except through [direct] appeal." 11 U.S.C. § 524(g)(3)(A)(i) (App 474a).

## A. Johns-Manville

This case concerns the first asbestos-related channeling order issued by a federal bankruptcy court, in the reorganization of Johns-Manville Corporation. Manville was a Fortune 500 company beset by a rapidly growing number of asbestos-related lawsuits when it sought bankruptcy protection in 1982. Its Chapter 11 filing commenced "the most complex bankruptcy reorganization in history." *In re Johns-Manville Corp.*, 78 B.R. 407, 408 (S.D.N.Y. 1987) (App 207a).

Manville's most valuable asset was its insurance coverage, including in particular more than 425 policies issued by Travelers, Manville's primary insurer for decades. The availability of this insurance to pay asbestos claimants was the subject of contentious litigation between Manville and Travelers regarding the scope and limits of the policies. Numerous parties (including Manville factory workers in Louisiana and Manville executives and vendors who distributed Manville asbestos) also claimed rights under the policies. *See, e.g.*, *In re Davis*, 730 F.2d 176 (5th Cir. 1984). Thus, Manville's most significant asset was illiquid and of uncertain value, making it unavailable to satisfy the thousands of asbestos-related personal injury claims that were asserted and would continue to be asserted against the company in courts throughout the country.

The bankruptcy court crafted a solution. Drawing on the long-recognized authority of bankruptcy courts to sell encumbered property free and clear of any liens, *cf.* 11 U.S.C. § 363, the plan of reorganization provided that Travelers "buy back" the insurance policies it had issued to Manville in exchange for a promise of finality expressly contained in the confirmation order. The proceeds of the "sale," in turn, were deposited into the Manville Personal Injury Settlement Trust for the benefit of current and future asbestos claimants, and all asbestos-related claims—past, present and future—were then "channeled" to the corpus of the trust created by the plan of reorganization and whose administration remained within the jurisdiction of the bankruptcy court.

Drawing on its broad equitable power to "issue

any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title," 11 U.S.C. § 105(a), and to "enjoin suits that might impede the reorganization process," *MacArthur Co.* v. *Johns-Manville Corp.*, 837 F.2d 89, 93–94 (2d Cir. 1988) (App 200a), the bankruptcy court enjoined "any Person" from commencing "any claims" "based upon, arising out of or related to" the insurance policies that Travelers issued to Manville.

The bankruptcy court's 1986 confirmation order was affirmed on direct appeal by both the district court and the court of appeals. The Second Circuit's 1988 affirmance (unlike its 2008 decision below) held that the Manville confirmation order "preclude[s] . . . those suits against the settling insurers that arise out of or relate to Manville's insurance policies." *Id.* at 91 (App 194a).

### B. Section 524(g)

Congress has attempted to address the challenges of asbestos litigation on many occasions over the last several decades,[1] but the only statute enacted into law is Section 524(g) of the Bankruptcy Code, which was enacted as part of the Bankruptcy Reform Act of 1994, Pub. L. 103-394, 108 Stat. 4106. Section 524(g) replicates the trust/channeling order used by the bankruptcy court in Manville. A companion provision, Section 524(h), codifies the pre-existing Manville confirmation order.

---

[1] *See, e.g.*, Asbestosis & Mesothelioma Benefits Act, H.R. 6906, 93rd Cong. (1973); Asbestos Health Hazards Compensation Act, H.R. 8689, 95th Cong. (1977); Asbestos Compensation Fairness Act, H.R. 1957, 109th Cong. (2005).

The committee report accompanying the legislation described the Manville confirmation order as "a creative solution to help protect the future asbestos claimants," H.R. Rep. 103-835, at 40, and notes that the purpose of the statute is "to strengthen the Manville . . . trust/injunction mechanisms and to offer similar *certitude* to other asbestos trust/injunction mechanisms that meet the same kind of high standards, as in Manville, with respect to regard for the rights of claimants, present and future . . . ." *Id.* at 41 (emphasis supplied).

## C. Proceedings Below

Twenty years after the Second Circuit affirmed the confirmation order on direct appeal, and more than a decade after Congress enacted Section 524(g) based on the Manville model, a different panel of the Second Circuit refused to enforce as written one of its key terms.

In 2002, after being named in a series of lawsuits (the so-called "direct actions") claiming that Petitioners "conspired" with Manville to conceal the dangers of asbestos, Petitioners sought enforcement of the Manville confirmation designed to protect it from such suits. While the matter was pending before the bankruptcy court, former New York Governor Mario Cuomo (appointed as a special mediator by the bankruptcy court) helped facilitate a series of settlements between Petitioners and the direct action claimants that would (if the bankruptcy court's order is reinstated) provide nearly a half billion dollars in funds for the benefit of asbestos claimants.

After a full, contested evidentiary hearing, the bankruptcy court concluded that all of the pending direct action suits against Petitioners violated the 1986 confirmation order, finding as a matter of fact that these new claims were part of a global strategy developed by the asbestos plaintiffs' bar to put Petitioners "'in Manville's chair'" and thereby collect on claims that had already been channeled to the Manville trust. *In re Johns-Manville Corp.*, 2004 WL 1876046, at *12 (Bankr. S.D.N.Y. 2004) (App 127a) (quoting W. Mark Lanier, *Conspiracy Theory: Putting New Defendants In Manville's Chair*, Asbestos L. & Litig., ALI-ABA, Dec. 6–7, 2001 (Am. L. Inst. 2001)). In other words, the bankruptcy court found as a matter of fact that these new direct action claims were indirect attempts to do what the plaintiffs' lawyers were barred from doing directly, and amounted to "double-dipping" from the Manville Trust. *Id.* at *36 (App 185a) (Manville Trust is "designed to fully compensate Trust claimants for all liabilities channeled to the Trust—whether such liability arises from actions by Manville or by the Settling Insurers.").

The Second Circuit agreed with the bankruptcy court's conclusion that these new claims against Petitioners fell squarely within proscriptions of the Manville confirmation order, which enjoined "any Person" from commencing "any claims" "based upon, arising out of or related to" the insurance policies that Petitioners issued to Manville:

> There is little doubt that, in a literal sense, the instant claims against Travelers "arise out of" its provision of insurance coverage to Manville. The

> bankruptcy court's extensive factual findings regarding Manville's all-encompassing presence in the asbestos industry and its extensive relationship with Travelers support this notion.

*In re Johns-Manville Corp.*, 517 F.3d 52, 67 (2d Cir. 2008) (App 33a).

Yet, rather than enforcing the confirmation order as written, the panel 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 66 n.24 (App 33a). The panel limited the Manville confirmation order retroactively so that only *certain* claims against Travelers arising out of its insurance relationship with Manville are barred: those that are "derivative" of Manville's liability, or that "directly affect the *res* of the bankruptcy estate." *Id.* at 61, 66 (App 31a, 35a).

## REASONS FOR GRANTING THE PETITION

Section 524(g) and the channeling order it codified from the Manville confirmation order cannot work unless they provide *finality*. Congress recognized that fact by providing for iron-clad relief protecting insurers from third-party claims that "aris[e] by reason of [an insurance company's] provision of insurance to the debtor or a related party." 11 U.S.C. § 524(g)(4)(A)(ii) (App 476a-77a).[2] Here, the Second Circuit agreed that the claims against Petitioners satisfy that statutory definition because they "arise out of [Petitioners'] provision of insurance coverage to Manville." 517 F.3d at 67 (App 33a). But rather than end the statutory inquiry there and affirm the considered conclusions of the bankruptcy court and the district court, the court of appeals proceeded to add a further requirement, effectively holding that application of the text as enacted by Congress "risks federal bankruptcy courts displacing state courts for large categories of disputes in which someone may be bankrupt." *Id.* (App 33a).

The Second Circuit's constrained reading of the statute—cabining its reach to only "derivative" liability that directly affects the "*res*" of a debtor's estate—rewrites the text of the statute to add a substantive limitation that was not enacted by Congress. Left uncorrected, the court of appeals'

---

[2] Although Section 524(g) was enacted after the Manville confirmation orders were issued and affirmed, its proscriptions nevertheless apply here. As noted above, Section 524(h) effectively codified the pre-existing Manville confirmation order.

ruling would undermine the purposes of the statute and drastically reduce, if not eliminate, the incentive for insurers to contribute funds necessary to make 524(g) trusts the vehicle for distribution of assets to asbestos victims, as practitioners and commentators have been quick to point out when criticizing the Second Circuit's decision. *See, e.g.*, Dan Schechter, *Despite § 524(g), Global Settlement in Asbestosis Case Cannot Deprive Third-Party Plaintiffs of Direct Actions Against Nondebtor Insurer*, 2008 Comm. Fin. News. 18 (Feb. 25, 2008) ("If this opinion stands . . . , quite a few supposedly 'global' asbestos settlements will be imperiled. Some insurers will decline to participate in Manville settlements.").

## I. THE SECOND CIRCUIT'S HOLDING THAT BANKRUPTCY JURISDICTION IS LIMITED TO THE "*RES*" OF THE DEBTOR'S ESTATE IS CONTRARY TO THIS COURT'S DECISION IN *KATZ* AND DECADES OF BANKRUPTCY PRACTICE IN THE LOWER FEDERAL COURTS

The Second Circuit held that "a bankruptcy court has jurisdiction only to enjoin third-party non-debtor claims that directly affect the *res* of the bankruptcy estate." 517 F.3d at 66 (App 31a). While *in rem* jurisdiction is the foundation for much of bankruptcy practice, the "Framers would have understood that laws 'on the subject of Bankruptcies' included laws providing, in certain limited respects, for more than simple adjudications of rights in the *res*," including the power to "issue ancillary orders enforcing [bankruptcy courts'] *in rem* adjudications." *Central Virginia Community College* v. *Katz*, 546

U.S. 356, 370 (2006). No Justice sitting in *Katz* disagreed with this core principle. *See id.* at 391 (Thomas, J. dissenting) ("The fact that certain aspects of the bankruptcy power may be characterized as *in rem*, however, does not determine whether or not the States enjoy sovereign immunity against such *in rem* suits. And it certainly does not answer the question presented in this case: whether the Bankruptcy Clause subjects the States to transfer recovery proceedings—proceedings the majority describes as "ancillary to and in furtherance of the court's *in rem* jurisdiction," though not necessarily themselves *in rem* . . . .").

Indeed, bankruptcy courts have long issued orders that necessarily reach beyond the debtors' *res*. *See, e.g.*, *In re Drexel Burnham Lambert Group, Inc.*, 130 B.R. 910 (Bank. S.D.N.Y 1991) (affirming a settlement agreement pursuant to which all future claims against a debtor's officers and directors were enjoined), *aff'd*, 960 F.2d 285, 293 (2d Cir. 1992); *In re A.H. Robins Co.*, 880 F.2d 694, 701–02 (4th Cir. 1989) (affirming bankruptcy court confirmation order that barred claims against a debtor's directors, attorneys and insurers); *In re Dow Corning Corp.*, 280 F.3d 648, 658 (6th Cir. 2002) (affirming confirmation order that barred claims against debtor's insurers, in connection with creation of $2.35 billion fund for compensation of personal injury claims); *Petition of Portland Electric Power Co.*, 97 F. Supp. 877 (D. Or. 1943) (noting that a federal bankruptcy court can enjoin a state public utilities commissioner from taking action against a public utility company that was a non-debtor subsidiary of the debtor because the state regulated utility, though solvent and not in bankruptcy, "is a wholly owned

subsidiary" of a bankrupt debtor and the company's "stock is the principle asset to be dealt with in the reorganization proceedings"). *See also United States* v. *Energy Resources*, 495 U.S. 545 (1990) (bankruptcy court's power to restructure debtor/creditor relationships in a plan of reorganization not limited to assets in which the debtor has a property interest).

Under Section 524(g)'s trust/channeling mechanism, companies facing asbestos-related liability—as well as their insurers—are, subject to numerous conditions and the approval of two federal judges, permitted to have liabilities to past, present and future claimants dealt with in a plan of reorganization. The claimants, in turn, benefit from the establishment of well-funded trusts designed to maintain solvency for decades. Over a century ago, this Court held that "Congress may prescribe any regulations concerning discharge in bankruptcy that are not so grossly unreasonable as to be incompatible with fundamental law . . . ." *Hanover National Bank* v. *Moyses*, 186 U.S. 181, 192 (1902).

The decision below calls this statutory scheme into question. The Second Circuit improperly limited the reach of Section 524(g) to only those claims that are "derivative" of a debtor's liability, or that seek the "*res*" of the debtor's estate. *See* 517 F.3d at 66 (App 31a). This interpretation is inconsistent with the carefully crafted legislative scheme Congress constructed. Congress drafted important conditions to this use of the reorganization process, but not the limitations engrafted by the panel below. *Cf. United States* v. *Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242 n.5 (1989) ("[w]hen Congress want[s] to restrict the application of a particular provision of the

[Bankruptcy] Code," it does so in the plain text of the provision). The decision below deprives insurance companies, business enterprises and injured workers and their families of the only means available for definitively resolving asbestos-related liability, outside of flooding the Nation's judicial system with hundreds of thousands of individual lawsuits. Moreover, outside of the asbestos context, the Second Circuit's erroneous limitation of bankruptcy jurisdiction to the "*res*" of the estate undermines the ability of bankruptcy courts to fashion reorganizations in a wide variety of other settings (such as in *Drexel Burnham* and *A.H. Robins*, *supra*), including the reorganization of economically viable business enterprises. The scope of bankruptcy jurisdiction is a matter of material importance in the administration of the Nation's bankruptcy laws.

## II. THE SECOND CIRCUIT'S HOLDING THAT ALLEGED STATE-CREATED RIGHTS CAN OVERRIDE A RELEASE AND CHANNELING INJUNCTION CONTAINED IN A BANKRUPTCY COURT'S CONFIRMATION ORDER CANNOT BE RECONCILED WITH THE SUPREMACY CLAUSE

By definition, the discharge, injunction and release remedies of federal bankruptcy law override state laws that give various creditors collection rights outside bankruptcy. The Second Circuit inverted this point, holding that a state law potentially giving collection rights to certain tort claimants takes precedence over the power of the bankruptcy courts to fashion an effective remedy in

the context of a confirmed plan of reorganization.

As a statute enacted pursuant to the Bankruptcy Clause, Section 524(g) necessarily overrides any state statutory or common law that "frustrates the full effectiveness of federal law . . . ." *Perez* v. *Campbell*, 402 U.S. 637, 649 (1971) (declaring a law refusing issuance of a driver's license ineffective against a discharged debtor because the state law frustrated the debtor's "fresh start"). Even earlier than *Perez*, this Court had ruled that private rights arising under state law are subject to laws enacted under Article I, Section 8. *See Hanover National Bank* v. *Moyses*, 186 U.S. 181, 192 (1902) (right to enforce judgment on a note, as permitted by state law, subject to discharge in bankruptcy). The purpose of the release and injunctive channeling provisions of the confirmation order at issue here was to deal with alleged state-law claims or demands that could be asserted against Petitioners.

Nonetheless, the court erroneously held that state law, not a federal confirmation order, determined whether these claims could proceed against Petitioners outside of the express provisions of the confirmation order. The court below erroneously looked to *state* tort law to determine the force and effect of a confirmation order issued under *federal* bankruptcy law:

> The nature and extent of Travelers' duty to the Direct Action plaintiffs is a function of state law. Neither [the bankruptcy court nor the district court] looked to the laws of the states where the claims arose to determine if indeed

> Travelers did have an independent legal duty in its dealing with plaintiffs, notwithstanding the factual background in which the duty arose.

517 F.3d at 63.

The Second Circuit had it precisely backwards. Federal law authorizing relief in favor of a discrete class of non-parties in the special context of asbestos bankruptcies is "the supreme Law of the Land . . . [,] any Thing in the Constitution or laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. The force and effect of a federal confirmation order is not dependent on whether an asserted state law-created right truly exists. If "the laws of the states where the claims [against Travelers] arose" purport to allow the imposition of liability on Travelers based on its insurance relationship with Manville, those laws would "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Perez*, 402 U.S. at 652, and must thus be of no effect in the face of a federal confirmation order dealing with those claims.

Virtually all claims dealt with in a confirmation order are created by non-bankruptcy law (*e.g.*, federal statutory or common law, state statutory or common law). The decision of the panel below that "there is not one but many courthouses where the legitimacy of these actions must be tested" misses the point. Under the Supremacy Clause, once dealt with in a federal confirmation order (here, released and channeled to a trust within bankruptcy court jurisdiction), alleged state law-created causes of action cannot be otherwise pursued. To allow

alleged state law created rights to override express provisions of a federal confirmation order undermines the ability of bankruptcy courts to release asbestos-related liabilities in a confirmation order. The force and effect of a federal confirmation order is a matter of material importance in the administration of the Nation's bankruptcy laws.

## III. THE SECOND CIRCUIT'S DECISION UNDERMINES IMPORTANT PRINCIPLES OF JUDICIAL FINALITY AND REPOSE

Upon affirmance by an appellate court, the finality and repose afforded by a federal court judgment "acquires an added moral dimension." *Calderon* v. *Thompson*, 523 U.S. 538, 556 (1998). In the intervening two decades since Judge Lifland entered the confirmation order in this case, that order has governed the rights and obligations of hundreds of thousands of Manville asbestos claimants and other interested parties. These orders allowed these hundreds of thousands of asbestos claimants to pursue their rights and obtain compensation without the traditional cost and delay associated with the judicial system. No court—prior to the panel that rendered the decision below—had ever questioned the validity of the long-final confirmation order in this case.

Respect for "longstanding observances and settled expectations," *City of Sherrill* v. *Oneida Indian Nation*, 544 U.S. 197, 218 (2005), are at their height here, where Congress has codified the judgment in question and has used it as a blueprint for future asbestos-related bankruptcies. Indeed,

Congress explicitly recognized the importance of finality in the context of Section 524(g). The statute provides that when a bankruptcy court enters a confirmation order containing asbestos-related channeling orders issued or affirmed by a district court, "then after the time for appeal of the order that issues or affirms the plan . . . the injunction shall be valid and enforceable *and may not be revoked or modified by any court* except through [direct] appeal . . . ." 11 U.S.C. § 524(g)(3)(A)(i) (emphasis added) (App 474a). The legislative history confirms that Congress intended that asbestos bankruptcy confirmation orders be considered "permanent and irrevocable *except on initial appeal* of the plan, if any . . . ." *See* 140 Cong. Rec. S14464 (daily ed. Oct. 6, 1994) (statement of Sen. Heflin) (emphasis added).

Moreover, as noted above, through Section 524(h), and as confirmed by the legislative history, Congress also specifically ratified the confirmation order at issue *in this case*. 11 U.S.C. § 524(h)(1); *see also* H.R. Rep. 103-835, at 41 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3340, 3350 ("Johns-Manville [has] met and surpassed the standards imposed in this section, [and] will be able to take advantage of the certainty it provides without having to reopen [its] case[].").

The court of appeals' decision to revisit the propriety and scope of the confirmation order nearly a quarter century after the fact "dishonor[s] the historic wisdom in the value of repose." *City of Sherrill*, 544 U.S. at 219. So strong is the principle in favor of finality and repose in our federal system that this Court has rejected collateral attacks on

final confirmation orders even when the portion of the statute under which a plan was confirmed was later found unconstitutional. In *Chicot County Drainage District* v. *Baxter State Bank*, 308 U.S. 371 (1940), for example, a municipality availed itself of a "municipal-debt readjustment[,]" and a final decree was entered barring all bondholders from asserting any claims not presented to the court. *Id.* at 372–73. Years later, when the act under which the readjustment took place had already been declared unconstitutional,[3] this Court nonetheless rejected a bondholder's attempt to collaterally attack the final order and collect on the bond. *Id.* at 376.

Indeed, here, it is particularly telling that the two principal cases relied upon by the court of appeals—*Matter of Zale Corp.*, 62 F.3d 746 (5th Cir. 1995), and *In re Metromedia Fiber Network, Inc.*, 416 F.3d 136 (2d Cir. 2005)—were decided on *direct* appeal of the orders in question. If the original panel opinion in *MacArthur* (affirming the Manville confirmation order on direct appeal in 1988) had reached the same conclusion as the panel opinion below, Petitioners would never have contributed to the Manville trust. *MacArthur*, 837 F.2d at 90 ("The insurers are entitled to terminate the settlements if the injunctive orders are not issued or if they are set aside on appeal.").

The inequity of altering bankruptcy court protections—*ex post* and without compensation—is the very reason why settled authority prohibits collateral attacks on Chapter 11 reorganizations.

---

[3] *Ashton* v. *Cameron County Water Improvement District*, 298 U.S. 513, 532 (1936).

*Chicot County*, 308 U.S. at 376 (subject matter jurisdiction, may not be attacked collaterally); *Stoll* v. *Gottlieb*, 305 U.S. 165 (1938) (acknowledging same principle). Redefining the scope of a long-final confirmation order "unravel[s] intricate transactions so as to knock the props out from under the authorization for every transaction that has taken place," and thereby creates "an unmanageable, uncontrollable situation" for courts and litigants alike. *In re Chateaugay Corp.*, 10 F.3d 944, 953 (2d Cir. 1993).

In refusing to enforce the plain terms of the orders in this case, the Second Circuit erred not only by improperly circumscribing the reach of a bankruptcy court's plan of reorganization and rewriting a statute validly enacted pursuant to Congress's broad constitutional authority, but also by failing to enforce as written what was a long-final order without even considering the deference due to final orders. The order that the court below failed to enforce was "a cornerstone of Manville's proposed plan of reorganization . . . [and] a critical part of the entire reorganization." *MacArthur*, 837 F.2d at 90 (App 192a). Even *assuming* that order was somehow improper when written in 1986 and affirmed by the district court and the court of appeals in 1988 (and it assuredly was not, for all of the reasons discussed above), that would not justify the Second Circuit's decision to re-write that final order years after the fact, as if it were writing on a totally clean slate.

The importance of finality is not only reflected in numerous decisions of this Court, but Congress also specifically mandated that the injunctive provisions contained in confirmation orders such as

the Manville orders be deemed final and that such injunctions may not be revoked or modified except on direct appeal. *See* 11 U.S.C. § 524(g)(3)(A)(i) (App 474a); *accord* 11 U.S.C. § 524(h)(1) (App 478a-79a). The importance of finality of bankruptcy court confirmation orders also is reflected in 11 U.S.C. § 1144, under which confirmation orders may only be revoked upon application made within 180 days upon a showing that the orders were procured by fraud.

Nowhere has the interest in finality been as important to litigants and the courts as it is in the context of asbestos litigation. What Judge Lifland recognized correctly more than twenty years ago and Congress recognized in enacting the only federal response to the asbestos litigation crisis to date, is that finality is critical. It was critical to Johns-Manville to enable it to emerge from bankruptcy, to insurers such as Petitioners which contributed to the asbestos personal injury trust, and the asbestos claimants who benefited from those contributions. It is the finality offered by orders modeled on this case and those entered pursuant to Section 524(g) that has allowed some seventy companies with asbestos liabilities to reorganize successfully and to provide funds to compensate those injured by asbestos. It is finality that has induced insurers to fund asbestos trusts for the benefit of asbestos claimants, past present and future. Indeed, as Judge Lifland explained:

> The Court's repeated use of the term[s] 'arising out of' and 'related to' [in the court's 1986 orders was] not gratuitous or superfluous; [these terms] were meant to provide the broadest

> protection possible to facilitate global finality for Travelers as a necessary condition for it to make a significant contribution to the Manville estate.

*In re Johns-Manville Corp.*, 2004 WL 1876046 at *31 (App 172a).

Likewise, literally tens of billions of dollars have been committed to asbestos trusts in cases throughout the country based on the premise that the channeling mechanism originally used by Judge Lifland in the Manville bankruptcy will provide all parties with finality, and that once entered and affirmed, the finality of those orders will be respected. Those resources have been used to pay the claims of vast numbers of past, present and future claimants.

When the Second Circuit effectively rewrote Judge Lifland's orders retroactively (at precisely the time when the court was called on to enforce them), the court failed to consider the important interests in finality and repose that were at stake, and instead gave enterprising plaintiffs' lawyers an "end run" around a final federal court judgment. The decision also stands in conflict with 11 U.S.C. §§ 524(g)(3)(A)(i) and 524(h), and, if allowed to stand, would create enormous uncertainty to parties in prior and future asbestos-related bankruptcies. It would mean courts can reopen long-final orders years after the fact. This highly irregular result "so far depart[s] from the accepted and usual course of judicial proceedings" that it "call[s] for an exercise of this Court's supervisory power." S. Ct. R. 10(b).

## CONCLUSION

For the reasons set out above, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

*Of Counsel*
ELIZABETH A. WARREN
Leo Gottlieb Prof. of Law
HARVARD LAW SCHOOL
1563 Massachusetts Ave.
Cambridge, MA 02183

BARRY R. OSTRAGER
*Counsel of Record*
MYER O. SIGAL, JR.
ANDREW T. FRANKEL
ROBERT J. PFISTER
SIMPSON THACHER &
BARTLETT LLP
425 Lexington Ave.
New York, NY 10017
(212) 455-2000

*Attorneys for The Travelers Indemnity Company, Travelers Casualty & Surety Co. and Travelers Property Casualty Corp.*