No. 23-124

IN THE

Supreme Court of the United States

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

v.

PURDUE PHARMA L.P., *et al.*,
Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

BRIEF FOR *AMICI CURIAE* ALDRICH PUMP LLC, MURRAY BOILER LLC, AND BESTWALL LLC IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*

Several asbestos claimants describing themselves as "Texas Two-Step Victims" (the "Asbestos Amici") have filed a brief as *amici curiae* in support of Petitioner (the "Asbestos Brief"). However, they have no interest in this case and assert positions ultimately irrelevant to the matters before the Court. Although they purport to address 11 U.S.C. § 524(g), they actually focus on criticizing a group of asbestos defendants that have filed bankruptcy petitions after undergoing a particular form of corporate reorganization under a 30-year old Texas law called a "divisional merger"—what the Asbestos Amici disparage as the "Texas Two-Step." The amici here, Aldrich Pump LLC, Murray Boiler LLC, and Bestwall LLC (the "Debtor Amici"), are debtors in that group. Together, their interest is to correct the Asbestos Amici's errors and misstatements regarding these bankruptcy cases and § 524(g).[1]

SUMMARY OF ARGUMENT

The Asbestos Amici's contentions about divisional merger bankruptcy cases are as false as they are irrelevant to the question before the Court. Far from "shielding assets" from claimants, the debtors in such cases have the same amount of assets available to resolve and pay claims as their predecessors did before the corporate restructuring. And far from seeking to force claimants to accept "pennies on the dollar" for

[1] In accordance with Supreme Court Rule 37.6, amici state that no counsel for a party authored this brief in whole or in part, and that no person or entity, other than amici and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief.

their claims, the Debtor Amici are seeking to pay claims in full under a consensual resolution with claimants that is required by § 524(g). The Asbestos Amici's complaints about preliminary injunctions entered in these cases, which ensure the bankruptcy court's ability to resolve the asbestos claims as § 524(g) intends, are similarly misguided and irrelevant here.

The Asbestos Amici also suggest novel constitutional "concerns" about asbestos trusts under § 524(g), but they cite no decision expressing such concerns in the three decades since that statute was enacted. The Court should disregard the Asbestos Amici's mischaracterization of the Debtor Amici's bankruptcy cases and purported constitutional concerns with § 524(g).

ARGUMENT

I. The Asbestos Amici's Complaints about the "Texas Two-Step" Are Baseless and Irrelevant.

The question before the Court is whether bankruptcy courts have authority to release or enjoin "direct" claims of a debtor's creditors against non-debtors, without consent, when those non-debtors have contributed to the debtor's reorganization to help pay such creditors through a Chapter 11 plan.

Ignoring that issue, the Asbestos Amici have weighed in ostensibly to opine on § 524(g). As their brief makes clear, however, the Asbestos Amici's main complaints concern roughly a half-dozen recent cases involving divisional mergers. Those complaints have nothing to do with the question before this Court. Because the Asbestos Brief contains numerous misrepresentations, however, undersigned amici correct the record.

The few extant divisional merger cases follow a pattern. *See*, *e.g.*, *In re Bestwall LLC*, 71 F.4th 168, 173–74 (4th Cir. 2023); *In re Aldrich Pump LLC*, 2021 WL 3729335, at *7-16 (Bankr. W.D.N.C. Aug. 23, 2021); *In re DBMP LLC*, 2021 WL 3552350, at *6-13 (Bankr. W.D.N.C. Aug. 11, 2021). A corporation for decades has spent billions of dollars defending and resolving thousands of asbestos cases; faces thousands of current claimants who have asbestos claims pending against it; and, given the long latency periods associated with asbestos-related diseases, expects tens of thousands of future claimants to bring new asbestos claims for decades to come. The corporation turns to Chapter 11 of the Bankruptcy Code for resolution, like dozens of previous asbestos defendants who have used the mechanism that Congress established precisely for this purpose. Before filing, however, the corporation carries out a divisional merger authorized under Texas law, splitting itself into two new companies.[2]

The first new company receives the substantial majority of the assets and operations plus all liabilities *other than* asbestos liabilities, while the second new company—here, each of the Debtor Amici—receives

[2] The same result can be achieved—albeit potentially less efficiently—through other types of corporate restructuring transactions or under analogous divisional merger laws of other states. *See, e.g.*, Ariz. Rev. Stat. Ann. § 29-2601; Del. Code Ann. tit. 6, § 18-217(b)-(c); 15 Pa. Cons. Stat. § 361; *see also* Declaration of David J. Gordon, 11-16, *In re Paddock Enters., LLC,* No. 20-10028, Dkt. 2 (Bankr. D. Del. Jan. 6, 2020) (describing "Corporate Modernization Transaction to structurally separate the legacy liabilities of the Debtor's predecessor, Owens-Illinois, Inc., from the active operations of Owens-Illinois, Inc.'s subsidiaries, while fully maintaining the Debtor's ability to access the value of those operations to support its legacy liabilities").

the remaining assets and operations and the asbestos liabilities and eventually files for bankruptcy. Crucially, however, each debtor also receives a funding agreement from the other newly created company (and possibly others), ensuring that it has the same financial ability to resolve asbestos claims as its predecessor did before the divisional merger. In none of these divisional merger cases has a court questioned the debtor's ability to pay claims. *See In re Bestwall LLC*, 605 B.R. 43, 49 (Bankr. W.D.N.C. 2019) ("Bestwall has the full ability to meet all of its obligations… through the Funding Agreement."); *cf. In re LTL Mgmt., LLC*, 64 F.4th 84, 110 (3d Cir. 2023) (dismissing case because debtor had *too much* funding, and acknowledging the "apparent irony" of this result).

The pre-bankruptcy divisional mergers enhance the effectiveness of the bankruptcy cases, while maintaining protections for claimants. By not subjecting the entire pre-restructuring enterprise to bankruptcy, the companies and the claimants avoid an exponential increase in the complexity and expense of the bankruptcy case. The risk of value destruction from a more complex proceeding benefits no one, especially because resolution of asbestos liability will still be the main—if not only—issue at stake. By keeping the primary business operations out of Chapter 11, numerous creditors, employees, and other stakeholders have been spared the adverse impact of bankruptcy.

Yet the Asbestos Amici assert that Debtor Amici's Chapter 11 cases are "abusive," even "fraudulent," and intended to "limit… exposure" by "shielding valuable assets" from claimants. Asbestos Br. 1, 4. This is false. As the Asbestos Amici well know, the divisional-mer-

ger cases have not shielded valuable assets at all. Rather, through the funding agreements implemented in each case, the full extent of the assets available to pay claimants pre-divisional merger remain available to pay claims post-divisional merger. In fact, claimants have relied on the continued availability of these assets in seeking to have the Debtor Amici's bankruptcy cases and other divisional merger cases dismissed, claiming that each debtor lacks a need for bankruptcy because it is "backed by the full financial might of [its counterparty] under the funding agreement," which "provides sufficient funding for all present and future liabilities."[3]

The Asbestos Amici also fail to note that, in Aldrich's and Murray's cases, the representative of future claimants supports the Chapter 11 cases as well as a plan of reorganization that Aldrich and Murray negotiated and filed more than two years ago, and $270 million already has been deposited into a qualified settlement fund. In Bestwall's case, more than three years ago, Bestwall filed a plan and deposited $1 billion into a qualified settlement fund for the exclusive benefit of asbestos claimants.

Regrettably, though, counsel for current claimants in all these cases have stalled at every turn. Thus, the Fourth Circuit in Bestwall's case recently wondered

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[3] *See* Motion to Dismiss of Claimants Wilson Buckingham and Angelika Weiss 2, 4, 17-19, *In re Bestwall LLC*, No. 17-31795, Dkt. 2882 (Bankr. W.D.N.C. Feb. 17, 2023); Motion to Dismiss on Behalf of Robert Semian and Other Clients of MRHFM 2, 5, *In re Aldrich Pump LLC*, No. 20-30608, Dkt. 1712 (Bankr. W.D.N.C. Apr. 6, 2023) (arguing that assets remain "fully available," such that debtors are "fully capable of paying their current and future asbestos liabilities").

"why Claimant Representatives' counsel have relentlessly attempted to circumvent the bankruptcy proceeding," adding that "aspirational greater fees that could be awarded to the claimants' counsel in the state-court proceedings is not a valid reason to object to the processing of the claims in the bankruptcy proceeding." *In re Bestwall LLC*, 71 F.4th at 183–84; *see also In re Bestwall LLC*, 47 F.4th 233 (3d Cir. 2022) (rejecting claimants' collateral attack on bankruptcy court's discovery order).

The Asbestos Amici also attempt to claim the high ground in advocating for every plaintiff to have "access to our nation's tort system" and their "own day in court." Asbestos Br. 5, 12 (citation omitted). This point is spurious. Asbestos litigation remains the same "elephantine mass" that "defies customary judicial administration" that it was almost 25 years ago when this Court decided *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821 (1999). Taking an asbestos claim to trial is the very rare exception, not the rule. For instance, at the trial on the motions to dismiss LTL Management's second bankruptcy petition, claimants' attorneys repeatedly emphasized their expert's opinion that only ten cases per year were likely to go to trial. *In re LTL Mgmt., LLC*, 652 B.R. 433, 449 (Bankr. D.N.J. 2023). If a company faces *tens of thousands* of claims and *ten* trials per year then, doing the math, "the vast majority of claimants will not get the opportunity to seek recovery for years to come, if ever." *Id.* For reference, the entire state of Missouri, a favorite asbestos jurisdiction, had just 269 civil jury verdicts *of any kind* in 2022.[4]

[4] https://www.courts.mo.gov/file.jsp?id=1744.

Moreover, the evidence presented in these bankruptcy cases has established the extraordinary delays claimants suffered in the tort system before the bankruptcy filings. Such "long delays are routine" in asbestos litigation. *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 598 (1997). In Bestwall's case, for example, approximately 75% of unresolved claims pending on the date of filing were pending for ten or more years; more than 55% were pending 15 or more years. In addition, in asbestos cases, "transaction costs exceed the victims' recovery by nearly two to one" and "future claimants may lose altogether" when assets are exhausted. *Id.*

By contrast, asbestos trusts "provide all claimants—including future claimants who have yet to institute litigation—with an efficient means through which to equitably resolve their claims." *In re Bestwall LLC*, 606 B.R. 243, 257 (Bankr. W.D.N.C. 2019). Indeed, in a half-century of asbestos litigation, such trusts have proven the only "viable alternative" to the "intractable pathologies of asbestos litigation," serving "the interests of both current and future asbestos claimants and corporations saddled with asbestos liability," including by "considerably reduc[ing] transaction costs and attorneys' fees." *In re Fed.-Mogul Glob. Inc.*, 684 F.3d 355, 362 (3d Cir. 2012). As of 2011, asbestos debtors had successfully created 60 such trusts, with $37 billion in assets, $17 billion *already paid* to claimants, and billions more distributed each year.[5] And the trusts ensure that funds remain available to

[5] *See* U.S. Gov't Accountability Office, GAO–11–819, *Asbestos Injury Compensation: The Role and Administration of Asbestos Trusts* 3, 16-17, 25 (2011), available at https://www.gao.gov/assets/gao-11-819.pdf.

future claimants whose diseases manifest long after the bankruptcy cases and who might have had no recourse at all in the absence of the trust mechanism Congress authorized. *See* § 524(g)(2)(B)(ii)(V) (requiring mechanisms to ensure trust is "in a financial position to pay… future demands").

Finally, the Asbestos Amici's attacks on *preliminary* injunctions issued in asbestos cases are baseless. Asbestos Br. 1, 3, 5–6. Such injunctions are particularly irrelevant here. Unlike the *permanent* injunctions at issue in this appeal, these injunctions are *preliminary* and are informed by the traditional preliminary-injunction standard. Their purpose is to protect and enable the process of reaching a reorganization plan, by preventing claimants from pursuing the same claims against other parties during the bankruptcy case. Such preliminary injunctions have been entered in asbestos bankruptcy cases for decades. Undersigned amici are unaware of *any* asbestos case in which a preliminary injunction in some form was *not* approved if requested. The Fourth Circuit in the *Bestwall* decision cited above recently rejected a challenge to one.

Indeed, in Aldrich and Murray's cases, the court found that the automatic stay (11 U.S.C. § 362) *by its own force* applied to bar such attempts at circumventing the bankruptcy case. That is because, as the bankruptcy court found, the claims asserted against certain third parties are identical to and coextensive with those the debtors seek to resolve in bankruptcy—involving the same facts, conduct, products, exposures,

and diseases as those against the Debtor and not involving any separate acts or direct, independent liability of the protected third parties.[6]

II. Asbestos Trusts Are Constitutional.

The Asbestos Amici's claimed reason for filing a brief in this case is to address 11 U.S.C. § 524(g), a three-decade-old provision authorizing a debtor facing asbestos liability to fund a trust, as part of a confirmed plan of reorganization, and to receive a permanent "channeling" injunction directing present and future asbestos claims to the trust, including claims against third parties for which the debtor is responsible.

The Asbestos Amici do not cite a single decision questioning the constitutionality of § 524(g) in the three decades since its enactment. Even the Trustee identifies no constitutional question that that provision supposedly presents. *See* Brief for Petitioner William K. Harrington, U.S. Trustee at 43-44, No. 23-124.

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[6] *See In re Aldrich Pump LLC*, 2021 WL 3729335, at *30 ¶ 181 ("[C]ommencement or continuation of Aldrich/Murray Asbestos Claims against the Protected Parties would necessarily result in the liquidation and recovery of claims against the Debtors outside of the bankruptcy case. This is barred by the automatic stay."); *In re DBMP LLC*, 2021 WL 3552350, at *27 ¶ 175 (similar). In Bestwall's case, the court granted preliminary injunctive relief under § 105(a) and declined to reach the issue of the applicability of the automatic stay, but noted that the claims enjoined are identical to the claims asserted against the debtor. *In re Bestwall LLC*, 606 B.R. at 251, 258 (the enjoined claims "would be identical and co-extensive in every respect. Both sets of claims involve the same plaintiffs, the same asbestos-containing products, the same alleged injuries, the same legal theories and causes of action, the same time periods, the same markets, and the same alleged damages resulting from the same alleged conduct").

Nevertheless, the Asbestos Amici suggest that "constitutional concerns" "linger," and counsel this Court "to avoid the sweeping, unintended consequences that could result from any premature, overbroad pronouncement on section 524(g)'s validity or scope." Asbestos Br. 2. The Asbestos Amici's concerns are groundless, and the undersigned amici are confident that this Court knows how to calibrate the breadth of its opinions without assistance from the Asbestos Amici.

On due process, the Asbestos Amici suggest claimants' right to representation in connection with a "judgment" is violated because creditors are not represented *before* a bankruptcy petition is filed. Amicus Br. 18. This is a non-sequitur: There is no "judgment" or even a case pre-petition. And once there is, the Code provides ample tools to review and challenge relevant pre-bankruptcy events, including by bringing fraudulent conveyance claims. *See generally* 11 U.S.C. § 548.

The Asbestos Amici then purport to advocate on behalf of future claimants, raising a theoretical concern that a single representative of future claimants "may" face conflicts of interest among this constituency. But despite the creation of dozens of asbestos trusts, they cite no case in which this was a problem. *See generally*, U.S. Gov't Accountability Off., GAO–11–819, *Asbestos Injury Compensation: The Role and Administration of Asbestos Trusts* (2011). And their solution is worse than the perceived problem: They wish to return to the tort system, where future claimants are not represented *at all*. There, current claimants can attempt to recover as much as possible, even if that threatens "exhaustion of assets" for future claimants.

Amchem, 521 U.S. at 598. They have "naturally conflicting interests" from future claimants and a "natural adversity." *In re Imerys Talc Am., Inc.*, 38 F.4th 361, 366 (3d Cir. 2022).

The Asbestos Amici also present a novel argument that the inability of future claimants to opt out of a § 524(g) injunction violates due process, but they cite in support not a single bankruptcy decision from this or any court. In fact, the requirements of § 524(g), especially the appointment of a future claimants' representative and the approval of a plan by an Article III district-court, "are specifically tailored" to provide "due process" to "future claimants." *In re Combustion Eng'g, Inc.*, 391 F.3d 190, 234 n.45 (3d Cir. 2004).

Finally, the creation of asbestos trusts does not raise issues under the Seventh Amendment. A claimant dissatisfied with a trust's offer of settlement may sue the trust and receive a jury trial.[7] In practice, however, claimants (and their counsel) rarely choose to exercise these rights because of the efficiency with which they can obtain compensation from trusts under standard distribution processes.

CONCLUSION

The Asbestos Amici's arguments are inaccurate and groundless, and irrelevant to the issue before this Court. The Court should not assign any weight to the Asbestos Amici's arguments.

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[7] *See, e.g.*, *Settlement Facility Second Amended and Restated Claims Resolution Procedures*, § 9.6, *In re Garlock Sealing Techs., LLC*, No. 10-31607 (Bankr. W.D.N.C.) ("If the holder of a disputed Claim disagrees with the Trust's determination… the holder may file a lawsuit against the Trust.").

OCTOBER 27, 2023 Respectfully submitted,

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