NO. 25-1013

IN THE

Supreme Court of the United States

OFFICIAL COMMITTEE OF ASBESTOS CLAIMANTS OF BESTWALL, LLC,

Petitioner,

v.

BESTWALL, LLC

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF AMICI CURIAE BANKRUPTCY AND LEGAL HISTORY PROFESSORS IN SUPPORT OF GRANTING THE PETITION FOR A WRIT OF CERTIORARI ON THE HISTORICAL SCOPE OF THE BANKRUPTCY POWER

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INTEREST OF THE AMICI CURIAE[1]

Amici, whose names, titles, and institutions are set forth in alphabetical order on Appendix A, are professors at law schools around the nation who study the United States' bankruptcy system and legal history. They write solely out of concern about the effect the opinion below will have on the bankruptcy system.

[1] Pursuant to Supreme Court Rule 37, amici respectfully submit this brief amicus curiae in support of petitioners. Counsel of record for all parties received notice of our intention to file an amicus brief at least 10 days prior to the due date for the amicus brief. No counsel for a party authored this brief in whole or in part and no person or entity other than amici or counsel made a monetary contribution to its preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case requires the Court to resolve not only the circuit split identified by Petitioners, but also a deeper methodological divide going to the core of the bankruptcy and judicial powers: Does history limit Congress's power to enact "uniform Laws on the subject of Bankruptcies" under Article I, Section 8, Clause 4?

On one hand, this Court has described the "subject of bankruptcies" as broad and perhaps "incapable of final definition[,]" because the concept of bankruptcy changes over time. *Wright v. Union Central Life Ins. Co.*, 304 U.S. 502, 513–14 (1938). Cases such as *Sturges v. Crowninshield*, 17 U.S. 122 (4 Wheat.), 193–94 (1819), and *Continental Illinois National Bank & Trust Co. v. Chicago, Rock Island & Pacific Railway Co.*, 294 U.S. 648, 668–69 (1935), likewise recognize that Congress is not confined to reproducing the precise institutional forms of English or early American bankruptcy legislation.

On the other hand, this Court has repeatedly grounded the constitutional scope of the bankruptcy power in founding-era history, especially where bankruptcy threatens other structural powers and protections. *See N. Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 71–72 (1982); *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 42–43 (1989); *Stern v. Marshall*, 564 U.S. 462, 484–85 (2011); *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 363–64 (2006).

The lesson of these cases is straightforward: although bankruptcy is not frozen in its founding-era

form, it has always presupposed some degree of financial distress. History becomes especially important when the bankruptcy power trenches on other constitutional structures and protections, including the judicial power and the jury-trial right.

To be sure, "financial distress" is not defined in the Bankruptcy Code and is not self-defining. But this Court has long described bankruptcy as involving "the relations between an insolvent or nonpaying or fraudulent debtor and his creditors[.]" *Ry. Labor Executives' Ass'n v. Gibbons*, 455 U.S. 457, 466 (1982) (quoting *Wright*, 304 U.S. at 513–14, in turn quoting *In re Reiman*, 20 F. Cas. 490, 496 (S.D.N.Y. 1874) (No. 11,673), aff'd, 20 F. Cas. 500 (C.C.S.D.N.Y. 1875) (No. 11,675)). And the bankruptcy power reaches its constitutional limit when it "encroach[es] upon the judicial power" of the United States, *N. Pipeline*, 458 U.S. at 63, or other structural protections such as the right to trial by jury. *Granfinanciera*, 492 U.S. at 43–46.

The Fourth Circuit erred by misunderstanding this history. Its majority reasoned that, under eighteenth-century English law, "it mattered not whether the defendant was insolvent or otherwise[.]" *Bestwall LLC v. Official Committee of Asbestos Claimants of Bestwall, LLC*, 148 F.4th 233, 244 (4th Cir. 2025) (Agee, C.J., concurring) (quoting *In re Klein*, 42 U.S. (1 How.) 277, 277 (C.C.D. Mo. 1843)). But that statement was misleadingly incomplete. Although English law did not limit bankruptcy to balance-sheet insolvents, both English and early American law limited bankruptcy to debtors who could not pay, who refused to pay, or who defrauded

creditors—that is, to financial distress, broadly understood.

None of those conditions are present here. Bestwall, LLC (the "Debtor") is not in financial distress as that concept has historically been understood. The Debtor has repeatedly said it can and will pay its debts in full, it is solvent, and that it has committed no act in fraud of creditors. *See, e.g.*, Pet. for Cert. at 12, 25 (explaining that the Debtor is "able to pay any conceivable liabilities now and in the foreseeable future" and faces no "real financial distress"). Its resort to bankruptcy therefore exceeds the constitutional scope of that power.

The stakes are substantial. The Debtor does not invoke bankruptcy because it cannot meet its obligations, but because it seeks to avoid defending personal-injury and wrongful-death claims in the ordinary courts. *See id.* at 6–7 (explaining that the filing "consolidated . . . asbestos-related litigation into a single, federal forum of its choice" and enjoined tort claims against non-debtor affiliates). The Fourth Circuit nevertheless accepted this use of bankruptcy because it reasoned that bankruptcy includes "nothing less than 'the subject of the relations between [a] debtor and his creditors.'" *Bestwall,* 148 F.4th, at 244 (Agee, C.J., concurring) (quoting *Siegel v. Fitzgerald*, 596 U.S. 464, 473–74 (2022), quoting *Wright*, 304 U.S. at 513–14).

But that proves too much. Every civil litigation involves "relations between [a] debtor and his creditors." Without a limiting principle, the bankruptcy power could displace ordinary judicial and procedural protections wholesale.

This Court's precedent supplies that limiting principle: when bankruptcy collides with other structural powers and protections, history defines its bounds. History teaches that the bankruptcy power is unavailable to debtors not actually or imminently failing to pay their debts. *See* 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1113, at 53 n.2 (1851). That is especially true where, as here, the asserted use of bankruptcy encroaches on other constitutional structures and protections.

The Fourth Circuit's approach contains no limiting principle. If bankruptcy extends to any dispute involving a debtor and creditors, the Bankruptcy Clause would authorize Congress to displace ordinary judicial processes whenever a defendant prefers a different forum. The Constitution does not permit such a result. The Petition should be granted to correct the errors of the courts below.

ARGUMENT

I. Historically, "Bankruptcy" Presupposed Financial Distress

Although the bankruptcy power has a "complex history," Professor Ralph Brubaker has observed that "tracing that history from our English ancestry through our colonial beginnings, Independence, the Founding, and up until the present day, reveals a remarkable consistency at its core."[2] The Supreme Court has consistently described the "subject of bankruptcies" as involving "the relations between an

[2] Ralph Brubaker, *Assessing the Legitimacy of the "Texas Two-Step" Mass-Tort Bankruptcy (Part III): The Constitutional Limits of the Bankruptcy Power*, 44 BANKR. L. LETTER No. 10, at 2–3 (2024).

insolvent or nonpaying or fraudulent debtor and his creditors." *Ry. Labor Executives'*, 455 U.S. at 466 (1982) (quoting *Wright*, 304 U.S. at 513–14 (1938), *quoting In re Reiman*, 20 F. Cas. 490, 496 (S.D.N.Y. 1874)).

That formulation reflects the historical premise of bankruptcy law: bankruptcy addresses debtors experiencing serious breakdowns in their payment relations with creditors—whether because they cannot pay their debts, they refuse to pay them, or they have engaged in fraud on creditors.[3] In modern terms, that condition can be described as "financial distress."

A. Early Federal Bankruptcy Statutes Required Financial Distress

The historical record confirms the necessity of financial distress in seeking bankruptcy relief. At the founding, the legal landscape included both English bankruptcy statutes and colonial insolvency laws. *See Cent. Va. Cmty. Coll.*, 546 U.S. at 363–64 (2006) (explaining that the Bankruptcy Clause incorporated both English bankruptcy law and colonial insolvency practice). English bankruptcy functioned primarily as a creditor remedy whereby debtors could be forced into bankruptcy if they failed or refused to satisfy

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[3] *See, e.g.*, Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5 (1995); Thomas E. Plank, *The Constitutional Limits of Bankruptcy*, 63 TENN. L. REV. 487, 526, 530 (1996); Jonathan C. Lipson, *Debt and Democracy: Towards a Constitutional Theory of Bankruptcy*, 83 NOTRE DAME L. REV. 605, 617–24 (2008) (describing bankruptcy as a collective constitutional response to financial distress and default).

obligations, while colonial and early American insolvency regimes permitted voluntary relief for debtors unable to pay their debts. *See id.*

Although these systems differed procedurally, both addressed the same basic, underlying condition: a debtor who could not pay, who would not pay, or who had engaged in fraud. Because the Debtor here has said it can and will pay its debts in full, Pet. at 6, it does not fall within that historical category and, therefore, is not a proper subject of a bankruptcy filing.

The role of financial distress in bankruptcy law becomes clear when examining how Congress exercised the bankruptcy power in the early years of the republic. The bankruptcy laws enacted after ratification consistently assumed that bankruptcy addressed debtors experiencing financial distress, whether manifested as inability to pay debts, unlawful refusal to satisfy obligations, or fraudulent conduct toward creditors.

Congress enacted no bankruptcy law until 1800. The first such law emerged in the aftermath of the Panic of 1797, which left many previously prosperous debtors imprisoned for unpaid obligations and prompted calls for a national insolvency regime.[4] The Bankruptcy Act of 1800 permitted only involuntary proceedings initiated by creditors against a debtor who had committed a statutory "act of bankruptcy." Bankruptcy Act of 1800, ch. 19, 2 Stat. 19 (Apr. 4, 1800).

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[4] *See* BRUCE H. MANN, REPUBLIC OF DEBTORS: BANKRUPTCY IN THE AGE OF AMERICAN INDEPENDENCE 197–205 (2002).

Because debtors could not voluntarily commence bankruptcy, the statute functioned primarily as a creditor-collection mechanism directed at debtors who had defaulted on obligations or engaged in evasive conduct. Yet, contemporaries widely understood that the law could provide relief to distressed debtors as well. When news of the statute reached the debtors' prison in New York, inmates reportedly toasted the passage of what they called "this Godlike act," expecting it would offer them a path to discharge and freedom.[5]

The statutory "acts of bankruptcy" under the 1800 act—including refusal to pay debts, fraudulent transfers, concealment of assets, or absconding—served as proxies for financial distress. They signaled that a debtor could not or would not meet obligations as they came due. More specifically, those acts targeted conduct that delayed, obstructed, or defeated creditors' ability to obtain process against the debtor or the debtor's assets.[6] Historical records confirm that distress in these cases was genuine: most bankrupt estates returned only pennies on the dollar to creditors.[7]

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[5] *Id.* at 8–11 (describing how English bankruptcy law required creditors to establish that a debtor had committed an "act of bankruptcy," such as fraudulent concealment of assets or flight from creditors, before bankruptcy proceedings could commence).

[6] Jonathan C. Lipson & Jennifer L. Vandermeuse, *Stern, Seriously: The* Article *I Judicial Power, Fraudulent Transactions, and Leverage Buyouts*, 2013 WIS. L. REV. 1161, 1170–74 (2013) (discussing the role that fraudulent conveyance law performed in protecting judicial and legal process integrity).

[7] B. MANN, *supra* note 4, at 203–05.

Congress later expanded bankruptcy beyond the English model by permitting voluntary relief. Beginning with the Bankruptcy Act of 1841, federal bankruptcy law permitted both voluntary and involuntary proceedings. Even so, financial distress remained the central premise of bankruptcy relief.

The Bankruptcy Act of 1841 (in force until 1843) required voluntary petitioners to attest that they were "unable to pay all [their] debts in full." Bankruptcy Act of 1841, ch. 9, § 1, 5 Stat. 440 (Aug. 19, 1841). Likewise, the Bankruptcy Act of 1867 (repealed in 1878) allowed voluntary filings only by debtors unable to pay their debts. Bankruptcy Act of 1867, ch. 176, § 14, 14 Stat. 517 (Mar. 2, 1867). Involuntary proceedings remained available when a debtor engaged in conduct that indicated a breakdown in the debtor's payment relations with creditors, such as the refusal to pay debts or the concealment of assets.

Courts interpreting these early statutes likewise assumed that bankruptcy presupposed financial distress. Colonial insolvency statutes had long provided for distribution of a debtor's estate without relieving the debtor of liability.[8] Bankruptcy uniquely paired insolvency with discharge. In that sense, bankruptcy historically functioned as insolvency plus discharge.

Critically, early American bankruptcy legislation was directed at debtors who had failed to pay their debts as they came due, confirming that bankruptcy

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[8] Imprisonment for failure to pay debts was then an important creditor remedy, and these insolvency statutes, although varying among jurisdictions and over time, primarily provided for release from debtor's prison. *See* Plank, *supra* note 3, at 518-25.

was triggered by a breakdown in payment relations, and financial distress remained a central condition to such relief.[9] As Justice Catron explained: "Our law contemplated a proceeding by a debtor against his creditors, provided the debtor was insolvent." *In re Klein*, 42 U.S. (1 How.) 277 (C.C.D. Mo. 1843).

Accordingly, although early bankruptcy law evolved beyond the English model and permitted voluntary relief, the historical record—in particular Congress's actual use of the bankruptcy power in early legislation—consistently reflects a shared premise: bankruptcy addressed debtors experiencing financial distress.

B. The Current Bankruptcy Code Presumes Insolvency, Rebuttable as a Showing of a Lack of Good Faith

By 1978, Congress recognized that requiring proof of insolvency or an "act of bankruptcy" in every case created unnecessary delay. In enacting the Bankruptcy Reform Act of 1978, Congress eliminated these formal prerequisites at the commencement stage. Under the current bankruptcy law, 11 U.S.C. §§ 101, et seq. (the "Bankruptcy Code"), a voluntary case begins simply with the filing of a petition. 11 U.S.C. § 301(a).

Congress adopted this approach to avoid costly threshold litigation and to encourage early resort to

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[9] *See, e.g.*, Plank, *supra* note 3, at 518–25, 526 (explaining that early bankruptcy regimes targeted debtors unable or unwilling to pay their debts and relied on acts of bankruptcy reflecting default); Tabb, *supra* note 3, at 7–10 (describing early bankruptcy statutes as addressing debtors who failed to satisfy obligations to creditors).

reorganization before financial deterioration became irreversible. Under prior law, initiating bankruptcy often required litigating whether the debtor was insolvent or committed an "act of bankruptcy"—an inquiry Congress viewed as technical and wasteful. H.R. Rep. No. 95-595, at 322–23 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6279–80.

The legislative history emphasizes that Chapter 11 was designed to promote speed and minimize value destruction caused by delay. *Id.* at 220–21, 232–34, reprinted in 1978 U.S.C.C.A.N. at 6179–81, 6191–93. Accordingly, Congress provided that a voluntary case—and the corresponding order for relief—would arise automatically upon the filing of the petition itself. 11 U.S.C. § 301; S. Rep. No. 95-989, at 31–32 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5817–18.

Nothing in the legislative history suggests that Congress intended Chapter 11 to serve as an all-purpose liability-management device for a solvent debtor facing no financial distress. Instead, Congress assumed that courts would police abusive filings through the doctrine of good faith. H.R. Rep. No. 95-595, at 405.

Modern case law reflects this understanding. Courts routinely treat financial distress as the predicate of a good-faith Chapter 11 filing. *See, e.g.*, *In re LTL Management, LLC*, 64 F.4th 84, 103–04 (3d Cir. 2023) (noting "financial distress is vital to [a] good faith [filing]"); *In re Integrated Telecom Express, Inc.*, 384 F.3d 108, 128 (3d Cir. 2004) (a valid reorganizational purpose "assumes a debtor in financial distress"). In this way, the good-faith doctrine functions as the modern successor to the earlier statutory distress requirements.

The court below erred by applying an historically erroneous understanding of the role of financial distress in bankruptcy and thereby permitting bankruptcy to proceed in the absence of the conditions that historically justified the exercise of the bankruptcy power.

C. Founding-era Usage Also Presumed that Bankruptcy Meant Financial Distress

This Court increasingly looks to the original public meaning of constitutional terms. *See, e.g.*, *New Prime Inc. v. Oliveira*, 586 U.S. 105, 113–15 (2019); *Wis. Cent. Ltd. v. United States*, 585 U.S. 274, 277–80 (2018); *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 25–26 (2022).[10] Founding-era sources confirm that "bankruptcy" commonly described economic collapse—that is, financial distress.

In a 1765 letter published by Benjamin Franklin, for example, colonial economic conditions were described in explicitly functional terms ("our debts multiplying, and no way to pay them") followed by the observation that "bankruptcies are daily following

[10] Amici take no position on whether "original public meaning" should be an interpretive method, but reference it here because it appears that several members of the Court find it helpful under some conditions. *See, e.g.*, Victoria Nourse, *The Paradoxes of a Unified Judicial Philosophy: An Empirical Study of the New Supreme Court*: 2020–2022, 38 CONST. COMMENT. 1, 4 (2023) (characterizing the current Court by a "uni[ty]" in "judicial philosophy" centered around "original public meaning []"-based interpretation).

bankruptcies."[11] Bankruptcy was presented not as a procedural choice, but as the cascading result of widespread financial distress.

Earlier popular writing reflects the same usage. In a 1722 essay printed in *The New-England Courant*, Franklin (writing pseudonymously as Silence Dogood) described tradesmen whose "Trade decays" or suffers losses until "he Breaks," after which he would face the coercive consequences of bankruptcy under English law.[12] In these sources, bankruptcy denotes commercial failure, something that befalls debtors as a consequence of economic collapse. In 1755, Samuel Johnson's Dictionary defined "bankruptcy" as "In debt beyond the power of payment."[13]

Scholarly work confirms that this understanding was widespread. Professor Thomas E. Plank collected numerous founding-era dictionary definitions equating "bankruptcy" with insolvency or inability to pay debts.[14]

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[11] Letter from Charles Thomas, "A Merchant in Philadelphia," to Benjamin Franklin (1765).

[12] Silence Dogood, *No. 10*, THE NEW-ENGLAND COURANT, Aug. 13, 1722.

[13] SAMUEL JOHNSON, DICTIONARY OF THE ENGLISH LANGUAGE (London, W. Strahan 1755).

[14] Plank, *Constitutional Limits, supra* note 3, at 526:

> The first [A]merican edition of Perry's The Royal Standard English Dictionary printed in 1794, the 1790 third edition, and the 1796 sixth edition (which was printed in Philadelphia) of Sheridan's Dictionary of the English Language contain[] similar definitions for "bankrupt" and "bankruptcy" and their synonyms "insolvent"

Across these materials, bankruptcy is used descriptively to explain the consequences of financial failure. Authors explain why bankruptcy occurs—losses, multiplying debts, inability to pay—without needing to further define the term itself. The ordinary meaning of the term thus presupposed financial collapse rather than merely describing a procedural device available regardless of a debtor's financial condition.

> and "insolvency" or their antonyms "solvent" or "solvency."

Professor Plank's sources were as follows:

> WILLIAM PERRY, THE ROYAL STANDARD ENGLISH DICTIONARY (3rd ed.) (1st American ed. Massachusetts 1794) ("Bankrupt . . . . one who cannot pay his debts"; "Bankruptcy, . . .The state of a bankrupt"; "Solvency . . . . an ability to pay"; "Solvent, a. able to pay debts"); I THOMAS SHERIDAN, DICTIONARY OF THE ENGLISH LANGUAGE (3d ed. London 1790) ("Bankruptcy f. The state of a man broken, or bankrupt; the act of declaring one's self bankrupt"; "Bankrupt, f. A person incapable of paying his debts; one against whom a commission of bankruptcy is awarded"; "Bankrupt, a. In debt beyond the power of payment"; "Insolvent, a. Unable to pay"; "Insolvency, f. Inability to pay debts"); THOMAS SHERIDAN, DICTIONARY OF THE ENGLISH LANGUAGE (6th ed. Philadelphia 1796) ("Bankrupt, a. In debt beyond the power of payment"; "Bankrupt, f. A man in debt beyond the power of payment"; "Bankruptcy, f. The state of a man broken, or bankrupt"; "Insolvent, a. Unable to pay"; "Insolvency, f. Inability to pay debts").

Id. at 530, n. 226.

II. This Court's Structural Bankruptcy Jurisprudence Presupposes Historically Bounded "Bankruptcies"

Historical practice and understanding become especially important when the bankruptcy power threatens limits on other structural powers and protections, including the Article III judicial power and the Seventh Amendment jury-trial right. In these and related contexts, this Court has looked to history to determine the permissible scope of Congress's authority to structure bankruptcy relief.

A. Article III Limits the Scope of the Bankruptcy Power

Article III vests "[t]he judicial Power of the United States" in courts whose judges enjoy life tenure and salary protection. U.S. CONST. art. III, § 1. The federal judicial power shall "extend to all Cases, in Law and Equity," within certain enumerated categories, for example between citizens of different states. *Id.* § 2. These guarantees safeguard the structural independence of the federal judiciary and the power of states to create their own judicial systems.[15]

From the earliest days of the republic, bankruptcy has been understood to involve judicial adjudication. As this Court observed, "[e]very bankrupt or insolvent system in the world[] must partake of the character of a judicial investigation." *Ogden v. Saunders*, 25 U.S. 213, 366 (1827). Because the bankruptcy power is

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[15] *See* Thomas E. Plank, *Why Bankruptcy Judges Need Not and Should Not Be Article III Judges*, 72 AM. BANKR. L.J. 567, 631–35 (1998) (discussing the need to limit bankruptcy court power to protect state-court adjudicatory processes).

exercised through federal courts, the subject of "Bankruptcies" must remain judicially cognizable and cabined. Otherwise, it would collapse into a general regulatory power. U.S. CONST. art. I, § 8, cl. 4; *see United States v. Lopez*, 514 U.S. 549, 552–53 (1995).

Consistent with that premise, this Court has repeatedly relied on history to police the boundary between the bankruptcy power and Article III. In *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, the Court held that bankruptcy courts could not adjudicate a state-law contract claim between private parties because such claims lay outside the traditional domain of bankruptcy. 458 U.S. at 71–72 (1982). Such a claim was "the stuff of the traditional actions at common law tried by the courts at Westminster in 1789," and thus a matter for adjudication by an Article III or competent state court—not the bankruptcy court. *Id.* at 90 (Rehnquist, C.J., concurring). The Court reaffirmed that principle in *Stern v. Marshall*, explaining that Congress's designation of a matter as "core" does not resolve the constitutional question—history does. 564 U.S. at 484–85 (2011) (quoting *Marathon,* 458 U.S. at 90 (1982)).

Likewise, in *Central Virginia Community College v. Katz*, the Court grounded Congress's authority to abrogate state sovereign immunity in the founding-era understanding of bankruptcy as a collective system for administering a debtor's estate. 546 U.S. at 363–64 (2006). These decisions reflect a common premise: the structural limits on bankruptcy adjudication depend on the historical boundaries of the subject itself.

B. The Seventh Amendment Imposes a Parallel Historical Constraint

The Seventh Amendment preserves the right to a jury "[i]n Suits at common law." U.S. CONST. amend. VII. Congress cannot eliminate that right merely by placing traditional legal claims within the bankruptcy system. *Granfinanciera*, 492 U.S. at 52–55 (1989).

Under *Granfinanciera*, the relevant inquiry is whether the claim resembles a traditional common-law action in 1789. *Id.* at 42–43. If so, the jury right remains unless the claim falls within the narrow category of "public rights." *Id.* at 51–55. Applying that framework, the Court held that a fraudulent-transfer action could not be adjudicated without a jury simply because Congress labeled it a "core" bankruptcy proceeding. *Id.* at 55–56.

Personal-injury tort claims fall even more clearly within the Seventh Amendment's protection. Such claims are paradigmatic common-law causes of action historically resolved by juries. Congress recognized this when it enacted 28 U.S.C. § 1411, which preserves the jury-trial right for personal-injury and wrongful-death claims.

Modern asbestos reorganizations, however, effectively remove those claims from the jury system. Plans confirmed under 11 U.S.C. § 524(g) channel present and future asbestos claims to a trust that resolves claims through administrative procedures rather than adjudication. Claimants typically receive compensation according to scheduled values and payment percentages designed to preserve trust assets for future claimants, often yielding recoveries far below the nominal value assigned to the claim.

Although jury trials remain theoretically available, the structure of trust compensation—discounted payments combined with the costs and risks of individual litigation—makes pursuing a jury verdict economically impractical in most cases. The system thus substitutes an administrative compensation regime for the jury-based adjudication that historically defined personal-injury tort law, which has otherwise been forbidden by this Court. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846, 860 (1999).[16]

C. Due Process Also Limits the Use of Bankruptcy to Extinguish Private Claims

The Due Process Clauses impose an independent constraint on the use of bankruptcy to restructure and extinguish private rights, paralleling the historical concerns that limit bankruptcy's intrusion on judicial and jury protections. The Fifth and Fourteenth Amendments provide that the government may not "deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amends. V, XIV, § 1.

This Court has repeatedly emphasized that aggregate procedures cannot override fundamental fairness where claimants' rights are adjudicated or impaired without adequate procedural protections. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 626–27 (1997); *Ortiz*, 527 at 846–48 (1999). These concerns are acute in the asbestos context, where § 524(g) channeling injunctions replace individualized

[16] *See also* Brubaker, *supra* note 2, at 11–12 & nn. 123–24.

adjudication with administrative compensation schemes that bind present and future claimants alike.

The constitutional justification for that displacement has always depended on the presence of a debtor in genuine financial distress whose estate must be administered collectively. Bankruptcy historically operated as a proceeding directed at the debtor's limited assets, justifying the aggregation and adjustment of claims that could not otherwise be satisfied in full. But where, as here, the debtor is neither insolvent nor unable to pay its debts as they come due, that justification disappears. What remains is not the collective administration of a distressed estate, but the use of the federal bankruptcy power to extinguish and restructure private rights for the benefit of wealthy mass tort defendants.

This Court has cautioned that bankruptcy cannot be used to adjudicate and eliminate private rights that lie beyond its historical domain. *See N. Pipeline*, 458 U.S. at 71–72 (1982); *Granfinanciera*, 492 U.S. at 52–55 (1989). Yet that is precisely what occurs when a solvent enterprise invokes Chapter 11 to channel tort claims into a trust that replaces jury adjudication with scheduled payouts and bars claimants from pursuing non-debtor parties.

Courts have recognized that such extensions of bankruptcy raise serious constitutional concerns, particularly where they affect the rights of claimants against entities that have not themselves entered bankruptcy. *See In re Combustion Engineering, Inc.,* 391 F.3d 190, 245–46 (3d Cir. 2004) (holding that asbestos trust structures "implicate due process[,]" especially regarding the adequate representation of future claimants); *In re Johns-Manville Corp.*, 600

F.3d 135, 148–49 (2d Cir. 2010) (holding that parties could not be bound by a bankruptcy injunction absent constitutionally sufficient notice). These concerns are also reflected in contemporary scholarship examining the use of bankruptcy to restructure mass-tort liabilities.[17]

Absent financial distress, there is no principled basis for subordinating the ordinary processes of adjudication—including the right to a jury trial and the protections of Article III courts—to an administrative compensation regime. If bankruptcy may be used in this manner, then any solvent defendant facing substantial tort liability could invoke Chapter 11 to cap exposure, control litigation, and displace the civil justice system. The Constitution does not permit such a result.

These due process concerns reinforce the historical limits on the bankruptcy power described above. Bankruptcy has always been understood as a mechanism for resolving the affairs of a financially distressed debtor, not as a device by which wealthy entities may redesign legal processes for resolving claims against themselves and their insiders and affiliates. Extending the bankruptcy power to permit that result would allow Congress to displace core due

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[17] *See, e.g.*, Pamela Foohey & Christopher K. Odinet, *Silencing Litigation Through Bankruptcy*, 109 VA. L. REV. 1261, 1265–70, 1275–80 (2023) (arguing that mass-tort bankruptcies can suppress claimant participation and displace traditional adjudicatory processes); Michael A. Francus, *Designing Designer Bankruptcy*, 102 TEX. L. REV. 1205, 1210–15 (2024) (describing modern mass-tort bankruptcies as "designer bankruptcies" in which defendants structure proceedings to control the treatment of liabilities).

process protections whenever a defendant prefers an alternative forum.

CONCLUSION

The Constitution grants Congress the authority to enact "uniform Laws on the subject of Bankruptcies." But, as Professor Melissa Jacoby has observed, "[a]sserting a goal of maximizing value"—as the Debtor has below—"does not make a matter fit the Constitution's bankruptcy clause."[18] That grant presupposes a constitutionally bounded subject: the resolution of financial distress through a collective federal process.

This Court has consistently looked to history to determine the bounds of the "subject of bankruptcies," and has consistently found it is defined by financial distress, whether evidenced by a debtor's insolvency, unlawful refusal to pay, or fraud on creditors. It has emphasized the importance of that history when the bankruptcy power conflicts with other structural powers and protections, such as the right to a merits trial before a judge and jury.

The Debtor here presents no financial distress. Instead, it seeks to use the bankruptcy process to obtain a litigation advantage it could not enjoy outside bankruptcy. The lower courts failed to appreciate critical historical limits on the bankruptcy power that would preclude this use of that power. This Court should grant the Petition and reverse the errors of the lower courts.

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[18] Melissa B. Jacoby, *Sorting Bugs and Features of Mass Tort Bankruptcy*, 101 TEX. L. REV. 1745, 1771 (2023).

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