

No. 26-263

IN THE
Supreme Court of the United States

OFFICIAL COMMITTEE OF TALC CLAIMANTS,

Petitioner,

v.

WHITTAKER, CLARK & DANIELS, INC., *et al.*,

Respondents.

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

**BRIEF FOR *AMICUS CURIAE* WHEN JUSTICE
IN SUPPORT OF PETITIONER**

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INTERESTS OF AMICUS CURIAE¹

WHEN Justice is a 501(c)(3) nonprofit organization dedicated to advancing corporate accountability and effective remedies for conduct that harms human health and the environment. WHEN Justice supports the use of legal and regulatory mechanisms to ensure that entities responsible for environmental and human-health harms bear the costs of those harms rather than shifting them to individuals, communities, and taxpayers. Its work is grounded in the principle that economic prosperity, innovation, environmental protection, and public well-being are mutually reinforcing—not competing—objectives. WHEN Justice has a particular interest in preserving meaningful avenues of redress, including traditional state-law remedies, where misconduct causes harm to communities.

SUMMARY OF THE ARGUMENT

Who owns a tort claim? State law supplies a common-sense answer: the victim who was injured. At common law, victim and claim were so intertwined that the claim could not be voluntarily assigned. In most States, this remains the case.

Congress did not rewrite State tort law when it enacted the Bankruptcy Code. Section 541 brings the debtor's preexisting claims into the estate, where they

¹ No counsel for a party authored this brief in whole or in part, and no person or entity other than amicus curiae or its counsel made a monetary contribution to fund its preparation or submission. Counsel for amicus curiae provided notice of its intent to file at least 10 days before the due date.

may be pursued, resolved, and released. It does not enlarge the debtor's rights. Nor does it eliminate anyone else's.

The Third Circuit held otherwise. It took victims' mesothelioma claims against Brenntag, the solvent buyer of Whittaker's business, and made them the property of the estate of the company that harmed them. The result: victims' claims were released without their consent.

Its rule gives Section 541 a meaning the text cannot bear and an effect the Constitution forbids.

On text, Section 541 asks only whether the debtor owned the claim when the case began. The Third Circuit gave victims' claims to Whittaker's estate simply because they rested on a common theory of liability against Brenntag. It did not matter what state law said, who suffered the injury, or who would receive the recovery. Commonality is a test for aggregation, not ownership.

More troubling, the Third Circuit's construction makes Section 541 unconstitutional twice over: the transfer is a taking, and its effect—releasing third parties without the true claimholder's consent—violates due process.

First, the bankruptcy power, like every other, is subject to the Takings Clause. *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 589 (1935). Congress cannot give a debtor's estate property that belongs to someone else. The day before Whittaker entered bankruptcy, the claim belonged to the victim.

The day after, it belonged to the estate. No one paid the victim.

In every bankruptcy, claims against the debtor are given a haircut. That is the bankruptcy power at work. But appropriating the claims of one nondebtor against another nondebtor has never been part of bankruptcy. And taking from A simply to give to B is the very mischief the Takings Clause exists to prevent.

Second, once the claim is given to the estate, it can be settled without the victim's consent. Here, it was. Due process protects a plaintiff's right to control and settle her claim. That is why she can ordinarily opt out of a class action. When there is not enough to go around, the Constitution permits forced aggregation and resolution of claims. But *Brenntag* is not insolvent, is not a limited fund, and has not declared bankruptcy.

"[W]ord games cannot obscure the underlying reality." *Harrington v. Purdue Pharma L.P.*, 603 U.S. 204, 223 (2024). Simply calling this an estate release does not cure the constitutional defect.

* * *

Purdue recognized that the victims' claims against the Sacklers did not belong to Purdue and were not derivative of any injury to it. The Code therefore did not authorize their release without the victims' consent. Under the Third Circuit's test, the Sacklers could slip out the back door by renaming verboten third-party releases estate releases. The Court should grant review.

ARGUMENT

I. Section 541 Did Not Overturn the Common-Law Rule That Personal-Injury Claims Belong to the Injured.

When people are injured or property is damaged, tort law gives the victim a right to seek compensation. That right—a *chose in action*—is an ancient property interest.

Claim and injury are inseparable: the injury both creates the right and sets the damages owed. Congress legislated against this common-law background when it enacted the Bankruptcy Code. It did not alter it.

Section 541 does not create new property interests; it requires the bankruptcy court to identify the interests the debtor already had. When a claim arises under state law, state law determines who owns it. And there is an easy way to test that ownership: see who gets paid after trial. In a personal-injury case, that is the victim, not the tortfeasor.

The Third Circuit reached the opposite result by asking the wrong question—whether the victims pursued a common theory of liability against Brenntag. But the fact that one victim’s claim resembles another does not deprive either of them of ownership.

A. Personal-injury claims are property interests that belong to victims.

1. Tort law rights “private wrongs” by providing compensation when people suffer bodily or property harm. *See* 3 William Blackstone, *Commentaries* *2–3 (1768); W. Page Keeton et al., *Prosser & Keeton on the Law of Torts* § 1, at 5–6 (5th ed. 1984).

The claims tort law creates are property rights themselves. “When you are injured, *you* have a claim against the tortfeasor; it does not belong to someone else or to the state.” D. Theodore Rave, *Tort Claims as Property Rights*, 69 DePaul L. Rev. 587, 588 (2020).

This right to seek damages ripens “the instant [the victim] receives the injury.” 3 Blackstone, *supra*, at *116. And the damages themselves are measured by the injury—the amount that would make the plaintiff whole. Thus, the personal injury creates and sets the scope of the property right.

2. For centuries, tort claims (particularly for personal injury) could not be separated from the individual who suffered the harm. This was true even in bankruptcy.

In *Comegys v. Vasse*, Justice Story distinguished “mere personal torts,” which were “not capable of passing by assignment,” from claims growing out of property, which could pass to a debtor’s assignees for the benefit of creditors. 26 U.S. (1 Pet.) 193, 213, 218–19 (1828). *A fortiori*, the claims of a debtor’s victims—which grow out of *their* person—were never the debtor’s property.

This principle governed common-law rules outside bankruptcy. “[A] chose in action always presupposes a personal relation between two individuals. [And] a personal relation in the very nature of things cannot be assigned.” J.B. Ames, *The Disseisin of Chattels: The Inalienability of Choses in Action*, 3 Harv. L. Rev. 337, 339 (1890). Their uniquely personal nature is also why tort claims did not survive the victim’s death at common law. *Robertson v. Wegmann*, 436 U.S. 584, 589 (1978).

3. Legislatures have softened this rule against separability, but the modifications have mostly increased the claimholder’s rights or protected the claim itself. In the few States where a personal-injury claim can be assigned, see Anthony J. Sebok, *The Inauthentic Claim*, 64 Vand. L. Rev. 61, 74–75 (2011) (surveying state law), the claimholder has gained the right to transfer it. Survival statutes, which are now common, preserve the claim upon the victim’s death. See *Robertson*, 436 U.S. at 589; Restatement (Second) of Torts § 926 cmt. a (1979).

And while creditors can now reach an individual debtor’s personal-injury claims—because Section 541 makes them part of his estate—in most cases, he *seeks* bankruptcy protection. He thus chooses to give up the claim. See *Purdue*, 603 U.S. at 221. Even when bankruptcy is involuntary, he still gets the benefit of a discharge. And better still, an individual debtor can shield some of his *own* personal-injury recovery from *his* creditors. 11 U.S.C. § 522(d)(11)(D)–(E).

The Third Circuit provides no comparable protection or reciprocal benefit when it hands over the

victim's personal-injury claims to the estate. Indeed, its rule—which severs a living victim from a personal-injury claim against her will, gives that claim to someone else, and leaves her empty-handed—resembles no legislative scheme amicus has seen.

B. Section 541 does not expand the debtor's property rights, nor diminish the property rights of victims.

When Congress enacted Section 541, it legislated against this common-law background, and it used a few words to convey a simple concept: the estate takes the property and claims the debtor had when the case began.

Congress does not hide elephants in mouseholes or confer transformative power through oblique language. Bankruptcy is no exception. *See Purdue*, 603 U.S. at 224.

A power to gather the debtor's property is not the power to redefine what everyone else owns. Personal-injury claims have always belonged to the victims. If Congress had meant Section 541 to move victims' claims against third parties into the debtor's estate, it would have said so. *Ibid.*

1. The text of Section 541 is short. The estate comprises “all legal or equitable interests *of the debtor* in property *as of the commencement* of the case.” 11 U.S.C. § 541(a)(1) (emphasis added). It asks one question: what did the debtor own when the case began?

Property rights—the debtor’s or anyone else’s—are chiefly set by state law. *Butner v. United States*, 440 U.S. 48, 55 (1979); see Pet. 21–24. And Section 541 does not reassign what belongs to others under it. *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 204 n.8 (1983).

2. The estate stands in the debtor’s shoes, not those of creditors. This Court drew that line in *Caplin v. Marine Midland Grace Trust Co.*, holding that a trustee could not assert creditors’ claims against a third party under the prior Act. 406 U.S. 416, 428–29, 434 (1972).

When Congress enacted the current Code, a provision overruling *Caplin* was proposed and then dropped. See H.R. Rep. No. 95-595, at 370–71 (1977) (proposed § 544(c) “overrules *Caplin*”); 124 Cong. Rec. H11,097 (daily ed. Sept. 28, 1978). This history reinforces the plain reading of Section 541’s text. Congress left the line where *Caplin* drew it. See *In re Ozark Rest. Equip. Co.*, 816 F.2d 1222, 1226–28 (8th Cir. 1987).

3. *Purdue* confirms this reading. The bankruptcy bargain is: put up all *your* assets; discharge *your* debts. 603 U.S. at 221. There is no equity in or sense to that bargain if the debtor is taking someone else’s assets—and by so doing, releasing a third party’s debts. Nor was there a historical practice of bankruptcy courts “discharg[ing] claims brought by nondebtors against other nondebtors” that suggests Congress would have expected them to have this power. *Id.* at 223–24.

The distinction *Purdue* drew between derivative claims and the claims against the Sacklers confirms that Section 541 does not reach victims' tort claims against a third party (regardless of whether they rest on vicarious, secondary, or successor liability). When a company is looted by one of its officers, a shareholder can bring a derivative claim, but the shareholder is "only a nominal plaintiff"; "[t]he substantive claim belongs to the corporation." *Id.* at 219 (citation omitted). The shareholder can sue only if the company has a valid cause of action; the injury vindicated by the suit is the company's; and any damages return to the company. *See Ross v. Bernhard*, 396 U.S. 531, 538 (1970). If the company declares bankruptcy, of course that claim belongs to the estate.

But as this Court held, the claims against the Sacklers were "nothing like that"; those claims "belong[ed] to their victims." *Purdue*, 603 U.S. at 219. And thus, they could not be "bargained away without the consent of those affected, as if the claims were somehow Purdue's own property." *Id.* at 220.

C. The Third Circuit took victims' claims by mistaking commonality for ownership.

The decision below reached the wrong result because it applied the wrong test. Section 541 asks who owns a claim. The Third Circuit asks whether it is common. By stopping at commonality, the test never reaches state law—which gives these claims to the victims.

Twice now, the Third Circuit has given a tortfeasor's estate claims that, like those against the Sacklers, belonged to their victims. Twice is too often. More will come because the test has no stopping point.

1. The Third Circuit reached its rule in three steps that took it farther and farther from the text of Section 541.

First came the lower-court framework for classifying creditors' claims: so-called "general" claims belong to the estate; "personal" claims remain with the creditor. *In re Emoral, Inc.*, 740 F.3d 875, 879 (3d Cir. 2014). At best, that framework restates what Section 541 and *Butner* already require; at worst, as *Emoral* and the decision below show, it invites courts to skip the ownership inquiry.

Then, *Emoral* applied that framework to victims' claims against a company that had bought the debtor's assets before bankruptcy. In part of the opinion, *Emoral* acknowledged that the debtor must have had standing to pursue the claim prior to its bankruptcy, *ibid.*, but its analysis quickly abandoned that mooring. Despite it being "difficult to imagine" that a solvent *Emoral* could have sued for the victims' personal injuries, the Third Circuit held the claims were estate property because the plaintiffs' theory was not "unique to them" and success for one would mean success for all. *Id.* at 879–81.

Finally, the decision below made explicit what *Emoral* left implicit. A claim may now be estate property even if the debtor could not have asserted it

under state law. *In re Whittaker Clark & Daniels Inc.*, 176 F.4th 241, 265 & n.21 (3d Cir. 2026).

2. The result is a test for Section 541 that turns solely on whether creditors share a theory of liability. But a theory of liability is not a property interest; it is a means of establishing liability. *Cf. Keene Corp. v. United States*, 508 U.S. 200, 212–13 (1993). A claim may become stronger or weaker depending on the theory asserted. Its ownership does not change with the theory.

By focusing on the theory of liability against the defendant, the Third Circuit’s test ignores the defining feature of the claim and what brought it into being—the victim’s individual injury. Judge Cowen recognized this flaw in *Emoral*: victims’ claims are “inextricably tied to—and cannot be considered separate or apart from—their underlying personal injury.” 740 F.3d at 883 (Cowen, J., dissenting). The majority treated the *sine qua non*—no claim would have existed without the injury—as irrelevant.

Having made this mistake in *Emoral*, the Third Circuit below simply declared the victims’ common claims “derivative” of a claim Whittaker never had. *Whittaker*, 176 F.4th at 266–67. Not so. A claim is not derivative merely because liability is indirect. As *Purdue* shows, a claim is derivative when the plaintiff sues on another’s substantive right, not because liability rests on another party’s conduct. In a derivative suit, the plaintiff vindicates an injury to the corporation and gets nothing individually if the case succeeds. *See supra* Part I.B.3; *Purdue*, 603 U.S. at 219. These claims are nothing like that. Neither

Emoral nor Whittaker was injured by the asset sale—certainly neither suffered a personal injury. Nor was either entitled to share in the victims’ tort recoveries if they prevailed.

Even if the sale were a fraudulent conveyance, two claims can rest on the same transfer and belong to different people. The estate could take over any claims for looted assets. 11 U.S.C. §§ 544(b), 548. But victims would retain their claims for personal injury.

3. There is no reason the Third Circuit’s test will stop at successor liability. If a bankruptcy court can determine ownership of a claim without reference to a state-law right to recovery on a particular injury, and a common theory of liability suffices, any claim that depends on the debtor’s conduct will be estate property.

A solvent parent company that assumed a subsidiary’s liability is already trying to release its own mass-tort liability through that subsidiary’s bankruptcy. *See* Ruling on Disclosure Statement, *In re Kidde-Fenwal, Inc.*, No. 23-10638-LSS (Bankr. D. Del. June 16, 2025); *see also* Pet. 30–31 & n.4.

And this will not stop at parent companies or asset purchasers. Consider agency. If a company hired a crop duster to spray its fields, but he sprayed a whole town instead, what happens when the crop duster declares bankruptcy? The townspeople’s claims have a common theory of liability that runs through the debtor, so they are now estate property. And the company that hired him can buy its release from the estate.

The same would be true for the Sacklers. Their liability depended on Purdue's opioids. If the victims would have had no claim against the Sacklers without Purdue, the logic of the decision below makes those claims property of Purdue's estate.

* * *

Section 541 asks one question: whose property is it? That inquiry does not give bankruptcy courts discretion or invite consideration of policy. Estate ownership might make the claims easier to resolve, but Section 541 is not about simplifying bankruptcy or increasing creditor recoveries. Commonality may justify coordination. Efficiency may justify aggregation. Neither is a test for ownership.

II. The Third Circuit's Test Runs Section 541 Headfirst into the Fifth Amendment.

The text of Section 541 does not compel the decision below. Worse, the Third Circuit's reading creates twin constitutional problems: the act (of transferring claims to the estate) is contrary to the Takings Clause; the effect (of releasing them without the plaintiff's consent) violates the Due Process Clause.

A. Personal-injury claims are constitutionally protected property.

"No person shall . . . be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V.

Personal-injury claims are *choses in action*—rights to sue—and property of the victim. *Supra* Part I.A. The claim *is* property before judgment fixes its value; and even a claim that ultimately fails *was* property. *See* Rave, *supra*, at 589; *cf.* 3 Blackstone, *supra*, at *116.

This right to sue “is a constitutionally recognized property interest” protected by the Due Process Clause. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 807 (1985); *accord* *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982). And nothing in the text justifies protecting a chose in action as “property” under the Due Process Clause, but not as “private property” under the adjacent Takings Clause.²

This Court has specifically recognized that a “chose in action” falls within the sovereign’s power to take. *Cincinnati v. Louisville & Nashville R.R. Co.*, 223 U.S. 390, 400 (1912). If it is property that can be taken, symmetry requires that it be property that is protected. The government can no more appropriate a claim without satisfying the Takings Clause than it can extinguish it without satisfying the Due Process Clause.

² This textual difference may, however, explain why the two protections are not perfectly coextensive: a government-created entitlement may qualify as “property” for due-process purposes without necessarily being “private property” protected from a taking. But the difference cannot turn on tangibility because the Takings Clause protects intangible property. *See Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003–04 (1984).

B. The Takings Clause does not permit Congress to take a claim from a victim and give it to the tortfeasor; bankruptcy is no exception.

Bankruptcy judges resolve, discount, and even deny creditors' claims against debtors every day. That is what bankruptcy is for, and the Takings Clause has never stood in the way.

The Third Circuit's rule does something else. Before Whittaker filed for bankruptcy, the victims owned their state-law claims against Brenntag; now, Whittaker's estate does. Bankruptcy judges cannot give the debtor someone else's claim against a stranger to the bankruptcy. That power is foreign to the *Purdue* bargain and forbidden by the Takings Clause.

1. Bankruptcy is not *sui generis*. "The bankruptcy power, like the other great substantive powers of Congress, is subject to the Fifth Amendment." *Radford*, 295 U.S. at 589. Congress "may discharge the debtor's personal obligation," but it cannot take others' rights in property for the benefit of the debtor or his creditors. *Id.* at 589–90.

The rule holds "[h]owever great the Nation's need." *Id.* at 602. A power may make sense or be efficient, but "that inquiry is quite separate from the question whether the enactment takes property within the prohibition of the Fifth Amendment." *United States v. Sec. Indus. Bank*, 459 U.S. 70, 74–75 (1982).

2. “It is against all reason and justice, for a people to entrust a Legislature with” the power to simply “take[] property from A. and give[] it to B.” *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798) (opinion of Chase, J.). The whole Court could not agree on much in *Kelo v. City of New London*, 545 U.S. 469 (2005), but everyone reaffirmed that basic principle. *See id.* at 477; *id.* at 490 (Kennedy, J., concurring); *id.* at 494, 504–05 (O’Connor, J., dissenting); *id.* at 512 (Thomas, J., dissenting).

Thus, to satisfy the Takings Clause, taken private property must be put to public use and payment must be made. The Third Circuit’s rule flunks both requirements. It takes A’s claim against a third party and gives it to B, the tortfeasor, so B can satisfy its own debts. If A gets anything, it is less than what they had before—some undetermined share of B’s estate that will be distributed to *all* its creditors.

3. Giving victims’ claims against Brenntag to Whittaker’s estate did not put that property to public use. Instead, the taking had purely private beneficiaries: principally Brenntag and Whittaker; secondarily, Whittaker’s other creditors, including those who never contracted mesothelioma or had their claims taken.

While the bounds of the public-use requirement are debatable—as the disagreements in *Kelo* showed³—this case is simpler. It does not involve a

³ This Court has recognized that a “public purpose” rather than “public use” may suffice. *See Kelo*, 545 U.S. at 480; *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 241–44 (1984). But the original meaning of the Clause is likely narrower and requires

development plan, future public use of property, or indirect private beneficiaries. It involves a transfer of property from one private party to another, not because the government deemed it a public use, but because one private actor invoked bankruptcy to clear its debts.⁴

A “one-to-one transfer of property” is “an unusual exercise of government power” that “raise[s] a suspicion that a private purpose [is] afoot.” *Kelo*, 545 U.S. at 487; *see also id.* at 477–78. And “[a] purely private taking [cannot] withstand the scrutiny of the public use requirement.” *Midkiff*, 467 U.S. at 245; *accord Thompson v. Consolidated Gas Utilities Corp.*, 300 U.S. 55, 80 (1937).

Bankruptcy *can* serve a public purpose. When a debtor is in financial distress, an orderly and equitable distribution of its own assets serves that purpose. *See In re LTL Mgmt., LLC*, 64 F.4th 84, 101–02 (3d Cir. 2023). But taking property from people who are not in bankruptcy so that the debtor can pay its debts does not. This is a private transfer of wealth.

The mere fact that the taking took place within a bankruptcy does not establish the public purpose. To

actual government use or a public right “to use the property.” *Kelo*, 545 U.S. at 521 (Thomas, J., dissenting).

⁴ By enacting the Code, Congress did not determine that every act under it meets the Takings Clause’s public-use requirement. Even if Section 541 means what the Third Circuit says, Congress still made no such finding. If it does not, the Third Circuit’s judicial gloss receives no deference. *Cf. Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Env’tl. Prot.*, 560 U.S. 702, 713–15 (2010) (plurality opinion).

be sure, the Constitution gives Congress the power to enact bankruptcy laws. But acting under an enumerated power cannot suffice. If it could, the Clause would impose no added limit. And limiting Congress's power is the Clause's point. *See Sec. Indus. Bank*, 459 U.S. at 75.⁵

And that limit matters most where, as here, the act is inconsistent with historical bankruptcy practice. As *Purdue* explained, bankruptcy and Section 541 are about gathering the debtor's property to pay the debtor's creditors; they have never reached claims that belong to someone else. *See* 603 U.S. at 219–22; *supra* Parts I.A.2, I.B. Enlarging the estate with a stranger's property is not part of the bankruptcy bargain; it is paying B's creditors with A's property.

⁵ *Midkiff* described public use as “coterminous with the scope of a sovereign’s police powers.” 467 U.S. at 240. *Berman v. Parker* said that “[o]nce the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear.” 348 U.S. 26, 33 (1954). But “[t]his language was unnecessary to the specific holdings of those decisions,” because the takings there were also for public use. *Kelo*, 545 U.S. at 501 (O’Connor, J., dissenting).

Berman, moreover, addressed condemnation in pursuit of a legitimate object. Section 541 condemns nothing; on the Third Circuit’s reading, it simply moves property from one private party to another. And unlike the power over the District of Columbia in *Berman*, which is akin to a police power, Congress’s bankruptcy power is enumerated and not part of a general police power. *United States v. Morrison*, 529 U.S. 598, 618–19 (2000). As Justice Brandeis made clear in *Radford*, it is independently limited by the Takings Clause. 295 U.S. at 589.

Because there is neither a public purpose nor a public use underlying this taking, “[n]o amount of compensation can authorize” it. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 543 (2005).

4. Just compensation requires “a full and perfect equivalent for the property taken.” *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 326 (1893). The owner must be put “in as good position pecuniarily as he would have occupied if his property had not been taken.” *United States v. Miller*, 317 U.S. 369, 373 (1943).

That is impossible here. Outside bankruptcy, the victims could pursue their claims against Brenntag to their jury-determined value. Now those claims have been cut down twice: the pot is whatever Whittaker settled them for; their share is their individual piece of whatever slice the plan allocates to their class of creditors.

The money Brenntag paid Whittaker’s estate is not earmarked for the victims, and it is diluted by every other creditor’s share—most problematically the share going to those creditors who did not have their claims confiscated. Paying A less with A’s own money is not just compensation.

C. Empowering the estate to release victims’ claims against third parties denies them due process.

The Due Process Clause gives plaintiffs control of their claims: they choose to file; they can go with a class or their own way; and they decide to settle or not. The Third Circuit’s rule strips this autonomy.

The debtor's estate owns their claims and does as it sees fit. The requirements of due process cannot be evaded by simply calling the claims the debtor's. A "purely taxonomic change cannot alter" the constitutional analysis. *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 61 (1989).

Not all losses of autonomy are unconstitutional, of course. Due process is flexible and accounts for special remedial circumstances. When a defendant cannot pay all its bills, plaintiffs can be forced into a single proceeding. This is equity at work: it stops a race to the courthouse that prejudices those who are not first through the door. Bankruptcy and limited-fund class actions rest on that premise.

This special justification for loosening the Constitution's usual guarantees is missing when a solvent third party gets released. A solvent defendant can pay. There is enough to go around, and so each plaintiff's ordinary power to opt out and to reject a settlement returns in full force. Scarcity justifies aggregation. Solvency ends it.

1. "The owner of a tort claim gets to decide how to use the claim," and holds "the right to exclude" others from it. Rave, *supra*, at 590. This Court's class-action precedents make clear that the Due Process Clause protects these rights. It provides more than notice and an opportunity to be heard; it limits what may be done with the claim without the plaintiff's consent.⁶

⁶ Similarly, due process is not purely procedural for defendants either. Limits on personal jurisdiction provide protection even if notice was perfectly given and the defendant had every opportunity to be heard. For defendants, those

Those protections track the rights at stake—the right to control the claim and exclude others from resolving it. Thus, “due process requires at a minimum” that the claimholder have the “opportunity to remove himself” from the aggregate proceeding and that he be adequately represented if he chooses to remain in it. *Shutts*, 472 U.S. at 812; *see also Hansberry v. Lee*, 311 U.S. 32, 42–45 (1940).

2. A plaintiff can be forced to press her claim within a “special remedial scheme” like bankruptcy or probate, but “the burden of justification rests on the exception.” *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846 (1999).

Bankruptcy and mandatory limited-fund class actions are consistent with due process *because* the insolvency of the defendant threatens everyone’s rights. In both situations, the defendant’s inability to pay all claimholders effectively turns all the *in personam* proceedings into a single *in rem* one; all claimholders are vying for a piece of the same corpus and need to be gathered in one proceeding. *See Central Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 362, 369–70 (2006); *Ortiz*, 527 U.S. at 838–41.

3. The Third Circuit’s so-called “estate” release fails both of *Shutts*’s minimum requirements. Brenntag is not a limited fund. Nor has it filed for bankruptcy and put up all its assets—the *Purdue*

substantive protections derive from territoriality and federalism; for plaintiffs, they derive from ownership of the claim. Thus, no one has suggested that a resident absent class member lacks due-process protection.

bargain. Instead, Whittaker's estate simply swallowed the victims' claims against Brenntag and settled them. The victims could not opt out, and they could not reject the settlement of claims that, before bankruptcy, were theirs. They lost their claims without ever being asked.

Nor could the estate adequately represent them. The estate is a fiduciary for all of Whittaker's creditors—and that is precisely the problem. Once the proceeds of the victims' claims enter the estate, they are distributed through a bankruptcy regime that serves competing interests and gives secured creditors priority over estate assets, even though those creditors had no prebankruptcy ownership interest in the victims' claims. *Cf. Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625–27 (1997) (an adequate representative must share the absent class member's interest and not favor any subset of those they represent).

The Third Circuit's rule gives control of every victim's claim not to a representative victim, but to the estate of the company that harmed them. The victims' own representative in the bankruptcy, the Official Committee of Talc Claimants, is the petitioner here. Yet the estate settled the victims' claims with its "own indemnitor and corporate parent." Pet. 29.

The problem is starkest for future claimants. What does a future claims representative do once their claims against Brenntag belong to Whittaker's estate? She may speak for future victims as creditors of Whittaker. But does she represent their claims

against Brenntag, which they no longer own? What can representation accomplish when the represented claimant no longer owns the claim being resolved? Neither the Code nor the decision below says.

4. The Code authorizes the release of claims against third parties only once, in Section 524(g). This Court has never passed on its constitutionality, and amicus does not concede it. But it is stacked with protections and benefits that lay bare the constitutional problem with the Third Circuit's rule.

Section 524(g) releases certain entities that may be liable for a debtor's asbestos business. But those third parties must contribute to an ongoing trust that pays present and future claims. A representative must protect future claimants. The court must find the release fair and equitable to them. And 75% of the affected claimants must approve it. *See* Pet. 28–29. Whether or not those safeguards are enough, the Third Circuit's release has none of them.

* * *

Once a claim is declared estate property, the victim cannot prosecute it, reject its settlement, or insist on her own day in court. Calling it an “estate” claim does not solve the constitutional problem. It amplifies it.

CONCLUSION

The Third Circuit's rule stands alone. But its impact is outsized.

A company can file for bankruptcy wherever it is incorporated, and Delaware remains the capital of incorporation. Until this Court acts, solvent companies will continue to shed mass-tort liability in the Third Circuit. In each of those cases, victims will lose their claims without consent or compensation, in violation of the Constitution.

This Court shut the front door in *Purdue*. It should not leave the back door open. The petition should be granted.

Respectfully submitted,

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