

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 OF FUTURE CLAIMANTS'
REPRESENTATIVES AS *AMICI CURIAE*
IN SUPPORT OF PETITIONER**

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INTEREST OF *AMICI CURIAE*¹

Amici curiae, who are identified in the attached Appendix, are long-tenured bankruptcy practitioners who have either served or are currently serving as the court-appointed representatives of future claimants in asbestos-related bankruptcies or settlement trusts. Future claimants are those individuals who hold claims arising from exposure to asbestos-containing products before the bankruptcy case but whose asbestos-related injuries have yet to manifest. Because the injuries are unmanifested, the future claimants themselves do not know that they may have claims, and it is therefore impossible to provide them with constitutionally sufficient notice that the bankruptcy proceeding could affect their rights. Even if future claimants were to read a bankruptcy notice, they would have no reason to know their rights were at stake. As court-appointed representatives for future claimants in other asbestos-related bankruptcy cases or settlement trusts, *amici curiae* are uniquely positioned to address the due-process issues posed by future claimants.

SUMMARY OF THE ARGUMENT

Future claimants in asbestos-related bankruptcy cases present unique due-process concerns. Unlike present claimants, future claimants in asbestos-related bankruptcies cannot appear in the bankruptcy

1. Counsel for all parties received notice of *amici*'s intention to file this brief at least 10 days prior to the deadline for filing the brief. No counsel for any party authored this brief in whole or in part, and no person or entity, other than *amici curiae* or their counsel, made a monetary contribution to fund the preparation or submission of this brief.

proceeding, cannot receive meaningful notice, cannot vote on a proposed plan, and cannot protect their own interests. Recognizing those concerns, Congress enacted § 524(g) of the Bankruptcy Code and established a comprehensive framework designed to protect future asbestos claimants before their rights may be affected in a bankruptcy proceeding. Those protections include appointment of a future claimants' representative (or "**FCR**"), supermajority approval by present claimants of any proposed plan of reorganization, trust mechanisms designed to ensure the substantially equal treatment of present and future claims, and judicial findings that the proposed treatment of future asbestos claimants is fair and equitable.

The Third Circuit's decision below held that asbestos victims' successor-liability claims against solvent non-debtor Brenntag North America ("**Brenntag**") are property of Whittaker's bankruptcy estate under § 541 of the Bankruptcy Code, blocking asbestos victims' personal-injury claims against Brenntag and allowing Whittaker to assume control over those claims and purportedly settle them out from under the asbestos victims. In doing so, the Third Circuit gave no consideration to § 524(g), future asbestos claimants, or due process under the Fifth Amendment.

Section 524(g) is the Bankruptcy Code's asbestos-specific framework for protecting future asbestos claimants' rights and interests, particularly when the proposed bankruptcy relief could impair their rights against non-debtors. The decision below, however, authorizes debtors to settle or release asbestos-related personal-injury claims against non-debtors, without

affording future asbestos claimants the protections Congress prescribed in § 524(g). The Court should grant certiorari to clarify that due process does not permit that result.²

ARGUMENT

I. Future asbestos claimants present intractable due-process issues.

Future claimants are individuals who have unmanifested injuries resulting from exposure to a debtor’s harmful asbestos-containing products before bankruptcy. They are sometimes referred to as “exposure-only” or “latent” claimants. The category, however, may also include persons whose claims derive from an exposed individual’s asbestos-related disease, such as the wrongful-death claims of future spouses or unborn children. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 628 (1997).

The long latency period of asbestos-related diseases, which may last as long as forty years, presents significant due-process challenges in a bankruptcy proceeding. *See Amchem*, 521 U.S. at 598. It is well established that the Due Process Clause of the Fifth Amendment to the United States Constitution requires that creditors receive adequate notice of the bankruptcy proceedings before

2. Section 524(g) applies only to asbestos-related bankruptcies. The *amici curiae* express no opinion as to whether the result below would be permissible or appropriate in the context of bankruptcies that do not implicate asbestos-related liability or § 524(g).

they can be bound by a plan of reorganization. *See DPWN Holdings (USA), Inc. v. United Air Lines, Inc.*, 747 F.3d 145, 150 (2d Cir. 2014) (“[A] claim cannot be discharged if the claimant is denied due process because of lack of adequate notice.”); *Wright v. Owens Corning*, 679 F.3d 101, 107 (3d Cir. 2012) (“Inadequate notice accordingly ‘precludes discharge of a claim in bankruptcy.’” (quoting *Chemetron Corp. v. Jones*, 72 F.3d 341, 346 (3d Cir. 1995))); *In re Spring Valley Farms, Inc.*, 863 F.2d 832, 835 (11th Cir. 1989) (affirming lower court’s holding that debtors’ failure to provide constitutionally adequate notice exempted creditor’s claim from discharge); *Reliable Elec. Co. v. Olson Constr. Co.*, 726 F.2d 620, 623 (10th Cir. 1984) (“[T]he discharge of a claim without reasonable notice of the confirmation hearing is violative of the fifth amendment to the United States Constitution.”); *see also New York v. N.Y.C., New Haven & Hartford R.R. Co.*, 344 U.S. 293, 297 (1953).

The latent nature of asbestos injuries makes it impossible to provide effective notice to all potential victims. *See Amchem*, 521 U.S. at 628; *see also In re Waterman S.S. Corp.*, 141 B.R. 552, 559 (Bankr. S.D.N.Y. 1992) (“[E]ven if that individual had read the ‘notice,’ those individuals would have remained completely unaware that their substantive rights were affected.”), *vacated on other grounds*, 157 B.R. 220 (S.D.N.Y. 1993). The Court described the difficulty in providing future asbestos claimants with due process in *Amchem*, stating:

Many persons in the exposure-only category . . . may not even know of their exposure, or realize the extent of the harm they may incur. Even if they fully appreciate the significance of class

notice, those without current afflictions may not have the information or foresight needed to decide, intelligently, whether to stay in or opt out.

Amchem, 521 U.S. at 628. The Court thus questioned whether adequate notice “could ever be given to legions so unselfconscious and amorphous.” *Id.*

A. *Manville* and *UNR* provide a framework for using bankruptcy to address future asbestos claims.

Johns-Manville Corporation (“**Manville**”) and UNR Industries (“**UNR**”) were pioneering asbestos bankruptcy cases that developed the trust-and-injunction framework Congress later codified in § 524(g). *See In re Imerys Talc Am., Inc.*, 38 F.4th 361, 376 (3d Cir. 2022). The cornerstone of the *Manville* plan of reorganization was the creation of a trust that was designed to satisfy the claims of asbestos victims, both present and future, while allowing the corporation to maximize its value by continuing as a going concern. *In re Johns-Manville Corp.*, 68 B.R. 618, 621 (Bankr. S.D.N.Y. 1986), *aff’d in part, rev’d in part*, 78 B.R. 407 (S.D.N.Y. 1987), *aff’d sub nom. Kane v. Johns-Manville Corp.*, 843 F.2d 636 (2d Cir. 1988). To accomplish this goal, the plan provided for issuance of an injunction channeling asbestos-related personal-injury claims to the trust and enjoining claimants from taking any legal action against Manville, its other operating entities, and certain other identified third parties. The *Manville* court also appointed a legal representative to participate on behalf of the future asbestos claimants. *See In re Johns-Manville Corp.*, 36 B.R. 743, 759 (Bankr. S.D.N.Y. 1984), *aff’d*, 52

B.R. 940 (S.D.N.Y. 1985). The bankruptcy court found that “future asbestos claimants” were parties in interest under § 1109(b) of the Bankruptcy Code and required a legal representative to protect their rights and interests. *Id.* at 748–49, 758–59.

The court in *UNR* believed that its only option for a workable plan of reorganization was to address future asbestos liability using the same method that the *Manville* court used. *UNR*’s reorganization plan, confirmed in June 1989, similarly provided for (i) the creation of a trust to assume and resolve the company’s asbestos-related personal-injury claims and (ii) the issuance of an injunction prohibiting claimants from suing the reorganized *UNR* or the insurers settling with it. *See UNARCO Bloomington Factory Workers v. UNR Indus., Inc.*, 124 B.R. 268, 271–72 (N.D. Ill. 1990). The court also approved the appointment of a legal representative for future asbestos claimants, who were parties in interest entitled to be heard in the chapter 11 case. *See In re UNR Indus., Inc.*, 46 B.R. 671, 675–76 (Bankr. N.D. Ill. 1985); *In re UNR Indus., Inc.*, 71 B.R. 467, 478–80 (Bankr. N.D. Ill. 1987).

Yet, even with the appointment of a legal representative and the eventual confirmation of the *Manville* and *UNR* chapter 11 plans, there remained uncertainty whether these resolutions would endure given the courts’ untested authority to bind future asbestos claimants. Indeed, both the *Manville* and *UNR* courts were concerned that the “failure to provide for future claimants in a reorganization plan might fatally undermine any such plan as well as prejudice the position of future claimants.” *In re Amatex Corp.*, 755 F.2d 1034, 1042 (3d Cir. 1985).

B. Congress codifies the *Manville*/*UNR* framework in § 524(g) of the Bankruptcy Code.

In 1994, in response to many of the uncertainties raised by *Manville* and *UNR*, Congress enacted § 524(g) of the Bankruptcy Code. As the Third Circuit has explained, “Congress opted to follow the *Manville*/*UNR* model,” *Imerys Talc*, 38 F.4th at 366, and codified the *Manville* trust mechanism as a “creative solution to help protect . . . future asbestos claimants,” *In re Federal-Mogul Global Inc.*, 684 F.3d 355, 359 (3d Cir. 2012) (alteration in original) (quoting H.R. Rep. No. 103-835, at 40 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3340, 3348). Indeed, a “central” goal was to protect future asbestos claimants who were “not yet before the court, because their disease had not yet manifested itself.” H.R. Rep. No. 103-835, at 40. In enacting § 524(g), Congress expressly sought to “strengthen the *Manville* and *UNR* trust/injunction mechanisms and to offer similar certitude to other asbestos trust/injunction mechanisms that meet the same kind of high standards with respect to regard for the rights of claimants, present and future, as displayed in the two pioneering cases.” *Id.* at 41.

Many of § 524(g)’s requirements “are specifically tailored to protect the due process rights of future claimants” *In re W.R. Grace & Co.*, 729 F.3d 311, 323–24 (3d Cir. 2013) (quoting *In re Combustion Eng’g, Inc.*, 391 F.3d 190, 234 n.45 (3d Cir. 2004)); *see also Federal-Mogul*, 684 F.3d at 359 & n.9 (explaining that, to “protect the due process rights of future claimants,” Congress “imposed ‘many statutory prerequisites’” that must be satisfied before a court may issue a channeling injunction (quoting *Combustion Eng’g*, 391 F.3d at 234

n.45)); *In re Grossman's Inc.*, 607 F.3d 114, 127 (3d Cir. 2010) (“By enacting § 524(g), Congress took account of the due process implications of discharging future claims of individuals whose injuries were not manifest at the time of the bankruptcy petition.”). The Third Circuit thus held in *W.R. Grace* that “as long as a court correctly determines that § 524(g)’s requirements are satisfied, present and future claims can be channeled to a § 524(g) trust without violating due process.” 729 F.3d at 324.

The most obvious due-process requirement in § 524(g) is the appointment of a legal representative “for the purpose of protecting the rights of persons that might subsequently assert [future asbestos-related] demands” 11 U.S.C. § 524(g)(4)(B)(i).³ An FCR “functions, in effect, as a ‘creditors’ committee’ of one,” advocating for the rights and interests of future asbestos claimants. *Imerys Talc*, 38 F.4th at 378; *see also* 11 U.S.C. § 1103(c) (identifying the powers of a creditors’ committee); *UNR Indus.*, 71 B.R. at 479 (stating that the FCR “has been granted the powers and responsibilities of a committee”); *In re Johns-Manville Corp.*, 52 B.R. 940, 942 (S.D.N.Y. 1985) (affirming the FCR’s authorization “to exercise the powers and perform the duties of a Committee under Section 1103 of the Bankruptcy Code”). FCRs “participate in the formulation of a plan,” § 1103(c)(3), and

3. Section 524(g) refers to future asbestos claims as “demands,” in contrast to present asbestos “claims.” *See, e.g., In re Flintkote Co.*, 486 B.R. 99, 126 (Bankr. D. Del. 2012) (“[F]or purposes of § 524(g), future demand holders are those who have been exposed to asbestos but whose disease or other injury, sufficient to prove damages, has not yet manifested.” (citations and internal quotation marks omitted)), *aff’d*, 526 B.R. 515 (D. Del. 2014); *accord W.R. Grace*, 729 F.3d at 322.

“may raise and may appear and be heard on any issue” in the bankruptcy case, § 1109(b). Courts emphasize, however, that FCRs standing alone do not have the legal authority to bind future asbestos claimants. *See, e.g., Imerys Talc*, 38 F.4th at 375 nn.9, 11 (“We do not suggest, for example, that an FCR *is* a guardian *ad litem* for the future claimants; true guardians *ad litem* have the legal authority to bind those they represent, which an FCR does not (it merely participates in the negotiation of a plan and channeling injunction that will govern its constituents’ future claims).”).

Appointing an FCR is necessary to provide future asbestos claimants with due process, but it is not sufficient. *See, e.g., Combustion Eng’g*, 391 F.3d at 237 (“The *several prerequisites* set forth in § 524(g) are designed to protect the interests of future claimants whose claims are permanently enjoined.” (emphasis added)). In *Combustion Engineering*, the Third Circuit explained that, “to protect the interests of future [asbestos] claimants whose claims are permanently enjoined,” § 524(g) also requires that a proposed plan of reorganization “must be approved by a super-majority of current claimants, and must provide substantially similar treatment to present and future claimants.” *Id.*; *see also* 11 U.S.C. § 524(g)(2)(B)(ii)(IV)(bb), (V). Taken together, the twin requirements of equal treatment and the supermajority vote provide assurance that future asbestos claimants would vote in favor of their treatment in the bankruptcy, were they able to do so.

Finally, § 524(g) provides additional requirements that must be satisfied before a bankruptcy may impair future asbestos claimants’ rights against non-debtors. Section 524(e) ordinarily provides that a debtor’s discharge “does

not affect the liability of any other entity” for that debt. 11 U.S.C. § 524(e). Under certain circumstances, however, § 524(g) permits a channeling injunction to protect qualifying non-debtors “[n]otwithstanding” § 524(e). *Id.* § 524(g)(4)(A)(ii); *see also Harrington v. Purdue Pharma L.P.*, 603 U.S. 204, 222 (2024) (explaining that § 524(g) “is a notable exception to the code’s general rules” against providing relief to non-debtors). To grant relief to non-debtors, the court must determine that granting that relief would be “fair and equitable with respect to the persons that might subsequently assert [future asbestos-related] demands, in light of the benefits provided . . . to such trust on behalf of such debtor . . . or such third party.” 11 U.S.C. § 524(g)(4)(B)(ii); *see also In re Plant Insulation Co.*, 734 F.3d 900, 912 (9th Cir. 2013) (“[B]efore it may issue an injunction under § 524(g), a court must ensure that the remedy be ‘fair and equitable’ to future asbestos plaintiffs (the parties to be enjoined) when viewed in comparison to the benefits provided by the bankrupt and its insurers (the parties to be benefitted by the injunction).”). This fair-and-equitable requirement is “specifically tailored to protect the due process rights of future claimants.” *W.R. Grace*, 729 F.3d at 324 (quoting *Combustion Eng’g*, 391 F.3d at 234 n.45).

II. The Third Circuit’s decision allows debtors to evade the requirements of § 524(g).

A. Whittaker files for bankruptcy to use § 524(g) to address its asbestos-related liability.

For decades before filing for bankruptcy, Whittaker was among the nation’s largest distributors of talc and industrial compounds. Since 1979, thousands of individuals

exposed to asbestos-contaminated talc in Whittaker's products developed asbestos-related diseases, resulting in thousands of personal-injury claims. *See* Pet. App. 7a. Since 2008, Whittaker paid approximately \$213 million to its asbestos personal-injury victims. Decl. of Mohsin Y. Meghji in Supp. of Chapter 11 Petitions & First Day Mots. ¶ 31, *In re Whittaker, Clark & Daniels, Inc.*, No. 23-13575-MBK (Bankr. D.N.J. Apr. 27, 2023), ECF No. 5. In one recent case, a South Carolina jury returned a verdict against Whittaker of \$29 million for mesothelioma caused by Whittaker's asbestos-contaminated talc products. *See* Pet. App. 9a. All told, as of the bankruptcy filing, approximately 2,700 individuals had brought asbestos-related lawsuits arising from Whittaker's contaminated talc products. *See id.*

On April 26, 2023, Whittaker filed for chapter 11 bankruptcy, seeking to use § 524(g) of the Bankruptcy Code to address its asbestos-related liability. Decl. of Mohsin Y. Meghji in Supp. of Chapter 11 Petitions & First Day Mots. ¶¶ 10, 12, *In re Whittaker, Clark & Daniels, Inc.*, No. 23-13575-MBK (Bankr. D.N.J. Apr. 27, 2023), ECF No. 5. Indeed, Whittaker asserted that it filed bankruptcy because asbestos-related personal-injury claims "threatened to swiftly exhaust [Whittaker's] remaining assets, leaving the universe of potential future claimants without any remaining assets from which to collect." *Id.* ¶ 36. Whittaker's stated goal for its chapter 11 case was to use the "tools afforded by chapter 11 of the Bankruptcy Code to establish a claims trust or trusts, as applicable, consistent with the requirements of sections 524(g) and 105(a) of the Bankruptcy Code, and ultimately seek approval of a settlement [with asbestos claimants] as part of a chapter 11 plan." *Id.* ¶ 10.

On May 3, 2023, Whittaker moved for entry of an order appointing the Honorable Shelley C. Chapman, retired bankruptcy judge for the United States Bankruptcy Court for the Southern District of New York, as the FCR in the chapter 11 case. Whittaker sought appointment of the FCR under § 524(g) specifically, asserting that “the most equitable and expeditious way to permanently, globally, and fairly resolve all of the Tort Claims is to utilize sections 524(g) and 105(a) of the Bankruptcy Code, as applicable, to establish a trust for all current and future claimants.” Debtors’ Mot. for Entry of an Order (I) Appointing the Honorable Shelley C. Chapman (Ret.) as Future Claimants’ Representative, Effective as of the Pet. Date and (II) Granting Related Relief ¶ 9, *In re Whittaker, Clark & Daniels, Inc.*, No. 23-13575 (MBK) (Bankr. D.N.J. May 3, 2023), ECF No. 54. On June 26, 2023, the Bankruptcy Court appointed Judge Chapman as FCR “[p]ursuant to sections 105(a) and 524(g)(4)(B)(i) of the Bankruptcy Code” Order (I) Appointing the Honorable Shelley C. Chapman (Ret.) as Future Claimants’ Representative, Effective as of the Pet. Date and (II) Granting Related Relief ¶ 1, *In re Whittaker, Clark & Daniels, Inc.*, No. 23-13575 (MBK) (Bankr. D.N.J. June 26, 2023), ECF No. 231.

In September 2023, however, Whittaker initiated an adversary proceeding against non-debtor Brenntag, which had acquired substantially all of Whittaker’s assets in 2004. *See* Pet. App. 109a. Whittaker’s adversary proceeding sought, among other things, a declaration that asbestos victims’ successor-liability claims against Brenntag were property of Whittaker’s bankruptcy estate under § 541 of the Bankruptcy Code. *See id.*

The day after commencing the adversary proceeding, Whittaker moved for summary judgment. *See id.* On August 28, 2024, the Bankruptcy Court granted that motion and ruled that asbestos victims' claims seeking to hold Brenntag liable for their injuries as Whittaker's successor were property of Whittaker's bankruptcy estate. *See* Pet. App. 187a–94a.

Shortly after that ruling, Whittaker filed a motion with the Bankruptcy Court seeking approval of a settlement with Brenntag under which Brenntag would pay Whittaker approximately \$535 million (which would be only partially allocable to asbestos-related liability) in exchange for a release of successor-liability claims against Brenntag. *See id.* at 12a. The motion to approve this settlement remains pending before the Bankruptcy Court.

The Whittaker FCR did not participate in the adversary proceeding, ostensibly to avoid the implication that future asbestos claimants were parties to, or bound by, that proceeding. At the Bankruptcy Court's request, however, the FCR filed a statement asserting that future asbestos claimants could not be bound by any declaratory judgment entered in the adversary proceeding because they were not parties to that proceeding. *See* Statement of the Future Claimants' Representative Regarding Debtors' Mot. for Summ. J. in the Adversary Proceeding at 1, *In re Whittaker, Clark & Daniels, Inc.*, No. 23-13575 (MBK) (Bankr. D.N.J. Nov. 20, 2023), ECF No. 675.

In ruling that asbestos victims' successor-liability claims against Brenntag were property of Whittaker's estate, the Bankruptcy Court purported to avoid deciding

what effect its ruling would have on future asbestos claimants' claims against Brenntag, observing that the issue was "a question for another day." *See* Pet. App. 239a. The Bankruptcy Court presumed, however, that its ruling would apply to future asbestos claimants. *See id.* at 239a–240a ("To the extent a future claimant files a claim and wishes to challenge the collateral or preclusive effect of the instant ruling, the Court will address the issue at that time.").

On a direct appeal under 28 U.S.C. § 158(d)(2), the Third Circuit affirmed the Bankruptcy Court's order granting summary judgment. *See id.* at 48a.

B. The Third Circuit fails to acknowledge the due-process implications of its decision.

The Third Circuit found that successor-liability claims against Brenntag belonged to Whittaker's bankruptcy estate rather than the individual asbestos claimants who were injured. *See* Pet. App. 28a. The *Whittaker* court concluded that the successor liability here, including product-line liability, depends on Brenntag's relationship to Whittaker, specifically Brenntag's acquisition of Whittaker's assets and continuation of its product lines. *See* Pet. App. 40a. Because those facts stemmed from the 2004 transaction and, according to the Third Circuit, were equally available to all creditors, claims against Brenntag based on its continuation of Whittaker's product lines were "generalized" and therefore belonged to the bankruptcy estate. *See id.* at 40a–43a. According to the Third Circuit, these claims were property of the estate even if Whittaker would not have owned, or been able to

assert, them without the bankruptcy. *See id.* at 39a–40a.⁴ That result cannot be correct here.

Applying the Third Circuit’s rule to future asbestos claims presents a problem that neither *Emoral* nor *Armetale* had to confront: the significant due-process issues that future claimants present in an asbestos-related bankruptcy. *See In re Emoral, Inc.*, 740 F.3d 875, 877 (3d Cir. 2014) (addressing liability related to diacetyl, “a chemical used in the food flavoring industry”); *In re Wilton Armetale, Inc.*, 968 F.3d 273, 278, 284 (3d Cir. 2020) (addressing liability related to fraudulent-transfer, breach-of-fiduciary-duty, and related asset-plundering claims). Asbestos-related liability is different. Transferring control of *future* asbestos-related personal-injury claims against non-debtors from the victims to the tortfeasors is constitutionally improper and fundamentally unfair. Yet the Third Circuit’s opinion never even mentions future asbestos claims, § 524(g), or due process under the Fifth Amendment.

III. The Court should grant the petition.

The Court should grant the petition for a writ of certiorari to foreclose the nonconsensual release of future

4. The Third Circuit recognized that “many courts” have adopted the contrary rule that a claim is property of the estate when, among other things, “applicable non-bankruptcy law authorized the debtor corporation to assert it prior to bankruptcy” Pet. App. 32a. The circuit split discussed in Petitioner’s brief would be an appropriate basis for the Court to grant a writ of certiorari; for purposes of this brief, however, the focus of the *amici curiae* is on the due-process issues that concern future asbestos claimants.

asbestos claims against non-debtors and to ensure that future asbestos claimants are not deprived of their rights and interests without due process.

A. Because the future asbestos claimants cannot give affirmative consent, Whittaker cannot bind future asbestos claimants to a settlement absent § 524(g).

The Court has repeatedly recognized that individuals whose asbestos-related claims have not yet manifested cannot be bound by a proposed resolution of asbestos liabilities, except under § 524(g). In *Amchem Products, Inc. v. Windsor*, for instance, the Court declined to approve a settlement class that sought to resolve both existing asbestos claims and claims held by individuals whose injuries had not yet manifested. *See* 521 U.S. 591 (1997). The Court questioned whether individuals who lacked any present disease, and in many cases may not even have understood that they had potential claims, could receive constitutionally adequate notice of proceedings affecting their rights. *Id.* at 628. According to the Court, due-process concerns “rendered highly problematic any endeavor to tie to a settlement class persons with no perceptible asbestos-related disease at the time of the settlement.” *Id.* (citing *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 633 (3d Cir. 1996)).

The Court reaffirmed those principles in *Ortiz v. Fibreboard Corp.*, where it declined to approve another mandatory class-action settlement designed to resolve existing and future asbestos claims. *See* 527 U.S. 815 (1999). The Court explained that such settlements compromise future asbestos claimants’ “Seventh Amendment rights [to

a jury trial] without their consent” and “implicate the due process principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party” *Id.* at 846 (citations and internal quotation marks omitted).

The concerns identified in *Amchem* and *Ortiz* are even more acute here. In those cases, the settlements that would purportedly bind future asbestos claimants were at least negotiated and agreed to by the present asbestos claimants who would be bound by the settlements. *See Amchem*, 521 U.S. at 601, 626–27; *Ortiz*, 527 U.S. at 823–25. Here, by contrast, the present claimants had no role in the proposed resolution of their claims against Brenntag and are in fact vehemently opposed to Whittaker’s plan to release those claims. The protections provided to future asbestos claimants here are thus a far cry from those the Court deemed insufficient in *Amchem* and *Ortiz*, let alone those § 524(g) would require.

The Court recently underscored the significance of § 524(g)’s asbestos-specific procedures in *Harrington v. Purdue Pharma L.P.*, 603 U.S. 204 (2024). According to the Court, § 524(g) “illustrate[s] how Congress might proceed if it intended to confer upon bankruptcy courts a novel and extraordinary power to extinguish claims against third parties without claimants’ consent.” *Id.* at 222 n.5. And the fact that Congress authorized the nonconsensual release of future asbestos-related claims “in only *one* context[] makes it all the more unlikely” that the Bankruptcy Code can be read to afford courts that same authority in other contexts. *See id.* at 222; *cf. AMG Cap. Mgmt., LLC v. Fed. Trade Comm’n*, 593 U.S. 67, 77

(2021) (“It is highly unlikely that Congress would have enacted provisions expressly authorizing *conditioned* and *limited* monetary relief if the Act, via § 13(b), had already implicitly allowed the Commission to obtain that same monetary relief and more without satisfying those conditions and limitations.”); *Czyzewski v. Jevic Holding Corp.*, 580 U.S. 451, 465 (2017) (“[W]e would expect to see some affirmative indication of intent if Congress actually meant to make structured dismissals a backdoor means to achieve the exact kind of nonconsensual priority-violating final distributions that the Code prohibits in Chapter 7 liquidations and Chapter 11 plans.”).

Courts cannot bind future asbestos claimants outside the context of a § 524(g) plan. *Cf. Imerys Talc*, 38 F.4th at 375 n.9. The New Jersey district court’s opinion in *In re G-I Holdings, Inc.* is illustrative. 328 B.R. 691 (D.N.J. 2005). There, the debtor commenced an adversary proceeding seeking to prevent future asbestos claimants from asserting successor-liability claims against a non-debtor affiliate; the debtor argued that the presence of the FCR appointed under § 524(g) would allow the court to bind future claimants. *Id.* at 695. The district court rejected that theory, explaining that “conscripting the [FCR] in this manner does not comport with notions of due process,” *id.* at 696, and would “essentially bypass[] the safeguards of . . . § 524(g) that protect the due process rights of the future claimants,” *id.* at 697. The court thus held that due process prevents a chapter 11 debtor from doing exactly what the Third Circuit permitted below.

B. The Third Circuit’s decision undermines due-process protections for future asbestos claimants.

The Court should grant the petition because the Third Circuit’s decision undermines the due-process protections Congress enacted to protect future asbestos claimants. Future asbestos claimants occupy a uniquely vulnerable position. As the Third Circuit has recognized, § 524(g) “took account of the due process implications of discharging future claims” and includes requirements “specifically tailored to protect the due process rights of future claimants.” *In re Energy Future Holdings Corp.*, 949 F.3d 806, 812–13 (3d Cir. 2020) (quoting *Grossman’s*, 607 F.3d at 127).⁵

5. The debtor in *Energy Future* sought to address future asbestos claims through a proof-of-claim bar date rather than § 524(g). *See* 949 F.3d 806 (3d Cir. 2020). Claims not filed by the bar date would be “discharged,” but holders of those “discharged” claims would have the ability to file a motion under Bankruptcy Rule 3003(c) to file their claims late. *Id.* at 814. If those late-filed claims were allowed under Rule 3003(c), the claims would be reinstated and paid in full. *Id.* The Third Circuit concluded that the process provided by Rule 3003(c) provided future claimants “a fair opportunity post-confirmation to seek reinstatement of their claims[.]” *Id.* at 825. Thus, the “discharge” of future claims in *Energy Future* was, in reality, no discharge at all because the plan preserved the future claimants’ ability to have their claims reinstated and paid in full. The Third Circuit further recognized that it would be “quite simple” for future claimants to obtain relief under Rule 3003(c) to have their claims reinstated given the deprivation of due process that would otherwise occur. *Id.* at 824. (And, to be clear, the procedure in *Energy Future* had no effect on future asbestos claimants’ personal-injury claims against non-debtors.)

The Third Circuit’s decision renders the due-process protections of § 524(g) largely meaningless. If a debtor may obtain control over future claimants’ asbestos claims against a non-debtor by characterizing successor-liability claims as estate property under § 541, then the debtor may engineer the functional equivalent of a § 524(g) channeling injunction for the benefit of third parties, while disregarding the protections Congress deemed essential before a bankruptcy can impair future asbestos claimants’ rights or interests.

For instance, if an Article I bankruptcy court can release future asbestos claimants’ claims against non-debtors, without affirmative consent and despite the FCR’s objection, the FCR ceases to function as the meaningful advocate Congress intended under § 524(g). *Cf. In re Johns-Manville Corp.*, 551 B.R. 104, 114 (S.D.N.Y. 2016) (explaining that, if an FCR cannot “provide adequate representation to the absent future claim holders, it is doubtful that the injunction provisions binding them would be found to comply with the due process clause”). The FCR becomes little more than a figurehead whose participation offers future asbestos claimants no meaningful protection.

And if a debtor may unilaterally decide the value of future asbestos-related personal-injury claims against a non-debtor and compromise those claims—without the claimants’ consent—through an adversary proceeding and settlement, § 524(g)’s supermajority-vote requirement becomes a nullity. By the time asbestos claimants would have an opportunity to vote on their treatment under a plan, the debtor will have already settled and released their claims against non-debtors without their consent. Indeed, after settling and releasing asbestos victims’

personal-injury claims against non-debtors, a debtor could simply dismiss or convert its bankruptcy case and deprive claimants of the vote entirely.

Nor does the Third Circuit’s approach leave any meaningful role for § 524(g)’s fair-and-equitable requirement. Congress authorized relief protecting some non-debtors (in some circumstances) only after a court determines that such relief is “fair and equitable with respect to the persons that might subsequently assert [future] demands[.]” 11 U.S.C. § 524(g)(4)(B)(ii). Yet, under the decision below, a debtor could compromise asbestos claims against non-debtors with no assurance that doing so would be fair to future asbestos claimants. *Cf. In re Immune Pharms. Inc.*, 635 B.R. 118, 122 (Bankr. D.N.J. 2021) (“[T]he Bankruptcy Court need not probe the merits of all claims or conduct a ‘mini-trial’ before approving the settlement’ Instead, the court need only canvas the issues to determine whether the settlement falls above the ‘lowest point in the range of reasonableness’; and under normal circumstances, the court should defer to the trustee’s judgment so long as there is a legitimate business justification.” (quoting *In re NovaPro Holdings, LLC*, 815 F. App’x 655, 658 (3d Cir. 2020), and *In re ID Liquidation One, LLC*, 555 F. App’x 202, 207 (3d Cir. 2014))). The decision below, moreover, would authorize debtors to release future asbestos claimants’ claims against non-debtors that would not even have been eligible for relief under § 524(g). *See* 11 U.S.C. § 524(g)(4)(A)(ii) (permitting relief for non-debtors only if, among other things, the non-debtor’s alleged liability “arises by reason of” one of four circumstances specified in the statute); *see also Combustion Eng’g, Inc.*, 391 F.3d at 234–35.

Section 524(g) provides a framework for debtors, and sometimes non-debtors, to obtain relief from future asbestos claims in a manner consistent with due process. The ruling below, however, authorizes debtors and non-debtors with asbestos-related liability to accomplish indirectly what Congress authorized only through § 524(g). This is inappropriate and impermissible. If debtors can usurp future asbestos claimants and release their claims against non-debtors through an adversary proceeding and settlement of estate claims, then § 524(g) would be meaningless, and due process would be optional. The Court should grant the petition to foreclose that result.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX

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**APPENDIX — LIST OF *AMICI CURIAE*
FUTURE CLAIMANTS' REPRESENTATIVES**

List of Amici Curiae Future Claimants' Representatives
(affiliations provided for identification purposes only)

Heather Barlow

Presperse Corporation Trust

James L. Patton, Jr.

Celotex Asbestos Settlement Trust

Fairbanks Asbestos Personal Injury Trust

Legal Representative for Future Talc Personal Injury
Claimants, Chapter 11 Bankruptcy of Imerys Talc
America, Inc., *et al.*

Leslie Controls, Inc. Asbestos Personal Injury Trust

Maremont Asbestos Personal Injury Trust

Owens-Illinois Asbestos Personal Injury Trust

Asbestos Personal Injury Trust of United Gilsonite
Laboratories

Yarway Asbestos Personal Injury Trust

Appendix

Edwin J. Harron

ACandS Asbestos Settlement Trust

APG Asbestos Trust

Durabla Manufacturing Company and Durabla Canada
Ltd. Asbestos Trusts

Duro Dyne Asbestos Personal Injury Trust

Geo. V. Hamilton, Inc. Asbestos Trust

Kaiser Gypsum Asbestos Personal Injury Trust

Metex Asbestos PI Trust

North American Refractories Company Asbestos
Personal Injury Settlement Trust

Pittsburgh Corning Corporation Asbestos Personal
Injury Settlement Trust

Sepco Asbestos Personal Injury Trust

Maria H. Keane

Manville Personal Injury Settlement Trust

Appendix

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Legal Representative for Future Talc Personal Injury
Claimants, Chapter 11 Bankruptcy of The Stephan
Co.

Charles N. Persing

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Richard B. Schiro

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J.T. Thorpe, Inc. Settlement Trust

Swann Asbestos and Silica Settlement Trust

UTEX Industries Asbestos Trust