United States Court of Appeals

for the

Third Circuit

Case Nos. 22-2003(L), 22-2004, 22-2005, 22-2006, 22-2007, 22-2008, 22-2009, 22-2010, 22-2011

In re: LTL MANAGEMENT LLC

ON APPEAL FROM AN ORDER OF THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF NEW JERSEY

BRIEF FOR ERWIN CHERMINSKY, AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS AND SUPPORTING REVERSAL

NATALIE D. RAMSEY
ROBINSON & COLE LLP
Attorneys for Amicus Curiae
1201 North Market Street, Suite 1406
Wilmington, Delaware 19801
(302) 516-1700

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae Erwin Chemerinsky is a scholar of United States constitutional law, and files this brief under Federal Rule of Appellate Procedure 29(a). As a historian, academic and professor of constitutional law, Dean Chemerinsky has a strong interest in the constitutional issues presented in this case.

Dean Chemerinsky has an academic career spanning nearly 40 years. Presently, he is the Dean of the University of California, Berkeley School of Law and the Jesse H. Choper Distinguished Professor of Law, and the 2022 President of the Association of American Law Schools. Prior to assuming this position, from 2008 to 2017, he was the founding Dean and Distinguished Professor of Law, and Raymond Pryke Professor of First Amendment Law, at the University of California, Irvine School of Law, with a joint appointment in Political Science. Before that, he was the Alston and Bird Professor of Law and Political Science at Duke University from 2004 to 2008, and from 1983 to 2004 was a professor at the University of Southern California Law School, including as the Sydney M. Irmas Professor of

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), Dean Chemerinsky declares that: (i) while no party has authored this amicus brief in whole or in part, the brief does include arguments Dean Chemerinsky included in an amicus brief filed with the Bankruptcy Court, parts of which TCC counsel contributed to; (ii) no party or party's counsel contributed money intended to fund preparing or submitting the brief; and (iii) no person, other than Dean Chemerinsky and his counsel, contributed money to prepare or submit this brief. Pursuant to Rule 29(a)(2), the Appellee, along with each of the Appellants, consented to the filing of this *amicus curiae* brief.

Public Interest Law, Legal Ethics, and Political Science. He is the author of 14 books, including casebooks and leading treatises on constitutional law and federal jurisdiction. Amicus has authored more than 200 law review articles and is a contributing writer for several newspapers. He also frequently argues appellate cases, including in the Supreme Court of the United States.

Dean Chemerinsky has frequently written and lectured about constitutional issues relating to the bankruptcy courts. He submits this brief to address his concerns about the ramifications of a judicial endorsement of bankruptcy cases that breach the borders drawn by the United States Constitution and the United States Bankruptcy Code. Specifically, Dean Chemerinsky writes to address why, as a matter of constitutional law, the order of the United States Bankruptcy Court for the District of New Jersey issued in the Chapter 11 case of LTL Management, LLC, case no. 21-30589 (MBK), denying the *Motion of the Official Committee of Talc Claimants to Dismiss Debtor's Chapter 11 Case* [Dkt. No. 632], should be reversed.

INTRODUCTION AND SUMMARY OF THE CASE

Bankruptcy courts are courts of limited jurisdiction, created by Congress pursuant to Article I, Section 8, Clause 4 of the Constitution. They are empowered to provide extraordinary relief to the "honest but unfortunate" debtor, and in so doing permit, among other things, maximization of recovery to creditors, preservation of jobs, and other societal benefits. But Article I, Section 8, Clause 4 of the Constitution does not allow for the deprivation of other constitutional rights. For that reason, personal injury cases may not be liquidated by the bankruptcy courts and the right of personal injury claimants to a jury trial is expressly preserved by 28 U.S.C. § 157.

In cases whose purpose is not a legitimate business reorganization, even a temporary or interim impact on the fundamental and essential constitutional rights of creditors cannot be justified. Without strict adherence to the statutory framework created by the Bankruptcy Code, the bankruptcy process could be abused to deny creditors their constitutionally protected rights under Article III and the Seventh Amendment. The Bankruptcy Code should not be construed in that manner.

This case involves just such an abuse. The Debtor is a newly created shell, with no business to restructure, no operations to rehabilitate, and no customers or genuine employees to serve. In short, the Debtor has no reorganizational purpose. Worse, the Debtor's case was filed to provide bankruptcy relief to non-debtor

Johnson & Johnson Consumer Inc. ("New JJCI"), the real successor to tortfeasor Johnson & Johnson Consumer Inc. ("Old JJCI"), which received the assets and business of tortfeasor Old JJCI in the divisional merger that created the Debtor. And perhaps worst of all, it is a blatant litigation tactic and forum-shopping exercise that affects the constitutional rights of thousands of individual tort claimants.

On October 11-12, 2021, Johnson & Johnson ("J&J"), a conglomerate with a market capital of over $400 million, embarked on a series of corporate machinations to isolate all of the talc-related personal injury tort liabilities of its solvent and successful subsidiary, Old JJCI, through a divisive merger under Texas law. The transaction resulted in the creation of New JJCI and LTL Management, LLC ("LTL" or the "Debtor"). Substantially all of the operating assets of Old JJCI were allocated to New JJCI, while all of Old JJCI's talc liabilities, and little else, were foisted upon LTL.

Just two days later, on October 14, 2021, LTL sought bankruptcy protection under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code") before the United States Bankruptcy for the Western District of North Carolina. The case was subsequently transferred to the United States Bankruptcy Court for the District of New Jersey (the "Bankruptcy Court"). Thereafter, several parties representing talc claimants sought to dismiss LTL's bankruptcy pursuant to Bankruptcy Code § 1112(b) for cause as a bad faith filing (the "Dismissal Motions").

Following motion practice and a multiday hearing on the Dismissal Motions (and a related preliminary injunction motion), the Bankruptcy Court denied the Dismissal Motions. The Bankruptcy Court certified its decision for direct review before this Court pursuant to 28 U.S.C. § 158(d)(2). Over the Debtor's opposition, this Court granted the claimants' petitions for permission to appeal, *see* Order, *In re LTL Mgmt. LLC,* No. 22-8015 [Dkt. No. 12-1] (3d Cir. May 11, 2022), and these consolidated appeals followed.

When bankruptcy courts adhere to the Bankruptcy Code's "basic policy" of "affording relief only to an 'honest but unfortunate debtor,'" *Cohen v. de la Cruz*, 523 U.S. 213, 217 (1998), bankruptcy provides a debtor with a "fresh start" that can benefit not only the debtor, but its creditors and society at large. But where the goal of a bankruptcy is to afford a non-debtor with the benefits of bankruptcy without submitting itself to bankruptcy, as in the instant case, serious constitutional issues arise.

The Debtor in this case is a sham entity that was created solely to allow the Debtor's wealthy predecessor and its ultimate parent (J&J, which has separate, direct liability) to avoid the resolution of claims in the state tort system, and thus to deny individual tort claimants fundamental and constitutionally guaranteed rights, including: (i) the right to have Article III courts resolve traditional causes of action, such as personal injury suits; (ii) the right to jury trial in such cases; and (iii) the

right to due process, including the right to have each individual case heard on the merits.

This Court has held that the Bankruptcy Code does not "allow for the filing of a bankruptcy petition that lacks a valid reorganizational purpose." *In re SGL Carbon Corp*., 200 F.3d 154, 163 (3d Cir. 1999). But that is precisely what the Debtor, New JJCI, and J&J seek to do. If LTL is in financial distress because its predecessor, Old JJCI, was in financial distress—as the Bankruptcy Court found—then Old JJCI should have filed for bankruptcy protection. The structural subordination of one type of creditor, and the failure to fairly distribute assets among creditors in accordance with the Bankruptcy Code's priority scheme, constitutes bad faith. If the Bankruptcy Court's determination that LTL is in financial distress is in error because it is based on the general proposition that the future is uncertain, then LTL would have no legitimate basis to take advantage of "bankruptcy" as envisioned by Article I, Section 8, Clause 4.

In either event, LTL is not an entity seeking to reorganize consistent with the policies underlying bankruptcy. It is not "reorganizing" so that it may continue in business, save jobs, or benefit the community; it is not liquidating under chapter 11 so that it may fairly distribute limited funds among its creditors. Indeed, LTL cannot liquidate because liquidation would not afford it the section 524(g) relief it seeks. It is not seeking to adjust its debtor/creditor relationships in a proper manner. Instead,

the Debtor is taking a discrete group of creditors and trapping them in one-sided litigation that deprives them of their urgent constitutional rights to seek justice for the injuries caused by the products of non-debtors—the very non-debtors that crafted a corporate manipulation designed to misuse bankruptcy. In addition, LTL's bankruptcy is not designed principally for the relief of the newly created "Debtor." It is designed to provide relief to entities that have not placed themselves in a bankruptcy process.

JJCI's machinations disserve, rather than promote, chapter 11's reorganization purposes, and the Debtor's abuse of the Bankruptcy Code raises grave constitutional questions under Article III of the Constitution, the Due Process Clauses of the Fifth and Fourteenth Amendments, and the right to jury trial protected by the Seventh Amendment. Therefore, this Court should reverse the Bankruptcy Court and dismiss the Debtor's case. Such a course of action would also comport with separation of powers principles by ensuring that courts do not apply the Bankruptcy Code in a manner that Congress never imagined, and certainly never authorized.

ARGUMENT

I. LTL'S PETITION CREATES SERIOUS CONSTITUTIONAL VIOLATIONS.

A. The Resolution of State Law Tort Claims by the Bankruptcy Court Would Violate *Stern* and Raise Serious Questions Under Article III.

Permitting the Debtor to invoke bankruptcy jurisdiction to resolve tort claims on the basis of the "Texas two-step" bankruptcy at issue here raises serious questions under Article III of the Constitution. This case presents two unusual and problematic components. First, this case was ***not*** filed by the "real" tortfeasor; it was filed by an entity created to seek bankruptcy resolution of a certain type of liability disfavored by the entity with the liability, while allowing that entity to avoid submitting itself to the bankruptcy process. This structure is ***not*** intended to provide bankruptcy relief to the "debtor," but instead to provide that relief to one or more non-debtors.

Second, Appellees seek to use bankruptcy relief to adjust the rights of creditors where the entity holding the liabilities is not in imminent or foreseeable financial distress. In so doing, it constitutes a litigation strategy that deprives the targeted creditors of their fundamental and guaranteed constitutional rights to resolve those claims on an individual basis before an Article III court and jury. Instead, these creditors are forced into a proceeding before a court that cannot determine those liabilities, while LTL seeks to impose a process that will delay and adjust these creditors' rights against an entity that has the financial wherewithal to

fully satisfy these liabilities.[2] Case law interpreting the bounds of Bankruptcy Court jurisdiction has expressly held that the Constitution does not so permit.

"Article III provides for the establishment of a court system as one of the separate but coordinate branches of the National Government . . . ." *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 15 (1955). "Since ratification, Article III has served a crucial role in our 'system of checks and balances' and 'preserve[s] the integrity of judicial decisionmaking[.]'" *In re Millennium Lab Holdings II, LLC*, 945 F.3d 126, 139 n.13 (3d Cir. 2019) (quoting *Stern v. Marshall*, 564 U.S. 462, 483-84 (2011)). It protects each branch from undue interference by the other two branches and helps secure individual liberty. *Stern*, 564 U.S. at 483.

The "record of history shows that the Framers crafted this charter of the judicial department with an expressed understanding that it gives the Federal Judiciary the power not merely to rule on cases, but to *decide* them, subject to review only by superior courts in the Article III hierarchy." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218-19 (1995) (emphasis in original). The Supreme Court has "long recognized that, in general, Congress may not 'withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in

[2] Neither the Bankruptcy Court's opinion on the Motion to Dismiss nor its companion opinion relating to injunctive relief appears to address this argument. *See generally*, Memorandum Opinion, Case No. 21-30589 (MBK) [Doc. No. 1572] (filed Feb. 25, 2022) (the "Dismissal Opinion"); Memorandum Opinion, Adv. Pro. No. 21-03032 (MBK) [Doc. No. 184] (filed Feb. 25, 2022).

equity, or admiralty.'" *Stern*, 564 U.S. at 484 (citation omitted). "When a suit is made of 'the stuff of the traditional actions at common law tried by the courts at Westminster in 1789,' and is brought within the bounds of federal jurisdiction, the responsibility for deciding that suit rests with Article III judges in Article III courts." *Id*. (quoting *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 90 (1982) (Rehnquist, J., concurring in judgment)); *see also N. Pipeline*, 458 U.S. 50 (1982) (plurality opinion) (holding bankruptcy court could not constitutionally decide state law claim for breach of contract against entity that was not otherwise part of the bankruptcy proceedings).

Article III prevents a bankruptcy court from adjudicating common-law tort claims against non-debtors that are brought before a bankruptcy court through artifice, as in this case. In *Stern*, the Supreme Court held that the bankruptcy court lacked the constitutional power to enter a final judgment on a state law tortious interference counterclaim the debtor had asserted in an adversary proceeding where the claim would not be "resolved in the process of ruling on [the counterclaim defendant's] proof of claim" and did not derive from or depend upon bankruptcy law. 564 U.S. at 497, 499, 503. *Stern* explained that the tortious interference claim had to be decided by an Article III court because "this case involves the most prototypical exercise of judicial power: the entry of a final, binding judgment *by a court* with broad substantive jurisdiction, on a common law cause of action, when

the action neither derives from nor depends upon any agency regulatory regime." *Id*. at 494 (emphasis in original). "[T]he "'experts' in the federal system at resolving common law counterclaims such as [debtor's] are the Article III courts, and it is with those courts that [debtor's] claim must stay." *Id*. Otherwise, "[i]f such an exercise of judicial power may nonetheless be taken from the Article III Judiciary simply by deeming it part of some amorphous 'public right,' then Article III would be transformed from the guardian of individual liberty and separation of powers we have long recognized into mere wishful thinking." *Id.* at 494-95.[3] Thus, "Congress

[3] *See also Waldman v. Stone*, 698 F.3d 910, 918-20 (6th Cir. 2012); *In re Bellingham Ins. Agency, Inc.*, 702 F.3d 553, 564 (9th Cir. 2012) ("*Granfinanciera* involved a federal-law claim, and *Stern* involved a state-law claim. But *Stern* held that both claims required an Article III court."); *In re Global Techs. Inc.*, 694 F.3d 705, 722 (6th Cir. 2012) (*Stern* held that "[w]hen a claim is 'a state law action independent of the federal bankruptcy law and not necessarily resolvable by a ruling on the creditor's proof of claim in bankruptcy,' the bankruptcy court cannot enter final judgment.") (quoting *Stern*, 564 U.S. at 487) (additional citation omitted); *In re Frazin*, 732 F.3d 313, 319 (5th Cir. 2013) ("Despite the narrowing language at the end of the Court's opinion, *Stern* clearly grounded its reasoning in principles that are broad in scope."); *In re Ortiz*, 665 F.3d 906, 911, 914 (7th Cir. 2011); *In re Fisher Island Invs., Inc.*, 778 F.3d 1172, 1192 (11th Cir. 2015).

As now-Justice Gorsuch explained for the Tenth Circuit:

> But along the way *Stern* did clearly take at least one thing off the table. It held that when a "claim is a state law action . . . and not necessarily resolvable by a ruling on the creditor's proof of claim in bankruptcy," it implicates private rights and thus is not amenable to final resolution in bankruptcy court.

In re Renewable Energy Dev. Corp., 792 F.3d 1274, 1279 (10th Cir. 2015) (Gorsuch, J.), *as amended on denial of reh'g* (July 28, 2015) (citations omitted).

may not bypass Article III simply because a proceeding may have *some* bearing on a bankruptcy case; the question is whether the action at issue stems from the bankruptcy itself or would necessarily be resolved in the claims allowance process." *Id.* (emphasis in original).

The Supreme Court's opinions following *Stern* have adopted the same reasoning. *See Wellness Int'l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1939 (2015) (holder of a *Stern* claim is entitled to an adjudication of that claim by an Article III court, unless he ***consents*** to a final disposition of the claim by the Bankruptcy Court); *Exec. Benefits Ins. Agency v. Arkison*, 134 S. Ct. 2165, 2172 (2014). *Stern* held that Article III barred bankruptcy court adjudication of the claim even though that counterclaim was a "core" proceeding under the Bankruptcy Code. As this Court has explained, *Stern* makes clear that "bankruptcy courts may violate Article III even while acting within their statutory authority in 'core' matters." *In re Millennium Lab Holdings II, LLC.*, 945 F.3d 126, 135 (3d Cir. 2019) (citation omitted).

In recognition of these constitutional concerns, Congress expressly excluded "the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11" from "core" claims. *See* 28 U.S.C. § 157(b)(2)(B).

The mesothelioma and ovarian cancer talc claims at issue here are "'made of the stuff of the traditional actions at common law tried by the courts at Westminster

in 1789.'" *Millennium*, 945 F.3d at 134 (quoting *Stern*, 564 U.S. at 484). These claims do not "stem from the bankruptcy itself." *Id.* at 136. And the claims against third-party entities (including J&J and New JJCI) would not "necessarily"—indeed ***cannot***—be resolved in the bankruptcy proof of claim process. Because the bankruptcy is a transparent attempt to evade the limits of Article I by creating a shell "debtor" to take on certain liabilities of New JJCI and J&J (the true defendants), the claims cannot be considered integral to the restructuring of a debtor-creditor relationship, which this Court has said is critical to assessing a *Stern* claim. *See Millennium*, 945 F.3d at 140.

The Debtor and its parent seek to subvert Article III jurisdiction through a carefully orchestrated charade through which non-debtors New JJCI and J&J have sought to claim all the benefits of bankruptcy, with none of the obligations. If the "exercise of judicial power may nonetheless be taken from the Article III Judiciary simply by" manipulation of corporate structure such as occurred here, "then Article III would be transformed from the guardian of individual liberty and separation of powers we have long recognized into mere wishful thinking." *Stern*, 564 U.S. at 494-95.

B. This Case Gives Rise to Grave Seventh Amendment Violations.

The Seventh Amendment provides: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be

preserved . . . ." U.S. Const., amend. 7. The Seventh Amendment applies to suits in which "legal rights [are] to be ascertained and determined," *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 41 (1989) (internal quotation marks omitted), and these include "[a]ctions sounding in tort" for damages to person or property. *Billing v. Ravin, Greenberg & Zackin, P.A.*, 22 F.3d 1242, 1245 (3d Cir. 1994). Accordingly, "asbestos claims . . . constitute lawsuits seeking the adjudication of 'legal rights' under the Seventh Amendment," and the court may not sanction any application of the Bankruptcy Code that infringes upon those rights. *In re G-I Holdings, Inc.*, 323 B.R. 583, 602 (Bankr. D. N.J. 2005).

Congress "lacks the power to strip parties contesting matters of private right of their constitutional right to a trial by jury" by assigning them to a bankruptcy court. *Granfinanciera*, 492 U.S. at 51-52. "[L]egal claims are not magically converted into equitable issues by their presentation to a court of equity," *Ross v. Bernhard,* 396 U.S. 531, 538 (1970), "nor can Congress conjure away the Seventh Amendment by mandating that traditional legal claims be brought there or taken to an administrative tribunal." *Granfinanciera*, 492 U.S. at 53-55 (holding that fraudulent conveyance action was a "private right" that was "not closely intertwined with a federal regulatory program" and had to be decided "by an Article III court"); *see also Beard v. Braunstein*, 914 F.2d 434, 439-40 (3d Cir. 1990); *cf. N. Pipeline*, 458 U.S. at 90-91 (Rehnquist, J., concurring in judgment) (explaining that the

damages claims for breach of contract and misrepresentation under state law were "the stuff of the traditional actions at common law tried by the courts at Westminster in 1789" as to which "[n]o method of adjudication is hinted, *other than the traditional common-law mode of judge and jury*") (emphasis added). This Court has applied these teachings to invalidate a bankruptcy court decision in a breach of contract action brought by the Trustee. *Beard*, 914 F.2d at 447. It held that the assertion of a compulsory counterclaim did not constitute consent to jurisdiction. *Id.* at 442.[4]

In its decision denying the Motion to Dismiss, the Bankruptcy Court held that an asbestos trust implemented under Bankruptcy Code section 524(g) would not violate claimants' Seventh Amendment jury rights because the "rights of talc plaintiffs would remain intact under a properly drafted and approved plan and [trust distribution procedures]." *See* Dismissal Opinion, at 24-25 (noting that "numerous

[4] The Bankruptcy Code itself recognizes that even in core proceedings, there may be a right to a jury trial. With respect to personal injury tort and wrongful death claims, it directs that such claims "shall be tried in the district court" where such claim "is pending or in the district court" presiding over the bankruptcy proceedings. 28 U.S.C. § 157(b)(5). And it says that "[i]f the right to a jury trial applies in a proceeding that may be heard under this section by a bankruptcy judge, the bankruptcy judge may conduct the jury trial if specially designated to exercise such jurisdiction by the district court and with the express consent of all the parties." 28 U.S.C. § 157(e). Absent that express consent, the jury trial must occur in and Article III court. But the Debtor's petition is designed to eliminate the jury rights of parties whose claims that are not even against the Debtor and who have not consented to resolution in bankruptcy court.

asbestos trusts implemented under § 524(g) . . . provide tort victims with choices between receiving guaranteed compensation under the trusts, or alternatively pursuing recovery against trusts through jury trials").

But the Bankruptcy Court's dismissal of Seventh Amendment concerns presupposes a bankruptcy that was filed in good faith. Because both mesothelioma and certain stages of ovarian cancer are terminal diseases, the very filing of the bankruptcy will deprive those creditors who passed during the pendency of LTL's bankruptcy case of their Seventh Amendment rights. Further, relying on a super-majority vote to bind non-consenting creditors poses a threat to the Seventh Amendment right of the non-consenting creditors of a solvent corporation (even assuming that the requirements of sections 1129 and 524(g) could be met).

Importantly, the potential loss of a jury trial is not a mere by-product of the filing; the sole purpose of the bankruptcy is to remove tort claimants from the tort system and strip them of their rights against extraordinarily wealthy and highly solvent entities. This fundamental concern merits more than a perfunctory consideration and dismissal.[5]

[5] The Bankruptcy Court takes a well-intentioned but paternalistic position, substituting its judgment for those of tort claimants in weighing "the substantial risks facing the talc claimants in the tort system." Dismissal Opinion, at 26-27. ("In the eyes of this Court, the tort system produces an uneven, slow-paced race to the courthouse, with winners and losers. Present and future talc claimants should not have to bear the sluggish pace and substantial risk if there exists another viable option."). But the claimants, and not the Bankruptcy Court, should be able to

Just as the bankruptcy court's decision on the merits in *Beard* violated the Seventh Amendment, a bankruptcy court's decision to resolve non-consenting claimant's legal claims against a solvent corporation (and without the statutory authority to determine the merits of these claims *at all*) would violate the Seventh Amendment, and this would be so even if the decision was reviewed *de novo* by a district court. *G-I Holdings* already held that asbestos claimants possess jury trial rights for the purpose of liquidating their claims. 323 B.R. at 602, 605. Indeed, in *In re SGL Carbon Corp*., 200 F.3d at 169 n.23, this Court reserved the question of whether a bankruptcy plan that resolves, without consent, jury-triable claims violates the Seventh Amendment right to a jury trial.

C. This Case Raises Serious Questions Regarding the Deprivation of Claimants' Constitutional Due Process Rights

The Debtor's petition also created due process violations, which similarly are not adequately addressed by the Dismissal Opinion. "[A] cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause." *Logan v. Zimmerman Brush Co.,* 455 U.S. 422, 428 (1982). Thus, "the Due Process Clauses protect civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances." *Id.* at 429 (citation omitted). This Court has explicitly "recognized as a protected property

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determine their chosen method for vindicating their rights.

interest the ability to pursue an asbestos claim." *In re Energy Future Holdings Corp.*, 949 F.3d 806, 822 (3d Cir. 2020) (citing *In re Grossman's Inc.*, 607 F.3d 114, 127 (3d Cir. 2010)); *see also Tulsa Pro. Collection Servs., Inc. v. Pope*, 485 U.S. 478, 485 (1988) ("Appellant's interest is an unsecured claim, a cause of action against the estate for an unpaid bill. Little doubt remains that such an intangible interest is property protected by the Fourteenth Amendment.").

Bankruptcy calls into question the ability of claimants to pursue their claims in the civil justice system, which is a constitutionally protected due process interest. Here, the Debtor proposes to curtail that interest by imposing an asbestos trust on unwilling claimants through an artificially staged and orchestrated bankruptcy. The Supreme Court has twice rejected similar attempts to impose asbestos trusts via the class action mechanism of Fed. R. Civ. P. 23, and that experience is highly instructive here. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 845-48 (1999); *Amchem Prods. v. Windsor*, 521 U.S. 591, 597-98 (1997).

Ortiz involved a staged proceeding in which a "limited fund" was created between the parties through an insurance settlement. The Supreme Court held that a federal court may not rely on a "limited fund" rationale where the limitation was contrived by a settlement between the parties. 527 U.S. at 864. The Court explained that "[a]ssuming, arguendo, that a mandatory, limited fund rationale could under some circumstances be applied to a settlement class of tort claimants, it would be

essential that the fund be shown to be limited *independently of the agreement of the parties to the action*." *Id.* at 864 (emphasis added).

Ortiz further explained that permitting an artificially limited fund to justify a mandatory class action would be "irreconcilable with the justification of necessity in denying any opportunity for withdrawal of class members whose jury trial rights will be compromised, whose damages will be capped, and whose payments will be delayed." *Ortiz*, 527 U.S. at 860. Enforcing "the traditional norm" that each individual is entitled to his day in court absent non-artificial inadequacy of funds, *id.* at 842, ensures that the defendant with the inadequate fund "ha[s] no opportunity to benefit himself or claimants of lower priority by holding back on the amount distributed to the class," and giving himself "a better deal than *seriatim* litigation would have produced." *Id.* at 839.

While the Bankruptcy Court held that *Ortiz* actually supports the use of bankruptcy to address mass tort claims, *see* Dismissal Opinion at 21-22, that assertion again assumed underlying good faith. The Bankruptcy Court, noting what it viewed as conflicting positions as to whether any filing was necessary by any J&J-related party at all, ignored the distinction between LTL and the non-filing entities, apparently finding that the "torrent of significant talc-related liabilities facing J&J and Old JJCI" were sufficient evidence of *the Debtor's* financial distress. *Id.* at 36.

By failing to distinguish between the pre-restructuring Old JJCI and the post-restructuring LTL, the Bankruptcy Court has begged the very question it has been asked to resolve. *See id.* at 33 (expressly acknowledging the Bankruptcy Court's determination to not "distinguish between the financial burdens facing Old JCCI and Debtor" and noting that, "[a]t issue in this case is *Old JJCI's talc liability* (and the financial distress that liability caused), now the legal responsibility of Debtor") (emphasis added). The Bankruptcy Court thus appears to relegate the divisive merger and subsequent bankruptcy filing by LTL as a matter of form over substance, concluding that "neither entity would be able to defend or economically resolve the current and future talc-related claims." *Id.* But the question of good faith does not require consideration of whether Old JJCI could have weathered the storm of mass tort litigation without bankruptcy; it requires an examination of why J&J, in carrying out the transactions that preceded this Chapter 11 case, went to great lengths to ensure they would never need to address that question—*and then* it requires a consideration of the effect of those transactions on the due process rights of personal injury claimants. Thus, the due process questions raised by *Ortiz* are not fully answered by the Dismissal Opinion: in determining to conduct the divisive merger, J&J and its subsidiaries ensured that only tort claimants—and neither any other J&J affiliate nor any other creditor constituency—would suffer the negative effects of a bankruptcy filing.

II. THE SEPARATION OF POWERS PRINCIPLES REQUIRE THIS COURT TO APPLY THE CANON OF CONSTITUTIONAL AVOIDANCE.

This Court has warned that:

> Chapter 11 vests petitioners with considerable powers—the automatic stay, the exclusive right to propose a reorganization plan, the discharge of debts, etc.—that can impose significant hardship on particular creditors. When financially troubled petitioners seek a chance to remain in business, the exercise of those powers is justified. But this is not so when a petitioner's aims lie outside those of the Bankruptcy Code.

In re SGL Carbon, 200 F.3d at 164-65.

That warning is fully applicable here. At a minimum, there are serious constitutional questions whether (1) under the principles recognized by the Supreme Court in *Stern v. Marshall*, 564 U.S. 462, 484 (2011), *Granfinanciera*, 492 U.S. at 58-59, *N. Pipeline*, 458 U.S. at 52, an Article I judge may properly preside over litigation transferred to the bankruptcy court by virtue of a Chapter 11 filing that serves no valid reorganizational purpose; (2) resolution of causes of action that are before the Article I judge only as a result of that filing would violate the right to a jury trial, and (3) resolution without adjudication on the merits would be consistent with due process.

These constitutional concerns arise because the Debtor's bankruptcy petition lies at the very outer limits of the Bankruptcy Code, if not beyond. "Congress' power under the Bankruptcy Clause 'contemplate[s] an adjustment of a failing debtor's obligations.'" *Ry. Lab. Execs.' Ass'n v. Gibbons*, 455 U.S. 457, 466 (1982) (quoting

Cont'l Ill. Nat'l Bank & Tr. Co. of Chi. v. Chi., R.I. & P. Ry. Co., 294 U.S. 648, 673 (1935)). "The purpose of Chapter 11 reorganization is to assist financially distressed business enterprises by providing them with breathing space in which to return to a viable state." *In re SGL Carbon*, 200 F.3d at 166 (internal quotation marks and citation omitted). And "there must be 'some relation' between filing and the 'reorganization-related purposes that [Chapter 11] was designed to serve.'" *Id*. at 165. This Court has explained that "filing a Chapter 11 petition merely to obtain tactical litigation advantages is not within 'the legitimate scope of the bankruptcy laws.'" *Id.* (citation omitted). "The Bankruptcy provisions are intended to benefit those in genuine financial distress. They are not intended to be used as a mechanism to orchestrate pending litigation." *Id.* (internal quotation marks and citation omitted). "Chapter 11 was designed to give those teetering on the verge of a fatal financial plummet an opportunity to reorganize on solid ground and try again, not to give profitable enterprises an opportunity to evade contractual or other liabilities." *Id.* at 166 (internal quotation marks and citation omitted). In such circumstances, "the 'statutory provisions designed to accomplish the reorganizational objectives become destructive of the legitimate rights and interests of creditors." *Id*. (citation omitted).

The Bankruptcy Court expressly endorsed the Debtor's filing, concluding that LTL did not file solely to gain a litigation advantage, Dismissal Opinion at 50, and

that it had a reorganizational purpose. *Id.* The determination of the Debtor's good faith, however, required the Bankruptcy Court to look broadly at the entire J&J enterprise and the cherry-picking engaged in by the non-debtor entities that was enabled by the corporate reshuffling that resulted in the LTL filing. LTL has no meaningful operations of its own, and its chapter 11 case was filed for the sole purpose of forcing the resolution of claims against a profitable operating predecessor, Old JJCI, and its parent, non-debtor J&J, itself a solvent and indeed extremely wealthy entity. The bankruptcy courts were not intended to be an alternative to the tort system. In reviewing the Bankruptcy Court's decision, this Court should not construe the Bankruptcy Code as authorizing the kind of abusive filing the Debtor is attempting here.

Settled principles of statutory interpretation, as well as the separation of powers, require this Court to construe the Bankruptcy Code as precluding the *LTL* case. The canon of constitutional avoidance requires courts to construe statutes, "if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score." *Almendarez-Torres v. United States*, 523 U.S. 224, 237-38 (1998) (citations omitted); *see also Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) ("The Court will not pass upon a constitutional question, although properly presented by the record, if there is also present some other ground upon which the case may be disposed of . . . . Thus, if a

case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter."). "[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems," courts will construe the statute to avoid such problems "unless such construction is plainly contrary to the intent [of the legislature]." *DeBartolo Corp. v. Fl. Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988). "'The elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.'" *Id.* (quoting *Hooper v. California*, 155 U.S. 648, 657 (1895)). "This approach not only reflects the prudential concern that constitutional issues not be needlessly confronted, but also recognizes that [legislatures,] like [the courts] [are] bound by and swear[ ] an oath to uphold the Constitution." *Id.*

The Supreme Court has already opined that the courts should defer to Congress with respect to the creation of innovative administrative compensation schemes for mass torts and asbestos in particular. *Amchem Prods.*, 521 U.S. at 628-29 ("The argument is sensibly made that a nationwide administrative claims processing regime would provide the most secure, fair, and efficient means of compensating victims of asbestos exposure. Congress, however, has not adopted such a solution"). Indeed, Congress enacted section 524(g) of the Bankruptcy Code to permit good faith debtors to resolve runaway asbestos claims through a trust

process. That relief does not, however, permit the machinations initially before the Bankruptcy Court, and now before this Court on appeal.

At a minimum, the Debtor's petition raises serious questions regarding fundamental constitutional rights, and this Court should interpret the Bankruptcy Code to preclude the deprivation of those rights.

CONCLUSION

For the reasons stated above, the Bankruptcy Court's order denying the Motion to Dismiss should be reversed and the Motion to Dismiss should be granted.

Date: July 7, 2022

Respectfully submitted,

ROBINSON & COLE LLP

/s/ Natalie D. Ramsey

Natalie D. Ramsey, Esq.
Davis Lee Wright, Esq.
1201 North Market Street, Suite 1406
Wilmington, Delaware 19801
Telephone: (302) 516-1700
Facsimile: (302) 516-1699
Email: nramsey@rc.com
dwright@rc.com

Attorneys for Erwin Chemerinsky, Proposed Amicus Curiae

CERTIFICATE OF ADMISSION TO BAR

I, NATALIE D. RAMSEY, certify as follows:

1. I am a member in good standing of the bar of the United States Court of Appeal for the Third Circuit.

2. Pursuant to 28 U.S.C. § 1746, I certify under penalty of perjury that the foregoing is true and correct.

ROBINSON & COLE LLP
Attorneys for Erwin Chemerinsky
Proposed Amicus Curiae

By: /s/ Natalie D. Ramsey

Dated: July 7, 2022

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), I certify that:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i) because this brief contains 6,115 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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3. This brief complies with the electronic filing requirements of Local Rule 31.1(c) because the text of this electronic brief is identical to the text of the paper copies, and the Vipre Virus Protection, version 3.1 has been run on the file containing the electronic version of this brief and no viruses have been detected.

/s/ Natalie D. Ramsey
Natalie D. Ramsey

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I certify that on July 7, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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Natalie D. Ramsey