No. 24-1493

IN THE

United States Court of Appeals for the Fourth Circuit

IN RE BESTWALL LLC,

Debtor.

THE OFFICIAL COMMITTEE OF ASBESTOS CLAIMANTS,

Appellant,

v.

BESTWALL LLC,

Appellee.

On Appeal from the U.S. Bankruptcy Court
for the Western District of North Carolina
No. 17-31795 (Hon. Laura Turner Beyer)

BRIEF OF AMERICAN ASSOCIATION FOR JUSTICE AS AMICUS CURIAE IN SUPPORT OF APPELLANT

LORI ANDRUS
President
AMERICAN ASSOCIATION FOR JUSTICE
777 6th Street, NW #200
Washington, DC 20001
(415) 986-1400
lori.andrus@justice.org

JEFFREY R. WHITE
Counsel of Record
AMERICAN ASSOCIATION FOR JUSTICE
777 6th Street, NW #200
Washington, DC 20001
(202) 617-5620
jeffrey.white@justice.org

Counsel for Amicus Curiae

September 3, 2024

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case, except that a disclosure statement is **not** required from the United States, from an indigent party, or from a state or local government in a pro se case. In mandamus cases arising from a civil or bankruptcy action, all parties to the action in the district court are considered parties to the mandamus case.

Corporate defendants in a criminal or post-conviction case and corporate amici curiae are required to file disclosure statements.

If counsel is not a registered ECF filer and does not intend to file documents other than the required disclosure statement, counsel may file the disclosure statement in paper rather than electronic form. Counsel has a continuing duty to update this information.

No. 24-1493 Caption: Bestwall LLC v. The Official Committee of Asbestos Claimants

Pursuant to FRAP 26.1 and Local Rule 26.1,

American Associataion for Justice
(name of party/amicus)

who is amicus curiae, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(a)(2)(B))? ☐ YES ☑ NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☐ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☑ YES ☐ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ Jeffrey R. White Date: 9/3/2024

Counsel for: American Association for Justice

CERTIFICATE OF SERVICE

****

I certify that on September 3, 2024 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

/s/ Jeffrey R. White (signature) 9/3/2024 (date)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

IDENTITY AND INTEREST OF AMICUS CURIAE[1]

The American Association for Justice ("AAJ") is a national, voluntary bar association established in 1946 to strengthen the civil justice system, preserve the right to trial by jury, and protect access to the courts for those who have been wrongfully injured. With members in the United States, Canada, and abroad, AAJ is the world's largest plaintiff trial bar. AAJ members primarily represent plaintiffs in personal injury actions, employment rights cases, consumer cases, and other civil actions, including class actions. Throughout its 78-year history, AAJ has served as a leading advocate for the right of all Americans to seek legal recourse for wrongful conduct.

This case is of acute interest to AAJ and its members. If allowed to stand, the decision below would improperly extend the benefits of Chapter 11 bankruptcy beyond its purpose of assisting an ongoing business to resolve its overwhelming debts, to serving as a tool for demonstrably solvent companies to escape full accountability for harms they have caused to consumers.

SUMMARY OF ARGUMENT

1a. The Georgia-Pacific Corporation, a multibillion-dollar company whose assets derive in part from its marketing of asbestos-containing products, is a pioneer in

[1] All parties consent to the filing of this brief, and no counsel for any party authored it in whole or in part. Apart from the amicus curiae, no person, party, or party's counsel contributed money intended to fund the brief 's preparation and submission.

using the Texas divisional merger statute to cabin all its obligations to numerous injury victims in a shell corporation (Bestwall), safeguarding its assets and ongoing business activities in a "new" company (Georgia-Pacific LLC). Bestwall is fully capable of satisfying all present and future asbestos claims by virtue of a funding agreement with its sibling corporation. However, by posing as a bankrupt debtor, Bestwall hopes to delay payment until it establishes a bankruptcy trust, which it expects will pay claimants far less than they might be awarded in the tort system.

The question before this Court is whether Bestwall's bankruptcy petition falls within the federal bankruptcy subject matter jurisdiction of the lower court. AAJ submits that the Bankruptcy Clause of the Constitution is limited by the Seventh Amendment, which guarantees the right of asbestos victims to a jury trial of their claims for money damages before an Article III tribunal. The Bankruptcy Clause does not authorize Congress to create bankruptcy jurisdiction to eliminate the constitutional rights of the victims of tortfeasors who are not in any financial distress.

The subject matter jurisdiction that Congress can create is defined in the Constitution's Bankruptcy Clause. Undisputably, that provision historically extends bankruptcy protections only to debtors who are insolvent or in significant financial distress. But the mere absence of any prohibition against treating financially healthy debtors as "subjects of Bankruptcy" is not a sufficient basis. The federal government is a government of limited, enumerated powers; authority to negate state law tort

causes of action cannot be presumed.

b. To the contrary, the Seventh Amendment commands that plaintiffs' right to trial by jury before an Article III court "be preserved." The jury right in civil cases is so central to our history that any seeming curtailment must be given the highest scrutiny. Indeed, the right to trial by jury in civil actions was so important to the Founders that the Constitution itself could not have won ratification without it. A primary reason for their insistence upon that right was their conviction that disputes between debtors and creditors would be more justly adjudicated by civil juries, rather than by federal judges.

The bankruptcy power of the federal courts must therefore be construed so as to avoid any conflict with the Seventh Amendment. The Supreme Court has made clear that private tort claims are not within Congress's constitutional authority to create subject matter jurisdiction in juryless, non-Article III courts. Neither Congress nor the courts may conjure away the Seventh Amendment by mandating that traditional legal claims be brought before an Article I bankruptcy court.

c. The lower court's decision would lay out a blueprint for major corporations seeking to evade the Supreme Court's firm protections of the due process and Seventh Amendment rights of tort victims, and instead pay them pennies on the dollar in compensation. The Supreme Court has made clear that corporations may not, using Federal Rule of Civil Procedure 23, create a global settlement class

to limit compensation of asbestos victims to a designated fund. This Court should not invite corporate tortfeasors to accomplish the same illicit objective using the Bankruptcy Code.

2. Quite apart from these constitutional infirmities, bankruptcy trusts are not preferable to the civil justice system in handling tort claims against financially healthy tortfeasors. Amici supporting Bestwall in the previous appeal to this Court suggested that the tort system has "limited ability" to achieve global resolution of mass tort claims. To the contrary, for over fifty years, Article III judges have employed multidistrict litigation (MDL) to do just that. Even the U.S. Chamber of Commerce study relied upon by those amici concedes that MDLs can be an efficient means of advancing litigation.

MDLs have become the primary means of aggregating and settling mass tort cases precisely because the MDL procedure is specifically designed to address the difficult challenges of mass tort litigation. MDLs achieve remarkable success in achieving fair and efficient global settlements because, unlike bankruptcy trust claimants, the constitutional rights of injured tort plaintiffs are preserved. Their right to walk away from a proposed settlement and demand a jury trial serves as a strong incentive for defendants proposing a mass tort settlement to maximize its benefits to plaintiffs.

3. MDL courts enjoy extraordinary flexibility to develop innovative procedures

to resolve mass tort claims efficiently at every stage of litigation. They have made effective use of document repositories, discovery databases, bellwether trials, and fact sheets, in order to reduce expense and wasteful redundancy. They also possess tools to advance settlements, including private claims resolution facilities, and "negotiation classes." With these tools available, the tort system is well equipped to resolve the claims of tort victims seeking redress from corporations experiencing no financial distress.

ARGUMENT

I. CONGRESS'S CONSTITUTIONAL AUTHORITY TO ESTABLISH BANKRUPTCY LAW DOES NOT INCLUDE AUTHORITY TO ELIMINATE TORT CLAIMS AGAINST DEBTORS WHO ARE IN NO FINANCIAL DISTRESS.

The Georgia-Pacific Corporation manufactured and sold joint compound and other products containing asbestos fibers from 1965 until 1977, when the Consumer Product Safety Commission banned the use of asbestos in such products. *See* 16 C.F.R. § 1304.1. Consequently, as Judge King noted previously, the company faced hundreds of thousands of lawsuits, "the vast majority of which have been filed by individuals suffering from the scourge of mesothelioma." *In re Bestwall LLC*, 71 F.4th 168, 186–87 (4th Cir. 2023) (King, J., dissenting). But Georgia-Pacific, which had grown into a multibillion-dollar company, was always fully capable of responding to those civil suits and satisfying any judgments against it.

In 2017, Georgia-Pacific "moved" to Texas for about five hours—long

enough to make use of the state's divisional merger statute in order to divide itself into two new entities. *Id*. at 187. Georgia-Pacific LLC ("New GP") received the company's profitable assets and business operations, while Bestwall (a shell with no business operations) was laden with the company's asbestos liabilities.

By virtue of a funding agreement with New GP, Bestwall remained "able to pay any conceivable liabilities now and in the foreseeable future." *In re Bestwall LLC*, 658 B.R. 348, 373 (Bankr. W.D.N.C. 2024). Nevertheless, Bestwall moved to North Carolina and filed for bankruptcy. With that maneuver, the company hoped to delay and discount the claims against it by moving them out of the civil justice system, to be replaced with claims against a trust to be established under 11 U.S.C. § 524(g). Other major corporations have followed suit with their own versions of this scheme. *See* Michael A. Francus, *Texas Two-Stepping Out of Bankruptcy*, 120 Mich. L. Rev. Online 38, 41–42 (2022); Lindsey D. Simon, *Bankruptcy Grifters*, 131 Yale L.J. 1154, 1186–1205 (2022).

The question before this Court is whether Congress can create subject matter jurisdiction under the Bankruptcy Clause over claims against debtors experiencing no financial distress.

A. The Bankruptcy Clause Does Not Empower Congress to Extend Bankruptcy Protections to Entities Who Are in No Financial Distress.

As Bankruptcy Judge Beyer correctly stated, the Bankruptcy Clause of the Constitution defines the limits of constitutional subject matter jurisdiction for

bankruptcy. *In re Bestwall LLC*, 658 B.R. at 362. The Constitution succinctly grants to Congress the power "[t]o establish . . . uniform Laws on the subject of Bankruptcies throughout the United States." U.S. Const. art. I, § 8, cl. 4. Judge Beyer is also correct that, unfortunately, "the Framers did not give us much with which to work." *In re Bestwall LLC*, 658 B.R. at 365.

Without doubt, "[a]ll bankruptcy law . . . no matter when or where devised and enacted . . . aims, first, to secure an equitable division of the *insolvent* debtor's property among all his creditors." Louis Edward Levinthal, *The Early History of Bankruptcy Law*, 66 U. Pa. L. Rev. 223, 225 (1918) (emphasis added). Nor is there any dispute that a primary purpose of bankruptcy is "to rehabilitate a distressed but viable business." *Carolin Corp. v. Miller*, 886 F.2d 693, 704 (4th Cir. 1989).

Judge Beyer acknowledged that the Founders "might be surprised that an entity like [Bestwall] with access to significant financial resources has sought bankruptcy protection." *In re Bestwall LLC*, 658 B.R. at 380. Nevertheless, because the constitutional grant of bankruptcy power "does not explicitly require debtors to suffer from any level of financial distress," *id.* at 363, and because "there is no direct evidence that the Framers intended to require financial distress for bankruptcy jurisdiction," *id.* at 365, Judge Beyer concluded that "financial distress is not a prerequisite for bankruptcy subject matter jurisdiction pursuant to the Constitution." *Id.* at 379.

This is plainly insufficient. The absence of an express constitutional limit cannot serve as the basis for the exercise of power by the federal government. As Chief Justice Roberts has noted:

> In our federal system, the National Government possesses only limited powers; the States and the people retain the remainder. The States have broad authority to enact legislation for the public good—what we have often called a "police power." *United States v. Lopez*, 514 U.S. 549, 567 (1995). The Federal Government, by contrast, has no such authority and "can exercise only the powers granted to it," *McCulloch v. Maryland*, 4 Wheat. 316, 405 (1819), including the power to make "all Laws which shall be necessary and proper for carrying into Execution" the enumerated powers, U.S. Const., Art. I, § 8, cl. 18.

Bond v. United States, 572 U.S. 844, 854 (2014). Thus, for example, in deference to the states' role as independent sovereigns vested with police power and to "the historic primacy of state regulation of matters of health and safety," there is a presumption against preemption of state tort causes of action. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996); *see also Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 523 (1992) (noting "the strong presumption against pre-emption" of state tort lawsuits). The overbroad interpretation of the bankruptcy power in this case amounts to "granting Congress an unlimited police power inconsistent with a Constitution of enumerated and limited federal powers." *Brzonkala v. Va. Polytechnic Inst. & State Univ.*, 169 F.3d 820, 852 (4th Cir. 1999), *aff'd sub nom. United States v. Morrison*, 529 U.S. 598 (2000).

B. The Seventh Amendment Protects Plaintiffs' Right to a Jury Trial of Their Claims in an Article III Court.

The court below also ignored the clear and explicit limitation the Founders enshrined in the Seventh Amendment.

The Supreme Court very recently made clear that "[t]he right to trial by jury is 'of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right' has always been and 'should be scrutinized with the utmost care.'" *Sec. & Exch. Comm'n v. Jarkesy*, 144 S. Ct. 2117, 2128 (2024) (quoting *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935)).

The colonists took to heart Blackstone's praise for the jury trial as "the most transcendent privilege" of English subjects. 3 William Blackstone, Commentaries *379. And they closely followed the civil suit by John Wilkes and his printer against government officials for conducting an illegal search, establishing the supremacy of the jury as arbiter of damages. *See Wilkes v. Wood* (1763) 98 Eng. Rep. 489 (KB), and *Huckle v. Money* (1763) 95 Eng. Rep. 768 (CP). Wilkes' case was "a matter of keen interest in the American colonies," *see* Stephan Landsman, *The Civil Jury in America: Scenes from an Unappreciated History*, 44 Hastings L.J. 579, 591 (1993), and "was probably the most famous case in late eighteenth-century America." Akhil Reed Amar, *Fourth Amendment First Principles*, 107 Harv. L. Rev. 757, 772 (1994).

The colonists also complained bitterly when the Crown "began evading American juries by siphoning adjudications to juryless admiralty, vice admiralty,

and chancery courts." *Jarkesy*, 144 S. Ct. at 2128. Ultimately, they decided that the King's conduct in "depriving us in many cases, of the benefits of Trial by Jury" warranted separation from England. Declaration of Independence para. 20 (U.S. 1776). Notably, trial by jury was the only right universally secured by all thirteen original American state constitutions. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 341 (1979) (Rehnquist, J., dissenting).

The new Americans were surprised, then, when the delegates to the Constitutional Convention finished their work and rode away from Philadelphia without including an express guarantee of the right to trial by jury in civil cases. Jeffrey R. White, *The Civil Jury: 200 Years Under Siege*, Trial, June 2000, at 22. That omission very nearly doomed ratification of the entire constitution. Edith Guild Henderson, *The Background of the Seventh Amendment*, 80 Harv. L. Rev. 289, 295–99 (1966). As Justice Story recounts, it was only after the Federalists agreed to adopt a Bill of Rights that included such a guarantee that the Constitution won ratification. *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 445 (1830); *see also* Stanton D. Krauss, *The Original Understanding of the Seventh Amendment Right to Jury Trial*, 33 U. Rich. L. Rev. 407, 411–13 (1999).

Most importantly, the original intent for mandating preservation of the jury right was to limit the power of federal judges in disputes between debtors and creditors. In the ratification debates, the Antifederalists voiced their fear that federal

judges would naturally side with wealthy and powerful organizations in debtor-creditor cases. Alan Howard Scheiner, *Judicial Assessment of Punitive Damages, the Seventh Amendment, and the Politics of Jury Power*, 91 Colum. L. Rev. 142, 152 (1991).

> A state-by-state examination of the surviving records of the debates in the state ratification process reveals that the resulting concern for local debtors faced with the threat of suit in a federal court, without a jury, was one of the chief motivations for opposition to the Constitution.

Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 Minn. L. Rev. 639, 679 (1973).

Bankruptcy courts, in the proper exercise of their subject-matter jurisdiction pursuant to the Bankruptcy Clause, "are courts of equity," not bound by the Seventh Amendment. *Young v. United States*, 535 U.S. 43, 50 (2002); *see also In re Hudson*, 170 B.R. 868, 873–74 (E.D.N.C. 1994). Suits for monetary damages, including Plaintiffs' state-law causes of action in this case, are quintessentially actions at law to which the jury right attaches. *See Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 476 (1962).

The bankruptcy court's decision below erases that crucial distinction and deprives plaintiffs of their constitutional right to present their case in an Article III court before a jury. It purports to do so by finding an unexpressed and heretofore unrecognized congressional authority in Congress to create bankruptcy subject matter jurisdiction over cases at law between asbestos victims and a debtor-

tortfeasor who is wholly able to respond to all current and future tort claims.

Congressional acts must "be so construed as to avoid serious doubt of their constitutionality." *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 841 (1986) (citation omitted). There is certainly room for serious doubt as to the constitutionality of construing the statute conferring bankruptcy jurisdiction, 28 U.S.C. § 1334, to extend the benefits of Chapter 11 to tortfeasors whose only qualification to file a bankruptcy petition is a strong desire for those benefits.

The Supreme Court has made clear that "[w]holly private tort, contract, and property cases . . . are not at all" within Congress's constitutional authority to create subject matter jurisdiction in non-Article III courts. *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 51 (1989) (quoting *Atlas Roofing Co. v. Occupational Safety & Health Rev. Comm'n*, 430 U.S. 442, 458 (1977)). A creditor's direct claim of liability against a nondebtor under applicable nonbankruptcy law is not within the ambit "of those claims that fell within the scope of the historical" core bankruptcy tribunals. *Exec. Benefits Ins. Agency v. Arkison*, 573 U.S. 25, 33 n.7 (2014). Nor is a tort victim's state-law claim against a tortfeasor who is not in any financial distress. Rather, it is "the stuff of the traditional actions at common law tried by the courts at Westminster in 1789" for which there can be no method of adjudication "other than the traditional common-law mode of judge and jury." *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 90 (1982) (Rehnquist, J., concurring).

The Bankruptcy Clause does not confer upon Congress the power to invent subject matter jurisdiction "whenever it finds that course expedient." *Id.* at 73. The Supreme Court has emphatically rejected the notion that the right to trial by jury of legal claims may be disregarded if it "would impede swift resolution of bankruptcy proceedings and increase the expense of Chapter 11 reorganizations." *Granfinanciera*, 492 U.S. at 63. Such considerations "are insufficient to overcome the clear command of the Seventh Amendment." *Id.* (quoting *Curtis v. Loether*, 415 U.S. 189, 198 (1974)). In short, the bankruptcy court erred in interpreting Congress's power as capable of "conjur[ing] away the Seventh Amendment by mandating that traditional legal claims be brought" before an Article I bankruptcy court. *Id.* at 52.

Nor may the judicial branch do so.

C. Permitting Tortfeasors Who Are Fully Capable of Satisfying Their Liabilities to Take Undeserved Advantage of the Benefits of Chapter 11 Violates the Due Process and Seventh Amendment Rights of Victims.

The Supreme Court has prohibited corporations from using a settlement class action to force a global settlement on asbestos victims in violation of their due process and Seventh Amendment rights. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999). The decision below invites corporations to accomplish the same objective by manipulating the bankruptcy process.

In *Ortiz*, Fibreboard sought to achieve a global resolution of asbestos claims through use of a mandatory, no opt-out class action under Federal Rule of Civil

Procedure 23(b)(1)(B), designating a large, but limited, fund composed of assets and liability insurance coverage. The parties then immediately entered into a global settlement of all pending and future asbestos injury claims, to be compensated only out of the fund. *Id.* at 824–25.

The Supreme Court rejected the proposed settlement. Justice Souter, writing for the Court, emphasized that the plan implicated both the "Seventh Amendment jury trial rights of absent class members" and "the due process principle . . . 'that everyone should have his own day in court.'" *Id.* at 846 (citation omitted).[2] At minimum, due process requires that plaintiffs who find their claims included in a class action must be "provided with an opportunity to remove [themselves] from the class." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985); *see also Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 363 (2011) ("In the context of a class action predominantly for money damages we have held that absence of notice and opt out violates due process.").

The rationale supporting Rule 23(b)(1)(B) limited fund class actions is that "the totals of the aggregated liquidated claims and the fund available for satisfying them, set definitely at their maximums, demonstrate the inadequacy of the fund to

[2] Indeed, the Supreme Court has "grounded the right of access to courts in the Article IV Privileges and Immunities Clause, the First Amendment Petition Clause, the Fifth Amendment Due Process Clause, and the Fourteenth Amendment Equal Protection, and Due Process Clauses." *Christopher v. Harbury*, 536 U.S. 403, 415 n.12 (2002) (citations omitted).

pay all the claims." *Ortiz*, 527 U.S. at 838. The forced settlement must represent the best that claimants could expect from the assets available, and did not simply "give a defendant a better deal than *seriatim* litigation would have produced." *Id.* at 839.

The settlement trust envisioned by Bestwall bears a striking resemblance to the limited fund settlement the Court struck down in *Ortiz*, and the due process and Seventh Amendment deficiencies that proved fatal to the Fibreboard global settlement are equally fatal here.

The impact of this maneuver, mass tort defendants well know, will show up in their bottom lines. "[R]ecoveries in bankruptcy give cents on the dollar to tort claimants." Francus, *supra*, at 40 & n.12. Asbestos trusts in particular notoriously fail to pay out anywhere near full compensation, but provide only "pennies on the dollar" for asbestos injuries. Stephen J. Carroll et al., *Asbestos Litigation* 102 (RAND 2005), http://www.rand.org/pubs/monographs/MG162/. The "most prominent example" is the Johns-Manville bankruptcy trust, which initially promised to pay the full value of injury claims, faced insolvency within a few years, and was allowed a reduction of 10% of the full value in 1995, and to 5.1% by 2022. Sergio Campos & Samir D. Parikh, *Due Process Alignment in Mass Restructurings*, 91 Fordham L. Rev. 325, 351–52 (2022). In fact, a federal study found the percentage for some asbestos trusts can be as low as 1.1% of the scheduled compensation. Government Accounting Office, GAO-11-819, *Asbestos Injury*

Compensation: The Role and Administration of Asbestos Trusts 21 (Sept. 2011).

The ruling by the bankruptcy court below invites corporate defendants to use bankruptcy petitions by non-bankrupt debtors "to 'create *de facto* class actions at will.'" *Taylor v. Sturgell*, 553 U.S. 880, 901 (2008) (quoting *Tice v. Am. Airlines, Inc.*, 162 F.3d 966, 973 (7th Cir. 1998)). It invites financially sound tortfeasors to accomplish by way of bankruptcy the result that is forbidden under the class action rules: To deprive tort victims of their due process and Seventh Amendment rights, not for the purpose of offering a troubled corporation a fresh start, but simply to "give a defendant a better deal." *Ortiz*, 527 U.S. at 839.

II. BANKRUPTCY TRUSTS ARE NOT INHERENTLY SUPERIOR TO ARTICLE III COURTS IN RESOLVING MASS TORT CLAIMS JUSTLY AND EFFICIENTLY.

Amici supporting Bestwall in the previous appeal to this Court, defended resort to bankruptcy as a superior means of resolving mass tort claims compared to Article III courts. In their view, the Texas Two-Step "is a particularly apt business decision with mass torts, especially asbestos, where forms of aggregate litigation 'have limited utility in providing effective, timely, and final global resolution.'" Brief for Chamber of Commerce of the United States of America and the American Tort Reform Association as Amici Curiae Supporting Debtor and Plaintiffs-Appellees and Opposing Rehearing En Banc at 12, *In re Bestwall LLC*, 71 F.4th 168 (4th Cir. 2023) (Nos. 22-1127 & 22-1135) (quoting U.S. Chamber of Com. Inst. for

Legal Reform, *Unlocking the Code: The Value of Bankruptcy to Resolve Mass Torts* 30 (Dec. 2022), https://instituteforlegalreform.com/wp-content/uploads/2022/12/Unlocking-the-Code-the-Value-of-Bankruptcy-to-Resolve-Mass-Torts-final-digital.pdf) [hereinafter "Chamber Advocacy Paper"].

The U.S. Chamber's advocacy paper does not and cannot make the case for either the inability of the civil justice system or the superiority of bankruptcy trusts in handling mass tort claims. In fact, for over fifty years, Article III courts have made use of multidistrict litigation to do just that. As the Chamber also acknowledges, "the MDL mechanism can be an efficient way of resolving pretrial matters." *Id.* at 9.

Moreover, the Chamber's paper claims that "MDLs have faced increasing criticism." *Id.* However, if the two cases cited are the strongest examples, that criticism hardly shows the superiority of bankruptcy over the tort system. The first case cited by the Chamber involved the MDL for claims against Bayer, the maker of Roundup, alleged to have caused numerous cases of non-Hodgkins lymphoma. *Id.* at 10. Judge Chhabria disapproved of Bayer's proposed $2 billion global settlement because it failed to protect the legal rights of future claimants—fundamental rights not unique to MDLs but mandated by due process and the Seventh Amendment. *See In re Roundup Products Liability Litigation*, MDL No. 2471, 541 F. Supp. 3d 1004 (N.D. Cal. May 26, 2021). When Bayer withdrew its settlement proposal, it did not resort to bankruptcy, but opted for adjudication in Article III courts, "setting aside

$4.5 billion to compensate any potential future claims it may face in the tort system." Chamber Advocacy Paper, *supra*, at 10.

The second example involved the hundreds of thousands of claims against 3M and Aearo Technologies that their allegedly defective ear protection devices inflicted hearing damage on military personnel. *Id*. Aearo's criticism was directed not at the MDL but at the high number of claims filed, which increased the settlement cost and therefore "preclude[d] any reasonable settlement." *Id.* (quoting Informational Brief of Aearo Technologies LLC at 5–6, 20, *In re Aearo Techs. LLC*, 642 B.R. 891 (Bankr. S.D. Ind. 2022) (No. 22-02890)). And yet, Aearo and 3M the following year reached a global settlement of all claims through the MDL's efforts. *See* Press Release, 3M, *3M Announces Combat Arms Settlement* (Aug. 29, 2023), https://investors.3m.com/news-events/press-releases/detail/1797/3m-announces-combat-arms-settlement.Nor does the Chamber's own advocacy piece support the notion that Article III courts have "limited utility" in resolving large tort cases. In fact, "judicial supervision, evidentiary burdens, and procedural requirements" enable the tort system to achieve global settlements with integrity and efficiency. Chamber Advocacy Paper, *supra*, at 17–18. While AAJ in no way agrees with the U.S. Chamber's public attacks on the capabilities of asbestos trusts, *see id.* at 16, it is not entitled to sing a completely different tune before this Court.

Indeed, multidistrict litigation was specifically designed to address the kind

of mass tort litigation involved in this case. *See generally* Andrew Bradt, *"A Radical Proposal": The Multidistrict Litigation Act of 1968*, 165 U. Pa. L. Rev. 831 (2017) (providing a detailed history of the origins, drafting, and enactment of the MDL statute, 28 U.S.C. § 1407). For that reason, MDLs have become "the most important federal procedural device to aggregate (and settle) mass torts." Margaret S. Thomas, *Morphing Case Boundaries in Multidistrict Litigation Settlements*, 63 Emory L. J. 1339, 1346–47 (2014) (citation omitted).

Historically, about a quarter of the MDL docket has consisted of mass tort cases. Samir D. Parikh, *The New Mass Torts Bargain*, 91 Fordham L. Rev. 447, 475 (2022). Although § 1407 provides for the return of cases for trial in their transferor courts, experience has shown that the vast majority can be settled without trial following the resolution of pretrial issues by the MDL court. "From 1968 through September 30, 2018, transferee courts had received and resolved approximately 516,593 cases," about 97% of which were resolved in the MDL court by dispositive motion or voluntary settlement. *Id*.

The right of plaintiffs to reject a proposed settlement and opt instead for a jury in an Article III court is crucial to this success rate. Because "settlement designers must purchase those rights by way of the benefits promised to [claimants] for remaining in the settlement," their option not to participate can furnish "a kind of market test of a settlement's fairness and adequacy, particularly of the specific

compensation offers that will be made." Ralph Brubaker, *Mandatory Aggregation of Mass Tort Litigation in Bankruptcy*, 131 Yale L.J. Forum 960, 992–93 (2022). By contrast—and despite the lack of any financial distress— Bestwall seeks Chapter 11 benefits that "do not have the procedural protections that accompany Article III review" and which present "the gravest due-process threats facing mass-tort victims." Simon, *supra*, at 1159.

Although Bestwall inherited from Georgia-Pacific "enormous potential liabilities and defense costs," *Ortiz*, 527 U.S. at 829, the company faces those challenges only because Georgia-Pacific exposed hundreds of thousands of individuals to the dangers of airborne asbestos fibers—dangers that were well known before 1965. *See Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 598 (1997). No one underestimates those challenges. But, as the Supreme Court recently underscored, bankruptcy law does not provide a bankruptcy court "with a roving commission to resolve all such problems that happen its way, blind to the role other mechanisms (legislation, class actions, *multi-district litigation*, consensual settlements, among others) play in addressing them." *Harrington v. Purdue Pharma L. P.*, 144 S. Ct. 2071, 2084 (2024) (emphasis added).

III. THE ARTICLE III CIVIL JUSTICE SYSTEM IS EXPERIENCED AND WELL-EQUIPPED TO HANDLE MASS TORT LITIGATION.

A. Article III Judges Using Multidistrict Litigation Have Handled Mass Tort Litigation Efficiently and Fairly.

Federal courts have for decades resolved mass tort claims of even the most complex variety while avoiding "piecemeal litigation and conflicting judgments." *Moses v. CashCall, Inc.*, 781 F.3d 63, 72 (4th Cir. 2015). Multidistrict litigation was explicitly designed and enacted to address the exigencies of mass torts. *See* Bradt, *supra*, at 847–907 (tracing the drafting, legislative journey, and enactment of § 1407); Zachary D. Clopton & Andrew D. Bradt, *Party Preferences in Multidistrict Litigation*, 107 Calif. L. Rev. 1713, 1721 (2019) (noting that § 1407 was specifically designed by judges to address the increasing caseload of the federal courts).

Administered by Article III courts with the guarantee of the right to trial by jury, "MDL consolidation has been an enormously successful strategy for efficiently managing and resolving many mass tort cases." D. Theodore Rave & Francis E. McGovern, *A Hub-and-Spoke Model of Multidistrict Litigation*, 84 Law & Contemp. Probs. 21, 22 (2021). In an MDL, "all of the involved parties in a single proceeding [can be gathered] before a judge who can flexibly guide the case to a resolution." J. Maria Glover, *Due Process Discontents in Mass-Tort Bankruptcy*, 72 DePaul L. Rev. 535, 548 (2023) (quoting Andrew D. Bradt, *Something Less and Something More: MDL's Roots as a Class Action Alternative*, 165 U. Pa. L. Rev. 1711, 1718 (2017)). For this reason, MDLs have become "the dominant procedure for mass tort litigation." Natalie R. Earles, *The Great Escape: Exploring Chapter 11's Allure to Mass Tort Defendants*, 82 La. L. Rev. 519, 539 (2022).

B. MDL Judges Are Equipped with the Authority and Appropriate Tools to Handle Mass Tort Cases.

To address mass tort issues, MDL judges are vested with what one scholar has termed "procedural exceptionalism," which enables judges to remain "flexible and creative" in fashioning and employing innovative tools to address the challenges presented by mass tort litigation. Abbe R. Gluck, *Unorthodox Civil Procedure: Modern Multidistrict Litigation's Place in the Textbook Understandings of Procedure*, 165 U. Pa. L. Rev. 1669, 1689 (2017). After "more than fifty years of multidistrict litigation under § 1407, federal courts have worked with parties and their counsel to develop 'specialized procedures to manage the pretrial proceedings in the related cases.'" *Looper v. Cook Inc.*, 20 F.4th 387, 390 (7th Cir. 2021) (citation omitted).

1. Discovery Tools

One highly effective option open to MDL judges is to order the creation and maintenance of centralized document repositories and discovery databases that vastly reduce redundancy and expense in both document and deposition discovery. *See, e.g.*, *In re Avandia Mktg., Sales Pracs. & Prods. Liab. Litig.*, No. 07-MD-1871, 2021 WL 5178489, at *1 (E.D. Pa. July 12, 2021), *report and recommendation adopted*, No. 07-MD-1871, 2021 WL 4129426 (E.D. Pa. Sept. 10, 2021); *In re Volkswagen "Clean Diesel" Mktg., Sales Pracs., & Prods. Liab. Litig.*, MDL No. 2672 CRB (JSC), 2017 WL 4680242, at *1 (N.D. Cal. Oct. 18, 2017).

MDL judges may also make use of "fact sheets," which are "questionnaires eliciting a wide range of information [from claimants], such as the circumstances of their exposures and the severity of their injuries, to facilitate settlement negotiations or improve claim administration following settlement." Manual For Complex Litigation (Fourth) § 22.91 (2004).

MDL judges continue to make refinements for screening claims, including "staggered claim-specific discovery devices that generate far more information about not only the specific allegations underlying individual claims, but also the nature of the evidence supporting those allegations." S. Todd Brown, *Specious Claims and Global Settlements*, 42 U. Mem. L. Rev. 559, 613 (2012). Transferee courts can also implement separate discovery tracks and motion tracks for issues affecting only a subset of cases. *See, e.g.*, *In re Soc. Media Adolescent Addiction/Pers. Inj. Prod. Liab. Litig.*, 637 F. Supp. 3d 1377, 1378 (J.P.M.L. 2022).

2. Trial Tools

MDL judges also employ "bellwether" trials to resolve particular issues that the parties will be precluded from relitigating over and over. *See generally* Zachary B. Savage, *Scaling Up: Implementing Issue Preclusion in Mass Tort Litigation Through Bellwether Trials*, 88 N.Y.U. L. Rev. 439 (2013). Such issue preclusion has been effective in assisting courts "to manage asbestos caseloads more efficiently in order to reduce private and public transaction costs." Carroll et al., *supra*, at 28–31.

For example, in *In re E. I. du Pont de Nemours & Co. C-8 Pers. Inj. Litig.*, 54 F.4th 912 (6th Cir. 2022), residents downriver from a DuPont plant alleged that the plant allowed a toxic chemical used in making Teflon to contaminate their air and water. The Sixth Circuit held that DuPont was estopped in future actions from relitigating issues of duty, breach of duty, and foreseeability that were decided adversely to DuPont in two bellwether jury trials. *Id.* at 928.

MDL bellwether trials also can allow the parties to assess the strength of their cases or the extent of any damage awards that might be realistically anticipated. *See, e.g.*, *In re Chinese-Manufactured Drywall Prods. Liab. Litig.*, MDL No. 2047, 2021 WL50455, at *2 (J.P.M.L. Jan. 5, 2021); *see generally* Eldon E. Fallon et al., *Bellwether Trials in Multidistrict Litigation*, 82 Tul. L. Rev. 2323 (2008).

3. Settlement Tools

Recognizing that the great majority of civil actions are resolved without trial, it should be no surprise that MDL judges have developed innovative tools and combinations of procedures to move mass tort claims toward agreed settlements.

One of the simplest of these tools is the "inventory settlement," where a defendant "seeks to obtain closure by entering into (usually confidential) agreements with law firms that represent large numbers of claimants. Typically, these deals resolve each firm's entire inventory of qualifying claims for a lump-sum dollar amount." Lynn A. Baker & Charles Silver, *In Defense of Private Claims Resolution*

Facilities, 84 Law & Contemp. Probs. 45, 56 (2021). It then falls to plaintiffs' counsel to allocate specific amounts to individual claimants. Plaintiffs' counsel generally has closer knowledge of their clients' personal injuries and situation than a trust administrator. A claimant may have greater confidence in the attorney they have chosen to represent them and will have greater transparency in knowing the amounts paid to others and the total amount available for all claimants. In the event they are dissatisfied, they can opt to litigate—a factor that motivates the defendant to offer a lump sum that will invite wide acceptance. *Id.* at 58. General Motors, for example, resolved many of the claims in its faulty ignition MDL in this fashion. *Id.* at 55–56. In fact, "[v]irtually all cases in every MDL are resolved through settlement, and the overwhelming majority of those settlements are confidential inventory settlements." Lynn A. Baker, *Mass Tort Remedies and the Puzzle of the Disappearing Defendant*, 98 Tex. L. Rev. 1165, 1185 (2020).

Private claims resolution facilities ("CRF") represent a more formal version of this settlement tool. *See* Francis E. McGovern, *The What and Why of Claims Resolution Facilities*, 57 Stan. L. Rev. 1361 (2005). CRF is a broad category encompassing an aggregation of claimants and an aggregation of funds to be distributed to them outside the court system but administered by a neutral party with an opt-out right for claimants. *Id.* at 1361–62, 1367.

One example involved the numerous claims against pharmaceutical giant

Merck, whose highly popular anti-inflammatory and analgesic drug was withdrawn from the market after it was linked to an increased risk of heart attack and stroke. *In re Vioxx Prods. Liab. Litig.*, 650 F. Supp. 2d 549, 551 (E.D. La. 2009). The MDL transferee court conducted six bellwether trials and, based on those outcomes, the parties agreed upon a $4.85 billion global settlement fund, to compensate some 50,000 eligible claimants. *Id.* at 552–53. Judge Eldon Fallon also agreed to serve as chief administrator overseeing the settlement. *See* Baker & Silver, *supra*, at 56.

In sum, MDL judges have the authority and the tools to efficiently resolve mass tort claims without diminishing claimants' right to their day in court. And because the Seventh Amendment preserves plaintiffs' option to walk away from a proposed mass settlement, the civil justice system better serves the societal interest in fair compensation to the victims of wrongful injury.

CONCLUSION

For the foregoing reasons, AAJ urges this Court to reverse the judgment below.

Dated: September 3, 2024

Respectfully submitted,

/s/ *Jeffrey R. White*

JEFFREY R. WHITE
AMERICAN ASSOCIATION FOR JUSTICE
777 6th Street, NW #200
Washington, DC 20001
(202) 617-5620
jeffrey.white@justice.org

Counsel for Amicus Curiae
American Association for Justice

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 24-1493 **Caption:** Bestwall LLC v. The Off. Comm. of Asbestos Claimants

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

Type-Volume Limit, Typeface Requirements, and Type-Style Requirements

Type-Volume Limit for Briefs if Produced Using a Computer: Appellant's Opening Brief, Appellee's Response Brief, and Appellant's Response/Reply Brief may not exceed 13,000 words or 1,300 lines. Appellee's Opening/Response Brief may not exceed 15,300 words or 1,500 lines. A Reply or Amicus Brief may not exceed 6,500 words or 650 lines. Amicus Brief in support of an Opening/Response Brief may not exceed 7,650 words. Amicus Brief filed during consideration of petition for rehearing may not exceed 2,600 words. Counsel may rely on the word or line count of the word processing program used to prepare the document. The word-processing program must be set to include headings, footnotes, and quotes in the count. Line count is used only with monospaced type. See Fed. R. App. P. 28.1(e), 29(a)(5), 32(a)(7)(B) & 32(f).

Type-Volume Limit for Other Documents if Produced Using a Computer: Petition for permission to appeal and a motion or response thereto may not exceed 5,200 words. Reply to a motion may not exceed 2,600 words. Petition for writ of mandamus or prohibition or other extraordinary writ may not exceed 7,800 words. Petition for rehearing or rehearing en banc may not exceed 3,900 words. Fed. R. App. P. 5(c)(1), 21(d), 27(d)(2), 35(b)(2) & 40(b)(1).

Typeface and Type Style Requirements: A proportionally spaced typeface (such as Times New Roman) must include serifs and must be 14-point or larger. A monospaced typeface (such as Courier New) must be 12-point or larger (at least 10½ characters per inch). Fed. R. App. P. 32(a)(5), 32(a)(6).

This brief or other document complies with type-volume limits because, excluding the parts of the document exempted by Fed. R. App. R. 32(f) (cover page, disclosure statement, table of contents, table of citations, statement regarding oral argument, signature block, certificates of counsel, addendum, attachments):

☑ this brief or other document contains 6,219 [*state number of*] words

☐ this brief uses monospaced type and contains _____ [*state number of*] lines

This brief or other document complies with the typeface and type style requirements because:

☑ this brief or other document has been prepared in a proportionally spaced typeface using
Microsoft Word for Microsoft 365 [*identify word processing program*] in
14-point Times New Roman [*identify font size and type style*]; **or**

☐ this brief or other document has been prepared in a monospaced typeface using
_____ [*identify word processing program*] in
_____ [*identify font size and type style*].

(s) Jeffrey R. White

Party Name American Association for Justice

Dated: 9/3/2024

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5) because this brief contains 6,219 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f). I further certify that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word for Microsoft 365 in 14-point Times New Roman type style.

CERTIFICATE OF SERVICE

I, hereby certify that on this day, September 3, 2024, the foregoing *Brief for the American Association for Justice as Amicus Curiae Supporting Appellant* was electronically served on counsel of record for all parties via the United States Court of Appeals for the Fourth Circuit using the appellate CM/ECF system. All participants in this case are registered CM/ECF users.

Date: September 3, 2024

/s/ *Jeffrey R. White*
JEFFREY R. WHITE

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

APPEARANCE OF COUNSEL FORM

BAR ADMISSION & ECF REGISTRATION: If you have not been admitted to practice before the Fourth Circuit, you must complete and return an Application for Admission before filing this form. If you were admitted to practice under a different name than you are now using, you must include your former name when completing this form so that we can locate you on the attorney roll. Electronic filing by counsel is required in all Fourth Circuit cases. If you have not registered as a Fourth Circuit ECF Filer, please complete the required steps at Register for eFiling.

THE CLERK WILL ENTER MY APPEARANCE IN APPEAL NO. 24-1493 as

☑ Retained ☐ Court-appointed(CJA) ☐ CJA associate ☐ Court-assigned(non-CJA) ☐ Federal Defender

☐ Pro Bono ☐ Government

COUNSEL FOR: American Association for Justice

(party name) as the

☐ appellant(s) ☐ appellee(s) ☐ petitioner(s) ☐ respondent(s) ☑ amicus curiae ☐ intervenor(s) ☐ movant(s)

/s/ Jeffrey R. White
(signature)

Please compare your information below with your information on PACER. Any updates or changes must be made through PACER's Manage My Account.

Jeffrey R. White Name (printed or typed)	2026175620 Voice Phone
American Association for Justice Firm Name (if applicable)	 Fax Number
777 6th Street NW, #200 Washington, DC Address	jeffrey.white@justice.org E-mail address (print or type)

CERTIFICATE OF SERVICE

I certify that on September 3, 2024 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

/s/ Jeffrey R. White Signature	9/3/2024 Date