No. 12-300

IN THE

Supreme Court of the United States

PFIZER INC.,

Petitioner,

v.

LAW OFFICES OF PETER G. ANGELOS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF FOR PETITIONER

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RULE 29.6 CORPORATE DISCLOSURE STATEMENT

The corporate disclosure statement for Pfizer Inc. was set forth on page iii of its petition for a writ of certiorari, and there are no amendments to that statement.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

TABLE OF AUTHORITIES - Continued

Other Authorities

INTRODUCTION

The invitation brief of the United States as *amicus curiae* urges denial of certiorari based on the argument (U.S. Br. 7-12) that the term "by reason of" in 11 U.S.C. § 524(g)(4)(A)(ii) does not encompass "but-for causation" and that such an interpretation would improperly expand § 524(g)'s protections "to bar 'the prosecution of claims bearing only an accidental nexus to an asbestos bankruptcy'" (U.S. Br. 17 (quoting Pet. App. 34a)). Petitioner respectfully files this supplemental brief to respond to the government's arguments, which are in error.

To begin with, the government errs in suggesting that the claims here "bear only an accidental nexus to an asbestos bankruptcy." It is uncontested that Quigley placed petitioner's name and logo on "diaries, advertisements …, purchase orders, invoices, packaging and sales reports" relating to Quigley's manufacture and sale of its asbestos-containing product Insulag (Pet. App. 65a-66a) *solely* by virtue of petitioner's ownership of Quigley—a relationship expressly enumerated in § 524(g)(4)(A)(ii)(I). It is uncontested that respondent sued both petitioner and Quigley for the very same injuries from the very same sales of the very same asbestos-containing product. And it is uncontested that petitioner and Quigley hold shared liability insurance that is the property of the Quigley estate (Pet. App. 2a-4a) and that will be depleted if asbestos injury suits are allowed to proceed against petitioner outside the trust (*id.* at 90a). In light of these uncontested facts, the government is mistaken to suggest (U.S. Br. 8-9) that the relationship between petitioner and the estate here is a mere fortuity or coincidence having as little relationship to

an asbestos bankruptcy as a fender-bender upon leaving church has to religion.

Accordingly, contrary to the government's argument (U.S. Br. 8), this case fits well within the most "natural" reading of § 524(g)(4)(A)(ii)—namely, that a channeling injunction may bar claims against a nondebtor that arise "by reason of," *inter alia*, its ownership of the debtor. The only "reason" that petitioner was sued as the "apparent manufacturer" of Quigley's products under Pennsylvania law was that Quigley marked its promotional and sales materials for Insulag with the name and logo of petitioner, its corporate owner, by virtue of their corporate parent-subsidiary relationship. The decision of the court of appeals to the contrary conflicts with the text, context and purpose of § 524(g)(4)(A)(ii) as well as with decisions of this Court and other courts of appeals, and thus warrants this Court's review.

The government is similarly incorrect to argue (U.S. Br. 18-20) that this case presents "a narrow question" limited to claims under an unusual Pennsylvania cause of action. To the contrary, the Second Circuit's novel and unprecedented interpretation of § 524(g)(4)(A)(ii) has broad implications. By excluding the financially sound parent of a debtor in an asbestos bankruptcy from a channeling injunction directing all asbestos claims to a 524(g) trust, the decision below casts uncertainty over a wide range of cases in which asbestos claimants sue nondebtor affiliates of an asbestos debtor in an attempted end run (as here) around § 524(g). Congress authorized the creation of § 524(g) trusts in 1994 in order to maximize the assets available to pay asbestos claims in the event of asbestos bankruptcies (Pet. 32-34), and since then, tens of billions of dollars have been

contributed to such trusts by both debtors *and* related nondebtors. The decision below threatens to destabilize that statutory scheme, disrupting the settled expectations of parties who have long relied upon it while discouraging nondebtors from contributing to § 524(g) trusts in the future.

For these reasons and those set forth in the petition and reply, the petition warrants this Court's review.

I. THE DECISION BELOW CONFLICTS WITH THE TEXT, CONTEXT AND PURPOSE OF § 524(G)

a. The government's brief conspicuously disregards the plain text of § 524(g)(4)(A)(ii). The government, like the court of appeals, would rewrite the clause "by reason of" ownership as if it read "'as a legal consequence of'" ownership (U.S. Br. 7 (quoting Pet. App. 30a)), despite acknowledging (U.S. Br. 10) that "the only occurrences of that phrase" appear not in § 524(g) but "in other provisions of Section 524." Statutory construction, however, "'must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose,'" *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 175-76 (2009) (citation omitted), especially when interpreting the Bankruptcy Code, *Lamie v. U.S. Tr.*, 540 U.S. 526, 538 (2004).

Section 524(g)(4)(A)(ii) permits a channeling injunction to extend, as relevant here, to "any action directed against a third party who … is alleged to be directly or indirectly liable for the conduct of … the debtor to the extent such alleged liability of such third party arises by reason of—(I) the third party's ownership of a financial interest in the debtor…." Properly read in light of its plain text, this section

covers the action here because (i) petitioner owned Quigley as a subsidiary; (ii) petitioner is alleged to be liable for Quigley's conduct in manufacturing and selling an asbestos-containing product (Insulag); and (iii) any liability against petitioner would arise "by reason of" its ownership of Quigley. To be sure, this section excludes suits brought against a third party for its own rather than the debtor's conduct, but petitioner is not being sued here for its own conduct: petitioner never made or sold Insulag, and it is uncontested that Quigley, not petitioner, affixed petitioner's name and logo to Quigley's materials as "a statement of corporate affiliation" (Pet. App. 71a, 75a). As respondent conceded in the bankruptcy court, "[b]ut for Pfizer's ownership and/or management of Quigley, its name and logo would never have been used." Pet. App. 72a.[1]

b. The government insists that "by reason of" must be read in light of "surrounding language"(U.S. Br. 10) and statutory "context" (*id.* at 17), but the language and context surrounding § 524(g)(4)(A)(ii) supports petitioner's reading, not the government's. In setting forth an exception to the rule that bankruptcy jurisdiction does not extend to nondebtors, that section expressly limits the circumstances under which nondebtors may be included in a channeling injunction, but contrary to the government's suggestion (U.S. Br. 10-11), the phrase "by reason of"

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[1] Accordingly, the government's reframing of the question presented (U.S. Br. I) as whether § 524(g)(4)(A)(ii) applies "when *the actions of the corporate parent* … resulted in potential liability" (emphasis added) finds no support in the record, for there were no such actions of the corporate parent here.

does not do all the work. Two other express limitations also cabin the reach of the exception: (i) the enumeration of the four listed relationships the nondebtor must have to the debtor, and (ii) the requirement that nondebtor's liability be vicarious or derivative (*i.e.*, be based on the debtor's conduct). The most natural reading of the three limitations is that the latter two limitations provide legal prerequisites and the "by reason of" clause provides a factual prerequisite.

The government's reading, by contrast, would collapse these three distinct limitations, treating them all as merely different ways of saying that "the nondebtor-debtor relationship must be 'a legally relevant factor to the third party's alleged liability'" (U.S. Br. 11 (quoting Pet. App. 30a)). But any such reading would render the clause "by reason of" surplusage, in violation of the traditional canon that every term in a statute is to be given meaning.

On the government's reading, § 524(g)(4)(A)(ii) would be rewritten to allow a third party to be included in a channeling injunction only "where an action is directed against a third party *as a legal consequence of* …(I) the third party's ownership of a financial interest in the debtor…." (emphasis added). But that is not how the statute is written; the requirements that liability be sought "for the conduct of…the debtor" and "by reason of … ownership" of the debtor are separate and distinct, with the former requiring a legal theory of derivative liability and the latter requiring *additionally* a factual link between the debtor's "conduct" and the nondebtor's "ownership." The government offers no reason why these two separate phrases should be elided. And if the statute is so ambiguous as to permit either petitioner's or the

government's readings, that only underscores the need for this Court to grant the petition and clarify the proper construction.

c. The government's proposed construction would also defeat the purpose of § 524(g)(4)(A)(ii), which is to maximize the incentives of both debtors *and* related third-party contributors to place assets in § 524(g) trusts for the benefit of asbestos claimants (Pet. 33-34). Under the government's strained reading (U.S. Br. 12-13), Congress's use of the term "alleged" in § 524(g)(4)(A)(ii) requires deference to "the plaintiff's theory of the case" in the complaint no matter how implausible. Such an approach would allow asbestos plaintiffs to circumvent channeling injunctions through artful pleading: on the government's theory, asbestos plaintiffs could freely sue corporate parents, affiliates or insurers of the debtor, defeating Congress's purpose, simply by declining to "invoke[] one of the enumerated relationships as a factor supporting third-party liability" (*id.* at 12) in their complaints. For this additional reason, the government' proposed construction fails.

II. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS

The government does not cite a single case construing the term "by reason of" in any statute to mean "as a legal consequence of." In contrast, petitioners have cited numerous decisions of this Court and the courts of appeals reading "by reason of" to embrace "but for" causation. *See* Pet. 19-21. The government's efforts (U.S. Br. 16-18) to discount or distinguish these cases are unavailing.

First, the government purports (U.S. Br. 16-17) to distinguish *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992), as interpreting the phrase "by reason of" in the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1964(c), as requiring "not only but-for causation but also proximate causation" (citing 503 U.S. at 268). But *Holmes* did not eliminate "but for" causation from the meaning of "by reason of," *see* 503 U.S. at 267-68; to the contrary, in adding a proximate causation requirement, *Holmes* merely limited the scope of RICO liability where but-for causation is present, *see* W. Page Keeton, et al., *Prosser & Keeton on the Law of Torts*, § 41, at 264 (5th ed. 1984) (explaining that proximate cause is a limitation on cause-in-fact).

Moreover, the government's purported distinction of *Holmes* ignores the express provisions of § 524(g)(4)(A)(ii) that limit the universe of channeling injunctions that can extend to nondebtor defendants even where a but-for causal relationship to the debtor's conduct exists. Specifically, a nondebtor asbestos defendant, in addition to showing but-for causation, must show (i) that one of the four enumerated relationships to the debtor exists, and (ii) that the liability asserted against the defendant derives from the debtor's conduct. These two additional express limitations in § 524(g)(4)(A)(ii) cabin the universe of injunctions in this context just as the judicially implied proximate causation requirement cabins liability in the RICO context. It is thus absurd for the government to suggest (U.S. Br. 17) that petitioner's reading of the statute will permit bars against "'the prosecution of claims bearing only an accidental nexus to an asbestos bankruptcy'" (quoting Pet. App. 34a); but-for causation is but one of three prerequisites to

the application of § 524(g)(4)(A)(ii) and together they preclude any such attenuated defenses.

Thus, this case bears no resemblance to a situation where a driver who hits another vehicle on the way home from church invokes a statute barring his liability "'for money damages by reason of his attendance at a religious ceremony'"—the fanciful "analogy" the government offers (U.S. Br. 8-9). This hypothetical would resemble the current case only if the statute were limited to accidents caused by church vehicles for which a parent church entity might be held vicariously liable—limitations that would significantly cabin the universe of accidents but-for caused by attendance at a religious ceremony.

Second, the government suggests that several court of appeals decisions construed "by reason of" to connote but-for causation only in the context of "situations in which some factual event occurs 'by reason of' another event" (US. Br. 17-18 & n.1 (citing cases)), rather than where "*legal liability* … 'arises by reason of' specified relationships" (*id.* at 18). But any purported distinction between an "event" causing an "event" and a "relationship" causing "liability" is irrelevant where the question is the nature of the causal link between the two—*i.e.*, whether "by reason of" connotes but-for causation. And as explained above, the derivative liability and by-reason-of clauses in § 524(g)(4)(A)(ii) cannot be elided into a single legal causation requirement without improperly making one or the other redundant.

III. THE PETITION PRESENTS AN IMPORTANT FEDERAL QUESTION

The government agrees (U.S. Br. 19) with petitioner that "Section 524(g) has played an

important role in the resolution of asbestos-related liability," but nonetheless argues (*id.* at 18-20) that the petition raises no important question regarding that longstanding and salutary statutory scheme. Contrary to the government's argument, however, the decision below has sweeping implications that warrant this Court's review. Far from confining itself to denying application of § 524(g)(4)(A)(ii) to a peculiar Pennsylvania cause of action (*see* U.S. Br. 18), the Second Circuit instead ruled broadly to hold that, in the government's own words (U.S. Br. 8), a bankruptcy court may "enjoin an asbestos-related claim against a corporate parent only when the parent's relationship to the debtor *actually forms part of the basis for the claim*" (emphasis added).

The Second Circuit's holding reaches every "relationship" identified in all four subparts of § 524(g)(4)(A)(ii), affecting at least ten different types of third parties: corporate parents, affiliates, predecessors in interest, managers, officers, directors, employees, insurers, and financers as well as advisors. *See* 11 U.S.C. § 524(g)(4)(A)(ii)(I)-(IV). As to each and every one of these nondebtor third parties, the government's proposed interpretation of the statute invites asbestos claimants to plead around § 524(g), leading to enormous uncertainty about the scope and effect of channeling injunctions. Such uncertainty will discourage the very contributions by nondebtors to asbestos bankruptcy trusts that Congress intended to encourage.

The government further downplays the importance of the question presented by suggesting (U.S. Br. 19-20) that asbestos-related litigation is abating, adverting to the rate of recent asbestos-related bankruptcy filings within the Third Circuit as well as

several confirmed reorganization plans and pending bankruptcies in those districts. But the scope of § 524(g) asbestos-related channeling injunctions is a recurring federal question that can arise even *after* plan confirmation. By narrowing its focus only to new asbestos filings, the government ignores the millions of asbestos claims that have already been enjoined by § 524(g) (Pet. 12, 29) and the long duration of each existing asbestos litigation. The reorganization plan in *Travelers*, for example, was confirmed in 1986 but reviewed by this Court more than two decades later, *Travelers Indem. Co. v. Bailey*, 557 U.S. 137 (2009), and litigation over its scope has continued for years thereafter, *see In re Johns-Manville Corp.* (*Manville IV*), 600 F.3d 135, 138 (2d Cir. 2010), *cert. denied*, 131 S. Ct. 644 (2010).

Moreover, in reviewing the § 524(g) framework (U.S. Br. 2), the government fails to recognize that third-party contributions are often the "'cornerstone'" of § 524(g) trusts. *See Travelers*, 577 U.S. at 141. Congress intended § 524(g) to incentivize such third parties to fund § 524(g) trusts by giving them assurance of global finality, predictability, and repose. *See* Pet. 32-34. The decision below threatens to undermine that repose and upset the settled expectations of parties who have relied upon Congress's plain language since 1994. The petition thus, contrary to the government's arguments, presents a question of national significance warranting this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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