Docket #2098 Date Filed: 2/5/2024

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

In re:	)	
	)	Chapter 11
ALDRICH PUMP LLC,	)	
MURRAY BOILER LLC,	)	
	)	Case No. 20-30608 (JCW)
Debtors.	)	

REPLY IN SUPPORT OF REQUEST FOR CERTIFICATION OF DIRECT APPEAL TO THE COURT OF APPEALS OF ORDER DENYING MR. ROBERT SEMIAN AND MRHFM CLAIMANTS' MOTION TO DISMISS

Faced with this Court's comprehensive opinion on the motions to dismiss, as well as its frequent on the record statements regarding the need for appellate review (*see* Ex. 1, Appendix), which Appellants[1] believe invite a direct appeal (*see* Mot. for Leave, Dkt. 2059; Mem. of Law in Supp., Dkt. 2060; Request for Cert., Dkt. 2061), the Debtors insist on opposing certification anyway.

Having successfully stranded the rights of thousands of dying Americans in the Bankruptcy Court, the Debtors "win" every day they bask in the protection of the automatic stay. And because these dying Americans have decided to stand on their

[1] The Appellants in this matter are Robert Semian (who was not required to file a proof of claim) and forty-six clients of Maune Raichle Hartley French & Mudd, LLC ("MRHFM") who filed proofs of claim in this case. MRHFM only represents mesothelioma victims. MRHFM represents forty-seven mesothelioma victims who have filed proofs of claim in this case. MRHFM client Joseph Hamlin (deceased, now represented by his surviving spouse) is a member of the Official Committee. This Request is not made on behalf of Mr. Hamlin or on behalf of the Committee.

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rights, rather than be bullied by billionaire corporations trying to squeeze them into compromising their rights, these cases are going nowhere. *See* Dismissal Order at 21.

Faced with this Court's ruling, which lays out in detail the facts and conclusions needed to support certification for immediate review, the Debtor weaves an elaborate and lengthy fantasy world, recasting and ignoring arguments of Mr. Semian and the other Appellants and—at best—myopically lifting phrases from the Court's opinion in a desperate hope to keep these cases stranded here.

I. AN APPEAL WILL MATERIALLY ADVANCE THE CASE

Contrary to the Debtor's Pollyanna proclamation that this and the other wealthy, non-distressed Texas-Two-Step bankruptcies are just run-of-the-mill cases that do not raise significant legal issues, this Court has consistently noted the need for guidance from the Circuit Court of Appeals, most recently in its Dismissal Order.

> "Until the propriety of the 'Texas Two Step' and its use by solvent 'non-distressed' corporations is determined by the higher courts, no progress will be made in these bankruptcy cases."

Dismissal Order at 21.[2] This, by itself, is grounds to grant the Appellants' request for certification: an appeal will materially advance this case.[3]

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[2] Order Denying Motions to Dismiss (Hon. J. Craig Whitley), entered December 28, 2023 (Dkt. No. 2047) (the "Dismissal Order").

[3] Section 158(d)(2) provides that an appeal must be certified for direct appeal to the court of appeals if the lower court determines that ***any*** one of the following criteria are met:

> (i) the judgment, order, or decree involves a question of law as to which there is no controlling decision of the court of appeals for the circuit or of the Supreme Court of the United States, or involves a matter of public importance; (ii) the judgment, order, or decree

The Debtors' objection to the Appellants' request for certification of direct appeal rehashes rejected arguments from the Debtors' objection to the motion to dismiss—blaming Mr. Semian for allegedly not seeking dismissal promptly enough. Objection at 1. But the Court rejected this argument in its opinion, finding that Mr. Semian, who was diagnosed in May 2022, did not sit on his rights. *See* Dismissal Order at 18-19. And the Court rejected the Debtors' other laches arguments as well.

The Debtors then flip-flop and argue that concerns about the Constitutional and statutory validity of limiting 7th Amendment rights in the absence of a limited fund "comes too soon." Objection at 14. But the Court has raised this concern as well (Dismissal Order at 37-40), and it is never "too early" to raise the Constitutional rights of Americans as a matter of *immediate* concern. No plan will be confirmed absent unfettered opt-outs to the tort system where plaintiffs can pursue uncapped state law remedies against the Debtors before juries—a solution the Debtors' counsel has equated to dismissal. *See Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999).

The Debtors desperately and flagrantly ignore Mr. Semian's briefing and arguments and claim that "Movants do not dispute" that the naked *desire* for Section 524(g) relief, by itself, constitutes a "valid purpose" for filing a petition even in the

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involves a question of law requiring resolution of conflicting decisions; or (iii) an immediate appeal from the judgment, order, or decree may materially advance the progress of the case or proceeding in which the appeal is taken. *See* 28 U.S.C. § 158(d)(2)(A).

absence of financial distress. Objection at 10. But the Appellants' Motion to Dismiss is premised on the fact that—absent financial distress—a petition does not further the purposes of the Code—as articulated in *Carolin*, *Premier*, and the cases they cite and rely upon. The entire discussion of this Court's ruling in *Patel* relates to the Debtors' fundament problem of conflating a desire for access to a proper bankruptcy tool, with a proper bankruptcy purpose. So too, the discussion of the legislative history of Section 524(g) being to provide relief for companies facing "overwhelming" asbestos liabilities. *See e.g.*, Motion to Dismiss at 1-3, 16-18, 22, and 28 (Dkt. 1712). And the Court surely remembers the discussion of this issue at oral argument:

> And in Patel, your Honor looks at the same facts, the same fact pattern and, and ends up with the same situation. You've got a couple that's living an extravagant lifestyle, spending lots of money. They don't need it. They just wanna get that one liability down. By using the tool of the Code, 524(g) -- I'm sorry -- 502, right, the claims, the claims rejection process, to get the SBA to stop garnishing their, their funds. And, and as your Honor said, that confuses a tool of the Code, for a valid purpose of the Code.

> And that's what we have here. 524(g) is just a tool. It's a tool for people that are properly before the Court. It is not, in fact, an independent purpose. That issue was not disputed in Judge Beyer's initial ruling. ***It is the centerpiece of our motion.***

Transcript of Oral Argument July 14, 2023 p. 98-102 (emphasis added).

So why would the Debtors make such an egregious mischaracterization of the Appellants' foundational argument? Because their opposition to certification depends upon these cases being run-of-the-mill incursions into the bankruptcy court for which guidance is not necessary (contrary to this Court's statements). The validity of the Debtors' premise that Section 524(g) is, in fact, available to any company that *wants* it, rather than a tool available only to those companies facing *overwhelming* liabilities and who *need* Section 524(g), and the conflict between that argument and the myriad of decisions in the 4th Circuit that emphasize the need for financial distress and this Court's own decision in *Patel* is undeniable.

The Debtors' "solution" to this problem is to simply ignore the Appellants' extensive and repeated refusal to concede that a desire for Section 524(g) relief is—itself—a valid bankruptcy purpose. Voila! Problem solved.

Blackletter law, uniformly applied by the federal appellate courts, forbids the wielding of bankruptcy courts' "powerful equitable weapons"—such as a channeling injunction under Section 524(g)—by "financially healthy companies with no need to reorganize." *In re Premier Automotive Servs., Inc.*, 492 F.3d 274, 281–82 (4th Cir. 2007).

II. THE PUBLIC IMPORTANCE CRITERIA IS SATISFIED

The Debtors, citing *LTL*, contend the widespread media attention on these cases has been "ginned up" and that these cases are, therefore, not of public importance. Objection at 15. But the Court itself has repeatedly recognized, below in December 2021, for example, the public importance of these issues:

> First of all, as to the direct appeal, as you folks know, very often you have to warm up a judge to a question in bankruptcy before you get the right answer. But it may well be that if everybody in this room, including the Court, were of the same mind that that needed to be done, we might ask again in this case. And you've got all the publicity that's come out of Bestwall, DBMP, and now LTL in the meantime, plus the, all that's going on in Congress. It might be, if you, you put that up properly, that [the Fourth Circuit] might take another look at it if all concerned were, were asking for the direct appeal. Appendix, No. 3.

Public importance may be reflected by public attention (and there has been lots of attention), but the public importance of these cases is demonstrated by (1) the fact that tens of thousands of terminally ill Americans' Constitutional rights have been frozen indefinitely, and (2) if allowed to stand, these cases expand the Bankruptcy Courts into the tort-reform super-legislative Courts for the super-wealthy.

The public importance of this distortion of the Bankruptcy Code was recently highlighted in a bipartisan Amicus Brief filed with the Supreme Court supporting the Official Committee's request for a writ of *certiorari* in *Bestwall*, including from United States Senators Richard Durbin, Sheldon Whitehouse, and Josh Hawley (Ex. 2), and a Brief from the Attorney General of North Carolina—where New Trane and New TTC are

headquartered—and from over twenty other states, including Delaware (where many large asbestos defendants are incorporated and where *Paddock* was filed) and New Jersey (home of Old IRNJ) (Ex. 3).

Permitting billionaires to subject a single class of creditors to Chapter 11—while paying everyone else in due course—destroys public confidence in the bankruptcy system. Having now wasted over a hundred million dollars in professional fees and thousands of hours litigating in bankruptcy court—time the claimants dying with cancer do not have—the Debtors say it would be a "wasteful exercise" for this appeal to be taken. Objection at 17. The Debtors' entire ***existence*** has been a wasteful exercise. Murray and Aldrich have accomplished absolutely nothing since their petitions were filed nearly four years ago. There will be no plan confirmed, and there will be no "settlement." A Fourth Circuit appeal now will save years of this Court's time and, conservatively, over a hundred million dollars in professional fees.

III. CONTROLLING LAW HAS NOT BEEN PROPERLY APPLIED

The Fourth Circuit has never reviewed a motion to dismiss on facts like these: a non-financially distressed billionaire debtor using bankruptcy—on the heels of a divisive merger—to avoid the absolute priority rule, isolate a single class of creditors, and limit the Constitutional rights of victims under state law—all while holding a funding agreement that allows it to pay all claims in full.

The Debtors suggest *Carolin* would have to be *modified* to rule in the Appellants' favor. Not so. The Appellants' first argument is that *Carolin* has not been properly applied to "Two-Step" debtors, including Aldrich and Murray. The Court's extensive discussion and appreciation of the Appellants' arguments in this regard in its Dismissal Order make clear that they need not be restated here.

The Fourth Circuit does not have to modify or re-address *Carolin*: it can simply confirm that decisions denying dismissal here and in *Bestwall* have failed to properly apply the objective futility prong as described in *Carolin*. The Debtors contend—as did Bestwall—that these cases are not objectively futile because they have enough money to pay every claimant in full. Under the Debtors' construction of *Carolin*, the more money a company has—the less *need* it has for bankruptcy relief—the more immune from dismissal it is. The Court found that its hands were tied and that it was mandated to apply this approach to *Carolin*.

But the Appellants argue—and *Carolin* expressly states—that the objective futility prong is designed to ensure that a petition furthers the purpose of the Code, and the purpose of the Code—as defined by *Carolin*—is to allow the resuscitation of a financially troubled debtor. *Carolin*, 886 F.2d at 701. Without a financially troubled debtor, the petition cannot further the purpose of the Code and is, therefore, objectively futile. This dispute demands immediate Fourth Circuit clarification.

The Debtors contend the Fourth Circuit already "reiterated" its good faith dismissal standard in *Bestwall*. Objection at 5. But dismissal—the issue ***here***—was expressly ***not*** before the Fourth Circuit in *Bestwall*. There, Judge Agee believed "Claimant Representatives" were using "jurisdictional arguments" related to the preliminary injunction as a "back-door way to challenge the propriety of the reorganization and the merits of a yet-to-be-filed chapter 11 plan." *In re Bestwall LLC*, 71 F.4th 168, 183 (4th Cir. 2023). The majority opinion expressly noted it was not ruling on a motion to dismiss and any attempts to predict how such a ruling might come out if such a motion were before the Court were left for a later date. Moreover, as the Court, and the Debtors, are aware, Judge Beyer held in *Bestwall* that the ACC had conceded that the desire for Section 524(g) relief was a sufficient proper purpose for filing a petition—so the panel in *Bestwall* was starting with that premise as undisputed. It is disputed here.

Here, as in *LTL Management*, the Appellants contend the Debtors filed in bad faith, and their petitions should be dismissed. The Fourth Circuit understands the distinction between reviewing a dismissal motion (*LTL* and this case) on the one hand, and the preliminary injunction (*Bestwall*) on the other. The Circuit majority wrote that "by **contrast**" to *LTL*, in *Bestwall* the "Claimant Representatives do **not** make the arguments raised by [those in *LTL*]. They do **not** contend Bestwall was not in financial distress . . . nor does this appeal involve a motion to dismiss . . . ." *In re Bestwall LLC*, 71 F.4th at 183

(emphasis) (citing *LTL Management, LLC,* 64 F.4th 84 (3rd Cir. 2023)).[4] The issues raised in this case have not been before the Fourth Circuit, and nearly six years since Jones Day launched the first "Two-Step", it is well past time for the Circuit to weigh in.

The Debtors say the Fourth Circuit need not assess whether *Carolin's* strictures lessen as a case progresses. If this were how *Carolin* was to be interpreted, the Debtors contend creditors could engage in "absurd gamesmanship" by prolonging the case and then moving to dismiss. Objection at 11. This bizarre argument (how would such gamesmanship benefit dying claimants?) cries out for the playground retort "I know you are, but what am I?" Aldrich and Murray certainly know what "absurd gamesmanship" looks like: both sprung to life under cover of night in Texas cyberspace, before sneaking into this District and filing for Chapter 11 as New Trane, New TTC, and Trane plc all count their money. The only "gamesmanship" in this case has been perpetrated by Trane and started in 2020.

The Debtors argue the Circuit declined to review dismissal issues in *Bestwall* in 2019, so it should not be bothered to do so again. Objection at 3. This is unavailing. *First,* Judge Beyer found the Official Committee in *Bestwall* conceded that a desire for Section

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[4] While the Fourth Circuit wrote that "the Third Circuit recognized [ ] this Court applies a more comprehensive standard to a request for dismissal of a bankruptcy petition for lack of good faith," *id.*, at 182, the footnote referenced in the Third Circuit's decision says that "the **Bankruptcy Court** in the District of New Jersey described this as a 'much more stringent standard for dismissal of a case for lacking good faith…'" *See LTL Mgmt.,* 64 F.4th at 98 Fn. 8 (emphasis). The Third Circuit was not expressing its own opinion of the Fourth Circuit's standard for dismissal, merely what the bankruptcy court's belief was about the Fourth Circuit standard.

524(g) relief was a sufficient proper bankruptcy purpose, even absent financial distress. *See In re Bestwall LLC*, 605 B.R. 43, 49 (Bankr. W.D.N.C. 2019) ("Attempting to resolve asbestos claims through 11 U.S.C. § 524(g) is a valid reorganizational purpose…The Committee agrees."). Given Judge Beyer's view of that concession, it is not surprising the Fourth Circuit found the dismissal order unworthy of review. The Appellants reject the idea that attempting to resolve asbestos claims through Section 524(g)—in the absence of good faith, distress, or a financially troubled debtor—is a valid bankruptcy purpose. *See, e.g.*, Motion to Dismiss at 16-18. The issues present here are different than those in *Bestwall*.

Second, four additional companies have filed bad faith bankruptcies in this District (DBMP, Aldrich, Murray and LTL Management) after the Circuit declined to review *Bestwall*, showing the copycat nature of this scheme. *Third,* as this Court has found, no progress has been made in *Bestwall, DBMP,* or *Aldrich/Murray* (Dismissal Order at 21), and LTL's petitions were dismissed for bad faith, ***twice***.

The Debtors say their pre-petition restructuring is common and intended by Section 524(g)(4)(A)(ii)(IV). Objection at 15. To argue these "Two-Step" cases are not unique and were intended by Section 524(g) is delusional. Trane's restructuring was an attempt to divest its businesses from a single class of liabilities, liabilities that exist notwithstanding the "Two-Step", and which the Debtors have more than enough funding to satisfy in full in the tort system. Aldrich and Murray—with the funding agreements—

are not and never were financially threatened by the asbestos litigation. Neither are "overwhelmed" by asbestos liability in the manner of Johns-Manville, whose confirmed Chapter 11 plan the section was modeled after.

Carolin holds that the good faith inquiry is designed to "determine whether the purposes of the Code would be furthered" by allowing the petition, and the Code's "statutory objective" is "resuscitating a financially troubled debtor." *Carolin*, 886 F.2d at 701. Trane plc and its Debtors purport to be protected by Section 524(g) after they manufactured jurisdiction, made circular indemnification agreements, avoided the absolute priority rule, and discriminated against a specific class of creditors, a class of creditors the Debtors readily admit they can pay ***in full***. All of this shows bad faith, the billionaire Debtors' mere desire for relief provided in the Code is ***not*** a valid justification for filing a bankruptcy petition.

If these maneuvers are "common", it is only because the five petitions filed by Jones Day in these "Texas Two-Step" cases are now sufficiently numerous to qualify as "common."

IV. THE FCR'S OBJECTION SHOULD BE IGNORED

The Future Claimants' Representative also opposes certification (*see* Dkt. 2093), continuing to demand that ***less*** money go to future cancer victims than what the Debtors can easily pay them. Aldrich admits it can pay victims $750 million in the tort system over the next ten years alone (*see* Tananbaum Dep., Dkt. 1909-3 at 167:6-168:1), but the

FCR promotes his "settlement" with Aldrich and Murray for $200 million ***less*** ($545 million) and over the next 30 years. *See* FCR Objection at 5.

The Debtors and the FCR tend to tout their "settlement" as a type of progress. But the FCR cannot vote on a plan, nor can he impose his value judgments about the tort system on future claimants, cap their state law remedies, or impair their jury access. Claiming that a trust is better for all claimants due to the "inequities and inefficiencies" of the tort system, the FCR points to the "confidential claims database," which shows there has only been one trial against Old Trane and Old IRNJ in decades of asbestos litigation. *See* FCR Objection at 2-4. This observation completely destroys the FCR's baseless value judgements—it irrefutably proves how efficient, predictable, and equitable the tort system is, where 99.99% of the time the parties agree on the value of a claim. The FCR's clear preference for the trust system has zero relevance to dismissal and the issues in this appeal, and there is no statutory or Constitutional support for the proposition that, in a case involving an unlimited fund, an FCR can make value judgments that future claimants would prefer a normalized administrative remedy over unfettered Constitutional rights to unlimited jury trials. That is not how America works.

V. CONCLUSION

As this Court stated in early 2022, "the challenges to the merger are going to get resolved higher up, either by an appellate court, maybe the Supreme Court, maybe they get resolved in Congress." Appendix, No. 11. Now is the time for the Fourth Circuit to

decide whether debtors and their corporate parents can stretch bankruptcy jurisdiction well beyond any legal limit. If bankruptcy courts in the Fourth Circuit are open to ultra-wealthy tortfeasors who wish to escape state law tort liability and the jurisdiction of state and Article III federal courts, the Fourth Circuit should say so.

The Appellants respectfully ask this Court to certify its ruling for direct appeal.

Dated: February 5, 2024

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Exhibit 1

APPENDIX

No.	Citation	Statement
1	*See* Ex. A1, Tr. 5/7/21 at 709:6-11.	"…given the seriousness of the litigation and the assumption that it's going up somewhere, at least one level, maybe two, maybe, perhaps, more, then I don't want you go to up on appeal and find out that you don't have enough in the, in the findings of fact and that you end up with a remand."
2	*See* Ex. A2, Tr. 12/3/2021 at 295:9-14.	"I would love to see some way that we could bring that up and get a ruling on it and let someone appeal it in a form that, that is appealable. Because I'm fearful until we get that decision made by a higher court, that we're not going to get out of the, out of where we are now…"
3	*See* Ex. A2, Tr. 12/3/2021 at 300:10-19.	"First of all, as to the direct appeal, as you folks know, very often you have to warm up a judge to a question in bankruptcy before you get the right answer. But it may well be that if everybody in this room, including the Court, were of the same mind that that needed to be done, we might ask again in this case. And you've got all the publicity that's come out of Bestwall, DBMP, and now LTL in the meantime, plus the, all that's going on in Congress. It might be, if you, you put that up properly, that they might take another look at it if all concerned were, were asking for the direct appeal."
4	*See* Ex. A2, Tr. 12/3/2021 at 303:13-17.	"…but I think there's a very serious legal question there and it's just a question of how do you get it raised in a form where a final ruling could be made that's appealable or how do we get it where it's interlocutory and, and a higher court would take it."
5	*See* Ex. A2, Tr. 12/3/2021 at 313:3-7.	"…but I would hate for the client to have to pay for all the fees that we're gong to engender in the next two or three years if there's a quicker way of doing this and I don't want the claimants to have to wait for two or three years to get paid if there's a quicker way of doing this."

APPENDIX

6	*See* Ex. A2, Tr. 12/3/2021 at 313:10-14.	"And if y'all can come up with a way of front loading a couple of these questions so we can get them up to the Court of Appeals, I'll, if you're all in agreement, I will, will probably jump onboard with you to try to make it happen."
7	*See* Ex. A2, Tr. 12/3/2021 at 313:17-24.	"And I'm not above calling upstairs and telling Judge Conrad or whoever draws the case that we, we've got one that's burning down here and we need to, to get some help as quickly as possible. I'm not at liberty to call the Circuit and say that, but, but at the same time if, if you had a mechanism that you thought would work and, and I could approve it, I would certainly be happy to enter an order that says the same thing."
8	*See* Ex. A3, Tr. 3/3/2022 at 191:13-15.	"So I doubt it's going to be me that makes the final decision about any of that or my colleague in New Jersey or Judge Beyer."
9	*See* Ex. A3, Tr. 3/3/2022 at 192:7-12.	"I'm getting a little frustrated with us spinning around in circles and never coming out with any final orders that can get you to a point where that, that underlying issue can be addressed by a higher court, so. And I hate to see you spend as much client money as you're having to do to, to go through the exercise."
10	*See* Ex. A3, Tr. 3/3/2022 at 192:19-23.	"But at the end of the day, there's some folks who need some money here, the ones who are the victims, and we need to do what we can, whether it's here or in the tort system, or wherever, to get them compensated as quickly as possible."
11	*See* Ex. A4, Tr. 4/1/2022 at 8:17-19.	"The challenges to the merger are going to get resolved higher up, either by an appellate court, maybe the Supreme Court, maybe they get resolved in, in Congress."
12	*See* Ex. A5, Tr. 3/30/2023 at 70:20-22.	"But at the same time, if, if there's a desire to seek review on appeal on that, then I understand where you're coming from and I, I'd love to be enlightened by a higher court."

Exhibit A1

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

IN RE:	:	Case No. 20-30608-JCW (Jointly Administered)
ALDRICH PUMP LLC, ET AL.,	:	
		Chapter 11
Debtors,	:	
		Charlotte, North Carolina
	:	Friday, May 7, 2021
		9:30 a.m.
	:	
ALDRICH PUMP LLC and MURRAY BOILER LLC,	:	AP 20-03041-JCW
	:	
Plaintiffs,		
	:	
v.		
	:	
THOSE PARTIES TO ACTIONS LISTED ON APPENDIX A TO COMPLAINT and JOHN AND JANE DOES 1-1000,	:	
	:	
Defendants.	:	

VOLUME 3

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE J. CRAIG WHITLEY,
UNITED STATES BANKRUPTCY JUDGE

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That's option to you. I will tell you it is very helpful to me. It saves a lot of keystrokes, first of all, and secondly, as an outsider to this who has not been in all the depositions and lived it the way you have, there is entirely likely you will think of some findings that you would like to see in the order that I might not remember to put in and given the, the seriousness of the litigation and the assumption that it's going up somewhere, at least one level, maybe two, maybe, perhaps, more, then I don't want you go to up on appeal and find out that you don't have enough in the, in the findings of fact and that you end up with a remand. I'd rather be reversed than remanded.

So with that in mind, the question is, having put out as much work on this as you have and briefed it to this extent, is there any interest in doing that? It's not required. It's just a -- it's -- it's an opportunity to give the Judge the comparing orders and that would at least get me started in this. Up to y'all.

MR. MACLAY: Well, your Honor, you just said that it would be useful to you.

THE COURT: Uh-huh (indicating an affirmative response).

MR. MACLAY: And I think that, frankly, answers the question itself. If it would be useful to you, I'm sure all parties would agree that it's something we should be doing and

Exhibit A2

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

IN RE:	:	Case No. 20-30608-JCW (Jointly Administered)
ALDRICH PUMP LLC, ET AL.,	:	Chapter 11
Debtors.	:	Charlotte, North Carolina
	:	Friday, December 3, 2021 9:30 a.m.
	:	

: :

VOLUME 2
TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE J. CRAIG WHITLEY,
UNITED STATES BANKRUPTCY JUDGE

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headed there anytime soon and I'm concerned we're going to spend three or four years litigating on estimation, on fraudulent conveyances, on everything else, and then find ourselves in the same posture that we're at at that time. And I would like to spare you that, if there's a way that all the smart people in this room could figure out if at the end of the day what we need is a determination of whether it is appropriate for an otherwise solvent corporation to access 524(g) in dealing with its asbestos liabilities. I would love to see some way that we could bring that up and get a ruling on it and let someone appeal it in a form that, that is appealable. Because I'm fearful until we get that decision made by a higher court, that we're not going to get out of the, out of where we are now, that I allow -- let's say I allow the debtors to estimate and then we get a number and the, the ACC looks at that number and says, "Pah," you know, "that, we don't agree with that number and we don't vote for the plan and you can't cram it down on us." That was one of the questions I had.

Does anyone in this room think that you can cram down a, a 524(g) plan? I've never seen a case do it and from what I've heard, I've, I've always assumed that y'all thought you couldn't.

MR. NEIER: Your Honor, I know Mr. Maclay filed an extensive brief on this subject and the Court has commented on

MR. NEIER: Years.

THE COURT: Uh-huh (indicating an affirmative response).

MS. RAMSEY: But I, I do believe that if, if we could find a way to tee up the issue in connection with the disclosure statement, that was exactly what we were proposing yesterday.

THE COURT: Here, here's the thing, folks, what I'm, I'm talking.

First of all, as to the direct appeal, as you folks know, very often you have to warm up a judge to a question in bankruptcy before you get the right answer. But it may well be that if everybody in this room, including the Court, were of the same mind that that needed to be done, we might ask again in this case. And you've got all the publicity that's come out of Bestwall, DBMP, and now LTL in the meantime, plus the, all that's going on in Congress. It might be, if you, you put that up properly, that they might take another look at it if all concerned were, were asking for the direct appeal.

Mr. Erens, you want to say something?

MR. ERENS: Yeah. In response to your questions and comments, your Honor, I think what we'd like to do is consider them. I mean, I hear what the --

THE COURT: Right.

MR. ERENS: -- primary issue is, which is is somehow

limine? And we've been trying to come up with the right procedure to tee this up sooner. Because we absolutely agree with your Honor that the sooner that we can get some clarity around that issue, it will guide all the parties.

THE COURT: But it would seem to me if there were a higher court that made a decision, one way or the other, on this, on that particular point, the rest of this could follow if, assuming we're still here, the, the traditional asbestos, negotiate, estimate, come to a number that works for everyone pattern. But as long as that's hanging out there, I'm, I'm just wondering whether we really get to a resolution.

Now I understand posturing and I understand negotiating and all that sort of thing, but I think there's a very serious legal question there and it's just a question of how do you get it raised in a form where a final ruling could be made that's appealable or how do we get it where it's interlocutory and, and a higher court would take it.

MR. MACLAY: Your Honor, I just want to add one thing on, on Energy Futures. Energy Futures was a, was a different case. There are plenty of different creditors than asbestos creditors and you could do a cramdown plan because there was an impaired consenting class.

THE COURT: Yeah.

MR. MACLAY: Here, there is only one impaired consenting class. Mr. Mascitti said it's the hope to confirm a

everyone's happy with if this issue is still out there. And, you know, we can reasonably disagree what's the best way to get to that resolution, but I would hate for the client to have to pay for all the fees that we're going to engender in the next two or three years if there's a quicker way of doing this and I don't want the claimants to have to wait for two or three years to get paid if there's a quicker way of doing this.

So, you know, I would extort you to your best efforts and instead of figuring out why you can't do something, see if there's some way that we can. And if y'all can come up with a way of front loading a couple of these questions so we can get them up to the Court of Appeals, I'll, if you're all in agreement, I will, will probably jump onboard with you to try to make it happen.

MR. ERENS: Uh-huh (indicating an affirmative response).

THE COURT: And I'm not above calling upstairs and telling Judge Conrad or whoever draws the case that we, we've got one that's burning down here and we need to, to get some help as quickly as possible. I'm not at liberty to call the Circuit and say that, but, but at the same time if, if you had a mechanism that you thought would work and, and I could approve it, I would certainly be happy to enter an order that says the same thing. So, you know, effectively.

All right. If there's nothing else, I hope y'all

Exhibit A3

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

IN RE:	:	Case No. 20-30608-JCW (Jointly Administered)
ALDRICH PUMP LLC, ET AL.,	:	
Debtors,	:	Chapter 11
	:	Charlotte, North Carolina
	:	Thursday, March 3, 2022
	:	9:30 a.m.
	:	
OFFICIAL COMMITTEE OF ASBESTOS PERSONAL INJURY CLAIMANTS,	:	AP 21-03029
Plaintiff,	:	
v.	:	
ALDRICH PUMP LLC, MURRAY BOILER LLC, TRANE TECHNOLOGIES COMPANY LLC, AND TRANE U.S. INC.,	:	
Defendants.	:	

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE J. CRAIG WHITLEY,
UNITED STATES BANKRUPTCY JUDGE

Audio Operator: COURT PERSONNEL

Transcript prepared by: JANICE RUSSELL TRANSCRIPTS
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Proceedings recorded by electronic sound recording; transcript produced by transcription service.

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	ALLAN TANANBAUM Chief Legal Counsel for Debtors
	EVAN TURTZ, ESQ. General Counsel for Trane

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really impress me too much, and the *ad hominems*, which are, impress me even less, at the end of the day what you've got are some public policy decisions as well as, you know, some contentions about is doing this, which is potentially in my best interest, also improper vis-à-vis the, the claimants and vice versa and reasonable people can disagree on that.

And I was only being half facetious when I said I wish Gordon had gone with you, Mr. Maclay, to Congress. We could have cut some of the time out of all this.

But, but the reality is at the end of the day there are some public policy decisions that have to be made as to who and when can you access chapter 11 and, in particular, the 524 relief. So I doubt it's going to be me that makes the final decision about any of that or my colleague in New Jersey or Judge Beyer.

So if y'all think -- I mentioned this before in one of the cases -- that negotiating now would help you, you can keep all your powder dry. You can continue to fight over, over this is it proper to do the twostep and file chapter 11 while you negotiate about the dollars. But it seems to me that there's going to be a test case that goes up somewhere. Judge Conrad's order, I think, is being appealed in Bestwall. Someone's going to surely file the same in LTL and we've got DBMP in, in front of you here. If there is really a likelihood that a number could be arrived at that would pay all the claimants in this

case, these cases, it might be well to let those others be the test case and work out the number and get everyone paid in this one. That way, the, the policy concerns can be addressed and maybe some of these people and their families could get paid in, in short order.

Just a thought. Not my job to make you settle, but I -- I -- like you, I'm getting a little frustrated with us spinning around in circles and never coming out with any final orders that can get you to a point where that, that underlying issue can be addressed by a higher court, so. And I hate to see you spend as much client money as you're having to do to, to go through the exercise.

So just a thought. You might want to talk amongst yourselves and see if, with everyone reserving rights, that there might be an appropriate time to, to chat and, if so, we can make accommodations here. But that's just a, a third party's observation that I understand how it gets when you're, you're in the middle of heated litigation and how entrenched people can get. But at the end of the day, there's some folks who need some money here, the ones who are the victims, and we need to do what we can, whether it's here or in the tort system, or wherever, to get them compensated as quickly as possible.

All right. Nothing else, we'll recess.

Thank you, all.

Exhibit A4

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

IN RE:	:	Case No. 20-30608-JCW (Jointly Administered)
ALDRICH PUMP LLC, ET AL.,	:	
Debtors,	:	Chapter 11
	:	Charlotte, North Carolina
	:	Friday, April 1, 2022
	:	9:30 a.m.
	:	
OFFICIAL COMMITTEE OF ASBESTOS PERSONAL INJURY CLAIMANTS,	:	AP 21-03029
Plaintiff,	:	
v.	:	
ALDRICH PUMP LLC, MURRAY BOILER LLC, TRANE TECHNOLOGIES COMPANY LLC, AND TRANE U.S. INC.,	:	
Defendants.	:	

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE J. CRAIG WHITLEY,
UNITED STATES BANKRUPTCY JUDGE

Audio Operator: COURT PERSONNEL

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For the ACC:	Caplin & Drysdale BY: KEVIN MACLAY, ESQ. One Thomas Circle, NW, Suite 1100 Washington, DC 20005
	Winston & Strawn LLP BY: DAVID NEIER, LLP CARRIE V. HARDMAN, ESQ. 200 Park Avenue New York, NY 10166-4193
For the FCR:	Orrick Herrington BY: JONATHAN P. GUY, ESQ. 1152 15th Street, NW Washington, D.C. 20005-1706
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	Burt & Cordes, PLLC BY: STACY C. CORDES, ESQ. 122 Cherokee Road, Suite 1 Charlotte, NC 28207
ALSO PRESENT (via telephone):	JOSEPH GRIER, FCR 521 E. Morehead St, Suite 440 Charlotte, NC 28202

the disputes in our case and no agreement on either tolling or staying or mediating or even simple settlement negotiations, I'm not inclined to order mediation or a standdown at this point in time. It was tried in Bestwall and did not work and I would assume we've get a similar result there, notwithstanding the fact that the debtors and affiliates and the FCR are all in agreement on a plan.

I think the other thing I would say is I am pretty confident at this point that estimation alone won't result in a compromise as long as the challenges to the merger are still untested. The debtor has suggested, of course, that since Judge Kaplan has gotten into the game and ruled on the dismissal motion up in New Jersey, that the propriety of the twostep may have been established. Frankly, you, bankruptcy judge opinions vary across the land on a variety of fronts and no one here is going to be relying on a bankruptcy judge's opinion. The challenges to the merger are going to get resolved higher up, either by an appellate court, maybe the Supreme Court, maybe they get resolved in, in Congress.

But in the meantime, I think it's an open question and if we end up having to go forward, resolve an estimation, get a number, and then the ACC is still not willing to go forward on negotiations -- and I'm not faulting them for that, but the point is I can't impose an estimation on anyone -- and if parties are still wanting to find out what happens when someone

Exhibit A5

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

IN RE:	:	Case No. 20-30608 (JCW) (Jointly Administered)
ALDRICH PUMP LLC, ET AL.,	:	
Debtors,	:	Chapter 11
	:	Charlotte, North Carolina
	:	Thursday, March 30, 2023 9:30 a.m.
	:	
OFFICIAL COMMITTEE OF ASBESTOS PERSONAL INJURY CLAIMANTS, on behalf of the estates of Aldrich Pump LLC and Murray Boiler LLC,	:	AP 22-03028 (JCW)
Plaintiff,	:	
v.	:	
INGERSOLL-RAND GLOBAL HOLDING COMPANY LIMITED, et al.,	:	
Defendants,	:	
OFFICIAL COMMITTEE OF ASBESTOS PERSONAL INJURY CLAIMANTS, on behalf of the estates of Aldrich Pump LLC and Murray Boiler LLC,	:	AP 22-03029 (JCW)
Plaintiff,	:	
v.	:	
TRANE TECHNOLOGIES PLC, et al.,	:	
Defendants,	:	

ARMSTRONG WORLD INDUSTRIES, INC. ASBESTOS PERSONAL INJURY SETTLEMENT TRUST, et al.,	:	Miscellaneous Pleading No. 22-00303 (JCW) (Transferred from District of Delaware)
Plaintiffs,	:	
v.	:	
ALDRICH PUMP LLC, et al.,	:	
Defendants,	:	
AC&S ASBESTOS SETTLEMENT TRUST, et al.,	:	Miscellaneous Pleading No. 23-00300 (JCW) (Transferred from District New Jersey)
Petitioners,	:	
v.	:	
ALDRICH PUMP LLC, et al.,	:	
Respondents,	:	
VERUS CLAIM SERVICES, LLC,	:	
Interested Party,	:	
NON-PARTY CERTAIN MATCHING CLAIMANTS,	:	
Interested Party.	:	

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE J. CRAIG WHITLEY,
UNITED STATES BANKRUPTCY JUDGE

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ask her whether she's got any free time to come to North Carolina and iron out your differences.

But the point is I, I understand why there's a difference between Paddock and here and we've got some heartfelt differences of opinion, but on the current motion the bottom line is that I cannot find cause. I don't think the Robbins test, Robbins with one "b," and the, and the Tweetsie Railroad connection, I don't think those criteria are met. I can't protect the estate. That was one domestic case and in an area where the court, federal courts are beholden to the state court to grant a great deal of deference to their, their procedures and rulings in the field of domestic relations and that's not us. We've got thousands of claims.

So regrettably, I will have to say no. I will just ask the debtors to draw an order consistent with those remarks and what's been previously stated. I think that should give you enough between the adoption of the briefs, brief arguments, and the reference back to the reasoning that's in the preliminary injunction findings to keep it short.

But at the same time, if, if there's a desire to seek review on appeal on that, then I understand where you're coming from and I, I'd love to be enlightened by a higher court. So for now, no, okay?

All right.

MR. THOMPSON: Thank you, Judge.

Exhibit 2

No. 23-675

In the Supreme Court of the United States

OFFICIAL COMMITTEE OF ASBESTOS CLAIMANTS,
Petitioner,

v.

BESTWALL LLC; GEORGIA-PACIFIC LLC; AND SANDER L. ESSERMAN, IN HIS CAPACITY AS FUTURE CLAIMANTS' REPRESENTATIVE,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF MEMBERS OF CONGRESS AS AMICI CURIAE IN SUPPORT OF PETITIONER

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January 22, 2024

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TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTEREST OF AMICI CURIAE

Amici curiae are the following members of the U.S. Senate:[1]

Senator Richard Joseph Durbin, the Chair of the Senate Judiciary Committee and the senior United States senator from Illinois, a seat he has held since 1997.

Senator Sheldon Whitehouse, the Chair of the Senate Judiciary Committee Subcommittee on Federal Courts, Oversight, Agency Action, and Federal Rights and the junior United States senator from Rhode Island, a seat he has held since 2007.

Senator Josh Hawley, member of the Senate Judiciary Committee and the senior United States senator from Missouri, a seat he has held since 2019.

Amici possess deep experience with the Nation's bankruptcy laws. They hold leadership positions on, and are members of, the Senate committee and subcommittee with legislative jurisdiction over the Bankruptcy Code. While they represent different states and political parties, amici share a grave concern regarding the manipulation and misuse of the bankruptcy system. Two of the amici previously filed an amicus brief citing similar concerns, which was cited below by Judge King in dissent. *See* App. 46a (King, dissenting) (citing Brief of Senator Richard Durbin, et al. as Amici Curiae Supporting Appellees, *In re Aearo Techs., LLC*, No. 22-2606 (7th Cir. Feb. 1, 2023)).

Amici are troubled by the increasing prevalence of bankruptcy abuse by wealthy, solvent corporations. In

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[1] No counsel for a party authored this brief in whole or in part and no person other than amici or their counsel made any monetary contribution to its preparation or submission. Both parties received timely notice of intent to file this brief.

recent years, multiple profitable corporations have sought non-debtor injunctions to immunize themselves from liability while denying thousands of injured claimants—including amici's constituents—their day in court. If maintained, the decision below would validate this manipulation of the bankruptcy system and encourage other corporations to follow suit. Solvent non-debtors should not be given the green light to use bankruptcy to sidestep litigation, and Congress certainly did not intend to authorize such maneuvers when it created the Bankruptcy Code.

INTRODUCTION AND SUMMARY OF ARGUMENT

The question presented by this case is whether the Bankruptcy Code authorizes a bankruptcy court to stay third-party litigation against a debtor's non-bankrupt affiliates. In answering that question, the Fourth Circuit devised a rule that gives bankruptcy courts virtually unlimited authority to halt litigation against non-debtors under 11 U.S.C. § 105(a).[2]

Amici are members of Congress who write to urge the Court to reject this latest attempt at bankruptcy abuse. Congress created bankruptcy to give the "honest but unfortunate debtor" a "fresh start," *Marrama v. Citizens Bank of Mass.*, 549 U.S. 365, 367 (2007), as the "last resort" for those with no other option, H.R. Rep. No. 109-31, pt. 1, at 4 (2005). Yet, in recent years, corporations have sought to extend bankruptcy's reach to contexts progressively further afield from the Code's text and purpose—not to obtain badly needed financial relief, but to exploit the

[2] Unless otherwise specified, all internal quotation marks, citations, and alterations are omitted.

power of the bankruptcy court to avoid facing litigation from tort victims.

Through dubious readings of the Code and novel legal strategies, financially healthy corporations have invented elaborate loopholes in an attempt to secure the debt-discharging benefits of bankruptcy without subjecting themselves to its creditor-protecting burdens. These maneuvers were expressly designed to consolidate, delay, or prevent lawsuits brought against the companies by individuals who allege that they suffered serious harm. Even when unsuccessful, these misuses of the Code allow corporations to continue business as usual, while victims are denied the chance to seek restitution.

The poster child for this tactic is the so-called "Texas Two-Step" maneuver, in which a corporation transfers its tort liability to a shell company created for the sole purpose of discharging that liability in bankruptcy. The success of the maneuver depends on a sweeping non-debtor injunction—the same type of injunction at issue here—that halts all litigation against not only the bankrupt shell company, but also its non-bankrupt parents and affiliates.

Congress provided no mechanism in the Bankruptcy Code to stay litigation against non-debtors in such situations. In this case, Bestwall's successful attempt to enjoin hundreds of thousands of legal claims against Georgia-Pacific exemplifies both the benefit of the Texas Two-Step to tortfeasors and the cost of the maneuver to the American people—and to the integrity of the bankruptcy system itself. Through its unprincipled, atextual interpretation of the Code's provisions, Bestwall has created a legal stratagem that radically expands the authority of bankruptcy courts and makes a mockery of

congressional intent. The bankruptcy system was not designed to provide solvent non-debtors with the option to simply decline to be held liable for alleged wrongdoing, but that is precisely what the Fourth Circuit's decision countenances. That was not what Congress intended, and it is not a result that this Court should permit.

STATEMENT

In recent years, a growing number of wealthy corporations have exploited the Bankruptcy Code to exempt themselves from mass-tort litigation. The maneuver at issue here is the "Texas Two-Step." In pursuing this maneuver, a corporation facing liability attempts to limit its exposure (and evade adverse jury verdicts) by reincorporating in Texas or Delaware, dividing itself in two, and offloading its liability onto a newly formed shell company. The shell company then moves to a favorable jurisdiction, files for bankruptcy, and promptly asks the bankruptcy court to issue an injunction on lawsuits against the affiliated "parent" company. If the injunction is granted, the entire corporate enterprise stands to benefit from the bankruptcy court's protection, shielding valuable assets from victims' reach while allowing the "parent company" to continue business as usual.

Under the auspices of the Code, profitable corporations have used the Texas Two-Step to obtain sweeping preliminary injunctions without ever filing for bankruptcy themselves. These injunctions have barred personal-injury claimants like amici's constituents—among them cancer and mesothelioma patients—from pursuing state-law remedies against the entities that caused their injuries. In other words, through systematic "abuse of bankruptcy laws," 168 Cong. Rec. S683 (daily ed.

Feb. 15, 2022) (statement of Sen. Durbin), these companies have denied hundreds of thousands of Americans an opportunity to seek restitution in a court of law for the grievous harms they have suffered.

Georgia-Pacific pioneered the scheme after it faced thousands of personal-injury lawsuits stemming from asbestos poisoning. In 2017, the company "moved" to Texas for less than five hours and promptly divided itself into two new entities. New GP was entrusted with the old Georgia-Pacific's profitable assets and business operations, while Bestwall was shouldered with virtually all its asbestos liabilities. *See* App. 31a. Three months later, Bestwall filed for bankruptcy, seeking and receiving a preliminary injunction under 11 U.S.C. § 105(a) that protected the entire Georgia-Pacific enterprise from asbestos litigation. *See* App. 89a.

Georgia-Pacific is far from alone in pursuing the Texas Two-Step: CertainTeed replicated the move in 2019, Trane Technologies followed suit in 2020, and Johnson & Johnson attempted it (twice) in 2021 and 2023. *See* Michael A. Francus, *Texas Two-Stepping Out of Bankruptcy*, 120 Mich. L. Rev. Online 38, 41–42 (2022). In each case, the new, liability-laden shell declared bankruptcy, obtaining an automatic stay for itself and seeking an expansive preliminary injunction to safeguard separate corporate entities from mass-tort claims.

The Texas Two-Step and its linchpin injunction have thus severely undermined and distorted a system designed to help "struggling businesses as a last resort." Letter from Senators Richard J. Durbin, Elizabeth Warren, and Richard Blumenthal and Representatives Carolyn B. Maloney and Raja Krishnamoorthi, to Joaquin Duato, Vice-Chairman of the Executive Committee,

Johnson & Johnson at 1 (Dec. 17, 2021), https://perma.cc/XYF2-4QUC. They allow corporations "to avoid legal accountability for their own wrongdoing," and "to dodge their legal obligations to victims." 168 Cong. Rec. S683.

ARGUMENT

I. Congress has never given bankruptcy courts the authority to stay litigation against a debtor's non-bankrupt affiliates.

The Fourth Circuit insisted that every one of the hundreds of thousands of asbestos claims asserted against the Georgia-Pacific enterprise must be halted because "the asbestos-related claims against Bestwall are identical to the claims against New GP," and resolution of these claims "could have an effect on the Bestwall bankruptcy estate." App 13a. But the ties that bind New GP and Bestwall are no different than those shared by any other corporate affiliates defending the same mass-tort action. Congress did not provide bankruptcy courts with the jurisdiction or authority to extend their injunctive powers to encompass claims against such non-bankrupt co-defendants.

A. Bankruptcy courts lack jurisdiction to stay litigation against non-debtors like New GP.

The statutory power of the bankruptcy courts is limited to "the confines of the Bankruptcy Code." *Law v. Siegel*, 571 U.S. 415, 421 (2014). The Code, in section 105(a), provides bankruptcy courts with "residual" equitable authority to issue orders. *United States v. Energy Res. Co., Inc.*, 495 U.S. 545, 549 (1990). But it "does not provide an independent source of federal subject matter jurisdiction." *In re Combustion Eng'g, Inc.*, 391 F.3d 190, 225 (3d Cir. 2004). The first question, then, is

whether a bankruptcy court has jurisdiction to stay litigation against a debtor's non-bankrupt affiliates.

Under longstanding precedent, it does not. Congress has granted bankruptcy courts jurisdiction over only two kinds of proceedings: (i) core proceedings and (ii) proceedings "related to" core proceedings. 28 U.S.C. § 1334(b); *id.* § 157(a). A direct claim of liability against a non-bankrupt third party constitutes neither.

1. Claims against non-debtors are not core proceedings.

This Court has explained that bankruptcy jurisdiction extends to three categories of core proceedings: cases "under" Chapter 11, proceedings "arising under" Chapter 11, and proceedings "arising in" a Chapter 11 case. 28 U.S.C. § 1334(a)–(b); *see Stern v. Marshall*, 564 U.S. 462, 495 (2011). In these core proceedings, a bankruptcy judge may "hear and determine" the controversy and "enter appropriate orders and judgments," subject only to appellate review. 28 U.S.C. § 157(b)(1).

Although Congress has not provided an exhaustive list of core proceedings, *see id.* § 157(b)(2), the courts of appeals have defined the three categories in greater detail. First, a case "under" Chapter 11 "refers merely to the bankruptcy petition itself." *Matter of Wood*, 825 F.2d 90, 92 (5th Cir. 1987). Second, a proceeding "arising under" Chapter 11 requires that "the Bankruptcy Code creates the cause of action or provides the substantive right invoked." *Stoe v. Flaherty*, 436 F.3d 209, 217 (3d Cir. 2006). Finally, a proceeding "arising in" a Chapter 11 case is one that "by its nature, not its particular factual circumstance, could arise *only* in the context of a bankruptcy case." *Gupta v. Quincy Med. Ctr.*, 858 F.3d 657, 665 (1st Cir. 2017).

Here, the enjoined personal-injury claims against New GP and its affiliates are not "core" under any definition. The claims are distinct from the bankruptcy petition. They are founded in state tort law, not the federal Bankruptcy Code. And they are not unique to Bestwall's bankruptcy filing; for more than forty years, Georgia-Pacific has faced hundreds of thousands of lawsuits for precisely the same tort violations. *See* App. 29a.

Congress's careful designation of core proceedings makes plain that the mere "existence of a bankruptcy proceeding" is not "an all-purpose grant of jurisdiction." *In re W.R. Grace & Co.*, 591 F.3d 164, 174 (3d Cir. 2009). If it were, "a bankruptcy court would have power to enjoin any action, no matter how unrelated to the underlying bankruptcy it may be, so long as the injunction motion was filed in the adversary proceeding." *Id.*

2. Claims against non-debtors are not "related to" proceedings.

Because third-party claims against third-party defendants cannot be core proceedings, they are at best "related to" proceedings. 28 U.S.C. § 1334(b). Related-to jurisdiction encompasses "suits between third parties" only if they "have an effect on the bankruptcy estate." *Celotex Corp. v. Edwards*, 514 U.S. 300, 307 n.5 (1995). Simply put: "bankruptcy courts have no jurisdiction over proceedings that have no effect on the estate of the debtor." *Id.* at 308 n.6. Because claims against third parties for their own liability do not affect the estate, bankruptcy courts lack jurisdiction to enjoin claimants from bringing such suits.

The Fourth Circuit held that the bankruptcy court had statutory jurisdiction to enjoin mass-tort proceedings against New GP because there was a "possibility" that the

proceedings could affect the estate. App. 13a. That is wrong for two reasons.

First, it is far from clear that "issue preclusion, inconsistent liability, and evidentiary issues . . . based on the results of the state-court litigation against New GP . . . would inevitably affect the bankruptcy estate." App. 14a. A bankruptcy court cannot use its jurisdiction over core proceedings to enjoin unrelated proceedings just because they are factually similar.

That is why bankruptcy courts can only exercise related-to jurisdiction over claims affecting "the property or thing in question." *Tenn. Student Assistance Corp. v. Hood*, 541 U.S. 440, 448 (2004). That is also why "some overlap" between claims is insufficient to establish jurisdiction. *Stern*, 564 U.S. at 497. Factual similarity between claims might make it more likely that a claim impacts the estate. But likelihood is not evidence, and it cannot create a connection to the estate where one does not exist.

Second, the fact that New GP might seek indemnification or secondment from the estate also fails to establish related-to jurisdiction. *See* App. 15a n.13. This Court has made clear that an "indemnification provision does not somehow convert [a] suit against [a third party] into a suit against [the estate]." *Lewis v. Clarke*, 581 U.S. 155, 165 (2017). A judgment against a non-debtor for its independent liability "will not bind [the estate] in any way," and the existence of a potential indemnification or secondment obligation does not alter that fact. *Id.*

In this case, any tort judgment against New GP will not bind the estate. Instead, "an entirely separate action would be necessary for any liability incurred by [New GP] to have an impact on [the] estate." *W.R. Grace*, 591 F.3d

at 172. That is precisely the situation in which related-to jurisdiction doesn't exist—where the third-party claim has "only the *potential* to give rise to a separate lawsuit seeking indemnification from the debtor." *Id.* at 173 (emphasis added). If a later reimbursement proceeding were brought against the estate, the bankruptcy court could stay that action then. But enjoining thousands of suits by third parties against other third parties in advance goes too far.

3. Non-debtors cannot collusively manufacture bankruptcy jurisdiction.

Even if the released claims did eventually "have an effect on the bankruptcy estate," *Celotex*, 514 U.S. at 307 n.5, that effect would arise only because Georgia-Pacific ensured it would. And Congress made clear in 28 U.S.C. § 1359 that federal courts, including bankruptcy courts, lack jurisdiction over any "civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined." *See Kramer v. Caribbean Mills, Inc.*, 394 U.S. 823, 824, 829 (1969) (explaining that Congress enacted section 1359 to prevent the "manufacture of Federal jurisdiction").

Here, the agreements between Bestwall and New GP attempt to manufacture related-to jurisdiction in direct contravention of section 1359. Without those agreements, asbestos claimants would have no connection to Bestwall, which never manufactured any asbestos products, and non-debtors like New GP would have no basis to invoke bankruptcy jurisdiction.

The agreements are also insufficient on their own terms. Examining the underlying provisions makes clear that "Bestwall's supposed indemnity obligations to New GP are in fact wholly circular, essentially a legal fiction."

App. 39a. After all, "to satisfy a claim for indemnity from New GP relating to its defense of asbestos claims, Bestwall would obtain the necessary cash from New GP itself." *Id.* And "New GP actually concedes in its briefing that it contributed $150 million to Bestwall under the funding agreement." App. 40a n.7. For New GP to then rely on such a circular, jurisdiction-creating contrivance would undermine the very purpose of bankruptcy, leaving the Code "nothing but a sham and a cloak." *Sampsell v. Imperial Paper & Color Corp.*, 313 U.S. 215, 217 (1941).

In any event, it cannot be the case that a bankruptcy court can enjoin a claimant from suing a non-bankrupt third party because of the mere *possibility* that the claimant would recover against the third party, causing that third party, perhaps, to seek reimbursement from the estate. That entire scenario guarantees no impact on the estate, much less the "direct and substantial adverse effect" required to confer jurisdiction. *Celotex*, 514 U.S. at 310. And enjoining terminally ill claimants because of that scenario would not only render bankruptcy jurisdiction "limitless." *Id.* at 308. It would also reduce "Article III . . . into mere wishful thinking." *Stern*, 564 U.S. at 495.

B. Section 105(a) does not permit bankruptcy courts to enjoin claims in the absence of some other statutory authority.

Even if the bankruptcy court had jurisdiction to stay litigation against Bestwall's non-bankrupt affiliates, it still lacked statutory authority to do so under the Code. In evaluating the non-debtor injunction here, the bankruptcy court, *see* App. 114a, the district court, *see* App. 62a, and the court of appeals, *see* App. 8a n.6, all relied on a single provision—section 105(a).

Section 105(a) authorizes bankruptcy courts to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a). The provision is "similar in effect to the All Writs Statute" and conveys "full injunctive power[s]" to bankruptcy courts. H.R. Rep. No. 95-595, at 12, 316 (1977). But just as it confers no "independent source of federal subject matter jurisdiction," *Combustion Eng'g*, 391 F.3d at 225, section 105(a) provides no independent, substantive authority for bankruptcy courts to issue orders, *see United States v. Sutton*, 786 F.2d 1305, 1037 (5th Cir. 1986) ("Section 105(a) simply authorizes a bankruptcy court to fashion such orders as are necessary to further the purposes of the substantive provisions of the Bankruptcy Code.").

The text of section 105(a) makes those limitations clear. Because a bankruptcy court may issue injunctions only "to carry out the provisions" of the Code, 11 U.S.C. § 105(a), a bankruptcy court's exercise of section 105(a) must be tied to, and authorized by, "an identifiable right conferred elsewhere in the Bankruptcy Code," *In re Jamo*, 283 F.3d 392, 403 (1st Cir. 2002). It cannot be based on some "general bankruptcy concept or objective." 2 Collier on Bankruptcy ¶ 105.01, at 1 (16th ed. 2018).

Bestwall's failure to show that any other provision of the Code encompasses third-party claims against New GP therefore dooms its attempt to obtain an injunction under section 105(a)—because it leaves Bestwall without the necessary statutory authority under the Code to support such an injunction. *See Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 206 (1988) (explaining that a bankruptcy court's equitable powers "can only be exercised within the confines of the Bankruptcy Code").

II. The increasing prevalence of bankruptcy abuse by wealthy, solvent tortfeasors underscores the need for this Court to grant certiorari.

This case is just one example of recent abuse within the bankruptcy system. Georgia-Pacific's pursuit of the Texas Two-Step maneuver inspired a wave of companies to attempt the same or similar strategies, using bankruptcy to sidestep litigation without ever declaring bankruptcy themselves. *See, e.g.*, Letter from Senators Richard J. Durbin, Elizabeth Warren, and Richard Blumenthal and Representatives Carolyn B. Maloney and Raja Krishnamoorthi, to Alex Gorsky, Chairman and CEO, Johnson & Johnson at 2 (Nov. 10, 2021), https://perma.cc/N7TC-SPKX ("Exploitation of the bankruptcy system by large companies to avoid accountability is unsurprising, but it is also unacceptable."). The practice, still new but increasingly common, has been dubbed "bankruptcy grifting," to refer to cases in which a joint tortfeasor "latch[es] onto a bankruptcy case," receiving benefits such as "channeling injunctions and releases" without incurring any of the associated costs. *See* Lindsey D. Simon, *Bankruptcy Grifters*, 131 Yale L.J. 1154, 1207 (2022).

The Court has rejected similar schemes for nearly a century. In *Shapiro v. Wilgus*, 287 U.S. 348 (1932), the debtor created a new corporation to take on his debts and, three days later, put that shell company into receivership and obtained an injunction against his creditors. *See id.* at 352–53. As Justice Cardozo explained, the debtor did not act in good faith because he designed the receivership to put his debt "in such a form and place that levies would be averted." *Id.* at 354. The same is true here.

Georgia-Pacific relied on an atypical provision of Texas state law to create Bestwall not for a "normal business purpose," but "for the very purpose of being sued." *Id.* at 355. The company's divisional merger, Bestwall's subsequent Chapter 11 filing, and the non-debtor injunction freezing all asbestos litigation against New GP and its affiliates were "parts of a single scheme to hinder and delay creditors in their lawful suits," a purpose long "condemned in Anglo-American law." *Id.* at 353–54. For six years and counting, the sweeping injunction has shielded Georgia-Pacific's profitable operations and assets from asbestos claimants. And for critically ill and dying cancer patients, this delay is devastating. As amici have stated, it deprives them of "their day in court," 168 Cong. Rec. S683, and provides inspiration for other deep-pocketed tortfeasors to escape liability by doing the same.

To be sure, certain tortfeasors have "faced enormous potential liabilities and defense costs." *Ortiz v. Fireboard Corp.*, 527 U.S. 815, 829 (1999). But the extraordinary nature of these cases—in which lucrative enterprises face staggering liability only because they harmed thousands in the first place—does not justify dismissing the forum Congress provided to resolve mass claims: multi-district litigation. 28 U.S.C. § 1407. While "the Bankruptcy Code presents an inviting safe harbor for such companies," its "lure creates the possibility of abuse which must be guarded against to protect the integrity of the bankruptcy system and the rights of all involved." *In re SGL Carbon Corp.*, 200 F.3d 154, 169 (3d Cir. 1999).

In downplaying the grave policy implications of its rule, the Fourth Circuit freely endorsed bankruptcy abuse as an end-run around mass-tort liability. If Bestwall's

position becomes law—if a non-debtor's ordinary corporate connections to a bankrupt affiliate are truly enough to justify a stay of litigation against the non-debtor during the pendency of a Chapter 11 proceeding—those abuses are likely to become routine, making "every case that rare case." *Czyzewski v. Jevic Holding Corp.*, 580 U.S. 451, 470 (2017). This, then, is the logical consequence of denying certiorari in this case: Corporations facing mass-tort liability will have a well-defined playbook for sidestepping lawsuits, undermining both the ability of individuals to hold companies accountable and the integrity of the bankruptcy system.

In short, allowing Bestwall's position to prevail here would fuel abuses that are already transforming a system of last resort into a "corporate shell game" that allows fully solvent corporations "to evade accountability for any harm caused by [their] products" and deny "tens of thousands of people their day in court." Letter from Senators Richard J. Durbin, Elizabeth Warren, and Richard Blumenthal and Representatives Carolyn B. Maloney and Raja Krishnamoorthi, to Alex Gorsky, Chairman and CEO, Johnson & Johnson at 1.

"That's not what Congress intended when it created bankruptcy." *Evading Accountability: Hearing on Corporate Manipulation of Chapter 11 Bankruptcy Before the S. Comm. on the Judiciary*, 118th Cong., at 00:24:48 (2023) (statement of Sen. Durbin), https://perma.cc/GS3B-TJ6M. And it's not a result that this Court should allow to continue.

CONCLUSION

The petition for certiorari should be granted and the decision below should be reversed.

Respectfully submitted,

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January 22, 2024

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Exhibit 3

No. 23-675

In the Supreme Court of the United States

OFFICIAL COMMITTEE OF ASBESTOS CLAIMANTS,
Petitioner,
v.
BESTWALL LLC, ET AL.,
Respondents.

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

AMICUS BRIEF OF NORTH CAROLINA, ARIZONA, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, ILLINOIS, MAINE, MASSACHUSETTS, MICHIGAN, MINNESOTA, MISSISSIPPI, NEVADA, NEW JERSEY, NEW MEXICO, NEW YORK, NORTH DAKOTA, OREGON, PENNSYLVANIA, RHODE ISLAND, SOUTH DAKOTA, VERMONT, WASHINGTON, WISCONSIN, AND THE DISTRICT OF COLUMBIA IN SUPPORT OF PETITIONER

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INTEREST OF AMICI STATES

Amici are the States of North Carolina, Arizona, California, Colorado, Connecticut, Delaware, Illinois, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Nevada, New Jersey, New Mexico, New York, North Dakota, Oregon, Pennsylvania, Rhode Island, South Dakota, Vermont, Washington, Wisconsin, and the District of Columbia.[1]

The amici States have a strong interest in supporting the petition for writ of certiorari. The Fourth Circuit's decision allows tortfeasor corporations not facing financial distress to abuse the bankruptcy process. It allows them to enjoin litigation against their solvent corporate affiliates for years while States are unable to stop violations of their laws and victims receive nothing. This delay in turn allows them to unjustly limit their liability for the harms they have caused the States and their people. In fact, the device used by Respondent Georgia Pacific has already been exploited by one of the nation's most profitable corporations to enjoin claims by States. The decision below therefore undermines the amici States' authority to enforce their state laws to protect their people.

In addition, amicus the State of North Carolina has a special interest in this case because Respondent Bestwall LLC is organized under North Carolina law. North Carolina thus has an interest in ensuring that its corporate laws are not used for abusive purposes,

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[1] Under Rule 37.2, amici affirm that all parties received timely notice of the intent to file this brief.

and that it does not become the venue of choice for such abuse. *See* N.C. Gen. Stat. §§ 57D-6-02(1), 75-9.

SUMMARY OF THE ARGUMENT

This case involves a scheme known as the "Texas Two-Step." Using this scheme, highly solvent companies seek to improperly gain the benefits of bankruptcy without having to face its corresponding burdens. Specifically, the scheme is designed to allow highly solvent corporations to access the Bankruptcy Code's coercive, nonconsensual tools—including injunctions against tort claims filed in state court—while remaining free from the burdens of bankruptcy court oversight.

Below, the Fourth Circuit effectively blessed this attempted manipulation of the bankruptcy process. Its decision threatens States' sovereign power to enforce their laws against corporate wrongdoers. It also violates the statutory bar on manufacturing federal jurisdiction, as well as statutory limits on bankruptcy jurisdiction. And it endorses an inappropriate standard for bankruptcy judges to use their equitable powers to preliminarily enjoin litigation. This Court should grant the petition and reverse these erroneous rulings.

ARGUMENT

I. The Fourth Circuit's Decision Undermines the States' Critical Role in Protecting Consumers.

A. The "Texas Two-Step" allows highly solvent companies to limit liability for their torts.

This case concerns a scheme known as the "Texas Two-Step." The scheme's first step uses Texas corporate law to effectuate a "divisional merger" that assigns a highly solvent company's tort liability to a newly formed entity that is created specifically to house that liability. *See In re LTL Mgmt., LLC*, 64 F.4th 84, 95-97 (3d Cir. 2023). At the second step, the entity holding the tort liability files for bankruptcy, leaving the bulk of the company's operations unencumbered by bankruptcy. *See id.* at 97.

The Texas Two-Step allows highly solvent companies to limit liability for torts that they committed. As the Third Circuit recently explained, the scheme's "stated goal [is] to isolate the [mass tort] liabilities in a new subsidiary so that entity [can] file for Chapter 11 without subjecting [its] entire operating enterprise to bankruptcy." *Id.* at 93; *see also* Pet. App. 3a (noting the bankruptcy in this case was intended to allow the new entity to use the Bankruptcy Code's tools "without subjecting the entire . . . enterprise to chapter 11"). This maneuver seeks to "provide [a tortfeasor] with additional leverage to negotiate a global settlement"—leverage that it could not achieve if it were required to litigate

the claims in an Article III federal court or state court. *In re Aearo Techs. LLC*, 642 B.R. 891, 912 (Bankr. S.D. Ind. 2022), *appeal filed*, No. 22-2606 (7th Cir.).

However, the Texas Two-Step only works if the solvent entity obtains a preliminary injunction—pursuant to a bankruptcy court's equitable powers—that stops tort litigation against it. *See* 11 U.S.C. § 105(a) ("The [bankruptcy] court may issue any order . . . that is necessary or appropriate to carry out the provisions of this title."). In other words, the protections of bankruptcy have minimal practical value if States and victims can continue to litigate against the solvent entity. As the decision below acknowledged, failing to obtain a preliminary injunction shielding Respondent Georgia-Pacific from tort claims would have "render[ed] the bankruptcy futile." Pet. App. 8a.

Once the injunction is in place, the tortfeasor has limited incentive to resolve the claims against it. After all, the injunction protects the company from litigation that could lead to adverse judgments negatively affecting the company's global settlement position. And unlike a bankrupt company, the solvent entity in a Texas Two-Step is free from the considerable burdens of bankruptcy court oversight. *See, e.g.*, 11 U.S.C. § 363(b)(1) (requiring oversight of bankrupt companies' use, sale, or lease of property not in the ordinary course of business); *id.* § 503(c) (requiring oversight of bankrupt companies' compensation of certain executives). Thus, for as long as the bankruptcy remains pending, the tortfeasor is effectively insulated from liability without pressure to

exit bankruptcy and regain control of its operations. For example, as a bankruptcy court in North Carolina confirmed just last month, "no progress . . . has been made in [Respondent Bestwall's case], which was filed six years ago." *In re Aldrich Pump LLC*, No. 20-30608, 2023 WL 9016506, at *11 (Bankr. W.D.N.C. Dec. 28, 2023).

Courts and commentators have sharply questioned the legality of highly solvent businesses leveraging Texas law like this in bankruptcy proceedings. Most notably, the Third Circuit recently dismissed Johnson & Johnson's Texas Two-Step bankruptcy for lack of good faith. *LTL*, 64 F.4th at 106-10. The court held that the company did not file for bankruptcy in good faith because it was not in financial distress. *Id.* at 110; *see also* Michael A. Francus, *Texas Two-Stepping Out of Bankruptcy*, 120 Mich. L. Rev. Online 38, 43 (2022) (arguing that such use of the Texas Two-Step "fits the textbook definition" of a fraudulent transfer).

B. The Fourth Circuit's holding will allow use of the Texas Two-Step to proliferate.

Below, the Fourth Circuit did not expressly rule on whether the Texas Two-Step is lawful as a matter of corporate law. Pet. App. 3a n.1. But the court's jurisdictional holdings, along with the exceedingly lenient standard that the court held governs requests to shield solvent affiliates under section 105 of the Code, will have the practical effect of ensuring that Texas Two-Step bankruptcies continue to proliferate. These holdings will also ensure that the Fourth Circuit remains the venue of choice for the Texas Two-Step. Indeed, "every debtor using the Texas Two Step

[has] filed for bankruptcy in [the Western] [D]istrict [of North Carolina]." *In re LTL Mgmt. LLC*, No. 21-30589, 2021 WL 5343945, at *6 (Bankr. W.D.N.C. Nov. 16, 2021).[2]

This has been possible because, no matter where a corporation is based, a Texas Two-Step can create a new entity formally domiciled in North Carolina that can seek bankruptcy in the Fourth Circuit. *See id.* Because the formal domicile of a corporation is easy to change, the bankruptcy venue statute allows corporations to file for bankruptcy anywhere. *See* 28 U.S.C. § 1408. For this reason, a bankruptcy practice allowed in one circuit is effectively available nationwide. *See generally* Brief of the Commercial Law League of America & the National Bankruptcy Venue Reform Committee as Amici Curiae in Support of Neither Party*, Harrington v. Purdue Pharma L.P.*, No. 23-124 (U.S. Sept. 27, 2023).

Given these realities, the decision below is all the more consequential because the Fourth Circuit has established a high bar for dismissing bankruptcy cases when the debtor's petition lacks good faith. In some circuits, the good-faith requirement limits the potential abuse of the Texas Two-Step by companies not in financial distress. *See LTL*, 64 F.4th at 106-10. But as the decision below recognized, the Fourth Circuit less rigorously scrutinizes whether a bankruptcy petition was filed in good faith. Pet. App.

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[2] Although Texas Two-Step bankruptcies filed to date have involved asbestos liability, the decision below clears the path for future uses of the tactic outside of the asbestos context.

20a (citing *Carolin Corp. v. Miller*, 886 F.2d 693, 694 (4th Cir. 1989)). And already, a bankruptcy court in the Fourth Circuit has read the decision below to render it very difficult to dismiss a Texas Two-Step under the Fourth Circuit's good-faith test. *See Aldrich Pump*, 2023 WL 9016506, at *27-29 (citing *In re Bestwall LLC*, 71 F.4th 168, 182 (4th Cir. 2023)).

This Court should not allow the Texas Two-Step to proliferate. Nor should it wait for a petition that more squarely addresses the equitable good-faith dismissal test when this case presents straightforward statutory grounds for stopping the Texas Two-Step's abuse of the bankruptcy process. This Court "ha[s] been careful to explain that the [Bankruptcy Code] limits the opportunity for a completely unencumbered new beginning to the 'honest but unfortunate debtor.'" *Grogan v. Garner*, 498 U.S. 279, 286-87 (1991) (quoting *Loc. Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934)). Because highly solvent companies are not within that class, this Court should grant the petition to prevent abuse of the bankruptcy process through the Texas Two-Step scheme.

C. Using the Texas Two-Step to initiate bankruptcy proceedings causes significant harm to States' sovereign power to enforce their laws.

The Fourth Circuit's jurisdictional and preliminary injunction rulings in this case wrongly threaten amici States' sovereign power to enforce their civil consumer-protection and other laws.

In recent years, corporate wrongdoers have increasingly filed for bankruptcy and quickly sought preliminary injunctions barring State litigation against both the debtor and non-bankrupt related entities. *See, e.g.*, Motion for Preliminary Injunction, *In re Purdue Pharma L.P.*, Adv. Pro. No. 19-08289 (Bankr. S.D.N.Y. Oct. 11, 2019), ECF No. 2 (seeking preliminary injunction of States' civil litigation against Purdue and the non-bankrupt Sackler family that owned bankrupt Purdue Pharma). For example, Johnson & Johnson successfully employed the Texas Two-Step to preliminarily enjoin Mississippi and New Mexico from pursuing claims against it. *In re LTL Mgmt., LLC*, 645 B.R. 59, 76 n.11, 87 (Bankr. D.N.J. 2022).[3]

Such injunctions would not be possible if not for the Fourth Circuit's erroneous holdings. The decision below could therefore allow a non-Article III federal bankruptcy court to overrule a State's sovereign decision to seek redress against a non-bankrupt company in its own state court. But as this Court has held, States have inherent sovereign authority to enforce their own regulatory laws in their state courts. *See, e.g.*, *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 604 (1975) (applying *Younger* abstention to a State's civil enforcement action).

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[3] Mississippi and New Mexico were subject to this injunction even though the Bankruptcy Code exempts States' "police and regulatory power" from the automatic stay that the Code grants to bankrupt entities. 11 U.S.C. § 362(b)(4). Amici States maintain that rulings like *LTL* enjoining States from civil litigation against non-bankrupt entities are wrongly decided.

The Fourth Circuit's decision also harms States' sovereign interest in the timely resolution of claims against corporate wrongdoers. Allowing preliminary injunctions against non-debtors can thwart States' ability to quickly stop conduct that violates their laws. *See, e.g.*, Plaintiffs' Amended Motion for Preliminary Injunction, *In re MV Realty PBC, LLC*, Adv. Pro. No. 23-01211 (Bankr. S.D. Fla. Nov. 15, 2023), ECF No. 42 (seeking order from bankruptcy court to prevent seven States from obtaining preliminary injunctive relief in their state courts against debtors and non-debtor affiliates engaged in an alleged real-estate scam). Moreover, States regularly and successfully engage in direct negotiations with companies responsible for mass torts to efficiently resolve claims brought under state law. This relatively streamlined process contrasts sharply with the delays and roadblocks that States face when forced to resolve their claims through the bankruptcy process.

A particularly striking example of this phenomenon arose in the States' efforts to address the unlawful corporate conduct that gave rise to the opioid crisis. In 2021 and 2022, States and local governments entered global settlements worth approximately $50 billion with nine companies that engaged in misconduct related to the manufacturing, distribution, and dispensing of opioids.[4] Meanwhile, more than four years of bankruptcy proceedings and

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[4] *See* Press Release, N.C. Dep't of Just., Bipartisan Coalition of Attorneys General Secures More Than $10 Billion in Opioid Funds from CVS and Walgreens: Brings total recoveries from drug industry to more than $50 billion (Dec. 12, 2022).

related appeals still have not resolved the States' claims against opioid manufacturer Purdue Pharma and its owners, the Sackler family. All that time, States and local governments have been unable to pursue litigation against the non-bankrupt Sackler family. *See In re Purdue Pharms. L.P.*, 619 B.R. 38 (S.D.N.Y. 2020) (affirming the bankruptcy court's issuance and extension of a preliminary injunction of State and local government litigation).

If corporate tortfeasors are allowed to use a Texas Two-Step bankruptcy to protect themselves from States' civil enforcement litigation, they will have less incentive to negotiate with States for timely, mutually acceptable resolutions. This Court should therefore grant review to ensure that States retain their sovereign authority to effectively enforce their laws against corporate wrongdoers.

II. The Fourth Circuit Erred by Enjoining Claims Against Reorganized Georgia-Pacific.

This Court should also grant the petition because the Fourth Circuit erred in three different ways by affirming the bankruptcy court's decision to enter an injunction shielding Respondent Georgia-Pacific from litigation. First, the injunction was based on wrongfully manufactured bankruptcy jurisdiction. Second, even under ordinary jurisdictional rules, the bankruptcy court lacked jurisdiction to enjoin claims against Georgia-Pacific. And third, the injunction exceeds the statutory powers of bankruptcy courts.

A. The Fourth Circuit erred by affirming an injunction premised on an attempt to manufacture jurisdiction.

First, review is needed because the jurisdiction for the bankruptcy court's injunction was improperly manufactured.

Under 28 U.S.C. § 1359, federal courts lack jurisdiction over civil lawsuits where "any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court." Congress enacted the precursor to this legislation in 1875 to stop corporations from using stock transactions and asset assignments to manufacture jurisdiction in federal courts. *See* 7C Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1830 (3d ed., rev. 2023).

Here, for a Texas Two-Step to work, Georgia-Pacific needed to win an injunction blocking litigation against it without becoming a debtor itself. *See supra* at 3-5. Thus, Georgia-Pacific devised a way to try to bring a reorganized Georgia-Pacific within the jurisdiction of a bankruptcy court that could enjoin claims against it. Specifically, it relied on 28 U.S.C. § 1334, which authorizes bankruptcy courts to exercise jurisdiction over proceedings that are "related to" a bankruptcy case. This form of jurisdiction reaches proceedings that "have an effect on [a] bankruptcy estate." *Celotex Corp. v. Edwards*, 514 U.S. 300, 307 n.5 (1995).

To try to manufacture such jurisdiction, Georgia-Pacific assigned its asbestos liabilities to a newly

formed successor, Bestwall, which then declared bankruptcy. Pet. App. 30a-31a (King, J., dissenting). Georgia-Pacific also brokered contracts between Bestwall and the reorganized Georgia-Pacific "to create the appearance of their corporate relations being inextricably intertwined," such that litigation against the new Georgia-Pacific could be said to affect Bestwall's bankruptcy. Pet. App. 36a-37a (King, J., dissenting). Without these steps, "there would have been no 'effects'" on Bestwall's bankruptcy that could have justified any injunction to protect the new Georgia-Pacific. Pet. App. 37a (King, J., dissenting).

Thus, the jurisdictional basis for the injunction protecting the new Georgia-Pacific from asbestos claims arose only because the old Georgia-Pacific carefully structured a transaction for the express purpose of creating jurisdiction. There is no real dispute on this point: Bestwall candidly admits that the goal of its restructuring was to create jurisdiction—that is, to provide a basis for jurisdiction that could allow the reorganized Georgia-Pacific to gain the benefits of bankruptcy without its burdens. Pet. App. 31a-32a, 36a-37a (King, J., dissenting); *see also Kramer v. Caribbean Mills, Inc.*, 394 U.S. 823, 828 (1969) (holding that similar admission showed that no jurisdiction existed).

The Fourth Circuit nonetheless held that this transparent maneuvering did not offend 28 U.S.C. § 1359. It reached this result in part by failing to require Bestwall, as "the party asserting jurisdiction," to satisfy its "burden" to show that its divisional merger was not designed to create jurisdiction.

Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994); *see also Lehigh Mining & Mfg. Co. v. Kelly*, 160 U.S. 327, 336-37 (1895) (applying burden in collusive-jurisdiction case).

That failure allowed the court to conclude that it was "evident" that Bestwall had not manufactured jurisdiction. Pet. App. 18a. It reasoned that, if Georgia-Pacific "had filed for bankruptcy" itself, then a bankruptcy court would have had jurisdiction to enjoin claims against it. Pet. App. 18a. But Georgia-Pacific *did not* file for bankruptcy itself. It instead created Bestwall and "improperly or collusively made" Bestwall a debtor for the sole purpose of creating jurisdiction that otherwise would not exist. 28 U.S.C. § 1359.

This arrangement patently contravenes 28 U.S.C. § 1359. Indeed, courts have repeatedly applied this statute in bankruptcy cases like this one, to ensure that transactions like Bestwall's that have "no valid business purpose" are not used to create jurisdiction that reaches "dispute[s] between non-parties to a bankruptcy proceeding."[5]

The Fourth Circuit's erroneous decision to accede to Respondents' improper manufacture of jurisdiction warrants review.

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[5] *See, e.g.*, *In re Maislin Indus.*, 66 B.R. 614, 615 (E.D. Mich. 1986); *see also Home Ins. Co. v. Cooper & Cooper, Ltd.*, 889 F.2d 746, 750 (7th Cir. 1989); *Balzotti v. RAD Invs.*, 273 B.R. 327, 331 (D.N.H. 2002); *In re Gyncor, Inc.*, 251 B.R. 344, 352-53 (Bankr. N.D. Ill. 2000).

B. The Fourth Circuit erred by affirming an injunction issued without jurisdiction.

Second, review is also warranted because Georgia-Pacific's attempt to confer jurisdiction on the bankruptcy court was unsuccessful: Asbestos claims against the reorganized Georgia-Pacific are not "related to" Bestwall's bankruptcy. *See* 28 U.S.C. § 1334.

Lawsuits involving "third parties" like the new Georgia-Pacific can fall within a bankruptcy court's related-to jurisdiction where they "have an effect on [a] bankruptcy estate." *Celotex*, 514 U.S. at 307 n.5. Such lawsuits can do so, for example, if they would "have a direct and substantial adverse effect" on a debtor's estate, as occurs when ongoing litigation would diminish the estate by allowing a third party to reach a debtor's collateral. *Id.* at 310.

Here, however, while Bestwall must indemnify the reorganized Georgia-Pacific if it has to satisfy any asbestos judgments, *see* Pet. App. 5a, judgments against Georgia-Pacific will not drain any funds from Bestwall's estate. That is because the indemnification obligations between the new Georgia-Pacific and Bestwall are "wholly circular." Pet. App. 39a (King, J., dissenting). Specifically, if the reorganized Georgia-Pacific incurs costs that are subject to indemnification from Bestwall, Bestwall may request funds from Georgia-Pacific itself to satisfy those indemnification obligations. Pet. App. 39a (King, J., dissenting). Under this unusual circular arrangement, Bestwall's indemnification obligations are satisfied by Georgia-Pacific itself. Those obligations therefore cannot

diminish Bestwall's estate, and cannot serve as a proper basis for related-to jurisdiction. *See, e.g.*, *Aearo*, 642 B.R. at 908-12 (holding that similar circular arrangement could not serve as basis for related-to jurisdiction).

The Fourth Circuit disagreed, however. It reasoned that if the new Georgia-Pacific were "found liable" on claims, this could in turn "reduce . . . claims" against Bestwall, with the result that Bestwall might become *more* solvent. Pet. App. 14a. This reasoning again fails to appreciate the circular nature of the indemnification obligations at issue here. If Bestwall faces fewer claims, its solvency will remain unchanged, because fewer funds from Georgia-Pacific would flow into its estate to satisfy those claims. Pet App. 5a-6a.

At bottom, the Fourth Circuit's capacious understanding of related-to jurisdiction reflects the improper view that, "as many a curbstone philosopher has observed, everything is related to everything else." *Cal. Div. of Lab. Standards Enf't v. Dillingham Constr., N.A., Inc.*, 519 U.S. 316, 335 (1997) (Scalia, J., concurring). But as this Court has held, related-to "jurisdiction cannot be limitless," because Congress has only "vested 'limited authority' in bankruptcy courts." *Celotex*, 514 U.S. at 308 (quoting *Bd. of Governors, FRS v. MCorp Fin., Inc.*, 502 U.S. 32, 40 (1991)).

Review of the decision below is therefore needed to correct the Fourth Circuit's overbroad reading of the scope of related-to jurisdiction.

C. The Fourth Circuit erred by affirming an injunction without statutory basis.

Third, review is also needed because the injunction issued below lacked a proper basis in the statutory powers of bankruptcy courts. To justify enjoining claims against the new Georgia-Pacific, the bankruptcy court relied on section 105 of the Code. Pet. App. 114a.

Section 105 empowers bankruptcy courts to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions" of the Code. 11 U.S.C. § 105(a). Given this text, when courts act under section 105, they necessarily must be acting to implement some other provision of the Code, not simply "a general bankruptcy concept or objective." 2 *Collier on Bankruptcy* ¶ 105.01[1] (Richard Levin & Henry J. Sommer eds., 16th ed., rev. 2023). Recognizing this point, this Court has held that section 105 "confers authority to 'carry out' the provisions of the Code." *Law v. Siegel*, 571 U.S. 415, 421 (2014).

Below, however, the Fourth Circuit did not uphold the bankruptcy court's injunction under section 105 because it carried out some other specific provision of the Code. Rather, the court affirmed the injunction because it related to a general bankruptcy objective: Debtors may receive injunctive relief "under § 105(a)," the court held, if they can show a "realistic likelihood of successfully reorganizing." Pet. App. 25a. The court held that if debtors make that showing, they need not "show entitlement" to relief under any other Code provision. Pet. App. 25a. For that reason, the Court

declined to consider if injunctive relief was appropriate under section 105 to implement another Code provision. *See* Pet. App. 8a n.6, 25a-26a (referencing 11 U.S.C. § 362 & 524(g)).

In the Fourth Circuit's view, therefore, bankruptcy courts possess an unbounded, roving commission to grant equitable relief, so long as debtors can show some "likelihood of successfully reorganizing." Pet. App. 25a. This approach cannot be reconciled with the Code itself, which only allows equitable power to be used to "carry out [its] provisions." 11 U.S.C. § 105(a). Nor can it be reconciled with this Court's recognition that bankruptcy courts' equitable powers "must and can only be exercised within the confines of the Bankruptcy Code." *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 206 (1988).

Review of the decision below is needed to ensure that bankruptcy courts act within their circumscribed statutory authority. But at minimum, as petitioners have suggested, this Court should hold their petitions pending resolution of *Purdue Pharma*. If this Court holds that use of section 105 must always be linked to another section of Code, *see* Brief for Petitioner at 22, *Purdue Pharma*, No. 23-124 (U.S. Sept. 20, 2023); Brief of Respondent Ad Hoc Committee of Governmental & Other Contingent Litigation Claimants at 29, *Purdue Pharma*, No. 23-124 (U.S. Oct. 20, 2023), then the injunction issued below would necessarily be infirm. Vacatur and remand for further proceedings would then be needed in this case, so that the Fourth Circuit could reconsider whether injunctive relief has an independent statutory basis.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing REPLY IN SUPPORT OF REQUEST FOR CERTIFICATION OF DIRECT APPEAL TO THE COURT OF APPEALS OF ORDER DENYING MR. ROBERT SEMIAN AND MRHFM CLAIMANTS' MOTION TO DISMISS was filed in accordance with the local rules and served upon all parties registered for electronic service and entitled to receive notice thereof through the CM/ECF system.

Respectfully submitted this the 5th day of February 2024.

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