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

DEEPAK GUPTA
Counsel of Record
GREGORY A. BECK
GUPTA WESSLER LLP
2001 K Street, NW
Suite 850 North
Washington, DC 20006
(202) 888-1741
deepak@guptawessler.com

Counsel for Amici Curiae

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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

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[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,

DEEPAK GUPTA
Counsel of Record
GREGORY A. BECK
GUPTA WESSLER LLP
2001 K Street, NW
Suite 850 North
Washington, DC 20006
(202) 888-1741
deepak@guptawessler.com

CHRISTOPHER M. PLACITELLA
COHEN, PLACITELLA & ROTH, P.C.
127 Maple Avenue
Red Bank, NJ 07701
(732) 747-9003

JUSTIN H. SHRADER
SHRADER & ASSOCIATES LLP
Greenway Plaza, Suite 2300
Houston, TX 77046
(713) 782-0000

January 22, 2024

Counsel for Amici Curiae