No. 23-_____

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**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

In 2017, solvent conglomerate Georgia-Pacific attempted to sequester its asbestos liabilities in a new entity ("Bestwall") it designed for bankruptcy, while shielding most of its valuable assets in a new entity ("New GP") it kept outside of bankruptcy. The bankruptcy court enjoined thousands of asbestos lawsuits against Bestwall *and* against various other *non-debtors*, including New GP, under 11 U.S.C. § 105(a).

In affirming, the Fourth Circuit parted with the majority of circuits by declining to apply a presumption of collusion to Georgia-Pacific's jurisdiction-conferring transactions, disregarding both common law and 28 U.S.C. § 1359, which strip jurisdiction over civil actions in which a party "has been improperly or collusively made or joined." Also in conflict with other circuits, it found "related to" jurisdiction under 28 U.S.C. § 1334(b) to enjoin claims against non-debtors based on circular funding agreements with no economic effect on the estate. The questions presented are:

1. Whether jurisdiction-conferring transactions between related business entities are subject to a presumption of collusion in violation of 28 U.S.C. § 1359.

2. Whether a bankruptcy court has "related to" jurisdiction under 28 U.S.C. § 1334(b) to enjoin claims against a non-debtor with no actual economic effect on estate assets or their distribution to creditors.

3. Whether 11 U.S.C. § 105(a) permits bankruptcy courts to issue equitable relief not expressly authorized in the Bankruptcy Code or, at a minimum, whether the Court should hold this petition for *Harrington v. Purdue Pharma L.P.*, No. 23-124, and then grant, vacate, and remand if the Court reaches this question there.

## PARTIES TO THE PROCEEDINGS

Petitioner Official Committee of Asbestos Claimants was an appellant in the district court proceedings and an appellant in the court of appeals proceedings.

Respondent Sander L. Esserman, in his capacity as Future Claimants' Representative, was an appellant in the district court proceedings and an appellant in the court of appeals proceedings.

Respondent Bestwall LLC (debtor) was the plaintiff in the bankruptcy court proceedings, an appellee in the district court proceedings, and an appellee in the court of appeals proceedings.

Respondent Georgia-Pacific LLC was an appellee in the district court proceedings and an appellee in the court of appeals proceedings.[*]

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[*] The individuals listed on Appendix A to the Complaint are plaintiffs or potential plaintiffs in state court proceedings involving asbestos claims against the predecessor and affiliates of the debtor. Those individuals were not parties to the bankruptcy court proceedings, the district court proceedings, or the court of appeals proceedings, and thus are not parties to the proceedings before this Court. Appendix A to the Complaint can be found on Pacer for the United States Bankruptcy Court for the Western District of North Carolina, *In re Bestwall LLC*, No. 17-31795, Adv. Proceeding No. 17-03105, ECF No. 1 (Nov. 2, 2017).

## RELATED CASES

*In re Bestwall LLC*, No. 17-31795, Adv. Proceeding No. 17-03105 (Bankr. W.D.N.C.) (judgment entered July 29, 2019)

*In re Bestwall LLC*, No. 3:20-cv-103-RJC (W.D.N.C.) (judgment entered Jan. 6, 2022)

*In re Bestwall LLC*, No. 3:20-cv-105-RJC (W.D.N.C.) (judgment entered Jan. 6, 2022)

*In re Bestwall LLC*, Nos. 22-1127(L) & 22-1135 (4th Cir.) (judgment entered June 20, 2023)

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Petitioner Official Committee of Asbestos Claimants petitions for a writ of certiorari to review the Fourth Circuit's judgment in this case.

## OPINIONS BELOW

The Fourth Circuit's opinion (App. 1a-46a) is reported at 71 F.4th 168. The orders of the district court (App. 47a-67a, 68a-87a) are not reported but are available at 2022 WL 67469 and 2022 WL 68763. The memorandum opinion and order of the bankruptcy court (App. 88a-116a) is reported at 606 B.R. 243.

## JURISDICTION

The Fourth Circuit entered judgment on June 20, 2023, and denied petitions for rehearing en banc on August 7, 2023. App. 117a-118a. On October 24, 2023, Chief Justice Roberts extended the time for filing a petition for a writ of certiorari to and including December 20, 2023. App. 131a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Bankruptcy Code (11 U.S.C.), 28 U.S.C. § 1334, and 28 U.S.C. § 1359 are reproduced at App. 119a-130a.

## INTRODUCTION

Wealthy manufacturing behemoth Georgia-Pacific hatched this bankruptcy case to escape civil liability for poisoning people with asbestos. It did so by pioneering a controversial scheme, now commonly called the "Texas Two-Step," that began with a divisional merger in 2017. The first step was for Georgia-Pacific to separate into two new entities: Bestwall, which received the asbestos liabilities and minimal assets; and New GP, which received most of the profitable assets and business operations. The second step was for Bestwall to declare bankruptcy and promptly

obtain an injunction halting all asbestos lawsuits against not only itself, but also New GP and other affiliated companies it left outside bankruptcy. The bankruptcy court below blessed that maneuver. It gave Bestwall's *non-debtor* affiliates a core bankruptcy benefit – a reprieve from all civil litigation – without asking them to shoulder any corresponding bankruptcy burden.

This petition raises the important question whether bankruptcy courts exceed their authority in issuing such injunctions. In affirming the non-debtor injunction here, the Fourth Circuit adopted an expansive view of bankruptcy court jurisdiction that distorts the Bankruptcy Code's text and upends foundational principles of federal jurisdiction. Indeed, the Fourth Circuit's rule gives bankruptcy courts virtually boundless power to halt litigation against non-bankrupt companies. That expansive rule entrenches several circuit splits that warrant this Court's review.

First, the decision below deepened a recognized conflict over whether jurisdiction-creating transactions between related business entities are presumptively improper under 28 U.S.C. § 1359 – which bars collusively manufactured jurisdiction – and the common-law principles it embodies. Four circuits apply a rebuttable presumption that such transactions are collusive under § 1359. Two circuits, by contrast, reject that approach and instead assess whether a related-party transaction is collusive in light of its particular facts. The Fourth Circuit departed from both sides of the split by subjecting Georgia-Pacific's jurisdiction-conferring transactions to virtually no scrutiny at all. Had it followed the approach other circuits employ, the Fourth Circuit would have rejected Georgia-Pacific's scheme to manufacture jurisdiction.

Second, the decision below intensifies the long-standing circuit split this Court recognized in *Celotex Corp. v. Edwards*, 514 U.S. 300 (1995), over the scope of bankruptcy courts' "related to" jurisdiction under 28 U.S.C. § 1334(b). *Celotex* recognized limits on "related to" jurisdiction, holding that "bankruptcy courts have no jurisdiction over proceedings that have no effect on the estate of the debtor." *Id.* at 309 n.6. Three circuits apply that test by requiring an injunction to have an actual, concrete economic effect on the bankruptcy estate. The Fourth Circuit and two others, by contrast, allow jurisdiction based on purely contingent and hypothetical effects. That legal rule was vital to the outcome here. The decision below upheld jurisdiction based on circular funding agreements that affect neither Bestwall's estate nor any creditor. Three other circuits would hold such agreements insufficient to confer jurisdiction to issue a non-debtor injunction.

Third, the circuits are divided over how to construe 11 U.S.C. § 105(a). Five circuits hold that § 105(a) is a residual clause that merely empowers bankruptcy courts to implement the powers the Bankruptcy Code enumerates elsewhere. The Fourth Circuit and four others, by contrast, treat § 105(a) as a freestanding grant of authority empowering bankruptcy courts to take virtually *any* action the Code does not expressly prohibit. That conflict too was outcome-determinative, as the Fourth Circuit identified no other statutory basis for the sweeping inunction it affirmed. This Court should grant plenary review to resolve that conflict. At a minimum, it should hold the petition for *Harrington v. Purdue Pharma L.P.*, No. 23-124, which raises a similar question about § 105(a)'s breadth. If the Court addresses that question in *Purdue*, it should then grant, vacate, and remand to the Fourth Circuit.

All these issues are important and likely to recur. Other wealthy tortfeasors are increasingly targeting the Fourth Circuit for similar litigation-stopping injunctions, relying on that court's refusal to subject such injunctions to meaningful scrutiny. And the decision below provides a roadmap for solvent companies to continue abusing bankruptcy through the same jurisdiction-creating contrivance Georgia-Pacific invented here. Without this Court's review, the Fourth Circuit will become even more of a haven for "manipulation of the Bankruptcy Code" by "solvent business corporations" seeking "shelter from sweeping tort litigation without having to file for bankruptcy themselves." App. 27a-28a (King, J., dissenting in part).

## STATEMENT

**1.** Georgia-Pacific is a thriving business worth tens of billions of dollars. Founded nearly a century ago, it sells familiar paper goods, like Brawny, Angel Soft, and Dixie. C.A.App.588, 591. For decades, Georgia-Pacific also sold products containing asbestos, including products widely used in residential and commercial construction. App. 3a; App. 29a (King, J., dissenting in part). As a result, it has faced hundreds of thousands of asbestos-related lawsuits for more than 40 years. App. 29a (King, J., dissenting in part). Most of Georgia-Pacific's asbestos liability is to victims with mesothelioma, a fatal disease associated only with asbestos exposure. C.A.App.472-73.

Georgia-Pacific has continued to thrive despite the financial strains of litigation. It repeatedly represented to the bankruptcy court below that it has sufficient assets to satisfy the asbestos liabilities at issue. C.A.App.596; App. 3a-4a. Yet in 2017, Georgia-Pacific pioneered a scheme under Texas law – now commonly called the "Texas Two-Step" – to extinguish its

asbestos liabilities and shield its significant assets from asbestos claimants. App. 3a.

On July 31, 2017, Old GP – then, a Delaware corporation – "moved" itself to Texas solely to exploit the State's "divisional merger" statute. *See* Tex. Bus. Orgs. Code § 1.002(55)(A); C.A.App.517-18. Old GP then separated into two new entities, Bestwall and New GP. Old GP assigned virtually all its potential asbestos liabilities to Bestwall; Bestwall otherwise received minimal assets. New GP, by contrast, received all Old GP's other profitable assets and business operations. Bestwall then "moved" itself to North Carolina, where it filed for bankruptcy. C.A.App.589, 592-95. New GP resumed its predecessor's status as a Delaware corporation and continued its lucrative operations just as Old GP did. Both Bestwall and New GP existed as Texas business entities for less than five hours. C.A.App.592-94.

Bestwall, the newly created entity, is non-operational. After moving to North Carolina, it did not hire employees, enter new business ventures, or do much of anything else. Rather, on November 2, 2017 – about three months after its formation – Bestwall filed for Chapter 11 bankruptcy in the Western District of North Carolina. App. 31a (King, J., dissenting in part).

To avoid charges of fraud and bad faith, Georgia-Pacific engineered several agreements between New GP and Bestwall. A Funding Agreement between New GP and Bestwall provides the newly created debtor with funding for all asbestos liabilities[1] and all

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[1] This includes all funding for an asbestos trust under 11 U.S.C. § 524(g) in the amount required to confirm the plan of reorganization. Section 524(g) is "an extraordinary remedy for debtors overwhelmed by asbestos-related liabilities." *In re*

expenses incurred during bankruptcy. App. 5a. The Funding Agreement is not a loan, and Bestwall has no obligation to repay it. *Id.* An indemnification agreement also requires Bestwall to indemnify New GP for any loss relating to New GP's asbestos liabilities. App. 5a-6a. But that arrangement is "wholly circular"; the Funding Agreement also requires New GP to fund Bestwall's indemnification obligations to New GP. App. 39a (King, J., dissenting in part). In other words, to satisfy a claim for indemnity from New GP relating to asbestos claims, Bestwall pays New GP with New GP's own money. *Id.* Finally, because Bestwall has no employees of its own, New GP also provided personnel to run Bestwall under a Secondment Agreement. App. 40a (King, J., dissenting in part). The Secondment Agreement specifies that New GP cannot remove any of the seconded employees from Bestwall unless Bestwall assents. *Id.*

By remaining outside bankruptcy, New GP retained control of its assets without subjecting them to bankruptcy court oversight. Since Bestwall's bankruptcy began, New GP has gained more than $7.1 billion in equity value and paid about $5.4 billion in dividends to its private-equity owner. *See* Decl. of Julie A. Anderson at 3-4, *In re Bestwall LLC*, No. 17-31795, ECF No. 2857 (Bankr. W.D.N.C. Jan. 18, 2023); Second Stip. Regarding Postpetition Dividends Paid by Non-Debtor Georgia-Pacific LLC at 3-4, *id.*, ECF No. 2346, at 3-4 (Jan. 19, 2022).

**2.** When Bestwall filed for bankruptcy, the Bankruptcy Code's automatic-stay provisions paused all litigation against Bestwall itself. *See* 11 U.S.C. § 362(a).

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*Federal-Mogul Glob. Inc.*, 411 B.R. 148, 166 (Bankr. D. Del. 2008). It authorizes the discharge of asbestos claims against third parties in prescribed circumstances.

But on the day Bestwall filed for bankruptcy, it also initiated an adversary proceeding in the bankruptcy court seeking a preliminary injunction under 11 U.S.C. § 105(a) barring all current and future asbestos plaintiffs from litigating against non-debtor New GP and its affiliates. App. 89a. As Bestwall admitted, the restructuring's purpose was to insulate Georgia-Pacific's profitable business from asbestos claims "without subjecting the entire Old GP enterprise to chapter 11." C.A.App.591.

Georgia-Pacific achieved its goal. The bankruptcy court held that any asbestos lawsuits against non-debtor New GP and affiliates were sufficiently "related to" Bestwall's bankruptcy case to confer jurisdiction under 28 U.S.C. § 1334(b). App. 94a-98a. The court found that the claims against New GP might distract Bestwall's personnel, produce indemnification claims against Bestwall, and defeat Bestwall's "purpose" of creating a settlement trust under 11 U.S.C. § 524(g). *Id.* The court granted the injunction protecting non-debtors under § 105(a), a catch-all provision authorizing bankruptcy courts to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of" the Bankruptcy Code. By enjoining all asbestos litigation against non-debtor New GP and affiliates, the bankruptcy court shielded the entire Old GP enterprise from liability. App. 114a.

The district court affirmed, adopting the bankruptcy court's "related to" ruling. App. 57a-61a, 77a-82a. The district court was "not convinced" that the circular indemnity provision impermissibly manufactured jurisdiction, noting that "[i]ndemnity provisions are common provisions in contractual agreements for a multitude of valid reasons." App. 60a, 81a. For the injunction, the district court held that § 105(a)

"'empowers the bankruptcy court to enjoin parties other than the bankrupt from commencing or continuing litigation' and to stay related third-party litigation against non-debtors." App. 62a, 82a-83a (citation omitted).

A divided panel of the Fourth Circuit affirmed. App. 1a-46a. The majority held that the bankruptcy court had "related to" jurisdiction because litigation against New GP could affect Bestwall's bankruptcy by "reducing the amount of money that would be paid out of the bankruptcy estate and leaving more funds in the estate for other claimants." App. 14a-15a. The majority also ruled that Bestwall and New GP had not improperly manufactured bankruptcy jurisdiction, reasoning that, without the divisional merger, the asbestos claims would have remained with Old GP. The majority also thought it important that, if Old GP had filed for bankruptcy, the bankruptcy court would have had jurisdiction over those claims. App. 16a-23a. The majority thus affirmed the preliminary injunction under § 105(a). App. 24a-27a.

Judge King dissented in part. He explained that Georgia-Pacific had "improperly or collusively" "manufactured the jurisdiction of the bankruptcy court . . . in an unmistakable effort to gain leverage over future asbestos claims against New GP." App. 28a, 39a. Judge King further opined that the "creative use of the so-called 'Texas divisional merger' and the creation of unorthodox contractual relationships between Bestwall and New GP . . . ran afoul of the foundational principle that parties may not artificially construct a federal court's jurisdiction — especially that of a federal bankruptcy court, which possesses particularly limited jurisdiction." App. 28a-29a. Judge King emphasized that "the debtor in bankruptcy cannot

write its own jurisdictional ticket — and it logically follows that the debtor cannot make out such a ticket for a distinct, non-debtor entity either." App. 36a (internal quotation marks omitted). Under the correct legal standard, "Bestwall was obliged to demonstrate that" the corporate restructuring was "driven by an independent, legitimate business justification, and that those maneuvers were not 'pretextual.'" App. 38a. Instead, Bestwall "never offered any substantive explanation" for the transactions and "concede[d] that Old GP's restructuring was specifically intended to shield the corporation's assets without the need for a wholesale declaration of bankruptcy." App. 38a-39a.

Judge King also explained that the bankruptcy court lacked "related-to" jurisdiction over the claims against non-debtor New GP, App. 39a-45a, because "Bestwall's supposed indemnity obligations to New GP are in fact wholly circular, essentially a legal fiction," App. 39a. As such, "there is no indication that litigation against New GP would impair or otherwise 'affect' the valuation of the bankruptcy estate at all." *Id.* As to any overlap in claims, such effects "would arise *only* because Old GP ensured that they would." App. 41a.

Judge King also criticized the majority's broad view of § 105(a). He emphasized that "[s]ection 105(a) is not a magic wand that a debtor can wave" and that the majority's approach "expands the scope of the bankruptcy courts' authority beyond the legitimate bounds" that "other courts of appeals have recognized." App. 44a-45a.

Petitioner and the Future Claimants' Representative sought rehearing en banc, which the Fourth Circuit denied. App. 117a-118a. Eight judges voted to deny rehearing; five voted to grant. App. 118a.

## REASONS FOR GRANTING THE PETITION

### I. THE CIRCUITS ARE DIVIDED OVER WHETHER JURISDICTION-CREATING TRANSACTIONS BETWEEN RELATED CORPORATIONS ARE PRESUMPTIVELY COLLUSIVE

Section 1359 strips federal courts of jurisdiction over any "civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined." 28 U.S.C. § 1359. The First, Second, Eighth, and Ninth Circuits apply a rebuttable presumption that transfers between related business entities are collusive in violation of § 1359. The Seventh and Eleventh Circuits reject that presumption and instead assess a related-entity transaction on its facts. Many courts have acknowledged that conflict. *See*, *e.g.*, *Airlines Reporting Corp. v. S & N Travel, Inc.*, 58 F.3d 857, 862 n.5 (2d Cir. 1995) (recognizing "Seventh Circuit has declined to follow" Second Circuit approach, but "declin[ing]" to adopt minority approach); *Ambrosia Coal & Constr. Co. v. Pages Morales*, 482 F.3d 1309, 1314-15 (11th Cir. 2007) (recognizing "other Circuits have reasoned that a presumption of collusion is appropriate when certain closely-related entities assign claims amongst themselves," but declining to follow that precedent); *National Fitness Holdings, Inc. v. Grand View Corp. Ctr., LLC*, 749 F.3d 1202, 1208 & n.2 (10th Cir. 2014) (declining to "wad[e] into [the] circuit split" and collecting cases on each side).

The Fourth Circuit's holding both disavowed a presumption of collusion *and* declined to probe the facts of Georgia-Pacific's jurisdiction-conjuring transaction. That decision exacerbated the split and worsened the confusion over how courts should apply § 1359. This Court should grant review to resolve the deepening division on this important jurisdictional question.

### A. The First, Second, Eighth, And Ninth Circuits Apply A Presumption Of Collusion To Transactions Between Closely Related Business Entities That Create Federal Jurisdiction

Several circuits interpret § 1359 at odds with the decision below. Congress intended § 1359 to prevent the "manufacture of Federal jurisdiction" through sham transactions. *See Kramer v. Caribbean Mills, Inc.*, 394 U.S. 823, 828-29 (1969). It reflects the foundational jurisdictional principle that "no action of the parties can confer subject-matter jurisdiction upon a federal court." *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982); *see also Wisconsin Dep't of Corr. v. Schacht*, 524 U.S. 381, 389 (1998); *Kramer*, 394 U.S. at 828-29.

Consistent with § 1359 and the principles underpinning it, the First, Second, Eighth, and Ninth Circuits protect against jurisdictional manipulation by applying a "presumption of collusion" to jurisdiction-conferring transactions "between closely related business entities." *Branson Label, Inc. v. City of Branson*, 793 F.3d 910, 917, 919 (8th Cir. 2015); *see also Toste Farm Corp. v. Hadbury, Inc.*, 70 F.3d 640, 644 (1st Cir. 1995); *Prudential Oil Corp. v. Phillips Petroleum Co.*, 546 F.2d 469, 474-76 (2d Cir. 1976); *Yokeno v. Mafnas*, 973 F.2d 803, 809-10 (9th Cir. 1992).

The Second Circuit squarely addressed this issue in *Prudential Oil*, which considered a jurisdiction-conferring transaction between a parent and its wholly owned subsidiary. 546 F.2d at 472-73. Recognizing "the policy in favor of strict application of § 1359," the Second Circuit held that "assignments between related or affiliated corporations" are "presumptively improper" to create jurisdiction due to "the possibility

of collusion" and "the difficulty encountered in detecting [their] real purpose." *Id.* at 475-76. The party seeking federal jurisdiction "may rebut or meet the presumption by offering evidence that the transfer was made for a legitimate business purpose unconnected with the creation of [federal] jurisdiction." *Id.* at 476. In *Prudential Oil*, the presumption was decisive. The court found no "basis" to infer "a legitimate business reason, unconnected with acquisition of [federal] jurisdiction." *Id.*

Likewise, the First Circuit in *Toste Farm* considered a merger of an existing corporation into a newly formed shell company, holding that "[s]imply articulating a business reason" for the merger "is insufficient; the burden of proof is with the party asserting [jurisdiction] to establish that the reason [for the merger] is legitimate and not pretextual." 70 F.3d at 643-44. The First Circuit thus found that the merger was "a manufactured assignment" that violated § 1359, because the "significant reason" for the merger was "to invoke the jurisdiction of the federal court." *Id.* at 643, 645 (internal quotation marks omitted).

Similarly, the Eighth Circuit in *Branson* applied the "presumption of collusion" to a jurisdiction conferring merger "between closely related business entities." 793 F.3d at 917-19. The Eighth Circuit affirmed the district court's dismissal because the "corporate maneuvers were done to manufacture diversity in violation of 28 U.S.C. § 1359," and the asserted tax benefits of the merger were "merely pretextual to obtaining diversity jurisdiction." *Id.* at 914, 917 (citing *Prudential Oil* and *Toste Farm*).

Finally, the Ninth Circuit in *Yokeno* considered a transaction between a corporation and its director, holding that "[a]ssignments between parent companies

and subsidiaries, and assignments by corporations to their officers or directors are presumptively ineffective" to create federal jurisdiction. 973 F.2d at 809-10. The court explained that, "where a jurisdictional motive is apparent," the party seeking federal jurisdiction "must show more than simply a colorable or plausible business reason." *Id.* at 811. Rather, the reason "must be sufficiently compelling that the assignment would have been made absent the purpose of gaining a federal forum." *Id.*

### B. The Seventh And Eleventh Circuits Reject The Use Of A Presumption Of Collusion But Do Scrutinize Related-Party Transactions On Their Facts

The Seventh and Eleventh Circuits depart from the majority approach, "explicitly reject[ing] the use of a presumption when evaluating assignments between related entities." *Ambrosia*, 482 F.3d at 1314.

In *Ambrosia*, the Eleventh Circuit acknowledged that "other Circuits have reasoned that a presumption of collusion is appropriate when certain closely-related entities assign claims amongst themselves." *Id.* at 1314-15. It rejected the majority approach and declined to recognize a presumption of collusion, however, because "[t]he language of 28 U.S.C. § 1359 does not provide for applying a presumption of collusion." *Id.* at 1314. In fact, *Ambrosia* declined to interrogate the potentially collusive purpose of the transfers at all. *See id.* at 1315-16. The Eleventh Circuit instead focused "on the nature of the transfer, namely, whether the assignor . . . retained an interest in the assigned claim" and whether the transfers "were absolute transfers made in exchange for valuable consideration." *Id.* Answering both questions in the affirmative, the court was satisfied "that subject

matter jurisdiction . . . is proper[] and does not violate the anti-collusion statute." *Id*. at 1316.

Similarly, in *Herzog Contracting Corp. v. McGowen Corp.*, the Seventh Circuit held that "no inference of collusive invocation of jurisdiction can be drawn from the simple fact that assignor and assignee are under common ownership" because Congress has not "adopt[ed] a rule forbidding the conferral of [federal] jurisdiction by assignment to an affiliated corporation." 976 F.2d 1062, 1067 (7th Cir. 1992). The Seventh Circuit recognized that "the relation between the parties to the assignment" in question and "the timing of the assignment in relation to the parties' dispute and to this lawsuit[] emit an odor of collusion." *Id.* However, it did not assess the collusive purpose of the assignment beyond accepting "sworn evidence to the contrary submitted by [the assignor] and not countered by any evidence submitted by [the party opposing jurisdiction]." *Id.* And, like the Eleventh Circuit in *Ambrosia*, the Seventh Circuit in *Herzog* focused on the high-level characteristics of the assignment, such as the fact that the notes that served as consideration for the assignment "had some value." *Id*.

### C. The Decision Below Created Further Confusion By Staking Out Yet Another Approach To The Application Of § 1359

The decision below deepens the circuit conflict by departing from both sides. The Fourth Circuit did not follow the majority rule in applying a presumption of collusion to the jurisdiction-conferring transactions between the former Georgia-Pacific entities. Nor did it follow the minority approach in assessing whether the factual realities of the transactions made them improper or collusive. Had the Fourth Circuit

followed either approach, it would have been obliged to reject Bestwall's position.

In this case, Georgia-Pacific orchestrated a series of transactions to assign assets and asbestos liabilities to separate successor corporations solely to invoke bankruptcy jurisdiction to block tort suits against it. Contrary to the majority approach for analyzing such transactions under § 1359, the Fourth Circuit did not presume those transfers ineffective to create federal jurisdiction. Nor did it require Georgia-Pacific to offer evidence that the transactions had a legitimate, non-jurisdictional purpose. In fact, Bestwall "never offered any substantive explanation" for the transactions other than conjuring bankruptcy jurisdiction. App. 38a (King, J., dissenting in part). Bestwall "concede[d]" that Georgia-Pacific designed the restructuring to secure "'an injunction'" shielding Georgia-Pacific's assets "'without subjecting the entire Old GP enterprise to a chapter 11 reorganization.'" App. 37a-39a (King, J., dissenting in part) (quoting C.A.App.399, 603, 609). That admission would have defeated bankruptcy jurisdiction in every other circuit. Instead, the Fourth Circuit brushed aside Georgia-Pacific's concession that the "sole purpose of" the indemnification and funding agreements was "creating jurisdiction over the claims against New GP." App. 21a. And it declined even to consider the role of "those agreements" in "finding . . . jurisdiction." *Id.*

Georgia-Pacific's scheme was "presumptively improper" under the majority interpretation of § 1359. *Prudential Oil*, 546 F.2d at 476. In upholding jurisdiction without applying the presumption of impropriety, the Fourth Circuit deepened the conflict with the majority rule. Its reasoning also conflicted

with the minority of circuits that do not apply that presumption. Even absent a presumption, the Seventh and Eleventh Circuits at least review the factual record for some indicia that the transactions are not a sham – the Seventh Circuit by looking for some evidence of no collusive motive, and the Eleventh Circuit by considering characteristics that distinguish genuine from sham transactions. The Fourth Circuit did neither. *See* C.A.App.399, 603. This Court should grant certiorari to resolve the conflict and ensure that courts properly apply Congress's statute barring collusive jurisdiction-conferring schemes.

## II. THE DECISION BELOW ENTRENCHES THE DIVISION AMONG THE CIRCUIT COURTS ON THE SCOPE OF THE BANKRUPTCY COURT'S "RELATED TO" JURISDICTION

The decision below also intensifies a circuit split over the scope of "related to" bankruptcy jurisdiction. "The jurisdiction of the bankruptcy courts, like that of other federal courts, is grounded in, and limited by, statute." *Celotex Corp. v. Edwards*, 514 U.S. 300, 307 (1995). Section 1334(b) grants bankruptcy court's jurisdiction over civil proceedings "related to" cases under Title 11. 28 U.S.C. § 1334(b). As *Celotex* observed, the test for determining the existence of "related to" jurisdiction has fractured the courts of appeals for decades. *See* 514 U.S. at 308 n.6. The conflict since has deepened, and the decision below exacerbates it.

### A. After *Celotex*, The Circuits Are Divided Over "Related To" Jurisdiction

*Celotex* outlined certain limits on "related to" jurisdiction, holding that "bankruptcy courts have no jurisdiction over proceedings that have no effect on the estate of the debtor." 514 U.S. at 309 n.6; *see*

*id.* at 310 ("a direct and substantial adverse effect" sufficient for jurisdiction). Those limits track the Court's longstanding recognition that "a bankruptcy court's 'related to' jurisdiction cannot be limitless." *Id.* at 307-08; *see Travelers Indem. Co. v. Bailey*, 557 U.S. 137, 149 (2009) (interpreting "related to," as used in bankruptcy injunction, and noting "[t]here is, of course, a cutoff at some point, where the connection . . . would be thin to the point of absurd"); *California Div. of Lab. Standards Enf't v. Dillingham Constr., N.A., Inc.*, 519 U.S. 316, 335 (1997) (Scalia, J., concurring) ("[A]pplying the 'relate to' provision according to its terms was a project doomed to failure, since, as many a curbstone philosopher has observed, everything is related to everything else.").

But *Celotex* declined to resolve the split on the "test . . . used" to determine related to jurisdiction. 514 U.S. at 309 n.6. Before *Celotex*, the majority of the circuits agreed that "the test for determining whether a civil proceeding is related to bankruptcy is whether *the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy*." *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984).

When the Court decided *Celotex*, the circuits diverged on how to apply the "*Pacor*" test. *See*, *e.g.*, *In re Lemco Gypsum, Inc.*, 910 F.2d 784, 788 n.19 (11th Cir. 1990) ("The Fourth, Fifth, Eighth and Ninth Circuits have adopted the *Pacor* test without modification. The Second, Sixth, and Seventh Circuits have adopted a more restrictive form of the *Pacor* test.") (citations omitted). That division subsequently has deepened. Contrary to the Court's admonition in *Celotex*, now, the Second, Fourth, and Sixth Circuits consider contingent, hypothetical, and remote effects on the bankruptcy

estate sufficient to confer "related to" jurisdiction. In contrast, and recognizing the limitations on bankruptcy jurisdiction, the Third, Fifth, and Seventh Circuits require an actual economic effect on the assets of the estate or their distribution to creditors before finding "related to" jurisdiction. Here, the Fourth Circuit found jurisdiction to enjoin claims against non-debtors lacking any real effect on the bankruptcy estate. That decision deepened the already-pervasive confusion in this important area of federal law.

### B. The Third, Fifth, And Seventh Circuits Require Actual Economic Effect On The Bankruptcy Estate Or The Creditors

The Third, Fifth, and Seventh Circuits take a restrained view of "related to" jurisdiction. In those circuits, "simply because a dispute may have some type of nexus to a bankruptcy proceeding is not enough to give the court 'related to' jurisdiction over it." *In re Aearo Techs. LLC*, 642 B.R. 891, 909 (Bankr. S.D. Ind. 2022); *see also id.* (noting Seventh Circuit's "more constrained" approach, which "interpret[s] [the court's] jurisdiction narrowly"). Rather, "[a] case is 'related' to a bankruptcy when the dispute 'affects the amount of property for distribution [i.e., the debtor's estate] or the allocation of property among creditors.'" *In re Memorial Ests., Inc.*, 950 F.2d 1364, 1368 (7th Cir. 1991) (citation omitted; second alteration in *Memorial Estates*); *see In re Zale Corp.*, 62 F.3d 746, 753 (5th Cir. 1995) (no "related to" jurisdiction "when the asset in question is not property of the estate and the dispute has no effect on the estate") (footnote omitted). In these three circuits, moreover, mere "common issues of fact between a civil proceeding and a controversy involving the bankruptcy estate do[] not bring the matter" within the bankruptcy court's jurisdiction.

*Pacor*, 743 F.2d at 994; *see also Aearo*, 642 B.R. at 909 ("[Related-to] jurisdiction requires a direct effect upon either the assets of the estate or their distribution to creditors. Overlap between the bankrupt's affairs and another dispute is insufficient[.]") (internal quotation marks mitted); *Zale*, 62 F.3d at 753 ("Shared facts between the third-party action and a debtor-creditor conflict do not in and of themselves suffice to make the third-party action 'related to' the bankruptcy.").

In *Pacor*, which *Celotex* cited with approval, the Third Circuit found it lacked "related to" jurisdiction over litigation between two non-debtors: an asbestos victim and an asbestos distributor, "neither of which ha[d] filed in bankruptcy." 743 F.2d at 994. That litigation was "a mere precursor to the potential third party claim for indemnification" by the distributor defendant against the manufacturer, which had filed for bankruptcy. *Id.* at 995. Because the outcome of that litigation would have "no effect on the arrangement, standing, or priorities of [the debtor's] creditors," and "no effect on administration of the estate," jurisdiction was improper. *Id.* at 995-96.

In *In re Walker*, the Fifth Circuit considered whether a complaint against a third party to determine responsibility for damages to the estate was "related to" the bankruptcy proceeding. 51 F.3d 562 (5th Cir. 1995). The court held that the third-party claim "ha[d] no 'conceivable effect on the administration of the estate' nor would the outcome of that claim 'alter the debtor's rights, liabilities, options, or freedom of action,'" because "[i]t is difficult to imagine that whether [the third-party defendant] should be required to reimburse [the third-party plaintiff] for any money [the third-party plaintiff] pays to [the debtor] could somehow affect the estate." *Id.* at 569

(citation omitted). While the Fifth Circuit has at times used expansive language to describe the test for "related to" jurisdiction, *see*, *e.g.*, *In re Spillman Dev. Grp., Ltd.*, 710 F.3d 299, 305 (5th Cir. 2013), it still has required an actual economic effect on the estate before finding "related to" jurisdiction, *see*, *e.g.*, *Walker*, 51 F.3d at 569; *Zale*, 62 F.3d at 755-59 (no jurisdiction over tort claims between non-debtors where damages would not diminish the estate; jurisdiction over contract claims between non-debtors that would reduce the estate).

### C. The Second, Fourth, And Sixth Circuits Consider Contingent And Hypothetical Claims Sufficient To Confer "Related To" Jurisdiction

The Second, Fourth, and Sixth Circuits have adopted a broader view of the *Pacor* standard. In these circuits, proceedings raising only contingent claims for liability against the bankruptcy estate are sufficiently "related to" the bankruptcy case to confer subject-matter jurisdiction on the bankruptcy court. *See SPV Osus Ltd. v. UBS AG*, 882 F.3d 333, 341-42 (2d Cir. 2018) (collecting cases).

In *SPV*, for example, the Second Circuit addressed a state court action that "d[id] not directly involve the bankruptcy estates," but could result in third parties bringing putative contribution claims against the bankruptcy estate. *Id.* at 340. The court held that "[a] claim need not be certain to provide a federal court with jurisdiction: contingent outcomes can satisfy the 'conceivable effects' test." *Id.* (internal quotation marks omitted). It reasoned that even unsuccessful claims, or those raised in subsequent, untimely, and frivolous lawsuits, can "result in the estate incurring costs" and impact the bankruptcy estate. *Id.* at 341.

Similarly, the Sixth Circuit in *In re Wolverine Radio Co.* considered a contingent claim for indemnification. 930 F.2d 1132, 1142 (6th Cir. 1991). The Sixth Circuit recognized that, "[a]lthough several circuit courts have adopted the definition of 'related to' that is supplied by the Third Circuit in *Pacor*, the application of that definition has produced varying results." *Id.* Applying the broader standard, the *Wolverine* court concluded that it had "related to" jurisdiction, even though the debtor "would not be affected until and unless [the third party] invoked the indemnification" provision and the "dispute may ultimately have no effect on the debtor." *Id.* at 1143.

### D. The Split Is Outcome-Determinative, Particularly In Cases Like This One Involving Circular Funding Agreements

The circuit conflict over the "conceivable effect" standard produces different results, especially where, as here, circular funding agreements between affiliated parties bear on the jurisdictional inquiry. In the Third, Fifth, and Seventh Circuits, where courts take the narrower approach, such agreements foreclose "related to" jurisdiction because they negate any actual economic effects on the estate.

In *In re Combustion Engineering, Inc.*, the Third Circuit rejected the argument that mere corporate affiliation or contribution agreements can create related-to jurisdiction over non-debtors. 391 F.3d 190, 228 (3d Cir. 2004). The Third Circuit reasoned that, "[i]f that were true, a debtor could create subject matter jurisdiction over any non-debtor third-party by structuring a plan in such a way that it depended upon third-party contributions." *Id.*

Likewise, in a bankruptcy case that followed Seventh Circuit precedent, *Aearo*, the court found that

it lacked subject-matter jurisdiction to enjoin claims against Aearo's non-debtor parent, 3M, due to the existence of an uncapped funding agreement. *See* 642 B.R. at 910-11. "[F]ocus[ing] . . . on the *actual* economic effect continuation of the Pending Actions will have on the Aearo's estate and creditors," the court determined that the "circular" nature of the funding agreement eliminated "any financial impact to creditors" from proceedings against the non-debtor outside bankruptcy. *Id.* at 909-10. The *Aearo* court recognized that courts in the Fourth Circuit would find subject-matter jurisdiction notwithstanding such agreements because the "economic realities" were "not a limiting factor in [those] decisions." *Id. Aearo* declined to follow the Fourth Circuit approach. *Id.* at 910.

Here, by contrast, the Fourth Circuit found "related to" jurisdiction where the Third, Fifth, and Seventh Circuits would have found none. The Fourth Circuit held that the bankruptcy court had "related to" jurisdiction over claims against non-debtor New GP because litigation against New GP could "reduc[e] the amount of money that would be paid out of the bankruptcy estate and leav[e] more funds in the estate for other claimants." App. 14a. But, as the Third Circuit explained in *Combustion Engineering*, contribution agreements "alone do not provide a sufficient basis for exercising subject matter jurisdiction." 391 F.3d at 228. These circuits instead focus on the "economic realities" of the agreements. *See Aearo*, 642 B.R. at 909-10; *see also Pacor*, 743 F.2d at 995-96 (looking for actual "effect on . . . creditors" and "effect on administration of the estate"); *Zale*, 62 F.3d at 753 (same). Applying the Third, Fifth, and Seventh Circuit approach here would have produced the opposite

outcome, because "Bestwall's supposed indemnity obligations to New GP are in fact wholly circular, essentially a legal fiction." App. 39a (King, J., dissenting in part). If Bestwall has to pay anything to New GP, it can obtain the money to do so from New GP itself. *Id.*

## III. THE CIRCUIT COURTS ARE DIVIDED ON THE SCOPE OF THE BANKRUPTCY COURT'S RESIDUAL POWERS UNDER 11 U.S.C. § 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" the Bankruptcy Code. 11 U.S.C. § 105(a). The circuits disagree about that provision's scope. *See* 2 *Collier on Bankruptcy* ¶ 105.01[2] (16th ed. 2023) (describing "two general schools of thought regarding the breadth of section 105"). The Fourth, Sixth, Seventh, Eighth, and Tenth Circuits hold that § 105(a) grants bankruptcy courts broad equitable powers to issue any order, so long as no other specific provision of the Code prohibits it. *See, e.g.*, *In re A.H. Robins Co.*, 880 F.2d 694, 701 (4th Cir. 1989); *In re Mitan*, 573 F.3d 237, 246 (6th Cir. 2009); *In re Caesars Ent. Operating Co.*, 808 F.3d 1186, 1188 (7th Cir. 2015); *In re Archdiocese of Saint Paul & Minneapolis*, 888 F.3d 944, 952 (8th Cir. 2018); *In re Scrivner*, 535 F.3d 1258, 1263 (10th Cir. 2008). By contrast, the First, Second, Third, Fifth, and Ninth Circuits reject this expansive conception of the Code's residual authority, holding that § 105(a) merely empowers bankruptcy courts to issue orders implementing powers the Code elsewhere enumerates. *See, e.g.*, *Bessette v. Avco Fin. Servs., Inc.*, 230 F.3d 439, 444 (1st Cir. 2000); *In re Dairy Mart Convenience Stores, Inc.*, 351 F.3d 86, 92 (2d Cir.

2003); *In re Joubert*, 411 F.3d 452, 455 (3d Cir. 2005); *In re Smith*, 21 F.3d 660, 666 (5th Cir. 1994); *In re Saxman*, 325 F.3d 1168, 1174-75 (9th Cir. 2003).

The Fourth Circuit's decision conflicts with the rule that governs in the First, Second, Third, Fifth, and Ninth Circuits. Here, the Fourth Circuit affirmed a sweeping injunction of claims against non-debtors based solely on § 105(a), without considering whether any other specific provision of the Code authorizes such relief. That conflict warrants this Court's review.

### A. The First, Second, Third, Fifth, And Ninth Circuits Apply A More Restrained Conception Of § 105(a)'s Equitable Powers That Matches The Code's Text And Purpose

The First, Second, Third, Fifth, and Ninth Circuits interpret § 105(a) at odds with the decision below. Consistent with the Bankruptcy Code's text and purpose, those courts of appeals hold that § 105(a) empowers bankruptcy courts only to issue orders implementing powers enumerated elsewhere in the Code.

Section 105(a)'s text permits courts to act "to carry out *the provisions* of this title." 11 U.S.C. § 105(a) (emphasis added). As the Second Circuit has explained, "[t]his language 'suggests that an exercise of section 105 power be tied to another Bankruptcy Code section and not merely to a general bankruptcy concept or objective.'" *Dairy Mart*, 351 F.3d at 92 (quoting 2 *Collier on Bankruptcy* ¶ 105.01[1] (15th ed. 2003)). Additionally, using § 105(a) to create new powers nowhere enumerated in the Code undermines the predictability and consistency of bankruptcy law. *See*, *e.g.*, *Moushigian v. Marderosian*, 764 F.3d 123, 128 (1st Cir. 2014) (interpreting § 105(a) as a "roving commission to do equity" would render other provisions

of the Code "unduly unpredictable"). It also usurps Congress's role. Bankruptcy law is an "area of national concern" determined "not by the federal judiciary, purposefully insulated from democratic pressures, but by the people through their elected representatives in Congress." *City of Milwaukee v. Illinois*, 451 U.S. 304, 312-13 (1981).

The decision below illustrates the problems with the broad approach. Here, the bankruptcy court preliminarily enjoined all asbestos litigation against Bestwall's non-debtor affiliates solely under § 105(a). App. 114a. The district court affirmed, similarly concluding that § 105(a) "'empowers the bankruptcy court to enjoin parties other than the bankrupt from commencing or continuing litigation' and to stay related third-party litigation against non-debtors." App. 62a, 82a-83a (citation omitted). The Fourth Circuit likewise affirmed the district court based on § 105(a) and declined to address whether other Code provisions authorized the injunction, noting that "[t]he bankruptcy court and the district court did not address" the issue. App. 8a n.6, 25a. The dissent thus criticized the majority for treating § 105(a) as "a magic wand" that "expand[ed] the scope of the bankruptcy courts' authority beyond the legitimate bounds" that "other courts of appeals have recognized." App. 44a-45a.

Section 105(a) is not the Code provision most relevant to the injunction Bestwall sought. Congress created a detailed set of rules for when a pending bankruptcy freezes litigation against a debtor or non-debtor – the automatic stay provisions in 11 U.S.C. § 362(a). Section 362(a)(1) provides that a petition filed under § 301, § 302, or § 303 of the Code operates as a stay of "a judicial, administrative, or other action

or proceeding *against the debtor*" or "to recover a claim *against the debtor*." 11 U.S.C. § 362(a)(1) (emphases added). "The clear language of Section 362(a)(1) thus extends the automatic stay provision only to the debtor filing bankruptcy proceedings and not to non-bankrupt co-defendants." *Pitts v. Unarco Indus., Inc.*, 698 F.2d 313, 314 (7th Cir. 1983) (per curiam).[2]

It is well-established that "[g]eneral language of a statutory provision, although broad enough to include it, will not be held to apply to a matter specifically dealt with in another part of the same enactment." *D. Ginsberg & Sons, Inc. v. Popkin*, 285 U.S. 204, 208 (1932). "That is particularly true where, as [here], Congress has enacted a comprehensive scheme and has deliberately targeted specific problems with specific solutions." *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012) (internal quotation marks omitted). By instead assessing Bestwall's request for a non-debtor injunction under the more permissive § 105(a) test, the courts below made an end-run around the text of the Code and flouted Congress's purpose in enacting it.

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[2] Other provisions of § 362(a) conceivably could apply to non-debtors, but only in specific circumstances inapplicable here. *See*, *e.g.*, 11 U.S.C. § 362(a)(3) (staying "any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate"); *see also Aearo*, 642 B.R. at 905 ("Whereas § 362(a)(1) extends only to a debtor, § 362(a)(3) extends to property of the estate."); *National Tax Credit Partners, L.P. v. Havlik*, 20 F.3d 705, 708 (7th Cir. 1994) ("Section 362(a)(3) . . . encompass[es] every effort to 'exercise control over property of the estate'."). Congress thus has delineated when such stays are appropriate, making it even less appropriate to infer the power to issue broader stays under § 105(a)'s residual authority.

### B. At A Minimum, The Court Should Hold This Petition For *Harrington v. Purdue*

If the Court does not grant plenary review of the § 105(a) question, it should at least hold this petition for *Harrington v. Purdue Pharma L.P.*, No. 23-124 (argued Dec. 4, 2023). Like this case, *Purdue* presents a question of a bankruptcy court's power under § 105(a). Depending on the Court's ruling in *Purdue*, it should GVR here so that the Fourth Circuit can reconsider its holding.

In *Purdue*, the Second Circuit held that § 105(a) authorized a release of claims against non-debtors only when paired with another provision of the Bankruptcy Code. *In re Purdue Pharma L.P.*, 69 F.4th 45, 72-73 (2d Cir. 2023). The Second Circuit looked to § 1123(b)(6) for such authority. That section provides that "a plan may . . . include any other appropriate provision not inconsistent with the applicable provisions of [the Bankruptcy Code]." 11 U.S.C. § 1123(b)(6). The government in *Purdue* argues that "'§ 105(a) alone cannot justify the imposition of third-party releases' unless 'at least one other provision of the Bankruptcy Code . . . provide[s] the requisite statutory authority,'" and that the other provision the Second Circuit identified does not apply to the resolution of claims between non-debtors. Br. for Pet'r Trustee 22-23, No. 23-124 (U.S. Sept. 20, 2023) (quoting *Purdue*, 69 F.4th at 73) (alterations in Trustee Br.).

That question is decisive here. The decision below – and the preliminary injunction it affirms – rests on the premise that § 105(a) alone grants bankruptcy courts authority to enjoin claims against non-debtors. Indeed, the Fourth Circuit identified no other statutory authority for the non-debtor injunction it upheld. If the Court adopts the government's view in *Purdue*,

the Fourth Circuit would have to identify some such authority – something it likely cannot do. *Cf.* 11 U.S.C. § 362(a)(1) (automatically staying litigation "against the debtor").

Because this case "involve[s] the same issue as a case on which certiorari has been granted and plenary review is being conducted," at a minimum the Court should hold this petition pending its decision in *Purdue*. *Lawrence ex rel. Lawrence v. Chater*, 516 U.S. 163, 181 (1996) (Scalia, J., dissenting). If this Court holds in *Purdue* that § 105(a) alone does not permit bankruptcy courts to alter claims between non-debtors absent express statutory authority elsewhere in the Code, it would be an "intervening development[]" warranting a GVR order for reconsideration in light of *Purdue*. *See Elmbrook Sch. Dist. v. Doe*, 573 U.S. 922, 926 (2014) (Scalia, J., dissenting from the denial of certiorari) (under the "prevailing standard," a GVR order is appropriate where "intervening developments reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration") (cleaned up).

## IV. THE FOURTH CIRCUIT'S DECISION POSES ISSUES OF FUNDAMENTAL IMPORTANCE THAT MERIT THE COURT'S REVIEW

### A. The Fourth Circuit's Decision Undermines The Tort System Without Justification

It is our "deep-rooted historic tradition that everyone should have his own day in court." *Martin v. Wilks*, 490 U.S. 755, 762 (1989). Hundreds of thousands of asbestos victims have sought their day in court against Georgia-Pacific. But the Fourth Circuit's decision halts those cases for years and strips the rights of thousands of individuals to participate in and witness adjudication in court.

Mass-tort resolution "from which no one has the right to secede" can be "justified" only because of "its necessity." *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 838-39 (1999); *see also Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809, 812 (1985) (recognizing claimants have a due process right to "opt out" and pursue their "day in court," should they choose). Under normal circumstances, insolvency of the debtor justifies this tradeoff in bankruptcy. *See Ortiz*, 527 U.S. at 838 ("inadequacy of the [assets] to pay all the claims" requires "limit[ing] . . . an early feast to avoid a later famine"). These trade-offs are possible only because the Bankruptcy Code contemplates "meticulous—not to say mind-numbingly detailed—" requirements for debtors to ensure fair administration of their assets. *Law v. Siegel*, 571 U.S. 415, 424 (2014).

That justification disappears where a court enjoins claims against a non-debtor with no current or foreseeable inability to timely pay its debts, and whose assets are not subject to the control and supervision of the bankruptcy court. For wealthy non-debtor tortfeasors like Georgia-Pacific, the bankruptcy forum serves only to thwart the resolution of claims through civil litigation or settlement.

Here, Bestwall has no incentive to resolve the bankruptcy because it has no business operations to liberate from court supervision, and New GP has no bankruptcy burdens to escape. Meanwhile, the sweeping injunction – which already has lasted for six years – indefinitely shields New GP's sizeable assets from asbestos claimants. If those tort claims had not languished in bankruptcy, many of them would have been resolved. The delay is devastating the critically ill and dying victims and their families, left waiting for compensation for the injuries Georgia-Pacific caused.

### B. The Fourth Circuit's Decision Encourages Forum Shopping

The Fourth Circuit has become a haven for solvent corporations looking to escape mass-tort liability by manipulating the Bankruptcy Code. Georgia-Pacific pioneered the Texas Two-Step maneuver in 2017. Since then, a growing number of wealthy tortfeasors, including Johnson & Johnson, CertainTeed, and Trane Technologies, have used Texas's divisional-merger statute to isolate asbestos liabilities in bankruptcy without having to subject the entire corporate entity to Chapter 11 proceedings. These corporations all follow the same playbook: reincorporate in Texas, divide the corporation in two, offload tort liabilities into a new shell company, place the shell company into bankruptcy, and then go to the Fourth Circuit to obtain a sweeping injunction shielding the entire corporate enterprise from litigation. That stratagem blocks thousands of critically ill and dying personal-injury claimants from ever reaching the courthouse.

In each case, the broad preliminary injunction upheld by the Fourth Circuit – a freeze on all litigation against the debtor's non-bankrupt affiliates while the bankruptcy is pending – has been the key to the wealthy tortfeasor's scheme. *See*, *e.*g., App. 8a-9a (summarizing bankruptcy court finding that "the purpose of the bankruptcy would be defeated without the injunction because Bestwall would be unable to address all the claims against it in one forum"). These injunctions severely alter the bargaining power in mass-tort litigation. They erase victims' settlement leverage by alleviating the burdens of litigation on tortfeasors. And they coerce claimants into resolving their claims simply to avoid an indefinite standstill.

It is no coincidence that the first five Texas Two-Step bankruptcies in U.S. history all commenced in North Carolina, despite the companies lacking legitimate ties to it. *See also In re DBMP LLC*, No. 20-30080 (Bankr. W.D.N.C.); *In re Aldrich Pump LLC*, No. 20-30608 (Bankr. W.D.N.C.); *In re Murray Boiler LLC*, No. 20-30609 (Bankr. W.D.N.C.); *In re LTL Mgmt. LLC*, No. 21-30589 (Bankr. W.D.N.C.). Fourth Circuit courts regularly overlook collusive jurisdiction-conferring schemes and are willing to extend bankruptcy jurisdiction far beyond what this Court and other circuits have permitted. North Carolina is also one of only two States where the U.S. Trustee watchdog has no jurisdiction to ensure courts faithfully apply the Bankruptcy Code. *See Siegel v. Fitzgerald*, 596 U.S. 464, 468-69 (2022) (explaining history of North Carolina's exemption from Trustee Program).

Sweeping injunctions like this one do not survive outside the Fourth Circuit. *See*, *e.g.*, *Aearo*, 642 B.R. at 909-11 (declining to follow Fourth Circuit's standard for "related to" jurisdiction and finding that it lacked jurisdiction to enjoin claims against a non-debtor). That conflict raises forum-shopping concerns because bankruptcy laws are "intended to have uniform application throughout the United States." *McKenzie v. Irving Trust Co.*, 323 U.S. 365, 369-70 (1945). Only this Court's review can restore uniformity and prevent the Fourth Circuit from continuing to license abusive Two-Step machinations.

## CONCLUSION

The Court should grant the petition for a writ of certiorari. Alternatively, it should hold this petition for *Purdue*, and then grant, vacate, and remand for reconsideration by the Fourth Circuit.

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