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

REPLY BRIEF FOR PETITIONER

NATALIE D. RAMSEY
THOMAS J. DONLON
DAVIS LEE WRIGHT
ROBINSON & COLE LLP
1201 North Market Street
Suite 1406
Wilmington, Delaware 19801
(302) 516-1700

DAVID C. FREDERICK
Counsel of Record
JOSHUA D. BRANSON
KATHERINE C. COOPER
ANA NIKOLIC PAUL
ALEX P. TREIGER
KELLOGG, HANSEN, TODD, FIGEL & FREDERICK, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900
(dfrederick@kellogghansen.com)

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INTRODUCTION

The Bankruptcy Code does not permit a wealthy tortfeasor to stop all tort litigation against it while shielding its own assets from bankruptcy. The decision below held otherwise, blessing Georgia-Pacific's "Texas Two-Step" maneuver and inviting future tortfeasors to continue coming to the Fourth Circuit for similar injunctions. As explained by the Committee and its amici – bipartisan groups of U.S. Senators and State Attorneys General – that ruling raises questions of profound importance to the future of bankruptcy and to mass-tort litigation nationwide. And in allowing Georgia-Pacific to manipulate its way into bankruptcy court and thus halt all asbestos litigation against it, the Fourth Circuit entrenched several circuit splits that warrant review.

Respondents' effort to downplay those splits is unpersuasive. Their claim that 28 U.S.C. § 1359 applies only in diversity cases conflicts with the Fourth Circuit's own ruling, disregards the statute's text, and ignores years of bankruptcy court practice. Respondents' denial of the conflict over the "effects" needed to confer "related to" jurisdiction fares no better. The lower courts' confusion about that issue has only deepened in the 30 years since *Celotex Corp. v. Edwards*, 514 U.S. 300 (1995), which documented the prevailing disarray over "related to" jurisdiction. And respondents' contention that the circuits agree on 11 U.S.C. § 105(a) – a question also before the Court in *Harrington v. Purdue Pharma L.P.*, No. 23-124 – ignores widespread recognition of the split.

The Fourth Circuit's position on all these questions was outcome-determinative. Any other circuit would have held that Georgia-Pacific's Texas Two-Step scheme – which respondents *admittedly* designed to

create bankruptcy jurisdiction – violated § 1359. Other circuits also would have rejected jurisdiction because claims against New GP have no actual effect on the estate: the circular funding agreements here preclude any such effect, as a court in the Seventh Circuit ruled on materially identical facts. And the Fourth Circuit relied on § 105(a) alone as the statutory basis for the sweeping injunction it affirmed. In other circuits, § 105(a) cannot reach so far.

The important questions raised in the petition do not turn on whether Bestwall itself belongs in bankruptcy (though it does not). The Committee instead seeks review of a threshold legal question on which every Texas Two-Step case depends: whether, after a divisional merger, the *non-bankrupt* company can obtain an injunction based on its new affiliate's bankruptcy case. Whatever the legitimacy of divisional mergers more broadly, the Court should grant review of that question and reverse: non-bankrupt entities should not be permitted to gain enormous litigation advantages through maneuvers like Georgia-Pacific's (even if the bankruptcy later proves invalid). Alternatively, the Court should hold this petition for *Purdue* and then grant, vacate, and remand so the Fourth Circuit can reconsider its expansive view of § 105(a).

ARGUMENT

I. THE DECISION BELOW EXACERBATES THE SPLIT OVER WHETHER JURISDICTION-CREATING TRANSACTIONS BETWEEN RELATED CORPORATIONS ARE PRESUMPTIVELY COLLUSIVE

The circuits are divided over whether jurisdiction-conferring transactions between related business entities are presumptively collusive under 28 U.S.C. § 1359. Four circuits apply such a presumption. *See*

Pet. 11-13. Two circuits instead probe the transaction for indicia of collusion. *See* Pet. 13-14. The Fourth Circuit departed from both sides, subjecting respondents' jurisdiction-conferring transaction to virtually no scrutiny at all.

Respondents downplay (at 16-18) the conflict by asserting that § 1359 does not apply outside of diversity cases. But even the Fourth Circuit rejected that assertion, observing that "neither the statute itself nor case law interpreting it suggests such a limitation." App. 17a n.15. Section 1359 bars jurisdiction over "*a civil action* in which any party, by assignment or otherwise, has been improperly or collusively made or joined." 28 U.S.C. § 1359 (emphasis added). The text does not mention diversity jurisdiction. Many courts have therefore applied § 1359 in bankruptcy proceedings. *See* States' Amicus Br. 13 n.5 (collecting cases); *In re Coliseum Cartage Co.*, No. C-B-86-0688 (Bankr. W.D.N.C. Apr. 1, 1988); *cf. In re CBI Holding Co.*, 529 F.3d 432, 465 (2d Cir. 2008) (finding no collusion). And those courts fall on both sides of the circuit split. *Compare In re Keener*, 2015 WL 5118691, at *4-5 (Bankr. N.D. Iowa Aug. 28, 2015) (affirming dismissal after applying "heightened scrutiny" to transaction), w*ith Balzotti v. RAD Invs.*, 273 B.R. 327, 331 (D.N.H. 2002) (vacating dismissal because bankruptcy court did not "carefully examine" assignment).

Respondents also assert that "§ 1359 does not matter" because the claims against New GP "were 'identical and co-extensive in every respect' to the claims Bestwall is seeking to resolve in bankruptcy." Opp. 14-15 (quoting App. 98a). But the claims are "identical" only because the collusive transaction *made them identical*. Without the divisional merger, asbestos plaintiffs would have no claims against

Bestwall, which received Old GP's liabilities only because Georgia-Pacific transferred them. And without the "wholly circular" funding agreements making Bestwall and New GP appear "inextricably intertwined," claims against New GP would not affect Bestwall at all. App. 36a-37a, 39a (King, J., dissenting in part). Simply put, the jurisdiction-conferring effects respondents now cite (at 27) – such as indemnification, issue preclusion, and evidentiary overlap – all flow from the very collusive transaction the Fourth Circuit blessed. *See* States' Amicus Br. 11-12. Indeed, Georgia-Pacific admits it designed the transaction to create those very effects. C.A.App.399 (¶ 15). In any other circuit, § 1359 would bar jurisdiction.

Respondents maintain (at 15) that Georgia-Pacific did not manufacture jurisdiction because Old GP "could have filed for bankruptcy" itself. But the question presented is whether the bankruptcy court had jurisdiction to enjoin claims *against New GP*, a non-debtor that kept virtually all its assets outside of bankruptcy. "Hypothetical claims against Old GP" have "no bearing on" that question. App. 43a (King, J., dissenting in part). After all, had Old GP filed for bankruptcy, the bankruptcy court would have gained jurisdiction over all its assets. *See* 11 U.S.C. § 363(b). The whole point of the Texas Two-Step was for Georgia-Pacific to keep those assets out of the bankruptcy court's reach. In any event, respondents' hypothetical ignores that Old GP could not have filed for bankruptcy itself given its "bountiful assets," which were "fully 'sufficient to satisfy' [its] asbestos liabilities." App. 30a (King, J., dissenting in part); *see*, *e.g.*, *In re LTL Mgmt., LLC*, 64 F.4th 84 (3d Cir. 2023).

The Fourth Circuit did not, as respondents claim (at 18-19), apply any presumption of collusion. The

circuits that apply the presumption require a business justification "sufficiently compelling that the assignment would have been made absent the purpose of gaining a federal forum." *Yokeno v. Mafnas*, 973 F.2d 803, 811 (9th Cir. 1992). The Fourth Circuit did not even purport to apply that test, instead crediting Bestwall's averment that Georgia-Pacific's restructuring was "driven" by its "desire" to free "its non-asbestos-related business . . . from asbestos-related litigation." App. 21a. That justification relies on Bestwall "gaining a federal forum" in bankruptcy to freeze litigation against New GP. *Yokeno*, 973 F.2d at 811. The Fourth Circuit's justification is just another way of saying that Georgia-Pacific thought it would benefit from bankruptcy jurisdiction. That would not overcome the presumption in the circuits that apply it.

II. THE DECISION BELOW ENTRENCHES THE SPLIT OVER BANKRUPTCY COURTS' "RELATED TO" JURISDICTION

As this Court observed in *Celotex Corp. v. Edwards*, "related to" jurisdiction under 28 U.S.C. § 1334(b) has fractured the circuits for decades. *See* 514 U.S. 300, 308 n.6 (1995). Before *Celotex*, most circuits applied *Pacor*'s "'conceivabl[e] . . . effect'" test but diverged on how to apply it. *Id.* (quoting *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984)) (emphasis omitted). Nearly 30 years later, the circuits remain divided. *See* Pet. 18-21. The decision below exacerbated the conflict. Contrary to three circuits that condition "related to" jurisdiction on an actual economic effect on the estate, the Fourth Circuit found jurisdiction to enjoin claims against non-debtors without any such effect.

Respondents deny (at 21-23) that the Third, Fifth, and Seventh Circuits require an actual economic

effect on the estate or their distribution to creditors before finding "related to" jurisdiction. That argument conflicts with what those courts have said and done.

In *Pacor*, the Third Circuit held that the bankruptcy court lacked "related to" jurisdiction over asbestos litigation against non-debtors because any effect on the estate was conjectural: the litigation was "[a]t best" a "mere precursor" to a "potential third party claim for indemnification." 743 F.2d at 995. More recently, in a case involving circular funding agreements, the Third Circuit explained that contribution agreements "alone do not provide a sufficient basis for exercising subject matter jurisdiction," which instead hinges on the agreements' economic realities. *In re Combustion Eng'g, Inc.*, 391 F.3d 190, 228 (3d Cir. 2004). This approach would have precluded jurisdiction here, because "Bestwall's supposed indemnity obligations to New GP are in fact wholly circular." App. 39a (King, J., dissenting in part).

The Fifth Circuit, too, finds no bankruptcy jurisdiction over tort claims against non-debtors when "the claims are not property of the estate and they have no effect on the estate." *In re Zale Corp.*, 62 F.3d 746, 755 (5th Cir. 1995). Respondents ignore *Zale*.

The Seventh Circuit also recognizes that the "circuits are split" over how to apply § 1334(b) and that it "interpret[s] 'related to' jurisdiction narrowly." *In re FedPak Sys., Inc.*, 80 F.3d 207, 213-14 (7th Cir. 1996). Respondents' contention (at 22-23) that the Seventh Circuit repudiated that approach misreads *Bush v. United States*, 939 F.3d 839 (7th Cir. 2019). The court there held that bankruptcy courts must assess jurisdiction "at the outset of the dispute"; it "d[id] not imply an overruling or even a modification of circuit precedent." *Id.* at 846. Contrary to respondents'

assertion (at 22), *Aearo* properly applied *Bush* and followed the Seventh Circuit's "constrained approach" to "related to" jurisdiction, finding no bankruptcy jurisdiction on facts materially identical to those here. *In re Aearo Techs. LLC*, 642 B.R. 891, 909 (Bankr. S.D. Ind. 2022).

Respondents' focus (at 24-26) on the "identity of claims" against Bestwall and New GP is similarly misplaced. Here, the "wholly circular" funding agreement ensures that judgments against New GP can have no effect, hypothetical or otherwise, on Bestwall's estate. App. 39a (King, J., dissenting in part); *see* Senators' Amicus Br. 8-10. Nor can claims against New GP distract the New GP officers seconded to Bestwall, because New GP cannot recall them without Bestwall's consent. App. 40a (King, J., dissenting in part) (citing C.A.App.696). The possibility that claims against New GP could result in "issue preclusion, inconsistent liability, and evidentiary issues," App. 14a, are just the kind of "speculative and hypothetical" effects that cannot support "related to" jurisdiction in other circuits. *FedPak Sys.*, 80 F.3d at 214.

Respondents further argue (at 28-31) that the bankruptcy court could have exercised jurisdiction under § 1334(b)'s "arising in" or "arising under" prongs. But the Fourth Circuit declined to reach those grounds. App. 16a n.14. Respondents' alternative arguments are better addressed on remand and offer no reason to deny certiorari.

III. THE DECISION BELOW IMPLICATES A SPLIT OVER BANKRUPTCY COURTS' RESIDUAL POWERS UNDER § 105(a), A QUESTION ALSO PRESENTED IN *PURDUE*

The circuits are divided 5-5 over whether 11 U.S.C. § 105(a) authorizes bankruptcy courts to issue any

order not barred by another Code provision or instead only orders to implement powers the Code elsewhere enumerates. *See* Pet. 23-25. That split was outcome-determinative here because the Fourth Circuit disclaimed any other statutory basis for the injunction it upheld. App. 8a n.6, 25a. In five circuits, Bestwall could not have used § 105(a) to obtain an injunction unless the Code elsewhere authorized it.

Respondents' contention (at 33) that the circuits uniformly apply § 105(a) is incorrect. Courts' "substantial disagreement" over § 105(a) is widely recognized. Joshua M. Silverstein, *Hiding in Plain View: A Neglected Supreme Court Decision Resolves the Debate Over Non-Debtor Releases in Chapter 11 Reorganizations*, 23 Emory Bankr. Dev. J. 13, 15-16 (2006). And "the controversy is particularly acute" when it comes to extending bankruptcy relief to non-debtors. *Id.* at 16.

Respondents also argue (at 33-34) that the injunction here "advances" 11 U.S.C. § 362(a) and § 524(g). But the Fourth Circuit disclaimed reliance on both provisions. App. 8a n.6 (§ 362), 25a (§ 524(g)); *see also Aearo*, 642 B.R. at 903-07 (rejecting § 362(a) as a basis to uphold materially identical non-debtor injunction). Moreover, § 524(g) does not authorize bankruptcy courts to enjoin claims against non-debtors until a plan is confirmed, *see Combustion Eng'g*, 391 F.3d at 234, and the Fourth Circuit did not hold otherwise.

Nor did the Committee forfeit its § 105(a) argument. *Cf.* Opp. 32. The Committee argued below that "a party cannot rely upon § 105(a) itself as the source of jurisdiction." Appellants' C.A. Br. 48. That was more than enough to preserve the Committee's position on this issue, given the Fourth Circuit's longstanding precedent adopting an expansive view of § 105(a). *See*

A.H. Robins Co. v. Piccinin, 788 F.2d 994, 1002-03 (4th Cir. 1986) (holding § 105(a) extends bankruptcy court jurisdiction to non-debtors); *see also United States v. Williams*, 504 U.S. 36, 44 (1992) (rejecting argument that a petitioner must "demand overruling of a squarely applicable" circuit precedent). Moreover, the Fourth Circuit "passed on" the issue by affirming the injunction based solely on § 105(a). App. 8a n.6, 25a; *see Williams*, 504 U.S. at 41 (pressed-or-passed-on rule "operates . . . in the disjunctive"). Accordingly, the § 105(a) question is properly presented.

The Court should at least hold the petition pending *Harrington v. Purdue*, No. 23-124, which raises a similar question about the scope of § 105(a). *See* Pet. 27-28. If the Court holds that § 105(a) alone does not permit bankruptcy courts to extinguish claims against non-debtors in the context of third-party releases, it should grant, vacate, and remand for the Fourth Circuit to reconsider § 105(a)'s operation here.

Respondents' attempts (at 34-35) to distinguish *Purdue* fail. True, *Purdue* involves an order releasing claims against a non-debtor in a confirmed plan, not an order freezing those claims at the outset of a bankruptcy proceeding. But if § 105(a) does not permit the former, it cannot authorize the latter. The legal problem with both remains the same: without some Code provision expressly authorizing bankruptcy courts to restrain litigation against non-debtors, § 105(a) does not empower those courts to do what they otherwise cannot. *See* States' Amicus Br. 16-17; Senators' Amicus Br. 11-12. On remand, the Fourth Circuit can consider respondents' argument (which the decision below did not reach) about whether § 524(g) makes any difference to the analysis of that question.

IV. THE QUESTIONS PRESENTED ARE IMPORTANT AND WARRANT REVIEW

This Court's review is needed to address the growing trend of wealthy corporations using the Texas Two-Step to escape civil liability. Other tortfeasors are increasingly mimicking Georgia-Pacific by devising divisional mergers in Texas and then moving themselves into the Fourth Circuit to obtain the type of litigation-halting injunction the majority blessed here. *See* Pet. 30-31; Senators' Amicus Br. 13-15. That maneuver defies the Code's text and purpose, upends the civil-justice system, and imperils State civil enforcement actions. *See* States' Amicus Br. 5-8; Senators' Amicus Br. 13-15.

This petition is not a "'back-door' attack" on "Bestwall's bankruptcy petition," as respondents claim (at 36). The petition concerns only the bankruptcy court's authority to enjoin claims against non-debtor New GP. More than 20 States and a bipartisan group of U.S. Senators have urged review of that question and have persuasively explained its importance. *See* States' Amicus Br. 3-10; Senators' Amicus Br. 1-4

Indeed, Georgia-Pacific's dubious divisional merger provides a compelling reason for this Court to grant review now. That is because the non-debtor injunction is the key to the whole scheme. As the Committee and its amici have explained, the divisional-merger maneuver depends on the non-debtor – the one that receives most of the assets and the one that stays outside bankruptcy – obtaining an injunction stopping the tort litigation the company wants to evade. *See* Pet. 30; States' Amicus Br. 4. Without such an injunction, wealthy tortfeasors like Georgia-Pacific would not even try the Texas Two-Step maneuver in the first place. The Court thus should not wait for a future

case presenting whether Bestwall's bankruptcy case should be dismissed (though it should be, *see LTL*, 64 F.4th at 100-10). Rather, the entire scheme hinges on a threshold legal issue that is ripe for review now.

That threshold issue warrants certiorari. Respondents do not dispute that the first five Texas Two-Step bankruptcies were filed in North Carolina. *See* Pet. 31. Nor do they dispute that the only two such bankruptcies attempted outside the Fourth Circuit failed. *See LTL*, 64 F.4th at 93; *Aearo*, 642 B.R. at 912. The clear message to wealthy tortfeasors like Georgia-Pacific is that they should bring all future "Texas Two-Step" cases to the Fourth Circuit. Respondents dismiss those forum-shopping concerns (at 38), citing the transfer of Johnson & Johnson's bankruptcy from North Carolina to New Jersey. In that case, however, the bankruptcy court found that Johnson & Johnson's shell-company debtor was "not just forum shopping"; it had "manufacture[d] venue" to exploit the Fourth Circuit's lenient bankruptcy standards. *See In re LTL Mgmt. LLC*, 2021 WL 5343945, at *6 (Bankr. W.D.N.C. Nov. 16, 2021). The decision below will invite other companies to try the same gambit.

Respondents also deny (at 35, 37) that the Fourth Circuit's decision undermines the tort system, portraying their six-year-old (and counting) injunction as a mere "temporary" stay in service of establishing a future trust under § 524(g). But § 524(g) authorizes a Chapter 11 plan that may include "special" provisions for "an insolvent debtor facing the unique problems and complexities associated with asbestos liability." *Combustion Eng'g*, 391 F.3d at 234. It is intended for a debtor facing overwhelming liabilities, not for a non-debtor with the ability to pay its debts and whose assets are not subject to bankruptcy court

supervision. Here, the real point of New GP's injunction is to "gain leverage over future asbestos claims" – leverage they have now wielded for more than six years. App. 28a (King, J., dissenting in part). Respondents' desire to evade the tort system cannot justify their manipulation of the Bankruptcy Code.

CONCLUSION

The Court should grant the petition. Alternatively, it should hold it for *Purdue* and then grant, vacate, and remand.

Respectfully submitted,

NATALIE D. RAMSEY
THOMAS J. DONLON
DAVIS LEE WRIGHT
ROBINSON & COLE LLP
1201 North Market Street
Suite 1406
Wilmington, Delaware
19801
(302) 516-1700

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