

No. 26-394

In the Supreme Court of the United States

MICHAEL HERLIHY, ANN HERLIHY, AND THE ESTATE OF
PETER L. BERGRUD,
Petitioners,
v.

DBMP, LLC,
Respondent.

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

**BRIEF OF AMICI CURIAE NORTH CAROLINA,
19 OTHER STATES, AND THE DISTRICT OF
COLUMBIA IN SUPPORT OF PETITIONERS**

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	ii
INTEREST OF AMICI STATES	1
SUMMARY OF THE ARGUMENT	2
ARGUMENT	4
I. The Decision Below Undermines the States’ Critical Role in Protecting Their Citizens	4
A. The “Texas Two-Step” allows highly solvent companies to delay and avoid accountability for their torts.....	4
B. The Texas Two-Step causes significant harm to the States and their citizens.....	7
C. The Fourth Circuit’s holding will allow nationwide use of the Texas Two-Step, despite other circuits’ contrary decisions.....	12
II. The Decision Below Offers an Ideal Vehicle to Assess the Texas Two-Step’s Validity	15
III. The Decision Below Erred in Holding that Texas Two-Steps Are Filed in Good Faith.....	18
CONCLUSION	21

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez</i> , 458 U.S. 592 (1982)	11
<i>Bestwall LLC v. Off. Comm. of Asbestos Claimants</i> , 148 F.4th 233 (4th Cir. 2025)	15
<i>Carolin Corp. v. Miller</i> , 886 F.2d 693 (4th Cir. 1989)	13, 17
<i>Grogan v. Garner</i> , 498 U.S. 279 (1991)	20
<i>Harrington v. Purdue Pharma L.P.</i> , 603 U.S. 204 (2024)	14, 21
<i>Huffman v. Pursue, Ltd.</i> , 420 U.S. 592 (1975)	9
<i>In re Aearo Techs. LLC</i> , 642 B.R. 891 (Bankr. S.D. Ind. 2022)	6
<i>In re Bestwall LLC</i> , 71 F.4th 168 (4th Cir. 2023)	15
<i>In re Cohoes Indus. Terminal, Inc.</i> , 931 F.2d 222 (2d Cir. 1991)	19
<i>In re DBMP LLC</i> , Adv. Proc. No. 20-03004, 2021 WL 3552350 (Bankr. W.D.N.C. Aug. 11, 2021)	6, 7
<i>In re DBMP LLC</i> , Adv. Proc. No. 21-03023, 2026 WL 973870 (Bankr. W.D.N.C. Mar. 16, 2026)	13

<i>In re DBMP LLC</i> , Adv. Proc. No. 22-03000, 2026 WL 2851914 (Bankr. W.D.N.C. Sept. 17, 2026)	7
<i>In re Integrated Telecom Express, Inc.</i> , 384 F.3d 108 (3d Cir. 2004)	19
<i>In re Johns-Manville Corp.</i> , 36 B.R. 727 (Bankr. S.D.N.Y. 1984)	20
<i>In re Laguna Assocs. Ltd. P'ship</i> , 30 F.3d 734 (6th Cir. 1994)	16
<i>In re LTL Mgmt., LLC</i> , No. 23-2971, 2024 WL 3540467 (3d Cir. July 25, 2024) (unpublished)	6
<i>In re LTL Mgmt., LLC</i> , 64 F.4th 84 (3d Cir. 2023)	4, 5, 6, 12, 13, 19
<i>In re LTL Mgmt., LLC</i> , 645 B.R. 59 (Bankr. D.N.J. 2022)	1, 8
<i>In re Lutheran Home & Servs. for the Aged, Inc.</i> , No. 25-01705, 2026 WL 626606 (Bankr. N.D. Ill. Mar. 4, 2026)	14
<i>In re Purdue Pharms. L.P.</i> , 619 B.R. 38 (S.D.N.Y. 2020)	10
<i>In re SGL Carbon Corp.</i> , 200 F.3d 154 (3d Cir. 1999)	19
<i>Loc. Loan Co. v. Hunt</i> , 292 U.S. 234 (1934)	20
<i>Maryland v. King</i> , 567 U.S. 1301 (2012)	8

<i>Off. Comm. of Asbestos Claimants v. Bestwall LLC</i> , 144 S. Ct. 2519 (2024).....	16
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Statutes

11 U.S.C. § 105(a).....	5
11 U.S.C. § 362	5
11 U.S.C. § 362(b)(4)	8
11 U.S.C. § 362(d)(1)	12
11 U.S.C. § 363(b)(1)	5
11 U.S.C. § 503(c)	5
11 U.S.C. § 524(g)(1)(B).....	14
11 U.S.C. § 524(g)(2)(B)(i)	18
11 U.S.C. § 1112(b)(1)	12
28 U.S.C. § 1408	14

Other Authorities

Amicus Brief of North Carolina et al., <i>Off. Comm. of Asbestos Claimants v. Bestwall LLC</i> , No. 23-675 (U.S. Jan. 22, 2024).....	16
Brief in Opposition, <i>Off. Comm. of Asbestos Claimants v. Bestwall LLC</i> , No. 23-675 (U.S. Mar. 22, 2024)	16
Brief of the Commercial Law League of America & the National Bankruptcy Venue Reform Committee as Amici Curiae in Support of Neither Party, <i>Harrington v. Purdue Pharma L.P.</i> , No. 23-124 (U.S. Sept. 27, 2023).....	14

<i>Collier on Bankruptcy</i> (Richard Levin & Henry J. Sommer eds., 16th ed. rev. 2026)	12
Exhibits to Motion to Lift Stay, <i>In Re DBMP LLC</i> , Bankr. Ct. Doc. 2757	11
<i>In re Aldrich Pump LLC</i> , No. 20-30608 (Bankr. W.D.N.C.)	11
<i>In re Bestwall LLC</i> , No. 17-31795 (Bankr. W.D.N.C.)	11
<i>In re DBMP LLC</i> , No. 20-30080 (Bankr. W.D.N.C.)	11
<i>In re Murray Boiler LLC</i> , No. 20-30609 (Bankr. W.D.N.C.)	11
Michael N. & Ann Herlihy's Motion for Relief from the Automatic Stay, <i>In Re DBMP LLC</i> , Bankr. Ct. Doc. 2755-1	11
Motion for Preliminary Injunction, <i>In re Purdue Pharma L.P.</i> , Adv. Proc. No. 19-08289 (Bankr. S.D.N.Y. Sept. 18 , 2019), ECF No. 2	8
Petition for a Writ of Certiorari, <i>Off. Comm. of Asbestos Claimants v. Bestwall</i> <i>LLC</i> , No. 23-675 (U.S. Dec. 20, 2023)	15
Petition for a Writ of Certiorari, <i>Off. Comm. of Asbestos Claimants v. Bestwall</i> <i>LLC</i> , No. 25-1013 (U.S. Feb. 20, 2026)	15

Press Release, N.C. Dep't of Just., Attorney General Jeff Jackson Secures Nearly \$150 Million for North Carolina in Final Purdue/Sackler Opioid Settlement (May 1, 2026), https://bit.ly/4i3XKoB	10
Press Release, N.C. Dep't of Just., Attorney General Josh Stein Leads 43 Bipartisan Attorneys General in Reaching \$700 Million Talc Settlement with Johnson & Johnson (June 12, 2024), https://bit.ly/4egvDRQ	9
Press Release, N.C. Dep't of Just., Bipartisan Coalition of Attorneys General Secures More Than \$10 Billion in Opioid Funds from CVS and Walgreens: Brings total recoveries from drug industry to more than \$50 billion (Dec. 12, 2022), https://bit.ly/4isjbRt	10

INTEREST OF AMICI STATES

Amici are the States of North Carolina, Arizona, California, Colorado, Connecticut, Illinois, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Nevada, New Mexico, New York, Rhode Island, South Dakota, Tennessee, Vermont, Virginia, and Washington, and the District of Columbia.¹

The amici States have a strong interest in supporting the petition for a writ of certiorari. The Fourth Circuit’s decision below allows highly solvent tortfeasor corporations to abuse the bankruptcy process through a scheme known as the “Texas Two-Step.” The decision does so by reading the Bankruptcy Code to sanction efforts by these corporations to enjoin litigation against them for years, leaving States unable to stop violations of state laws and injured citizens unable to seek relief on state-law claims. That delay in turn gives tortfeasors a free pass to avoid accountability while impeding state efforts to protect their residents.

The harm that this abuse of the bankruptcy process inflicts on our system of federalism is manifest. Several years ago, one of the nation’s most profitable corporations used a Texas Two-Step to enjoin state-law claims brought in state court by States alleging that the corporation deceptively sold a cancer-causing product. *In re LTL Mgmt., LLC*, 645 B.R. 59 (Bankr. D.N.J. 2022). And today, more than

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

100,000 claims asserted by States' citizens under various state laws are currently stayed in Two-Step bankruptcies pending in the Western District of North Carolina—bankruptcies that are now endorsed by the Fourth Circuit's decision.

If left to stand, that decision will invite still more efforts to coopt the Bankruptcy Code for delay and evasion of state enforcement actions and state-law liability. The decision below thus strikes at the core of the amici States' sovereign authority to enforce their state laws and protect their people.

SUMMARY OF THE ARGUMENT

This case involves an abuse of the bankruptcy process called the Texas Two-Step. Bankruptcy is intended to provide an orderly and fair way for companies in financial distress to resolve their debts. One critical piece of that process is an automatic stay of judicial proceedings against the bankrupt entity. In the normal course, that stay ensures that the bankrupt entity's insufficient assets are distributed equitably, rather than in an uncontrolled race to the courthouse, thus protecting creditors.

The practice endorsed below turns this protection for creditors into a weapon against them. Under the Two-Step, highly solvent tortfeasor corporations—companies who can well afford to pay for the harms they have caused—spin off a new entity to effectively do little more than hold the company's tort liabilities. That entity then declares bankruptcy, thus automatically staying all litigation that seeks to hold it accountable, while separately obtaining a similar

injunction to protect its affiliates. For as long as the bankruptcy remains pending, the tortfeasor is insulated from liability. And the tortfeasor companies have no incentive to resolve the bankruptcy, since only the spun-off entity is under judicial supervision and all profitable operations remain free of the Bankruptcy Code's limitations on activities like paying dividends and buying back stock. The bankruptcy thus crawls along, the calendar turns year after year, injured people pass away, and the States and their citizens are left without a remedy.

Below, the Fourth Circuit permitted this transparent manipulation of the bankruptcy process. Namely, the Fourth Circuit held that even highly solvent companies act in "good faith" under the Bankruptcy Code when they create corporate alter egos under the Two-Step to file for bankruptcy solely to stay tort litigation. Two-Step bankruptcies thus cannot be dismissed as having been brought in bad faith, and plaintiffs cannot lift the bankruptcy's automatic stay. Even though the tortfeasor is perfectly capable of paying in full all claims against it, injured plaintiffs—including the States themselves—are left to wait and pressured to settle at a discount.

The decision below warrants this Court's review. There is indisputably a circuit split on this issue, as the Third Circuit has squarely held that the Texas Two-Step is an unlawful abuse of the bankruptcy system. Further percolation is unlikely to engender any meaningful development, as savvy companies who want to engage in the Texas Two-Step can always create new affiliates that can seek relief in the safe

haven of the Fourth Circuit. And the consequences of this abuse of the bankruptcy process are severe, not least because it threatens States' sovereign power to enforce their laws against corporate wrongdoers and States' ability to provide relief for their injured citizens.

The decision below thus presents an ideal vehicle for resolving the question of whether the Bankruptcy Code really does allow corporations that are not in financial distress to benefit from the Code's remedies. The answer to that question is no. Congress did not mean for bankruptcy to benefit solvent corporations that are capable of satisfying all claims against them.

This Court should grant the petition to correct the Fourth Circuit's erroneous decision.

ARGUMENT

I. The Decision Below Undermines the States' Critical Role in Protecting Their Citizens.

A. The "Texas Two-Step" allows highly solvent companies to delay and avoid accountability for their torts.

As its name suggests, the Texas Two-Step has two moves. The scheme's first step uses Texas corporate law to effectuate a "divisional merger" that assigns a highly solvent company's tort liability to a newly formed entity that is created specifically to house that liability. *See In re LTL Mgmt., LLC*, 64 F.4th 84, 95-97 (3d Cir. 2023). At the second step, the entity holding the tort liability files for bankruptcy, leaving

the bulk of the company's operations unencumbered by bankruptcy. *See id.* at 97.

As the Third Circuit has explained, this scheme's "stated goal [is] to isolate [mass tort] liabilities in a new subsidiary so that entity [can] file for Chapter 11 without subjecting [its] entire operating enterprise to bankruptcy proceedings." *Id.* at 93. The maneuver only works if the debtor and related entities are all protected by preliminary injunctions—pursuant to the Bankruptcy Code's automatic stay or its other remedies—that stop tort litigation against them. *See* 11 U.S.C. § 362 (automatic stay); *id.* § 105(a) ("The [bankruptcy] court may issue any order . . . that is necessary or appropriate to carry out the provisions of this title."). In other words, the protections of bankruptcy sought through the Texas Two-Step have minimal practical value if States and their citizens can continue to litigate against either the debtor or its affiliates outside of the bankruptcy court.

So long as the injunctions are in place, however, the tortfeasor has limited incentive to resolve claims, delaying their resolution. After all, the injunction protects the company from litigation that could lead to adverse factual developments, legal rulings, and verdicts negatively affecting the company's global settlement position. And unlike a bankrupt company, the solvent entity in a Texas Two-Step is free from the considerable burdens of bankruptcy court oversight. *See, e.g., id.* § 363(b)(1) (requiring oversight of bankrupt companies' use, sale, or lease of property not in the ordinary course of business); *id.* § 503(c) (requiring oversight of bankrupt companies'

compensation of certain executives). Thus, for as long as the bankruptcy remains pending, the tortfeasor is effectively insulated from liability without pressure to exit bankruptcy and regain control of its operations. This ability to delay “provide[s a tortfeasor] with additional leverage to negotiate a global settlement”—leverage that it could not achieve if it were required to litigate claims in an Article III federal court or state court. *In re Aearo Techs. LLC*, 642 B.R. 891, 912 (Bankr. S.D. Ind. 2022).

Courts have sharply questioned the legality of highly solvent businesses leveraging Texas law like this in bankruptcy proceedings. Most notably, in *In re LTL Management, LLC*, the Third Circuit has twice held that the Two-Step bankruptcy attempted by Johnson & Johnson was unlawful and merited dismissal. 64 F.4th at 106-11 (Ambro, J.); No. 23-2971, 2024 WL 3540467, at *3-5, *12 (3d Cir. July 25, 2024) (unpublished).

The facts of this case throw the Two-Step’s harms into sharp relief. For decades, CertainTeed Corporation manufactured and sold products that contained asbestos. Pet. App. 4a. Litigation ensued. CertainTeed resolved more than 300,000 asbestos lawsuits, incurring roughly \$2 billion in expenses. Pet. App. 4a. But it was still facing roughly 60,000 additional claims. Pet. App. 4a. Despite these liabilities, CertainTeed remained “a profitable going concern whose assets significantly outweighed its combined operating and asbestos liabilities.” *In re DBMP LLC*, Adv. Proc. No. 20-03004, 2021 WL 3552350, at *8 (Bankr. W.D.N.C. Aug. 11, 2021).

Seeking to “pay[] less” “than it would if it [had] continued paying asbestos claims as they arose in the tort system,” CertainTeed turned to the Texas Two-Step. *Id.* at *7. It first spun off its asbestos liabilities to another corporation, DBMP LLC. *Id.* at *1. DBMP then filed for bankruptcy in the Western District of North Carolina. *Id.* This maneuver, the bankruptcy court specifically found, was meant “to facilitate” CertainTeed’s ability to seek relief in “bankruptcy [court], without subjecting [its] entire . . . enterprise to chapter 11.” *Id.* at *6 (cleaned up). And the maneuver worked, securing an automatic stay of litigation against DBMP, as well as an injunction protecting CertainTeed and other nondebtor affiliates from asbestos litigation. Pet. App. 6a.

This Two-Step has left asbestos tort claims against these companies pending for many years. And there is no end in sight. While DBMP filed for bankruptcy in January 2020, the bankruptcy court’s current case-management order provides for a fall 2028 evidentiary hearing that would be used merely “for purposes of *developing* a Chapter 11 plan.” *In re DBMP LLC*, Adv. Proc. No. 22-03000, 2026 WL 2851914, at *6 (Bankr. W.D.N.C. Sept. 17, 2026) (emphasis added).

B. The Texas Two-Step causes significant harm to the States and their citizens.

The Fourth Circuit’s ruling in this case wrongly threatens amici States’ sovereign power to timely enforce their laws and the ability of States’ citizens to benefit from those laws.

In recent years, corporate wrongdoers have increasingly filed for bankruptcy and then quickly sought preliminary injunctions preventing claims filed by States from proceeding. *See, e.g.*, Motion for Preliminary Injunction, *In re Purdue Pharma L.P.*, Adv. Proc. No. 19-08289 (Bankr. S.D.N.Y. Sept. 18 , 2019), ECF No. 2 (seeking preliminary injunction of States’ civil litigation against Purdue Pharma and the non-debtor Sackler family that owned Purdue). The Texas Two-Step has been part of this trend: Before the Third Circuit’s *LTL* decision, for example, Johnson & Johnson successfully employed the Two-Step to enjoin Mississippi and New Mexico from pursuing state-law claims against it in their own state courts. *LTL*, 645 B.R. at 76 n.11, 87.²

These injunctions injure States by blocking them from enforcing their own laws in their own courts. *See, e.g.*, *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers) (“[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.”). Given the extraordinary intrusion on sovereign power that “federal judicial interference” with “state judicial proceedings” represents, this Court has cautioned in other contexts that federal courts must exercise great “restraint”

² Mississippi and New Mexico were subject to this injunction even though the Bankruptcy Code exempts States’ “police and regulatory power” from the automatic stay. 11 U.S.C. § 362(b)(4). Amici States maintain that rulings like *LTL* enjoining States from civil litigation against bankrupt and non-bankrupt entities are wrongly decided.

when parties seek to enjoin proceedings in state court. *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 603 (1975) (applying *Younger* abstention to a State’s civil enforcement action). But by sanctioning the Two-Step, the Fourth Circuit’s decision below endorses such intrusion. And it does so even though the real financial distress that might justify a bankruptcy court to grant such relief is lacking here.

The Fourth Circuit’s decision also harms States’ sovereign interest in the timely resolution of claims. States regularly and successfully engage in direct negotiations with companies responsible for mass torts to efficiently resolve claims brought under state law. For example, within one year of the formal dismissal of Johnson & Johnson’s Texas Two-Step bankruptcy, forty-two States and the District of Columbia entered into a \$700 million consensual settlement with the company over its talc misconduct.³ This relatively streamlined process contrasts sharply with the delays and roadblocks that States face when forced to resolve their claims through the bankruptcy process.

A particularly striking example of the harm caused by the bankruptcy process arose in the States’ efforts to address the unlawful corporate conduct that gave rise to the opioid crisis. States began investigating that misconduct in late 2016, and in 2021 and 2022,

³ See Press Release, N.C. Dep’t of Just., Attorney General Josh Stein Leads 43 Bipartisan Attorneys General in Reaching \$700 Million Talc Settlement with Johnson & Johnson (June 12, 2024), <https://bit.ly/4egvDRQ>.

States and local governments entered global settlements worth approximately \$50 billion with nine companies that engaged in misconduct related to the manufacturing, distribution, and dispensing of opioids.⁴

Meanwhile, it took until 2026—after more than six years of bankruptcy proceedings and related appeals—to resolve the States’ claims against the most nefarious opioid manufacturer: Purdue Pharma and its owners, the Sackler family.⁵ All that time, States and local governments were unable to pursue enforcement actions against Purdue and the non-bankrupt Sackler family. *See In re Purdue Pharms. L.P.*, 619 B.R. 38 (S.D.N.Y. 2020) (affirming the bankruptcy court’s issuance and extension of a preliminary injunction of state and local government litigation). Thus, if corporate tortfeasors are allowed to use a Texas Two-Step to protect themselves from States’ civil enforcement litigation, they will have less incentive to negotiate with States for timely, mutually acceptable resolutions.

⁴ See Press Release, N.C. Dep’t of Just., Bipartisan Coalition of Attorneys General Secures More Than \$10 Billion in Opioid Funds from CVS and Walgreens: Brings total recoveries from drug industry to more than \$50 billion (Dec. 12, 2022), <https://bit.ly/4isjbRt>.

⁵ See Press Release, N.C. Dep’t of Just., Attorney General Jeff Jackson Secures Nearly \$150 Million for North Carolina in Final Purdue/Sackler Opioid Settlement (May 1, 2026), <https://bit.ly/4i3XKoB>.

Separately, the Texas Two-Step also frustrates the ability of States to protect their residents through their own state laws. In addition to States' ability to enforce their own laws directly, States also have a "sovereign interest[]" in "creat[ing] . . . a legal code" that provides private redress to their residents. *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 601 (1982). Consistent with this interest, States have created causes of action that allow their injured residents to obtain relief against tortfeasors like DBMP and CertainTeed. Here, for instance, petitioners are Washington and California citizens who brought claims under state law in state court after they developed mesothelioma. *See* Exhibits to Motion to Lift Stay, *In Re DBMP LLC*, Bankr. Ct. Doc. 2757, at 95-100; Michael N. & Ann Herlihy's Motion for Relief from the Automatic Stay, *In Re DBMP LLC*, Bankr. Ct. Doc. 2755-1, at 26-54.

The Two-Step, however, has prevented these claims from proceeding. The claims of the Washington petitioner, for example, have now been pending for more than seven years, *see* Bankr. Ct. Doc. 2757, at 100, thanks to a bankruptcy stay obtained by a debtor that is not in financial distress.

The problem faced by the specific petitioners here is not an isolated one. More than 100,000 similar claims asserted under state law are currently stayed thanks to the multiple Two-Steps pending in the Western District of North Carolina. *See In re Bestwall LLC*, No. 17-31795 (Bankr. W.D.N.C.); *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.). The Two-Step thus also harms States by preventing their residents from obtaining timely relief on state-law claims.

This Court should therefore grant review to ensure that States retain their sovereign authority to enforce their laws and to create a legal code that can provide effective redress to their residents.

C. The Fourth Circuit’s holding will allow nationwide use of the Texas Two-Step, despite other circuits’ contrary decisions.

The Fourth Circuit’s decision below will also allow this abuse of the bankruptcy system to persist, cementing that circuit as the venue of choice for the Texas Two-Step, sidestepping other circuits’ contrary precedent on the issue, and making further percolation unlikely.

Under the Bankruptcy Code, courts may lift the automatic stay or dismiss petitions “for cause.” 11 U.S.C. §§ 362(d)(1), 1112(b)(1). These provisions have been read to allow for dismissal or lifting the stay when “a case has not been commenced in good faith.” 3 *Collier on Bankruptcy* ¶ 362.07[7] (Richard Levin & Henry J. Sommer eds., 16th ed. rev. 2026); *see also* 7 *id.* ¶ 1112.07.

In some circuits, this good-faith requirement limits the potential abuse of the Texas Two-Step by companies not in financial distress. *See LTL*, 64 F.4th at 106-10; *see also* Pet. 16-17. The Third Circuit, for example, has held that “a debtor who does not suffer

from financial distress cannot demonstrate its Chapter 11 petition serves a valid bankruptcy purpose supporting good faith.” *LTL*, 64 F.4th at 101. For that reason, the Third Circuit concluded that Johnson & Johnson’s Two-Step that sought to address its asbestos-related liability was not filed in good faith, because the debtor in that case was not “facing financial distress.” *Id.* at 110.

But in the Fourth Circuit, the good-faith standard is more demanding for creditors. *See id.* at 98 n.8 (citing *Carolin Corp. v. Miller*, 886 F.2d 693, 694 (4th Cir. 1989)). This is because in the Fourth Circuit, a debtor’s status as “profitable” and “non-distressed” prior to filing for bankruptcy is “irrelevant” to a good-faith analysis, which instead turns on whether a debtor has sought a remedy allowed under the Bankruptcy Code. Pet. App. 16a (discussing *Carolin*, 886 F.2d at 700-02). Applying that standard below, moreover, the Fourth Circuit held that in this specific context, Congress intended for companies that are not in any financial distress to be able to declare bankruptcy. Pet. App. 17a-18a. This holding, as the bankruptcy court that is overseeing this case has already observed, has “doubled down” on the Fourth Circuit’s endorsement of the Texas Two-Step. *In re DBMP LLC*, Adv. Proc. No. 21-03023, 2026 WL 973870, at *23 (Bankr. W.D.N.C. Mar. 16, 2026); *see also id.* at *50 (holding that Two-Steps do not qualify as “prima facie . . . fraudulent transfer[s]” because Fourth Circuit precedent prevents such a holding).

The Fourth Circuit’s decision thus guarantees that it will be the venue of choice for sophisticated debtors

to take advantage of the Texas Two-Step. That is so because, no matter where a corporation is based, it can create a new affiliate under Texas law to hold its tort liability, domicile that entity in North Carolina, and then seek bankruptcy protection in the Fourth Circuit. Because the formal domicile of a corporation is easy to change, the bankruptcy-venue statute allows corporations to file for bankruptcy anywhere. *See* 28 U.S.C. § 1408. For this reason, a bankruptcy practice allowed in one circuit is effectively available nationwide. *See generally* Brief of the Commercial Law League of America & the National Bankruptcy Venue Reform Committee as Amici Curiae in Support of Neither Party, *Harrington v. Purdue Pharma L.P.*, No. 23-124 (U.S. Sept. 27, 2023). This Court should not allow the Texas Two-Step—or the Fourth Circuit’s disregard for a debtor’s financial status prior to bankruptcy—to persist.⁶

⁶ Here, DBMP’s Two-Step aims to eventually confirm a plan that permanently “enjoin[s]” claims against its affiliates like CertainTeed under Bankruptcy Code section 524(g)’s provisions for asbestos-related bankruptcies. 11 U.S.C. § 524(g)(1)(B). The Two-Step, however, could also be used outside of the asbestos context. Debtors without asbestos liability could seek to block litigation against their affiliates on a preliminary basis to allow those affiliates later to try to obtain “consensual third-party releases” as part of a final plan. *Harrington v. Purdue Pharma L.P.*, 603 U.S. 204, 226 (2024); *see also In re Lutheran Home & Servs. for the Aged, Inc.*, No. 25-01705, 2026 WL 626606, at *21-23 (Bankr. N.D. Ill. Mar. 4, 2026) (discussing differing standards for finding adequate consent to third-party releases after *Purdue*).

II. The Decision Below Offers an Ideal Vehicle to Assess the Texas Two-Step’s Validity.

Review is also appropriate because this case provides this Court with an ideal vehicle to review the most important question concerning the legality of the Texas Two-Step: whether Two-Step bankruptcies are filed in good faith. That dispositive question was squarely presented and ruled on below, and there is no obstacle to this Court’s review now.

Petitions seeking review of the Fourth Circuit’s rulings about the Two-Step have come before this Court twice before. *See* Petition for a Writ of Certiorari, *Off. Comm. of Asbestos Claimants v. Bestwall LLC*, No. 25-1013 (U.S. Feb. 20, 2026); Petition for a Writ of Certiorari, *Off. Comm. of Asbestos Claimants v. Bestwall LLC*, No. 23-675 (U.S. Dec. 20, 2023). These prior petitions, however, did not concern the lynchpin issue of whether these bankruptcies were filed in good faith. They instead sought review of ancillary rulings about the jurisdictional and constitutional basis of bankruptcy courts allowing the Two-Step to proceed. *Bestwall LLC v. Off. Comm. of Asbestos Claimants*, 148 F.4th 233, 241 (4th Cir. 2025); *In re Bestwall LLC*, 71 F.4th 168, 180 (4th Cir. 2023).

Given the immediate and dramatic harms imposed by the Texas Two-Step, certain amici States nonetheless asked this Court two years ago to grant one of those petitions. In doing so, amici States urged this Court not to “wait for a petition that more squarely addresses” whether Two-Steps are

consistent with the “equitable good-faith” principles that underlie all bankruptcies. Amicus Brief of North Carolina et al. at 7, *Off. Comm. of Asbestos Claimants v. Bestwall LLC*, No. 23-675 (U.S. Jan. 22, 2024). The companies opposing certiorari, however, argued that review was not appropriate because these decisions did not address whether these bankruptcies are filed in bad faith. Brief in Opposition at 7-8, 24, *Off. Comm. of Asbestos Claimants v. Bestwall LLC*, No. 23-675 (U.S. Mar. 22, 2024). This Court denied review. 144 S. Ct. 2519 (2024). That key issue is now squarely raised here.

The Fourth Circuit tried to minimize the importance of its decision below, implying that it was not ruling on whether DBMP’s Two-Step should be dismissed as filed in bad faith. It observed that its decision did not involve “any motion to dismiss” DBMP’s petition for bad faith, but rather addressed “only the standard for lifting [the automatic] stay” for these specific petitioners. Pet. App. 9a.

This is a distinction without a difference. It is widely accepted that there is “no substantive difference” between the “requirement for dismissal of a petition” and the “requirement for relief from an automatic stay.” *In re Laguna Assocs. Ltd. P’ship*, 30 F.3d 734, 737-38 (6th Cir. 1994). Indeed, the bankruptcy court overseeing this case recognized that “lifting the automatic stay would” amount to “a de facto dismissal of [DBMP’s] bankruptcy.” Pet. App. 3a.

In its actual substantive analysis below, the Fourth Circuit reached the same conclusion. Over a

dissent on this issue, *see* Pet. App. 52a-53a, the panel majority held that the same demanding good-faith standard that governs dismissal motions in the Fourth Circuit *also* applies to motions for relief from the stay. *See* Pet. App. 14a (citing *Carolin*, 886 F.2d at 699). Applying that standard, the majority then further held that “bad faith” was absent here, because it believed that Congress *meant* for “solvent compan[ies]” to file for bankruptcy in the asbestos context. Pet. App. 14a-16a.

Given these holdings, going forward in the Fourth Circuit, a debtor’s solvency alone can seemingly never provide a basis for the dismissal of a bankruptcy filed by a debtor like DBMP. For that reason, this Court need not wait for the Fourth Circuit to speak further on the Two-Step: There is nothing more for it to say.

Nor, moreover, is it likely that further percolation in other circuits would assist this Court’s review of these issues. Because any company utilizing the Texas Two-Step can reorganize in such a way to file for bankruptcy in a jurisdiction governed by the Fourth Circuit’s precedents, *see supra* pp 13-14, it is unlikely that a sophisticated debtor would attempt a Two-Step elsewhere and produce further precedent that would contribute meaningfully to the understanding of these issues.

This Court thus need not wait to review the legitimacy of the Texas Two-Step. This case presents an ideal vehicle for this Court to decide that issue now.

III. The Decision Below Erred in Holding that Texas Two-Steps Are Filed in Good Faith.

Review is finally appropriate because the decision below is wrong.

The Fourth Circuit applied its good-faith test, which asks not whether a debtor faces real financial distress but rather whether a debtor seeks a remedy available under the Bankruptcy Code. Pet. App. 14a-15a. Applying that test, it then held that Congress intended for highly solvent companies to be able to declare bankruptcy in this context. The court reached that conclusion because DBMP faces asbestos-related claims and thus could theoretically satisfy those claims by funding a trust under section 524(g) of the Bankruptcy Code. 11 U.S.C. § 524(g)(2)(B)(i).

Section 524(g), the court held, permits highly solvent companies facing asbestos-related liability to declare bankruptcy because there is no express “insolvency” requirement that debtors must satisfy to seek relief under section 524(g). Pet. App. 16a. The provision also allows highly solvent companies to declare bankruptcy, the court held, because it supposedly addresses “a different form of financial distress” than insolvency. Pet. App. 18a. Pointing to section 524(g)’s origins as a codification of remedies developed in prior asbestos-related bankruptcies, the court held that the provision is meant to grant relief to companies that merely face “uncertainty” about the scope of their future asbestos-related liability. Pet. App. 16a-17a.

Congress, however, never meant for debtors that can satisfy claims without difficulty to be able to take advantage of section 524(g).

To begin, the lack of an express solvency requirement does not show that Texas Two-Steps filed by highly solvent debtors have statutory authorization. While it is true that the Code does not expressly require debtors that seek relief under section 524(g) to be insolvent, that point is also true about *all other relief* that is available under the Code's various chapters (except Chapter 9). *See, e.g., In re Integrated Telecom Express, Inc.*, 384 F.3d 108, 121-22 (3d Cir. 2004). Consistent with common sense, courts have nonetheless still read the Code to rule out relief under its chapters for debtors that face "no immediate financial difficulty." *In re SGL Carbon Corp.*, 200 F.3d 154, 163 (3d Cir. 1999); *see also In re Cohoes Indus. Terminal, Inc.*, 931 F.2d 222, 228 (2d Cir. 1991) (also requiring "financial difficulty"); *supra* pp 12-13.

Contrary to the Fourth Circuit's ruling, nothing about section 524(g) suggests that it alone permits highly solvent corporations to take advantage of the Bankruptcy Code's protections. Section 524(g) was, it is true, meant to address the liability faced by debtors like Johns-Manville that, beginning in the 1980s, faced "a tide of asbestos litigation." *LTL*, 64 F.4th at 104. But debtors like Johns-Manville were situated markedly differently from the highly solvent debtors like DBMP that have filed Texas Two-Steps. Johns-Manville's liability was so threatening that, absent bankruptcy, it would have had "to book a \$1.9 billion

liability reserve” that would have triggered “the acceleration of approximately \$450 million of outstanding debt,” which would in turn have resulted “in a forced liquidation of key business segments.” *Id.* (quoting *In re Johns-Manville Corp.*, 36 B.R. 727, 730 (Bankr. S.D.N.Y. 1984)). That liability thus “created a ‘compelling need [for the debtor] to reorganize in order to meet’ its obligations to creditors.” *Id.* (quoting *Johns-Manville*, 36 B.R. at 730). No such compelling need exists here, where DBMP cannot point to any similar financial distress to justify its bankruptcy. *See supra* p 6. The law does not permit DBMP, or any other highly solvent company, to abuse the bankruptcy process to avoid paying what it owes.

The Fourth Circuit thus erred in holding that section 524(g) of the Code statutorily authorizes the Texas Two-Step. Review by this Court is needed to correct its erroneous decision.

* * *

This Court “ha[s] been careful to explain that the [Bankruptcy Code] limits the opportunity for a completely unencumbered new beginning to the ‘honest but unfortunate debtor.’” *Grogan v. Garner*, 498 U.S. 279, 286-87 (1991) (quoting *Loc. Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934)). Because highly solvent companies do not fit this description, this Court should grant the petition to prevent abuse of the bankruptcy process through the Texas Two-Step scheme.

Although the Fourth Circuit found it legally relevant that the Texas Two-Step is supposedly

“quicker, more efficient, and fairer” than continued tort litigation, Pet. App. 17a-18a, this Court recently rejected just such arguments for broad bankruptcy power. To the contrary, as the Court explained, “bankruptcy law may serve to address some collective-action problems, but no one . . . thinks it provides a bankruptcy court with a roving commission to resolve all such problems that happen its way, blind to the role other mechanisms (legislation, class actions, multi-district litigation, consensual settlements, among others) play in addressing them.” *Purdue*, 603 U.S. at 220.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 22, 2026

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