No. ____

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

PETITION FOR A WRIT OF CERTIORARI

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September 17, 2026

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QUESTION PRESENTED

This case concerns the "Texas Two-Step," an increasingly familiar maneuver by which a profitable, non-distressed enterprise seeks the benefits of bankruptcy for its tort liabilities without bearing any of bankruptcy's burdens. Using an arcane procedure found in the corporate laws of a few states (including Texas), the profitable enterprise undergoes a "divisional merger" to divide itself in two. It keeps the bulk of its assets for one company and assigns its tort liability to the other, which it creates solely for the purpose of segregating its liabilities in bankruptcy. The asset-rich version of the company then continues business as usual, while the liability-laden shell enters bankruptcy as planned. Upon filing for bankruptcy, the purported debtor wins an automatic stay and seeks to enjoin litigation against the enterprise as a whole. If successful, the scheme removes thousands of plaintiffs from the civil justice system and, for asbestos plaintiffs in particular, channels them to a trust from which they cannot opt out.

The question presented is:

Does a debtor's pursuit of bankruptcy as part of a Texas Two-Step scheme lack good faith, such that "cause" exists to lift the automatic stay under 11 U.S.C. § 362(d)?

LIST OF PARTIES TO THE PROCEEDING

Petitioners Michael Herlihy, Ann Herlihy, and the estate of Peter L. Bergrud were the claimants-appellants below.

Respondent DBMP, LLC was the debtor-appellee in the Fourth Circuit. Respondent DBMP, LLC, is a wholly owned subsidiary of CertainTeed, LLC, which is itself a subsidiary of Compagnie de Saint-Gobain S.A. (U.S. ADR: CODYY; Euronext Paris: SGO). Respondent DBMP, LLC is a private limited-liability company.

RELATED PROCEEDINGS

This case arises from the following proceedings:

- *In re DBMP, LLC*, No. 20-30080 (Bankr. W.D.N.C. May 28, 2024)
- *Herlihy v. DBMP, LLC*, No. 24-cv-00558 (W.D.N.C. Oct. 28, 2024)
- *Herlihy v. DBMP, LLC*, No. 24-2109 (4th Cir. Feb. 11, 2026)

A related proceeding, *The Estate of Peter L. Bergrud v. DBMP, LLC*, No. 24-cv-00559 (W.D.N.C.) was consolidated with *Herlihy*, No. 24-cv-00558 (W.D.N.C.).

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INTRODUCTION

This case presents the Court with an ideal opportunity to address a growing form of bankruptcy abuse. Commonly known as the "Texas Two-Step," the practice has divided the circuits, drawn widespread criticism, and enabled profitable, non-distressed corporations to shed billions of dollars in liabilities in bankruptcy without enduring the safeguards or scrutiny of Chapter 11. The maneuver proceeds in two steps: first, a "divisional merger" (under the law of Texas or a few other states) that isolates the corporate enterprise's tort liabilities in a shell; and second, a bankruptcy filing by the shell alone. Whether this scheme constitutes a good-faith use of the bankruptcy system will determine the fate of tens of thousands of lawsuits in the civil justice system. That question is squarely and narrowly presented here, without the jurisdictional and constitutional issues that may have impeded previous attempts at review.

The decision below only heightens the need for this Court's intervention. By blessing this practice and denying en banc review, the Fourth Circuit has effectively endorsed bankruptcy abuse in its jurisdiction as an end-run around mass-tort liability. That decision invites forum shopping and will inevitably result in a race to the bottom. No further percolation is likely because no sophisticated corporation will be incentivized to file for bankruptcy anywhere else, allowing the Fourth Circuit's wayward approach to govern nationally. This case offers the Court a clean vehicle to resolve the conflict—and to reaffirm that an enterprise's corporate form may not be manipulated to obtain the benefits of bankruptcy without its burdens.

There is no dispute about the facts. CertainTeed is a wealthy company facing significant, but manageable, liability for the harm caused by its asbestos products. "[S]eeking a less expensive way of dealing with these tort liabilities," it devised a plan (codenamed "Project Horizon") to "isolate" those liabilities in an affiliated corporation and have it file for bankruptcy without "subjecting the entire enterprise to [C]hapter 11." App. 29a. Taking advantage of a formerly obscure provision in Texas law, CertainTeed divided itself in two—keeping the bulk of its assets in an ongoing enterprise with the same name and assigning its tort liabilities to a shell company it called DBMP. CertainTeed then continued business as usual while DBMP filed for bankruptcy as planned.

The maneuver is not unique. Georgia-Pacific pioneered it in 2017. Trane Technologies followed suit. And Johnson & Johnson tried its hand at the strategy three separate times. Courts, legal scholars, commentators, and lawyers have nearly universally condemned the practice.

The effect is to put tens of thousands of civil lawsuits, brought nationwide by plaintiffs who are suffering and dying because of their exposure to asbestos in CertainTeed's products, "on ice." App. 44a–45a; *see also* App. 42a–43a. The bankruptcy filing by DBMP triggered an automatic stay, accompanied by a preliminary injunction, of all litigation against both DBMP and CertainTeed more broadly. In bankruptcy, DBMP has sought to establish a trust under 11 U.S.C. § 524(g) to resolve all present and future claims against the enterprise.

The petitioners here are claimants who moved to lift the automatic stay that prevented them from pursuing their claims in their home states. Section 362(d) of the Bankruptcy Code, which requires a court to lift the automatic stay of litigation "for cause," has long been understood to encompass a lack of good faith.

Whether a debtor created in this fashion and for this purpose lacks good faith (or, conversely, acts in bad faith) has split the Third and Fourth Circuits. In *In re LTL Management, LLC*, 64 F.4th 84 (3d Cir. 2023), the Third Circuit—the court that leads the nation in bankruptcy expertise—concluded that the shell company created by Johnson & Johnson in its attempted Texas Two-Step lacked a valid bankruptcy purpose; because it entered Chapter 11 without financial distress, its petition was not filed in good faith. *Id.* at 110. Here, by contrast, the Fourth Circuit found it "irrelevant" that CertainTeed was a "profitable, non-distressed company." App. 16a. Instead, the Fourth Circuit concluded that DBMP was "legitimately seeking to invoke the § 524(g) process," which it held was not bad faith. App. 15a.

The Fourth Circuit is wrong. In a Texas Two-Step, a non-distressed debtor enters Chapter 11 only *after* manipulating its corporate form for the sole purpose of avoiding the burdens and guardrails that Chapter 11 would otherwise impose. That is the very picture of acting in bad faith. Indeed, this Court has long condemned such schemes, explaining that "Anglo-American law since the Statute of Elizabeth" has treated analogous corporate manipulations as a form of fraud. *Shapiro v. Wilgus*, 287 U.S. 348, 354 (1932). The "principal purpose" of bankruptcy is to give the "honest but unfortunate debtor" a "fresh start," *Marrama v. Citizens Bank of Mass.*, 549 U.S. 365, 367 (2007)—not to provide debtors lacking financial distress with tools to evade their liabilities.

Nevertheless, with the decision below, the blueprint is clear: the Fourth Circuit has cemented itself as a "safe haven" for "ultra-wealthy corporations seeking to evade asbestos-related civil tort liability under the guise of the Bankruptcy Code." App. 19a (King, J., dissenting). And only this Court can correct course. The Court should grant review to protect the integrity of the bankruptcy system, and to safeguard claimants' constitutional rights to seek redress in the nation's civil justice system.

OPINIONS BELOW

The Fourth Circuit's opinion is reported at 167 F.4th 142. App. 1a–61a. The district court's order is not reported but is available at 2024 WL 4589795. App. 62a–74a. The bankruptcy court's two orders are not reported. App. 75a–78a.

JURISDICTION

The Fourth Circuit entered judgment on February 11, 2026, and denied a petition for rehearing en banc on April 20, 2026. On July 16, 2026, Chief Justice Roberts extended the time within which to file a petition for a writ of certiorari until September 17, 2026. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISION

11 U.S.C. § 362. Automatic Stay.

(d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay—

(1) for cause, including the lack of adequate protection of an interest in property of such party in interest;

…

STATEMENT

I. Legal background

Chapter 11 is designed to "offer[] individuals and businesses in financial distress a fresh start to reorganize, discharge their debts, and maximize the property available to creditors." *Truck Ins. Exch. v. Kaiser Gypsum Co.*, 602 U.S. 268, 272 (2024).[1] For a debtor who "proceeds with honesty and places virtually all its assets on the table for its creditors," bankruptcy provides powerful tools to discharge its debts. *Harrington v. Purdue Pharma L.P.*, 603 U.S. 204, 209 (2024).

In recent years, however, a growing number of wealthy corporations facing mass-tort liability have sought to gain the benefits of the Bankruptcy Code without filing for bankruptcy. *See generally* Lindsey Simon, *Bankruptcy Grifters*, 131 Yale L.J. 1154 (2022). This case concerns one such tactic, referred to as the "Texas Two-Step." Dan Levine & Mike Spector, *How a Bankruptcy "Innovation" Halted Thousands of Lawsuits from Sick Plaintiffs*, REUTERS (June 23, 2022); *see also* App. 20a n.1 (King, J., dissenting) (explaining that this is "not a pejorative moniker" but "the very term used by the lawyers who developed this scheme").

The dance always follows the same basic steps. *See* C.A. J.A. 247–48; *see generally* Michael Francus, *Texas Two-Stepping Out of Bankruptcy*, 120 Mich. L. Rev. Online 38, 40 (2022); Ralph Brubaker, *Assessing the Legitimacy of the "Texas Two-Step" Mass-Tort Bankruptcy*, 42 Bankr. L. Ltr. 1, 1 (2022). The wealthy

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[1] Unless otherwise specified, all internal quotation marks, emphases, alterations, and citations are omitted from quotations throughout.

corporation begins by reincorporating in a state (typically Texas) that allows a maneuver paradoxically called a "divisional merger." *See* Tex. Bus. Orgs. Code Ann. § 1.002(55)(A).[2] This allows a corporation to divide itself in two, allocating assets and liabilities as it wishes between the new businesses. *See* Francus, *Texas Two-Stepping*, 120 Mich. L. Rev. Online at 40 & n.14.

Using this mechanism, the wealthy corporation purports to recreate itself as a new company with the same name and almost all the same assets, but without its mass-tort liabilities. *See* Brubaker, *Assessing the Legitimacy*, 42 Bankr. L. Ltr. at 1. Those liabilities are placed in a separate shell company with minimal assets. *See id.* The company with the assets promises to pay the debts of the company with the liability. *See id.* The shell then files for bankruptcy in a favorable forum (typically the Western District of North Carolina). *See id.* at 3; *see also LTL*, 64 F.4th at 98 n.8.

The benefit is immediate. Filing for bankruptcy triggers an automatic stay of pending litigation, 11 U.S.C. § 362, often accompanied by a preliminary injunction extending to the debtor's affiliates outside of bankruptcy. The broader enterprise thus wins a stay of litigation as if it had filed for bankruptcy itself—without subjecting its profitable operating business (or any other creditors) to the rigors of Chapter 11.

The benefit is particularly acute in cases like this one, which involve asbestos litigation. The Bankruptcy Code contains a special provision, section 524(g), that allows

[2] Delaware, Pennsylvania, and Arizona allow for similar divisional mergers. *See* Francus, *Texas Two-Stepping*, 120 Mich. L. Rev. Online at 41 n.13.

debtors facing "overwhelming" asbestos liabilities to create a trust to compensate present and future victims equally from limited funds. *See Truck Ins.*, 602 U.S. at 273. Section 524(g) permits the limited release of asbestos claims against non-debtor third parties so long as they have a particular relationship with the debtor and are "liable for the conduct of, claims against, or demands on the debtor." 11 U.S.C. § 524(g)(4)(A)(ii). The section 524(g) trust then acts as a cap on liability for the entire corporate enterprise—without the risk of opt-outs. *See generally* Brubaker, *Assessing the Legitimacy*, 42 Bankr. L. Ltr. at 8–10.

Critically, however, the Bankruptcy Code has built-in protections to guard against abuse. A claimant can move to lift the automatic stay under section 362(d), or dismiss the bankruptcy petition under section 1112(b), for "cause." Since 1898, the Bankruptcy Code has "incorporated literally, or by judicial interpretation, a standard of good faith for the commencement, prosecution, and confirmation of bankruptcy proceedings." *In re Little Creek Dev. Co.*, 779 F.2d 1068, 1071 (5th Cir. 1986); *see generally* Diane B. McColl, *Good Faith in Chapter Eleven Reorganizations*, 35 S.C. L. Rev. 333 (1984).

II. Factual and procedural background

A. For six decades, CertainTeed Corporation manufactured and sold building products that contained asbestos. App. 4a. Because its products caused terminal asbestos-related diseases, including mesothelioma, the company faced significant liability. *Id.* From 2002 to 2019, CertainTeed incurred "roughly $2 billion in expenses defending and resolving over 300,000 asbestos lawsuits" and was still facing approximately 60,000 additional claims. *Id.*

Even so, CertainTeed was "a profitable going concern whose assets significantly outweighed its combined operating and asbestos liabilities." App. 29a. It had "almost $3 billion in assets and less than half that in all liabilities." C.A. J.A. 235.

CertainTeed nevertheless sought "a less expensive way of dealing with these tort liabilities." App. 29a. CertainTeed and its parent company, Compagnie de Saint-Gobain, believed that "CertainTeed could end up paying less under a § 524(g) plan than it would if it continued paying asbestos claims as they arose in the tort system." C.A. J.A. 231. And, as Saint-Gobain explained to investors, bankruptcy meant that "all asbestos litigations [would be] stayed and all related costs suspended" while such a plan was formulated. App. 28a. The problem was that, for "a profitable going concern" like CertainTeed, "a bankruptcy filing would have serious negative consequences." App. 29a. As a result, "CertainTeed never entertained a bankruptcy filing for itself." *Id.*

Instead, CertainTeed's lawyers developed a plan—code-named "Project Horizon"—to take advantage of the benefits of bankruptcy "without subjecting the entire … enterprise to [C]hapter 11." *Id.* "Rather than file … CertainTeed or CertainTeed Enterprise in bankruptcy, the Project Horizon plan was to isolate the asbestos liabilities in a single affiliated corporation and file it in [C]hapter 11." *Id.*; *see also* C.A. J.A. 229–32. Hence, the Texas Two-Step.

Under this plan, CertainTeed converted from a Delaware corporation to a Delaware limited-liability company. App. 25a. The next day, it converted from a Delaware limited-liability company to a Texas limited-liability company. *Id.* Approximately thirty minutes later, it conducted a "divisional merger" to divide itself into two Texas limited-liability companies. App. 25a–26a. The first kept CertainTeed's name as well as 97% of its viable assets and operating liabilities—"i.e., its entire ongoing business." App. 25a–27a & n.5, 63a. The second, called "DBMP," was left holding "all of [CertainTeed's] asbestos liabilities" and minimal assets.[3] App. 5a. Shortly thereafter, CertainTeed converted back to a Delaware limited-liability company while DBMP converted to a North Carolina limited-liability company. App. 26a. "All told," the companies existed under Texas law "for less than four hours." *Id.*

CertainTeed then went back to business as usual. It was "essentially a mirror image of Old CertainTeed: a fully operating company which retained all of Old CertainTeed's employees, the bulk of its assets and operations, and all of its non-asbestos creditors." C.A. J.A. 219; *see also* App. 26a. The "primary difference" from its previous incarnation "was that CertainTeed's 'bad' liabilities—i.e., its entirely manageable asbestos liabilities—were now confined to DBMP." App. 27a n.5.[4]

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[3] One of DBMP's few assets was an exterior siding and trim business that had a manufacturing plant in North Carolina. App. 5a; C.A. J.A. 233. Project Horizon "earmarked" it for DBMP to "establish venue for a chapter 11 filing in the Western District of North Carolina." C.A. J.A. 233.

[4] The majority below refers to the legal entity that existed after the divisional merger as "New" CertainTeed. *See, e.g.*, App. 5a. But, as Judge King noted in dissent, "[t]he only thing that is truly 'new' about CertainTeed—following its effectuation of the 'Texas Two-Step' in 2019—was that it had rid itself of its existing asbestos-related civil tort liabilities." App. 26a n.4. Instead of giving credence to this legal fiction, we follow Judge King's example and refer to the ongoing enterprise as "CertainTeed." *Id.*

DBMP, meanwhile, filed for bankruptcy in the Western District of North Carolina. App. 26a. It had "no employees, no operations, and few assets." C.A. J.A. 219. But it had a funding agreement with CertainTeed that "ma[de] available [CertainTeed's] and DBMP's combined resources." App. 27a. As a result, DBMP and CertainTeed "have 'steadfastly' maintained … that [DBMP] 'has the same ability to fund the costs of defending and resolving present and future asbestos claims.'" *Id.*

Filing for bankruptcy triggered the automatic stay of litigation against DBMP as the debtor. App. 6a. The court also entered a preliminary injunction to protect CertainTeed and other non-debtor affiliates from any asbestos litigation. *Id.* In response, the committee appointed to represent current claimants—and the representative appointed to protect the rights of future claimants—filed a motion to lift the automatic stay and objected to the preliminary injunction. *Id.*

On August 10, 2021, the bankruptcy court denied the committee's motion and maintained the preliminary injunction. App. 7a. The court noted its "concerns about the propriety of what Old CertainTeed wrought," but felt constrained by "controlling law and present realities." C.A. J.A. 296. Namely, the court suggested that "bad faith" was only relevant to a motion to dismiss, which the committee had not brought. C.A. J.A. 260. The court nevertheless opined that the committee would "likely fail" to establish bad faith "due to the exacting … dual requirements of 'subjective bad faith' and 'objective futility'" in Fourth Circuit precedent. *Id.* The court pointed to another Texas Two-Step case in which the wealthy corporation's "promis[e] to fund any Section

524(g) plan" meant that bankruptcy was not objectively futile. C.A. J.A. 260 n.152.

B. The two individual claimants here seek to hold CertainTeed responsible in state court for the harms that they suffered as a result of its asbestos products. Peter Bergrud and Michael Herlihy were both diagnosed with mesothelioma after working on CertainTeed's asbestos-cement pipe. App. 44a. After Mr. Bergrud died, his estate sued CertainTeed in Washington in April 2019. *Id.* Mr. Herlihy, "who is yet living and suffering," sued CertainTeed in California in August 2023. *Id.* But the bankruptcy stay put the civil lawsuits of both claimants in their home states "on ice." App. 44a–45a.

In April 2024, both claimants moved to lift the automatic stay that had been in place for several years. App. 8a. The claimants sought only to quantify (that is, "liquidate") the value of their claims. App. 54a. They argued that bad faith on the part of DBMP and CertainTeed warranted lifting the stay to allow them to do so. App. 8a.

The bankruptcy court denied the motions in brief orders incorporating its reasoning from an earlier hearing. App. 75a–78a. Although the court stated that it didn't "feel comfortable" making a conclusion of subjective bad faith "on this record or at this stage," App. 36a, it recognized that "it's, of course, true that they'd like a capped plan … to protect their affiliates," App. 37a. On the question of whether the court could find "subjective bad faith" because the debtor was "a solvent non-distressed entity," it concluded that "the answer in this Circuit at the moment appears to be no." App. 37a–38a.

C. The district court affirmed. App. 62a–74a. It recognized that "DBMP and CertainTeed LLC were created with the intent of segregating all of [CertainTeed]'s asbestos-related liability in DBMP, where the claims could be collectively resolved in a bankruptcy." App. 65a. But it found no error of law in the bankruptcy court's bad-faith analysis. App. 73a–74a. To the extent that "bad faith" was relevant to lifting an automatic stay, the court reasoned that "a finding of bad faith alone does not constitute *per se* cause for relief from a stay." App. 73a. Rather, Fourth Circuit precedent required "a showing of both objective futility and subjective bad faith." App. 73a–74a.

D. A sharply divided panel of the Fourth Circuit affirmed in a published opinion. App. 1a–18a. The majority "agree[d] with Claimants that good faith is an *implied* requirement for obtaining an automatic stay and that a showing of a lack of good faith, or bad faith, can therefore justify lifting the stay." App. 13a. But, relying on circuit precedent, the court held that "the lack-of-good-faith requirement implied in 'cause' in both § 1112(b) and § 362(d) requires the movant to show both subjective bad faith and objective futility." App. 14a.

The majority found both prongs of its bad-faith standard lacking here. App. 15a. It considered the bankruptcy to be "*presumptively* viable," App. 9a (emphasis in original), and held that the debtor's financial status was "irrelevant," App. 16a. The majority reasoned that, regardless of DBMP's "ability … to pay the asbestos claims without the need of filing a Chapter 11," DBMP faced "a different form of financial distress" in the civil tort system. App. 16a–17a. The majority concluded that it was not subjective bad faith for DBMP to seek the protections of section 524(g), and "its invocation of that procedure" was not futile. App. 15a. The majority opined—without any evidentiary showing and despite the nearly seven-year freeze on thousands of Americans' rights—that a section 524(g) trust in bankruptcy would manage DBMP's assets in a process that is "quicker, more efficient, and fairer than can be provided by continuing with widely dispersed litigation in various federal and state courts." App. 17a–18a.

Judge King "wholeheartedly" dissented, lamenting that the majority went "one step further" in cementing the Fourth Circuit's "unfortunate reputation" as "the 'safe haven' for ultra-wealthy corporations seeking to evade asbestos-related civil tort liability under the guise of the Bankruptcy Code." App. 19a, 22a, 61a.

Judge King found "ample evidence" of "bad faith" sufficient to lift the automatic stay. App. 20a. At base, DBMP was "fabricated" by "a financially healthy and fully solvent corporation (i.e., CertainTeed)" for "the express purpose of circumventing our Nation's civil tort system." App. 43a, 59a. As a result, "tens of thousands of pending civil tort suits in state and federal courts across our Country—initiated by plaintiffs who are suffering and dying from mesothelioma and other diseases caused by asbestos-riddled products of CertainTeed—are at a screeching halt." App. 42a–43a.

In a footnote, Judge King suggested that the en banc Fourth Circuit consider "the viability" of the court's standard for "good faith" given "the deluge of similar 'Texas Two-Step' bankruptcies that are yet pending in the Western District of North Carolina's bankruptcy court." App. 55a n.13 (citing *In re Bestwall LLC*, No. 17-31795 (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 en banc court, however, declined to take up the case. App. 79a–80a.

REASONS FOR GRANTING THE PETITION

I. The Fourth Circuit's decision squarely splits with the Third Circuit and deepens the division over the standard for good faith in bankruptcy.

A. The decision below creates a direct split between the Third and Fourth Circuits. The two circuits have now reached opposite conclusions on whether a non-distressed company acts in good faith when it uses the Texas Two-Step to segregate its unwanted liability in bankruptcy. These facts constitute "bad faith" in the Third Circuit, but not in the Fourth Circuit. *Compare LTL*, 64 F.4th at 110; *with* App. 15a.

Both the Third and Fourth Circuits recognize that "cause" includes a lack of good faith. In *LTL*, the Third Circuit held that "[a] lack of good faith constitutes 'cause'" to dismiss a petition under 11 U.S.C. § 1112(b). 64 F.4th at 100. And the Fourth Circuit agreed that "good faith is an *implied* requirement," the lack of which can justify lifting the automatic stay or dismissing the petition. App. 13a–14a. Both courts tied the requirement to the "equitable limitations of the Bankruptcy Code." App. 13a; *see LTL*, 64 F.4th at 100.

But the two circuits diverged from there. The Third Circuit's standard asks "(1) whether the petition serves a valid bankruptcy purpose; and (2) whether it is filed merely to obtain a tactical litigation advantage." *LTL*, 64 F.4th at 100–01. The Fourth Circuit, by contrast, "requires the movant to show both subjective bad faith and objective futility." App. 14a. Subjective bad faith "focuses on … whether a petitioner actually *intends* to use the applicable provision for its intended purpose." App. 14a. And for objective futility, the court considered whether "there was a reasonable probability of success" in the pursuit of its purpose. *See* App. 15a.[5]

The two circuits also disagree on whether financial distress is dispositive or irrelevant. In the Third Circuit, "a valid bankruptcy purpose assumes a debtor in financial distress." *LTL*, 64 F.4th at 101. As a result, "a debtor who does not suffer from financial distress cannot demonstrate its Chapter 11 petition serves a valid bankruptcy purpose supporting good faith." *Id.*

According to the Fourth Circuit, however, the "fact" that a debtor is a "profitable, non-distressed" company is "irrelevant to their bad faith argument." App. 16a. Instead, in the Fourth Circuit, a non-distressed debtor acts in good faith if it "seek[s] to invoke the § 524(g) process authorized by Congress." App. 15a. Absent an argument challenging the use of section 524(g), the Fourth Circuit considered the Chapter 11 proceeding to be "*presumptively* viable." App. 9a (emphasis in original).

Because of these divergent standards, the two courts reached opposite conclusions on nearly identical facts. The Third Circuit concluded that a shell company created in the Texas Two-Step (Johnson & Johnson's offshoot, LTL) was not in financial distress and, as a result, could not show that "its petition served a valid bankruptcy purpose and was filed in good faith." *LTL*, 64 F.4th at 110. The majority here concluded that, irrespective of its lack of

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[5] The burden of proof flips between the two courts. The Third Circuit places "the burden to establish good faith … on *the debtor*." *LTL*, 64 F.4th at 100 (emphasis added). The Fourth Circuit, on the other hand, "requires *the movant* to show both subjective bad faith and objective futility." App. 14a (emphasis added).

financial distress, the shell company created in the Texas Two-Step (CertainTeed's offshoot, DBMP) was "legitimately seeking to invoke the § 524(g) process," which did not constitute bad faith. App. 15a–16a.

B. Beyond this clear and intractable split with the Third Circuit, the Fourth Circuit's decision also deepens its division with other circuits over the standard for good faith in bankruptcy.

First, the Fourth Circuit's additional requirement of "objective futility" directly conflicts with the Eighth and Eleventh Circuits. *See In re Cedar Shore Resort, Inc.*, 235 F.3d 375, 381 (8th Cir. 2000); *In re Phoenix Piccadilly, Ltd.*, 849 F.2d 1393, 1395 (11th Cir. 1988); *see generally* 7 *Collier on Bankruptcy* ¶ 1112.07[5] (16th ed. 2026). The Eighth Circuit "decline[d] to adopt the [Fourth Circuit's] test and h[e]ld that a Chapter 11 petition may be dismissed for bad faith alone where the circumstances warrant." *Cedar Shore*, 235 F.3d at 381. And the Eleventh Circuit has explained that "[t]he possibility of a successful reorganization cannot transform a bad faith filing into one undertaken in good faith." *Phoenix Piccadilly*, 849 F.2d at 1395; *see also Carolin Corp. v. Miller*, 886 F.2d 693, 700–01 (4th Cir. 1989) (noting disagreement).

Second, the Fourth Circuit's dismissive treatment of financial distress conflicts with circuits beyond the Third.[6]

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[6] In the context of subjective bad faith, the Fourth Circuit previously suggested that a debtor without "financial difficulties" had "no demonstrable need to reorganize when it filed [its] petition," which, "alone[,] may justify dismissal." *In re Premier Auto. Servs., Inc.*, 492 F.3d 274, 280 (4th Cir. 2007); *see generally* 7 *Collier on Bankruptcy* ¶ 1112.07[5][a][i]. In its decision here, however, the Fourth Circuit made clear that financial distress is "irrelevant" to its good-faith analysis. App. 16a.

The First Circuit requires a debtor acting in good faith to be "experiencing some type of financial distress." *In re Capitol Food Corp.*, 490 F.3d 21, 25 (1st Cir. 2007) (quoting *In re Integrated Telecom Express, Inc.*, 384 F.3d 108, 122 (3d Cir. 2004)). The Fifth and Eighth Circuits likewise consider the "debtor's financial condition" as part of their standards for good faith. *Little Creek*, 779 F.2d at 1072; *accord Cedar Shore*, 235 F.3d at 379 (citing *Little Creek*). And in the Eleventh Circuit, one of the factors that demonstrates an "intent to abuse the judicial process and the purposes of the reorganization provisions" is "whether the debtor is financially distressed." *In re Dixie Broad., Inc.*, 871 F.2d 1023, 1027 (11th Cir. 1989).

C. Indeed, even before the decision below, courts and commentators recognized that the Fourth Circuit had "the most … stringent standard" for bad faith. *See* Brubaker, *Assessing the Legitimacy*, 42 Bankr. L. Ltr. at 3; *see also In re Bestwall LLC*, 71 F.4th 168, 182 (4th Cir. 2023) (recognizing its standard as "more comprehensive" than that applied in the Third Circuit).

"Perhaps not by coincidence then," every company to attempt the Texas Two-Step has initially filed in the Western District of North Carolina. *LTL*, 64 F.4th at 98 n.8. The goal of this blatant forum shopping is "not to obtain a particular judge, but to benefit from the Fourth Circuit's strict standard for dismissing a case for lack of good faith." Francus, *Texas Two-Stepping*, 120 Mich. L. Rev. Online at 47. Having denied en banc review in this case, the Fourth Circuit does not seem inclined to revisit its standard.

When one circuit cements itself as such an outlier, further percolation is unlikely. No savvy company will be incentivized to file anywhere else. Indeed, the only reason that the direct split emerged with the Third Circuit is because *LTL*, which was initially filed in the Western District of North Carolina, was transferred to the District of New Jersey. *See* 64 F.4th at 97.

II. Only this Court can correct course on this exceptionally important issue.

CertainTeed is not alone in blatantly manipulating its corporate form to leverage Chapter 11 as a tool to remove thousands of claims from the civil tort system. And given its success here, more will surely follow. To safeguard the integrity of the bankruptcy system and protect the "deep-rooted historic tradition that everyone should have [their] own day in court," *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846 (1999), this Court should grant review.

The effect—and, indeed, goal—of the Texas Two-Step is to stay tort litigation in the state and federal courts and channel those claims to the company's preferred forum of bankruptcy. *See* App. 59a; *see also* App. 51a–52a. Through bankruptcy's automatic stay and the section 524(g) trust, the wealthy company delays, and ultimately denies, tort victims their day in court.

In this way, the section 524(g) remedy in bankruptcy is akin to a mandatory settlement-only class action. To "aggregat[e] claims … made by numerous persons against a fund insufficient to satisfy all claims," a court can certify a class whose members have no right to withdraw. *Ortiz*, 527 U.S. at 833–34. Similarly, a section 524(g) fund allows a company facing "overwhelming liability" to "channel[] all present and future claims" into a trust to ensure that its remaining assets are equitably distributed. *Truck Ins.*, 602 U.S. at 273–74; *see also* H.R. Rep. No. 103-835, at 41 (1994), *as reprinted in* 1994 U.S.C.C.A.N. 3340, 3350.

The two forms of relief thus raise similar concerns. Both "deny[] any opportunity for withdrawal of class members [or claimants] whose jury trial rights will be compromised, whose damages will be capped, and whose payments will be delayed." *See Ortiz*, 527 U.S. at 860. In *Ortiz*, this raised "serious constitutional concerns" in the absence of proof that a "limited fund" made a class action necessary. *Id.* at 845–46, 860. The same concerns require, at the very least, the existence of a valid bankruptcy to justify the use of Chapter 11.

The Texas Two-Step subverts the "simple bargain" that animates the Bankruptcy Code—that Chapter 11's remedies are available to a debtor that "proceeds with honesty" and subjects itself and its assets to the bankruptcy process. *Purdue Pharma*, 603 U.S. at 209; *see also* Melissa B. Jacoby, *Shocking Business Bankruptcy Law*, 131 Yale L.J.F. 409, 411 (2021). When an ongoing enterprise creates a shell company to take its liabilities into bankruptcy in its stead, that bargain breaks down. As Judge King explained in dissent, the Texas Two-Step allows well-resourced tortfeasors to discharge their liability in the bankruptcy system without subjecting themselves to "any of the scrutiny, transparency, and risk that a Chapter 11 bankruptcy should entail." App. 43a.

It is perhaps unsurprising, then, to see a chorus of commentators decrying this scheme. *See, e.g.*, Francus, *Texas Two-Stepping*, 120 Mich. L. Rev. Online at 44 (characterizing it as "a textbook fraudulent transfer" as well as "a textbook bad faith bankruptcy"); Brubaker, *Assessing the Legitimacy*, 42 Bankr. L. Ltr. at 8 (explaining how this "bald-faced 'litigation tactic' … systematically prejudices mass-tort claimants"); Laura S. Rossi, *The Texas Two-Step: How Corporate*

Debtors Manipulate Chapter 11 Reorganizations to Dance Around Mass Tort Liability, 39 Emory Bankr. Dev. J. 585 (2023); Katharine H. O'Neill, *Dirty Dancing: Is the Texas Two-Step a Bad Faith Filing*, 91 Fordham L. Rev. 2471 (2023).

Previous petitions have brought different facets of this recurring problem to the Court's attention. *See Off. Comm. of Asbestos Claimants v. Bestwall LLC*, No. 23-675 (Dec. 20, 2023); *Esserman v. Bestwall LLC*, No. 23-702 (Dec. 20, 2023); *Off. Comm. of Asbestos Claimants of Bestwall LLC v. Bestwall LLC*, No. 25-1013 (Feb. 20, 2026). And the recent oral argument in *Purdue Pharma* provoked questioning by Justice Barrett about "cases like the Johnson & Johnson litigation" and "[t]he Texas two-step." Transcript of Oral Argument at 52–53, *Purdue Pharma*, 603 U.S. 204 (No. 23-124). Although this Court recently denied certiorari in *Bestwall*, No. 25-1013 (another case where the Fourth Circuit denied en banc review), this case presents a far narrower issue: Does a debtor's pursuit of bankruptcy as part of a Texas Two-Step lack good faith for purposes of section 362(d)? The petition here narrowly focuses on that question—without added constitutional or jurisdictional complexity—and thus allows the Court, for the first time since *Purdue Pharma*, to weigh in on the propriety of the scheme.

To be sure, the scheme may have other flaws, not least of which is that it may be found to constitute a fraudulent conveyance. *See* Francus, *Texas Two-Stepping*, 120 Mich. L. Rev. Online at 44. But, because of the application of the automatic stay, claimants remain in limbo while such challenges are litigated. *See id.* (noting that the "difficulty" of such claims "is in the *delay*"). For this reason, resolving the good-faith question on this posture—a motion to lift an automatic stay so that civil claims can proceed in the meantime—is all the more important.

III. The decision below is wrong.

The Fourth Circuit not only splintered from its sister circuits on this important issue; it also erred on the merits. As framed by the majority below, the legal issue in this case is "narrow"—"whether the bankruptcy court properly denied the Claimants' motion for relief from the automatic stay, filed pursuant to 11 U.S.C. § 362(d)." App. 9a. Answering that question required the court to decide whether the undisputed facts here qualify as "bad faith" such that there is statutory "cause" to lift the stay. The answer has to be yes.

Section 362(d) of the Bankruptcy Code provides mandatory relief from an automatic stay for "cause." Specifically, "[o]n request of a party in interest and after notice and a hearing, the court *shall* grant relief from the [automatic] stay … for cause." 11 U.S.C. § 362(d) (emphasis added). Section 362(g) places the burden of proof for "all" issues, except "the issue of the debtor's equity in property," on the party opposing a motion to lift the stay.

Like the parallel use of this term in the provision for dismissing a petition, 11 U.S.C. § 1112(b), "cause" has long been understood to include a lack of "good faith." *Little Creek*, 779 F.2d at 1071; *see generally* 3 *Collier on Bankruptcy* ¶ 362.07[7][a] (16th ed. 2026); 7 *Collier on Bankruptcy* ¶ 1112.07.[7] This Court has assumed as much.

[7] "[I]dentical words and phrases within the same statute should normally be given the same meaning." *Monsalvo v. Bondi*, 604 U.S. 712, 726 (2025). Accordingly, there is "no substantive difference

See, e.g., *Raleigh v. Ill. Dep't of Rev.*, 530 U.S. 15, 25 (2000) (suggesting that a bankruptcy stay could be lifted for "a lack of good faith in attempting to avoid tax proceedings").

"Good faith," a flexible concept rooted in equity, allows courts to police the use of the Bankruptcy Code for "the rehabilitative purpose for which Chapter 11 was designed." *See LTL*, 64 F.4th at 101. That purpose, at base, is to provide "individuals and businesses in financial distress a fresh start to reorganize, discharge their debts, and maximize the property available to creditors." *Truck Ins.*, 602 U.S. at 272. The "fresh start" offered by bankruptcy assumes an "honest but unfortunate debtor." *Marrama*, 549 U.S. at 367; *see also Cohen v. de la Cruz*, 523 U.S. 213, 217 (1998).

"Congress designed Chapter 11 to give those businesses teetering on the verge of a fatal financial plummet an opportunity to reorganize on solid ground and try again, not to give profitable enterprises an opportunity to evade contractual or other liability." *LTL*, 64 F.4th at 103 (quoting *Cedar Shore*, 235 F.3d at 381); *see also Furness v. Lilienfield*, 35 B.R. 1006, 1009 (D. Md. 1983). For that reason, this Court has suggested that "attempting to avoid" liability in another proceeding "could well" constitute a "lack of good faith" sufficient for "cause." *Raleigh*, 530 U.S. at 25.

Indeed, in *Shapiro v. Wilgus*—the case that originated "[t]he concept of 'good faith' in the context of bankruptcy," *In re Wiggles*, 7 B.R. 373, 375 (Bankr. N.D. Ga. 1980)—

between the cause requirement for dismissal of a petition under Section 1112(b) and the cause requirement for relief from an automatic stay under Section 362(d)(1)." *In re Laguna Assocs. Ltd.*, 30 F.3d 734, 737–38 (6th Cir. 1994).

this Court distinguished between a valid reorganizational purpose and an invalid attempt to evade liability. There, a Pennsylvanian was "unable to pay his debts as they matured," but he "believed that he would be able to pay them in full" if given more time. *Shapiro*, 287 U.S. at 352. Because Pennsylvania law didn't permit the appointment of a receiver, he formed a Delaware corporation and, on the same day, conveyed all his property to the new company in exchange for a promise to pay back his debts. *See id.* Three days later, a federal court put the company in receivership and enjoined claims by its creditors. *See id.* at 352–53.

According to this Court, the debtor's scheme was incompatible with equitable principles of good faith. *Id.* at 357. The "aim of this receivership," Justice Cardozo explained for the Court, was "not to administer the assets of a corporation legitimately conceived for a normal business purpose," but to put the debt "in such a form and place that levies would be averted"—"a purpose which has been condemned in Anglo-American law since the Statute of Elizabeth." *Id.* at 353–55. It did not matter that the debtor intended only to delay creditors long enough to pay them in full, or that he "acted in the genuine belief" that the plan was "fair and lawful." *Id.* at 357. The receivership was "part and parcel of a scheme" in which the "judicial remedy was to supply a protective cover for a fraudulent design." *Id.* at 355. It therefore lacked the "scrupulous good faith" that equity requires. *See id.* at 357.

So, too, here. DBMP has maintained, "throughout these proceedings, that it is able to pay all asbestos creditors in full outside of bankruptcy." App. 30a (King, J., dissenting). Its funding agreement with CertainTeed guarantees as much. App. 50a. This lack of financial distress suggests that DBMP filed for bankruptcy without a valid reorganizational purpose. And, indeed, CertainTeed has been quite frank that its intent was to find "a less expensive way of dealing with these tort liabilities." App. 29a; *see also* App. 59a. The whole goal of Project Horizon was "[t]o facilitate [CertainTeed's] ability to pursue a § 524(g) resolution in bankruptcy without subjecting the entire … enterprise to Chapter 11." App. 29a. In this way, CertainTeed restructured its corporate form to obtain the benefits of bankruptcy while avoiding its rigors. Such a manipulation of the bankruptcy system is "textbook bad faith." Francus, *Texas Two-Stepping*, 120 Mich. L. Rev. Online at 44.

The majority reasoned, to the contrary, that CertainTeed's avowed goal of using section 524(g) somehow validates its scheme. It opined that "[t]he § 524(g) process is quicker, more efficient, and fairer than can be provided by continuing with widely dispersed litigation in various federal and state courts." App. 17a–18a. But that is a policy determination for Congress, not the courts. *See* App. 59a (King, J., dissenting) (characterizing the majority as engaging in "a rather alarming type of extra-legislative judicial 'tort reform'"). Judges "are not free to devise an ideal system for adjudicating these claims." *Ortiz*, 527 U.S. at 865 (Rehnquist, C.J., concurring). Notably, those tasked with devising such a system have renounced this very tactic. *See* Brief for Sen. Richard Durbin, Sen. Sheldon Whitehouse, and Sen. Josh Hawley as Amici Curiae Supporting Petitioner, *Off. Comm. of Asbestos Claimants of Bestwall LLC v. Bestwall LLC* (No. 25-1013) (Mar. 25, 2026).

Regardless, the majority's logic skips a critical step. Section 524(g) is a *remedy* for an otherwise valid bankruptcy filing. *See Integrated Telecom*, 384 F.3d at 128. It shields a company's "reorganization effort"—assuming a valid bankruptcy purpose—"from an onslaught of crippling lawsuits." *Truck Ins.*, 602 U.S. at 274 (quoting *Kane v. Johns-Manville Corp.*, 843 F.2d 636, 640 (2d Cir. 1988)). It does not provide a valid bankruptcy purpose where one is otherwise lacking. After all, CertainTeed could have pursued a section 524(g) remedy by filing for bankruptcy, and accepting Chapter 11's concomitant requirements, itself. Using the Texas Two-Step to obtain the benefit, while avoiding the burdens, of bankruptcy constituted bad faith. The Fourth Circuit erred in holding otherwise.

CONCLUSION

This Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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