No. 26-394

IN THE

Supreme Court of the United States

MICHAEL HERLIHY, *et al.*,

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 PUBLIC JUSTICE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

MATTHEW MELAMED
KELLER ROHRBACK L.L.P.
180 Grand Avenue,
Suite 1380
Oakland, CA 94612

ANDRE M. MURA
SARAH ELIZABETH HILLIER
GIBBS MURA LLP
1111 Broadway, Suite 2100
Oakland, CA 94607

LAURA GERBER
Counsel of Record
PATRICK MARRIOTT
KELLER ROHRBACK L.L.P.
1201 Third Avenue,
Suite 3400
Seattle, WA 98101
(206) 623-1900
lgerber@kellerrohrback.com

Counsel for Amicus Curiae

121374

COUNSEL PRESS
A Proceed Service
The Appellate Experts®
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

Page

TABLE OF CONTENTS. i

TABLE OF CITED AUTHORITIES iii

INTERESTS OF AMICUS. 1

INTRODUCTION AND SUMMARY OF ARGUMENT 1

ARGUMENT. 5

I. CertainTeed's asbestos products have gravely injured tens of thousands of ordinary people 5

II. CertainTeed's Texas Two-Step lacks the good faith the Bankruptcy Code requires and that failing is "cause" to lift the automatic stay. 7

III. The only creditors CertainTeed's Texas Two-Step burdens are its tort victims 11

IV. The Fourth Circuit's allowance of bad-faith bankruptcies has created a circuit split that this Court must resolve 14

Table of Contents

Page

V. Unless this Court grants certiorari, corporate tortfeasors seeking to avoid financial accountability will continue to weaponize the Fourth Circuit's precedent against the people they harmed 18

CONCLUSION 21

TABLE OF CITED AUTHORITIES

Page

Cases

Burch v. CertainTeed Corp.,
34 Cal. App. 5th 341 (2019) 13

Carolin Corp. v. Miller,
886 F.2d 693 (4th Cir. 1989). 8

Craft v. Ahold Delhaize US Inc. et al.,
No. 24-X-24-000005 (Md. Cir. Ct.,
Baltimore City Dec. 22, 2025) 17

Czyzewski v. Jevic Holding Corp.,
580 U.S. 451 (2017) 7, 13, 20

Emerson v. Johnson & Johnson,
Case No. 190509334 (Pa. Commw. Ct.,
Phila. Cnty. Feb. 13, 2026) 17

Furness v. Lilienfield,
35 B.R. 1006 (D. Md. 1983) 10

Grogan v. Garner,
498 U.S. 279 (1991) 10

Harrington v. Purdue Pharma L.P.,
603 U.S. 204 (2024). 4

Houghton Carley v. Johnson & Johnson,
Case No. 62-CV-25-2358 (Minn. Dist. Ct.,
Ramsey Cnty. Dec. 19, 2025) 16

Cited Authorities

Page

In re 3M Combat Arms Earplug Prods. Liab. Litig.,
No. 3:19MD2885, 2022 WL 17853203
(N.D. Fla. Dec. 22, 2022) 17

In re Aearo Techs. LLC,
No. 22-02890-JJG-11, 2023 WL 3938436
(Bankr. S.D. Ind. June 9, 2023) 17

In re Aldrich Pump LLC,
No. 20-30608, 2023 WL 9016506
(Bankr. W.D.N.C. Dec. 28, 2023) 19

In re Alexandra Trust,
526 B.R. 668 (Bankr. N.D. Tex. 2015) 15

In re Arnold,
806 F.2d 937 (9th Cir. 1986) 8, 9

In re Bestwall LLC,
71 F.4th 168 (4th Cir. 2023) 1, 18

In re Cedar Shore Resort, Inc.,
235 F.3d 375 (8th Cir. 2000) 8

In re Duvar Apt., Inc.,
205 B.R. 196 (B.A.P. 9th Cir. 1996) 15

In re Integrated Telecom Express, Inc.,
384 F.3d 108 (3d Cir. 2004) 8, 10

Cited Authorities

Page

In re Laguna Assocs. Ltd. P'ship,
147 B.R. 709 (Bankr. E.D. Mich. 1992) 15

In re Laguna Assocs. Ltd. P'ship,
30 F.3d 734 (6th Cir. 1994). 8

In re Little Creek Dev. Co.,
779 F.2d 1068 (5th Cir. 1986). 8, 14

In re LTL Mgmt., LLC,
64 F.4th 84 (3d Cir. 2023) 1, 3, 5, 6, 9, 15, 16, 18

In re MacInnis,
235 B.R. 255 (S.D.N.Y. 1998). 14, 15

In re RAD Props., Inc.,
84 B.R. 827 (Bankr. M.D. Fla. 1988) 15

In re Robbins,
964 F.2d 342 (4th Cir. 1992) 7

In re SGL Carbon Corp.,
200 F.3d 154 (3d Cir. 1999) 16

In re Tehum Care Services, Inc.,
No. 23-90086 (Bankr. S.D Tex.) 1

In re Wellpath Holdings, Inc.,
No. 24-90533 (Bankr. S.D. Tex.). 1

Page

Mack Trucks, Inc. v. Coates,
No. 2709, 2018 WL 2175932
(Md. Ct. Spec. App. May 11, 2018) 12

Maritime Elec. Co. v. United Jersey Bank,
959 F.2d 1194 (3d Cir. 1991). 7

Ortiz v. Fibreboard Corp.,
527 U.S. 815 (1999) 12

Raleigh v. Ill. Dep't of Revenue,
530 U.S. 15 (2000). 8, 14

Shapiro v. Wilgus,
287 U.S. 348 (1932). 2, 3, 13

Truck Ins. Exch. v. Kaiser Gypsum Co.,
602 U.S. 268 (2024). 7, 9, 10, 11

Williams v. U.S. Fid. & Guar. Co.,
236 U.S. 549 (1915) 9

Statutes and Other Authorities

11 U.S.C. § 362(a)(1). 7

11 U.S.C. § 362(d). 3, 11

11 U.S.C. § 362(g)(2) 10

11 U.S.C. § 524(g) 10, 12

Cited Authorities

Page

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) 20

Press Release, 3M, *3M Announces Combat Arms Settlement* (Aug. 29, 2023), https://investors.3m.com/news-events/press-releases/detail/1797/3m-announcescombat-arms-settlement 18

Rudzik, *A Priority Is a Priority Is a Priority—Except When It Isn't*, 34 Am. Bankr. Inst. J. 16, 79 (2015) 20

Supreme Court Rule 37.2 1

INTERESTS OF AMICUS

Public Justice[1] is a national public interest legal organization that specializes in pursuing justice for victims of corporate and government wrongdoing. The organization maintains an Access to Justice Project that pursues litigation and other advocacy to remove procedural obstacles that unduly restrict those who have been harmed from seeking redress in the civil court system.

Consonant with its mission, Public Justice has engaged in significant advocacy efforts against abuse of the bankruptcy system to evade the civil justice system, which hinders and delays justice for victims of corporate wrongdoing. For example, Public Justice has authored multiple amici curiae briefs urging courts to prevent corporations from misusing the bankruptcy system to avoid tort liability, including in *In re LTL Management, LLC, In re Tehum Care Services, Inc.*, *In re Wellpath Holdings*, and *In re Bestwall LLC*.

INTRODUCTION AND SUMMARY OF ARGUMENT

Nearly a century ago, this Court condemned a debtor's corporate reorganization that was designed to place his assets beyond the reach of certain creditors, denouncing

1. No counsel for a party authored this brief in whole or in part and no person other than the amicus or its counsel made any monetary contribution to its preparation or submission. Both parties received timely notice of intent to file this brief, pursuant to Rule 37.2.

it as incompatible with "scrupulous good faith" and as one of a species of evasive debtor tactics that had been "condemned in Anglo-American law since the Statute of Elizabeth [of 1571]." *Shapiro v. Wilgus*, 287 U.S. 348, 354, 357 (1932). CertainTeed's "Texas Two-Step" is another iteration of these evasive tactics, which are incompatible with good faith.

CertainTeed's Texas Two-Step singles out a particular group of its own creditors: working men and women—many of whom earned their living with their hands and who contracted fatal diseases from CertainTeed's products—and their families. The company devised its maneuver (code-named "project Horizon") to achieve a "less expensive way of dealing with these tort liabilities." App. 29a.

For six decades, CertainTeed manufactured asbestos building products. And since the 1970s, the company answered in the tort system for the cancers its products caused. Between 2002 and 2019, CertainTeed incurred "roughly $2 billion in expenses defending and resolving over 300,000 asbestos lawsuits, and it paid approximately $1.5 billion of that sum out of pocket. . . ." App. 4a. Despite those expenditures, incurred because its products cause cancer, CertainTeed remains a profitable, solvent, going concern.

Nevertheless, CertainTeed implemented project Horizon so that it could enjoy the privileges and protections of our Nation's bankruptcy system "without subjecting the entire . . . enterprise to [C]hapter 11." App. 29a. This Court should not countenance such efforts "to bring [a] corporation into being with the hindrance and

delay of [its creditors] the very aim of its existence." *Shapiro*, 287 U.S. at 356.

CertainTeed leveraged the Fourth Circuit's views on bankruptcy to thwart its victims' access to recovery. Using a "divisional merger" under Texas law, CertainTeed split itself in two. One entity, a shell company christened DBMP—which has no employees, no operations, and few assets—was assigned all of CertainTeed's asbestos liabilities. App. 24a. DBMP existed under Texas law for only four hours before being converted into a North Carolina limited liability company. App. 26a. As planned, DBMP was then sent into the Western District of North Carolina to file for bankruptcy under Chapter 11 because the Fourth Circuit maintains unique views on the Bankruptcy Code's requirement of good faith under Section 362(d). Meanwhile, the second entity kept the CertainTeed name, CertainTeed's employees, and nearly all the company's assets. *Id*. The "new" CertainTeed could go about its business, unencumbered by the obligations it would face had it entered a Chapter 11 bankruptcy.

This case presents a single and recurring question of federal law: does a debtor's use of the "Texas Two-Step" scheme lack good faith, such that "cause" exists to lift the automatic stay under 11 U.S.C. § 362(d)? The courts of appeals are divided. The Third Circuit says yes.[2] The Fourth Circuit says no.

2. *In re LTL Mgmt., LLC*, 64 F.4th 84, 103 (3d Cir. 2023) (dismissing bankruptcy petition and noting that "the availability of certain debtor-favored Code provisions assumes the existence of a valid bankruptcy" and that "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" (citation modified)).

In the Fourth Circuit, a solvent, non-distressed corporation can obtain bankruptcy's benefits without shouldering its concomitant burdens. That result fundamentally unsettles bankruptcy's "simple bargain"—the premise that its tools are reserved for a debtor that "proceeds with honesty" and "places virtually all its assets on the table for its creditors," *Harrington v. Purdue Pharma L.P.*, 603 U.S. 204, 209 (2024).

Even though the Fourth Circuit's interpretation stands alone, it serves as an open invitation. Unless this Court intervenes, therefore, the Fourth Circuit's endorsement of the Texas Two-Step will be the *de facto* law of the land. As occurred in this case, companies can incorporate outside the Fourth Circuit, then convert within hours to a limited liability company in the Fourth Circuit to seek its unique protection. Because any corporation can avail itself of the Fourth Circuit's rule—at minimal cost, given that only a shell company must convert its form into an LLC in the Fourth Circuit—the Fourth Circuit's rule will become the national default. *Id.* Other corporate tortfeasors will Texas Two-Step their way to the Fourth Circuit. Those companies will go on paying their shareholders and commercial creditors in the ordinary course, while casting aside one class of creditors: their tort victims and those victims' families. The human cost of that outcome is untenable.

Amicus writes to underscore a simple point: the Texas Two-Step scheme CertainTeed executed imposes real harm on working people. Those people are not abstractions. Bankruptcy's extraordinary tools should remain available to honest debtors pursuing a valid bankruptcy purpose. They should not become shields for

sophisticated, financially healthy corporate tortfeasors. Nor should a debtor be permitted to single out one class of creditors, the human victims of its tortious conduct, to delay or deny them recovery. As Judge King observed in dissent, the decision below blesses "a rather alarming type of extra-legislative judicial 'tort reform.'" App. 59a.

The Fourth Circuit has become the Circuit where companies seek bankruptcy protection for similar schemes. *See In re LTL,* 64 F.4th at 98 n.8 (noting that "debtors formed by divisional mergers and bearing substantial [tort] liabilit[ies] seem to prefer filing in the Fourth Circuit"). Because the issue is unlikely to arise in other Circuits the split will not continue to develop. This Court should grant certiorari and resolve the circuit split.

ARGUMENT

I. CertainTeed's asbestos products have gravely injured tens of thousands of ordinary people.

It is worth pausing to state plainly who the creditors in this bankruptcy are.

Peter Bergrud served our country in the United States Air Force. He afterward made his living in the construction trade. For many years he cut, beveled, and drilled the asbestos-cement pipe that CertainTeed manufactured and sold. App. 44a. He was unaware that the dust around him would one day prove fatal. In 2019, Mr. Bergrud was diagnosed with mesothelioma. He died that same year. An examination after his death confirmed the cause: asbestos in his lung tissue. His estate sued CertainTeed in 2019. *Id.*

Michael Herlihy came to the same disease by a different road. From the mid-1980s to the mid-1990s he worked for a California company that sharpened saw blades. Its principal customer was a CertainTeed plant, where the company manufactured asbestos-cement pipe for the better part of three decades. While sharpening the blades that had cut that CertainTeed pipe, Mr. Herlihy "regularly breathed 'dust cake'" laden with asbestos. *Id*. He was diagnosed with mesothelioma in March 2023. Mr. Herlihy and his wife, Ann Herlihy, sued CertainTeed in 2023. *Id.*

Sadly, Mr. Bergrud and Mr. and Mrs. Herlihy are representative, not exceptional. Theirs are among the tens of thousands of claims related to CertainTeed's asbestos products, which have been proven to cause mesothelioma, an "incurable cancer caused almost exclusively by asbestos exposure," and other fatal diseases. App. 44a.

Because of CertainTeed's maneuver, roughly 60,000 such claims are now held in abeyance across the country; some 32,000 of them were in active litigation when the automatic stay went into place. App. 42a–43a. Meanwhile, the people suffering from asbestos-related harms from their interaction with CertainTeed's products continue to die. The bankruptcy affects only the "ordinary and hardworking Americans who have spent their workdays installing drywall, laying insulation, cutting pipe, and then simply returning to their homes." App. 45a. CertainTeed, meanwhile, carries on its business, earns its profits, and pays its shareholders and commercial creditors in the usual way. DBMP's creditors are either gravely sick or are the families of those who have already died—all as a result

of exposure to CertainTeed's asbestos products. Only asbestos creditors are made to wait—many of them, as the record shows, dying before their claims are adjudicated. That is the human cost of the judgment below. And it is reason enough for this Court's review.

II. CertainTeed's Texas Two-Step lacks the good faith the Bankruptcy Code requires and that failing is "cause" to lift the automatic stay.

Ordinarily, bankruptcy functions 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). Among the most powerful protections the Bankruptcy Code affords debtors that pursue bankruptcy for a valid purpose is the automatic stay. *See* 11 U.S.C. § 362(a)(1).

The stay exists for a simple reason: it gives the bankruptcy court the "opportunity to harmonize the interests of both debtor and creditors while preserving the debtor's assets for repayment and reorganization. . . ." App. 10a (quoting *In re Robbins*, 964 F.2d 342, 345 (4th Cir. 1992)). For the honest debtor struggling to pay its debts, the stay is a reprieve. *See Maritime Elec. Co. v. United Jersey Bank*, 959 F.2d 1194, 1204 (3d Cir. 1991) (the stay is intended to provide the financially distressed debtor "a breathing spell from creditors"). When reorganizing under Chapter 11, the stay provides such a debtor with a chance to marshal its assets and treat its creditors equitably while "keep[ing] the business operating as a going concern." *Czyzewski v. Jevic Holding Corp.*, 580 U.S. 451, 455 (2017).

In addition to the automatic stay, bankruptcy affords debtors other tools designed to achieve equitable results, such as injunctive relief limiting—and often halting—claims against related non-bankrupt third parties. Such protections come at a steep price to the creditors who are forced to wait. Accordingly, they are available only to debtors that pursue bankruptcy in good faith. *See Raleigh v. Ill. Dep't of Revenue*, 530 U.S. 15, 25 (2000). The courts of appeals have applied this rule for decades. *See, e.g.*, *In re Little Creek Dev. Co.*, 779 F.2d 1068, 1071–72 (5th Cir. 1986); *In re Laguna Assocs. Ltd. P'ship*, 30 F.3d 734, 737–38 (6th Cir. 1994); *In re Arnold*, 806 F.2d 937, 939 (9th Cir. 1986).

The good faith requirement permeates the Bankruptcy Code. *Carolin Corp. v. Miller*, 886 F.2d 693, 698–700 (4th Cir. 1989). And courts across the country have concluded that the Code's good faith requirement serves to balance debtors' and creditors' competing interests. *See, e.g.*, *In re Little Creek*, 779 F.2d at 1071–72; *In re Cedar Shore Resort, Inc.*, 235 F.3d 375, 379 (8th Cir. 2000) (collecting cases across circuit courts holding "that the Code contains an implicit good faith requirement."). As the Third Circuit explained, "the good faith requirement ensures that the Bankruptcy Code's careful balancing of interests is not undermined by petitioners whose aims are antithetical to the basic purposes of bankruptcy. . . ." *In re Integrated Telecom Express, Inc.*, 384 F.3d 108, 119 (3d Cir. 2004); *see In re Little Creek*, 779 F.2d at 1072 (Good faith "prevents abuse of the bankruptcy process by debtors whose overriding motive is to delay creditors without benefitting them in any way or to achieve reprehensible purposes").

Two inquiries are "particularly relevant" to whether a debtor has pursued bankruptcy in good faith: "(1) whether the petition serves a valid bankruptcy purpose; and (2) whether it is filed merely to obtain a tactical litigation advantage." *In re LTL*, 64 F.4th at 100–01 (citation modified). For example, evaluating whether a debtor faces or anticipates facing financial distress is one component of the good-faith requirement. *See In re Arnold*, 806 F.2d at 939 (a debtor's "financial status" is a key consideration when evaluating the "existence of good faith"); *In re LTL*, 64 F.4th at 109 (dismissing bankruptcy for lack of good faith because "the debtor was in no financial distress"). This Court has repeatedly stated that assisting debtors in financial distress is a central purpose of bankruptcy. *See, e.g.*, *Williams v. U.S. Fid. & Guar. Co.*, 236 U.S. 549, 554–55 (1915); *Truck Ins.*, 602 U.S. at 272.

But Neither CertainTeed, a multibillion-dollar conglomerate, nor DBMP, its liability shell company, faces or anticipates financial distress. CertainTeed is a profitable going concern whose assets significantly outweigh its combined operating and asbestos liabilities—including those incurred by creditors here. App. 29a. Despite having few assets of its own, DBMP has an uncapped funding agreement obligating CertainTeed to pay the asbestos liabilities it assigned to DBMP. App. 27a. That funding agreement makes DBMP just as capable of paying them as CertainTeed itself; DBMP has "admitted, throughout these proceedings, that it is able to pay all asbestos creditors in full outside of bankruptcy." App. 30a. CertainTeed made plain what it sought: not survival or reorganization, but "a less expensive way of dealing with these tort liabilities," secured "without subjecting the entire . . . enterprise to [C]hapter 11." App. 29a.

A debtor that can pay its creditors but chooses instead to orchestrate a bankruptcy to spare its business the burdens of Chapter 11 is not an "honest but unfortunate debtor." *Grogan v. Garner*, 498 U.S. 279, 286–87 (1991). The statute assigns DBMP the burden of showing good faith; the party opposing stay relief has the burden of proof on all issues other than the debtor's equity in property, 11 U.S.C. § 362(g)(2), and good faith is such an issue. *See* App. 48a–49a. DBMP never carried that burden, and the courts below never required it to do so. *See id.* For a non-distressed debtor like DBMP—in bankruptcy only to avoid tort liabilities—the automatic stay is no reprieve but a "last-minute escape chute out of pending civil litigation." *Furness v. Lilienfield*, 35 B.R. 1006, 1009 (D. Md. 1983). And the injunction extending the stay's protection to non-debtor affiliates widens that escape chute from the shell company to the entire enterprise.

The Fourth Circuit excused this on a single ground: DBMP was "legitimately seeking to invoke the § 524(g) process," which in its view made CertainTeed's financial health "irrelevant." App. 15a–16a. But that puts the remedy before the right to it. Section 524(g) is a tool available *within* a bankruptcy that a debtor has filed in good faith. *See In re Integrated Telecom*, 384 F.3d at 128. Section 524(g) shields a legitimate reorganization "from an onslaught of crippling lawsuits." *Truck Ins.*, 602 U.S. at 274. It does not convert a non-distressed company's scheme into a good-faith filing. CertainTeed could have pursued a Section 524(g) trust by placing itself in Chapter 11 and shouldering the burdens that come with it. It sought instead to capture the benefits and shirk those burdens by creating and sending its liability shell into bankruptcy instead. That is bad faith, and bad faith is cause to lift the

automatic stay. Once cause is shown, Section 362(d) is not permissive and states that the court "shall grant relief" from the automatic stay. 11 U.S.C. § 362(d).

III. The only creditors CertainTeed's Texas Two-Step burdens are its tort victims.

Bankruptcy is a system of shared sacrifice. When an honest debtor enters bankruptcy, it subjects itself and its assets to the bankruptcy court's control, and its creditors take their place in a process in which each must give up something so that all may be treated equitably. *See Truck Ins.*, 602 U.S. at 272. What makes CertainTeed's maneuver abusive is not merely that CertainTeed was not in genuine financial distress, but also that the maneuver was engineered so that only one class of its creditors would bear the entire burden of DBMP's bankruptcy. Every other creditor—and the rest of CertainTeed's business—carried on untouched. Only those who have suffered asbestos-related harms resulting from exposure to CertainTeed's products are affected.

The record makes clear that that design was deliberate. CertainTeed orchestrated its maneuver with the very specific intention of isolating a single class of creditors while also shielding its run-of-the-mill business creditors, as well as its own corporate affiliates, from the strictures of bankruptcy. *See* App. 50a–51a (King, J., dissenting). Its suppliers, lenders, and other ordinary commercial creditors are all paid. Its corporate affiliates and shareholders are untouched. The operating business continues as though nothing had changed. Only the asbestos claimants have been forced to surrender anything at all.

In an honest bankruptcy, a distressed company puts itself and its assets before the bankruptcy court, and its claimants accept collective, deferred recovery from a Section 524(g) trust because the estate is finite. In such a case, there is not enough to pay everyone, so every creditor absorbs some share of the shortfall. That is the general premise on which the law has tolerated binding claimants to a capped collective fund. *See, e.g.*, *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 839 (1999) ("The equity of the limitation is its necessity."). But here, there are not insufficient funds. CertainTeed kept its assets and continues to pay its other creditors outside bankruptcy, all while backing its shell company with an uncapped funding agreement that commits CertainTeed to pay DBMP's asbestos liabilities. App. 27a. By doing so, CertainTeed could not only achieve a less expensive way of dealing with its asbestos liabilities, it could hold the rest of its assets beyond asbestos claimants' reach. That is the result CertainTeed intended—and the outcome the Fourth Circuit blessed.

Before DBMP filed its bankruptcy petition, those suffering from asbestos-related diseases were able to seek and obtain justice for their exposure to CertainTeed's asbestos products through civil courts. In some cases, CertainTeed prevailed. In others, like the case of Christopher Coates, CertainTeed chose to settle before a verdict was rendered.[3] And in others, like the case of Michael Burch, a jury found that CertainTeed had caused

3. *See, e.g.*, *Mack Trucks, Inc. v. Coates*, No. 2709, 2018 WL 2175932, at *13 (Md. Ct. Spec. App. May 11, 2018) (noting that CertainTeed settled "on the eve of trial").

his devastating illness.[4] The civil justice system worked as intended: CertainTeed faced no liability to plaintiffs who could not prove their case; for plaintiffs who could do so, verdicts offered timely justice when time was of the essence. DBMP's bankruptcy brought that to an abrupt halt. The same claimants who could prove their cases to a jury are now barred from trying—not because CertainTeed cannot pay them, but because it would prefer not to.

Regardless of sympathy for any party, a neutral observer of the bankruptcy system should find that troubling. Chapter 11's extraordinary powers are tolerable because they are designed to operate evenhandedly, binding together the debtor and all its creditors in the same process. *See Czyzewski*, 580 U.S. at 464. A debtor may not pick a single, disfavored class of claimants, and strip them of their rights, while leaving others whole. Yet that is what CertainTeed did and what the Fourth Circuit permitted. The liabilities CertainTeed singled out and assigned to its liability shell are the only type of liability CertainTeed wished to find a "less expensive way of dealing with." App. 29a. Equity has condemned precisely that kind of selective manipulation of corporate form since long before the Bankruptcy Code. *See Shapiro*, 287 U.S. at 354–55.

The consequence of that targeting is not evenhanded delay. It is distinctly uneven. It is also troubling because

4. *See, e.g.*, *Burch v. CertainTeed Corp.*, 34 Cal. App. 5th 341, 343 (2019) (jury awarded pipe installer who contracted mesothelioma from installing CertainTeed asbestos-cement pipe $776,201 in economic and $9.25 million in noneconomic damages).

the creditors CertainTeed chose to isolate are dying; the stay does not merely postpone their recovery—it drastically reduces the likelihood that those claimants who contracted fatal diseases from CertainTeed's products will recover anything during their lifetime. That asymmetry is not merely a regrettable byproduct of CertainTeed's scheme but its purpose. CertainTeed has frozen the only creditors who cannot afford to wait while its other obligations are honored, thereby manufacturing leverage to "extract favorable settlements and save CertainTeed money" by channeling asbestos claims into its preferred forum. App. 59a. An enterprise that uses bankruptcy not to treat its creditors equitably but to coerce one class of creditors into settlements more favorable to the enterprise has not entered bankruptcy in good faith. That is cause to lift the stay.

IV. The Fourth Circuit's allowance of bad-faith bankruptcies has created a circuit split that this Court must resolve.

Bankruptcy's "good faith" requirement "protects the jurisdictional integrity of the bankruptcy courts by rendering their powerful equitable weapons . . . available only to those debtors . . . with 'clean hands.'" *In re Little Creek*, 779 F.2d at 1072. This Court has recognized the threshold good-faith requirement, and that the lack of good faith is cause to lift the automatic stay. *See, e.g.*, *Raleigh*, 530 U.S. at 25 (noting that bad faith commencement of a bankruptcy justifies lifting stay).[5] The precedent set

5. Other courts in the Second, Fifth, Sixth, Ninth, and Eleventh Circuits have held that the lack of good faith constitutes cause to lift the automatic stay. *See, e.g.*, *In re MacInnis*, 235 B.R.

by the Fourth Circuit has placed bankruptcy's powerful equitable weapons into *unclean* hands. As Judge King explained, DBMP was "fabricated" by CertainTeed, a "financially healthy and fully solvent corporation," for "the express purpose of circumventing our Nation's civil tort system." App. 43a, 59a (King, J., dissenting).

Courts outside of the Fourth Circuit have rejected this very scheme and criticized other companies' use of the Texas Two-Step. Unlike the Fourth Circuit, these courts have enforced the good-faith requirement that protects creditors from sacrificing their rights while the profitable purported debtor sacrifices nothing.

Johnson & Johnson, for example, sought to halt thousands of claims against it by those suffering from exposure to its talc products. J&J placed its liabilities into a "a shell company" named LTL "'formed,' almost exclusively, 'to manage and defend thousands of talc-related claims.'" *In re LTL*, 64 F.4th at 109. LTL—like DBMP, backed by a funding agreement with the go-forward business—filed for bankruptcy within the Fourth Circuit just two days after its formation. *Id.* at 97. However, the bankruptcy court transferred venue to the District of New Jersey, where multidistrict litigation against J&J arising out of exposure to its talc products had already been consolidated. *Id.* at 97–98.

255, 259 (S.D.N.Y. 1998); *In re Duvar Apt., Inc.*, 205 B.R. 196, 200 (B.A.P. 9th Cir. 1996); *In re Alexandra Trust*, 526 B.R. 668, 670 (Bankr. N.D. Tex. 2015); *In re Laguna Assocs. Ltd. P'ship*, 147 B.R. 709, 714 (Bankr. E.D. Mich. 1992); *In re RAD Props., Inc.*, 84 B.R. 827, 831 (Bankr. M.D. Fla. 1988).

Because the Third Circuit does not agree with the Fourth Circuit, where CertainTeed's scheme succeeded, J&J's failed. The Third Circuit holds that "a Chapter 11 bankruptcy petition filed by a financially healthy company in the face of potentially significant civil . . . liability" "lacks a valid reorganizational purpose. . . ." *In re SGL Carbon Corp.*, 200 F.3d 154, 156, 169 (3d Cir. 1999). Applying this precedent, the bankruptcy court dismissed LTL's petition for bad faith. *In re LTL*, 64 F.4th at 101. On appeal, the Third Circuit found that the "funding backstop plainly mitigate[d] any financial distress" and held that "absent financial distress, there is no reason for Chapter 11 and no valid bankruptcy purpose." *Id.* at 102, 110. The court explained that "the exercise of" Chapter 11's "considerable powers," including the automatic stay, "assumes the existence of a valid bankruptcy, which, in turn, assumes a debtor in financial distress." *Id.* at 103 (citation modified). It further explained that embedding actual financial distress into bankruptcy's good-faith requirement is a "safeguard [that] ensures that claimants' pre-bankruptcy remedies—here, the chance to prove to a jury of their peers injuries claimed to be caused by a consumer product—are disrupted only when necessary." *Id.* at 111.

Afterwards, J&J attempted, and failed, to proceed in bankruptcy two more times. Litigation resumed in 2025, after dismissal of its third attempt. In the time since, juries have entered numerous verdicts against J&J, finding that J&J's talc products caused plaintiffs' illnesses and compensating plaintiffs accordingly.[6]

---

6. *See, e.g., Houghton Carley v. Johnson & Johnson*, Case No. 62-CV-25-2358 (Minn. Dist. Ct., Ramsey Cnty. Dec. 19, 2025);

A court in the Seventh Circuit criticized the attempt of 3M, another multibillion-dollar conglomerate, to execute a Texas Two-Step. For fifteen years, 3M (and its subsidiary, Aearo) sold earplugs it knew were defective. Hundreds of thousands of people—mostly veterans—who had relied on 3M's earplugs suffered hearing loss and damage. When those individuals sought accountability—the JPML ultimately consolidated 336,000 related actions—3M sought an escape chute. It attempted to isolate these liabilities into Aearo, which 3M backed with a funding agreement, and then Aearo petitioned for bankruptcy in Indiana. *In re Aearo Techs. LLC*, No. 22-02890-JJG-11, 2023 WL 3938436, at *1–9 (Bankr. S.D. Ind. June 9, 2023). The bankruptcy court dismissed Aearo's petition, reasoning that a financially healthy debtor—one "with no impending solvency issues"—resorting to Chapter 11 to manage mass-tort liability was not a valid purpose that warranted bankruptcy protection. *In re Aearo*, 2023 WL 3938436, at *21–22.

The MDL court then sanctioned 3M for its bad-faith attempt to "upend the nearly four years of methodical effort" to resolve earplug liabilities through the "Congressionally-established system for resolving mass tort disputes." *In re 3M Combat Arms Earplug Prods. Liab. Litig.*, No. 3:19MD2885, 2022 WL 17853203, at *3, *7 (N.D. Fla. Dec. 22, 2022). A year after Aearo's bankruptcy petition was dismissed, 3M reached a $6 billion global settlement of all claims through the MDL's efforts.

Craft v. Ahold Delhaize US Inc. et al., No. 24-X-24-000005 (Md. Cir. Ct., Baltimore City Dec. 22, 2025); *Emerson v. Johnson & Johnson*, Case No. 190509334 (Pa. Commw. Ct., Phila. Cnty. Feb. 13, 2026).

See Press Release, 3M, *3M Announces Combat Arms Settlement* (Aug. 29, 2023), https://investors.3m.com/news-events/press-releases/detail/1797/3m-announcescombat-arms-settlement. Rather than having their claims halted for years only to have their recoveries limited, 3M's victims were compensated for the harm 3M's defective earplugs caused shortly after its bankruptcy gambit failed.

Because DBMP sought bankruptcy protection in the Fourth Circuit, however, CertainTeed's victims' fates have differed sharply. Further, because of the Fourth Circuit's unique view, it will almost certainly become the Circuit where companies seek bankruptcy protection for similar schemes. As a result, the circuit split will not continue to develop. Instead, sophisticated, so-called debtors are unlikely to file elsewhere, meaning the question is unlikely to percolate out of that Circuit. As the Third Circuit has already noted, it is no coincidence that "debtors formed by divisional mergers and bearing substantial asbestos liability seem to prefer filing in the Fourth Circuit." *In re LTL*, 64 F.4th at 98 n.8. As long as corporate tortfeasors can continue to act on that preference to gain the advantages the Fourth Circuit affords them, the issue is unlikely to arise in other Circuits.

V. Unless this Court grants certiorari, corporate tortfeasors seeking to avoid financial accountability will continue to weaponize the Fourth Circuit's precedent against the people they harmed.

Since 2017, when Georgia-Pacific pioneered the Texas Two-Step using its own liability shell, Bestwall, *see In re Bestwall LLC*, 71 F.4th 168 (4th Cir. 2023), multiple affluent, corporate tortfeasors have successfully followed

its roadmap in the Fourth Circuit. Like CertainTeed, Trane Technologies jettisoned its asbestos liabilities into two new entities, Aldrich Pump and Murray Boiler. *In re Aldrich Pump LLC*, No. 20-30608, 2023 WL 9016506, at *1 (Bankr. W.D.N.C. Dec. 28, 2023). Seven weeks after their creation, both entities filed Chapter 11 petitions, each with their own funding agreement backed by a go-forward Trane entity. *Id*. at *8. Like the victims of Georgia-Pacific and CertainTeed, those harmed by Trane's asbestos products continue to die without getting their day in court.

Judges burdened by the Fourth Circuit's precedent have requested guidance from this Court. In 2023, the *Aldrich Pump* bankruptcy court wrote: "Until the propriety of the 'Texas Two-Step' and its use by solvent 'non-distressed' corporations is determined by the higher courts, no progress will be made in these bankruptcy cases." *In re Aldrich Pump*, 2023 WL 9016506, at *11 (Whitley, J.). The bankruptcy court in this case said the same from the bench, acknowledging the "differences of opinion about whether a non-distressed solvent company can use bankruptcy tools" and recognizing that "a higher court than this one will ultimately make the call." App. 37a.

For now, the Fourth Circuit's ruling creates perverse incentives for the next affluent corporation that learns its products or services are causing mass harm. Corporations whose products injure many people have a roadmap for evading accountability, even after the harm and its cause come to light. When liability accumulates, these affluent tortfeasors can funnel tens or even hundreds of thousands of lawsuits into the bankruptcy court in the Fourth Circuit—where claims can be indefinitely stayed, future claims can be redirected before they have arisen,

and where the company can exert substantial leverage on those it harmed to settle cheaply.

Once "the floodgates are opened, debtors and favored creditors can be expected to make every case that 'rare case.'" *Czyzewski*, 580 U.S. at 470 (quoting Rudzik, *A Priority Is a Priority Is a Priority—Except When It Isn't*, 34 Am. Bankr. Inst. J. 16, 79 (2015)). Because corporations have flexibility regarding bankruptcy venue, virtually any sophisticated tortfeasor could create and re-domicile a shell company within the Fourth Circuit to take advantage of its bad-faith allowance. *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).

Without this Court's intervention, the Fourth Circuit's condoning of bad-faith bankruptcies will become the functional law of the land—handing windfall upon windfall to corporations facing significant liability and further harming everyday Americans whom those same corporations have already gravely injured.

CONCLUSION

The Fourth Circuit has turned Chapter 11 into a device that any solvent, profitable corporate tortfeasor may use to freeze the claims of its tort victims and no one else. The circuit split will not heal on its own, and this case presents an opportunity for the Court to address the narrow, recurring question about the good faith the Bankruptcy Code requires. The petition for a writ of certiorari should be granted.

Respectfully submitted,

Matthew Melamed
Keller Rohrback L.L.P.
180 Grand Avenue,
Suite 1380
Oakland, CA 94612

Andre M. Mura
Sarah Elizabeth Hillier
Gibbs Mura LLP
1111 Broadway, Suite 2100
Oakland, CA 94607

Laura Gerber
Counsel of Record
Patrick Marriott
Keller Rohrback L.L.P.
1201 Third Avenue,
Suite 3400
Seattle, WA 98101
(206) 623-1900
lgerber@kellerrohrback.com

Counsel for Amicus Curiae