No. 23-702

IN THE

# Supreme Court of the United States

SANDER L. ESSERMAN, IN HIS OFFICIAL CAPACITY AS FUTURE CLAIMS REPRESENTATIVE,

*Petitioner,*

*v.*

BESTWALL LLC, *et al.*,

*Respondents.*

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

## REPLY BRIEF FOR PETITIONER


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## RULE 29.6 STATEMENT

The disclosure statement included in the petition remains accurate.

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## INTRODUCTION

The decision below permits state-court litigants to avail themselves of bankruptcy-court jurisdiction and obtain a nationwide injunction of indefinite duration (here more than six years and counting) without filing bankruptcy themselves, without showing a likelihood of success on the legal claims, and without any limiting principle. As explained in the petition and below, 28 U.S.C. § 1359 and the Court's four-prong injunction test are designed to provide just the sort of limitations that the Fourth Circuit dispensed with below.

Resolution of the issues presented by the petition is critically important. The Fourth Circuit ruled that bankruptcy courts have jurisdiction to enjoin claims against a company that *could* have filed bankruptcy, even if it did not. The Fourth Circuit also ruled that a debtor in bankruptcy can obtain a nationwide injunction without needing to demonstrate a likelihood of success on its ultimate legal claims. The combined effect of these rulings is that a pre-confirmation injunction is available in the Fourth Circuit to any company willing to (i) draft paperwork assigning liability (for asbestos or any other type of claim) to an affiliate and (ii) put that affiliate into bankruptcy. Respondents agree, contending that such nationwide injunctions protecting non-debtors should be "routine" in bankruptcy. BIO 1, 22.

For these reasons, and as recognized by bipartisan groups of U.S. Senators and State Attorneys General, the issues raised here and in the related petition in No. 23-675 are critically important and warrant review.

## I. The petition presents an acknowledged circuit split.

1. Section 1359 prohibits litigants from improperly or collusively making or joining a party, "by assignment or otherwise," to invoke a federal court's jurisdiction over a "civil action." The statute is the subject of an acknowledged circuit split, with four circuits on one side and two on the other. Pet. 17. The circuits disagree on the level of scrutiny that the statute requires when the transactions purportedly giving rise to federal jurisdiction are between corporate affiliates. Pet. 17. Respondents do not deny this.

Respondents urge the Court to avoid resolving the jurisdictional split by arguing for a "bankruptcy exception" that does not exist in the plain language of Section 1359, or Section 524(g), or anywhere in the Bankruptcy Code. According to Respondents, Section 1359 plays no role when parties manufacture "related-to" bankruptcy jurisdiction because the statute serves only to prevent parties "from creating federal diversity jurisdiction . . . ." BIO 2. The word *diversity*, however, appears nowhere in the statute.

Respondents never explain why litigants should be able to manufacture jurisdiction over actions before a bankruptcy court, even though they may not manufacture jurisdiction outside of bankruptcy. Section 1359 applies to any "civil action." The adversary proceeding in which the Bankruptcy Court issued its preliminary injunction is just such a civil action. *See Bullard v. Blue Hills Bank*, 575 U.S. 496, 505 (2015) (adversary proceedings in bankruptcy are "full civil lawsuits"); *cf.* Fed. R. Civ. P. 3 ("A civil action is commenced by filing a complaint with the court."); Fed. R. Bankr. P. 7003 ("Rule 3 F. R. Civ. P. applies in adversary proceedings."). Respondents do not deny that Bestwall's

complaint commenced a civil action before the Bankruptcy Court, ancillary to the chapter 11 case itself.

Nor do Respondents cite a single case holding that Section 1359 is inapplicable in bankruptcy. There are no such cases. The only cases to decide the issue have concluded that Section 1359 *does* apply. *See In re Maislin Indus.*, 66 B.R. 614, 617 (E.D. Mich. 1986); *In re Keener*, 2015 WL 5118691, *3–4 (Bankr. N.D. Iowa Aug. 28, 2015); *see also* App. 42a (King, J., dissenting in part).

Section 1359 prevents federal courts from asserting jurisdiction over state-law matters, which belong in the state courts. Preventing "a vast quantity of ordinary . . . tort litigation" from being "channeled into the federal courts at the will of one of the parties" was in fact "the very thing which Congress intended to prevent when it enacted [Section] 1359 . . . ." *Kramer v. Caribbean Mills, Inc.*, 394 U.S. 823, 828–29 (1969). The Bankruptcy Court's exercise of related-to jurisdiction here violates that fundamental purpose. Just as the statute prevents parties from creating diversity jurisdiction by assigning a claim from a non-diverse to a diverse plaintiff (BIO 2), the statute also prevents parties from creating related-to jurisdiction over an action by assigning liability for claims from a non-*debtor* to a *debtor* plaintiff. The jurisdictional defect arises when a company without access to federal jurisdiction, such as Georgia-Pacific here, assigns its liability for state-law tort claims to an affiliated entity *with* access to federal jurisdiction. As a result of this maneuver, Georgia-Pacific has enjoyed what Respondents call "temporary" relief (BIO 3, 10, 21–23, 26, 29, 34–36, 38) from a vast quantity of ordinary tort litigation for more than six years.

2. Respondents fare no better with their suggestion that the Fourth Circuit's decision was "fact-bound." BIO 21. The petition squarely presents the legal question that divides the circuits: what standard of review applies under Section 1359 when corporate affiliates engineer for themselves the transactions giving rise to federal jurisdiction. There are no disputed facts. Respondents admit that Georgia-Pacific created Bestwall and assigned it all of Georgia-Pacific's asbestos liability so that Georgia-Pacific could obtain the benefits of bankruptcy without having to file for bankruptcy itself. BIO 7. As more companies follow Georgia-Pacific's blueprint, this case provides a timely opportunity to resolve the circuit split. *See* Pet. 32–33 & nn.11–12.

The Fourth Circuit did not apply any presumption against jurisdiction, nor did it require any independent business justification for Georgia-Pacific's corporate maneuvering. As the dissent states, "unsurprisingly, Bestwall has never offered any substantive explanation along those lines." App. 45a.

The Fourth Circuit held that Georgia-Pacific's admitted desire to obtain the benefits of bankruptcy jurisdiction was a sufficient justification. App. 26a. If that were sufficient to avoid Section 1359, the statute would never apply to check bankruptcy courts' jurisdiction. *Cf. Prudential Oil Corp. v. Phillips Petroleum Co.*, 546 F.2d 469, 476 (2d Cir. 1976) (finding that jurisdiction was improper under Section 1359 when "[t]he most that can be said is that [the claim] was assigned to the wholly owned subsidiary for prosecution by the subsidiary rather than by the parent because the parent's management desired it to be handled that way").

Under the Fourth Circuit's ruling, litigants may freely manufacture related-to jurisdiction without any inquiry into whether there was a legitimate business purpose for their transactions beyond the desire to create jurisdiction. That directly implicates the jurisdictional split over Section 1359.

## II. The Fourth Circuit interposed a lesser standard for bankruptcy injunctions that conflicts with the Court's precedent.

Consistent with principles of equity, obtaining preliminary injunctive relief requires a litigant to make a "clear showing" that it satisfies the traditional four-factor test described by the Court. *See Winter v. Nat'l Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). The Fourth Circuit held, however, that *Winter* does not apply in bankruptcy cases. App. 31a. The Fourth Circuit cited no authority for that proposition. *See* App. 31a. Instead of the *Winter* test, the Fourth Circuit interposed a lesser standard, one that "is not intended to be a particularly high standard" and asks merely whether the debtor has a "realistic possibility of achieving a successful reorganization." *See* App. 28a, 31a, 103a.

The traditional preliminary-injunction test governs unless Congress plainly says otherwise. *See eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006) ("As this Court has long recognized, a major departure from the long tradition of equity practice should not be lightly implied." (internal quotation marks omitted)). In *eBay*, the Court overturned the Federal Circuit's rule categorically granting injunctions in patent-infringement disputes. *Id.* at 393–94. The Court held that this proclivity towards

injunctions was inconsistent with the need to apply "the traditional four-factor framework that governs the award of injunctive relief . . . ." *Id.* at 394. The decision below creates the same problem—it allows courts to categorically grant preliminary injunctions in bankruptcy cases without applying the *Winter* standard.

Respondents do not dispute that the Fourth Circuit's decision conflicts with this Court's precedent or that the Fourth Circuit is the only Court of Appeals to hold that a plaintiff in bankruptcy need not meet the *Winter* standard required outside of bankruptcy. Instead, Respondents argue that there is no circuit split with respect to the proper standard for preliminary injunctions in bankruptcy. True, the petition focuses on the importance of the question more than on any circuit split, but it is also the case that the Fourth Circuit's decision brings it into conflict with other Courts of Appeal. *Compare* App. 31a ("[T]he cases on which the Claimant Representatives rely in support of their argument were decided outside the context of a preliminary injunction in bankruptcy and are thus inapposite.") *with In re Excel Innovations, Inc.*, 502 F.3d 1086, 1094 (9th Cir. 2007) ("We hold that the usual preliminary injunction standard applies to stays of proceedings against non-debtors under § 105(a). As the relevant House and Senate reports indicate, Congress intended that standard to apply to § 105(a) preliminary injunctions."), *In re Eagle-Picher Indus., Inc.*, 963 F.2d 855, 858 (6th Cir. 1992), *and In re Commonwealth Oil Ref. Co.*, 805 F.2d 1175, 1188–89 (5th Cir. 1986).

Whether bankruptcy courts are allowed to disregard *Winter* is an important question.[1] Other non-debtor third

1. *Cf. Starbucks Corp. v. McKinney*, Case No. 23-367 (U.S. Jan. 12, 2024). The *Starbucks* petition asks whether injunctions

parties have already followed Georgia-Pacific's blueprint. If Georgia-Pacific can create bankruptcy jurisdiction and obtain an injunction simply by (i) executing documents that create a shell company and assign it liability and (ii) putting the shell company into bankruptcy, so can anyone else. The procedure, which is readily available to any litigant, routinizes the supposedly extraordinary remedy of a preliminary injunction protecting non-debtors prior to confirmation.

There is nothing routine about a nationwide injunction halting thousands of state-court lawsuits against Georgia-Pacific and other non-debtors for more than six years. *Cf. United States v. Texas*, 599 U.S. 670, 694 (2023) (Gorsuch, J., concurring) ("Universal injunctions continue to intrude on powers reserved for the elected branches."). Respondents observe that the Petitioner did not cite a case for the proposition that "*most* Section 524(g) cases confirm a plan without a pre-confirmation injunction protecting non-debtors,"[2] but Respondents do not dispute the point (BIO 10) because it is true.

In all other contexts, the Court has held that federal courts should not enjoin state-court proceedings unless the need for the injunction is "clear beyond peradventure." *Smith v. Bayer Corp.*, 564 U.S. 299, 307 (2011). Respondents provide no basis for a different rule in bankruptcy.

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granted under section 10(j) of the National Labor Relations Act specifically must satisfy the *Winter* standard.

2. Preliminary injunctions may be appropriate in some cases if the litigant satisfies the traditional injunction requirements. Pet. 30–31.

## III. Respondents fail to confront the issues justifying certiorari here.

Rather than face the import of the decision below, Respondents try to change the subject. They raise a series of arguments the Fourth Circuit did not decide, concerning issues that are not before the Court. BIO 25–28; *cf. McWilliams v. Dunn*, 582 U.S. 183, 200 (2017) (noting that the Court is "a court of review, not of first view" (internal quotation marks omitted)).

Respondents also begin their brief by arguing that the Petitioner is attacking the chapter 11 filing. BIO 1. Not so. The Petitioner is not challenging Bestwall's ability to seek confirmation of a Section 524(g) plan that channels claims against it and Georgia-Pacific (assuming that Bestwall meets the requirements of the Bankruptcy Code and federal law). *See* Pet. 30. The Petitioner, rather, challenges the Bankruptcy Court's exercise of related-to jurisdiction in an ancillary adversary proceeding, based on Georgia-Pacific's self-serving assignment of liability to Bestwall. The Petitioner also has not sought to dismiss Bestwall's chapter 11 case. Respondents concede this. BIO 9.[3]

Respondents suggest that judicial economy supports the preliminary injunction because Bestwall "seeks to resolve" claims against Georgia-Pacific in the bankruptcy case. *See* BIO i, 1, 9, 17, 24. That suggestion is speculation at best because the Bankruptcy Court expressly did not consider whether Section 524(g) ultimately would permit

3. Nor has the Petitioner sought to unwind or challenge Georgia-Pacific's divisional merger. The validity of that divisional merger under state law is irrelevant for purposes of Section 1359. *Kramer*, 394 U.S. at 829.

Bestwall to permanently channel claims against Georgia-Pacific. App. 82a. The Bankruptcy Court, moreover, lacks jurisdiction to resolve asbestos-related personal-injury claims. 28 U.S.C. § 157(b)(2)(B), (b)(5). Rather, Section 524(g) provides a platform for the efficient settlement of claims by a trust *after* the bankruptcy court confirms a plan of reorganization.

Pre-confirmation injunctions protecting non-debtors, such as the injunction here, thus undermine judicial economy by removing the non-debtors' incentives to negotiate and contribute funding for the trust that will actually resolve claims. Most asbestos bankruptcies, without pre-confirmation injunctions, confirm plans of reorganization in less than half the time of cases that have such injunctions. *See, e.g.*, *In re Paddock Enters., LLC*, 2022 WL 1746652, at *46, *60 (Bankr. D. Del. May 31, 2022) (confirming Section 524(g) plan in less than 2.5 years).

**IV. The decision below is incorrect.**

Respondents spend much of their opposition brief arguing that the decision below was correct. That is no basis for denying certiorari given the acknowledged circuit split and the importance of the preliminary-injunction issue. The decision below was wrong in any event.

1. Respondents' primary argument is that Georgia-Pacific's maneuverings were irrelevant to the jurisdictional inquiry because Georgia-Pacific could have filed for bankruptcy itself. Taking Respondents' argument to its logical extension, a bankruptcy court's jurisdiction would extend to *any* potential action because, theoretically, any company could file for bankruptcy.

As the dissent noted below, Georgia-Pacific contrived the entire basis for related-to jurisdiction "in an unmistakable effort to gain leverage over future asbestos claims" against it. App. 34a. The effects that the Fourth Circuit relied on to find jurisdiction "arise only because [Georgia-Pacific] ensured that they would." App. 48a (King, J., dissenting in part). Even Respondents concede that Georgia-Pacific manipulated the jurisdictional facts for its benefit; their argument is that Georgia-Pacific need not have done so. *Cf.* BIO 8, 17. The question, however, is not whether Georgia-Pacific needed to manipulate the jurisdictional facts; the question is whether Georgia-Pacific did. *See* App. 50a (King, J., dissenting in part). A pedestrian who could have used the crosswalk has no defense to jaywalking.

Georgia-Pacific does not have, and has never had, the ability to bring a civil action in the Bankruptcy Court to enjoin the claims against it. That is precisely why Georgia-Pacific created Bestwall and assigned that task to it.

2. In addition, the Fourth Circuit's preliminary-injunction test is unsound. It allows Article I bankruptcy courts to grant nationwide injunctions that Article III courts could not grant outside of bankruptcy. The issues associated with vesting such unchecked authority in bankruptcy courts are plain. *See Stern v. Marshall*, 564 U.S. 462, 482–84 (2011).

A preliminary injunction is "an extraordinary and drastic remedy" that "is never awarded as of right." *Munaf v. Geren*, 553 U.S. 674, 689–90 (2008). Yet according to the decision below, any request for a preliminary injunction in bankruptcy would automatically satisfy the likelihood-

of-success-on-the-merits prong as long as the debtor's reorganization was not impossible. *See* App. 28a–31a. This is untenable. The Court has explained that "[i]t is not enough that the chance of success on the merits be better than negligible" or "a mere possibility." *Nken v. Holder*, 556 U.S. 418, 434 (2009) (cleaned up);[4] *see also Trump v. Hawaii*, 585 U.S. 667, 711 (2018) ("Because plaintiffs have not shown that they are likely to succeed on the merits of their claims, we reverse the grant of the preliminary injunction as an abuse of discretion." (citing *Winter*, 555 U.S. at 32)).

Moreover, the Fourth Circuit affirmed the preliminary injunction without requiring *any* showing that Georgia-Pacific could qualify for permanent relief under Section 524(g). The Bankruptcy Court acknowledged that it did not consider the issue. *See* App. 82a. As the petition explained (Pet. 26), *Winter* instructs that there is no basis to grant a preliminary injunction if a permanent injunction would not be available. 555 U.S. at 32 (ruling that there was no basis to enjoin sonar training when the "ultimate legal claim" at issue was that the Navy had to prepare an environment impact statement). Respondents do not address this or acknowledge that Georgia-Pacific has now enjoyed a nationwide "precursor" injunction, *see* C.A. J.A. 407, for more than six years without any inquiry into whether Georgia-Pacific is even eligible for permanent relief under Section 524(g).

4. *Nken* concerned a stay pending appeal rather than a preliminary injunction, but there is "substantial overlap" between the governing factors "because similar concerns arise whenever a court order may allow or disallow anticipated action before the legality of that action has been conclusively determined." *Nken*, 556 U.S. at 434.

3. Finally, Respondents do not identify any provision of the Bankruptcy Code that authorizes the preliminary injunction here. Section 524(g) does not provide for preliminary injunctions. It authorizes injunctions protecting non-debtors only at plan confirmation and only "in connection with" the plan-confirmation order. 11 U.S.C. § 524(g)(1)(A); *see also In re Fed.-Mogul Glob. Inc.*, 684 F.3d 355, 359 (3d Cir. 2012) ("To . . . protect the due process rights of future claimants, section 524(g) imposed many statutory prerequisites that must be satisfied *before* a channeling injunction may issue." (emphasis added) (internal quotation marks omitted)). Many companies have confirmed plans under Section 524(g) without a pre-confirmation injunction protecting non-debtors. *See, e.g.*, *Paddock*, 2022 WL 1746652, at *46. If Congress wanted to protect non-debtors from asbestos lawsuits whenever a corporate affiliate filed for bankruptcy with the stated goal of seeking Section 524(g) relief, Congress would have put that in Section 524(g). It did not.

## CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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