APPENDIX

TABLE OF CONTENTS

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 24-1493

BESTWALL LLC F/K/A GEORGIA-PACIFIC LLC,
A TEXAS LIMITED LIABILITY COMPANY AND A
NORTH CAROLINA LIMITED LIABILITY COMPANY,
Debtor – Appellee,

v.

THE OFFICIAL COMMITTEE OF ASBESTOS CLAIMANTS
OF BESTWALL, LLC,
Creditor – Appellant,

AMERICAN ASSOCIATION FOR JUSTICE; CLAIMANTS;
THE OFFICIAL COMMITTEE OF ASBESTOS PERSONAL IN-
JURY CLAIMANTS IN IN RE ALDRICH PUMP LLC AND
IN RE MURRAY BOILER LLC,
Amici Supporting Appellant.

ANTHONY J. CASEY; BROOK E. GOTBERG; JOSHUA C.
MACEY; JOSEPH W. GRIER, III, FUTURE ASBESTOS
CLAIMANTS REPRESENTATIVE APPOINTED IN IN RE
ALDRICH PUMP LLC, ET AL.; TRANE TECHNOLOGIES
COMPANY LLC; TRANE U.S. INC.; CHAMBER OF
COMMERCE OF THE UNITED STATES OF AMERICA,
Amici Supporting Appellee.

Argued: May 8, 2025
Decided: August 1, 2025

Appeal from the United States Bankruptcy Court
for the Western District of North Carolina,
at Charlotte
Laura Turner Beyer, Chief Bankruptcy Judge
(17-31795)

Before KING, AGEE, and QUATTLEBAUM, Circuit Judges.

Affirmed by published opinion. Judge Quattlebaum wrote the opinion, in which Judge Agee joined. Judge Agee wrote a concurring opinion. Judge King wrote a dissenting opinion.

QUATTLEBAUM, Circuit Judge:

The question we must answer in this appeal is whether federal courts have subject-matter jurisdiction over bankruptcy cases involving solvent debtors? At least as framed here, we answer yes. We do so not because a debtor's financial condition is irrelevant under the Bankruptcy Code. It may be relevant in a number of contexts. Instead, we answer yes because the Constitution grants Article III judicial power over all cases arising under the laws of the United States. The Bankruptcy Code is a law of the United States. So, petitions for relief under the Bankruptcy Code—even those filed by solvent debtors—arise under the laws of the United States. Thus, we affirm the bankruptcy court's denial of the motion to dismiss for lack of subject-matter jurisdiction.

I.

Founded in 1927, Georgia-Pacific LLC is a multi-billion-dollar corporation that operates primarily in

the pulp and paper industry.[1] In 1965, Georgia-Pacific bought and then merged with Bestwall Gypsum Co., which manufactured wallboard, joint compound products and industrial plasters. But with its assets came its liabilities, including the asbestos claims against it, which plagued Georgia-Pacific for decades. *See In re Bestwall LLC*, 605 B.R. 43, 47 (Bankr. W.D.N.C. 2019). From 2014 to 2017, for example, Bestwall paid $558 million in defense and indemnity costs for asbestos litigation.

In 2017, Bestwall faced around 64,000 pending asbestos claims, with tens of thousands more anticipated through at least 2050. So, Georgia-Pacific sought to deal with these asbestos claims through a divisional merger that has been labeled the Texas two-step—named for Texas' Business Organizations Code § 1.002(55)(A) (the statutory vehicle for the divisional merger) and that state's beloved country dance.[2] This maneuver "splits a legal entity into two, divides its assets and liabilities between the two new entities, and terminates the original entity." *In re LTL Mgmt., LLC*, 64 F.4th 84, 96 (3d Cir. 2023). The lion's share

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[1] Unsurprisingly, Georgia-Pacific's corporate history is complicated, even before the events at issue in this case. But that is not relevant here. So, we do not detail that history and, for convenience, refer to the entity as Georgia-Pacific regardless of its specific legal name at the time.

[2] Originally dubbed the "valse a deux temps" ("waltz two times"), the Texas two-step mixed elements of the waltz, the Foxtrot and the polka. The popular dance style got its moniker in early 20th century Texas dance halls. *See* Scott Sosebee, *Dancin' Texas Style: The Origin of the Texas Two-Step*, THE DAILY SENTINEL (January 18, 2025), https://www.dailysentinel.com/life_and_entertainment/features/dancin-texas-style-the-origin-of-the-texas-two-step/article_dd470e3a-d9d7-5197-9948-bb377cec79e9.html [https://perma.cc/HZ7M-2V4D].

of assets—and indeed many liabilities—go into a new company, while the asbestos liabilities fall into a separate company, whose primary purpose is to resolve the asbestos claims.[3]

The company holding the asbestos liabilities then files for bankruptcy. The bankruptcy court issues an injunction channeling all asbestos-related claims into a personal injury trust, known as an 11 U.S.C. § 524(g) trust. *See In re Combustion Eng'g, Inc.*, 391 F.3d 190, 234 (3d Cir. 2004), *as amended* (Feb. 23, 2005). This "allows a debtor to address in one forum all potential asbestos claims against it, both current and future, as well as current and potential future claims against third parties alleged to be liable on account of asbestos claims against the debtor." *In re Bestwall LLC*, 606 B.R. 243, 249 (Bankr. W.D.N.C. 2019), *aff'd*, No. 3:20-cv-103-RJC, 2022 WL 67469 (W.D.N.C. Jan. 6, 2022), *aff'd*, 71 F.4th 168 (4th Cir. 2023); *see generally* Michael A. Francus, *Texas Two-Stepping Out of Bankruptcy*, 120 MICH. L. REV. ONLINE 38 (2022).[4]

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[3] That said, nothing inherent to the two-step requires the tort liabilities to be asbestos-related. *See*, *e.g.*, *In re Aearo Techs. LLC*, No. 22-02890-JJG-11, 2023 WL 3938436 (Bankr. S.D. Ind. June 9, 2023), *appeal dismissed*, No. 22-2606, 2024 WL 5277357 (7th Cir. July 11, 2024) (using a bankruptcy maneuver closely related to the Texas two-step to address tort claims regarding defective earplugs).

[4] Section 524(g) asbestos trusts trace back to the Johns-Manville bankruptcy, in which Judge Lifland pioneered this solution to the tricky timing problem presented by the long latency periods of asbestos-related diseases. *See In re Johns-Manville Corp.*, 68 B.R. 618 (Bankr. S.D.N.Y.1986), *aff'd*, 78 B.R. 407 (S.D.N.Y. 1987), *aff'd sub nom, Kane v. Johns-Manville Corp.*, 843 F.2d 636 (2d Cir. 1988). Congress codified the innovation by adding § 524(g) to the Bankruptcy Code via the Bankruptcy

Implementing this strategy, on July 31, 2017, Georgia-Pacific split into two entities, which, for convenience, we will refer to as Georgia-Pacific and Bestwall.[5] Georgia-Pacific received most of the $28.3 billion company. Bestwall received:

(a) three bank accounts containing approximately $32 million in cash;

(b) all contracts of the old Georgia-Pacific related to its asbestos-related litigation;

(c) certain real estate;

(d) 100% of a separate company that manufactures and sells gypsum plaster products. It was projected to generate cash flow of approximately $18 million per year, and was valued at approximately $145 million in 2017; and

(e) an agreement from Georgia-Pacific to pay for Bestwall's expenses incurred in the normal course of business; administration expenses if Bestwall declared bankruptcy; and a § 524(g) asbestos trust in the amount required by a confirmed reorganization plan if Bestwall couldn't fund the trust.

On November 2, 2017, Bestwall petitioned for relief under Chapter 11 of the Bankruptcy Code in the Western District of North Carolina. It simultaneously filed an adversary proceeding, in which it moved for an injunction prohibiting asbestos claimants from filing or prosecuting asbestos claims against Bestwall or Georgia-Pacific. *See Bestwall*, 606 B.R. at 246-47. The Official Committee of Asbestos Claimants—formed after Bestwall filed bankruptcy to represent

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Reform Act of 1994, Pub. L. No. 103-394, § 111, 108 Stat. 4106, 4113-17.

[5] The legal names of the entities are Georgia-Pacific LLC and Bestwall LLC.

the interests of individuals with personal injury claims for exposure to asbestos manufactured by Bestwall—opposed the injunction. The bankruptcy court granted Bestwall's motion.[6]

The Committee also moved to dismiss the bankruptcy case, arguing it was filed in bad faith because Bestwall wasn't really bankrupt. The same day the bankruptcy court granted the motion for an injunction, it denied the Committee's motion. *See In re Bestwall LLC*, 605 B.R. 43, 54 (Bankr. W.D.N.C. 2019). The court held that "[a]ttempting to resolve asbestos claims through 11 U.S.C. § 524(g) is a valid reorganizational purpose, and filing for Chapter 11, especially in the context of an asbestos or mass tort case, need not be due to insolvency."[7] *Id.* at 49.

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[6] The Committee argued that the bankruptcy court did not have jurisdiction to issue an injunction prohibiting suits against Georgia-Pacific, since it did not file for bankruptcy. The court rejected this argument, holding it had subject-matter jurisdiction to enjoin the claims against Georgia-Pacific because the injunction "related to" Bestwall's bankruptcy under 28 U.S.C. § 1334(b). *Bestwall*, 606 B.R. at 249. When the Committee appealed, the district court affirmed. *See In re Bestwall LLC*, No. 3:20-cv-103-RJC, 2022 WL 67469 (W.D.N.C. Jan. 6, 2022). It agreed the bankruptcy court had subject-matter jurisdiction given its "related-to" jurisdiction over the claimants' asbestos claims. *Id.* at *5. The court also held the bankruptcy court did not abuse its discretion in granting Bestwall's motion for a preliminary injunction. *Id.* at *7-9. In a split decision, we affirmed. *See In re Bestwall LLC*, 71 F.4th 168 (4th Cir. 2023).

[7] The bankruptcy court noted that the "Fourth Circuit standard for dismissal of a Chapter 11 case as a bad faith filing is one of the most stringent articulated by the federal courts." *Id.* at 49 (citing *In re Dunes Hotel Assocs.*, 188 B.R. 162, 168 (Bankr. D.S.C. 1995)). That standard permits a court to dismiss a Chapter 11 filing for bad faith only when the bankruptcy reorganization is both (i) objectively futile and (ii) filed in subjective bad faith. *See Carolin Corp. v. Miller*, 886 F.2d 693, 700-01 (4th Cir.

Several years later, the Committee moved to dismiss again, this time for lack of subject-matter jurisdiction. It is the bankruptcy court's ruling on this motion that is currently before us. The Committee noted that the Constitution gives Congress the power to establish "uniform Laws on the subject of Bankruptcies throughout the United States." U.S. CONST. art. I, § 8, cl. 4. The Committee then argued that Bestwall was not "bankrupt" according to a founding-era understanding of the word. For that reason, it maintained that the bankruptcy court had no legitimate subject-matter jurisdiction over Bestwall. This constitutional requirement for jurisdiction, the Committee insisted, precedes any statutory requirements for debtors.

The Committee claimed that its motion was a "new and distinct argument from any previously raised." J.A. 1773. And since the motion attacked the court's subject-matter jurisdiction, the court's previous denial of its motion to dismiss for bad faith did not bar it; subject-matter jurisdiction, the Committee noted, may be challenged at any time. *See Plyler v. Moore*, 129 F.3d 728, 731 n.6 (4th Cir. 1997).

The bankruptcy court agreed that subject-matter jurisdiction arguments "may be resurrected at any point in the litigation." *In re Bestwall LLC*, 658 B.R. 348, 361 (Bankr. W.D.N.C. 2024) (quoting *Gonzalez v. Thaler*, 565 U.S. 134, 141, 132 S.Ct. 641, 181 L.Ed.2d

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1989). The Committee sought leave to appeal, but the bankruptcy court denied its request. The Committee then moved for certification of direct appeal to the Fourth Circuit under 28 U.S.C. § 158(d)(2). Holding that certification would materially advance the case on a matter of public importance, the bankruptcy court certified the Committee's appeal. However, we denied the petition. *See Off. Comm. of Asbestos Claimants of Bestwall, LLC v. Bestwall LLC*, No. 19-408, 2019 WL 13512209 (4th Cir. Nov. 14, 2019).

619 (2012)). And it considered the Committee's argument that the bankruptcy court lacked subject-matter jurisdiction over a solvent debtor on the merits. The bankruptcy court observed that "Congress determines subject-matter jurisdiction within any limitations imposed by the Constitution[,]" and in turn, that the "Bankruptcy Clause of the Constitution determines the limits of constitutional subject-matter jurisdiction for bankruptcy." *Id.* at 362. But because the history of bankruptcy legislation has been one of liberalizing bankruptcy access, and Congress enjoys substantial deference in defining bankruptcy, the bankruptcy court ultimately rejected the Committee's argument that Congress cannot open bankruptcy to debtors who aren't in financial distress.[8] Therefore, it denied the Committee's motion.

When the Committee again moved for certification for direct appeal to us under 28 U.S.C. § 158(d)(2), the bankruptcy court once again granted it. This time, we granted the petition.

II.

At the outset, we clarify what this appeal is and is not about. This appeal is not about the validity of the controversial Texas two-step maneuver. The Committee acknowledged this at oral argument, agreeing that its view of jurisdiction would affect all debtors, not just those who recently performed a divisional merger. *See Bestwall LLC v. The Off. Comm. of Asbestos Claimants of Bestwall, LLC*, No. 24-1493, Oral Arg. at 16:00-16:20 (4th Cir. Mar. 8, 2025). Nor is it about whether a debtor's ability to pay its debts is relevant in a bankruptcy case. That issue was considered in the

[8] The Committee proffers a vague concept of "financial distress" but never defines the term. Neither does the Constitution, the Bankruptcy Code or any court.

Committee's motion to dismiss for bad faith and may come up at future junctures—at plan confirmation, for example. Instead, we face a narrow question—do federal courts have subject-matter jurisdiction over bankruptcy cases filed by debtors who may be able to pay their obligations?[9]

To answer this question, we start with the basics. The Constitution grants Article III judicial power over all cases arising under the laws of the United States. *See Royal Canin U. S. A., Inc. v. Wullschleger*, 604 U.S. 22, 26, 145 S.Ct. 41, 220 L.Ed.2d 289 (2025) ("'Arising under' jurisdiction—more often known as federal-question jurisdiction—enables federal courts to decide cases founded on federal law."). The Bankruptcy Code is a law of the United States. Bestwall petitioned to reorganize under Chapter 11 of the Code. So, that petition is a case arising under the laws of the United States. Seems straightforward.

The Committee insists it's not that simple. It claims, correctly, that Congress only has the power to enact laws pertaining to bankruptcy that the Constitution grants. And though it acknowledges Article I, Section 8 authorizes Congress to "establish . . . uniform Laws on the subject of Bankruptcies throughout the United States," the Committee maintains the meaning of "bankruptcy" at the founding did not include those able to pay their debts. Any law that permits a company that could pay its debts to seek bankruptcy protection, according to the Committee, cannot confer

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[9] We review such questions de novo. *See Capitol Broad. Co. v. City of Raleigh, N.C.*, 104 F.4th 536, 539 (4th Cir. 2024). We review the bankruptcy court's legal conclusions de novo and its factual findings for clear error. *See In re White*, 487 F.3d 199, 204 (4th Cir. 2007).

"constitutional subject matter jurisdiction."[10] Committee Br. at 16 (quoting *In re Bestwall*, 658 B.R. at 362).

But that phrase sounds an awful lot like a standing challenge. Indeed, all the cases we have located that use that phrase use it as a synonym for Article III standing. *See*, *e.g.*, *Norfolk S. Ry. Co. v. Guthrie*, 233 F.3d 532, 534 (7th Cir. 2000) ("NS argues that its complaint against Lakin and Snyder presents a case or controversy and thus should not have been dismissed for lack of constitutional subject-matter jurisdiction."); *United States v. Hahn*, 359 F.3d 1315, 1322-24 (10th Cir. 2004) (analyzing the existence of an Article III case or controversy for purposes of "constitutional subject matter jurisdiction"); *Umanzor v. Lambert*, 782 F.2d 1299, 1301 n.2 (5th Cir. 1986) ("Whether there

[10] Strictly speaking, the question isn't whether the bankruptcy court had subject-matter jurisdiction; it's whether the district court that referred the case to the bankruptcy court had subject-matter jurisdiction. As we have said, "since bankruptcy courts are not Article III courts, they do not wield the United States's judicial Power." *Kiviti v. Bhatt*, 80 F.4th 520, 532 (4th Cir. 2023). Accordingly, bankruptcy courts are not subject to Article III limitations. We held in *Kiviti* that bankruptcy courts can adjudicate cases that would be moot if they were heard by an Article III court. *See id.* By the same token, bankruptcy courts could, in theory, adjudicate cases that would lack subject-matter jurisdiction if they were heard by an Article III court. "Once a case is validly referred to the bankruptcy court, the Constitution does not require it be an Article III case or controversy for the bankruptcy court to act." *Id.* at 533. Granted, a bankruptcy case must satisfy Article III requirements at the bookends of the case's life. So, before a district court refers a bankruptcy case to a bankruptcy court, "a bankruptcy case must—at the start—be within the judicial Power." *Id.* at 532. For the same reason, "[s]o too must Article III be satisfied after the bankruptcy court acts and the case is returned to the district court[.]" *Id.* at 533. None of this changes the question before us. This point is only one of technical precision; the basic question presented of whether subject-matter jurisdiction exists remains just as pressing.

exists an Article III case or controversy, and thus Constitutional subject-matter jurisdiction, is analytically distinct from whether a habeas corpus statute] confer[s] statutory subject-matter jurisdiction"). Yet the Committee does not argue that Bestwall's restructuring doesn't satisfy Article III's standing requirements.

What the Committee's argument really does is convert a challenge to the Bankruptcy Code's constitutionality into a jurisdictional question. But that can't be right. Following the Committee's logic, challenges to Congress's Commerce Clause power ought to be about jurisdiction too. But they aren't. Consider *United States v. Lopez*, 514 U.S. 549, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995). There, the Supreme Court struck down a criminal conviction for violating 18 U.S.C. § 922(q)(1)(A), which criminalized possessing a gun in school zones. *Id.* at 551, 115 S.Ct. 1624. The Court held that Congress lacked authority under the Commerce Clause to make such laws. *Id.* at 567-68, 115 S.Ct. 1624. But not because the district court had no subject-matter jurisdiction over the case. Instead, the Court affirmed the Fifth Circuit's decision that "reversed respondent's conviction." *Id.* at 552, 115 S.Ct. 1624. If Congress' lack of constitutional authority stripped subject-matter jurisdiction, the Court would have said so. *See Vt. Agency of Nat. Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 778 n.8, 120 S.Ct. 1858, 146 L.Ed.2d 836 (2000) (explaining "the validity of *qui tam* suits under [Article II is not] a jurisdictional issue that we must resolve here"); *see also City of Boerne v. Flores*, 521 U.S. 507, 512, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997) (saying nothing about jurisdiction and merely reversing the Fifth Circuit after holding that RFRA "exceeded the scope of [Congress'] enforcement power under § 5 of the Fourteenth Amendment"). Plainly,

federal courts have subject-matter jurisdiction over constitutional challenges to Congressional enactments.

This is not to say bankruptcy courts are immune to questions of subject-matter jurisdiction. But that jurisdiction is determined by statute. 28 U.S.C. § 1334 vests district courts with "original and exclusive jurisdiction of all cases under title 11 . . . or arising in or related to cases under title 11." 28 U.S.C. § 1334(a)-(b). "Whether a bankruptcy court may exercise subject-matter jurisdiction over a proceeding is determined by reference to 28 U.S.C. § 1334." *Valley Historic Ltd. P'ship v. Bank of N.Y.*, 486 F.3d 831, 839 n.3 (4th Cir. 2007); *see In re Kirkland*, 600 F.3d 310, 315 (4th Cir. 2010) ("[S]ubject matter jurisdiction is determined by § 1334."). "Only Congress may determine a lower federal court's subject-matter jurisdiction." *Kontrick v. Ryan*, 540 U.S. 443, 452, 124 S.Ct. 906, 157 L.Ed.2d 867 (2004).[11]

Granted, § 1334 must remain within constitutional limits. *See Kline v. Burke Constr. Co.*, 260 U.S. 226, 234, 43 S.Ct. 79, 67 L.Ed. 226 (1922) (holding Congress

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[11] Relatedly, 28 U.S.C. § 157 permits district courts to channel that jurisdiction to bankruptcy courts. "Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district." 28 U.S.C. § 157(a). This raises an interesting delegation issue—can Article III power be delegated by Article III courts (United States District Courts) to non-Article III courts (Bankruptcy Courts)? But that thorny issue is not before us, so we need not delve into it. *See generally* Kevin H. Kim, *A Constitutional Tango of Judicial Interpretation: The Instability of Bankruptcy Court Authority under Article III*, 34 EMORY BANKR. DEV. J. 561 (2018); Troy A. McKenzie, *Judicial Independence, Autonomy, and the Bankruptcy Courts*, 62 STAN. L. REV. 747 (2010); Anthony J. Casey & Aziz Z. Huq, *The Article III Problem in Bankruptcy*, 82 U. CHI. L. REV. 1155 (2015).

"may give, withhold or restrict such jurisdiction at its discretion, provided it be not extended beyond the boundaries fixed by the Constitution"); *Kiviti*, 80 F.4th at 533 ("Bankruptcy courts, as statutory creatures, have whatever power Congress *lawfully* gives them." (emphasis added)). So, a party like the Committee can certainly argue that Congress exceeded its powers in giving the bankruptcy court jurisdiction over a company that can pay its debts. But that question really is about Congress's power under Article I of the Constitution to make parties eligible for bankruptcy protection.[12] It's not a question of subject-matter jurisdiction.

Indeed, no court has ever adopted the Committee's view. As the bankruptcy court pointed out, "[t]here are simply no cases at any level (of which this court is aware) that explicitly endorse the proposition that bankruptcy courts do not have subject-matter jurisdiction unless a debtor has a sufficient degree of financial distress." *Bestwall*, 658 B.R. at 371. Even the *In re LTL Management* court didn't decide the case on subject-matter jurisdiction grounds. *See* 64 F.4th 84 (3d Cir. 2023). There, the Third Circuit determined that LTL—the company formed to own and resolve Johnson & Johnson's talc liabilities—was not in financial distress. *See id.* at 106–10. So, it dismissed LTL's bankruptcy petition as a bad faith filing. *See id.* at 110. Importantly, the court determined that it had jurisdiction of the appeal under 28 U.S.C. § 158(d)(2)(A) and that the bankruptcy court had jurisdiction under § 157(a) and § 1334(a). *See id.* at 99. It said nothing

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[12] The parties here advance policy reasons for and against the idea that only insolvent debtors should file for bankruptcy protection. But those arguments are best left for Congress. We traffic in law, not policy.

about the Constitution or its bearing on subject-matter jurisdiction over bankruptcies.[13]

Perhaps the Committee's best authority is *Reid v. Covert*, 354 U.S. 1, 77 S.Ct. 1222, 1 L.Ed.2d 1148 (1957). There, the Supreme Court held that wives of military members could not be court-martialed but were instead entitled to regular civilian criminal jury trials. *Id.* at 18-19, 77 S.Ct. 1222. It analyzed Article 2(11) of the Uniform Code of Military Justice, which lists whom the Code covers. *Id.* at 16, 77 S.Ct. 1222. The Court determined that the Fifth and Sixth Amendments require criminal prosecutions to proceed in regular civilian jury trials, except for the "very limited and extraordinary jurisdiction" of military tribunals. *Id.* at 21, 77 S.Ct. 1222. Thus, the Court

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[13] Relatedly, at least five other circuits have rejected the argument that a debtor's ineligibility for bankruptcy is jurisdictional, and no court has ever accepted it. In *In re Zarnel*, 619 F.3d 156, 158 (2d Cir. 2010), the Second Circuit addressed whether a debtor who doesn't satisfy credit counseling requirements per 11 U.S.C. § 109(h) can commence a bankruptcy proceeding. The court held that "the restrictions of § 301 and § 109(h) are not jurisdictional, but rather elements that must be established to sustain a voluntary bankruptcy proceeding." *Id.* at 169. According to the court, "[r]estricting whether an individual may be a debtor either under the Bankruptcy Code in general or under a given chapter does not speak in jurisdictional terms or invoke the jurisdiction of the district court, delineated in 28 U.S.C. § 1344." *Id.*; *see also In re Trusted Net Media Holdings, LLC*, 550 F.3d 1035, 1046 (11th Cir. 2008) (en banc) (holding that the Bankruptcy Code's sections on involuntary cases do not implicate subject-matter jurisdiction); *In re McCloy*, 296 F.3d 370, 375 (5th Cir. 2002) (debtor eligibility under §§ 109(g) and 303(a) & (h) is not jurisdictional); *In re Marlar*, 432 F.3d 813, 815 (8th Cir. 2005) (failing to satisfy § 303(a) does not strip the court of subject-matter jurisdiction); *In re Hamilton Creek Metro. Dist.*, 143 F.3d 1381, 1385 n.2 (10th Cir. 1998) ("[N]one of the § 109(c) criteria is jurisdictional in nature.").

held that the court-martial had no jurisdiction over civilians. *Id.* at 39-40, 77 S.Ct. 1222.

But *Reid* never used the phrase "subject-matter jurisdiction." Indeed, the opinion seems to instead be concerned with *personal* jurisdiction. Perhaps *Reid* is a vestige of an era in which jurisdictional arguments and phrases were used more liberally than they are today. Since then, the Supreme Court has warned against the overuse of jurisdictional labels. "Because the consequences that attach to the jurisdictional label may be so drastic, we have tried in recent cases to bring some discipline to the use of this term." *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 435, 131 S.Ct. 1197, 179 L.Ed.2d 159 (2011); *see Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 153, 133 S.Ct. 817, 184 L.Ed.2d 627 (2013) ("Tardy jurisdictional objections can [] result in a waste of adjudicatory resources and can disturbingly disarm litigants."); *see also Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 125-27, 134 S.Ct. 1377, 188 L.Ed.2d 392 (2014) (repudiating the "prudential standing" doctrine as a misnomer that has nothing to do with Article III standing). What *Reid* really seems to concern itself with is violations of the Fifth and Sixth Amendments.[14] *See* 354 U.S. at 19,

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[14] To be sure, the Committee raises Seventh Amendment challenges to the use of a § 524(g) trust. Bestwall responds that, under the Bankruptcy Code, a plan with a § 524(g) trust must be approved by 75% of the asbestos claimants. 11 U.S.C. § 524(g)(2)(B)(ii)((IV)(bb). It also points out that, under the Code, any personal injury claimant can opt out and pursue his claim outside of bankruptcy. 28 U.S.C. § 157(b)(5) ("The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending."); 28 U.S.C. § 1411(a) ("[T]his chapter and title 11 do not affect any right to trial by jury that an individual has under

77 S.Ct. 1222. It therefore shines little light on this appeal.

Our colleague in dissent writes passionately about his disagreement with the Texas two-step bankruptcy maneuver, citing his views on both policy and law. In fact, he insists we approve that maneuver in this opinion. But while his arguments address the merits of whether solvent debtors may seek bankruptcy protection, ours do not. And while ours address subject-matter jurisdiction, his do not.

The Committee has already had an opportunity to argue that solvent debtors are not entitled to bankruptcy protection. It lost that argument before the bankruptcy court. The Committee may have another chance to renew that argument—at plan confirmation. If it doesn't like the result, it will then have a final order to appeal. But as we have explained, challenges about a debtor's eligibility for bankruptcy protection are not jurisdictional, even when those challenges are constitutional. For that reason, now is not the time for these arguments. We repeat that this appeal presents only one narrow question—do federal courts have subject-matter jurisdiction over bankruptcy cases filed by debtors who may be able to pay their obligations? We have answered yes.

III.

For all these reasons, the opinion of the bankruptcy court is,

AFFIRMED.

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applicable nonbankruptcy law with regard to a personal injury or wrongful death tort claim."). This opinion should not be construed to resolve this question. Rather, this opinion merely explains that question is not one of subject-matter jurisdiction.

AGEE, Circuit Judge, concurring:

I am pleased to concur fully in Judge Quattlebaum's opinion. I write separately to outline some of the errors in the dissent's discussion of bankruptcy precedent and the ramifications of its conclusion.

At the outset, I completely agree with Judge Quattlebaum's conclusion that this case is not "about whether a debtor's ability to pay its debts is relevant in a bankruptcy case," but rather whether "federal courts have subject-matter jurisdiction over bankruptcy cases filed by debtors who may be able to pay their obligations?" [App. 8a-9a]. Our friend in dissent views it differently, asserting that the majority's decision to rely on Section 1334 is an attempt to "sidestep th[e] constitutional issue," i.e., whether Congress exceeded its authority under the Bankruptcy Clause in crafting Section 1334. [App. 28a-29a]. As Judge Quattlebaum correctly explains, "that question really is about Congress's power under Article I of the Constitution to make parties eligible for bankruptcy protection," which is "not a question of subject-matter jurisdiction." [App. 13a]. The dissent's view, however, goes beyond being an outlier and is based on neither historical fact nor precedent.

Our colleague in dissent argues that the majority fails to view "the meaning of the Framers' words . . . against the backdrop of history and tradition." [App. 43a]. But the dissent's selective focus on out-of-context English and Colonial bankruptcy law is simply misplaced. The Supreme Court unequivocally explained nearly a century ago "that the power of Congress under the [B]ankruptcy [C]lause is not to be limited by the English or Colonial law in force when the Constitution was adopted." *Cont'l Ill. Nat. Bank & Tr. Co. of Chi. v. Chi., Rock Island & P. Ry. Co.*, 294 U.S. 648,

669, 55 S.Ct. 595, 79 L.Ed. 1110 (1935). Instead, the Court instructed that "the most satisfactory approach to the problem of interpretation . . . is to examine it in the light of the acts, and the history of the acts, of Congress which have from time to time been passed on the subject; for, like many other provisions of the Constitution, the nature of this power and the extent of it can best be fixed by the gradual process of historical and judicial inclusion and exclusion." *Id.* at 670, 55 S.Ct. 595 (cleaned up).

Through the Supreme Court's lens, the Official Committee of Asbestos Claimants' ("the Committee") read of the Bankruptcy Clause is not tenable. "From the beginning, the tendency of legislation and of judicial interpretation has been uniformly in the direction of progressive liberalization in respect of the operation of the bankruptcy power." *Id.* at 668, 55 S.Ct. 595. And directly to the point, the Supreme Court has recognized that "[t]he subject of bankruptcies is incapable of final definition. The concept changes." *Wright v. Union Cent. Life Ins. Co.*, 304 U.S. 502, 513, 58 S.Ct. 1025, 82 L.Ed. 1490 (1938). More recently, the Supreme Court reiterated that bankruptcy is difficult to define and includes "nothing less than 'the subject of the relations between [a] debtor and his creditors.'" *Siegel v. Fitzgerald*, 596 U.S. 464, 473-74, 142 S.Ct. 1770, 213 L.Ed.2d 39 (2022) (quoting *Wright*, 304 U.S. at 513-14, 58 S.Ct. 1025). Further, "[w]ithout purporting to define the full scope of the Clause," the Supreme Court "has interpreted the Clause to have granted plenary power to Congress over the whole subject of bankruptcies, and observed that the language used did not limit the scope of Congress' authority." *Id.* (cleaned up). So, the defining feature of "the subject of Bankruptcies" is its breadth. Against this backdrop,

the dissent's myopic view of "the subject of Bankruptcies" is unsupported.

And even if we were to look to English and Colonial-era bankruptcy laws, we find little support for the dissent's construct. Under 18th-century "English law . . . it mattered not whether the defendant was insolvent or otherwise" because involuntary proceedings were common and initiated by a creditor. *In re Klein*, 42 U.S. 277, 277, 1 How. 277, 11 L.Ed. 275 (1843); *cf.* Thomas E. Plank, *Bankruptcy & Federalism*, 71 Fordham L. Rev. 1063, 1094 (2002) (explaining that insolvency "was not always a direct condition to relief under . . . eighteenth-century bankruptcy legislation"). And at the dawn of our nation, "the American Colonies, and later the several States, had wildly divergent schemes for discharging debtors and their debts." *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 365, 126 S.Ct. 990, 163 L.Ed.2d 945 (2006). Nor does the Constitutional Convention provide any basis for the dissent's interpretation of the Bankruptcy Clause; the "Convention adopted the [Bankruptcy Clause] with very little debate," and Roger Sherman of Connecticut alone voted against it, "apparently because he was concerned that it would authorize Congress to impose upon American citizens the ultimate penalty for debt then in effect in England: death." *Id.* at 369, 126 S.Ct. 990. In sum, the "gradual process of historical and judicial inclusion and exclusion," which is our touchstone in this inquiry, plainly demonstrates that the Bankruptcy Clause was never intended to be restricted to those that are "actually bankrupt," whatever that undefined term purportedly means. *Cont. Ill. Nat'l Bank*, 294 U.S. at 670, 55 S.Ct. 595.

This highlights a significant concern with the dissent's conclusion because no one knows, including

the dissent, what it means to be "actually bankrupt." As for the Committee, it fails to advance any concrete theory of the financial standard ostensibly required for debtors to be permitted to initiate a bankruptcy proceeding under its read of the Bankruptcy Clause. Throughout its briefing, the Committee uses constantly shifting terms to define a debtor who is not "actually bankrupt," none of which would enable bankruptcy courts to adjudicate such a debtor with any specificity. *See* Opening Br. 17 (limiting it to debtors who "struggled to pay their debts"), 21 ("utterly incapable of repaying their debts"), 22 ("debtors who demonstrated an inability or . . . an unwillingness to repay their creditors"). Tellingly, it (and the dissent) *rejects* the one standard that is already well-known in bankruptcy law to gauge indebtedness: insolvency. *Id.* at 39. As the bankruptcy court below aptly pointed out, without "insolvency" as a touchstone, "determining whether a debtor is in financial distress would not be easy," and such a restrictive jurisdictional limitation is at odds with Congress's "policy decision to allow liberal access and encourage early filing" of bankruptcy petitions. *In re Bestwall LLC*, 658 B.R. 348, 376, 376-77 (Bankr. W.D.N.C. 2024).

No matter, according to the dissent. In its view, the definition is obvious; "debtors who [are] truly bankrupt" are "those unable or unwilling to pay their debts." [App. 24a]. And yet the dissent fails to identify any historical precedent that—as a *jurisdictional* matter, lest we forget the question presented—applies to support its position. One would think in the 235 years of judicial precedent since the Founding there

would be at least one case supporting the dissent's vague view; but there are none.[1]

Finally, the dissent attempts to differentiate Bestwall's bankruptcy proceeding from those it would deem appropriate for bankruptcy courts to hear. But the reality is that there are innumerable bankruptcy proceedings initiated by debtors who may not be "actually bankrupt" under either the Committee's or the dissent's wide-ranging and ill-supported interpretations of the phrase.

First, based on the aforementioned discretion conferred through the Bankruptcy Clause, Congress has created various statutory bankruptcy schemes. While Chapter 9 bankruptcy requires insolvency, neither Chapter 7, Chapter 11, nor Chapter 13 includes such a requirement. *See* 11 U.S.C. § 109. Since 2020, over one million Chapter 11 and Chapter 13 bankruptcy cases have been filed. United States Courts, Bankruptcy Statistics Data Visualizations, https://www.uscourts.gov/data-news/reports/statistical-reports/bankruptcy-filing-statistics/bankruptcy-statistics-data-visualizations [https://perma.cc/8XL9-2L7D] (last visited July 23, 2025). Under the dissent's view, all of these would be unconstitutional and therefore void. Only the Chapter 9 proceedings for municipal bankruptcies would be constitutionally permissible. And Chapter 9 was only added to the Bankruptcy Code in 1978. Since 2020, only twenty-two Chapter 9 proceedings have been initiated. *Id.* Apparently these are the only bankruptcy proceedings that the dissent would deem constitutionally valid. Bankruptcy Reform

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[1] It bears repeating that the bankruptcy court already considered and denied the Committee's motion to dismiss for bad faith on the merits. *See In re Bestwall LLC*, 605 B.R. 43, 54 (Bankr. W.D.N.C. 2019).

Act of 1978, Pub. L. No. 95-598, § 201(a), 92 Stat. 2549, 2557 (1978) (codified as 28 U.S.C. § 151), *amended by* Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333 (1984) (current version at 28 U.S.C. § 151).

Second, in recent decades, many manufacturers of asbestos-containing products have faced overwhelming asbestos liability. In fact, by 1988, the problem was so widespread that Congress "allow[ed] a Chapter 11 debtor with substantial asbestos-related liability to establish and fund a trust that assumes the debtor's liability for 'damages allegedly caused by the presence of, or exposure to, asbestos or asbestos-containing products.'" *Truck Ins. Exch. v. Kaiser Gypsum Co.*, 602 U.S. 268, 273, 144 S.Ct. 1414, 219 L.Ed.2d 41 (2024) (quoting 11 U.S.C. § 524(g)(2)(B)(i)(I)). By 2011, sixty § 524(g) trusts had been established, paying about 3.3 million claims valued at a total of approximately $17.5 billion. U.S. Gov't Accountability Off., GAO-11-819, Asbestos Injury Compensation: The Role and Administration of Asbestos Trusts (2011). Since then, at least one more § 524(g) trust has been created: Bestwall's trust. Therefore, it is not accurate to characterize "Bestwall's bankruptcy filing [as] not at all typical." [App. 27a]. In fact, it is akin to at least sixty other bankruptcy filings that resulted in § 524(g) trusts—which placed billions of dollars in the pockets of aggrieved plaintiffs. None of these cases have been challenged based on the dissent's newly-minted view, but all would be void under the dissent's construct and § 524(g) void ab initio.

The dissent simply disagrees with what has colloquially become known as the Texas Two-Step, which it characterizes as "a corporate sleight-of-hand maneuver." [App. 23a-24a]. Whatever the merits of

that policy viewpoint, that is a matter within the province of the Congress, not the judiciary. Regardless, the Texas Two-Step's validity is irrelevant in evaluating whether federal courts have subject-matter jurisdiction over bankruptcy cases filed by debtors who may be able to pay their obligations. And, for the reasons ably explained by Judge Quattlebaum, the answer to that question is "no." I therefore fully concur in the majority opinion.[2]

KING, Circuit Judge, dissenting:

I respectfully dissent. Today, the majority approves a legal maneuver that fundamentally departs from the central purpose of our Nation's bankruptcy system, which has long been to provide a "fresh start" to the "honest but unfortunate debtor." *See Grogan v. Garner*, 498 U.S. 279, 286-87, 111 S.Ct. 654, 112 L.Ed.2d 755 (1991). Bestwall LLC — an entity manufactured in a corporate boardroom, rather than amid a genuine financial crisis — is no such debtor. It has access to billions of dollars in funding, and it has conceded on the record that it can satisfy all of its obligations in full. Yet it remains immune to tort

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[2] The dissent also chastises Bestwall for having filed a § 524(g) Chapter 11 proceeding and claims it has placed thousands of claimants at risk. Perhaps so. But in the eight years this case has been pending, it is the Committee that has filed multiple challenges that have impeded progression to a plan and confirmation hearing. Namely, it has moved to dismiss the case as a bad faith filing under 11 U.S.C. § 1112(b) or, in the alternative, to transfer venue of the case to Delaware, which the bankruptcy court denied in full. And now—in the eleventh hour—the Committee moves to dismiss for lack of subject-matter jurisdiction. That begs the question, as we previously noted in *In re Bestwall LLC*, as to whether the delay relates to valid claims or the desire for perceived higher attorneys' fees should the claims be removed and be adjudicated outside of bankruptcy? 71 F.4th 168, 184 (4th Cir. 2023). Perhaps future review will answer that question.

liability while those harmed by its predecessor, Georgia-Pacific, must wait — some quite literally on borrowed time — for their tort claims to be heard and resolved.

Bestwall entered bankruptcy not because it was financially distressed, but because its parent corporation, Georgia-Pacific, sought to evade tort liability for harm caused by decades of manufacturing and selling dangerous products containing asbestos. Through a corporate sleight-of-hand maneuver known as the "Texas Two-Step," Georgia-Pacific restructured itself to isolate its asbestos liabilities into a newly created entity, Bestwall LLC. It then used that shell entity to file for Chapter 11 bankruptcy. As a result of Bestwall's bankruptcy proceedings, thousands of pending tort lawsuits, pursued by individuals dying from mesothelioma and other fatal diseases caused by its own products, have been halted. In effect, a financially healthy company has placed its tort liabilities to thousands of workers behind a wall of bankruptcy protection, without itself undergoing the scrutiny, transparency, or risk that bankruptcy typically entails.

Bestwall's entry into Chapter 11 was a strategic decision by lawyers and executives, designed to pause active tort litigation, consolidate those claims in a single forum, and extract favorable settlement terms from asbestos victims through delay. This is a far cry from the bankruptcy system that the Founders envisioned when they constitutionally authorized Congress to create "uniform Laws on the subject of Bankruptcies." *See* U.S. Const. art. I, § 8, cl. 4. At the time of the Founding, the protections of bankruptcy were available only to debtors who were truly bankrupt — that is, those unable or unwilling to pay their debts. Bankruptcy was meant to provide an orderly

process for resolving financial distress, not a legal shield for solvent corporations seeking to escape liability. It was not meant to extend the protections of bankruptcy to profitable entities facing mass liability for tort claims. Indeed, nothing in the Constitution permits Congress, or the federal courts, to allow a bankruptcy to be wielded as a strategic weapon by the powerful to avoid accountability to the harmed, as Bestwall and Georgia-Pacific have done here.

I cannot join the majority in allowing this result. I would instead hold that the bankruptcy court lacked subject-matter jurisdiction to entertain Bestwall's bankruptcy petition, and would reverse its denial of the Committee's motion to dismiss. Anything less fails the thousands of asbestos victims whose claims remain frozen while the entity that should be responsible for their injuries continues to operate unencumbered.

I.

The majority opinion has recited the lengthy history of Georgia-Pacific's various corporate maneuvers designed to insulate itself from serious tort liability. It is crucial, however, to emphasize the very real cost of allowing our Nation's bankruptcy system to be weaponized against tort victims as a tool for delay and leverage. Indeed, the suffering of those victims must remain central to any honest assessment of what is at stake in this appeal.

Unlike in many Chapter 11 bankruptcy proceedings, the Claimants here are not corporate lenders or institutional creditors. They are ordinary Americans who have spent their working lives installing drywall, laying insulation, cutting pipe, and simply returning to their homes each day to family members who laundered the toxic fibers from their clothing. They are

factory workers, veterans, tradespeople, and laborers. They are also widows, adult children, and family members of the deceased victims who now carry forward claims on behalf of loved ones who have died from asbestos-related diseases.[1]

Sadly, many of these Claimants suffer from mesothelioma — a rare, incurable cancer that is almost exclusively caused by asbestos exposure. Others have been diagnosed with asbestosis, lung cancer, or other severe respiratory diseases linked to asbestos fibers inhaled on the job, in their homes, or through second-hand contact. And while these individual Claimants are fighting the effects of horrific diseases caused by asbestos exposure, they have now been forced to fight through a legal process that has been indefinitely suspended by Bestwall's bankruptcy filing. Their right to pursue justice through the tort system of the civil courts — a right that is deeply rooted in the laws of our Nation and grounded in the most basic principles of accountability — has been put on hold by a solvent and profitable enterprise acting through a wholly manufactured bankruptcy proceeding.

The Claimants' fights began where I believe they should end — not in a bankruptcy court, but in the courts of our Nation's civil justice system. Faced with debilitating illnesses and premature deaths, the Claimants sought to bring their tort claims before a

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[1] The Official Committee of Asbestos Claimants (the "Committee") represents the injured parties (the "Claimants") in this appeal. The Committee includes personal representatives from across the country, each of whom is connected to a victim who suffered from, or died of, an asbestos-related illness. Notably, each of the six living Claimants appointed to the Committee have died while Bestwall's bankruptcy filing has been pending. Those Claimants are now represented by the administrators of, or successors to, the deceased individuals' estates.

jury of their peers. As these individuals began to seek justice, Bestwall — along with its sister entity, Georgia-Pacific — faced a rising tide of asbestos-related lawsuits.[2] But at no point during this time did Bestwall's or Georgia-Pacific's financial health falter. Indeed, in the year before Bestwall's bankruptcy filing, Georgia-Pacific paid its parent company, Koch Industries, a 2 billion dollar dividend. That is hardly the conduct of a debtor in distress.

Nevertheless, in 2017, Georgia-Pacific undertook a corporate restructuring under Texas law. It split itself into two entities: a "new" Georgia-Pacific, which received virtually all of the profitable business assets, and Bestwall, which inherited all asbestos liabilities. Shortly after this restructuring, Bestwall filed for Chapter 11 bankruptcy. That bankruptcy filing brought with it a powerful legal shield — an automatic litigation stay — which halted all ongoing asbestos litigation in the various state and federal courts against Bestwall and Georgia-Pacific.

Bestwall's bankruptcy filing was not at all typical, in that it did not involve a business entity on the brink of financial ruin or insolvency. Bestwall entered bankruptcy with a financial safety net, in the form of a "Funding Agreement" with Georgia-Pacific that ensures Bestwall can continue to access Georgia-Pacific's very substantial assets. As part of the Funding Agreement, Georgia-Pacific agreed to foot the bill for all expenses related to Bestwall's bankruptcy

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[2] When Bestwall filed for bankruptcy in 2017, there were about 22,000 active tort claims pending against it, plus an additional 13,300 inactive claims. The Committee also estimates that approximately 21,300 newly diagnosed individual claimants would have pursued compensation from Bestwall but for the bankruptcy stay.

and asbestos liability, including funding Bestwall's § 524(g) asbestos trust.[3]

At the time of Bestwall's bankruptcy filing, Georgia-Pacific's assets were estimated at more than 28.3 billion dollars. And today, Georgia-Pacific remains a multi-billion-dollar company with a long and stable record of profitability. It manufactures widely recognized consumer goods like Brawny paper towels, Angel Soft toilet paper, Dixie cups, and Quilted Northern tissues, among others, and also maintains extensive operations in pulp and paper products, building materials, and chemicals. It continues to generate substantial profits, wholly insulated from the asbestos liabilities it has offloaded onto Bestwall.

This is not a case, then, in which bankruptcy was invoked to rescue a failing business enterprise. Nor is it a case in which asset preservation was necessary to ensure equitable distribution among creditors. On the contrary, Bestwall's entry into Chapter 11 bankruptcy was a strategic decision, designed to pause active litigation, consolidate claims in a single forum, and pressure tort victims into favorable settlements through delay. The effect — and the goal — has been to disempower the asbestos Claimants, forcing them

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[3] The Bankruptcy Code allows a Chapter 11 debtor with significant asbestos liabilities to create a trust to resolve both current and future claims. *See* 11 U.S.C. § 524(g). Under this statutory provision, the debtor may fund a trust that assumes responsibility for asbestos-related damages. *Id.* § 524(g)(2)(B)(i). Once established, § 524(g) channels all such claims into the trust by "enjoin[ing] entities from taking legal action for the purpose of directly or indirectly collecting, recovering, or receiving payment or recovery" for claims "to be paid in whole or in part by [the] trust." *Id.* § 524(g)(1)(B). In short, § 524(g) bars asbestos claimants from pursuing separate legal actions to recover directly from the debtor.

to wait out the legal process while the debtor and its affiliates continue to amass record-setting profits outside the bankruptcy estate.

The human cost of this bankruptcy delay cannot be overstated. Asbestos-related diseases progress swiftly and painfully. The window for meaningful legal relief is, for many victims, heartbreakingly short. In the seven years since Bestwall filed for bankruptcy, about 25,000 Claimants have died without any resolution of their claims. Approximately 10,000 Claimants have died from mesothelioma — a harrowing disease that is nearly always fatal within 18 months to two years of diagnosis. Still others have seen their families saddled with medical debt and left without recourse. Indeed, not one of about 56,000 plaintiffs has been able to pursue his or her claims against Bestwall or Georgia-Pacific for causing asbestos-related diseases. Meanwhile, Bestwall and its sister corporation, Georgia-Pacific, have enjoyed the protections of bankruptcy alongside substantial and stable profits.

II.

The Claimants argue — correctly, in my view — that this case presents a fundamental threshold question of subject-matter jurisdiction. Their contentions warrant more than a passing glance, for they strike at the constitutional boundary between what Congress may regulate and what federal courts may adjudicate. Yet the majority declines to engage with the Claimants' jurisdictional contentions, instead labelling those arguments as a garden-variety challenge to a statute's constitutionality underpinned by "policy reasons." *See*, *e.g.*, *ante* [App. 13a] n.12.

The central flaw, however, in the majority's reasoning is its assumption that Congress's broad grant of jurisdiction under 28 U.S.C. § 1334 can override the

Constitution's more limited delegation of power under the Bankruptcy Clause. To be sure, Section 1334 grants jurisdiction over cases "under Title 11." *See* 28 U.S.C. § 1334(a). Crucially, this "authority is not freewheeling." *See Trump v. CASA, Inc.*, 606 U.S. 831, 145 S.Ct. 2540, 2551, 222 L.Ed.2d 930 (2025). Section 1334 does not — and cannot — independently determine what constitutes a "case" that Congress may authorize under Article I. Nor can the statute override the Constitution's limited delegation of power under the Bankruptcy Clause, which empowers Congress to enact "uniform Laws on the subject of Bankruptcies." *See Bowles v. Russell*, 551 U.S. 205, 212, 127 S.Ct. 2360, 168 L.Ed.2d 96 (2007) ("Within constitutional bounds, Congress decides what cases the federal courts have jurisdiction to consider.").

The majority's decision to sidestep this constitutional issue has immediate and troubling implications. By declining to squarely address whether Bestwall's petition satisfies the Bankruptcy Clause's jurisdictional limits, the majority permits bankruptcy jurisdiction to be extended to parties who are not actually bankrupt — and, in doing so, open the courthouse doors to a new kind of forum shopping by solvent corporations. Worse still, it allows the extraordinary powers of the bankruptcy court — including the automatic stay and the discharge of liabilities — to be deployed against injured individuals who have little say in how the process unfolds.

III.

Bankruptcy has always been understood as an extraordinary remedy, reserved for those in genuine financial distress. At the time of the Founding, and for well over a century thereafter, bankruptcy was available only to those who could not pay their debts.

It was not available to those who preferred not to satisfy those debts, or those whose financial resources remained vast but who sought a more favorable forum. It was against this backdrop that the Framers of the Constitution granted Congress the power, through the Bankruptcy Clause contained in Article I, to enact "uniform laws on the subject of Bankruptcies." *See* U.S. Const., art. I, § 8.

A.

As the Supreme Court has instructed, our understanding of bankruptcy must "accord with history and faithfully reflect the understanding of the Founding Fathers." *See Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 535-36, 142 S.Ct. 2407, 213 L.Ed.2d 755 (2022) (internal quotation marks and alterations omitted). In exercising jurisdiction over a debtor — like Bestwall — that is not actually bankrupt, however, the bankruptcy court endorsed an unbounded reading of § 1334 that is inconsistent with the Constitution's text and our Nation's legal traditions. And in affirming the bankruptcy court's decision today, the majority accepts that bankruptcy jurisdiction exists simply because Congress said so — that is, because 28 U.S.C. § 1334 confers jurisdiction over any case "arising under" or "related to" the Bankruptcy Code.

But "history and tradition," not "Congress's say-so," inform the scope of the Bankruptcy Clause, and therefore constrain Congress's authority to enact laws granting jurisdiction to the bankruptcy courts. *See TransUnion LLC v. Ramirez*, 594 U.S. 413, 424-26, 141 S.Ct. 2190, 210 L.Ed.2d 568 (2021). And while Congress is entitled to create statutory jurisdictional provisions like § 1334, it cannot enlarge the substantive scope of the "subject of Bankruptcies" beyond the limits established under the Constitution. *See Bowles*

v. Russell, 551 U.S. 205, 212, 127 S.Ct. 2360, 168 L.Ed.2d 96 (2007) ("Within constitutional bounds, Congress decides what cases the federal courts have jurisdiction to consider.").

To discern those limits, we must first examine the relevant language of the Constitution itself and, more specifically, the Bankruptcy Clause. *See Food and Drug Admin. v. All. for Hippocratic Med.*, 602 U.S. 367, 378, 144 S.Ct. 1540, 219 L.Ed.2d 121 (2024) ("[W]e begin as always with the precise text of the Constitution."); *see also Altman v. City of High Point*, 330 F.3d 194, 200 (4th Cir. 2003) ("[O]ur inquiry begins with the text of the Constitution."). Importantly, our reading of the Bankruptcy Clause must be informed by the very nature of the Constitution — that is, its status as a "written instrument" with provisions that carry meaning rooted in the historical moment in which they were adopted, as well as the legal and societal traditions that informed their drafting. *See South Carolina v. United States*, 199 U.S. 437, 448, 26 S.Ct. 110, 50 L.Ed. 261 (1905) ("The Constitution is a written instrument. As such, its meaning does not alter. That which it meant when adopted, it means now."). Our role in its interpretation, then, is not to update or revise the Constitution to meet modern preferences, but to faithfully apply the meaning its provisions bore when it was ratified. *See Lewis v. Casey*, 518 U.S. 343, 367, 116 S.Ct. 2174, 135 L.Ed.2d 606 (1996) (Thomas, J., concurring) (cautioning against courts "infusing the constitutional fabric with our own political views").

We are thus called upon to consider the ordinary public meaning of a phrase which is otherwise undefined in the text of the Constitution: "the subject of Bankruptcies." But, as Chief Justice Marshall put

it two centuries ago, we must always recall that "the enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense[.]" *See Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 188, 6 L.Ed. 23 (1824). Thus, "[t]he proper course of constitutional interpretation is to give the text the meaning it was understood to have at the time of its adoption by the people." *See Boumediene v. Bush*, 553 U.S. 723, 843, 128 S.Ct. 2229, 171 L.Ed.2d 41 (2008) (Scalia, J., dissenting).

At the time of the Founding, "bankruptcy" had a specific and well-understood legal meaning. Rooted in English law and early American practice, the term referred to a narrow legal framework that applied to merchants or traders who were unable or unwilling to pay their debts. The typical debtor in bankruptcy was financially distressed — indeed, insolvent — and bankruptcy provided an orderly process for liquidating assets and discharging debts. *See Hanover Nat'l Bank v. Moyses*, 186 U.S. 181, 185, 22 S.Ct. 857, 46 L.Ed. 1113 (1902) (explaining that early bankruptcy provisions were directed at "unfortunate and meritorious debtors"). In that regard, bankruptcy was not a general-purpose tool for managing financial risk or reorganizing a large corporation or business entity. It was instead an extraordinary remedy for situations of real economic distress.

B.

Crucially, when a word is "transplanted from another legal source," it "brings the old soil with it." *See Hall v. Hall*, 584 U.S. 59, 73, 138 S.Ct. 1118, 200 L.Ed.2d 399 (2018) (quoting Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 537 (1947)). Indeed, "the language of the [C]onstitution, as has been well said, [can]not be

understood without reference to the common law." *See United States v. Wong Kim Ark*, 169 U.S. 649, 654, 18 S.Ct. 456, 42 L.Ed. 890 (1898). The Framers of the Constitution "were familiar with the contemporary legal context" — that is, the English bankruptcy system — "when they adopted the Bankruptcy Clause." *See Central Va. Comm. Coll. v. Katz*, 546 U.S. 356, 362, 126 S.Ct. 990, 163 L.Ed.2d 945 (2006). Thus, our interpretation and application of the Constitution's text "is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in the light of its history." *See Smith v. Alabama*, 124 U.S. 465, 478, 8 S.Ct. 564, 31 L.Ed. 508 (1888).

1.

We begin — just as our Founding Fathers did — with English bankruptcy law. From its inception, England's bankruptcy system treated debtors not as beneficiaries of equitable relief but as malefactors to be disciplined for misconduct. More specifically, the English bankruptcy system was limited to involuntary proceedings against merchants or traders who had committed "acts of bankruptcy" — that is, persons "who craftily obtaining into their hands great substance of other men's goods, do suddenly flee to parts unknown, or keep their houses, not minding to pay or restore to any of their creditors their debts and duties[.]" *See* 34 & 35 Hen. 8, ch. 4 (1542-1543) (Eng.); *see also* 2 William Blackstone, Commentaries *474 (indicating that this citation was to "the first statute made concerning any English bankrupts"). In short, England's earliest bankruptcy statute targeted commercial fraud and absconding debtors, not any well-capitalized merchants or solvent actors.

Over time, the English system evolved to incorporate limited debtor protections, including an eventual discharge for those who cooperated with the court proceedings and were deemed to be "honest." *See*, *e.g.*, An Acte for the Better Reliefe of the Creditors Againste Suche as Shall Become Bankrupte, 1 Jac., ch. 15 (1603-1604) (Eng.); An Acte for the Discripceon of a Banckrupt and Releife of Credytors, 21 Jac., ch. 19 (1623-1624) (Eng.). But the defining feature of English bankruptcy law remained its focus on debtors that were unable to pay — that is, individuals or entities that were actually insolvent, even if insolvency was not strictly defined by statute. Plainly, bankruptcy was never a forum-shopping device or a means of centralized dispute resolution; it was a last resort for a debtor in financial ruin or for creditors seeking equitable distribution of a debtor's remaining estate.

A separate and discrete set of "insolvency" laws addressed non-trader and non-merchant debtor relief. *See generally* 1 Collier on Bankruptcy 20.01; *see also* 2 William Blackstone, Commentaries *475-77 (discussing who qualified as a "trader"). But while insolvency and bankruptcy were not identical concepts, they were inextricably linked. Indeed, despite the "difficulty of discriminating with any accuracy between insolvent and bankrupt laws," the bankruptcy laws "contain[ed] those regulations which [were] generally found in insolvent laws," and the insolvency laws "contain[ed] those which [were] common to a bankrupt law." *See Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 195, 4 L.Ed. 529 (1819). Put otherwise, "the line of partition between" bankruptcy and insolvency was "not so distinctly marked as to enable any person to say, with positive precision, what belongs exclusively

to the one, and not to the other class of law." *Id.* at 194.

In sum, the early bankruptcy and insolvency statutes each tied relief to a debtor's inability to meet fixed financial obligations. And those laws distinguished clearly between those who were simply facing litigation, and those who were truly insolvent or unable to pay their debts as they came due. A debtor who could pay his debts, therefore, was not what the Founders would have ever considered "bankrupt." *See*, *e.g.*, *In re Reiman*, 7 Ben. 455, 494-94 (1874) (describing bankruptcy "for the benefit and relief of creditors and their debtors, in cases in which the latter are unable or unwilling to pay their debts"). Only those "grown bankrupt like a broken man," "who hath not money," could seek relief through bankruptcy. *See* William Shakespeare, Richard II, act II, sc. 1, ls. 267, 269.

2.

Colonial America inherited much of the English bankruptcy regime, but adapted it in various ways. Because the English Parliament did not enact a comprehensive insolvency framework for the colonies, each colonial legislature developed its own insolvency or "debtor-relief" laws. Those laws were often more lenient than the English bankruptcy statutes and reflected local economic realities, including a heavy reliance on credit and the absence of strong centralized courts. *See generally* Bruce E. Mann, *Republic of Debtors: Bankruptcy in the Age of American Independence* 23-25 (2002).

Colonial insolvency laws were primarily designed to relieve individual debtors, many of whom were farmers, laborers, or small tradespeople. Such laws often provided for voluntary proceedings, allowing debtors to come forward, surrender their assets, and

seek release from imprisonment or execution of judgment. *See*, *e.g.*, 1 *Acts and Resolves of the Province of Massachusetts Bay* (21 vols., Boston, 1869-1922) (providing for release from debtor's prison in Colonial Massachusetts); *Colonial Laws of New York* 2, 753-56 (providing for assignment of servitude to discharge of "petty debtors"). But even in the colonies, the availability of such remedies was contingent on insolvency — that is, on a debtor's factual inability to satisfy his outstanding obligations. *See*, *e.g.*, *State v. Gee*, 1 Bay 163, 163 (S.C. Ct. Com. Pl. 1791) (interpreting 1759 South Carolina statute as an "insolvent debtor's law . . . intended only for the benefit of those who by accident, losses, or other misfortunes, are rendered incapable of paying their debts, and by that means had become objects of compassion"); *see also*, *e.g.*, *Colonial Laws of New York* 2, 669-75 (explaining that debtors made insolvent "by losses & other Misfortunes" were "the proper objects of publick compassion"). As in England, solvent individuals simply had no claim to protection under such laws. They remained subject to the full force of the ordinary legal processes.

Moreover, because there was no national bankruptcy system under the Articles of Confederation, debtors and creditors alike were subjected to a patchwork of inconsistent and sometimes conflicting laws across the several states. This lack of uniformity created confusion, promoted forum shopping, and invited inequitable outcomes. A debtor who was protected in one jurisdiction could be imprisoned in another. Creditors in different jurisdictions might receive radically different shares of the same insolvent estate. Still, the varied "insolvent laws of [the] many . . . states" were first and foremost enacted for the relief of "unfortunate" and "honest" debtors, and thus were

narrowly tailored to address real economic failure, not procedural or tactical advantages sought by solvent debtors. *See Crowninshield*, 17 U.S. (4 Wheat.) at 203.

3.

It was against this backdrop that the Founders included the Bankruptcy Clause in the Constitution. As James Madison explained, this Clause responded to a need for uniformity in the laws governing insolvency and bankruptcy. *See* The Federalist No. 42, at 282 (James Madison) (Clinton Rossiter ed., 1961); *see also Katz*, 546 U.S. at 365-66, 126 S.Ct. 990. But neither the inclusion of the Bankruptcy Clause, nor its delegation to Congress of "power . . . to establish uniform laws on the subject of bankruptcies throughout the United States," redefined bankruptcy itself. *See Int'l Shoe Co. v. Pinkus*, 278 U.S. 261, 265, 49 S.Ct. 108, 73 L.Ed. 318 (1929). The word "bankruptcy," as used in the Constitution, retained the same meaning it had acquired through the English and colonial usage. Indeed, "those from whom the word was doubtless transferred into the constitution, treat it as exactly commensurate with insolvency." *See Kunzler v. Kohaus*, 5 Hill 317, 320 (N.Y. 1843).

Founding-era dictionaries reflecting the ordinary usage of legal and economic terms confirm that the concepts of "bankruptcy" and "bankrupt" were tightly bound to the condition of insolvency — that is, a debtor's inability to pay his debts. *See*, *e.g.*, William Perry, *The Royal Standard English Dictionary* 51 (1777) (defining a "bankrupt" as "one who cannot pay his debts"); *see also*, *e.g.*, Samuel Johnson, *Dictionary of the English Language* (1773) (defining "Bankruptcy" as "[t]he state of a man broken, or bankrupt"); 1 Thomas Sheridan, *Dictionary of the English Language* (4th ed. 1797) (defining "bankrupt" and "bankruptcy"

as "[t]he state of a man" "in debt beyond the power of payment"). These definitions plainly reflect the public understanding of bankruptcy as "the act of declaring oneself a bankrupt," or "[b]roken for debt, incapable of payment, insolvent." *See* John Ash, *New and Complete Dictionary of the English Language* (1775) (defining a "bankrupt" and "bankruptcy"); *see also District of Columbia v. Heller*, 554 U.S. 570, 605, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008) (explaining that "the examination of a variety of legal and other sources to determine *the public understanding* of a legal text in [a] period . . . is a critical tool of constitutional interpretation").

C.

1.

These sources consistently reflect two key features: First, that bankruptcy primarily involved commercial actors, such as merchants or traders, and second, that it required financial failure or nonpayment. Notably, none of these relevant authorities define bankruptcy as a mechanism for strategic liability management by solvent entities, nor do they suggest that a party with the means to pay its debts could be properly described as "bankrupt." The uniformity in the term's usage is particularly significant given the broader legal context, as early bankruptcy legislation presumed a debtor's insolvency as a precondition for relief.

The Founders, in using the term "Bankruptcies," would have undoubtedly drawn upon that established understanding. After all, "[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning." *See United States v. Sprague*, 282 U.S. 716, 731, 51 S.Ct. 220, 75 L.Ed. 640 (1931). This historical understanding

should constrain the modern interpretation of the Clause and the permissible scope of federal bankruptcy jurisdiction. *See*, *e.g.*, *Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 576 U.S. 787, 813-14, 135 S.Ct. 2652, 192 L.Ed.2d 704 (2015) (using Founding-era dictionaries to ascertain original meaning). Thus, when read in light of contemporary dictionary definitions, the Bankruptcy Clause clearly refers to a legal regime designed only for insolvent debtors, not solvent corporations seeking to evade mass tort liability through complicated corporate restructuring.

At bottom, the historical record contains no suggestion that Congress would have the power to legislate a bankruptcy remedy for a solvent entity, or that the federal courts could ever exercise jurisdiction over bankruptcy petitions not grounded in genuine financial distress. In truth, the historical evidence points in a markedly different direction. As Justice Story explained, the "satisfactory . . . description of a bankrupt law" at the time of the Founding was "a law for the benefit and relief of creditors and debtors, in cases in which the latter are unable or unwilling to pay their debts." *See* 2 Joseph Story, *Commentaries on the Constitution* § 1113, at 50 n.3 (Thomas M. Cooley ed., 4th ed. 1873). And so "a law on the subject of bankruptcies," as contemplated by the Constitution, was "a law making provisions for cases of persons failing to pay their debts." *Id.*

2.

Early American bankruptcy statutes consistently reinforce this understanding. The Bankruptcy Act of 1800 — the first national bankruptcy law passed after Ratification — applied only to merchants and traders, and "was in many respects a copy of the English

bankruptcy statute then in force." *See Katz*, 546 U.S. at 373, 126 S.Ct. 990. The Act provided no protection to debtors who remained able to meet their obligations and, "like the English law, was conceived in the view that the bankrupt was dishonest." *See Continental Illinois Nat'l Bank & Trust Co. v. Chicago, Rock Island & Pac. Ry. Co.*, 294 U.S. 648, 670, 55 S.Ct. 595, 79 L.Ed. 1110 (1935).

But, consistent with the Founding-era view of bankruptcy as a remedy for the honest but unfortunate debtor, Congress progressively extended voluntary bankruptcy to non-merchants and non-traders burdened by debt and in need of relief. *See Continental Illinois*, 294 U.S. at 670-71, 55 S.Ct. 595 (explaining that "the [Bankruptcy] act of 1841 and the later acts proceeded upon the assumption that [a debtor] might be honest but unfortunate"). Indeed, the "primary purposes of these acts [were] to 'relieve the honest debtor from the weight of oppressive indebtedness, and permit him to start afresh[.]'" *Id.* at 670, 55 S.Ct. 595. And although the early American bankruptcy statutes were repealed and later replaced with broader legislation, the constitutional baseline for the remedy of bankruptcy remained tied to insolvency — that is, "consistent with the principles that underpin the Nation's [bankruptcy] tradition." *See United States v. Rahimi*, 602 U.S. 680, 681, 144 S.Ct. 1889, 219 L.Ed.2d 351 (2024).

What emerges from this relevant history is a consistent and constitutionally significant principle: Bankruptcy, as the Founders understood it, was meant for the financially distressed. It was never intended as a mechanism by which profitable enterprises could transform an honest but unfortunate debtor's shield into a sword for solvent corporations to

cut down the rights of injured Americans. To be sure, the constitutional power to legislate on "the subject of Bankruptcies," set forth in Article I, section 8 — i.e., the Bankruptcy Clause as ratified — was anchored in this well-developed legal tradition, one that aimed to ensure fairness among creditors while providing relief to debtors who were truly in distress. This tradition, as illuminated by "the uniform popular acceptation of the word from the earliest times and in all English countries," reveals how the Bankruptcy Clause should be interpreted: To grant Congress the "power to establish uniform laws on the subject of any person's general inability to pay his debts throughout the United States." *See Kunzler*, 5 Hill at 321.

In sum, our history and tradition does not support the majority's extension of bankruptcy protections to solvent tort defendants who seek a strategic advantage over their creditors and victims. When bankruptcy is used in that manner, it departs not only from historical practice but from the constitutional limits of the Bankruptcy Clause itself.

D.

It bears repeating: Bestwall is not a debtor in distress. It is a vehicle engineered by Georgia-Pacific to carry its asbestos liabilities while insulating its profitable operations. Bestwall possesses no business operations, generates no independent income, and exists solely to carry forward asbestos liabilities that Bestwall can fully satisfy through a Funding Agreement backed by Georgia-Pacific's billions of dollars in assets. That Funding Agreement, by Bestwall's own admission, guarantees that it can meet its obligations in full. *See In re Bestwall*, 658 B.R. 348, 355 (Bankr. W.D.N.C. 2024).

In substance, then, Bestwall's financial position has never triggered the sort of crisis the Bankruptcy Clause was designed to address. Its filing in the Western District of North Carolina was not a response to economic distress, but rather an effort to impose a federal forum and automatic stay over thousands of state law tort claims. And while Congress has created statutory mechanisms to manage mass-tort bankruptcies, such statutes can only operate within the limits of Article I. Indeed, those statutes cannot transform the scope of the Bankruptcy Clause itself. Bestwall's bankruptcy may be clever, but it is not constitutional. And it is not bankruptcy as the Framers understood it.

The bankruptcy court, however, failed to engage with those constitutional boundaries. Although it correctly ascertained that the Claimants' contentions were challenges to its subject-matter jurisdiction, it then reasoned that there is "no direct evidence" about what "concept of bankruptcy" the Framers had in mind. The court thus determined that "there is no direct evidence that the Framers intended to require financial distress for bankruptcy jurisdiction." *See In re Bestwall LLC*, 658 B.R. at 365.

In so ruling, the bankruptcy court justified its reading of the Bankruptcy Clause by focusing on various post-ratification sources, and relied on Congressional policy statements that espoused the "liberalization of access" to bankruptcy courts in order to "remove barriers to voluntary petitions." *See In re Bestwall LLC*, 658 B.R. at 367 (citing Report of the Commission on the Bankruptcy Laws of the United States, H.R. Doc. No. 93-137, pt. 1, at 75 (1973)). And the court erroneously concluded that it possessed subject-matter jurisdiction over Bestwall's bankruptcy because "there

are simply no cases at any level (of which this court is aware) that explicitly endorse the proposition that bankruptcy courts do not have subject matter jurisdiction unless a debtor has a sufficient degree of financial distress." *Id.* at 371.

It is true that "[i]n many cases, judicial precedent informs or controls the answer." *See Rahimi*, 602 U.S. at 717, 144 S.Ct. 1889 (Kavanaugh, J., concurring). And, "[a]bsent precedent, there are only two potential answers" to the question of constitutional interpretation: "history or policy." *Id.* The bankruptcy court chose the latter option, i.e., "policy," and thus departed from the touchstone of constitutional interpretation — treating "[h]istory [as] the essential guidepost" to a constitutional inquiry. *See Elhady v. Kable*, 993 F.3d 208, 219 (4th Cir. 2021). It thus failed to properly assess the Constitution's text, as we have instructed, "against its historical and legal backdrop." *See Bianchi v. Brown*, 111 F.4th 438, 448 (4th Cir. 2024) (en banc).

To be sure, proper constitutional interpretation "doesn't require 'a law trapped in amber,'" and "demand[s] only a historical 'principle, not a mold." *See Bianchi*, 111 F.4th at 475 (Diaz, C.J., concurring) (quoting *Rahimi*, 602 U.S. at 739-40, 144 S.Ct. 1889 (Barrett, J., concurring)). It does, however, require that the meaning of the Framers' words be viewed against the backdrop of history and tradition, rather than "contemporary, evolving beliefs about what kinds of suits should be heard in federal court." *See TransUnion*, 594 U.S. at 425, 141 S.Ct. 2190. To that end, the bankruptcy court erroneously relied on congressional policy in ruling that Bestwall's bankruptcy proceeding was within its subject-matter jurisdiction. It thus impermissibly broadened its view of subject-

matter jurisdiction outside of its Constitutional bounds, thereby allowing our Nation's bankruptcy system to be weaponized against thousands of tort victims, as simply a tool for delay and leverage.

That result is not what the Bankruptcy Clause was designed to permit. If the term "Bankruptcies" has a fixed constitutional meaning, it cannot be stretched to include solvent tort defendants in civil lawsuits seeking a tactical advantage over severely injured plaintiffs. If that were possible, then any solvent defendant in any mass tort case could file for Chapter 11 to stall litigation and corral claimants into a trust. And any profitable business facing legal risk could simply offload its tort liabilities into a subsidiary or sister entity, file for bankruptcy, and invoke an automatic stay of litigation, not because it is unwilling or unable to pay its debts, but because it prefers to evade the scrutiny of a jury — as required by the Seventh Amendment — and shirk accountability for its civil wrongdoing.

Put simply, the Bankruptcy Clause does not authorize a solvent and profitable corporation to secure a cloak of immunity from accountability. And it does not authorize the federal courts to sanction an artificial bankruptcy proceeding devoid of any real financial distress. The Bankruptcy Clause should not tolerate a system where a rich and powerful corporate defendant can invoke federal bankruptcy jurisdiction in order to suppress the tort claims of sick and dying victims and evade responsibility for harms caused.

IV.

I would reverse the judgment of the bankruptcy court, thereby dismissing Bestwall's bankruptcy filing. By treating Bestwall's petition as a bankruptcy filing within its jurisdiction, the bankruptcy court —

and now this Court — have given their imprimatur to a corporate strategy that mocks the structure of Article I, subverts our Nation's history and tradition of bankruptcy, and inflicts grievous harm on our fellow Americans. The majority's failure to confront the constitutional infirmity at the heart of this appeal does more than ratify the abuse of our bankruptcy system. I t reduces the Constitution's careful allocation of legislative power relating to "Bankruptcies" to an afterthought. In doing so, it rewrites the Constitution to suit the needs of a profitable tortfeasor. And it strips tens of thousands of asbestos victims of their Seventh Amendment right to have their claims heard before a jury of their peers.

As Justice Kavanaugh has correctly emphasized, "[h]istory, not policy, is the proper guide." *See Rahimi*, 602 U.S. at 717, 144 S.Ct. 1889 (Kavanaugh, J., concurring). The Framers gave Congress the power to legislate in the area of bankruptcy so that it could enact a uniform system capable of resolving genuine cases of financial distress and insolvency. Adhering to this original understanding is not optional, as it is the anchor that holds the bankruptcy system to its constitutional moorings.

I respectfully dissent.

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT NORTH CAROLINA
CHARLOTTE DIVISION

Case No. 17-31795

IN RE: BESTWALL LLC, Debtor.

[Filed February 21, 2024]

ORDER DENYING THE MOTIONS TO DISMISS OF CLAIMANTS WILSON BUCKINGHAM AND ANGELIKA WEISS AND THE OFFICIAL COMMITTEE OF ASBESTOS CLAIMANTS

Laura T. Beyer, United States Bankruptcy Judge

This matter comes before the court on the February 17, 2023 Motion to Dismiss of Claimants Wilson Buckingham and Angelika Weiss (Dkt. 2882[1]) (the "Buckingham Motion") and the March 30, 2023 Official Committee of Asbestos Claimants' Motion to Dismiss for Lack of Subject Matter Jurisdiction (Dkt. 2925) (the "Committee's Motion") (collectively the "Motions to Dismiss"). The court concludes that it has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334,[2] venue is proper in this district pursuant to 28 U.S.C. §§ 1408 and 1409, and this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). Having reviewed and considered the Motions to Dismiss, the joinders,

[1] Docket references in this order are to the docket for this case unless otherwise indicated.

[2] The court's jurisdictional conclusions are explained in (far) more depth later in this order. See *infra* ¶¶ 25–60.

responses, and replies thereto, and after considering the arguments of counsel at the hearings on March 15, 2023 and May 17, 2023 and having announced its ruling on the Motions to Dismiss at a hearing on July 28, 2023, the court further finds and concludes that it should deny the Motions to Dismiss for the reasons that follow.

Facts and Procedural History

1. Bestwall LLC (the "Debtor") filed a petition under Chapter 11 of the United States Bankruptcy Code (the "Bankruptcy Code") on November 2, 2017. The Debtor's pre-petition history was unusual and unusually brief. About three months prior to the petition date, the Debtor was created in a divisive merger corporate transaction pursuant to Texas state law that has come to be known as the "Texas Two-Step." See Debtor's Opposition to Third Motion to Dismiss Chapter 11 Case (Dkt. 2894) ("Debtor's Response to the Buckingham Motion") at 3 (noting corporate restructuring on July 31, 2017); Michael A. Francus, *Texas Two-Stepping Out of Bankruptcy*, 120 MICH. L. REV. ONLINE 38, 40 (2022) (explaining divisive mergers). The transaction divided the Debtor's predecessor, Georgia-Pacific LLC ("Old GP" prior to the transaction), into two new entities, the Debtor and a new version of Georgia-Pacific LLC ("New GP"). Informational Brief of Bestwall LLC (Dkt. 12) at 7-8. The divisive merger imbued the Debtor with Old GP's asbestos liability and certain assets including a "funding agreement" with New GP that "ensures that the Debtor has the same financial resources and ability to satisfy asbestos claims as Old GP had prior to the 2017

Corporate Restructuring," while New GP took all of Old GP's other assets and liabilities.[3] Id. at 8.

2. The Motions to Dismiss constitute the third and fourth motions to dismiss this bankruptcy case. On August 15, 2018, the Official Committee of Asbestos Claimants (the "Committee") filed a motion to dismiss this case as a bad faith filing pursuant to 11 U.S.C. § 1112(b)[4] or, alternatively, to transfer venue of the case to Delaware (Dkt. 495) (the "First Motion to Dismiss"). The court entered its Memorandum Opinion and Order Denying the Official Committee of Asbestos Claimants' Motion for Dismissal, or Alternatively, Venue Transfer (Dkt. 891) (the "Opinion and Order") on July 29, 2019. In re Bestwall LLC, 605 B.R. 43 (Bankr. W.D.N.C. 2019). In its Opinion and Order, the court summarizes the two-prong standard for dismissing a Chapter 11 case as a bad faith filing established by the United States Court of Appeals for the Fourth Circuit (the "Fourth Circuit") in the Carolin case, which requires a determination that the case is both (i) objectively futile and (ii) filed in subjective bad faith. Bestwall, 605 B.R. at 48 (citing Carolin Corp. v. Miller, 886 F.2d 693, 700-01 (4th Cir. 1989)). Among other things, the court determined that "[a]ttempting to resolve asbestos claims through 11 U.S.C. § 524(g)

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[3] This is an oversimplified description of the divisive merger performed by Old GP intended to provide sufficient context for the following discussion of the Motions to Dismiss. While the Texas Two-Step transaction informs the entirety of this case, it is not directly relevant to the Motions to Dismiss. See, e.g., May 17, 2023 Hr'g Tr. 136:11-14 (Buckingham's counsel answering "Absolutely" when asked by the court if the Buckingham Motion would have been filed if there was no divisional merger and the debtor in this case was Georgia-Pacific).

[4] Subsequent statutory references in this order are to Title 11 unless otherwise indicated.

is a valid reorganizational purpose, and filing for Chapter 11, especially in the context of an asbestos or mass tort case, need not be due to insolvency." Id. at 49. The court also stated that "[t]he volume of current asbestos claims that Bestwall faced as of the Petition Date, coupled with the projected number of claims to be filed through 2050 and beyond, is sufficient financial distress for Bestwall to seek resolution under section 524(g) of the Bankruptcy Code" and that the asbestos-related claims could be "sufficiently addressed and fairly adjudicated through a section 524(g) trust." Id. at 49, 50. The court concluded that because Bestwall has the resources with which to reorganize, this case is not objectively futile, it need not reach the issue of whether the case was filed in subjective bad faith, and dismissal was not appropriate under the Fourth Circuit's stringent two-prong dismissal standard. Id. at 50-51.

3. On August 12, 2019, the Committee filed a notice of appeal (Dkt. 917) of the Opinion and Order, a motion for leave to appeal (Dkt. 918), and a request for certification of direct appeal to the Fourth Circuit (Dkt. 920). This court approved the request for the direct appeal on September 11, 2019 in its Certification for Direct Appeal to the United States Court of Appeals for the Fourth Circuit Under 28 U.S.C. § 158(d)(2) (Dkt. 987) ("Certification for Direct Appeal"),[5] and, in turn, the Committee filed its petition

[5] In its Certification for Direct Appeal, the court concluded that directly certifying the appeal to the Court of Appeals materially advanced the Debtor's case because the issue of reconsidering the Carolin standard would require a determination by the Fourth Circuit. Certification for Direct Appeal at 3. The court also concluded that the Opinion and Order involved a matter of public importance because the pre-petition restructuring created an issue of first impression in the Fourth Circuit regarding the

for direct appeal with the Fourth Circuit on October 11, 2019. On November 14, 2019, the Fourth Circuit denied the petition for direct appeal, and New GP opposed the Committee's motion for leave to appeal before the United States District Court for the Western District of North Carolina (the "District Court").

4. On February 3, 2023, the Committee filed a notice of supplemental authority (W.D.N.C. Dkt. 12[6]) ("Committee's Notice") bringing to the attention of the District Court the "pertinent and significant new authority" of the opinion of the United States Court of Appeals for the Third Circuit in the LTL Management case (the "LTL Opinion"). Committee's Notice at 2; see LTL Mgmt., LLC v. Those Parties Listed on Appendix A to Complaint and John and Jane Does 1-1000 (In re LTL Mgmt., LLC), 64 F.4th 84 (3d Cir. 2023). Based on the LTL Opinion, the Committee urged the District Court to accept the pending notice of appeal (or grant the Committee's motion for leave to pursue an interlocutory appeal) so the Fourth Circuit would have a chance to consider the applicability of the Carolin standard to "a debtor that failed to exhibit financial distress prior to invoking the substantial protections of the Bankruptcy Code." Committee's Notice at 2. The Debtor responded (W.D.N.C. Dkt. 13) ("Debtor's Response to Committee's Notice") and asserted that nothing about the LTL Opinion changed the reasons why the District Court should "deny leave to appeal the interlocutory order denying the Committee's

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subjective bad faith prong of the Carolin standard that "transcends this case, its litigants, and asbestos cases in general." Certification for Direct Appeal at 4.

[6] "W.D.N.C." docket references are to the District Court's docket in case no. 19-396, the Committee's appeal of the Opinion and Order.

motion to dismiss Bestwall's bankruptcy case." Debtor's Response to Committee's Notice. The Debtor further opined that the LTL Opinion is based on a different standard and has no application to the appeal of the Opinion and Order. Id. at ¶ 3.

5. More recently in the District Court and based on the pleadings filed by the Committee in this case related to the Committee's Motion, the Debtor filed a motion for leave to file a statement regarding the Committee's change in position on the finality of the Opinion and Order (W.D.N.C. Dkt. 14) ("Debtor's Motion for Leave"). The Debtor points out that in support of the Committee's Motion in this court, the Committee argues that the Opinion and Order denying the First Motion to Dismiss is interlocutory contrary to its position in the District Court that the Opinion and Order is final and appealable as of right. Debtor's Motion for Leave. In addition, the Committee filed a second notice of supplemental authority (W.D.N.C. Dkt. 15) notifying the District Court of the recent decision of the United States Bankruptcy Court for the Southern District of Indiana dismissing Aearo's bankruptcy cases, which it argues supports the Committee's motion for leave to appeal the Opinion and Order. See In re Aearo Techs. LLC, Ch. 11 Case No. 22-02890, 2023 WL 3938436 (Bankr. S.D. Ind. June 9, 2023). Finally, the Debtor filed a notice of supplemental authority (W.D.N.C. Dkt. 17) ("Debtor's Notice") notifying the District Court of the Fourth Circuit's opinion in Bestwall LLC v. Off. Comm. of Asbestos Claimants (In re Bestwall LLC), 71 F.4th 168 (4th Cir. 2023). The Debtor argues that the Fourth Circuit's decision is relevant because it (1) confirmed that the two-pronged standard of Carolin remains the controlling law in this circuit for a motion to dismiss a Chapter 11

case as a bad faith filing;[7] (2) reinforced the bankruptcy court's finding that this case is not objectively futile; and (3) rejected the Committee's "attempt to attack the preliminary injunction 'as a back-door way to challenge the propriety of the reorganization and the merits of a yet-to-be-filed chapter 11 plan,' which was 'both premature and improper.'" Debtor's Notice at 1-2 (quoting Off. Comm. of Asbestos Claimants, 71 F.4th at 183). The Committee's appeal and motion for leave to appeal the Opinion and Order remained pending before the District Court at the time the court issued its ruling from the bench on the Motions to Dismiss on July 28, 2023.[8]

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[7] The Debtor further explains that in its jurisdictional analysis, the Fourth Circuit "rejected the Committee's attempts to invoke the [LTL Opinion] because, among other things, the Fourth Circuit 'applies a more comprehensive standard' for a bad-faith dismissal than the Third Circuit, looking to both 'subjective bad faith' and 'objective futility of any possible reorganization.'" Debtor's Notice at 1-2 (quoting Off. Comm. of Asbestos Claimants, 71 F.4th at 182).

[8] Subsequent to the court issuing its oral ruling on the Motions to Dismiss but prior to the entry of this order memorializing that ruling, the District Court entered an Order on November 7, 2023 denying the Committee's motion for leave to appeal, denying as moot the Debtor's Motion for Leave, and dismissing the Committee's appeal. In re Bestwall LLC, No. 19-cv-00396, slip op. at 10, 2023 WL 7361075 (W.D.N.C. Nov. 7, 2023). The District Court first concluded that the Opinion and Order is not appealable as a final order. Id. at 4-7. It then considered and denied the Committee's request for leave to appeal the Opinion and Order. Id. at 7-10. The District Court concluded that: (1) an appeal of the Opinion and Order does not involve a controlling question of law because this court applied Carolin, which is binding law in this circuit; (2) "there is not substantial ground for difference of opinion" about the test to use in the context of motions to dismiss under section 1112(b) in the Fourth Circuit; and (3) the Committee had not shown the exceptional circumstances required to

6. The Committee filed a second motion to dismiss (Dkt. 938) (the "Second Motion to Dismiss") on August 16, 2019, arguing primarily that the case should be dismissed based on the Debtor's failure to prosecute this case. The Committee filed the Second Motion to Dismiss less than one month after the court entered the Opinion and Order, and the court entered an order (Dkt. 1546) on December 22, 2020 denying the Second Motion to Dismiss without prejudice. The court decided that the Debtor had not failed to prosecute the Chapter 11 case within the meaning of section 1112(b)(4) and that the Committee had not established cause to dismiss the case.

7. In the Committee's Motion (its third motion to dismiss this case), the Committee moves to dismiss this case for lack of constitutional subject matter jurisdiction. The Committee asserts that the Debtor is not an eligible subject of bankruptcy pursuant to the Bankruptcy Clause of the Constitution because it lacks sufficient financial distress. Committee's Motion at 2. According to the Committee, the Debtor is neither insolvent nor in need of bankruptcy for its survival and, therefore, does not qualify for bankruptcy relief. Id. The Committee insists that "Bestwall's economic health and ability to timely and fully pay all its creditors, including all present and future asbestos claimants, is (and was at the time of its bankruptcy filing) unthreatened. Neither financial nor operational requirements have necessitated bankruptcy restructuring, and Bestwall is therefore not an eligible 'subject of [B]ankruptc[y]' as that word was understood by the drafters of the Constitution and the delegates ratifying the Constitution." Id. The

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ignore the policy of postponing appellate review until a final judgment has been entered. Id. at 9-10.

Committee contends that "a bankruptcy court must first determine whether the entity seeking debtor status meets the fundamental requirements of the Constitution" before considering statutory restrictions on debtors, including whether a bankruptcy case should be dismissed as a bad faith filing. Id. In other words, the Debtor must be in sufficient financial distress to be constitutionally eligible to seek protection under the Bankruptcy Code.

8. In support of its argument, the Committee cites findings of fact made by this court in its Opinion and Order and its July 29, 2019 Memorandum Opinion and Order Granting the Debtor's Request for Preliminary Injunctive Relief (A.P. Dkt. 164[9]) in reliance on the Debtor's assertion that it is fully capable of paying all asbestos claims in full with the support of the funding agreement. Id. at 4. The Committee further relies on developments that have occurred since the filing of the case to demonstrate that Bestwall's financial wherewithal has grown stronger as this case has progressed. Id. at 4-5. Specifically, the Committee points to the facts that since the filing of the case, Bestwall has created and funded a $1 billion qualified settlement trust; New GP's equity value has increased by $7.1 billion to $27.8 billion; and New GP has upstreamed over $5 billion in dividends to its ultimate parent, Koch Industries. Id. at 5.

9. The Committee asserts that this motion to dismiss "is a new and distinct argument from any previously raised; [and] it also provides additional context for considering the proper scope and application of the Fourth Circuit's Carolin test," which it concedes was the focus of the First Motion to Dismiss. Id. at 7, 9.

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[9] "A.P." docket references are to this court's docket in adversary proceeding no. 17-3105.

According to the Committee, in addition to lacking constitutional subject matter jurisdiction, the "Fourth Circuit's case law, regarding debtors whose bankruptcies were dismissed for bad faith, must be read, interpreted and applied within the constitutional limitations of bankruptcy jurisdiction." Id. at 20. The Committee says that consistent with the constitutional requirement of significant financial distress, "[t]he rationale behind Carolin . . . suggests that real financial distress is, in effect, to be assumed or accepted before application of the Carolin test." Id. at 26.

10. This part of the Committee's argument is consistent with the Buckingham Motion. Mr. Buckingham argues this case must be dismissed because it does not meet the good-faith threshold established by the Fourth Circuit in Carolin, the Debtor is not eligible for bankruptcy relief because it is neither in financial distress nor facing "overwhelming liabilities," and it cannot confirm a § 524(g) plan of reorganization. Buckingham Motion at 7. The Buckingham Motion relies extensively on the Third Circuit's recent LTL Opinion dismissing the LTL Management case as a bad faith filing in urging the court to dismiss this case under 11 U.S.C. §§ 105 and 1112(b) for lack of good faith.[10] See id. at 3, 4, 6, 10, 12-13, 19, 20, 22-23, 26-27. Similar to the conclusion reached by the Third Circuit in the LTL Opinion, Mr. Buckingham argues that pursuant to Carolin, and as a threshold matter, the Debtor must demonstrate it is in sufficient

[10] In his reply in support of the Buckingham Motion and in his oral argument at the hearing on March 15, 2023, Mr. Buckingham's counsel characterized his argument as one of subject matter jurisdiction. However, at the May 17, 2023 hearing, Mr. Buckingham's counsel seemed to abandon that argument and focused on dismissal of the case as a bad faith filing under Carolin. See, e.g., May 17, 2023 Hr'g Tr. 118:10-17.

financial distress due to overwhelming asbestos liability and that it has a limited fund that is insufficient to pay current and future claimants in order for its bankruptcy case to serve a legitimate bankruptcy purpose and to survive a motion to dismiss the case as a bad faith filing. Id. at 8, 15. Only once the Debtor has demonstrated sufficient financial distress should the court reach the question of the Debtor's ability to be rehabilitated. Id. at 8. And like the Committee's Motion, Mr. Buckingham relies on several events that have occurred since the filing of the case that he believes demonstrate the Debtor's lack of financial distress and the impropriety of the case, including the fact that New GP has distributed over $5 billion in dividends to Koch Industries and New GP's substantial increase in equity value. Id. at 14-15, 17. Mr. Buckingham argues that the proper focus is not the number of asbestos claims pending against the Debtor but the Debtor's ability to pay those claims. Id. at 6. And the profitability of the Debtor since this case was filed—as evidenced by the dividends issued by New GP and the substantial increase in its equity—demonstrates the Debtor's clear ability to pay its current and future asbestos claims. Id. at 14-15. On this basis, Mr. Buckingham moves to have the court dismiss this case as a bad faith filing pursuant to Carolin.

11. In response, the Debtor contends that the court lacks jurisdiction to consider the Buckingham Motion because it seeks the same relief that was sought by the Committee in its First Motion to Dismiss on fundamentally the same grounds. Debtor's Response to the Buckingham Motion at 1, 17-25. The Debtor argues the court is divested of jurisdiction to consider the Buckingham Motion due to the Committee's appeal of the court's Opinion and Order denying the First

Motion to Dismiss and its motion for leave to appeal. Id. at 5-8. In addition, the Debtor insists that Mr. Buckingham should be barred by the doctrine of laches from bringing his motion to dismiss given the length of time this case has been pending. The Debtor also argues that the Opinion and Order is law of the case and the court should deny the Buckingham Motion because it seeks to dismiss the case on the same grounds argued by the Committee in the First Motion to Dismiss. Id. at 8-11. Finally, the Debtor insists that even if the court were to consider the merits of the Buckingham Motion, it presents no new arguments that would cause the court to reach a different conclusion than when it denied the First Motion to Dismiss. Id. at 17-25.

12. Similarly, in its response to the Committee's Motion, the Debtor asserts that the doctrines of laches and law of the case bar the Committee's argument and that this court is divested of jurisdiction to consider the dismissal issues raised in the Committee's Motion because they are pending before the District Court on appeal. Debtor's Opposition to the Official Committee of Asbestos Claimants' Third Motion to Dismiss Chapter 11 Case (Dkt. 2973) at 2, 13-19. In response to the Committee's assertion that this court lacks subject matter jurisdiction, the Debtor insists that the court has jurisdiction and has properly exercised it in the six years this case has been pending. Id. at 2, 6-13. According to the Debtor, the question of eligibility to be a debtor is not a question of jurisdiction because bankruptcy courts have subject matter jurisdiction over all cases filed under the Bankruptcy Code. Id. at 7 (quoting In re Auto. Pros., Inc., 370 B.R. 161, 167 (Bankr. N.D. Ill. 2007)). Further, the Debtor argues that the Bankruptcy Clause of the United States

Constitution does not impose an insolvency or financial distress requirement to be a debtor. Id. at 9.

Discussion

13. Mr. Buckingham seeks dismissal of this case under Carolin largely for the same reasons previously argued by the Committee in its First Motion to Dismiss and considered and decided by this court in its Opinion and Order. As demonstrated by the chart ("Debtor's Chart") attached as Exhibit A to the Debtor's Response to the Buckingham Motion, Mr. Buckingham and the Committee use similar language to argue that the court should dismiss this case as a bad faith filing and that the Debtor and/or New GP are not in financial distress.

14. Pursuant to the law of the case doctrine and in the interest of finality, "when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." Carlson v. Bos. Sci. Corp., 856 F.3d 320, 325 (4th Cir. 2017) (quoting TFWS, Inc. v. Franchot, 572 F.3d 186, 191 (4th Cir. 2009)); see also Mar-Bow Value Partners, LLC v. McKinsey Recovery & Transformation Servs. U.S., LLC, 469 F. Supp. 3d 505, 524 (E.D. Va. 2020) ("[C]learly, courts could not perform their duties satisfactorily and efficiently if a question once considered and decided were to be litigated anew in the same case . . . ." (quoting Sejman v. Warner-Lambert Co., 845 F.2d 66, 68-69 (4th Cir. 1988))).

15. To determine the extent to which the law of the case governs, the court must first determine what issues it decided in the Opinion and Order and then decide whether any exceptions apply that might justify departing from the law of the case. See Mar-Bow, 469 F. Supp. 3d at 525. "The Fourth Circuit has recognized three exceptions to the law of the case doctrine:

'(1) a subsequent trial produces substantially different evidence, (2) controlling authority has since made a contrary decision of law applicable to the issue, or (3) the prior decision was clearly erroneous and would work manifest injustice.'" Id. (quoting TFWS, 572 F.3d at 191). In addition, "the Supreme Court has advised that a 'court has the power to revisit prior decisions of its own or of a coordinate court in any circumstance, although as a rule courts should be loathe to do so in the absence of extraordinary circumstances . . . .'" Id. (quoting Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 817, 108 S.Ct. 2166, 100 L.Ed.2d 811 (1988)).

16. As previously explained, the court concluded under Carolin in its Opinion and Order that this case is not objectively futile because Bestwall has the resources with which to reorganize, and, therefore, the court did not need to reach the issue of whether the case was filed in subjective bad faith and declined to dismiss this case under the Fourth Circuit's two-prong dismissal standard. Bestwall, 605 B.R. at 49-51. In reaching that conclusion, the court found that attempting to resolve asbestos claims through section 524(g) is a valid reorganizational purpose and that the volume of current asbestos claims coupled with the number of claims to be filed is sufficient financial distress for the Debtor to file this Chapter 11 case. Id. at 49.

17. In considering the exceptions to the law of the case doctrine, the court notes that Mr. Buckingham does not cite to substantially different evidence (or any evidence produced in a subsequent trial) sufficient to cause this court to revisit the Opinion and Order. Rather, he relies on the comments of Bestwall's counsel at a meeting of the American Bankruptcy Institute, Buckingham Motion at 4, 5, 17, 20, 21, that

largely appear to have been taken out of context and are not inconsistent (when read in context) with statements Debtor's counsel has made on the record to this court. Mr. Buckingham focuses on the dividends issued by Georgia-Pacific post-petition, id. at 5, 6, 14-15, 16-17, 27, that have been disclosed throughout this case and are consistent with corporate practice predating this case, see Stipulation Regarding Post-petition Dividends Paid by Non-Debtor Georgia-Pacific LLC (Dkt. 997); Declaration of Tyler L. Woolson (Dkt. 998); Second Stipulation Regarding Postpetition Dividends Paid by Non-Debtor Georgia-Pacific LLC (Dkt. 2346); Declaration of Tyler L. Woolson (Dkt. 2347); Declaration of Julie A. Anderson (Dkt. 2857). Additionally, the Debtor's rejection of the Committee's plan does not serve as a basis for this court to reconsider the Opinion and Order. At a prior hearing in this case, the court noted that the Committee's plan is "akin to dismissal" and would need to be modified to be confirmable. See Oct. 22, 2020 Hr'g Tr. 16:22-24; 17:22-23.

18. Mr. Buckingham points to the Fourth Circuit's recently-issued opinion in the Kaiser case as new law issued by controlling authority that is applicable to the issue of whether the court should dismiss this case under Carolin. Buckingham Motion at 2, 6, 11 (citing In re Kaiser Gypsum Co., 60 F.4th 73 (4th Cir. 2023)). According to Mr. Buckingham, in Kaiser "the Fourth Circuit Court of Appeals reiterated the purpose of Chapter 11 generally and of Section 524(g) specifically: it is for (a) financially distressed debtors, (b) faced with overwhelming asbestos liabilities, to (c) create a trust that marshals limited and inadequate assets so that present and future claimants share equitably—providing all with a better outcome than a forced liquidation." Buckingham Motion at 2

(emphasis omitted) (citing Kaiser, 60 F.4th at 77-78). Mr. Buckingham, however, misconstrues the discussion of section 524(g), which is in two introductory paragraphs of an opinion that addresses an insurer's standing to object to a Chapter 11 plan. Financial distress was not at issue in Kaiser, and the cited portion of Kaiser actually confirms that "§ 524(g) of the Bankruptcy Code allows a Chapter 11 debtor with **substantial asbestos liabilities** to obtain a channeling injunction that diverts all asbestos claims, current and future, to a trust established by the debtor's reorganization plan and funded by the debtor," Kaiser, 60 F.4th at 77-78 (emphasis added), which is not inconsistent with the conclusion reached by this court in its Opinion and Order.

19. Mr. Buckingham also relies heavily on the Third Circuit's recent LTL Opinion as mandating the dismissal of this case. See *supra* ¶ 10. That opinion, however, is neither controlling nor applicable to this matter. Indeed, the Third Circuit recognizes in the LTL Opinion that "[i]n the Fourth Circuit, a court can only dismiss a bankruptcy petition for lack of good faith on a showing of the debtor's 'subjective bad faith' and the 'objective futility of any possible reorganization.'" LTL, 64 F.4th at 98 n.8 (quoting Carolin, 886 F.2d at 694). The Third Circuit also acknowledges the reference by the bankruptcy court below to the Fourth Circuit's dismissal standard as a "much more stringent standard for dismissal of a case for lacking good faith" than the standard in the Third Circuit, but it did not analyze—nor should it have—whether this case should be dismissed pursuant to that standard. Id. (quoting In re LTL Mgmt., LLC., 637 B.R. 396, 406 (Bankr. D.N.J. 2022)).

20. In sum, the Buckingham Motion seeks to have this court reconsider its earlier ruling in the Opinion and Order. Counsel for Mr. Buckingham insists to the contrary and at the hearing on the Buckingham Motion, he argued that the First Motion to Dismiss "was a different focus at a different time on different facts by a different party." March 15, 2023 Hr'g Tr. 19:12-13. While the movant is different and the motion was filed four and a half years after the First Motion to Dismiss, the focus is on substantially the same facts, some new facts that the court does not consider to be substantially different evidence, and some new law that is either not controlling or is consistent with the court's Opinion and Order. And the ultimate question remains exactly the same: should the court dismiss this case as a bad faith filing under Carolin? Neither the new facts cited by Mr. Buckingham nor the new law issued since the court entered its Opinion and Order cause this court to conclude that its earlier decision to deny the First Motion to Dismiss was either erroneous or works a manifest injustice, extraordinary circumstances do not exist which cause this court to revisit its earlier decision, and the court concludes that the Opinion and Order continues to be the law of this case.

21. In addition to concluding that the Opinion and Order is the law of this case and should not be reconsidered, the court also thinks that its jurisdiction to do so is questionable given the pending appeal of the Opinion and Order. Generally, the timely filing of a notice of appeal "confers jurisdiction on the court of appeals and divests the district court[11] of its control

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[11] In non-bankruptcy federal litigation like Levin, the district court is the trial court, and the court of appeals is the (initial) appellate court. In bankruptcy matters, the bankruptcy court is

over those aspects of the case involved in the appeal." Levin v. Alms & Assocs., Inc., 634 F.3d 260, 263 (4th Cir. 2011) (quoting Griggs v. Provident Consumer Disc. Co., 459 U.S. 56, 58, 103 S.Ct. 400, 74 L.Ed.2d 225 (1982)). For the same reasons, "[a] bankruptcy court is divested of jurisdiction with respect to matters raised in an appeal to a higher court." In re Bryant, 175 B.R. 9, 13 (W.D. Va. 1994) (citing In re Bialac, 694 F.2d 625, 627 (9th Cir. 1982)). "The purpose of the general rule is to avoid the confusion of placing the same matter before two courts at the same time and [to] preserve the integrity of the appeal process." In re Whispering Pines Ests., Inc., 369 B.R. 752, 757 (B.A.P. 1st Cir. 2007) (citations omitted); see also Doe v. Pub. Citizen, 749 F.3d 246, 258 (4th Cir. 2014) (The divesting rule "fosters judicial economy and guards against the confusion and inefficiency that would result if two courts simultaneously were considering the same issues.").

22. The court is attuned to the fact that bankruptcy cases often raise multiple issues, many of which are entirely unrelated to issues involved in an appeal. For that reason, "[t]he application of a broad rule that a bankruptcy court may not consider any request filed while an appeal is pending has the potential to severely hamper a bankruptcy court's ability to administer its cases in a timely manner." Whispering Pines, 369 B.R. at 758 (citations omitted). And courts recognize that "when a notice of appeal has been filed in a bankruptcy case, the bankruptcy court retains

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the trial court, and the initial appeal goes to the district court (or, in certain other circuits, a bankruptcy appellate panel). See, e.g., FED. R. BANKR. P. 8003 (Appeal as of Right—How Taken; Docketing the Appeal), 8005 (Election to Have an Appeal Heard by the District Court Instead of the BAP).

jurisdiction to address elements of the bankruptcy proceeding that are not the subject of that appeal." In re Scopac, 624 F.3d 274, 280 (5th Cir. 2010) (quoting In re Transtexas Gas Corp., 303 F.3d 571, 580 (5th Cir. 2002)). The end result is a functional test: "once an appeal is pending, it is imperative that a lower court not exercise jurisdiction over those issues which, although not themselves expressly on appeal, nevertheless so impact the appeal so as to interfere with or effectively circumvent the appeal process." Id. (quoting Whispering Pines, 369 B.R. at 759).

23. That is the situation here given the similarity between the issues raised in the Buckingham Motion and those on appeal in the District Court. For this court to exercise jurisdiction over the issues raised in the Buckingham Motion could unnecessarily interfere with or confuse the appeal process. For the same reasons previously explained, the Buckingham Motion is an attempt to have the court reconsider its Opinion and Order, and the issues raised in the motion are closely related to the issues on appeal in the District Court. The Buckingham Motion seeks dismissal of this case for "cause" under section 1112(b) as a bad faith filing for many of the same reasons previously argued by the Committee in its First Motion to Dismiss and considered and decided by this court in its Opinion and Order denying that motion. See Debtor's Chart (comparing arguments from the First Motion to Dismiss and the Buckingham Motion). Mr. Buckingham asks this court to bring "fresh eyes" and "hindsight" to its prior ruling and disputes the Debtor's earlier arguments against dismissal. Buckingham Motion at 4-5. By way of further example, the Buckingham Motion cites the LTL Opinion in arguing that financial distress is a threshold requirement when

considering a debtor's good faith in seeking the benefits of a bankruptcy filing. See *supra* ¶ 10. Similarly, the Committee filed a notice of supplemental authority to bring the LTL Opinion to the attention of the District Court and relies on it as a basis for the District Court to accept the appeal of the Opinion and Order so the Fourth Circuit can consider "the applicability of the Carolin standard [to] a debtor that failed to exhibit financial distress prior to invoking the substantial protections of the Bankruptcy Code." Committee's Notice at 2. Both the Committee and Mr. Buckingham argue that this case lacks a valid bankruptcy purpose, manipulates the Bankruptcy Code and bankruptcy jurisdiction, and deprives victims of jury trial rights. See, e.g., First Motion to Dismiss at 15-18, Committee's reply in support of First Motion to Dismiss (Dkt. 653) at 13, Buckingham Motion at 4, 7. Finally, the crux of both motions is a determination of whether this case should be dismissed under Carolin as a bad faith filing. In short, the issues raised in the Buckingham Motion are closely related to the matter on appeal and consideration of the merits of the Buckingham Motion could "so impact the appeal . . . as to interfere with or effectively circumvent the appeal process." Scopac, 624 F.3d at 280 (quoting Whispering Pines, 369 B.R. at 759).

24. There is an exception to the divestment rule if the appeal is interlocutory. See BAE Sys. Tech. Sol. & Servs., Inc. v. Republic of Korea, No. 14-3551, 2016 WL 6167914, at *3 (D. Md. Oct. 24, 2016) ("Interlocutory appeals do not divest [lower] courts of jurisdiction." (citing Columbus-Am. Discovery Grp. v. Atl. Mut. Ins. Co., 203 F.3d 291, 302 (4th Cir. 2000))). The determination of whether the Opinion and Order is interlocutory, however, is also pending in the District Court. As Bryant recognized, "it is not for this court

to determine ultimately whether its order is properly appealable such that jurisdiction has vested in the appellate court." 175 B.R. at 12-13. To rule on that issue and to reconsider the court's earlier ruling on the First Motion to Dismiss while the appeal remains pending could moot the appeal, lead to inconsistent results, or prompt a second appeal. Undoubtedly, it would unnecessarily muddy the waters. For those reasons, the court will decline to consider the merits of the issues raised in the Buckingham Motion.[12]

25. With respect to the arguments the Committee makes regarding Carolin by extension of its subject matter jurisdiction argument, the court will decline to reconsider its earlier rulings in the Opinion and Order for the same reasons it is declining to consider the Buckingham Motion on the merits. Issues of subject matter jurisdiction, however, "may be resurrected at any point in the litigation." Gonzalez v. Thaler, 565 U.S. 134, 141, 132 S.Ct. 641, 181 L.Ed.2d 619 (2012); see also Ashcroft v. Iqbal, 556 U.S. 662, 671, 129 S.Ct.

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[12] After the District Court's November 7, 2023 decision not to allow an interlocutory appeal of this court's ruling on the First Motion to Dismiss, Mr. Buckingham filed a Notice of Supplemental Authority (Dkt. 3172) that reports the District Court's denial of the Committee's motion for leave to appeal and asks the court to rule on the merits of his motion to dismiss. The court declines the invitation. First, the court announced its ruling at the July 28, 2023 hearing, prior to the District Court's denial of the Committee's motion for leave to appeal, and this order memorializes that ruling. In addition, and more importantly, even if the District Court's ruling occurred prior to the July 28 hearing, the court would not have gotten to the merits of the Buckingham Motion. The court already ruled on the bad faith arguments at the heart of the Buckingham Motion, and the end of the appeal would not lead this court to reconsider its previous conclusions for the reasons explained in this order. See, e.g., *supra* ¶ 20.

1937, 173 L.Ed.2d 868 (2009) ("Subject-matter jurisdiction cannot be forfeited or waived and should be considered when fairly in doubt." (citing Arbaugh v. Y & H Corp., 546 U.S. 500, 514, 126 S.Ct. 1235, 163 L.Ed.2d 1097 (2006))); Educ. Credit Mgmt. Corp. v. Kirkland (In re Kirkland), 600 F.3d 310, 315 (4th Cir. 2010) ("[S]ubject matter jurisdiction may be questioned at any stage of litigation, including an appeal."); In re Aldrich Pump LLC, Ch. 11 Case No. 20-30608, 2023 WL 9016506, at *9 (Bankr. W.D.N.C. Dec. 28, 2023) ("Lack of subject matter jurisdiction can be asserted at any time." (citations omitted)). Because the absence of subject matter jurisdiction may be raised at any time, the court will consider that aspect of the Committee's Motion.

26. This court and all federal courts have limited jurisdiction and can only exercise the power authorized by the Constitution and Congress. Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377, 114 S.Ct. 1673, 128 L.Ed.2d 391 (1994); Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 374, 98 S.Ct. 2396, 57 L.Ed.2d 274 (1978). Subject matter jurisdiction sets the outer limit of a court's authority, and non-jurisdictional rules control within the jurisdictional boundaries. Santos-Zacaria v. Garland, 598 U.S. 411, 416, 143 S.Ct. 1103, 215 L.Ed.2d 375 (2023) (citations omitted). The Bankruptcy Clause of the Constitution determines the limits of constitutional subject matter jurisdiction for bankruptcy. See Wright v. Union Cent. Life Ins. Co., 304 U.S. 502, 513, 58 S.Ct. 1025, 82 L.Ed. 1490 (1938) (providing that the right of Congress to legislate on bankruptcy is in general terms and quoting the Bankruptcy Clause); Schumacher v. Beeler, 293 U.S. 367, 374, 55 S.Ct. 230, 79 L.Ed. 433 (1934) ("The Congress, by virtue of its constitutional authority over bankruptcies (Const. Art. 1, § 8), could

confer or withhold jurisdiction to entertain such suits and could prescribe the conditions upon which the federal courts should have jurisdiction."); Ralph Brubaker, *On the Nature of Federal Bankruptcy Jurisdiction: A General Statutory and Constitutional Theory*, 41 WM. & MARY L. REV. 743, 807 (2000) [hereinafter *Federal Bankruptcy Jurisdiction*] (noting that most Supreme Court discussions of bankruptcy jurisdiction rely on the Bankruptcy Clause); William E. Mussman & Stefan A. Riesenfeld, *Jurisdiction in Bankruptcy*, 13 LAW & CONTEMP. PROBS. 88, 89 (1948) (reading the scope of the Bankruptcy Clause with Article III as allowing all bankruptcy jurisdiction in federal court). But see Aldrich, 2023 WL 9016506, at *13 ("[C]onstitutional challenges which are not targeted at the scope of Article III are not challenges to the Court's subject matter jurisdiction.").[13] Congress determines subject matter jurisdiction within any limitations imposed by the Constitution. United States v. Denedo, 556 U.S. 904, 912, 129 S.Ct. 2213, 173 L.Ed.2d 1235 (2009). The party advocating in favor of a court's subject matter jurisdiction over a particular case or issue bears the burden of proof. Demetres v. E. W. Constr., Inc., 776 F.3d 271, 272 (4th Cir. 2015); Piney Run Pres. Ass'n v. Cnty. Comm'rs, 523 F.3d 453, 459 (4th Cir. 2008); Glaspell v. United States (In re Glaspell), Ch. 7 Case No. 17-bk-00301, Adv. No. 19-ap-36, 2020 WL 4577479, at *2 (Bankr. N.D. W. Va. Aug. 7, 2020).

27. Since subject matter jurisdiction can be raised at any time and is a requirement for courts to exercise their power, it cannot be defeated by equitable defenses. See Gonzalez, 565 U.S. at 141, 132 S.Ct. 641 ("Subject-

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[13] If this debate is not jurisdictional, it is about congressional power pursuant to the Bankruptcy Clause. Aldrich, 2023 WL 9016506, at *12-14.

matter jurisdiction can never be waived or forfeited."); cf. Valley Historic Ltd. P'ship v. Bank of N.Y., 486 F.3d 831, 838 (4th Cir. 2007) (deciding even res judicata does not overcome a bankruptcy court's obligation to determine its subject matter jurisdiction). The concepts of consent, waiver, and estoppel do not apply to subject matter jurisdiction because it is created and limited by the Constitution and statutes. Constantine v. Rectors & Visitors of George Mason Univ., 411 F.3d 474, 480 (4th Cir. 2005); see MOAC Mall Holdings LLC v. Transform Holdco LLC, 598 U.S. 288, 298, 143 S.Ct. 927, 215 L.Ed.2d 262 (2023) ("[N]ot even such egregious conduct by a litigant could permit the application of judicial estoppel as against a jurisdictional rule."). Similarly, neither laches nor the law of the case doctrine[14] prevents review of subject matter jurisdiction. Hager v. Gibson, 188 B.R. 194, 196 (E.D.

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[14] The Debtor's law of the case argument on the subject matter jurisdiction issue focuses on this court's previous conclusion in the Opinion and Order that "[t]he volume of current asbestos claims that Bestwall faced as of the Petition Date, coupled with the projected number of claims to be filed through 2050 and beyond, is sufficient financial distress for Bestwall to seek resolution under section 524(g) of the Bankruptcy Code." Bestwall, 605 B.R. at 49. While the court's previous order speaks for itself, the court was not considering subject matter jurisdiction in that order, and, as the context of the entire sentence makes clear, the court was only considering the evidence before it about the (significant) liabilities faced by the Debtor and was not considering the Debtor's (more significant) assets, cf. LTL, 64 F.4th at 104 ("These cases show that mass tort liability can push a debtor to the brink. But to measure the debtor's distance to it, courts must always weigh not just the scope of liabilities the debtor faces, but also the capacity it has to meet them."); Aldrich, 2023 WL 9016506, at *15 (explaining argument that the court must consider the denominator (i.e., revenues/cash flow) as well as the numerator (i.e., asbestos liability) in determining financial distress).

Va. 1995) (laches); Aldrich, 2023 WL 9016506, at *9 (laches); Am. Canoe Ass'n, Inc. v. Murphy Farms, Inc., 326 F.3d 505, 515-16 (4th Cir. 2003) (law of the case).

28. Since the equitable defenses proffered by the Debtor are insufficient to defeat a motion challenging subject matter jurisdiction, the court will consider the Committee's Motion on the merits. The Committee's nuanced argument is that the court does not have constitutional subject matter jurisdiction to hear this case due to the Debtor's lack of financial distress.[15] See *supra* ¶ 7. Put another way, the Committee contends that the language of the Bankruptcy Clause implicitly disqualifies entities that are not suffering financial distress from invoking the subject matter jurisdiction of this court. Since there is no subject matter jurisdiction, according to the Committee, this case is void and must be dismissed.

29. Accordingly, the court must look to the language of the Bankruptcy Clause and its meaning in order to determine whether there is subject matter jurisdiction for this case. The Bankruptcy Clause is found at Article I, Section 8, Clause 4 of the Constitution and provides, in its entirety, that "Congress shall have Power . . . To establish . . . uniform Laws on the subject of Bankruptcies throughout the United States." The limited constitutional guidance on the breadth of the bankruptcy power does not explicitly require

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[15] As mentioned *supra* ¶ 8, the Committee's Motion refers to the Debtor's financial situation at its petition date and since then, so it is not clear whether the court should examine the Debtor's alleged lack of financial distress as of the petition date over 6 years ago, now, or both. Similarly and as discussed further *infra* ¶ 53, at the hearing on the Motions to Dismiss, the advocates for the Committee's position disagreed about whether the court should determine subject matter jurisdiction only as of the petition date or throughout the case.

debtors to suffer from any level of financial distress. In fact, the Bankruptcy Clause does not provide any guidance at all about what types of entities are constitutionally eligible for bankruptcy protection. The Committee, however, contends that the Debtor exceeds the constitutional grant of jurisdiction because it is not a proper "subject of Bankruptcies" due to its lack of financial distress. See Committee's Motion at 2. In other words, according to the Committee, Congress could not make any "uniform Laws on the subject of Bankruptcies" applicable to this Debtor. In a way, and contrary to more typical challenges to subject matter jurisdiction, the Committee is not challenging a law about subject matter jurisdiction but the absence thereof, contending that Congress failed to include a necessary condition, financial distress, in its statutory grant of jurisdiction to the bankruptcy court.

30. Since the language of the Bankruptcy Clause does not address the meaning of "the subject of Bankruptcies," the court looks to the meaning of the clause at the time of adoption and as interpreted by courts since then. Bankruptcy and insolvency law[16] as

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[16] Until the 18th century, bankruptcy and insolvency were two separate (but related) bodies of substantive law. Thomas E. Plank, *The Constitutional Limits of Bankruptcy*, 63 TENN. L. REV. 487, 516 (1996) (observing that English bankruptcy and insolvency law began to merge in 1758). The Supreme Court has determined that the Bankruptcy Clause encompasses both types of law. Cont'l Ill. Nat'l Bank & Tr. Co. of Chi. v. Chi., Rock Island & Pac. Ry. Co., 294 U.S. 648, 667-68, 55 S.Ct. 595, 79 L.Ed. 1110 (1935) ("While attempts have been made to formulate a distinction between bankruptcy and insolvency, it long has been settled that, within the meaning of the constitutional provision, the terms are convertible."); Sturges v. Crowninshield, 17 U.S. 122, 195, 4 Wheat. 122, 4 L.Ed. 529 (1819) ("This difficulty of discriminating with any accuracy between insolvent and bankruptcy

practiced in 1787 in England and the United States (pre-Constitution) undoubtably influenced the Framers of the Bankruptcy Clause. See Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356, 362, 126 S.Ct. 990, 163 L.Ed.2d 945 (2006) ("It is appropriate to presume that the Framers of the Constitution were familiar with the contemporary legal context when they adopted the Bankruptcy Clause . . . ."). English law bore some similarities with modern bankruptcy law, but the modern bankruptcy practitioner would probably be more struck by the differences. See Thomas E. Plank, *The Constitutional Limits of Bankruptcy*, 63 TENN. L. REV. 487, 499-503 (1996) [hereinafter "*Constitutional Limits*"] (discussing similarities and differences). Eighteenth-century English bankruptcy was exclusively for the benefit of creditors, and the system was strictly involuntary. Cont'l Ill. Nat'l Bank & Tr. Co. of Chi. v. Chi., Rock Island & Pac. Ry. Co., 294 U.S. 648, 668, 55 S.Ct. 595, 79 L.Ed. 1110 (1935). But see *Constitutional Limits*, *supra*, at 496 n.33 & 510 (arguing that English bankruptcy was only technically limited to involuntary petitions because friendly creditors frequently commenced cases). The concept of the discharge of debts was not introduced until 1705 (along with the death penalty for fraudulent debtors), and Parliament conditioned discharge on the consent of 80% of the creditor body (in number and amount of debt) the following year. *Constitutional Limits*, *supra*, at 500, 505-06. In addition, only businessmen

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laws, would lead to the opinion, that a bankrupt law may contain those regulations which are generally found in insolvent laws; and that an insolvent law may contain those which are common to a bankrupt law.") (Marshall, C.J.).

("traders") could be debtors in England at the time.[17] Hanover Nat'l Bank of the City of N.Y. v. Moyses, 186 U.S. 181, 184-85, 22 S.Ct. 857, 46 L.Ed. 1113 (1902). Despite these fundamental differences, some aspects of 18th century English bankruptcy law, such as the use of the predecessors of trustees, meetings of creditors, and proofs of claims, would be recognizable to a modern bankruptcy practitioner. *Constitutional Limits*, *supra*, at 500-01. Perhaps most importantly for this court's present purposes, 18th century English bankruptcy law did not require insolvency.[18] In re Klein, 14 F. Cas. 716, 717 (C.C.D. Mo. 1843) ("By the English law, . . . it mattered not whether the defendant was insolvent or otherwise . . . ."); Thomas E. Plank, *Bankruptcy and Federalism*, 71 FORDHAM L. REV. 1063, 1094 (2002) [hereinafter *Bankruptcy and Federalism*] (noting that insolvency was not always required by 18th century laws). But see *Bankruptcy and Federalism*, *supra*, at 1094 (arguing that "acts of bankruptcy" and other jurisdictional requirements represented "more particular examples of insolvency").

31. Some American colonies and states got an early start on federalism, embraced the idea of the states as the laboratories of democracy, see New State Ice Co. v. Liebmann, 285 U.S. 262, 311, 52 S.Ct. 371, 76 L.Ed. 747 (1932) ("It is one of the happy incidents of the federal system that a single courageous state may, if

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[17] There is disagreement among authorities about when both English and American bankruptcy relief became available to debtors who were not traders. See *infra* ¶ 33, nn.19-20.

[18] While very few opinions consider a debtor's degree of financial distress, and many of the authorities (including the majority of the sources cited by the Committee as support for its argument) discuss a debtor's financial condition in terms of insolvency, it is important to recognize that "insolvency" and "financial distress" are not synonymous. See *infra* ¶¶ 49–51.

its citizens chose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."), and experimented more with their bankruptcy systems. *Bankruptcy and Federalism*, *supra*, at 1085. Unlike English law, certain jurisdictions allowed voluntary proceedings, non-consensual discharge of debts, and non-trader debtors. Klein, 14 F. Cas. at 717; *Bankruptcy and Federalism*, *supra*, at 1085-87.

32. Against this backdrop, the Framers of the Constitution met in Philadelphia and adopted, among other provisions, the Bankruptcy Clause. Unfortunately for courts trying to divine its meaning 250 years later, the Framers did not give us much with which to work. See *Constitutional Limits*, *supra*, at 527 (noting that "[t]he proceedings of the Constitutional Convention shed little light" on the intent of the Bankruptcy Clause). The only vote against the Bankruptcy Clause came from a member of the Connecticut delegation who feared giving Congress the power to institute the death penalty as a punishment for bankruptcy. Katz, 546 U.S. at 369, 126 S.Ct. 990 (citation omitted); Ry. Lab. Execs.' Ass'n v. Gibbons, 455 U.S. 457, 472 & n.13, 102 S.Ct. 1169, 71 L.Ed.2d 335 (1982) (citation omitted). In the only meaningful, if brief, discussion of bankruptcy in *The Federalist*, James Madison emphasized the close relationship between bankruptcy and commerce as proof of the importance of uniform bankruptcy laws. Gibbons, 455 U.S. at 465-66, 102 S.Ct. 1169 ("As James Madison observed, '[t]he power of establishing uniform laws of bankruptcy is so intimately connected with the regulation of commerce, and will prevent so many frauds where the parties or their property may lie or be removed into different States, that the expediency of it seems

not likely to be drawn into question.'" (alteration in original) (quoting THE FEDERALIST No. 42 at 285 (N.Y. Heritage Press 1945))). There is no direct evidence about whether the Framers intended to enshrine English bankruptcy law into the Constitution or had a more general concept of bankruptcy in mind. *Constitutional Limits*, *supra*, at 527. Likewise, there is no direct evidence that the Framers intended to require financial distress for bankruptcy jurisdiction.

33. It is difficult to discern exactly what the Framers had in mind for bankruptcy law, and subsequent developments (and the Supreme Court opinions allowing them) suggest that the Framers' intent was not of utmost importance, as the Framers could not have foreseen the ways that American bankruptcy would change (and be allowed to change). The liberalization of bankruptcy law, however, did not start immediately. The first several Congresses attempted but failed to pass a bankruptcy law until the first bankruptcy act passed in 1800. Katz, 546 U.S. at 373, 126 S.Ct. 990 (quoting C. WARREN, BANKRUPTCY IN UNITED STATES HISTORY 10 (1935)). The 1800 law was a copy of the familiar English law. Id.; *Constitutional Limits*, *supra*, at 499 & 533. But see Cont'l Ill., 294 U.S. at 670, 55 S.Ct. 595 (claiming the first American bankruptcy law "ignored" English law by expanding the reach beyond traders).[19]

34. More fundamental changes to the American bankruptcy system followed. The 1841 Act took a "radical step forward" by introducing voluntary petitions. Cont'l Ill., 294 U.S. at 670, 55 S.Ct. 595; see also In re Marshall, 300 B.R. 507, 516, 520 (Bankr. C.D.

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[19] Professor Plank claims that English bankruptcy law of the 18th century had already expanded beyond traders prior to 1787. *Constitutional Limits*, *supra*, at 541 n.309.

Cal. 2003) (noting that the 1841 Act was the first American bankruptcy law that allowed voluntary petitions), *aff'd*, 403 B.R. 668 (C.D. Cal. 2009), *aff'd*, 721 F.3d 1032 (9th Cir. 2013).[20] Previous bankruptcy regimes were intended to benefit creditors and viewed debtors as dishonest, but the 1841 law began the assumption of the honest but unfortunate debtor. Cont'l Ill., 294 U.S. at 670-71, 55 S.Ct. 595 (quoting Loc. Loan Co. v. Hunt, 292 U.S. 234, 244, 54 S.Ct. 695, 78 L.Ed. 1230 (1934)). Justice Catron, sitting as a circuit judge, reversed a district court ruling that the Bankruptcy Clause only allowed the 1787 English version of bankruptcy. Klein, 14 F. Cas. at 716, 719.

35. Insolvency was never a requirement for English or early American involuntary cases, which instead required "acts of bankruptcy." Marshall, 300 B.R. at 517-18. The 1841 Act did include a requirement for voluntary debtors to plead an inability to pay their debts, but it "was only a pleading requirement" as "[n]either the parties nor the court had the authority to inquire into whether a debtor was in fact insolvent." Id. at 516 (citing Ex parte Hull, 12 F. Cas. 853, 856 (S.D.N.Y. 1842)). This insolvency pleading requirement carried over into the 1867 Act but "disappeared entirely in 1878 (the date of repeal of the 1867 Act)" and did not reappear for voluntary cases in subsequent bankruptcy laws. Id. at 517.

36. The 1867 Act also continued the expansion of (or at least change in) American bankruptcy law from its English roots. A creditor challenged a provision of the 1867 Act allowing discharge on the partial payment of debt as not part of "the subject of Bankruptcies" as

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[20] Marshall says the "second landmark major development" of the 1841 Act was the extension of bankruptcy law to non-traders. 300 B.R. at 520.

intended by the Bankruptcy Clause. In re Reiman, 20 F. Cas. 490, 492-93 (S.D.N.Y. 1874). A future Supreme Court justice, then-Judge Blatchford, catalogued the differences between bankruptcy as practiced in England and the United States and held that "[i]t cannot be doubted, that [C]ongress, in passing laws on the subject of bankruptcies, is not restricted to laws with such scope only as the English bankruptcy laws had when the [C]onstitution was adopted." Id. at 495-96; see also *Constitutional Limits*, *supra*, at 539-40 (summarizing Reiman and noting Judge Blatchford's subsequent Supreme Court position).

37. Congress enacted the first permanent American bankruptcy law in 1898. *Constitutional Limits*, *supra*, at 540. Among other innovations, the 1898 Act removed the need for creditors to consent to the debtor's discharge. Id. The Supreme Court faced a creditor's complaint that the 1898 Act violated the Bankruptcy Clause due to a lack of uniformity, the delegation of legislative power to the states, allowing non-trader debtors, and permitting voluntary petitions. Moyses, 186 U.S. at 183-84, 22 S.Ct. 857. The new law, however, "easily withstood challenges to its constitutionality as within the 'subject of Bankruptcies.'" *Constitutional Limits*, *supra*, at 540-41 (citing Moyses, 186 U.S. at 187, 22 S.Ct. 857).

38. Congress further expanded the 1898 Act in 1933 by adding reorganization provisions for individuals, farmers, and railroads. Id. at 541. Both the Supreme Court and the Fourth Circuit endorsed the expansion. See Cont'l Ill., 294 U.S. at 671, 55 S.Ct. 595 ("[T]hese acts, far-reaching though they be, have not gone beyond the limit of congressional power; but rather have constituted extensions into a field whose bounda-

ries may not yet be fully revealed."); Campbell v. Alleghany Corp., 75 F.2d 947, 951 (4th Cir. 1935) ("[W]e entertain no doubt as to the constitutionality of the statute."). The Supreme Court concluded that the "fundamental and radically progressive . . . extensions" were within Congress's bankruptcy power and showed the ability of the Bankruptcy Clause to address changes in business and social interactions, Cont'l Ill., 294 U.S. at 671, 55 S.Ct. 595, while the Fourth Circuit noted that Congress was addressing the shortfalls of prior bankruptcy laws, Campbell, 75 F.2d at 951.

39. Congress overhauled the 1898 Act by adopting our current bankruptcy law, the Bankruptcy Code, in 1978. Frank R. Kennedy, *The Commencement of a Case Under the New Bankruptcy Code*, 36 WASH. & LEE L. REV. 977, 981 (1979). Congress sought the recommendations of a Commission on Bankruptcy Laws of the United States, id. at 977-78, and, among other things, the Commission recognized the potential for a delay in filing a bankruptcy case to doom a reorganization before it even started and sought to remove barriers to voluntary petitions, REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. DOC. NO. 93-137, pt. 1, at 75 (1973) [hereinafter "REPORT"]. Accordingly, the Code provides for a "liberalization of access" by making the "order for relief"[21] "equivalent to adjudication under the Bankruptcy Act and . . . tantamount to an order approving the court's exercise of jurisdiction" and requiring "[n]either insolvency nor inability to pay debts nor even the fact that the debtor is indebted in any amount . . . to be alleged or proved" in voluntary

[21] The filing of a petition constitutes the "order for relief" in a voluntary case. 11 U.S.C. § 301(b).

petitions. Kennedy, *supra*, at 983-84 (footnote omitted); see also *Constitutional Limits*, *supra*, at 496 (noting that, other than a few exceptions, "there is no requirement of insolvency in any sense" to commence voluntary cases under the Bankruptcy Code).

40. This brief overview of the history of American bankruptcy law shows great change and innovation since the adoption of the Bankruptcy Clause, and the Supreme Court has described the clause in terms that suggest Congress has nearly unlimited power to determine the proper "subject of Bankruptcies." The Court has repeatedly emphasized that the "subject of Bankruptcies" is not limited to the English and/or early state version of bankruptcy in 1787. Wright, 304 U.S. at 513, 58 S.Ct. 1025 (citing Adair v. Bank of Am. Nat'l Tr. & Sav. Ass'n, 303 U.S. 350, 354, 58 S.Ct. 594, 82 L.Ed. 889 (1938); Cont'l Ill., 294 U.S. at 668, 55 S.Ct. 595); Cont'l Ill., 294 U.S. at 668, 55 S.Ct. 595 (remarking that the idea that the Framers intended to limit Congress to English law had been long-dispelled (in 1935)); Moyses, 186 U.S. at 187, 22 S.Ct. 857 (observing that the Framers were aware of Blackstone[22] and English law but granted power over the entire subject of bankruptcies without limitation); see also Bradford v. Fahey, 76 F.2d 628, 632 (4th Cir. 1935) ("It is clear that the power of Congress over bankruptcies is not limited by the terms of the British and colonial

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[22] William Blackstone, whose "*Commentaries* rank second only to the Bible as a literary and intellectual influence on the history of American institutions," William D. Bader, *Some Thoughts on Blackstone, Precedent, and Originalism*, 19 VT. L. REV. 5, 8 (1994) (quoting ROBERT A. FERGUSON, LAW AND LETTERS IN AMERICAN CULTURE 11 (1984)), thoroughly considered English bankruptcy law and did not include insolvency as a requirement. Marshall, 300 B.R. at 517 (citing 2 WILLIAM BLACKSTONE, COMMENTARIES *471-88).

statutes as they existed at the time of the adoption of the Constitution.").

41. If the language of the Bankruptcy Clause does not require bankruptcy as practiced in 1787, what exactly does it mean? The Supreme Court has resisted giving us a precise definition and has even asserted, as recently as 2022, that the scope of the Bankruptcy Clause cannot be fully defined. Siegel v. Fitzgerald, 596 U.S. 464, 473, 142 S.Ct. 1770, 213 L.Ed.2d 39 (2022) ("[T]he 'subject of bankruptcies is incapable of final definition . . . .'" (quoting Wright, 304 U.S. at 513, 58 S.Ct. 1025)); see also Moyses, 186 U.S. at 186, 22 S.Ct. 857 ("In considering the question before me, I have not pretended to give a definition (but purposely avoided any attempt to define) the mere word 'bankruptcy.'" (quoting Klein, 14 F. Cas. at 718)); *Federal Bankruptcy Jurisdiction*, *supra*, at 747 ("[B]ankruptcy has become the seemingly inscrutable crucible of federal jurisdiction theory."). Similarly, the Supreme Court has said there are some limits to Congress's power pursuant to the Bankruptcy Clause, but the limits are also beyond definition. Cont'l Ill., 294 U.S. at 669-70, 55 S.Ct. 595 ("Those limitations have never been explicitly defined, and any attempt to do so now would result in little more than a paraphrase of the language of the Constitution without advancing far toward its full meaning."). Given its inability to define the contours of the bankruptcy power, it is not surprising that the Court treats bankruptcy jurisdiction as unusual and unique. See, e.g., Allen v. Cooper, 589 U.S. 248, 140 S. Ct. 994, 1002, 206 L.Ed.2d 291 (2020) (noting that Katz reflects "what might be called bankruptcy exceptionalism" and distinguishing Katz based on the "'singular nature' of bankruptcy jurisdiction" (quoting Katz, 546 U.S. at 369 n.9, 126 S.Ct. 990)).

42. The Supreme Court has, however, attempted to describe elements of the undefinable bankruptcy power. For example, the "Court has repeatedly emphasized that the Bankruptcy Clause's language, embracing 'laws on the subject of Bankruptcies,' is broad." Siegel, 596 U.S. at 473, 142 S.Ct. 1770; see also Charles J. Tabb, *The Bankruptcy Clause, the Fifth Amendment, and the Limited Rights of Secured Creditors in Bankruptcy*, 2015 No. 2 Univ. ILL. L. REV. 765, 766 ("[T]he scope of congressional power . . . is exceedingly broad."), 778 ("Justice Catron's *extraordinarily broad* definition of the scope of congressional power under the Bankruptcy Clause [in Klein] has been quoted in numerous cases with approval by the Supreme Court . . . ." (emphasis added)). In fact, the scope is so broad that it includes concepts that do not fit neatly into any possible definition. See, e.g., Wright, 304 U.S. at 514, 58 S.Ct. 1025 (observing that the purchase of a debtor's property by a third party is not part of the debtor-creditor relationship but "does enter into the radius of the bankruptcy power over debts"); *Bankruptcy and Federalism*, *supra*, at 1100-1104 (describing a few sections of the Bankruptcy Code, including 11 U.S.C. § 363(h), that violate "the Non-Expropriation Principle" by subordinating the property interests of third parties to the interests of creditors).

43. Congress's bankruptcy power is not just broad; it is also potent. Courts and commentators are especially fond of describing the power as "plenary"[23] and use similar terms that suggest that Congress's power in this field approaches omnipotence. Siegel, 596 U.S. at 474, 142 S.Ct. 1770 ("plenary" (quoting Moyses, 186

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[23] *Black's Law Dictionary* defines "plenary" as "Full; complete; entire." *Plenary*, BLACK'S LAW DICTIONARY (9th ed. 2009).

U.S. at 187, 22 S.Ct. 857)); Int'l Shoe Co. v. Pinkus, 278 U.S. 261, 265, 49 S.Ct. 108, 73 L.Ed. 318 (1929) ("unrestricted and paramount"); Campbell, 75 F.2d at 955 ("plenary"); Reiman, 20 F. Cas. at 496 ("general, unlimited and unrestricted"); Ralph Brubaker, *Explaining Katz's New Bankruptcy Exception to State Sovereign Immunity: The Bankruptcy Power as a Federal Forum Power*, 15 ABI L. REV. 95, 131 (2007) ("practically unlimited"); *Federal Bankruptcy Jurisdiction*, *supra*, at 746 ("Congress, of course, has plenary legislative power 'on the subject of Bankruptcies.'"). In In re Klein, Justice Catron describes a "general and unlimited" power that "gives the unrestricted authority to [C]ongress over the entire subject, as the parliament of Great Britain had it, and as the sovereign states of this Union had it before the time when the [C]onstitution was adopted."[24] 14 F. Cas. at 717, 42 U.S. 277.

44. When courts do discuss the boundary of the bankruptcy power, it is usually in reference to the uniformity requirement mentioned in the Bankruptcy Clause, and uniformity is frequently referenced as the singular restriction. See Siegel, 596 U.S. at 476, 142 S.Ct. 1770 ("Although the Bankruptcy Clause confers broad authority on Congress, the Clause also imposes *a* limitation on that authority: the requirement that the laws enacted be 'uniform.'" (emphasis added)); Gibbons, 455 U.S. at 468, 102 S.Ct. 1169 ("Unlike the Commerce Clause, the Bankruptcy Clause itself contains *an* affirmative limitation or restriction upon Congress' power: bankruptcy laws must be uniform throughout the United States." (emphasis added));

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[24] Concerns about subject matter jurisdiction presumably did not limit the bankruptcy authority of Parliament and the pre-Constitution states.

Kunzler v. Kohaus, 5 Hill 317, 324 (N.Y. 1843) ("The power conferred is without restriction, save in its uniformity."). The court does not place excessive emphasis on one word, particularly an extremely short one, but it is notable that uniformity is described as *the* limitation on the bankruptcy power and not one of the limitations or even the primary one. But see Tabb, *supra*, at 767 ("Two limits appear in the Clause: that the law be 'uniform,' and that it be 'on the subject of Bankruptcies.'").

45. As suggested by a broad and supreme power that is not moored to its roots in English bankruptcy law, courts and commentators have also described the ability of the Bankruptcy Clause to adapt to changing conditions, once as bluntly as "The concept changes." Wright, 304 U.S. at 513, 58 S.Ct. 1025; see also Cont'l Ill., 294 U.S. at 668, 55 S.Ct. 595 (describing a tendency toward "progressive liberalization" of the bankruptcy power since its inception); Tabb, *supra*, at 804 ("[T]he scope of the constitutional grant on the 'subject of Bankruptcies' has an expansive and elastic reach . . . ."); *Constitutional Limits*, *supra*, at 567-68 (arguing that even though the automatic stay and discretionary injunction did not exist in early bankruptcy law, they are part of the "subject of Bankruptcies" because they are "logical developments"). "Congress is not limited by what has been attempted in the past but may shape its remedies in a way to meet adequately the problems of the present." Campbell, 75 F.2d at 955. Throughout the history of American bankruptcy law, the Supreme Court has determined that various changes of a "fundamental and radically progressive nature" are within Congress's power pursuant to the Bankruptcy Clause. Marshall, 300 B.R. at 520 (quoting Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555, 588, 55

S.Ct. 854, 79 L.Ed. 1593 (1935)). But see *Constitutional Limits*, *supra*, at 500 (claiming the "subject of Bankruptcies" has not changed since the adoption of the Bankruptcy Clause and descriptions of the subject as constantly expanding are "both superficial and myopic").

46. Despite forswearing the ability to do so, the Supreme Court has occasionally offered or endorsed definitions of the bankruptcy power. These definitions, however, tend to "result in little more than a paraphrase[25] of the language of the Constitution without advancing far toward its full meaning." Cont'l Ill., 294 U.S. at 669-70, 55 S.Ct. 595. Bankruptcy jurisdiction "extends to all cases where the law causes to be distributed the property of the debtor among his creditors; this is its least limit. Its greatest is a discharge of the debtor from his contracts. And all intermediate legislation, affecting substance and form, but tending to further the great end of the subject—distribution and discharge—are in the competency and discretion of [C]ongress." Klein, 14 F. Cas. at 718; see *Constitutional Limits*, *supra*, at 538 (noting that the Supreme Court has repeatedly expressed its approval of the Klein definition (citing United States v. Bekins, 304 U.S. 27, 47, 58 S.Ct. 811, 82 L.Ed. 1137 (1938);[26] Radford, 295 U.S. at 588 n.18, 55 S.Ct. 854; Cont'l Ill., 294 U.S. at 669, 55 S.Ct. 595; Moyses, 186 U.S. at 186, 22 S.Ct. 857)). The "subject of Bankruptcies" is "not,

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[25] The lengthier of these definitions might be more like the opposite of a paraphrase since a paraphrase is usually shorter and simpler than the original statement.

[26] Despite the citation in *Constitutional Limits*, the Bekins opinion does not actually discuss the Klein definition at all. It does, however, quote the Reiman formulation of the bankruptcy power. Bekins, 304 U.S. at 47, 58 S.Ct. 811.

properly, anything less than the subject of the relations between an insolvent or non-paying or fraudulent debtor, and his creditors, extending to his and their relief." Reiman, 20 F. Cas. at 496; see *Constitutional Limits*, *supra*, at 540 n.291 (noting that the Supreme Court endorsed the Reiman definition in Wright, 304 U.S. at 513-14, 58 S.Ct. 1025, Radford, 295 U.S. at 588 n.18, 55 S.Ct. 854, Cont'l Ill., 294 U.S. at 672-673, 55 S.Ct. 595, and Moyses, 186 U.S. at 187, 22 S.Ct. 857). "[T]he restructuring of debtor-creditor relations . . . is at the core of the federal bankruptcy power . . . ." N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 71, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982).

47. While the language of the Bankruptcy Clause, the history of American bankruptcy law, and the Supreme Court's descriptions of the bankruptcy power do not definitively answer, or even directly address, the question of whether constitutional subject matter jurisdiction requires a debtor in financial distress,[27] the absence of support for the Committee's argument is conspicuous. There are simply no cases at any level (of which this court is aware) that explicitly endorse the proposition that bankruptcy courts do not have subject matter jurisdiction unless a debtor has a sufficient degree of financial distress. See Aldrich, 2023 WL 9016506, at *4, *16, *33 (observing that there are no cases that hold that financial distress is a constitutional or jurisdictional requirement for debtors). With no precedent for the exact relief it seeks, the Committee argues its position primarily by focusing on the historical meaning of bankruptcy, see May 17, 2023 Hr'g Tr. 24:12-25:9 (discussing bankruptcy in ancient

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[27] But see Gibbons, 455 U.S. at 476, 102 S.Ct. 1169 (Marshall, J., concurring) ("Congress may specify what debtors . . . will be subject to bankruptcy legislation.").

Greece, Rome, and Europe); id. at 28:15-33:8 (discussing the meaning of bankruptcy from "back in the day" (1777) through the present), references to insolvency and other terms suggesting financial difficulty in dicta, see Committee's Motion at 11 ("I read the constitution thus: 'Congress shall have power to establish uniform laws on the subject of any person's general *inability* to pay his debts.'" (quoting (and adding emphasis to) Kunzler, 5 Hill at 321)); id. at 12 ("The subject of bankruptcies is nothing less than 'the subject of the relations between an *insolvent or nonpaying or fraudulent debtor*, and his creditors, extending to his or their relief.'" (quoting (and adding emphasis to) Wright, 304 U.S. at 513-14, 58 S.Ct. 1025)); id. at 13 ("[T]he 'Bankruptcy Code strikes a balance between the interests of *insolvent debtors and their creditors*.'" (quoting (and adding emphasis to) Bartenwerfer v. Buckley, 598 U.S. 69, 72, 143 S.Ct. 665, 214 L.Ed.2d 434 (2023)), and the pleas of commentators about how the bankruptcy system should work (which is not always the same as how it actually operates), see Judith K. Fitzgerald, *Over-Thinking Ramifications of the Dismissal of LTL Management LLC's Bankruptcy*, HARV. L. SCH. BANKR. ROUNDTABLE (Feb. 14, 2023), https://bankruptcy roundtable.law.harvard.edu/2023/02/14/texas-two-step-and-the-future-of-mass-tort-bankruptcy-series-postscript-and-analysis-of-third-circuit-dismissal-of-ltl-managements-bankruptcy/ (claiming the LTL Opinion "determined that the need for some form of imminent and demonstrable financial relief is foundational to invoking bankruptcy jurisdiction"[28]); Ralph Brubaker, *The Texas Two-Step and Mandatory Non-Opt-Out Settlement Powers*,

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[28] Judge Fitzgerald appears to be using the word "jurisdiction" loosely in the quoted phrase. See *infra* n.36, ¶ 58.

HARV. L. SCH. BANKR. ROUNDTABLE (July 12, 2022), https://bankruptcy roundtable.law.harvard.edu/2022/07/12/texas-two-step-and-the-future-of-mass-tort-bankruptcy-series-the-texas-two-step-and-mandatory-non-opt-out-settlement-powers/ (theorizing that the risk of solvent defendants undercompensating their victims might be acceptable when there is "a clear and present threat to entity viability"); *Constitutional Limits*, *supra*, at 492, 545 (arguing that insolvency is a jurisdictional requirement for bankruptcy).

48. It is not surprising that the popular understanding of the term "bankruptcy" relates to insolvency or that many bankruptcy opinions include references to insolvency, see, e.g., Wright, 304 U.S. at 513-14, 58 S.Ct. 1025 (quoting Reiman, 20 F. Cas. at 496), since most debtors are insolvent, see In re Ultra Petroleum Corp., 51 F.4th 138, 142 (5th Cir. 2022) ("Bankruptcy is ordinarily for the insolvent."); Aldrich, 2023 WL 9016506, at *17 (observing that "the vast majority" of debtors are insolvent and financially distressed); *Constitutional Limits*, *supra*, at 488 ("[M]ost proceedings under the Code do involve insolvent debtors . . . ."). Potential debtors normally do not want to subject themselves to the disclosure requirements and negative societal ramifications (like public disapproval/embarrassment and, for publicly-traded companies, stock market consequences) of a bankruptcy filing unless they have no other option, and they normally have other options until they are insolvent or very close to it.[29] Cf. Kennedy, *supra*, at 980 ("A debtor

[29] Texas Two-Step cases like this one, where an existing company (Georgia-Pacific here) creates a separate entity like the Debtor in order to gain access to benefits available only in bankruptcy for itself, appear to be an exception to this rule. Cf. *Bankruptcy and Federalism*, *supra*, at 1095 (contending that

contemplating reorganization under Chapter XI frequently postponed the filing of the petition until losses and deterioration of his financial condition frustrated efforts to accomplish any realistic rehabilitation."). Some commentators argue in favor of a jurisdictional insolvency requirement, see, e.g., *Bankruptcy and Federalism*, *supra*, at 1064 & 1129 (arguing that Congress can only overrule state law to alter the relationship between insolvent debtors and creditors); *Constitutional Limits*, *supra*, at 488, 492, 545 (claiming that insolvency is a jurisdictional requirement), but courts, including this one, have rejected a rule requiring debtors to be insolvent, see, e.g., LTL, 64 F.4th at 102 (noting the lack of an insolvency requirement); Bestwall, 605 B.R. at 49 ("[F]iling for Chapter 11, especially in the context of an asbestos or mass tort case, need not be due to insolvency."); In re Mid-Valley, Inc., 305 B.R. 425, 429 (Bankr. W.D. Pa. 2004) (Fitzgerald, J.) ("The Bankruptcy Code does not require that a debtor be insolvent."); Marshall, 300 B.R. at 509 (holding that the Bankruptcy Clause does not require insolvency), 519 ("[I]t is not credible that the framers of the Constitution thought that a requirement of insolvency was included in the concept of bankruptcy that found its way into the Bankruptcy Clause."), and no court has held that insolvency is a prerequisite for constitutional subject matter jurisdiction. References to insolvency in bankruptcy opinions are dicta, see, e.g., Bartenwerfer, 598 U.S. at 72, 143 S.Ct. 665 (referring to the Bankruptcy Code's balance between insolvent debtors and creditors in the first sentence of the opinion); Kunzler, 5 Hill at 320 (asserting that

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an insolvency requirement would prevent solvent debtors from taking advantage of bankruptcy rules that are not available elsewhere).

"bankruptcy" is synonymous with "insolvency"), and the court is not bound by dicta, see Katz, 546 U.S. at 363, 126 S.Ct. 990 (citing Cohens v. Virginia, 6 Wheat. 264, 399-400, 5 L.Ed. 257 (1821)).

49. In addition, "insolvency" and "financial distress" do not mean the same thing, LTL, 64 F.4th at 102 ("To say, for example, that a debtor must be in financial distress is not to say it must necessarily be insolvent."), and the Committee explicitly and emphatically rejects the concept of an insolvency requirement for bankruptcy jurisdiction, Official Committee of Asbestos Claimants' Consolidated Reply in Support of the Committee's Motion to Dismiss for Lack of Subject Matter Jurisdiction (Dkt. 2993) ("Committee's Reply") at 8 ("[T]he Committee ***does not*** argue that an entity must be insolvent to file for bankruptcy."). There are several ways to define "insolvency," two of which are regularly used in bankruptcy: (1) balance sheet insolvency, and (2) the liquidity (or "equity" or "cash flow") test for insolvency. Marshall, 300 B.R. at 511-513. Generally, balance sheet insolvency means a debtor's total debt exceeds the value of its property. *Balance-sheet insolvency*, BLACK'S LAW DICTIONARY (9th ed. 2009) ("Insolvency created when the debtor's liabilities exceed its assets."). The Bankruptcy Code includes its own modified versions of balance sheet insolvency applicable to entities other than municipalities. 11 U.S.C. § 101(32)(A)-(B). Courts use the Code's versions of balance sheet insolvency primarily "to define narrowly drawn rights under particular statutory provisions," Marshall, 300 B.R. at 512 (citing §§ 365, 525, 541, 543, 545, 546, 547, 548, 553), and they are not used to determine debtor eligibility.

50. The liquidity test for insolvency does not compare a debtor's assets and liabilities. Instead, it

looks at whether a debtor is promptly paying its debts. *Equity insolvency*, BLACK'S LAW DICTIONARY (9th ed. 2009) ("Insolvency created when the debtor cannot meet its obligations as they fall due."). The Bankruptcy Code includes a version of the liquidity test in section 101(32)(C) that courts use to determine the eligibility of municipalities to file bankruptcy under Chapter 9. See § 109(c)(3).[30] It is the only type of insolvency ever used to determine debtor eligibility for bankruptcy in the United States. Marshall, 300 B.R. at 512.

51. While insolvency examines whether a debtor's liabilities exceed its assets (literally for balance sheet insolvency and figuratively under the liquidity test), financial distress is a more nebulous concept that implies a less severe degree of financial trouble than insolvency. The LTL Opinion, which the Committee (understandably) puts great stock in, does not attempt to define "financial distress." LTL, 64 F.4th at 102 ("[W]e need not set out any specific test to apply rigidly when evaluating financial distress."), 110 ("[W]hile it is unwise today to attempt a tidy definition of financial distress justifying in all cases resort to Chapter 11, we can confidently say the circumstances here fall outside those bounds."). The concept is so vague that the Committee does not attempt to precisely define it despite asking this court to determine that it is implicitly required by the Bankruptcy Clause. See Committee's Motion at 20 (asserting that "[t]his

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[30] Municipalities must be insolvent to be debtors, but the requirement is included in section 109 and does not implicate the court's subject matter jurisdiction. See In re Hamilton Creek Metro. Dist., 143 F.3d 1381, 1385 n.2 (10th Cir. 1998) (noting that "none of the § 109(c) criteria is [sic] jurisdictional in nature" while determining that a Chapter 9 debtor "did not meet the essential criterion of insolvency"); see also *infra* ¶ 57.

court need not determine where the constitutional line is" because it is so clear that the Debtor is not in financial distress). The court accepts the Committee's argument that the Debtor has never been in financial distress in the sense that its access to the funding agreement, and, therefore, Georgia-Pacific's assets, makes it able to pay any conceivable liabilities now and in the foreseeable future (and the Debtor does not argue to the contrary), but the requirements of constitutional subject matter jurisdiction, especially given the potentially drastic consequences of the lack thereof, see *infra* ¶ 53, need to be definable. As previously noted, no court has ever concluded that financial distress is a requirement for constitutional subject matter jurisdiction, and there is some indication in the case law that it is not, see, e.g., United States v. Huebner, 48 F.3d 376, 379 (9th Cir. 1994) ("The Bankruptcy Act[31] does not require any particular degree of financial distress as a condition precedent to a petition seeking relief."); Rudd v. Laughlin, 866 F.2d 1040, 1041-42 (8th Cir. 1989) ("[T]he statutes governing the authority of federal courts to hear bankruptcy cases do not limit jurisdiction according to amounts involved."); In re Honx, Inc., No. 22-90035, 2022 WL 17984313, at *2 (Bankr. S.D. Tex. Dec. 28, 2022) (concluding that a debtor with asbestos liability did not commence its case in bad faith because "Congress recognized that . . . an asbestos bankruptcy differs from a 'classic' bankruptcy with an insolvent or near-insolvent debtor"); In re Gen. Growth Props., Inc., 409 B.R. 43,

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[31] Huebner deals with the appeal of tax evasion convictions involving bankruptcy petitions filed in 1985 and 1986, see 48 F.3d at 377-79, well after the effective date of the Bankruptcy Code, so the reference to the Bankruptcy "Act" appears to be in error.

60 (Bankr. S.D.N.Y. 2009) (declining to establish a rule that debtors cannot file bankruptcy unless their debt is due within a particular period of time); In re Mirant Corp., No. 03-46590, 2005 WL 2148362, at *12-13 (Bankr. N.D. Tex. Jan. 26, 2005) (using laches to deny motions to dismiss despite allegation that the debtor "was highly solvent and financially healthy on the date of its bankruptcy filing and has continued to be so since that date").

52. Given the lack of support in bankruptcy history for a financial distress requirement, the relative abundance of references to insolvency (and, at least in relevant scholarship, support for an insolvency requirement), and the similarity of the two concepts (i.e., both look at the financial problems of a debtor), it is not surprising or unreasonable for the Committee to use references to insolvency to support its argument, but the Committee's rejection of the implications of most of the authorities it cites for support undermines its position. For example, the Committee says "a debtor's eligibility to be a proper 'subject of Bankruptc[y]' within the meaning of the Bankruptcy Clause 'is a jurisdictional requirement for invoking a bankruptcy proceeding,'" quoting Professor Plank. Committee's Motion at 17 (quoting *Constitutional Limits*, *supra*, at 492). Professor Plank's full assertion, however, is that "[t]he *insolvency* of the debtor in this sense [i.e., in the sense of balance sheet or liquidity insolvency] is a jurisdictional requirement for invoking a bankruptcy proceeding." *Constitutional Limits*, *supra*, at 492 (emphasis added). The Committee uses Professor Plank's contention, which advocates a position that the Committee explicitly disclaims (that insolvency is a jurisdictional requirement), to support its claim that a different concept, financial distress, is a juris-

dictional requirement. Similarly, the LTL Opinion prompted the Committee's Motion to some extent, see Committee's Motion at 9 ("In light of the *LTL Mgmt.* decision . . . , the Committee believes that the Court should now address whether Bestwall is constitutionally eligible to be a debtor in bankruptcy." (footnote omitted)), and the Committee cites it for support, see May 17, 2023 Hr'g Tr. 18:8-10 ("[T]he language in LTL is entirely consistent with what we believe is the constitutional limitation on a company that seeks to access the bankruptcy laws."). In that case, however, the Third Circuit determined that it and the bankruptcy court below had subject matter jurisdiction, LTL, 64 F.4th at 99 ("The Bankruptcy Court had jurisdiction of the bankruptcy case under, *inter alia*, 28 U.S.C. §§ 157(a) and 1334(a). We have jurisdiction of the appeals under 28 U.S.C. § 158(d)(2)(A)." (footnote omitted)), prior to determining that the debtor did not file its case in good faith due to its lack of financial distress, id. at 110. The Committee's need to reach for authorities that advocate a different (but related) argument shows the lack of support for its contention.

53. One reason for the lack of support for a constitutional financial distress requirement is the difficulty in administering such a rule. Professor Plank, a leading proponent of the insolvency requirement (which no party to this case supports), says "there does not seem to be any principled way" to administer a financial distress requirement. *Constitutional Limits*, *supra*, at 493 n.23. At the hearing on the Motions to Dismiss, the advocates for the requirement disagreed about whether financial distress should be determined at the outset of a case or throughout the proceedings. On the one hand, despite citing post-petition develop-

ments as support, the Committee took the position that it was a "gatekeeping or access-to-bankruptcy question," May 17, 2023 Hr'g Tr. 43:19-20, and was not sure what should happen if subsequent events showed a debtor to be solvent, id. at 44:6-10. On the other hand, the attorney representing certain claimants represented by Maune, Raichle, Hartley, French & Mudd, LLC ("Maune Raichle"), id. at 46:22-47:11, and the attorney for Mr. Buckingham, id. at 107:21-108:13, argued that the court has a continuing duty throughout its cases to constantly assess its jurisdiction and dismiss any case, at any point in the case, when a debtor is not in financial distress. The latter position is arguably more consistent with a constitutional jurisdiction requirement since courts must always assess their subject matter jurisdiction, see, e.g., Valley Historic, 486 F.3d at 838 ("We do not find that these principles and our precedent, however, can be read or extended to preclude the bankruptcy court from exercising its unflagging obligation to examine its subject matter jurisdiction at every stage of the proceeding."), but determining that subject matter jurisdiction was lost due to post-petition developments would be contrary to both the Bankruptcy Code and long-standing traditions of bankruptcy practice, see, e.g., § 726(a)(5) & (6) (authorizing payment of interest and refunds to a Chapter 7 debtor when all claims are paid in full); Ultra Petroleum, 51 F.4th at 150 ("For some three centuries of bankruptcy law, courts have held that an equitable exception to the usual rules applies in the unusual case of a solvent debtor.");[32]

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[32] The Ultra Petroleum court described its debtor as becoming "supremely solvent," 51 F.4th at 142, "massively solvent," id. at 143, and, fittingly, "ultra solvent," id. at 150, due to a post-petition increase in the price of natural gas.

see also *Bankruptcy & Federalism*, *supra*, at 1112-13 (noting that § 726(a)(5) allows "greater payments to creditors in bankruptcy than they would receive outside of bankruptcy" without addressing the apparent solvency of the debtor's estate in a situation where the provision is invoked). A rule that subject matter jurisdiction is lost when a determination is made post-petition that a debtor is no longer in financial distress would create a perverse incentive for Chapter 7 trustees, whose compensation is based on the assets recovered, not to find too many assets.[33] Likewise, many Chapter 13 cases end with early discharges and full payments to creditors as a result of the appreciation of the value of real property, an inheritance, or some other financial good fortune. See, e.g., In re Miloni, No. 20-30258, slip op. at 1-2 (Bankr. W.D.N.C. Nov. 8, 2023) (approving sale of debtor's real property with proceeds to pay off Chapter 13 plan at 100% and surplus refunded to the debtor and noting post-petition appreciation of the real property). Under the version of the financial distress rule advocated by Mr. Buckingham and Maune Raichle, these Chapter 13 cases could instead conclude with dismissal due to the court's post-petition loss of subject matter jurisdiction. Bankruptcy courts could also face attempts to revoke confirmation of Chapter 11 and 13 plans and the discharge of debtors after cases close based on allegations of a lack of financial distress. Cf. In re Tatsis, 72 B.R. 908, 911 (Bankr. W.D.N.C. 1987) ("There are many instances in which Chapter 13 cases are filed where

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[33] The incentive for a Chapter 7 trustee not to find too many assets could also exist under the Committee's "gatekeeping" version of the financial distress requirement if the recovered assets indicated that a debtor was actually not in financial distress on its petition date.

the qualifications of the debtor under § 109(e) might be called into question. In such a case, when no issue is raised by a party in interest, the case will be administered pursuant to Chapter 13. Can someone then come one, two, or three years after confirmation and question the jurisdiction of the court? Can a creditor sue a debtor after his discharge in Chapter 13, alleging that the bankruptcy court never had jurisdiction? These are questions that Congress never intended this Court or any other bankruptcy court be required to answer.").

54. Whether assessed only at the beginning of a case or throughout, determining whether a debtor is in financial distress would not be easy. As previously mentioned, the Committee is not concerned with a standard for the determination because it asserts that this case is not a close call. See Committee's Reply at 16 ("Experience up until now has not required courts to further clarify those limits (and even now this Court does not have to define the dividing line)."). But a constitutional rule would apply to all of the cases before the court, now and in the future, so the court needs to have some idea of how to enforce it. Other courts and commentators have noted the difficulty of enforcing a theoretical insolvency rule, see, e.g., Marshall, 300 B.R. at 513 (noting the extensive amount of time necessary to make a solvency determination); *Constitutional Limits*, *supra*, at 493 ("To be sure, whether and when a debtor becomes insolvent in either sense may present difficult factual and conceptual questions."), and insolvency is a defined and familiar concept compared to financial distress.[34] Any consideration of the practicalities of a financial distress rule leads to more

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[34] *Black's Law Dictionary* and the Bankruptcy Code do not include definitions for "financial distress."

questions than answers. The Committee and its allies may not be concerned with the logistics of applying its rule in contexts other than this unusual case, but the court would have to apply a constitutional rule across the board, and very few debtors have access to the resources of Fortune 500 companies.

55. Another problem with a financial distress requirement for subject matter jurisdiction is the tension with the goal of getting potential debtors to commence their cases early. In adopting the Bankruptcy Code, Congress saw the benefit in incentivizing Chapter 11 debtors to file their cases in time to maintain the value of their estates and avoid liquidation.[35] Gen. Growth, 409 B.R. at 60; In re Johns-Manville Corp., 36 B.R. 727, 736 (Bankr. S.D.N.Y. 1984); Kennedy, *supra*, at 980-81; REPORT, *supra*, at 75. Under the Committee's rule, however, debtors would have to thread the needle between filing early enough to preserve value as encouraged by the Code but not filing too early and therefore facing dismissal (or the threat thereof) for an absence of sufficient financial distress. In addition, the assessment of financial distress by courts would itself cause some loss of value. Cf. Marshall, 300 B.R. at 513 ("If a reorganization is held up pending a determination of balance sheet insolvency, businesses will rarely be reorganized, and at least some of the reorganization value (the value of a business as reorganized as opposed to its liquidation value) will inevitably be lost.").

56. Consistent with a policy decision to allow liberal access and encourage early filing, Congress did not make the statutory subject matter jurisdiction require-

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[35] The court acknowledges that the priorities of the Bankruptcy Code would have to yield if financial distress was an element of constitutional subject matter jurisdiction.

ments for bankruptcy very strenuous. While the instant dispute focuses on the Constitution, the court notes that this case satisfies the modest statutory requirements for subject matter jurisdiction. Section 1334 of Title 28 determines statutory subject matter jurisdiction for bankruptcy. Kirkland, 600 F.3d at 315; Valley Historic, 486 F.3d at 839 n.3; Houck v. Lifestore Bank (In re Houck), Ch. 13 Case No. 11-51513, Adv. No. 15-5028, 2018 WL 722462, at *7 (Bankr. W.D.N.C. Feb. 5, 2018). Section 1334(a) gives district courts jurisdiction over the administration of bankruptcy cases, and section 1334(b) provides district courts with jurisdiction over all of the discrete proceedings within the cases. Houck, 2018 WL 722462, at *7. Section 157 of Title 28 allows district courts to send bankruptcy matters to bankruptcy courts, and the District Court's April 14, 2014 Amended Standing Order of Reference sends all local cases to this court. The statutes that establish the subject matter jurisdiction of the bankruptcy court do not look at financial distress, insolvency, or any other characteristics of debtors.

57. Accordingly, if Congress decided to add a financial distress requirement for debtors in bankruptcy, it would most likely not implicate the subject matter jurisdiction of the court. Congress would likely add the requirement to section 109, which "defines who may be a debtor under the various chapters of the Code." Toibb v. Radloff, 501 U.S. 157, 160, 111 S.Ct. 2197, 115 L.Ed.2d 145 (1991); see also Kennedy, *supra*, at 986 (similar). Section 109's requirements for debtor eligibility are not jurisdictional. In re Zarnel, 619 F.3d 156, 169 (2d Cir. 2010); Rudd, 866 F.2d at 1042 (citations omitted); see also In re Phillips, 844 F.2d 230, 235 n.2 (5th Cir. 1988) (section 109(g) is not juris-

dictional); In re Stinnie, 555 B.R. 530, 533 (Bankr. W.D. Va. 2016) (section 109(h) is not jurisdictional); In re Baxter, Ch. 7 Case No. 06-30452, slip op. at 8 (Bankr. W.D.N.C. May 17, 2006) (section 109(h) is not jurisdictional). But see In re Keziah, 46 B.R. 551, 554 (Bankr. W.D.N.C. 1985) ("§ 109 is a part of the eligibility (to be a debtor) section which involves the subject matter jurisdiction of this Court.").[36] In municipal bankruptcies, which do require insolvency, the requirement is in section 109(c), and it is not jurisdictional. Hamilton Creek, 143 F.3d at 1385 n.2. A bankruptcy case commences even if a debtor is not eligible under a particular chapter, see, e.g., Tatsis, 72 B.R. at 910 ("Movant argues that in the event a debtor files a petition pursuant to Title 11, but chooses a chapter for which he is not qualified, then there is no jurisdiction of any kind or type in the court and the filing is a nullity. This argument is incorrect."), or at all, see, e.g., Zarnel, 619 F.3d at 169 ("[W]e find that the restrictions of § 301 and § 109(h) are not jurisdictional, but rather elements that must be established to sustain a voluntary bankruptcy proceeding."); see also Kennedy, *supra*, at 983 ("Filing the petition results in an automatic entry of an order for relief under the chapter invoked by the petition. The expression

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[36] Keziah is an example of this court not being sufficiently rigorous in its analysis of subject matter jurisdiction. See also *infra* ¶ 58. The reasoning of Keziah has been explicitly and convincingly rejected by the Fifth Circuit, see Phillips, 844 F.2d at 235 n.2, and two years after Keziah, the same judge, the Honorable Marvin R. Wooten, took a contrary jurisdictional position consistent with this order, see Tatsis, 72 B.R. at 910 ("Filing of a case under Title 11 establishes jurisdiction in this Court in accordance with 28 U.S.C. §§ 1334 and 157. It gives the Court the right and authority to administer the case in accordance with the Bankruptcy Code.").

'order for relief' in the Code is equivalent to adjudication under the Bankruptcy Act and is tantamount to an order approving the court's exercise of jurisdiction to grant relief pursuant to the provisions of the law. If the debtor is ineligible or the petition is insufficient, however, the language of the statute does not preclude the court from taking whatever action is appropriate to dispose of the document." (footnotes omitted)); REPORT, *supra*, at 75 ("There should be no legal barrier to voluntary petitions."). If debtor eligibility was an element of subject matter jurisdiction, a case commenced by an ineligible debtor would instead be void. See Baxter, slip op. at 7 ("Some courts maintain that compliance with Section 109(h) is jurisdictional and a filing by a debtor who does not qualify is a nullity." (citations omitted)); cf. Arbaugh, 546 U.S. at 514, 126 S.Ct. 1235 ("[W]hen a federal court concludes that it lacks subject-matter jurisdiction, the court must dismiss the complaint in its entirety." (citing 16 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 106.66[1], at 106-88 to 106-89 (3d ed. 2005)).

58. In part due to the harsh results of a decision that subject matter jurisdiction is lacking, the Supreme Court has been trying "to bring some discipline" to the jurisdictional analysis in recent years. MOAC, 598 U.S. at 298, 143 S.Ct. 927 (quoting Henderson v. Shinseki, 562 U.S. 428, 435, 131 S.Ct. 1197, 179 L.Ed.2d 159 (2011)). The Eleventh Circuit, applying the Supreme Court's guidance in the bankruptcy context, noted that "the failure of a cause of action does not automatically produce a failure of jurisdiction." In re Trusted Net Media Holdings, LLC, 550 F.3d 1035, 1042 (11th Cir. 2008) (quoting Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 91, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998)); see also id. at 1043 (concluding

that the requirements of § 303 for involuntary cases are not jurisdictional). The Supreme Court addressed subject matter jurisdiction multiple times in 2023, including a determination of whether a bankruptcy statute implicated subject matter jurisdiction. See MOAC, 598 U.S. at 292, 143 S.Ct. 927 (deciding that § 363(m) is not jurisdictional); Santos-Zacaria, 598 U.S. at 413, 143 S.Ct. 1103 (holding that an immigration law (8 U.S.C. § 1252(d)(1)) is not jurisdictional). In MOAC, the Court observed that "[t]he 'jurisdictional' label is significant because it carries with it unique and sometimes severe consequences." 598 U.S. at 297, 143 S.Ct. 927. While these decisions deal with statutory subject matter jurisdiction, they suggest the Supreme Court would not favor expansive new ideas about constitutional subject matter jurisdiction for similar reasons.

59. There is no need for a harsh new jurisdictional rule because there are other ways for courts to address any perceived abuse by debtors lacking financial distress. Cf. *Constitutional Limits*, *supra*, at 555 ("The requirement of good faith, the ability to lift the automatic stay for cause, and the discretion to disapprove rejection of contracts may be sufficient to prevent solvent debtors from abusing the bankruptcy process."). As previously noted, the LTL Opinion is a basis for the Committee's Motion. See *supra* ¶¶ 51-52. In contrast with the Committee's Motion, however, the Third Circuit decided that it had jurisdiction, LTL, 64 F.4th at 99, and dismissed the LTL case pursuant to section 1112(b) because the debtor could not show that it commenced its case in good faith due to its lack of financial distress, id. at 110.[37] The LTL Opinion is not the only

[37] As mentioned previously *supra* ¶ 19, the LTL Opinion acknowledges that the good faith analysis is different in the

example of a court using good faith to police against financially healthy debtors abusing the bankruptcy system. See, e.g., In re Cedar Shore Resort, Inc., 235 F.3d 375, 381 (8th Cir. 2000) ("Nor did the bankruptcy court abuse its discretion in dismissing Cedar Shore's petition. 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.'" (quoting Furness v. Lilienfield, 35 B.R. 1006, 1009 (D. Md. 1983))); In re SGL Carbon Corp., 200 F.3d 154, 164 (3d Cir. 1999) ("SGL Carbon cites no case holding that petitions filed by financially healthy companies cannot be subject to dismissal for cause."); *Constitutional Limits*, *supra*, at 548-551 (collecting cases).

Fourth Circuit and requires objective futility in addition to subjective bad faith. 64 F.4th at 98 n.8 (citing Carolin, 886 F.2d at 694); see also Off. Comm. of Asbestos Claimants, 71 F.4th at 182 (noting that the Fourth Circuit requires "a more comprehensive standard" to be met in order to dismiss a Chapter 11 case for a lack of good faith). The absence of financial distress ironically helps a debtor avoid a bad faith dismissal in this circuit. See Bestwall, 605 B.R. at 49-51 (finding that "Bestwall has the full ability to meet all of its obligations (whatever they may be) through its assets and New GP's assets, which are available through the Funding Agreement" in the course of concluding that this case is not objectively futile and denying the First Motion to Dismiss without addressing subjective bad faith); Aldrich, 2023 WL 9016506, at *27 (observing that all bankruptcy cases filed by solvent debtors without financial distress will survive dismissal under the Carolin standard and wondering if the Carolin court considered the application of its test to such debtors); *33 ("Aldrich and Murray were designed to meet the objective futility standard, and they do."). This case may provide a basis for the Fourth Circuit to reexamine its standard for good faith, at least in Texas Two-Step cases like this one, but it is not a basis to create a new jurisdictional requirement that could have "far-reaching consequences," Phillips, 844 F.2d at 235 n.2.

Some courts even find "cause" under section 362 to grant relief from the automatic stay when a debtor files a case in bad faith. See, e.g., In re Corp. Deja Vu, 34 B.R. 845, 850 (Bankr. D. Md. 1983) ("The petition was filed in bad faith. This bad faith constitutes cause to allow the secured creditor relief from the stay."); *Constitutional Limits*, *supra*, at 551 (citing In re Dixie Broad., Inc., 871 F.2d 1023 (11th Cir.), *cert. denied*, 493 U.S. 853, 110 S.Ct. 154, 107 L.Ed.2d 112 (1989)). In addition, some courts deny access to special bankruptcy rules and protections based on a debtor's solvency without examining good faith. See, e.g., Claughton v. Mixson, 33 F.3d 4, 6-7 & n.4 (4th Cir. 1994) (affirming bankruptcy court's lifting of stay due to debtor's solvency); *Constitutional Limits*, *supra*, at 551-52 (collecting cases including Claughton). There are many tools available for bankruptcy courts to deal with a debtor's lack of financial distress without a new rule of subject matter jurisdiction.

60. Based primarily on its analysis of the history of the Bankruptcy Clause and the Supreme Court's interpretation of Congress's expansive power pursuant to it, this court holds that financial distress is not a prerequisite for bankruptcy subject matter jurisdiction pursuant to the Constitution. Instead, the court joins others that have held that the subject matter jurisdiction for bankruptcy extends to all cases filed under the Bankruptcy Code. See, e.g., Zarnel, 619 F.3d at 169 ("Restricting whether an individual may be a debtor either under the Bankruptcy Code in general or under a given chapter does not speak in jurisdictional terms or invoke the jurisdiction of the district court, delineated in 28 U.S.C. § 1344 as discussed above."); Rudd, 866 F.2d at 1041 ("When a petition is filed in a bankruptcy court seeking assist-

ance in 'the restructuring of debtor-creditor relations, which is at the core of the federal bankruptcy power,' the court has jurisdiction to administer the ensuing case in accordance with Title 11 of the United States Code." (quoting N. Pipeline, 458 U.S. at 71, 102 S.Ct. 2858)); Auto. Pros., 370 B.R. at 167 (citing Phillips, 844 F.2d at 236 n.2); Baxter, slip op. at 7-8 (agreeing with courts that take the position that "it is the petition that invokes the bankruptcy court's jurisdiction, not the debtor's characteristics"); see also Mussman & Riesenfeld, *supra*, at 92 ("The jurisdiction of the court attaches from the filing of the petition . . . ."). The Founding Fathers, like many contemporary observers, might be surprised that an entity like the Debtor with access to significant financial resources has sought bankruptcy protection. Their presumed astonishment, however, does not mean that the Debtor has violated the subject matter jurisdiction of the bankruptcy court, and the question of whether the Debtor should be able to access the bankruptcy system is different than the question of whether the Constitution bars it. Accordingly, the court emphasizes the limited nature of this jurisdictional ruling. The court is not making a policy judgment that a debtor without financial distress should be able to file bankruptcy; it is simply deciding that the limited language of the Bankruptcy Clause, as interpreted by the Supreme Court over the last 250 years, does not prevent the Debtor from doing so.

Conclusion

While framed as new arguments, the Buckingham Motion and portions of the Committee's Motion actually seek reconsideration of this court's prior Opinion and Order on the Debtor's good faith without satisfying the standard for reconsideration. The law of

the case doctrine counsels against a court straying from its previous legal conclusions. Furthermore, the divestment rule prevents a court from addressing issues on appeal, and the Committee's attempt to appeal the Opinion and Order was pending in the District Court when the Motions to Dismiss were filed, argued, and ruled on.

In addition to the good faith argument, the Committee's Motion asserts a new basis for dismissal: an absence of constitutional subject matter jurisdiction based on the Debtor's lack of financial distress. After analyzing the Bankruptcy Clause of the Constitution and its interpretation by the Supreme Court, other courts, and outside commentators, the court is confident that the Constitution does not require debtors to have financial distress in order for bankruptcy courts to have subject matter jurisdiction. The court's conclusion is buttressed by the complete lack of support for the Committee's novel argument in the relevant case law, the practical problems with a jurisdictional financial distress requirement, the policy decision to encourage potential debtors to file their cases early, the Supreme Court's recent approach to issues of subject matter jurisdiction, and the ability of bankruptcy courts to use other tools to address the problem asserted by the Committee.

Based on these findings and conclusions, and for the additional reasons set forth on the record at the July 28, 2023 hearing (which record is incorporated herein), the Motions to Dismiss are hereby DENIED.

SO ORDERED.

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT NORTH CAROLINA
CHARLOTTE DIVISION

Case No. 17-31795

IN RE BESTWALL LLC,[1] Debtor.

[Filed July 29, 2019]

MEMORANDUM OPINION AND ORDER DENYING THE OFFICIAL COMMITTEE OF ASBESTOS CLAIMANTS' MOTION FOR DISMISSAL, OR ALTERNATIVELY, VENUE TRANSFER

Laura T. Beyer, United States Bankruptcy Judge

On November 9, 2018 and January 24, 2019, the Court convened hearings on the *Motion of the Official Committee of Asbestos Claimants to (I) Dismiss the Debtor's Chapter 11 Case for Cause as a Bad Faith Filing Pursuant to 11 U.S.C. § 1112(b), or Alternatively, (II) Transfer Venue in the Interest of Justice and for the Convenience of the Parties Pursuant to 28 U.S.C. § 1412* [Docket No. 495] (the "Motion"). For the reasons set forth below, the Court denies the Motion.

PROCEDURAL HISTORY

On November 2, 2017 (the "Petition Date"), Bestwall LLC ("Bestwall") filed a voluntary petition for relief under Chapter 11 of Title 11 of the United States Code (the "Bankruptcy Code") in this district, initiating the

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[1] The last four digits of the Debtor's taxpayer identification number are 5815. The Debtor's address is 133 Peachtree Street, N.E., Atlanta, GA 30303.

above-captioned case to resolve mass asbestos claims through a section 524(g) trust. Shortly after the Petition Date, this Court approved the appointment of the Official Committee of Asbestos Claimants (the "Committee") to represent the asbestos claimants in the Chapter 11 case, and thereafter has approved modifications to the Committee [Docket Nos. 97, 335, 348, 666, 690].

On August 15, 2018, the Committee filed the Motion requesting that the Court dismiss Bestwall's bankruptcy case as a bad faith filing pursuant to section 1112(b) of the Bankruptcy Code. Alternatively, the Committee requested that the Court transfer venue of this case in the interests of justice or for the convenience of the parties, pursuant to 28 U.S.C. § 1412.

In connection with the Court's consideration of the Motion, Bestwall, the Committee, the Future Claimants' Representative, and Bestwall's non-debtor affiliate, Georgia-Pacific LLC ("New GP"), stipulated to the admission into evidence of the *Debtor's Submission in Lieu of Live Testimony* [Docket No. 651] (the "Submission"). See Submission, pp. 2, 26; see also *Transcript of Proceedings Before the Honorable Laura Turner Beyer, United States Bankruptcy Judge* (November 9, 2018) (the "November Transcript"), p. 42. Bestwall also submitted the *Declaration of Gregory M. Gordon* [Docket No. 641] (the "Gordon Declaration") into evidence, and no objections were made to its admission. See November Transcript, p. 42. Bestwall and the Committee fully briefed this matter[2] and presented

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[2] The parties filed the following briefs in support of or in objection to the Motion:

- *The Debtor's Objection to Motion of the Official Committee of Asbestos Claimants to Dismiss the Chapter 11 Case, or*

oral arguments with respect to the Motion at the November 9, 2018 hearing.

JURISDICTION

This Court has subject matter jurisdiction to consider this matter pursuant to 28 U.S.C. § 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue in this Court is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

RELEVANT FACTS

The former Georgia-Pacific LLC ("Old GP"), the predecessor to Bestwall, had a decades-long history of asbestos litigation that derived from its acquisition of Bestwall Gypsum Co. ("Old Bestwall"). Submission at ¶¶ 22-23. Old Bestwall manufactured and sold certain asbestos-containing products, principally joint compound, and Old GP continued to manufacture and sell those products following the acquisition. Id. The magnitude and projected continuation of that litigation through at least 2050 ultimately led Old GP to undertake a corporate restructuring on July 31, 2017 (the "2017 Corporate Restructuring"). Id. at ¶ 13.

Alternatively, Transfer Venue [Docket No. 640] ("Bestwall's Objection");

- *The Official Committee of Asbestos Claimants' Omnibus Reply in Support of Its Motion to (I) Dismiss the Debtor's Chapter 11 Case for Cause as a Bad Faith Filing Pursuant to 11 U.S.C. § 1112(b), or Alternatively, (II) Transfer Venue in the Interest of Justice and for the Convenience of the Parties Pursuant to 28 U.S.C. § 1412* [Docket No. 653] (the "Committee's Reply"); and
- *The Debtor's Sur-Reply in Support of Its Objection to Motion of the Official Committee of Asbestos Claimants to Dismiss the Chapter 11 Case, or Alternatively, Transfer Venue* [Docket No. 659] ("Bestwall's Sur-Reply").

The 2017 Corporate Restructuring was effectuated through a Texas divisional merger.[3] As a result of that divisional merger, Old GP ceased to exist and two new companies were formed:[4]

a) Bestwall (the debtor in this case), which received certain assets and liabilities of Old GP, including (i) Old GP's asbestos liabilities (with the exception of claims made under a workers' compensation statute or similar laws) and (ii) certain assets related to the historical Old Bestwall business; and

b) New GP, which received the other businesses, assets, and liabilities of Old GP, most of which are unrelated to Old Bestwall's historical business.

Id. at ¶ 14.

As of the Petition Date, approximately 64,000 asbestos claims were pending against Bestwall, and Bestwall projected that tens of thousands of additional claims would continue to be filed or asserted against it every year through at least 2050. Submission at ¶¶ 23, 29.

Through the 2017 Corporate Restructuring, Bestwall received, among others, the following tangible assets:

a) three bank accounts with approximately $32 million in cash at the time of the transaction;

b) all contracts of Old GP related to its asbestos-related litigation;

c) certain real estate in Mt. Holly, North Carolina; and

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[3] See Tex. Bus. Orgs. Code § 1.002(55)(A).

[4] See Gordon Declaration at ¶ 28, Ex. Z.

d) all equity interests in non-debtor GP Industrial Plasters LLC, a North Carolina limited liability company ("PlasterCo"), which owns certain assets of Old Bestwall's historical business, is projected to generate annual cash flow (EBITDA) of $18 million starting in 2019, and whose equity was valued at approximately $145 million prior to the Petition Date.

Id. at ¶ 15.

As part of the 2017 Corporate Restructuring, Bestwall also became party to a funding agreement with New GP (the "Funding Agreement"). Id.; see Gordon Declaration at ¶ 7, Ex. A. Without any corresponding repayment obligation by Bestwall, the Funding Agreement requires New GP to provide funding to pay for all costs and expenses of the Debtor incurred in the normal course of its business during the pendency of its Chapter 11 case, including the costs of administering the Chapter 11 case, to the extent that any cash distributions received by Bestwall from its subsidiaries are insufficient to pay such costs and expenses. In addition, and again in the absence of any corresponding repayment obligation by Bestwall, the Funding Agreement requires New GP to provide the funding for a section 524(g) asbestos trust in the amount required by a confirmed plan of reorganization for Bestwall to the extent that Bestwall's assets are insufficient to provide the requisite trust funding. Submission at ¶ 17. In light of the Funding Agreement, which allows the Debtor to draw from New GP the amount of money necessary to pay the costs of this Chapter 11 case and to fund a section 524(g) trust, to the extent the Debtor's assets are insufficient to do so, there is no reason for the Court to conclude, at this point, that the Debtor does not have the ability to fully fund a section

524(g) trust, as well as the administrative costs of its Chapter 11 case.

DISCUSSION

I. Dismissal Is Not Appropriate.

A. Legal Standard

In the Fourth Circuit, a court may dismiss a Chapter 11 filing as a bad faith filing only when the bankruptcy reorganization is both (i) objectively futile *and* (ii) filed in subjective bad faith. Carolin Corp. v. Miller, 886 F.2d 693, 700-01 (4th Cir. 1989).

"Th[is] Fourth Circuit standard for dismissal of a Chapter 11 case as a bad faith filing is one of the most stringent articulated by the federal courts." In re Dunes Hotel Assocs., 188 B.R. 162, 168 (Bankr. D.S.C. 1995). As the Fourth Circuit stated in Carolin, this two-prong test:

> contemplates that it is better to risk proceeding with a wrongly motivated invocation of Chapter 11 protections whose futility is not immediately manifest than to risk cutting off even a remote chance that a reorganization effort so motivated might nevertheless yield a successful rehabilitation. Just as obviously, it contemplates that it is better to risk the wastefulness of a probably futile but good faith effort to reorganize than it is to risk error in prejudging its futility at the threshold.

886 F.2d at 701.

The moving party "has the burden of proof to establish cause for dismissal." In re Woodend, LLC, No. 11-31672, 2011 WL 3741071, at *3 (Bankr. W.D.N.C. Aug. 24, 2011) (citing In re Landmark Atl. Hess Farm, LLC, 448 B.R. 707 (Bankr. Md. 2011)); see also In re SUD Props., Inc., 462 B.R. 547, 551 (Bankr. E.D.N.C. 2011) ("First Bank [the movant] bears the burden of

demonstrating both objective futility and subjective bad faith by a preponderance of the evidence."); In re Surf City Invs., LLC, No. 11-01398-8-RDD, 2011 WL 5909489, at *4 (Bankr. E.D.N.C. May 6, 2011) (same).

"The Carolin court made clear that the burden of establishing this two-pronged requirement is very high." Dunes Hotel, 188 B.R. at 168. The power to dismiss a bankruptcy petition at the outset of a case "is obviously one to be exercised with great care and caution. Decisions denying access at the very portals of bankruptcy, before an ongoing proceeding has even begun to develop the total shape of the debtor's situation, are inherently drastic and not lightly to be made." Carolin, 886 F.2d at 700.

B. Analysis

1. Objective Futility

Per Carolin, the "objective futility inquiry" should "concentrate on assessing whether there is no going concern to preserve . . . and . . . no hope of rehabilitation, except according to the debtor's 'terminal euphoria.'" Carolin, 886 F.2d at 701-02 (citation omitted); see also In re Woodend, LLC, 2011 WL 3741071, at *3 (Bankr. W.D.N.C. Aug. 24, 2011) (objective futility prong "focuses on the debtor's financial stability, whether there exists a going concern to preserve, and whether there exists any realistic hope of rehabilitation") (citing Carolin, 886 F.2d at 701).

Attempting to resolve asbestos claims through 11 U.S.C. § 524(g) is a valid reorganizational purpose, and filing for Chapter 11, especially in the context of an asbestos or mass tort case, need not be due to insolvency. The Committee agrees. Committee's Reply at p. 11 ("agree[ing] that section 524(g) may provide a sufficient business purpose for an otherwise solvent debtor to seek Chapter 11 relief"). The volume of

current asbestos claims that Bestwall faced as of the Petition Date, coupled with the projected number of claims to be filed through 2050 and beyond, is sufficient financial distress for Bestwall to seek resolution under section 524(g) of the Bankruptcy Code. See Submission at ¶ 23.

Bestwall has the ability to reorganize and establish a trust that meets each of the statutory requirements of section 524(g) of the Bankruptcy Code. Bestwall has substantial assets, owns ongoing active businesses, and receives substantial cash flow. Id. at ¶¶ 15-16. Most importantly, Bestwall has the full ability to meet all of its obligations (whatever they may be) through its assets and New GP's assets, which are available through the Funding Agreement, (id. at ¶ 17), and to continue as a going concern.

The Committee argues that the Court should disregard the Funding Agreement and other support agreements between Bestwall and New GP and that without the Funding Agreement, Bestwall would be unable to reorganize. But the Funding Agreement exists and is enforceable; it cannot be disregarded.

Further, there is no requirement that Bestwall fund the entirety of a section 524(g) trust with its own assets or securities. Section 524(g)(2)(B)(i)(II) contemplates funding through non-debtor sources and requires that a trust be funded "in whole or in part by the securities of 1 or more debtors involved in such plan and by the obligation of such debtor or debtors to make future payments" (emphasis added). Indeed, there are multiple section 524(g) cases where trust funding was provided by non-debtors. E.g., In re Mid-Valley, 305 B.R. 425 (Bankr. W.D. Pa. 2004); In re N. Am. Refractories Co., 2007 WL 7645287 (Bankr. W.D.

Pa. Nov. 13, 2007); W.R. Grace, Case No. 01-1139 (Bankr. D. Del. 2001).

Alternatively, the Committee contends that the Funding Agreement's protections are illusory and insufficient. However, the terms of the Funding Agreement and the evidence of record demonstrate the opposite. The Funding Agreement is a binding and enforceable contractual obligation. New GP has performed all of its obligations under the Funding Agreement to date and New GP repeatedly has reaffirmed its commitment to honor those obligations going forward. And contrary to the Committee's assertion that New GP has refused to provide information about its finances, Bestwall has worked with New GP to provide both the Committee and the Future Claimants' Representative with New GP's 2017 audited financial statement and certain other requested financial information for New GP, including balance sheets, income statements, cash flow statements, and financial projections. See Gordon Declaration at ¶ 3.

The Committee has not pointed to any evidence that either party to the Funding Agreement has acted other than in full compliance with its terms. Rather, the Committee presents scenarios to suggest that, were it so motivated, New GP might seek to evade its performance obligations. While the Court may share some of those concerns, they are unsubstantiated and insufficient for dismissal. Any issues and concerns about the Funding Agreement can be addressed in the plan confirmation process.

Even outside of the Funding Agreement, Bestwall owns substantial assets and operating businesses that produce cash flow. These include bank accounts that contain approximately $20 million in cash, real

estate that generates monthly lease revenue, and, most materially, the equity interest in non-debtor PlasterCo, which is projected to generate $18 million in annual EBITDA in 2019 and beyond and whose equity is valued at approximately $145 million. Submission at ¶¶ 15-16. Unlike the debtor in In re W. Asbestos Co., 313 B.R. 832 (Bankr. N.D. Cal. 2003), relied upon by the Committee, Bestwall is not a "defunct company." Id. at 852. Bestwall owns a substantial operating business that generates cash flow; it has the ability to make future payments as required by section 524(g)(2)(B)(i)(II) of the Bankruptcy Code.

For those same reasons (i.e., Bestwall owns assets and businesses that generate revenue), Bestwall satisfies any applicable "ongoing business requirement" in sections 524(g) and 1141(d)(3) of the Bankruptcy Code. The Committee argues that Bestwall cannot satisfy the ongoing business requirement because it is a holding company. The Court disagrees. Bestwall owns substantial operations through its non-debtor subsidiaries, and there is nothing novel about a holding company filing for Chapter 11 relief. Numerous Chapter 11 debtors, including those who have successfully established section 524(g) trusts, were holding companies with non-debtor operating subsidiaries. See, e.g., In re Gulfmark Offshore, Inc., Case No. 17-11125 (Bankr. D. Del. 2017); In re Specialty Prods. Holding Corp., Case No. 10-11780 (Bankr. D. Del. 2010); In re DDI Corp., Case No. 03-15261 (Bankr. S.D.N.Y. 2003); In re XO Commc'ns, Inc., Case No. 02-12947 (Bankr. S.D.N.Y. 2002); In re Williams Commc'ns Grp., Inc., Case No. 02-11957 (Bankr. S.D.N.Y. 2002); In re NII Holdings, Inc., 288 B.R. 356 (Bankr. D. Del. 2002); In re Mercury Finance Co., 224 B.R. 380 (Bankr. N.D. Ill. 1998).

In addition to holding subsidiary stock worth approximately $145 million, Bestwall has millions of dollars in cash of its own. It also has the Funding Agreement—which permits Bestwall to draw from New GP an uncapped amount of money to pay the costs of this Chapter 11 case and fund Bestwall's liabilities to the extent that its assets are insufficient to do so. Because Bestwall has the resources with which to reorganize, this case is not objectively futile and dismissal is not appropriate.

Finally, the Committee raises concerns about the delay caused by this case and the claimants' inability to proceed with litigation in state court. But the claimants represented by the Committee are not necessarily worse off with this Chapter 11 case. Their claims can be sufficiently addressed and fairly adjudicated through a section 524(g) trust.

2. Subjective Bad Faith

Because the Court concludes that this case is not objectively futile, it need not (and does not) reach the issue of whether this case was filed in subjective bad faith. The Court will ultimately have to rule on Bestwall's good faith, albeit in a different context, at confirmation.

II. Venue Transfer Is Not Appropriate.

Alternatively, the Committee requests, pursuant to 28 U.S.C. § 1412, that the Court transfer venue of this case to Delaware or another appropriate venue either (a) in the interests of justice or (b) for the convenience of the parties.

As an initial matter, venue in this Court is proper pursuant to 28 U.S.C. §§ 1408 and 1409. Bestwall formed as a Texas limited liability company on July 31, 2017 and then transferred its domicile to North

Carolina 94 days prior to the Petition Date – i.e., for a longer portion of the 180-day period required by 28 U.S.C. § 1408. See Submission at ¶ 14. The Committee has acknowledged that the Debtor has, technically, complied with the statutory venue provisions. Motion, at ¶ 47.

Where, as here, the venue of a Chapter 11 case is valid, the "debtor's [] choice of forum [is to] be accorded substantial weight and deference." In re PWS Holding Corp., Case Nos. 98-212-SLR through 98-223-SLR, 1998 Bankr. LEXIS 549, at *4-5 (Bankr. D. Del. Apr. 28, 1998); see also In re Enron Corp., 284 B.R. 376, 386 (Bankr. S.D.N.Y. 2002) (same). "[W]here the existing venue is entirely appropriate, this Court exercises its power to transfer cases cautiously." In re Land Stewards, L.C., 293 B.R. 364, 369 (Bankr. E.D. Va. 2002).

A debtor's choice of forum is presumed to be "a proper district for venue purposes and the party challenging a debtor's choice must show by a *preponderance of the evidence* that the venue is improper." In re Honeycutt, No. 12-06921-8-JRL, 2012 WL 6681833, at *2, 2012 Bankr. LEXIS 5857, at *6-7 (Bankr. E.D.N.C. Dec. 21, 2012) (citations omitted) (emphasis added); see also In re Baltimore Food Sys., Inc., 71 B.R. 795, 798 (Bankr. D.S.C. 1986).

The Committee has failed to carry its burden: Neither the interests of justice nor the convenience of the parties warrants transferring venue of this case.

A. Interests of Justice

The interests of justice standard "is applied based on the facts and circumstances of each case." Enron Corp., 284 B.R. at 403 (citation omitted). Courts consider a variety of factors, such as: (1) whether transfer promotes the economic and efficient administration of

the bankruptcy estate; (2) whether transfer facilitates judicial economy; (3) the parties' ability to receive a fair trial in either venue; (4) whether either forum has an interest in deciding controversies within its jurisdictional borders; (5) whether transfer would affect the enforceability of any judgment rendered; and (6) whether the debtor's original choice of forum should be disturbed. See Brown v. Wells Fargo, NA, 463 B.R. 332, 338 (M.D.N.C. 2011).

Ultimately, the key consideration is "whether transferring venue would promote the efficient administration of the bankruptcy estate, judicial economy, timeliness, and fairness." In re Manville Forest Prods. Corp., 896 F.2d 1384, 1391 (2d Cir. 1990); see also Yolo Capital, Inc. v. Normand, No. 1:17-CV-00180-MR DLH, 2018 WL 576316, at *2 (W.D.N.C. Jan. 26, 2018) ("Not all of these [interest of justice] factors are weighed equally, however, as the most important of these factors is the economic and efficient administration of the estate.") (citing Hilton Worldwide, Inc. v. Global Benefits Admin. Comm. v. Caesars Entm't Corp., 532 B.R. 259, 274 (E.D. Va. 2015)).

Of all the factors that apply, they all weigh against transferring venue. Bestwall is neither organized in Delaware, nor does it have its principal place of business or assets there. Bestwall is domiciled in the Western District of North Carolina, and many of its assets are here. Most importantly, retaining the case in this district best promotes the efficient administration of Bestwall's estate because, among other things, it avoids the superfluous administrative expenses and delay associated with transferring a case that has been pending in this district for over a year (by the time of the hearing on the Motion) to a court in another district. See In re Pavilion Place Assocs., 88

B.R. 32, 35 (Bankr. S.D.N.Y. 1988) (explaining that "transfer is a cumbersome disruption of the [C]hapter 11 process") (citations omitted).

In support of its Motion, the Committee cites the Patriot Coal case from the Southern District of New York. See 482 B.R. 718 (Bankr. S.D.N.Y. 2012). Patriot Coal, however, is distinguishable and does not support a transfer of venue in this case. In Patriot Coal, the debtors created, on the eve of bankruptcy, two New York domiciled shell entities with essentially no assets to take advantage of the "affiliate filing rule" to permit the entire corporate family to file in New York. The New York entities were not the relevant entities for the Chapter 11 restructuring (i.e., they were not the entities with the operations and debt in need of restructuring); they were just a tool to allow affiliates with businesses outside of New York to file in the preferred court.

Here, Bestwall did not take advantage of the status of any of its affiliates to manufacture venue. In fact, no affiliates filed at all, and Bestwall is the only debtor. Further, Bestwall is not a shell company, as were the entities created in Patriot Coal. Instead, Bestwall has substantial assets. As a result, there were important legal consequences to the selection of a state to govern Bestwall's formation. Among other things, the decision to organize Bestwall in North Carolina (1) subjected it to the laws of North Carolina, (2) impacted its fiduciary obligations and the standards that govern indemnification and exculpation of its officers and directors, (3) required the payment of franchise taxes to North Carolina, and (4) created oversight of Bestwall by North Carolina governmental authorities. As a result, Bestwall accepted not just the potential benefits of organizing in North Carolina, but

any legal burdens as well. This was not the case in Patriot Coal, where the newly created entities had no true assets.

Further, Bestwall is not itself an operating company like the primary debtors in Patriot Coal. As a result, where Bestwall's Chapter 11 case should be venued "in the interest of justice" is a less relevant question than when a debtor files in a jurisdiction that is separate from where it actually conducts its operations. A court in this district expressly recognized as much in its decision denying a transfer of venue of another pending asbestos case, In re Kaiser Gypsum Co., Inc., No. 16-31602 (Bankr. W.D.N.C. Jan. 30, 2017). See *Order Denying Motion of Certain Kaiser Gypsum Claimants to Transfer Chapter 11 Cases to the United States District Court for the Western District of Washington* [Docket No. 348] (Decl. Ex. Y).

As in Kaiser Gypsum, there is no compelling basis to transfer venue in the interests of justice because Bestwall is not operating a business with numerous employees, vendors, customers, and tangible assets in a separate location, which was the concern leading to a venue transfer in Patriot Coal.

The Committee has not shown by a preponderance of the evidence that Bestwall's case should be transferred to Delaware or any other venue in the interests of justice.

B. Convenience of the Parties

The Committee also argues that this case should be transferred to the District of Delaware or any other appropriate jurisdiction for the convenience of the parties.

Courts evaluate six factors in determining convenience of the parties: "(1) the proximity of creditors

of every kind to the court; (2) the proximity of the Debtor to the court; (3) the proximity of the witnesses necessary to the administration of the estate; (4) the location of the assets; (5) the economic administration of the estate; and (6) the necessity for ancillary administration if a liquidation should occur." In re Lakota Canyon Ranch Dev., LLC, Case No. 11-03739-8, 2011 WL 5909630, at *3 (Bankr. E.D.N.C. 2011). "The consideration given the most weight is the economic and efficient administration of the estate." In re Dunmore Homes, Inc., 380 B.R. 663, 672 (Bankr. S.D.N.Y. 2008). Courts have also considered the learning curve of a case if transferred and the ability of interested parties to participate in the proceedings and the additional costs that might be incurred in doing so. Id.

Here, the factors do not support a transfer of venue. Bestwall's creditors are not located in, or clustered around, Delaware. They are spread throughout the country. Thus, Delaware is no more convenient to asbestos claimants than North Carolina or any other state. None of Bestwall's representatives are located in Delaware. In fact, Bestwall's headquarters in Atlanta is closer to Charlotte than to Delaware. None of the known potential witnesses in this case, including any representatives of Bestwall or New GP, are located in Delaware. Similarly, none of Bestwall's tangible assets are located in Delaware; they, instead, are located in North Carolina.

The Committee argues that convenience of the parties is supported by the location of its own counsel and counsel to the Future Claimants' Representative in Delaware. But location of counsel to a party in interest selected by that party after the filing of the Chapter 11 case has no bearing on venue. See In re Great Am. Res., Inc., 85 B.R. 444, 446 (Bankr. N.D.

Ohio 1988) ("venue decisions should not merely shift the inconvenience from one party to another") (citations omitted).

The Committee also argues that "economic and efficient administration of the estate" supports transfer to the District of Delaware. The Committee's position is that the case should be transferred to Delaware because courts within the Third Circuit have significant experience with, and a comprehensive body of case law governing, asbestos bankruptcies. But nowhere does the Committee cite any case law that stands for the proposition that the existence of case law in another jurisdiction justifies the transfer of a properly venued Chapter 11 case "for the convenience of the parties." Moreover, courts in this jurisdiction have experience with asbestos-related Chapter 11 cases, including the Garlock and Kaiser Gypsum Chapter 11 cases, as well as the body of law that exists from the Fourth Circuit on mass tort cases. See In re Garlock Sealing Tech., LLC, 504 B.R. 71 (Bankr. W.D.N.C. 2014); In re Kaiser Gypsum Co., Inc., Case No. 16-31602 (Bankr. W.D.N.C. 2016); Grady v. A.H. Robins Co., Inc., 839 F.2d 198 (4th Cir. 1988); In re A.H. Robins Co., Inc., 880 F.2d 694 (4th Cir. 1989).

The Committee has not shown by a preponderance of the evidence that Bestwall's case should be transferred to Delaware or any other jurisdiction for the convenience of the parties.

CONCLUSION

For reasons presented in this Memorandum Opinion and Order, and for the reasons stated in the Court's oral ruling on the record at the January hearing:

1. The Committee's Motion is **DENIED**.

2. This Memorandum Opinion and Order shall be immediately effective and enforceable upon its entry.

3. This Court shall retain exclusive jurisdiction over any and all matters arising from or related to the implementation, interpretation, or enforcement of this Memorandum Opinion and Order.

SO ORDERED.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 24-1493 (17-31795)

BESTWALL LLC F/K/A GEORGIA-PACIFIC LLC,
A TEXAS LIMITED LIABILITY COMPANY AND A
NORTH CAROLINA LIMITED LIABILITY COMPANY,
Debtor – Appellee,

v.

THE OFFICIAL COMMITTEE OF ASBESTOS CLAIMANTS
OF BESTWALL, LLC,
Creditor – Appellant,

AMERICAN ASSOCIATION FOR JUSTICE; CLAIMANTS;
THE OFFICIAL COMMITTEE OF ASBESTOS PERSONAL IN-
JURY CLAIMANTS IN IN RE ALDRICH PUMP LLC AND
IN RE MURRAY BOILER LLC,
Amici Supporting Appellant.

ANTHONY J. CASEY; BROOK E. GOTBERG; JOSHUA C.
MACEY; JOSEPH W. GRIER, III, FUTURE ASBESTOS
CLAIMANTS REPRESENTATIVE APPOINTED IN IN RE
ALDRICH PUMP LLC, ET AL.; TRANE TECHNOLOGIES
COMPANY LLC; TRANE U.S. INC.; CHAMBER OF
COMMERCE OF THE UNITED STATES OF AMERICA,
Amici Supporting Appellee.

FILED: October 30, 2025

ORDER

The court denies appellant's petition for rehearing en banc.

A requested poll of the court failed to produce a majority of judges in regular active service and not disqualified who voted in favor of rehearing en banc. Judges King, Gregory, Wynn, Thacker, Benjamin, and Berner voted to grant rehearing en banc. Chief Judge Diaz and Judges Wilkinson, Niemeyer, Agee, Harris, Quattlebaum, Rushing, and Heytens voted to deny rehearing en banc. Judge Richardson did not participate.

Judge King wrote an opinion dissenting from the denial of rehearing en banc.

Entered at the direction of Judge Quattlebaum.

KING, Circuit Judge, dissenting from the denial of rehearing en banc:

This appeal should have been accorded en banc consideration because these proceedings not only "involve[] . . . questions of exceptional importance," but because the panel decision conflicts with Article I of the Constitution. *See* Fed. R. App. P. 40(b)(2)(B), (D). Regrettably, by a narrow 8-6 vote, our Court has left intact the panel's erroneous ruling concerning the bankruptcy court's subject-matter jurisdiction in Bestwall LLC's sham Chapter 11 bankruptcy. For the sake of the Constitution and the thousands of asbestos claimants seeking their day in court, I regrettably dissent.[1]

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[1] Circuit Judges Gregory, Wynn, Thacker, Benjamin, and Berner voted with me to grant an en banc rehearing. Chief Judge Diaz, along with Judges Wilkinson, Niemeyer, Agee, Harris,

I.

A.

The corporate misconduct underlying these so-called "bankruptcy" proceedings is not some big secret. *See*, *e.g.*, *In re Bestwall LLC*, 71 F.4th 168, 185-86 (4th Cir. 2023) (King, J., dissenting); *Bestwall LLC v. Off. Comm. of Asbestos Claimants of Bestwall, LLC*, 148 F.4th 233, 246-58 (4th Cir. 2025) (King, J., dissenting). Owing to its extensive use of asbestos in commercial products such as joint compound and industrial plasters, Georgia-Pacific has faced — and continues to face — thousands of asbestos-related personal injury lawsuits since at least 1979, the vast majority of which have been filed by individuals suffering from the scourge of asbestosis and mesothelioma. Georgia-Pacific stands as one of the most frequently sued defendants in this Country's tide of asbestos litigation, having spent more than $2.9 billion defending such claims. And Georgia-Pacific has acknowledged that thousands of additional asbestos-related claims will be filed against it each year for decades to come. All those liabilities notwithstanding, Georgia-Pacific has remained a fully-solvent, multibillion-dollar business leader in the pulp and paper industry.

In July 2017, through a novel and provocative corporate sleight-of-hand maneuver called the "Texas Two-Step," Georgia-Pacific was restructured to isolate its asbestos liabilities into a new entity called "Bestwall." More specifically, Georgia-Pacific — then a Delaware corporation — reorganized under Texas law and promptly made use of the Lone Star State's "divisional merger" statute to carve itself into two

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Quattlebaum, Rushing, and Heytens, voted to deny en banc rehearing. Our fine colleague Judge Richardson did not participate in the decisional process.

new entities: Bestwall and the "new" Georgia-Pacific (hereinafter, "New Georgia-Pacific"). For its part, Bestwall was assigned nearly all of Georgia-Pacific's existing asbestos liabilities. Otherwise, Bestwall received minimal assets and no formal business operations. Meanwhile, New Georgia-Pacific was entrusted with the lion's share of the legacy Georgia-Pacific assets, along with non-asbestos-related liabilities. Almost immediately, New Georgia-Pacific resumed its predecessor's status as a Delaware corporation — where it has continued business operations — while Bestwall was reorganized in North Carolina. Stunningly, Bestwall and New Georgia-Pacific were Texas business entities for less than five hours.

As was the plan all along, Bestwall did not hire any employees, did not engage in any new business ventures, nor did it do much of anything else following its relocation to the Old North State. Rather, in November 2017 — some three months after its "inception" — Bestwall filed for Chapter 11 bankruptcy in the Western District of North Carolina, a favored judicial forum for massively profitable companies seeking to execute a Texas Two-Step "bankruptcy." *See*, *e.g.*, *In re Bestwall LLC*, No. 17-31795 (Bankr. W.D.N.C.); *In re DBMP LLC*, No. 20-30080 (Bankr. W.D.N.C.); *In re Aldrich Pump LLC*, No. 20-30608 (Bankr. W.D.N.C.); *In re Murray Boiler LLC*, No. 20-30609 (Bankr. W.D.N.C.).

Of especial relevance to this appeal, despite filing its Chapter 11 bankruptcy, Bestwall is not at all a debtor in distress. Indeed, Bestwall has no business operations and generates no independent income as a business concern, but exists solely to carry forward the asbestos-related liabilities of Georgia-Pacific, which Bestwall is able to fully pay through a so-called

"funding agreement" with New Georgia-Pacific. And that agreement is backed by New Georgia-Pacific's billions of dollars in assets. By Bestwall's admission here, the agreement guarantees that Bestwall is able to fully satisfy its asbestos-related financial obligations. *See In re Bestwall*, 658 B.R. 348, 355 (Bankr. W.D.N.C. 2024).

B.

On account of Bestwall's Chapter 11 bankruptcy petition, an automatic stay was imposed pursuant to 11 U.S.C. § 362(a), and a corresponding bankruptcy court preliminary injunction extended all the protections of the automatic stay to New Georgia-Pacific. As a result, thousands of pending civil suits in courts across our Country — initiated by plaintiffs who are dying from mesothelioma and other diseases caused by the asbestos-riddled products of Georgia-Pacific — are at a screeching halt. In effect, a financially-healthy and fully-solvent corporation (that is, New Georgia-Pacific) has placed its asbestos-related tort liabilities involving thousands of American workers behind the firewall of bankruptcy protection. Yet critically, New Georgia-Pacific is not undergoing the scrutiny, transparency, and risk that a Chapter 11 bankruptcy petition should entail.

Unlike run-of-the-mill Chapter 11 bankruptcies, the asbestos claimants in this situation are neither corporate lenders nor institutional creditors. Instead, they are simply ordinary and hardworking Americans who have spent their workdays installing drywall, laying insulation, cutting pipe, and then simply returning to their homes. They are factory workers, veterans, tradespeople, and laborers. They are also the widows, adult children, and family members of thousands of New Georgia-Pacific's and Bestwall's

deceased victims, seeking to pursue tort claims in the civil courts on behalf of their loved ones who have died or are suffering from harrowing asbestos-related diseases.

Tragically, many of the New Georgia-Pacific and Bestwall claimants suffer from mesothelioma — a rare, incurable cancer almost exclusively caused by asbestos exposure. Others have been diagnosed with asbestosis, lung cancer, or respiratory diseases linked to asbestos fibers. And while these tort plaintiffs fight the diseases caused by their asbestos exposures, they also encounter the legal process that has been suspended by Bestwall's bankruptcy. The sacred right of the New Georgia-Pacific and Bestwall asbestos claimants to pursue justice through the tort system of America's civil courts — deeply rooted in the laws and constitutional fabric of our Nation — has been placed on hold by a solvent profitable enterprise called Bestwall, acting through a manufactured sham bankruptcy.

All told, Bestwall's entry into its Chapter 11 bankruptcy was the strategic decision of lawyers and executives. And it was a concerted boardroom effort designed to pause active civil court tort litigation, consolidate thousands of asbestos-related claims against Georgia-Pacific into Bestwall, and then extract more favorable settlement terms from their suffering and dying victims through litigation delay. *See* Bestwall En Banc Response 18 (admitting that these Chapter 11 bankruptcy proceedings are designed to "end[] the inefficiencies and erratic results experienced in the tort system" for asbestos claims).

II.

Against this backdrop, the exceptionally important issue that our en banc Court should have addressed

is whether a bankruptcy court can possess subject-matter jurisdiction over a bankruptcy proceeding involving fully-solvent corporate entities who lack any semblance of financial distress? To frame that issue in a slightly different way, can ultra-wealthy corporations — like New Georgia-Pacific and its stooge subsidiary, Bestwall — utilize a bankruptcy court and a sham Chapter 11 bankruptcy proceeding to restructure this Country's civil justice system, trample on fundamental principles of federalism, and blatantly ignore the jurisdictional limitations placed on bankruptcy under Article I of the Constitution? *See* U.S. Const. art. 1, § 8 (granting Congress the power to "establish . . . uniform Laws on the subject of Bankruptcies throughout the United States") (the "Bankruptcy Clause"). Put most simply, the answer should emphatically be NO.

Drastically departing from Article I's foundational moorings, our panel majority concluded otherwise. As the majority sees it, although "a debtor's financial condition . . . may be relevant in a number of contexts" under the Bankruptcy Code, it is "irrelevant" for the purpose of assessing federal court subject-matter jurisdiction in a bankruptcy proceeding. *See Bestwall LLC v. Off. Comm. of Asbestos Claimants of Bestwall, LLC*, 148 F.4th 233, 236 (4th Cir. 2025). That is so, according to the majority, because "the Constitution grants Article III judicial power over all cases arising under the laws of the United States." *Id.* En banc rehearing was warranted to correct that erroneous and unconstitutional decision.

A.

1.

As I have heretofore explained, *see Bestwall LLC*, 148 F.4th at 246-58 (King J., dissenting), our distin-

guished Chief Justice recently emphasized that our understanding of the Constitution must "accord with history and faithfully reflect the understanding of the Founding Fathers." *See Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 535-36, 142 S.Ct. 2407, 213 L.Ed.2d 755 (2022) (citation modified). Of relevance here, it is "history and tradition" — not merely "Congress's say-so" — that informs the appropriate scope of the Bankruptcy Clause, and therefore constrains Congress's authority to enact laws granting jurisdiction to the bankruptcy courts. *See TransUnion LLC v. Ramirez*, 594 U.S. 413, 424-26, 141 S.Ct. 2190, 210 L.Ed.2d 568 (2021).

To discern those limits, the panel majority should have consulted the relevant language of the Constitution itself and, more specifically, the Bankruptcy Clause. *See Food & Drug Admin. v. All. for Hippocratic Med.*, 602 U.S. 367, 378, 144 S.Ct. 1540, 219 L.Ed.2d 121 (2024) ("[W]e begin as always with the precise text of the Constitution."); *see also Altman v. City of High Point*, 330 F.3d 194, 200 (4th Cir. 2003) ("[O]ur inquiry begins with the text of the Constitution."). That is so because any faithful reading of the Bankruptcy Clause must be informed by the very nature of the Constitution — that is, its status as a "written instrument" with provisions that carry meaning rooted in the historical moment when they were adopted, as well as the legal and societal traditions that informed their drafting. *See South Carolina v. United States*, 199 U.S. 437, 448, 26 S.Ct. 110, 50 L.Ed. 261 (1905) ("The Constitution is a written instrument. As such, its meaning does not alter. That which it meant when adopted, it means now."). In so doing, our interpretive role is not to update or revise the Constitution to meet modern preferences, but to

faithfully apply the meaning of its provisions at Ratification in November 1789. *See Lewis v. Casey*, 518 U.S. 343, 367, 116 S.Ct. 2174, 135 L.Ed.2d 606 (1996) (Thomas, J., concurring) (cautioning against courts "infusing the constitutional fabric with our own political views").[2]

At the time of the Founding in 1789, the protections of bankruptcy were made available only to a debtor who was truly and actually bankrupt — that is, a financially distressed debtor unable or unwilling to pay its debts. *See*, *e.g.*, *Cont'l Ill. Nat'l Bank & Trust Co. v. Chi., Rock Island & Pac. Ry. Co.*, 294 U.S. 648, 670, 55 S.Ct. 595, 79 L.Ed. 1110 (1935) (explaining that "the [Bankruptcy] act of 1841 and the later acts proceeded upon the assumption that [a debtor] might be honest but unfortunate"); *id.* at 670, 55 S.Ct. 595 (recognizing that "[the] primary purposes of these acts [were] to 'relieve the honest debtor from the weight of oppressive indebtedness, and permit him to start afresh'"); *see also Grogan v. Garner*, 498 U.S. 279, 286-87, 111 S.Ct. 654, 112 L.Ed.2d 755 (1991) (same). As James Madison explained, the Bankruptcy Clause responded to a need for uniformity in the laws governing insolvency and bankruptcy. *See* The Federalist No. 42, at 282 (James Madison) (Clinton Rossiter ed., 1961).

Critically, neither the inclusion of the Bankruptcy Clause, nor its delegation to Congress of "power . . . to establish uniform laws on the subject of bankruptcies throughout the United States," redefined bankruptcy itself. *See Int'l Shoe Co. v. Pinkus*, 278 U.S. 261, 265,

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[2] Ratification of the Constitution by the necessary 12th State — that is, North Carolina — occurred at Fayetteville on November 23, 1789. By those proceedings, the Old North State's delegates voted 194-77 for Ratification.

49 S.Ct. 108, 73 L.Ed. 318 (1929). The word "bankruptcy," as utilized in the Constitution, retained the meaning it had acquired through its English and colonial usage. Indeed, "those from whom the word was doubtless transferred into the constitution, treat it as exactly commensurate with insolvency." *See Kunzler v. Kohaus*, 5 Hill 317, 320 (N.Y. 1843).[3]

This history reflects two key features: First, that bankruptcy primarily involved commercial actors, such as merchants or traders, and second, that it required financial failure or nonpayment. Remarkably, none of the relevant authorities define bankruptcy as a mechanism for strategic civil liability management by solvent entities, nor do they suggest that a party with the means to pay its lawful debts could be properly described as "bankrupt." And uniformity in the term's usage is particularly significant given the broader legal context of the day, as early bankruptcy

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[3] Founding-era dictionaries reflecting the ordinary usage of legal and economic terms confirm that the concepts of "bankruptcy" and "bankrupt" were tightly bound to the condition of insolvency — that is, a debtor's inability to pay his debts. *See*, *e.g.*, William Perry, *The Royal Standard English Dictionary* 51 (1777) (defining a "bankrupt" as "one who cannot pay his debts"); *see also*, *e.g.*, Samuel Johnson, *Dictionary of the English Language* (1773) (defining "bankruptcy" as "[t]he state of a man broken, or bankrupt"); 1 Thomas Sheridan, *Dictionary of the English Language* (4th ed. 1797) (defining "bankrupt" and "bankruptcy" as "[t]he state of a man" "in debt beyond the power of payment"). These definitions plainly reflect the public understanding of bankruptcy as "the act of declaring oneself a bankrupt," or "[b]roken for debt, incapable of payment, insolvent." *See* John Ash, *New and Complete Dictionary of the English Language* (1775) (defining a "bankrupt" and "bankruptcy"); *see also D.C. v. Heller*, 554 U.S. 570, 605, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008) (explaining that "the examination of a variety of legal and other sources to determine the public understanding of a legal text in [a] period . . . is a critical tool of constitutional interpretation").

legislation necessarily presumed a debtor's insolvency as a precondition for obtaining an award of bankruptcy relief.

The Founders, in using the term "Bankruptcies" in the Bankruptcy Clause, would have drawn upon that established understanding. After all, "[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning." *See United States v. Sprague*, 282 U.S. 716, 731, 51 S.Ct. 220, 75 L.Ed. 640 (1931). And that historical understanding should circumscribe our interpretation of the Bankruptcy Clause, along with the permissible scope of federal bankruptcy jurisdiction. *See*, *e.g.*, *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 813-14, 135 S.Ct. 2652, 192 L.Ed.2d 704 (2015) (using Founding-era dictionaries to ascertain original meaning).

Early American bankruptcy statutes likewise reinforced such an understanding. For example, the Bankruptcy Act of 1800 — the first bankruptcy law passed after Ratification — applied only to merchants and traders, and "was in many respects a copy of the English bankruptcy statute then in force." *See Cent. Virginia Comm. College v. Katz*, 546 U.S. 356, 373, 126 S.Ct. 990, 163 L.Ed.2d 945 (2006). The Act of 1800 provided no protection to debtors able to meet their obligations and, "like the English law, was conceived in the view that the bankrupt was dishonest." *See Cont'l Ill.*, 294 U.S. at 670, 55 S.Ct. 595.

Consistent with the Founding-era view of bankruptcy as a remedy for the honest but unfortunate debtor, Congress progressively extended voluntary bankruptcy to non-merchants and non-traders burdened by debt and in need of relief. *See Cont'l Ill.*, 294 U.S. at 670-

71, 55 S.Ct. 595 (explaining that "the [Bankruptcy] act of 1841 and the later acts proceeded upon the assumption that [a debtor] might be honest but unfortunate"). To be sure, the "primary purposes of these acts [were] to 'relieve the honest debtor from the weight of oppressive indebtedness, and permit him to start afresh[.]'" *Id.* at 670, 55 S.Ct. 595. Notably, although the early American bankruptcy statutes were repealed and later replaced with broader legislation, the required and necessary constitutional baseline for the remedy of bankruptcy remained tied to insolvency, which is "consistent with the principles that underpin the Nation's [bankruptcy] tradition." *See United States v. Rahimi*, 602 U.S. 680, 681, 144 S.Ct. 1889, 219 L.Ed.2d 351 (2024).

2.

With these Founding-era principles front and center, it is apparent that nothing in the Constitution permits Congress — or the federal courts — to authorize bankruptcy as a strategic weapon of the powerful, to be used to avoid accountability to the harmed. Instead, as history and tradition teach us, "Bankruptcies" under Article I of the Constitution are limited to the truly bankrupt, not those who merely pretend to be bankrupt.

Diverging from that principle, however, the panel majority — and now, our 8-6 en banc Court — has blessed the Georgia-Pacific effort to manufacture a sham Chapter 11 bankruptcy proceeding. Such a result is repugnant to our Country's history and tradition, neither of which support the unconstitutional extension of bankruptcy protections to solvent tort defendants who seek a strategic advantage over their creditors and victims.

To justify its rejection of our Country's controlling Founding-era history and tradition, the panel majority erroneously assumed that Congress's broad grant of jurisdiction under 28 U.S.C. § 1334 can override the Constitution's more limited delegation of power under the Bankruptcy Clause. But that is not permitted as a matter of constitutional design. To be sure, although § 1334 grants the federal courts jurisdiction over cases "under Title 11," *see* 28 U.S.C. § 1334(a), that "authority is not freewheeling," *see Trump v. CASA, Inc.*, 606 U.S. 831, 145 S. Ct. 2540, 2551, 222 L.Ed.2d 930 (2025). Section 1334 does not — and cannot, because of the Bankruptcy Clause — independently determine what constitutes a "case" that Congress can authorize under Article I of the Constitution. Nor can that Code provision override the Constitution's limited delegation of power to Congress vis-à-vis the Bankruptcy Clause, which empowers Congress to *only* enact "uniform Laws on the subject of Bankruptcies." *See Bowles v. Russell*, 551 U.S. 205, 212, 127 S.Ct. 2360, 168 L.Ed.2d 96 (2007) ("Within constitutional bounds, Congress decides what cases the federal courts have jurisdiction to consider.").

In these novel circumstances, because Bestwall is not a "bankrupt" — as envisioned by our Founding Fathers and enshrined in the Bankruptcy Clause — Bestwall cannot establish subject-matter jurisdiction to maintain a Chapter 11 bankruptcy in federal court. I have previously further explained why that is so. *See Bestwall LLC*, 148 F.4th at 246-258 (King, J., dissenting). Distilled to the core:

> By treating Bestwall's petition as a bankruptcy filing within its jurisdiction, the bankruptcy court — and now [the panel majority] — have given their imprimatur to a corporate strategy that mocks the

> structure of Article I, subverts our Nation's history and tradition of bankruptcy, and inflicts grievous harm on our fellow Americans. The majority's failure to confront the constitutional infirmity at the heart of this appeal does more than ratify the abuse of our bankruptcy system. It reduces the Constitution's careful allocation of legislative power relating to "Bankruptcies" to an afterthought. In doing so, it rewrites the Constitution to suit the needs of a profitable tortfeasor. And it strips tens of thousands of asbestos victims of their Seventh Amendment right to have their claims heard before a jury of their peers.

Id. at 257.

B.

That this exceptionally important appeal qualifies for en banc rehearing is further underscored by the human cost of the eight-year bankruptcy delay that has already occurred — caused *solely* by New Georgia-Pacific and Bestwall. Asbestos-related disease progresses swiftly, and also very painfully. The window for obtaining meaningful legal relief is, for many victims, heartbreakingly short. In the near-decade since Bestwall filed for bankruptcy in 2017, nearly 25,000 asbestos claimants have died without resolving their tort claims in the various State and federal courts against Georgia-Pacific and Bestwall. Approximately 10,000 asbestos claimants have died from mesothelioma, the asbestos-related disease nearly always fatal within months of diagnosis. Other claimants have seen their families saddled with staggering medical debts and left without recourse.

Perhaps most distressing, not even one of the estimated 56,000 active plaintiffs has been able to pursue his pending tort claim against New Georgia-Pacific

or Bestwall in the State and federal courts, on account of the automatic stay favoring Bestwall and preliminary injunction extending those protections to New Georgia-Pacific. Meanwhile, New Georgia-Pacific and Bestwall have secured the protections of Bestwall's Chapter 11 bankruptcy, all while New Georgia-Pacific is reaping substantial and stable profits.

III.

Over 40 years ago, a wise and able federal judge in Maryland alerted us to the dangers of ultra-wealthy corporations abusing and manipulating the Bankruptcy Code:

> This Court has watched with alarm as major corporations have filed for Chapter 11 reorganization or threatened to file Chapter 11 petitions to evade existing labor contracts, or to invoke the automatic stay provision to evade pending litigation. [T]he Court considers such practices to be a gross abuse of the bankruptcy proceedings. Chapter 11 [of the Bankruptcy Code] was designed to give those 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. And the purpose of the automatic stay is to preserve a debtor's assets and permit an orderly, as opposed to chaotic, distribution or reorganization. The automatic stay was not intended to grant defendants a last-minute escape chute out of pending civil litigation.

See Furness v. Lilienfield, 35 B.R. 1006, 1009 (D. Md. 1983) (Young, J.).

Sadly, the disturbing behavior that Judge Young recognized occurs to this day, but at a more profound and troubling level. At the expense of thousands of

dying asbestos claimants, fully-solvent and multi-billion-dollar corporations have the audacity — indeed, an incentive under our Court's dubious precedent — to delay and evade civil tort liability. And they do so by creating corporate alter-egos, which they plunder into sham Chapter 11 bankruptcies with impunity. Meanwhile, the orchestrating corporations reap enormous profits and preserve their assets. Such an obscene — and, under the proper reading of the Bankruptcy Clause, unconstitutional — result is far from the fundamental proposition that "[b]ankruptcy offers individuals and businesses in financial distress a fresh start to reorganize, discharge their debts, and maximize the property available to creditors." *See Truck Ins. Co. v. Kaiser Gypsum Co., Inc.*, 602 U.S. 268, 272, 144 S.Ct. 1414, 219 L.Ed.2d 41 (2024).

Pursuant to the foregoing, our en banc Court has blundered in declining to recognize that there is simply a lack of subject-matter jurisdiction for Bestwall to maintain its manufactured sham Chapter 11 bankruptcy. And it does so at the expense of thousands of plaintiffs that are seeking tort relief in the Nation's civil courts against the likes of New Georgia-Pacific and Bestwall. Because we should have convened as an en banc Court and recognized that Bestwall's manufactured sham Chapter 11 bankruptcy is subject to dismissal on jurisdictional grounds, I respectfully dissent.

STATUTORY PROVISIONS INVOLVED

1. Section 1112(b) of the Bankruptcy Code provides:

11 U.S.C. § 1112. Conversion or dismissal

* * *

(b)(1) Except as provided in paragraph (2) and subsection (c), on request of a party in interest, and after notice and a hearing, the court shall convert a case under this chapter to a case under chapter 7 or dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, for cause unless the court determines that the appointment under section 1104(a) of a trustee or an examiner is in the best interests of creditors and the estate.

(2) The court may not convert a case under this chapter to a case under chapter 7 or dismiss a case under this chapter if the court finds and specifically identifies unusual circumstances establishing that converting or dismissing the case is not in the best interests of creditors and the estate, and the debtor or any other party in interest establishes that—

(A) there is a reasonable likelihood that a plan will be confirmed within the timeframes established in sections 1121(e) and 1129(e) of this title, or if such sections do not apply, within a reasonable period of time; and

(B) the grounds for converting or dismissing the case include an act or omission of the debtor other than under paragraph (4)(A)—

(i) for which there exists a reasonable justification for the act or omission; and

(ii) that will be cured within a reasonable period of time fixed by the court.

(3) The court shall commence the hearing on a motion under this subsection not later than 30 days after filing of the motion, and shall decide the motion not later than 15 days after commencement of such hearing, unless the movant expressly consents to a continuance for a specific period of time or compelling circumstances prevent the court from meeting the time limits established by this paragraph.

(4) For purposes of this subsection, the term "cause" includes—

(A) substantial or continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation;

(B) gross mismanagement of the estate;

(C) failure to maintain appropriate insurance that poses a risk to the estate or to the public;

(D) unauthorized use of cash collateral substantially harmful to 1 or more creditors;

(E) failure to comply with an order of the court;

(F) unexcused failure to satisfy timely any filing or reporting requirement established by this title or by any rule applicable to a case under this chapter;

(G) failure to attend the meeting of creditors convened under section 341(a) or an examination ordered under rule 2004 of the Federal Rules of

Bankruptcy Procedure without good cause shown by the debtor;

(H) failure timely to provide information or attend meetings reasonably requested by the United States trustee (or the bankruptcy administrator, if any);

(I) failure timely to pay taxes owed after the date of the order for relief or to file tax returns due after the date of the order for relief;

(J) failure to file a disclosure statement, or to file or confirm a plan, within the time fixed by this title or by order of the court;

(K) failure to pay any fees or charges required under chapter 123 of title 28;

(L) revocation of an order of confirmation under section 1144;

(M) inability to effectuate substantial consummation of a confirmed plan;

(N) material default by the debtor with respect to a confirmed plan;

(O) termination of a confirmed plan by reason of the occurrence of a condition specified in the plan; and

(P) failure of the debtor to pay any domestic support obligation that first becomes payable after the date of the filing of the petition.

* * *

2. 28 U.S.C. § 1334 provides:

28 U.S.C. § 1334. Bankruptcy cases and proceedings

(a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.

(b) Except as provided in subsection (e)(2), and notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

(c)(1) Except with respect to a case under chapter 15 of title 11, nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

(2) Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction.

(d) Any decision to abstain or not to abstain made under subsection (c) (other than a decision not to abstain in a proceeding described in subsection (c)(2))

is not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1292 of this title or by the Supreme Court of the United States under section 1254 of this title. Subsection (c) and this subsection shall not be construed to limit the applicability of the stay provided for by section 362 of title 11, United States Code, as such section applies to an action affecting the property of the estate in bankruptcy.

(e) The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction—

(1) of all the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate; and

(2) over all claims or causes of action that involve construction of section 327 of title 11, United States Code, or rules relating to disclosure requirements under section 327.

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

SCOTT S. HARRIS
Clerk of the Court
(202) 479-3011

January 23, 2026

Mr. David C. Frederick
Kellogg, Hansen, Todd,
Figel & Frederick, P.L.L.C.
1615 M Street, NW, Suite 400
Washington, DC 20036-3209

Re: Official Committee of Asbestos Claimants of
Bestwall LLC v. Bestwall LLC
Application No. 25A837

Dear Mr. Frederick:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to The Chief Justice, who on January 23, 2026, extended the time to and including February 20, 2026.

This letter has been sent to those designated on the attached notification list.

Sincerely,

Scott S. Harris, Clerk
by /s/ KATIE HEIDRICK
Katie Heidrick
Case Analyst

[attached notification list omitted]