No. 25-1013

IN THE

Supreme Court of the United States

OFFICIAL COMMITTEE OF ASBESTOS CLAIMANTS OF BESTWALL LLC,

Petitioner,

v.

BESTWALL LLC,

Respondent.

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

BRIEF OF *AMICI CURIAE* ON BEHALF OF A GROUP OF BANKRUPTCY LAW PROFESSORS IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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INTEREST OF THE *AMICI*[1]

The *amici* are the following: Diane Lourdes Dick (Charles E. Floete Distinguished Professor of Law, University of Iowa College of law); Edward Janger, (David M. Barse Professor, Brooklyn Law School), George Kuney (Professor Emeritus, University of Tennessee, Winston College of Law), Bruce Markell (Professor of Bankruptcy Law and Practice, and Edward Avery Harriman Lecturer in Law, Northwestern Pritzker School of Law) and Jack F. Williams (Georgia State University College of Law).

Amici are nationally recognized professors who teach bankruptcy law, corporate governance, and business law, and who have published numerous peer-reviewed articles in national periodicals and are regular speakers at national conferences on bankruptcy law.

Amici submit this brief to address two fundamental points. First, to trace the historical development of the Bankruptcy Code's statutory good-faith requirement, demonstrating its long-standing role as a critical gatekeeper that ensures chapter 11 cases serve a "valid bankruptcy purpose." The test for good faith has historically and continuously required a showing of financial distress. "[G]iven Chapter 11's ability to redefine fundamental rights of third parties, only those facing financial distress can call on bankruptcy's tools to do so." *In re LTL Mgmt., LLC*, 64 F.4th 84, 110 (3d Cir. 2023).

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1. Counsel of record for all parties received notice of our intention to file an amicus brief at least 10 days prior to the due date for the amicus brief. No counsel for a party authored the brief in whole or in part and no such counsel or a party made a monetary contribution intended to fund the preparation or submission of this brief.

Second, to address the constitutional underpinnings of the requirement for financial distress, which we submit is supported by this Court's decision in *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999).

INTRODUCTION

The petition for a writ of certiorari asks this Court to determine whether financial distress is required to satisfy the test of a "good-faith" filing under Chapter 11 of the U.S. Bankruptcy Code. The Petitioner contends that this threshold showing is required both as a statutory requirement under 11 U.S.C. § 1112(b) and under the reasoning of this Court's ruling in *Ortiz v. Fibreboard Corp.*, 527 U.S. 815. We agree.

No one disputed that Bestwall can "pay any conceivable liabilities now and in the foreseeable future." Pet.App.92a. Its invocation of bankruptcy under such circumstances violates good-faith principles sacrosanct for over 125 years. Good faith in commencing, continuing, and confirming a bankruptcy case has been essential under both the 1898 Act and the 1978 Code. Under the 1898 Act, courts recognized that bankruptcy is intended to prevent liquidation and preserve ongoing value. *See In re Victory Constr. Co., Inc.*, 9 B.R. 549, 554 (Bankr. C.D. Cal. 1981) (noting that Congress intended the 1898 Act to "relieve distressed corporations" threatened by "unnecessary or premature liquidation").

The 1978 Bankruptcy Code, and cases cited under it, carried forward this well-developed historical foundation. *In re SGL Carbon Corp.*, 200 F.3d 154, 166 (3d Cir. 1999) held that "[c]ourts, therefore, have

consistently dismissed Chapter 11 petitions filed by financially healthy companies with no need to reorganize under the protection of Chapter 11." Likewise, *LTL Mgmt.* confirmed the requirement for financial distress to establish good faith. 64 F.4th at 93.

In addition, this Court's decision in *Ortiz* further supports Petitioner. In *Ortiz*, this Court declined to affirm a mass-tort class action settlement absent a showing of a "limited fund"—an insufficiency of assets to pay all claims.[2] Professor Ralph Brubaker argues that "[b]ankruptcy is a payment-insufficiency exception to due process opt-out rights," but an exception that "*might* be justified, *if* the defendant's resources were insufficient to fully pay all claims ('otherwise some . . . would be paid and others . . . would not.')." Ralph Brubaker, *Assessing the Legitimacy of the "Texas Two-Step" Mass-Tort Bankruptcy* 44 Bankr. L. Ltr. 10 (Oct. 2024) (quoting *Ortiz*, 527 U.S. at 837).[3]

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2. This Court used the phrase "limited fund" and "insufficiency" as expressing the same notion; a suit where "aggregating claims . . . made by numerous persons against a fund [would be] insufficient to satisfy all claims." 527 U.S. 834: *see id*. at 853.

3. Professor Brubaker's three-part series is consolidated and contains the following separate publications: Bankruptcy Law Letter, Vol 42, No. 8 (August 2022); Bankruptcy Law Letter, Vol 43, No. 4 (April 2023); Bankruptcy Law Letter, Vol 44, No. 10 (October 2024). University of Illinois College of Law Legal Studies Research Paper No. 25-7, available at SSRN: https://ssrn.com/abstract=5380517or http://dx.doi.org/10.2139/ssrn.5380517. To simplify citation, this brief refers to the applicable article by page number, month and year.

The Fourth Circuit's decision was wrong.

The Fourth Circuit's decision below was wrong. It disregarded the plain language of § 1112(b) which permits a motion to dismiss by any party, at any time, and on an accelerated basis. The historical development of the good-faith requirement emphasizes financial distress as a key test for good faith. By holding that Bestwall's filing was "objectively" proper—based on its ability to pay all claims—it *de facto* rejected one of the core tenets of good-faith jurisprudence.

A clear circuit split exists. The Fourth Circuit stands alone in its concept and application of good faith. *See In re Bestwall LLC*, 605 B.R. 43, 48 (Bankr. W.D.N.C. 2019) (labeling the Fourth Circuit's standard as "one of the most stringent articulated by the federal courts").

The Fourth Circuit disregarded this Court's ruling in *Ortiz* and failed to even address the Committee's argument on this vital point. By permitting an aggregation of state-law claims in a federal bankruptcy forum for debtors lacking any financial distress, it eviscerated state sovereignty principles, along with the due process rights of claim holders. *See* Brubaker, *infra*. Instead, it affirmed the decision of the bankruptcy court, which had stated that, when acting under the Bankruptcy Clause, Congress had "nearly unlimited power" that "approaches omnipotence." *In re Bestwall LLC*, 658 B.R. 348, 367, 369 (Bankr. W.D.N.C. 2024).

Judge King's dissent below demonstrates the underlying problem with permitting ultra-wealthy entities to use bankrupcy in the absence of financial distress:

> 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.

Bestwall LLC v. Off. Comm. of Asbestos Claimants of Bestwall, LLC, 148 F.4th 233, 257 (4th Cir. 2025).

Judge King's dissent speaks directly to the need for the Court to grant the petition and review the growing use of the Texas Two-step, the misapplication of the good-faith doctrine, and the Court's ruling in *Ortiz*.

SUMMARY OF ARGUMENT

First, the doctrine of good faith has a long and time-tested history, evidenced in both the Bankruptcy Act of 1898 and the 1978 Bankruptcy Code. Section 1112(b) now carries forward the "good-faith" principle and permits any party in interest, at any time, to seek dismissal "for cause." Cause has been established to mean a lack of financial distress. *See SGL*, 200 F.3d at 166; *LTL Mgmt.*, 64 F.4th at 93.

Second, the Fourth Circuit's decision is erroneous. It disregarded the majority rule as set forth in *LTL*.

Instead, it followed the rule in *Carolin Corp. v. Miller*, 886 F.2d 693 (4th Cir. 1989), circumscribing the good-faith doctrine, holding that the test should rarely apply at the threshold, imposing the burden of proof on the moving party, and endorsing a standard which permits using bankruptcy for purposes well outside what constitutes a "valid bankruptcy purpose."

Third, this Court's reasoning in *Ortiz v. Fiberboard Corp.*, 527 U.S. 815, 817, further supports the conclusion that Bestwall's bankruptcy case should be dismissed. The reasoning of *Ortiz* applies in the bankruptcy context, and justifies dismissal for the same "serious constitutional concerns" noted therein. *Ortiz* requires a "limited fund" as a threshold requirement for the mandatory aggregation of claims under Rule 23. The reasoning underlying that requirement applies equally in a bankruptcy case. As the Court stated, the "nub" of the problem with such a mandatory aggregation is the absence of a "limited fund," 527 U.S. 829, or payment insufficiency.[4]

4. The confirmation of a plan of reorganization in a Chapter 11 case also results in a mandatory and collective aggregation that binds all tort victims, regardless of how they may vote on any proposed plan and whether they file a claim or are otherwise "present" in the case. *See* § 1141 on the "effect of confirmation" which binds creditors "whether or not such creditor . . . has accepted the plan."

LEGAL ARGUMENT

I. The Court should grant the petition to resolve the circuit split regarding the proper standard for a good-faith filing of a bankruptcy petition.

A. The requirement that a petition be filed in good faith, and is subject to dismissal if not, has been evident since the enactment of the 1898 Bankruptcy Act.

For over 125 years, the principle of "good faith" served as a threshold test to access the bankruptcy courts' jurisdiction. This doctrine, solidified through congressional acts and subsequent amendments, is a "direct lineal descendant of a legal philosophy solidly embedded in American bankruptcy law." *Victory*, 9 B.R. at 558.[5] "Every bankruptcy statute since 1898 has incorporated literally, or by judicial interpretation, a standard of good faith for the commencement, prosecution, and confirmation of bankruptcy proceedings." *In re Little Creek Dev. Co.*, 779 F.2d 1068, 1071 (5th Cir. 1986).

The good-faith requirement has long been anchored in financial distress and avoiding liquidation. "Jurisdictional

5. *Victory* contains a multi-page appendix with examples of how and when courts found a lack of good faith under the 1898 Act and the Chandler Act. *See* 9 B.R. at 565–69. The numerous fact patterns include the "new debtor syndrome," in which an entity creates a new entity, transfers assets to it, and then has the new entity file for bankruptcy—finding such to be bad faith under the Chandler Act and the 1978 Code. *See Victory*, 9 B.R. at 568 and Robert L. Ordin, *The Good Faith Principle in the Bankruptcy Code: A Case Study*, 38 Bus. L. 1795, 1813 (1983).

integrity of the bankruptcy court, articulated in terms of good faith, is often expressed as a threshold test to ensure that the legal status and *economic condition* of the debtor are within the jurisdictional grant of the Bankruptcy Code and the process of the bankruptcy court." Ordin, *The Good Faith Principle*, at 1796 (emphasis added).

The Bankruptcy Act of 1898 (the Nelson Act) ch. 541, 30 Stat. 544 (repealed 1978) "marked the beginning of the era of permanent federal bankruptcy legislation." Charles Tabb, *The History of the Bankruptcy Laws in the United States*, 3 Am. Bankr. Int. L. Rev. 5, 23 (1995). The Nelson Act and its subsequent amendments share two common objectives: avoiding the "consequences of economic dismemberment and liquidation" and preserving ongoing values in an equitable and fair manner. *See Victory*, 9 B.R. at 558.

Although § 12 of the 1898 Act initially required good faith only as a condition of confirmation, amendments to the statutory scheme codified the previously implicit good-faith filing requirements. *Id.* at 552. In 1933, Congress added § 74[6] and § 77,[7] both requiring a judicial good-faith

6. Section 74 permitted individuals to seek a composition or extension with creditors. Act of March 3, 1933, ch. 204, 47 Stat. 1467, 1467 (repealed 1978) ("Upon the filing of such a petition or answer the judge shall enter an order . . . approving it as properly filed . . . if satisfied that such petition or answer . . . has been filed in good faith or dismissing it.").

7. Section 77 established railroad reorganizations. Act of March 3, 1933, ch. 204, 47 Stat. 1467, 1474 (repealed 1978) ("Upon the filing of such a petition, the judge shall enter an order either approving it as properly filed . . . if satisfied that [it] . . . has been filed in good faith, or dismissing it if not so satisfied.")

determination at filing. Thus, the good-faith test has historically been seen as a threshold test and confirmation test. *See Victory*, 9 B.R. at 558.

Congress soon added § 77B, which provided a scheme for corporate reorganization. Act of June 7, 1934, ch. 424, 48 Stat. 911, 912–25; 1 COLLIER ON BANKRUPTCY ¶ 21.05 (16th 2026). "The essential purpose of Section 77B was to preserve . . . a going business . . . [and] avoid the consequences . . . of foreclosures, liquidations, and forced sales[.]" *Victory*, 9 B.R. at 553 (1981) (citing *In re Dutch Woodcraft Shops*, 14 F. Supp. 467, 469 (W.D. Mich. 1935); *Case v. L.A. Prod. Co.*, 308 U.S. 106, 124 (1939)). *See also In re Tenn. Pub. Co.*, 81 F.2d 463, 466 (6th Cir. 1936); ("The words 'in good faith' as used in the act imply an honesty of purpose . . . and to avoid the evils of liquidation. . . .")

The Chandler Act of 1938 codified the good-faith requirement as a threshold test. The Act created Chapters X, XI, XII, and XIII. Tabb, *The History of the Bankruptcy Laws*, 29–30. Chapter X replaced § 77B to cover the reorganization of corporate debtors. COLLIER, ¶ 21.06. Utilizing language from § 77B, it required the judge to "enter an order approving the petition [upon filing], if satisfied that it . . . has been filed in good faith, . . . or dismissing it if not so satisfied." Act of June 22, 1938, ch. 575, § 141, 52 Stat. 840, 887 (repealed 1978).

The absence of financial distress constituted grounds for dismissal for bad faith. In *In re U.S.A. Motel Corp.*, 450 F.2d 499, 506 (9th Cir. 1971), the Ninth Circuit dismissed a bankruptcy case under Chapter X because there was no genuine indication that the company could not pay its debts, finding that the petition was not filed

in good faith, and "the court's power was invoked for a purpose for which it may not be exercised." *Id.* at 505 (quoting *First Nat'l Bank of Cincinnati v. Flershem*, 290 U.S. 504, 515 (1934)); *see also Tucker v. Texas Am. Syndicate*, 170 F.2d 939, 940 (5th Cir. 1948) (finding that a Chapter X bankruptcy petition was not filed in good faith when petitioner had sufficient assets to pay debts and seemingly filed bankruptcy to take advantage of federal court jurisdiction).

Even where good faith was not an express statutory requirement, "courts quickly recognized [it] as an effective means to prevent abuse or distortion of . . . bankruptcy law" and "filled the gap." *Victory*, 9 B.R 557–58; *see, e.g.*, *In re Mallard Assocs.*, 475 F. Supp. 1045, 1049 (S.D.N.Y. 1979) (holding that "Chapter XII[8] requires that a petition must be filed in good faith"); *see also In re Bolton Hall Nursing Home*, 432 F. Supp. 528, 530 (D. Mass. 1977) (finding that, despite Chapters XI and XII lacking an express good-faith requirement, "good faith is an implicit prerequisite to the continuation of proceedings under both chapters"); Ordin, *The Good Faith Principle* at 1796–97.

8. Chapter XI and XII were passed with the 1938 Chandler Act. Chapter XI was closely related to Chapter X, providing flexible reorganization proceedings, although it seemed to be intended for smaller businesses, while Chapter X was intended for larger corporate entities. Chapter XII covered the reorganization of real property or chattels of real persons other than corporations. 1 Collier on Bankruptcy ¶ 21.06 (16th 2026).

B. The 1978 Code preserved good faith as a threshold test which in turn requires a showing of financial distress.

When Congress enacted the Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (1978) (the "Code"), it drew on statutory antecedents in the 1898 Act and added § 1112(b)[9] governing the dismissal of Chapter 11 cases. *See* 11 U.S.C. § 1112(b); H.R. Doc. No. 93-137, pt. II, at 233 (1973). Section 1112(b) authorizes a bankruptcy court to dismiss a Chapter 11 case "for cause," reflecting Congress's decision to carry forward, elaborate upon, and broaden the good-faith principles developed under the former Bankruptcy Act of 1898. In light of the Code's text, legislative history, and subsequent judicial rulings, § 1112(b)'s "for cause" standard encompasses a threshold good-faith requirement that demands a showing of financial distress. The good-faith requirement is central to the proper operation of the bankruptcy system.

The plain meaning of the Code's text demonstrates that dismissal for "cause" under § 1112(b) is justified where there is a showing of lack of good faith. Section 1112(b) is the central gatekeeping provision, enlarging both the bankruptcy court's authority and the parties' ability to challenge a Chapter 11 filing at the threshold. Section 1112(b) authorizes dismissal of a Chapter 11 case "for cause" on motion of any party in interest and permits dismissal at any stage of the proceeding, subject to an expedited hearing. 11 U.S.C. § 1112(b)(1). This contrasts

9. Section 1112(b) states in pertinent part: "[O]n request of a party in interest, and after notice and hearing, the court shall . . . dismiss a case under this chapter . . . for cause. . . ."

with the process under various provisions of the former Act, which authorized the court to make a threshold determination—but contained no express provision for parties to seek dismissal. The provision operates as an early screening mechanism, not merely a back-end remedy reserved for plan confirmation.

The statutory text is deliberately open-ended. Although § 1112(b) lists examples of "cause," it uses the term "including," which the Code expressly defines as "not limiting." *See id.* § 102(3). Congress thus declined to confine dismissal authority to enumerated grounds and instead vested bankruptcy courts with broad discretion to dismiss cases lacking substantive legitimacy or abusing the bankruptcy process, whether those defects become apparent early or late. Section 1112(b)'s structure therefore separates formal eligibility from entitlement to bankruptcy relief.

The legislative history emphasizes that the provision grants bankruptcy courts "wide discretion" to dismiss or convert cases and "consider other factors as they arise" to reach appropriate results in individual cases. H.R. Rep. No. 95-595, at 405–06 (1977); S. Rep. No. 95-989, at 10, 117 (1978).

Other Code provisions confirm the bankruptcy courts' substantial discretion to dismiss beyond § 1112(b). For example, § 105(a) authorizes issuance of any order "necessary or appropriate" and permits courts to act *sua sponte* to prevent abuse, an authority Congress deliberately expanded after concluding that prior limitations were "inconsistent with the increased powers and jurisdiction of the new bankruptcy court." S. Rep. No.

95-989, at 29. Section 105 is the bankruptcy equivalent of the "all writs" statute that governs federal courts, and confers broad powers on a court to control its docket and protect its jurisdictional integrity.

Section 109(a) governs who may be a debtor, but eligibility to file does not confer a right to remain in bankruptcy. 11 U.S.C. § 109(a). Congress assigned this gatekeeping function to § 1112(b), empowering courts to determine whether a case belongs in bankruptcy. Consistent with that structure, this Court has recognized that "for cause" provisions implicitly authorize good-faith limitations. *See Marrama v. Citizens Bank of Mass.*, 549 U.S. 365, 373 (2007). This power can be invoked even in the absence of an express provision:

> [E]ven if § 105(a) had not been enacted, the inherent power of every federal court to sanction 'abusive litigation practices,' see *Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980), might well provide an adequate justification for a prompt, rather than a delayed, ruling on an unmeritorious attempt to qualify as a debtor under Chapter 13.

Id. at 375–76.

The Code's structure confirms that bankruptcy is not an unrestricted entitlement triggered by mere eligibility. Title 11, in whole, is organized around features that presuppose an economic justification for bankruptcy where its protections are legitimate only when grounded in genuine financial distress. Permitting their invocation without meaningful distress would sever them from that

rationale, a result that follows if reading § 109 in isolation. Accordingly, Title 11 demands a gatekeeping mechanism to exclude cases lacking financial distress, a function § 1112(b)'s dismissal authority, implemented through the good-faith doctrine, is designed to perform.

C. The judicial interpretation of § 1112(b) confirms that good faith requires financial distress.

Building on the Code's statutory and economic foundations, courts continued to apply a good-faith filing requirement tied to financial distress to protect bankruptcy courts' jurisdictional integrity from bad-faith litigation tactics. Bankruptcy and district courts applied this standard shortly after the Code's enactment, and within a decade, at least three circuits had explicitly recognized a good-faith requirement linked to financial distress.[10] Further, courts were uniform in holding that once a good-faith objection was raised, the burden then shifted to the debtor to establish good faith.[11]

In *In re SGL Carbon Corp.*, 200 F.3d 154 (3d Cir. 1999), the Third Circuit confirmed the historically developed concept that there is a good-faith *threshold* requirement

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10. *See, e.g.*, *In re Eden Assocs.*, 13 B.R. 578, 583–84 (Bankr. S.D. N.Y. 1981); *In re Dolton Lodge Tr. No. 35188*, 22 B.R. 918, 922–23 (Bankr. N.D. Ill. 1982); *Furness v. Lilienfield*, 35 B.R. 1006, 1011 (D. Md. 1983); *Albany Partners, Ltd., v. Westbrook (In re Albany Partners, Ltd.)*, 749 F.2d 670, 674 (11th Cir. 1984); *In re Little Creek*, 779 F.2d at 1071–72; *In re Winshall Settlor's Tr.*, 758 F.2d 1136, 1137 (6th Cir. 1985), *overruled on other grounds by*, *Mich. Nat'l Bank v. Charfoos (In re Charfoos)*, 979 F.2d 390 (6th Cir. 1992).

11. *See In re Fraternal Composite Serv. Inc.*, 315 B.R. 247, 249 (N.D.N.Y. 2003).

for filing a Chapter 11 petition, which cannot be satisfied in the absence of financial distress. The issue presented was whether "a Chapter 11 bankruptcy petition filed by a financially healthy company in the face of a potentially significant civil antitrust liability complies with the requirements of the Bankruptcy Code." *Id.* at 156. The court expressly adopted a "good-faith" requirement for Chapter 11 petitions. *Id.*

SGL distinguished between the "distraction" of litigation and the danger of insolvency. *Id.* at 162-63. The court noted that the debtor faced significant future lawsuits yet remained solvent and profitable. *Id.* The petition was deemed "patently abusive" because it lacked a "valid reorganization[al] purpose"—the company did not need to reorganize its debts to survive, it merely wanted to pause litigation. *Id.* at 162, 169.

In *In re Integrated Telecom Express, Inc.*, 384 F.3d 108, 112 (3d Cir. 2004), the debtor was a wealthy entity that filed for Chapter 11 primarily to take advantage of the § 502(b)(6) cap on landlord damage claims and argued that maximizing value for shareholders was a "valid bankruptcy purpose." The Third Circuit rejected this, holding that the good-faith standard requires both financial distress and the absence of sufficient assets to pay all creditors:

> At its most basic level, the Bankruptcy Code maximizes value by alleviating the problem of financial distress. *See* Thomas H. Jackson, *The Logic and Limits of Bankruptcy Law* 10 (1986) ("The basic problem that bankruptcy law is designed to handle, both as a normative matter

> and as a positive matter, is that the system of individual creditor remedies may be bad for the creditors *as a group* when there are not enough assets to go around.")

Id. at 121.

In 2009, the Third Circuit dismissed a bankruptcy case for lack of good faith, focusing on "whether the petition serves a valid bankruptcy purpose," or "whether the petition is filed merely to obtain a tactical litigation advantage." *In re 15375 Memorial Corp. v. Bepco, L.P.*, 589 F.3d 605, 618 (3d Cir. 2009). The Court rejected one of the core arguments advanced below, namely, that the filing would permit a central process for the treatment of claims.

> Moreover, an orderly distribution of assets, standing alone, is not a valid bankruptcy purpose . . . In other words, the creation of a central forum to adjudicate claims against the Debtors is not enough to satisfy the good faith inquiry—the Debtors must show that bankruptcy has some "hope of maximizing the value of the [Debtors' estates]."

589 F.3d at 622.

The Third Circuit decision in *LTL* further established that the absence of financial distress is grounds for dismissal under § 1112(b). The petitioner was not in financial distress, stating that it had $61 billion available through a "funding agreement" to satisfy all of its talc liabilities. 64 F.4th at 95. The Third Circuit reversed

the bankruptcy court's failure to dismiss the case as not being filed in good faith. "But given Chapter 11's ability to redefine fundamental rights of third parties, only those facing financial distress can call on bankruptcy's tools to do so." *Id*. at 110.

> We start, and stay, with good faith. Good intentions–such as to protect the J&J brand or comprehensively resolve litigation– do not suffice alone. What counts to access the Bankruptcy Code's safe harbor is to meet its intended purposes. Only a putative debtor in financial distress can do so. LTL was not. Thus, we dismiss its petition.

Id. at 93.

LTL stands for the proposition that "absent financial distress, there is no reason for Chapter 11 and no valid bankruptcy purpose. 'Courts, therefore, have consistently dismissed . . . petitions filed by financially healthy companies with no need to reorganize under the protection of Chapter 11. . . ." *Id.* at 101.

II. The Fourth Circuit's decision is erroneous.

The Fourth Circuit's decision is erroneous. It misconstrued and misapplied the good-faith test as found in the plain text of § 1112(b) as well as its historical and judicial development. The good-faith test is a threshold test, and not merely a confirmation standard.[12] Further,

12. *Bestwall v. Off. Comm. of Asbestos Claimants*, 148 F.4th 233, 243 (4th Cir. 2025) ("The Committee may have another chance to renew that argument—at plan confirmation.").

it resisted the notion that good faith should be tested at the outset, stating instead "[d]ecisions denying access at the very portals of bankruptcy, . . . are inherently drastic and not lightly to be made." *Carolin*, 886 F.2d at 700. Section 1112(b) plainly provides that the dismissal for cause may be sought at any time, by any interested party, and without limit on the grounds. Unlike other courts, the Fourth Circuit placed the burden of proof on the moving party. By finding that objective bad faith was not shown because the debtor had sufficient funds to pay all claims, it disregarded the historical and statutory foundations that limit collective, compulsory aggregation to circumstances of genuine financial distress.

III. The reasoning in this Court's decision in *Ortiz* further supports Petitioner.

The statutory good-faith requirement established in §1112(b) does not stand alone. The same historical and equitable foundations that demand financial distress as a statutory threshold for good faith also reflect a deeper constitutional principle, one this Court articulated in *Ortiz v. Fibreboard*. Professor Brubaker describes this constitutional principle in *Ortiz* as requiring a "payment insufficiency" risk or a risk of non-payment of all creditors. Brubaker, 44 Bankr. L. Ltr. 10 (Oct. 2024). This standard, identified in *Ortiz* in the context of class action settlements, is also, Brubaker writes, applicable in what constitutes a valid bankruptcy filing. *See id*. This is because the Bankruptcy Clause itself does not authorize Congress to create a mandatory collective resolution process unconstrained by the payment-insufficiency requirement *Ortiz* identified.

A. *Ortiz* held that a mandatory, collective resolution of a class action settlement requires a showing of a limited fund. The same reasoning applies with equal force in bankruptcy

Ortiz arose in the context of a fairness hearing on a proposed class action settlement under Fed. R. Civ. P. 23(b)(1)(B). Rule 23(b)(1)(B) permits approval of a class action settlement through "representative parties," meaning that the settlement will bind parties who are not before the court. Hence, the Rule 23 process has been characterized as a collective and "mandatory" process for claims resolution. *See Ortiz*. 627 U.S. at 833, n.13. This Court disapproved the settlement in *Ortiz* for want of a limited fund, holding that the "first and most distinctive" requirement for approval is a "limited fund," *id.* at 838, or what Professor Brubaker has called a "payment insufficiency" or the "nonpaying debtor." *See generally* Brubaker, 44 Bankr. L. Ltr. 10 (Oct. 2024). This Court also noted its serious constitutional concerns with permitting a mandatory and collective resolution in the absence of such a limited fund. 527 U.S. at 819.

In deciding whether class certification was appropriate absent a limited fund, this Court examined the history of limited fund class actions, and found that such suits traditionally involved a fund whose ascertained limit was inadequate to satisfy all claims. *Id.* at 817. This Court emphasized that such mandatory aggregations were only justified by the necessity of equitable, pro rata distributions among claimants, making plain that the limited fund principle is presumptively necessary, not merely sufficient, to justify mandatory class treatment. *Id.*

The historical focus on insufficiency underscores that coercive and mandatory aggregation of creditors' claims was tolerated only where individualized adjudication would defeat the equitable distribution of an inadequate pool of assets. This Court made clear that this insufficiency was an essential historical principle—still pertinent today—against compelling claimants into a collective proceeding. Without the risk that early litigations would exhaust finite assets to the detriment of later claimants, the equitable necessity for mandatory aggregation disappears.

The *Ortiz* rule applies to all federal adjudications, not just class action settlements. As Professor Brubaker writes, under *Ortiz* "there is *no* nonbankruptcy process by which a *solvent* defendant can impose a judicially approved, mandatory, no-opt-outs settlement of its aggregate mass tort liability on nonconsenting claimants. Such a process would unconstitutionally infringe on individual claimants' due process rights." Brubaker, 42 Bankr. L. Ltr. 9 (Aug. 2022).

B. *Ortiz* supports the Petitioner's statutory grounds for dismissal because of the absence of financial distress.

Nor does any bankruptcy process exist that can circumvent what *Ortiz* prohibits. *Ortiz* bears directly on the bankruptcy process and pertains here. "Bankruptcy is designed to address the same kind of common-pool problem, or so-called 'tragedy of the commons,' as is a non-bankruptcy limited-fund class action, 'and the binding distribution scheme effectuated by a confirmed plan of reorganization is functionally identical to the mandatory non-opt-out settlement at issue in *Ortiz*." *Id.* at 9.

Ortiz supplies yet another reason why the § 1112(b) good-faith standard requires financial distress. Professor Brubaker argues that Chapter 11 "assumes a debtor in financial distress" and that the absence of financial distress is *per se* bad faith. Brubaker, Bankr. L. Ltr. 9 (April 2023). He points out that this is what *LTL* held, "[b]ecause LTL was not in financial distress, *it cannot show* its petition served *a valid bankruptcy purpose* and was filed in good faith." *Id.* (quoting *LTL*, 64 F.4th at 100).

Professor Brubaker concludes that the good-faith test must compel dismissal when financial distress is absent, given bankruptcy's capacity to impose a mandatory system that risks constitutional infringement.

> [T]he good-faith filing requisite for invoking the bankruptcy process must be particularly sensitive to bankruptcy's elimination of that important constitutional protection for claimants' ownership of their individual claims. Otherwise, bankruptcy becomes too easy an end-run around mass-tort claimants' constitutional due-process rights, e.g., by solvent mass-tort defendants using a Texas Two-Step bankruptcy to impose a mandatory no-opt-outs settlement (that is otherwise impermissible and unconstitutional) on nonconsenting claimants.

Brubaker, Bankr. L. Ltr. 10 (Aug. 2022).

C. The absence of a payment insufficiency raises constitutional concerns, including encroachment on state sovereignty, and hence justifies dismissal on constitutional grounds.

Ortiz relies on both the "historical necessity" of a limited fund, and also on "serious constitutional concerns." 527 U.S. at 842. While this Court noted its concern with the absence of a jury trial and the loss of due process rights, its holding is not limited to those concerns. A constitutional defect that arises in the bankruptcy context is its impermissible encroachment on state sovereignty through compelling state-law claims to be determined by a federal forum.

The petition for certiorari raises this exact point. "Because the Framers understood that bankruptcy would displace claims resolution from state courts to federal courts, they intended to limit that displacement to debtors unwilling or unable to pay." Cert. Pet. 22. The petition notes the need to "police [this] encroachment" *Id.*

Professor Brubaker makes this point concerning "encroachment" on state-law sovereignty:

> The structural importance of this nonpaying-debtor requirement flows from the ways in which bankruptcy comprehensively overrides multiple constitutional rights and limitations: Bankruptcy is a judicial process that forces all claimants into a mandatory federal-court process, that includes *any and all* state-law claims against a debtor-defendant, and that imposes an aggregate liability cap on those

> claimants, with no opt-out from that cap to pursue the debtor-defendant for full payment of the amount awarded by a jury in the available nonbankruptcy forums of claimants' choice.[13]

"The architectural feature of Article III that is most important . . . is its foundational premise that Article III's limits on federal subject-matter jurisdiction would preserve 'a protected sphere of state autonomy over the development and administration of state law.'" Brubaker, 44 Bankr. L. Ltr. 14 (Oct. 2024) (quoting Ralph Brubaker, *On the Nature of Federal Bankruptcy Jurisdiction: A General Statutory and Constitutional Theory*, 41 Wm. & Mary L. Rev. 743, 810 (2000). Federal courts possess no general authority to adjudicate state-law tort claims except where diversity jurisdiction or a constitutionally authorized federal judicial process exists. 28 U.S.C. § 1332. Bankruptcy jurisdiction is one such exceptional process, but only to the extent Congress acts within the bounds of the Bankruptcy Clause. *Id.* § 1334(b).

As Professor Brubaker argues, there is no constitutional basis, "for *all* of those claims to have been brought in (or removed into) federal court." Brubaker, Bankr. L. Ltr. 15 (Oct. 2024). Yet, when Bestwall filed for bankruptcy "a federal bankruptcy court *immediately* purported to assert federal jurisdiction over *all* of those state-law claims . . . against both the debtor entity *and* nondebtor affiliates, not least for the purposes of *immediately* staying their further assertion in any state court." *Id.*

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13. *See* introduction to Brubaker, Ralph, consolidated articles appearing in Bankr. L. Ltr., *supra*, n.3.

This "staggering enervation of state sovereignty" is *only* justified, writes Brubaker, "where there is a collective process in federal courts of an "insolvent or nonpaying or fraudulent debtor." *Id.* Where the debtor can continue to "fully and timely pay all state-law tort claims in the normal course, without even a hiccup, there is no such justification for wholesale federal displacement of state-court jurisdiction over *all* state-law tort claims against both the debtor entity and its affiliates."*Id.*

Article III's limitations on the powers of the federal courts also circumscribe Congress in its grants of bankruptcy jurisdiction, meaning the nonpaying debtor limitation is a subject matter jurisdiction limitation prescribed by the Bankruptcy Clause read in conjunction with Article III. The petition before this Court illustrates the stakes of this constitutional argument: the Committee notes that solvent defendants have systematically used the Texas Two-Step to displace thousands of state-law tort claims from state courts into federal bankrtupcy court, precisely the type of encroachment that exceeds the constitutional limits of federal bankruptcy jurisdiction. Cert. Pet. 30. To hold otherwise would permit solvent defendants to accomplish through bankruptcy precisely what *Ortiz* prohibits outside of it.

CONCLUSION

Amici respectfully requests that this Court grant the petition for writ of certiorari.

Respectfully submitted,

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