

No. 26-394

IN THE
Supreme Court of the United States

MICHAEL HERLIHY, *et al.*,

Petitioners,

v.

DBMP, LLC,

Respondent.

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

**AMICI CURIAE BRIEF 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 AMICI¹

The amici are Professor Stephen J. Lubben, holder of the Harvey Washington Wiley Chair in Corporate Governance & Business Ethics at Seton Hall; Bruce Markell (Professor of Bankruptcy Law and Practice, and Edward Avery Harriman Lecturer in Law, Northwestern Pritzker School of Law) and George Kuney (Professor Emeritus, University of Tennessee, Winston College of Law)(no relation to counsel of record).

Amici are nationally recognized professors of bankruptcy law 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.

The question presented in this case is this: “Does a debtor’s pursuit of bankruptcy as part of a Texas Two-Step scheme lack good faith such that ‘cause’ exists to lift the automatic stay under 11 U.S.C. § 362(d)?” Pet. i.

Amici respectfully submit that the answer to this question is in the affirmative. Cause for granting relief from the stay under 11 U.S.C. § 362(d) was fully established below based on the absence of financial distress by the

1. Pursuant to Sup. Ct. Rule 37.2, counsel of record for all parties has received notice of amici’s 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.

debtor, and hence, the absence of a valid reorganization purpose or goal.

Amici’s interest in submitting this brief is to address the growing misuse of Chapter 11 of the U.S. Bankruptcy Code by ultra-wealthy business firms that seek to use the bankruptcy process to “manage” mass- tort claims by which is meant the isolating of the core business assets of the initial tortfeasor, while denying tort victims the right to seek redress in the state or federal court of their choosing, often for many years, as in this case.

This abusive pattern has in recent years often involved a pre-bankruptcy “merger” under the Texas Divisive Merger Act (the “Texas Two-Step”).² In this purported “restructuring,” a business entity fully capable of paying all of its mass tort liabilities, transfers its mass-tort liabilities to a newly formed liability entity (in this case, DBMP), and then files only the liability entity in bankruptcy, leaving the original tort defendant and all of its operating assets free from the jurisdiction of the bankruptcy court—and yet, still demanding a release or discharge as if it had filed for bankruptcy.³ That is, this scheme exhibits the same defect as this Court found to be

2. *See* Tex. Bus. Orgs. Code Ann. §§ 1.002(55)(A), 10.001-008 (West 2025).

3. DBMP made clear in seeking preliminary injunctive relief at the outset that its goal was to obtain “permanent injunctive relief to the Protected Parties,” meaning in essence, a release or discharge of non-debtor parties through a § 524(g) plan. *See In re DBMP LLC*, No. 20-03004, 2021 WL 3552350, at *39 (Bankr. W.D.N.C. Aug. 11, 2021).

invalid in *Harrington v. Purdue Pharma L.P.* 603 U.S. 204, 215 (2024).⁴

Members of Congress have referred to the use of the Texas Two-Step as a “bait and switch corporate reshuffling” that has permitted defendants to “evade accountability” to victims.⁵ Legal scholars have decried the recent use of bankruptcy filings by wealthy companies that use such tactics, thereby displacing core due process rights and harming the civil justice system.⁶

The Herlihys and Peter Bergrud (now deceased) were on the receiving end of this abusive strategy. They were three of the many tort victims who believed they contracted asbestosis from exposure to Certain Teeds’ asbestos products. They had filed suit in state court, but then were blocked from pursuing their claims because of the bankruptcy filing of DBMP and the automatic stay under § 362. They moved for relief from the automatic

4. As in *Purdue*, CertainTeed is seeking a “discharge” in the form of a permanent injunction, but without submitting its assets to the jurisdiction of the court. This is precisely what *Purdue* said could not be done. “The question we face ... boils down to whether a court in bankruptcy may effectively extend to *nondebtors* the benefits of a Chapter 11 discharge usually reserved for *debtors*.”

5. See Letter from Senators Richard J. Durbin, *et al.*, to Johnson & Johnson, <https://perma.cc/XYF2-4QUC>.

6. See, e.g., Pamela Foohey & Christopher K. Odinet, *Silencing Litigation Through Bankruptcy*, 109 Va. L. Rev. 1261 (2023) (arguing that mass-tort bankruptcies can suppress claimant participation and displace traditional adjudicatory processes); Michael A. Francus, *Designing Designer Bankruptcy*, 102 Tex. L. Rev. 1205 (2024).

stay under 11 U.S.C. § 362(d) for cause, seeking only to liquidate their claims. They argued that a bankruptcy filing by an ultra-wealthy corporation and the use of the Texas Two-Step constituted “bad faith” and cause for relief from the stay.

The bankruptcy court denied their motion, the district court affirmed, and the Fourth Circuit affirmed in turn, despite the unrefuted evidence that DBMP had access to ample assets and was able to pay its tort liabilities. As a result of these holdings, the Herlihys and the Bergrud estate have been barred from seeking relief for more than seven years with no plan of reorganization in sight.

Our brief addresses two core defects with the ruling below. First, the Fourth Circuit held that “[t]his fact [lack of financial distress] is irrelevant to their bad faith argument.” *Herlihy v. DBMP, LLC*, 167 F.4th 142, 152 (4th Cir. 2026). Second, the Fourth Circuit held that the use of the Texas Two-Step and the invocation of Bankruptcy Code § 524(g) meant that the bankruptcy filing was “presumptively viable.” *Id.* at 149.

Both core findings are incorrect and merit review and reversal by this Court.

Our amicus brief challenges the ruling that financial distress is irrelevant to a motion for relief from the stay. This Court’s ruling in *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), is a relevant factor in assessing whether the absence of financial distress (or a “limited fund”) is a legitimate factor in determining the absence of good faith under 11 U.S.C. § 362(d). *Ortiz* identified the constitutional concerns in a mandatory, collective

judicial claims resolution process (be it a class action or bankruptcy). These constitutional concerns mean that *Ortiz* is relevant where it is shown that the use of Chapter 11 is being deployed to achieve what this Court held was impermissible in the class action context.

Ortiz held that financial distress, or what it called a “limited fund” was *presumptively* necessary in order to be permissible in the context of a mandatory, non-opt-out judicial process—which includes the bankruptcy process. 527 U.S. at 842 (emphasis added). This Court’s ruling in *Ortiz* is antagonistic to the finding below that the absence of financial distress was not relevant to the issue of bad faith and that DBMP’s bankruptcy filing was “*presumptively viable*” despite the absence of financial distress. Both presumptions cannot be correct.

The second key issue we address is the Fourth Circuit’s finding that the bankruptcy filing was presumptively viable, based on DBMP’s assertion that it filed for bankruptcy to invoke the statutory provisions of § 524(g) pertaining to a mass-tort, asbestos case, which supposedly demonstrated that DBMP did not file with subjective bad faith, nor that its filing was [objectively] futile. *See Herlihy*, 167 F.4th at 152 (“DBMP was legitimately seeking to invoke the § 524(g) process authorized by Congress. . .”).

This “presumption” was apparently based on the view that § 524(g) was modeled on *In re Johns-Manville Corp.*, 36 B.R. 727, 730 (Bankr. S.D.N.Y. 1984) and that DBMP’s case fit that model. “The asbestos trust/injunction mechanism established in the bill is available for use by any asbestos company facing a similarly overwhelming liability” as faced by *Johns-Manville* in the 1980s —

whose circumstances, as described, were similar to those facing CertainTeed in 2019. H.R. Rep. No. 103-835, at 40–41 (1994), as reprinted in 1994 U.S.C.C.A.N. 3340.” 167 F.4th at 146.

This reliance on the invocation of § 524(g) alone, as somehow showing good faith was legal error. The DBMP bankruptcy case is *unlike Johns-Manville* and most critically lacks the financial distress and risk of liquidation that animated Congress to enact § 524(g). There can be no fair suggestion that Congress intended for non-distressed business entities to use § 524(g).

Ultimately, our interest in submitting this amicus brief is based on our belief that *Ortiz* provides a vital safeguard against serious abuse of the bankruptcy system by providing a sound historical foundation for the requirement that a debtor establish financial distress as part of the required showing for good faith, the absence of which justifies granting a motion for relief from the stay and permitting tort victims to return to state and federal court to resolve their claims.⁷

While *Ortiz* identifies “constitutional concerns” with the absence of financial distress, its holding is based on historic equitable considerations, which provide ample justification for its holding without the necessity to rule on the constitutionality of such a filing. In short, *Ortiz*

7. The lack of financial distress has been seen as raising a variety of different issues including the meaning of the Constitution’s Bankruptcy Clause, U.S. Const. art. I, § 8, cl. 4, and whether the clause should be interpreted from an originalist standpoint, or instead, with the view that Congress’s power to legislate is largely unfettered.

provides the proper framework for finding a lack of the implied requirement of good faith and justifies granting the motion for relief from the stay.⁸

The question presented in this case focuses on the specific context of the Texas Two-Step and does not ask this Court to rule that the lack of financial distress by a debtor would necessarily make *all* such bankruptcy filings in bad faith. Further, we agree with Petitioners that the question “is squarely and narrowly presented, without the jurisdictional and constitutional issues that may have impeded previous attempts at review.” Pet. 1.

STATEMENT OF THE CASE

CertainTeed was a highly profitable business entity which had been sued in various state courts for inflicting thousands of workers with asbestosis. While it was able to pay all claims without interruption to its business operations, it sought instead to utilize the Texas Two-Step to “manage” its tort liabilities, to isolate its assets from the reach of creditors and the jurisdiction of the bankruptcy court and thus avoid the normal obligations of a Chapter 11 debtor.

The use of the Texas Two-Step enabled DBMP and CertainTeed to obtain certain protections and avoid certain obligations required of most Chapter 11 debtors.

8. As Petitioners have noted, both the Third and Fourth Circuits have recognized that good faith is an *implied* requirement, and that such requirement is grounded in the “equitable limitations of the Bankruptcy Code.” *See* Pet. 14, citing *In re LTL Mgmt., LLC*, 64 F.4th 84, 100 (3d Cir. 2023).

In this sense, the Texas Two-Step distorts the normal operation of a Chapter 11 case and precludes a finding that the bankruptcy filing was in good faith.

Several key provisions of the Texas act are pertinent to the issue of good faith under § 362(d).

Section 1.002(55) defines a merger as “(A) the division of a domestic entity into two or more domestic entities or other organizations or into a surviving domestic entity and one or more new domestic or foreign entities.” Tex. Bus. Orgs. Code Ann. § 1.002(55)(A). Second, “all liabilities and obligations ... are allocated to one or more of the surviving or new organizations” *Id.* § 10.008(a)(3).

The effect of the merger is set forth in § 10.008. When a merger takes effect, then, “the separate existence of each domestic entity that is a party to the merger, other than a surviving or new domestic entity, *ceases*.” *Id.* § 10.008(a)(1) (emphasis added).

Third, as pertinent here, § 10.008(a)(4) provides that “each surviving or new domestic organization to which a liability ... or obligation ... is allocated ... is the primary obligor for the liability or obligation and ... no other party to the merger ... obligated at the time of the merger ... is liable for the debt or other obligation.”

This “corporate restructuring” was completed on October 23, 2019. As a result of this scheme, Old CertainTeed ceased to exist, and “no other party” was liable for the tort claims, other than the newly formed DBMP—whose assets were bare-bones and modest, although it had what is sometimes called an “ATM” in the

form of a funding agreement from New CertainTeed. The funding obligation was an unsecured obligation, which as the *LTL* case has shown, is subject to the payor’s unilateral declaration that it has become “void.”⁹

Shortly thereafter, in January 2020, DBMP filed a voluntary petition for bankruptcy and triggered the automatic stay of 11 U.S.C. § 362(a). At the same time, DBMP filed both a complaint for injunctive relief and a separate motion, both of which sought to enjoin continuation or initiation of tort claims against a large group of so-called Protected Parties—that is, non-debtor parties, including New CertainTeed.¹⁰

In 2021 the Bankruptcy Court granted the debtor’s motion to preliminarily enjoin litigation against New CertainTeed, “effectively extending the protections of the

9. On the same day that the bankruptcy court, on remand from the Third Circuit, dismissed the first *LTL* bankruptcy, *LTL* filed its second bankruptcy case. In this second case, *LTL* and *J&J* now argued that the Funding Agreement was “void or voidable.” See Decl. of John K. Kim in Supp. of First Day Pleadings. *In re LTL Mgmt., LLC*, No. 23-12825-MBK (Bankr. D.N.J. April 4, 2023), ECF No. 4 (stating there was a “material risk that the 2021 Funding Agreement was no longer enforceable because it had become void or voidable”).

10. See Debtor’s Compl. for Injunctive & Declaratory Relief, *In re DBMP LLC*, No. 20-03004 (Bankr. W.D.N.C. Jan. 23, 2020), ECF No. 1 (seeking relief that included applying the automatic stay to non-debtor parties); see also Mot. of the Debtor for an Order (I) Preliminarily Enjoining Certain Actions Against Non-Debtors or (II) in the Alternative, Declaring That the Automatic Stay Applies to Such Actions, *id.*, ECF No. 2.

automatic stay to New CertainTeed.” Corrected Opening Br. of Appellants, 15.

In April 2024, the Petitioners moved for relief from the stay under 11 U.S.C. § 362(d)(1). Petitioners argued that the absence of financial distress was bad faith, and hence “cause” for relief from the stay. The Petitioners contended that this threshold showing of good faith is required both as a statutory requirement under 11 U.S.C. § 362(d)(1) and by the constitutional concerns identified in this Court’s decision in *Ortiz*, 527 U.S. at 845.

The motion for relief from the stay was limited in scope. Petitioners sought only “to quantify their state law claims against DBMP.”¹¹ The Petitioners did not seek dismissal of the case under § 1112(b).

The courts below did not dispute that a lack of good faith constitutes “cause” for granting relief from the stay under § 362(d)(1). “[W]e agree with Claimants that good faith is an *implied* requirement for obtaining an automatic stay and that a showing of a lack of good faith, or bad faith, can therefore justify lifting the stay” *Herlihy*, 167 F.4th at 151 (emphasis in original).¹²

11. Michael and Ann Herlihy’s Mot. for Relief from the Automatic Stay Pursuant to 11 U.S.C. § 362(d). *In re DBMP LLC*, No. 20-30080, ECF No. 2755.

12. The statutory requirement for good faith, and its close connection to the need for financial distress has deep roots. “[E]very 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 evidence was undisputed that the debtor was not experiencing financial distress. “In 2018, Old CertainTeed ‘was a profitable going concern whose assets significantly outweighed its combined operating and asbestos liabilities.’” Appellants’ Br. 11 (citing JA 231, Findings ¶ 44). Further, “on Old CertainTeed’s publicly disclosed financial statements, [it] had almost \$3 billion in assets and less than half of that in liabilities.” Appellants’ Br. 11 (citing C.A. J.A. 237).

Nevertheless, the bankruptcy court found that the Petitioners had “failed to demonstrate that DBMP acted in bad faith,” and that lifting the stay would amount to a *de facto* dismissal of the bankruptcy. *Herlihy*, 167 F.4th at 146. The district court affirmed.

The Fourth Circuit affirmed the district court and held that the evidence of lack of financial distress was “irrelevant” to the bad faith argument and that the bankruptcy filing was “presumptively viable” because DBMP sought to utilize § 524(g) to achieve its purported reorganization.

Both core holdings were error and justify review and reversal.

The Petitioners have been unable to pursue their claims for injuries for over seven years.

SUMMARY OF LEGAL ARGUMENT

First, the Fourth Circuit erred in holding that financial distress is not relevant to the determination of the lack of good faith. We urge the Court to consider

the equitable underpinnings of *Ortiz* as well as the constitutional concerns identified in *Ortiz*, which held that the presence of what this Court called a “limited fund” (or payment insufficiency) is *presumptively required* in order to justify any federal judicial form of compulsory aggregation and resolution of claims. The absence of such a fund is evidence of a lack of good faith in utilizing the bankruptcy system. The bankruptcy court’s finding that there was “no evidence” of bad faith is incompatible with this Court’s ruling in *Ortiz* and the Third Circuit’s ruling in *In re LTL Management, LLC*, 64 F.4th 84 (3d Cir. 2023).

Second, the Fourth Circuit erred in holding that the proposed use of § 524(g) made the bankruptcy presumptively viable because the case below was supposedly consistent with *Johns-Manville*—the earlier case which is understood to reflect the congressional goals of § 524(g). However, the proposed use of § 524(g) bears little resemblance to the financial distress evidenced in *Johns-Manville*. *Manville* faced liquidation; DBMP and its parent, CertainTeed sought bankruptcy to maximize profits, limit payments to tort claimants, and avoid the obligations of a debtor required by Congress under Title 11. However, there is little if any similarity between the risk of liquidation that animated the legal outcome in *Johns-Manville* and the use in this case by a company which had no such distress.¹³

13. The Fourth Circuit relied only on the number of claims, and not on the dollar amount and financial risk. *See Herlihy*, 167 F.4th at 146.

LEGAL ARGUMENT

I. THE COURT SHOULD GRANT THE PETITION TO RESOLVE WHETHER *ORTIZ* IS RELEVANT TO THE PROPER UNDERSTANDING OF BAD FAITH THAT JUSTIFIES GRANTING RELIEF FROM THE STAY WHERE THE DEBTOR IS NOT IN FINANCIAL DISTRESS.

We urge this Court to grant the writ of certiorari in order to address the relevancy of *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), in the context of determining whether a Chapter 11 debtor which is not experiencing financial distress is subject to a creditor’s motion for relief from the stay under 11 U.S.C. § 362(d).

The relevancy of *Ortiz* to a motion for relief from the stay arises in large measure from the serious “constitutional concerns” identified by this Court and relating to due process, jury trials, and the usurpation of state sovereignty. Those concerns were never addressed, either by DBMP or the courts below—other than to argue that *Ortiz* had no bearing on the lift-stay motion. Instead the Fourth Circuit relied on the legal standard for a motion to dismiss under *Carolin Corp. v. Miller*, 886 F.2d 693 (4th Cir. 1989).

Ortiz was based on historical equitable considerations, and its relevance in the bankruptcy context does not require this Court to resolve the issue of whether financial distress is constitutionally mandated. Under the doctrine of constitutional avoidance, this Court should hold that the failure to establish financial distress in the context of the

Texas Two-Step is cause for relief under § 362 based on the implied requirement of good faith.

A. *Ortiz* held that a mandatory, collective resolution of a class action settlement requires a showing of a limited fund. The bankruptcy process cannot be used to achieve a result which this Court has found to be impermissible in the class action context.

Ortiz arose in the context of a fairness hearing on a proposed class action settlement under Fed. R. Civ. P. 23. Rule 23 permits approval of a class action settlement through “representative parties,” meaning that the settlement will bind parties who are not before the court.¹⁴ Hence, the Rule 23 process has been characterized as a collective and “mandatory” process for claims resolution. *See* 527 U.S. at 831, 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 of a mandatory settlement is a “limited fund” or what scholars have called a “payment insufficiency.” *Id.* at 838. The debtor’s assets (i.e., the fund for claims’ payment) are insufficient because the debtor

14. The possibility of absent parties being bound (and hence the “mandatory” nature) arose from this Court’s recognition that “where parties are very numerous . . . it will be almost impossible to bring them all before the court.” *Ortiz*, 527 U.S. at 832. Absent parties, however, are at risk that the settlement would as a practical matter impair their ability to protect their interests. *Id.* at 833. The only justification for such a process was the existence of a limited fund to pay all creditors. *Id.* at 834 (describing the “traditional varieties” of suits where such a process was permissible).

lacks the ability to pay all creditors in full. This Court identified its constitutional concerns with permitting a mandatory and collective resolution in the absence of such a limited fund.

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 834-39. 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.* at 842.

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 litigation would exhaust finite assets to the detriment of later claimants, the equitable necessity for mandatory aggregation disappears.

B. The absence of a limited fund raises constitutional concerns, including impingement on state sovereignty, which arises in the bankruptcy context from both the automatic stay and the nondebtor stay.

While *Ortiz* is fundamentally based on equitable principles, the underpinnings also include certain “constitutional concerns.” These underlying concerns are part of the rationale for requiring a bankruptcy court to evaluate the absence of such distress in considering whether a debtor has met its burden in showing good faith when a motion for relief from the stay is filed.

This Court noted its concern with the absence of a jury trial and the loss of due process rights, but the Court’s holding is not limited to those concerns. A central constitutional concern that arises in the bankruptcy context is its impermissible impact on state sovereignty by staying all non-diverse claims against DBMP, and then by compelling non-diverse state law claims to be adjudicated by a bankruptcy court.

The structural importance of the 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.¹⁵

Article III circumscribes the jurisdiction of the federal courts. “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.’” Ralph Brubaker, *Assessing the Legitimacy of the “Texas Two-Step” Mass-Tort Bankruptcy (Part III): The Constitutional Limits of the Bankruptcy Power*, 44 Bankr. L. Letter, No. 10, Oct. 2024 at 14. (“Brubaker, *Part III*”).

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, *Part III, supra*, at 15. Yet, when DBMP filed for bankruptcy “a federal bankruptcy court immediately purported to assert federal jurisdiction over *all* 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.* This “staggering enervation of state sovereignty” is justified only 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

15. Ralph Brubaker, *Assessing the Legitimacy of the “Texas Two-Step” Mass-Tort Bankruptcy* (Univ. of Ill. Coll. of L. Legal Stud. Rsch. Paper No. 25-7, 2025), <https://ssrn.com/abstract=5380517> (consolidating Professor Brubaker’s three-part series in the Bankruptcy Law Letter (Aug. 2022, Apr. 2023 & Oct. 2024)).

in the normal course, without even a hiccup, there is no justification for wholesale federal displacement of state-court jurisdiction over all state-law tort claims against both the debtor entity and its affiliate.” *Id.*

This enervation of state sovereignty and claimants’ loss of their due process rights to control their claims is accentuated in Texas Two-Step cases, where, as here, in addition to the statutory stay of § 362, the debtor obtains a preliminary injunction enjoining litigation against hundreds of other non-debtor parties, thus giving the benefits of bankruptcy to a vast number of entities which have not filed for bankruptcy.¹⁶ New CertainTeed made clear that as part of the restructuring it wanted a permanent injunction for the Protected Parties, thus seeking the near-equivalent of a bankruptcy discharge.¹⁷

C. The absence of a limited fund is relevant to the threshold consideration of good faith in a motion for relief from stay and/or motion to dismiss and not just a confirmation issue.

As Professor Brubaker writes, under *Ortiz* “there is *no* non-bankruptcy 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.” Ralph Brubaker, *Assessing the Legitimacy of the “Texas Two-Step” Mass- Tort Bankruptcy (Part I)*,

16. *See supra* note 10.

17. *See supra* note 3.

42 Bankr. L. Letter No. 8 (August 2022) at 9 (“Brubaker, *Part I*”).

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 in a non-bankruptcy limited fund class action.” “[T]he binding distribution scheme effectuated by a confirmed plan of reorganization is functionally equivalent to the mandatory non-opt-out settlement at issue in *Ortiz*.” *Id.* at 9. “Both systems enable a mass-tort defendant to impose a judicially approved hard cap on their aggregate mass-tort liability, without any opt-outs by nonconsenting claimants.” *Id.* at 10.

Professor Brubaker concluded that the good-faith test must compel dismissal when payment insufficiency is absent, given bankruptcy’s capacity to impose a mandatory system that risks constitutional infringement, stating that “the 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.” *Id.* at 10.

In a similar Texas Two-Step case before the same bankruptcy court, Judge Whitley stated that arguments like Professor Brubaker’s “have considerable force. Common sense dictates that a solvent, non-distressed

debtor corporation should rarely consider bankruptcy—and even less often be afforded its protections.” *In re Aldrich Pump LLC*, 2023 WL 9016506 at *17, Case No. 20-30608 (Bankr. W.D.N.C. December 28, 2023). Citing Professor Brubaker, Judge Whitley stated that “the rights and considerations that caused the Supreme Court to reject that class action are also found in bankruptcy.” *Id.* at *20.

Judge Whitley then stated that if the Debtors’ plan has a capped plan and is a non-opt-out trust, then the question of its constitutionality is a “question for another day,” (*id.* at *21) suggesting apparently that the issue should be resolved at confirmation. However, we submit *Ortiz* is relevant as well in the context of a threshold motion for relief from the stay, or a motion to dismiss. This is particularly true when the constitutional concerns arise from the control over the claimant’s property rights (the claims)¹⁸ and the “enervation” of state sovereignty, as noted above. Since the constitutional concern arises at the outset of a bankruptcy case, the *Ortiz* concern becomes an issue that should be resolved at the threshold, not only at confirmation.

18. “A claimant has a due process property right in his tort claim. Fundamental to this right is the claimant’s autonomy and control over prosecution of his or her claim—a ‘settlement’ cannot be imposed on the claimant without consent.” *Aldrich*, 2023 WL 9016506 at *19 (citations omitted).

II. THE FOURTH CIRCUIT ERRED IN HOLDING THAT DBMP'S BANKRUPTCY FILING WAS PRESUMPTIVELY VIABLE BASED ON § 524(g).

Section 362(g) states that when a motion for relief from the stay is filed, the debtor has the burden of proof on all issues relevant here. That is, the debtor is required to establish that the filing of the bankruptcy was in good faith. Under *Ortiz*, DBMP's lack of financial distress should have meant that it did not, and could not, make the required good faith showing.

Rather than imposing the burden of proof on the debtor, the Fourth Circuit presumed that DBMP had a valid "reorganization" interest (e.g., the desire to invoke § 524(g)). "The majority then concludes that, because the Debtor DBMP invoked 11 U.S.C. § 524(g) —its Chapter 11 petition must be 'presumptively viable,' *id.* at 149, such that no further inquiry into the Debtor's 'bad faith' in filing a Chapter 11 bankruptcy petition is warranted." *Herlihy*, 167 F. 4th at 167 (King, J., dissenting).

This presumption of a viable Chapter 11 case was based predominantly on the notion that DBMP had filed bankruptcy to use § 524(g), and that its financial condition somehow mirrored *Johns-Manville's* financial condition, which was Congress's model when it adopted § 524(g). *See Herlihy*, 167 F. 4th at 146, suggesting that the § 524 trust is "available for use by any asbestos company facing a similarly overwhelming liability as faced by Johns-Manville in the 1980s — whose circumstances, as described, were similar to those facing CertainTeed in 2019."

The Fourth Circuit was incorrect when it found that the case below was similar to *Johns-Manville* or reflected the congressional purpose of § 524(g). The Fourth Circuit misunderstood § 524(g) as “authorizing a specific and unique Chapter 11 reorganization proceeding for debtors with a *large number of pending and future* personal injury claims based on exposure to asbestos-containing products.” *Herlihy*, 167 F.4th at 145–46 (emphasis added).

But a “large number” of claims was not the key factor in *Manville*. Instead, Manville’s distress arose from a valid concern over impending *liquidation*. Although the creditors’ committee challenged this assertion, the debtor argued that pursuant to required principles of the Financial Accounting Standards Board it had to book a reserve of at least \$1.9 billion for asbestos health liability, and that “the booking of such a reserve would, in turn, have triggered acceleration of approximately \$450 million of outstanding debt, possibly *resulting in a forced liquidation of key business segments*. *In re Johns-Manville*, 36 B.R. at 730 (Bankr. S.D.N.Y. 1984) (emphasis added).¹⁹

The overriding factor was the potential liquidation of *Manville*, and not the number of claims. Brubaker points out that the Third Circuit “flatly rejects that view, that sufficiently voluminous mass-tort litigation against a defendant ... in and of itself, supplies sufficient

19. “Thus, upon dismissal, Manville would become a target for economic dismemberment, liquidation, and chaos, which would benefit no one except the few winners of the race to the courthouse. The economic reality of Manville’s highly precarious financial position due to massive debt sustains its eligibility and candidacy for reorganization.” *Johns-Manville Corp.*, 36 B.R. at 740.

financial distress for a good-faith bankruptcy filing.” Ralph Brubaker, *Assessing the Legitimacy of the “Texas Two-Step” Mass-tort Bankruptcy, (Part II)*, 43 Bankr. L. Letter, No. 4, at 5 (April 2023), (citing *LTL*, 64 F.4th at 104).

No such calamity faced DBMP. There was no remote risk of liquidation or any similar distress. DBMP was using Chapter 11 to *manage* its case load in a more convenient forum. “In the fall of 2019, CertainTeed determined that it would *take advantage* of the § 524(g) ... to manage and resolve ongoing and future asbestos-related claims in circumstances like those facing CertainTeed.” *Herlihy*, 167 F.4th at 146.

More generally, the “desire to take advantage of the protections of the Code,” such as the automatic stay of litigation outside of bankruptcy, “cannot establish *good* faith as a matter of law” given “the truism that every bankruptcy petition seeks some advantage offered in the Code [and that] any other rule would eviscerate any limitation that the good faith requirement places on Chapter 11 filings.”

In re 15375 Mem’l Corp., 589 F.3d 605, 620 (3d Cir. 2009) (internal quotes omitted).

A desire to utilize the Code’s provisions (or to resolve claims) is not sufficient to show good faith. “Good intentions—such as to protect the J&J brand or comprehensively resolve litigation—do not suffice alone.” *LTL*, 64 F.4th at 93. “And absent financial distress, the debtor’s desire to benefit from certain Code provisions

(such as those capping claims for future rents) could not justify its presence in bankruptcy.” *Id.*

Judge King’s dissent provides a compelling rationale for the granting of certiorari—that is, for this Court to address the issue of whether debtors not experiencing financial distress can use the Chapter 11 process to manage their mass-tort claims. “And there is ample evidence in this record that the Debtor DBMP and its non-debtor parent, CertainTeed, have engaged in pervasive, well-documented, and systematic bad faith by subverting the Bankruptcy Code to evade asbestos-related civil tort liability and deprive tens of thousands of dead and dying Americans of their constitutionally-protected day in court before a jury of their peers.” *Herlihy* 167 F.4th at 155 (King J., dissenting).

CONCLUSION

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

Respectfully submitted,

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