No. 24-1493

In the United States Court of Appeals
FOR THE FOURTH CIRCUIT

IN RE: BESTWALL LLC,
Debtor,

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

v.

BESTWALL LLC,
Appellee.

On Direct Appeal from the United States Bankruptcy Court
for the Western District of North Carolina
Case No. 17-31795 (LTB), Hon. Laura T. Beyer

BRIEF OF *AMICUS CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA OPPOSING THE PETITION FOR REHEARING AND IN SUPPORT OF BESTWALL LLC

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. 24-1493 Caption: IN RE: BESTWALL LLC

Pursuant to FRAP 26.1 and Local Rule 26.1,

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA
(name of party/amicus)

who is AMICUS, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐YES ☑NO

2. Does party/amicus have any parent corporations? ☐YES ☑NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐YES ☑NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☐NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☑YES ☐NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

7. Is this a criminal case in which there was an organizational victim? ☐YES ☑NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: /s/ Robert E. Dunn Date: September 29, 2025

Counsel for: Amicus Curiae

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IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation's business community.

The Chamber and its members have a strong interest in ensuring that the bankruptcy process remains free of arbitrary restraints that would prevent companies from efficiently resolving mass-tort claims. The Committee's proposed rule would impede companies from using state-authorized divisional-merger mechanisms and the congressionally established bankruptcy process to manage mass-tort claims fairly and efficiently. The panel opinion correctly rejected the Committee's attempt to subvert Congress's constitutional authority to craft bankruptcy laws to address novel situations.

[1] No party's counsel authored this brief in whole or in part, and no entity or person, aside from *amicus curiae*, its members, or its counsel, contributed any money to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

INTRODUCTION

The panel properly rejected the Committee's attempt to rig the deck against bankruptcy, and this Court should deny its rehearing petition.

To start, the Committee's claim that bankruptcy is worse than mass-tort litigation is wrong. Bankruptcy frees companies (and claimants) trapped in endless mass-tort litigation. Without it, tort litigation often drags on for decades, wasting resources and benefiting only plaintiffs' attorneys. With bankruptcy, claims can be resolved, and a claims-paying trust established, in a fraction of the time, at lower cost, and with fairer results for claimants. It's a "simple bargain" that produces results. *Harrington v. Purdue Pharma L.P.*, 603 U.S. 204, 209 (2024).

The Committee argues that bankruptcy is unfair to tort claimants because it allows debtors "to delay or escape their tort liabilities," pointing to the delay here as proof. Petition at 12, 25; *see also* D. Theodore Rave Amicus, Dkt. 140 at 15 (claiming Bestwall has caused this case to "languish[ ] in bankruptcy since 2017"). But the Committee's own counsel caused that delay, filing "multiple challenges that have impeded progression to a [bankruptcy] plan and confirmation hearing." Concurrence at 23 n.2. As Judge Agee recognized, the delays in this case (and others) spring from "the desire for perceived higher attorneys' fees," not from any defect in the bankruptcy process. *Id.* (citing *In re Bestwall LLC*, 71 F.4th 168, 184 (4th Cir. 2023).

The Committee's legal arguments are also meritless. It asserts that every constitutional challenge to the Bankruptcy Code implicates the court's subject matter jurisdiction. But "that can't be right" for the reason enumerated by the majority. Opinion at 11. And even if the Committee's attack on Congress's Article I power were jurisdictional, it still fails because Congress is not limited to enacting bankruptcy laws that parallel pre-revolutionary English and colonial bankruptcy laws. Congress's Bankruptcy Clause power is "broad," *Siegel v. Fitzgerald*, 596 U.S. 464, 473 (2022), meaning Congress may tailor bankruptcy to address novel situations, including mass-tort litigation. Indeed, as even the dissent concedes, Congress's first bankruptcy laws were inconsistent with historical practice. Dissent (King, J.) at 41.

The Committee's proposed definition of "bankrupt" is also unworkable. The Committee now argues that "debtors with a *conceded* ability to pay all their debts" are not bankrupt, Petition at 17 (emphasis added), adding yet another definition to its already long list. *See* Concurrence at 19–20. The Committee's ever-changing position reveals that it is searching for a rule that would exclude Bestwall from bankruptcy, regardless of whether the rule is historically grounded (or good policy). In short, the Committee is asking this Court to convene en banc to engage in policymaking that should be left to Congress, which has "plenary power…over the whole subject of bankruptcies." *Siegel*, 596 U.S. at 474 (citation omitted).

ARGUMENT

I. THE COMMITTEE GROSSLY UNDERVALUES THE BENEFITS OF BANKRUPTCY, WHICH CAN EFFICIENTLY RESOLVE MASS-TORT LIABILITY

The Committee's argument that mass-tort-driven bankruptcy "unduly delays justice for thousands of tort victims," Petition at 25, echoes the dissent's assertion that bankruptcy allows parties "to evade tort liability," "stall litigation," and "corral claimants into a trust," Dissent at 24, 45. Those arguments are wrong. Bankruptcy is an effective solution to the crippling delays inherent to mass-tort litigation, and the true cause of any delay here is the Committee's own conduct.

Mass-tort litigation has vexed courts and litigants for decades. For starters, it drags on endlessly. Here, for example, "when Bestwall filed for bankruptcy in 2017, of the 64,000 pending asbestos-related claims, seventy-five percent had been pending for ten years or more, and fifty-five percent had been pending for fifteen years or more." *Bestwall*, 71 F.4th at 183. Mass-tort litigation also catalyzes a frenzied race to judgment as early claimants shoot for massive awards that can easily drain a company's assets before even a fraction of the potential claimants receive any recovery. *See, e.g.*, *Ingham v. Johnson & Johnson*, 608 S.W.3d 663 (Mo. Ct. App. 2020), *cert. denied*, 141 S. Ct. 2716 (2021) (jury awarded around $4.69 billion to 22 plaintiffs for injuries from one company's baby powder).

Despite this drain on potential recovery, plaintiffs' lawyers benefit from the delay and potential for disproportionate awards because "'clogged' mass tort dockets and overwhelmed courts" give them "settlement leverage." C. Anne Malik, *Unlocking the Code: The Value of Bankruptcy to Resolve Mass Torts*, U.S. Chamber of Commerce Institute for Legal Reform 7 (Dec. 2022).

Multidistrict litigation is no panacea either. It is often easy to add meritless claims, and those "masses of unvetted claims" falsely inflate settlement predictions, which "precludes any reasonable settlement." *Id.* at 10 (citation omitted). And if a major mass-tort multidistrict litigation does end, then tens (if not hundreds) of thousands of cases are remanded for trial, swamping courts around the country. *See In re 3M Combat Arms Earplug Prods. Liab. Litig.*, No. 3:19-MD-2885, Doc. 3188 at 2 (N.D. Fla. June 10, 2022). Even if a company patches together a global solution through multidistrict litigation or global settlement, that resolution itself may induce future claimants to materialize, exposing the company to additional, potentially crippling, liability. *See* Anthony J. Casey & Joshua C. Macey, *In Defense of Chapter 11 for Mass Torts*, 90 U. Chi. L. Rev. 973, 981 (2023). In the end, the only beneficiaries of the mass-tort quandary are plaintiffs' attorneys.

The dissent notes that with asbestos the "window for meaningful legal relief is, for many victims, heartbreakingly short." Dissent at 29. But that makes tort litigation a worse option, not a better one. Injured plaintiffs fail to receive "meaningful, timely relief" when they are forced to sit on the sidelines while their attorneys drag corporate defendants through years (or decades) of litigation. *Unlocking the Code*, *supra*, at 2.

Bankruptcy breaks the stalemate, providing relief to both debtors and tort claimants. Companies burdened with mass-tort liability may channel present and future claims to a post-confirmation settlement trust funded by the debtor. *See In re Glob. Indus. Techs., Inc.*, 645 F.3d 201, 205 n.10 (3d Cir. 2011). A mass-tort trust cannot be approved unless 75% of covered claimants approve the plan, 11 U.S.C. § 524(g)(2)(B)(ii)(IV)(bb), ensuring that any "bankruptcy … under Section 524(g) represents a negotiated settlement between the debtors [and] legal representatives of both current and future claimants." *Unlocking the Code*, *supra*, at 14; *contra* Rave Amicus at 12 (wrongly asserting that debtor can "impose aggregate resolution unilaterally").

Bankruptcy thus mitigates the otherwise inevitable frustration caused by endless litigation where "the costs…[are] large and value destructive for all stakeholders." Casey & Macey, *supra*, at 977. And for debtors, bankruptcy enables value-creating, job-sustaining business operations to continue smoothly, *see* Alan N. Resnick, *Bankruptcy as a*

Vehicle for Resolving Enterprise-Threatening Mass Tort Liability, 148 U. Pa. L. Rev. 2045, 2055 (2000), and provides finality by resolving all present and future claims, Casey & Macey, *supra*, at 977.

The dissent ignores these benefits, contending that because "Georgia-Pacific remains a multi-billion-dollar company with a long and stable record of profitability," bankruptcy was unavailable here. Dissent at 28. But Georgia-Pacific's profitability is precisely what guarantees stable funding for the trust that will be created once the bankruptcy plan is confirmed. The goal should be to ensure that injured claimants receive compensation, while preserving otherwise stable companies that employ thousands of workers, provide valuable products to consumers, and deliver returns to investors, including retirees.

The dissent's main concern appears to be that bankruptcy provides debtors "a cloak of immunity from accountability." Dissent at 45. Not true. For injured parties, claims are resolved faster, and the results are fairer and more predictable in bankruptcy. *See* Concurrence at 22 ("By 2011, sixty § 524(g) trusts had been established, paying about 3.3 million claims valued at a total of approximately $17.5 billion."); *contra* Rave Amicus at 12 (wrongly claiming that, compared to mass-tort litigation, bankruptcy causes "delay[ed] payments"). More eligible claimants can recover, particularly those with injuries that are harder to prove or that have lower value. *See Unlocking the Code, supra*, at 15–16.

Bankruptcy does not foist the cost of asbestos or other injuries onto injured claimants—it helps facilitate the payment of claims while minimizing collateral consequences on the company and the courts. As Judge Agee has twice pointed out, the delay here is not a function of the bankruptcy process, but rather a result of the Committee's litigation tactics. *See* Concurrence at 23 n.2; *Bestwall*, 71 F.4th at 184 ("[T]he main interference with the timely resolution of the claims in Bestwall's bankruptcy proceeding appears to be Claimant Representatives' challenge to the preliminary injunction.").

II. THE COMMITTEE'S ARGUMENTS ARE INCONSISTENT WITH CONGRESS'S BROAD ARTICLE I POWER TO CRAFT BANKRUPTCY LAWS THAT ADDRESS NEW SITUATIONS

The panel opinion exposes the Committee's argument for what it is: an attempt to "convert a challenge to the Bankruptcy Code's constitutionality [under Article I] into a jurisdictional question." Opinion at 11. But whether Congress can "make parties eligible for bankruptcy protection" is a question "about Congress's power under Article I of the Constitution.…It's not a question of subject-matter jurisdiction." *Id.* at 13. Because the Committee's jurisdictional argument fails, this Court properly affirmed.

Beyond that, the Committee's and dissent's view of Congress's bankruptcy power is wrong. The Supreme Court has held for "nearly a

century" that Congress's broad power under the Bankruptcy Clause "is not to be limited by the English or Colonial law in force when the Constitution was adopted." Concurrence at 17. Instead, Congress's power to enact "laws on the subject of Bankruptcies" is "broad." *Siegel*, 596 U.S. at 473–74. In fact, "the defining feature of 'the subject of Bankruptcies' is its breadth." Concurrence at 18.

The dissent's historical analysis only confirms the breadth of Congress's Bankruptcy Clause power. The dissent claims that constitutional provisions must be "rooted in the historical moment" and the "legal and societal traditions that informed their drafting," Dissent at 32, but then concedes that bankruptcy was originally understood as a necessarily evolving process. The dissent admits that "[o]ver time, the English system evolved" and that "Colonial America inherited much of the English bankruptcy regime, but adapted it in various ways." *Id.* at 35–36.

The dissent further argues that one of the two "key features" characterizing English and colonial bankruptcy was that it "involved commercial actors," *id.* at 39, but it concedes that Congress almost immediately rejected that "key" feature and "progressively extended voluntary bankruptcy to non-merchants and non-traders," *id.* at 41. The dissent itself thus refutes the Committee's argument that "post-ratification legislation…never exceeded the scope of historical practice."

Petition at 18. Both history and tradition show that the Bankruptcy Clause grants Congress plenary power over "the subject of the relations between [a] debtor and his creditors," regardless of the contours of bankruptcy laws in existence at the Founding. *Siegel*, 596 U.S. at 473 (citation omitted).

III. By Constantly Rewriting Its Rule, The Committee Reveals That It Is Engaged In Blatant Policymaking, Not Legal Interpretation

The Committee and the dissent ask this Court to restrict bankruptcy, as a constitutional and jurisdictional matter, to "actually bankrupt" debtors, but "no one knows, including the dissent, what [actually bankrupt] means," and the Committee "fails to advance any concrete theory of the financial standard." Concurrence at 19. Indeed, the Committee has "use[d] constantly shifting terms" at each stage, *id.* at 19–20 (collecting examples), and it continues to waffle in its rehearing petition, *e.g.*, Petition at 19 ("*insolvent*…debtor"); 22 ("unable to pay").

In fact, the Committee now proposes an unprecedented standard: that "debtors with a *conceded* ability to pay all their debts" are not "bankrupt." Petition at 17 (emphasis added). That rule is custom-made to exclude companies that have completed a divisional merger because companies taking on mass-tort liabilities (such as Bestwall) are guaranteed funding

streams sufficient to cover the obligations established through bankruptcy—*i.e.*, the bankruptcy trust.

By constantly rewriting its rule, the Committee shows that it is not interpreting historical requirements but rather making up new ones as it goes. Under its newest rule, Old Georgia-Pacific presumably could have filed for bankruptcy (as long as it didn't concede solvency), but Bestwall cannot (because it has conceded solvency), even though both have access to the same financial resources. *See* Petition at 13 (defining Bestwall's assets in terms of Georgia-Pacific's assets). But under the rules the Committee has previously advanced, neither could file without first proving insolvency.

And while the dissent sticks with variations of the Committee's previously offered standards (such as "financially distressed" and "financial failure or nonpayment," Dissent at 39, 41), its vague standards are just as unworkable. For one, they would render unconstitutional vast swaths of the Bankruptcy Code, which generally does not require anything like insolvency. *See* Concurrence at 21.

Moreover, determining whether a profitable company faced with enormous and uncertain future mass-tort liabilities can pay its debts would be a massively complex undertaking. Assessing in every case whether the court has jurisdiction over the debtor would require complicated calculations and predictions of the debtor's ability to pay

current debts, projected income streams, expected future value, pending and future liabilities (including mass-tort liability), and so on. *See* JA1912. That approach is incompatible with the Bankruptcy Code, which prioritizes quick resolution of threshold eligibility questions. *See, e.g.*, 11 U.S.C. § 1112(b)(3) (court usually must rule on motion to dismiss within 45 days). The threshold dispute over whether the company is constitutionally "bankrupt" would spin off into its own ancillary litigation replete with extensive discovery, expert testimony, and motions practice—all merely to determine whether the court has jurisdiction before beginning the actual bankruptcy process.

At bottom, the Committee wants this Court to rewrite the Bankruptcy Code to prohibit companies filing for bankruptcy from undertaking divisional mergers. But "[w]hatever the merits of that policy viewpoint, [it] is a matter within the province of the Congress, not the judiciary." Concurrence at 22. The Constitution vests Congress with broad authority over federal bankruptcy law, so when courts must decide whether they or Congress should reassess the scope of the Bankruptcy Code on a particular issue, "the correct answer most often will be Congress." *Hernandez v. Mesa*, 589 U.S. 93, 114 (2020) (citation omitted). And Congress is the correct answer here.

CONCLUSION

This Court should deny the Committee's petition for rehearing.

Dated: September 29, 2025

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), I certify the following:

This Brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(b)(4) because it contains 2,586 words, excluding the parts of the Brief exempted by Federal Rule of Appellate Procedure 32(f).

This Brief complies with all typeface and type style requirements of Federal Rules of Appellate Procedure 32(a)(5)–(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook.

Dated: September 29, 2025

/s/ *Robert E. Dunn*
Robert E. Dunn

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of September 2025, I filed the foregoing Brief with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all registered CM/ECF users.

Dated: September 29, 2025

/s/ *Robert E. Dunn*
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