No. ___

IN THE SUPREME COURT OF THE UNITED STATES

MAR-BOW VALUE PARTNERS, LLC,

***Applicant*,**

v.

MCKINSEY RECOVERY & TRANSFORMATION SERVICES US LLC (TURNAROUND ADVISOR FOR ALPHA NATURAL RESOURCES); ALPHA NATURAL RESOURCES, INCORPORATED,

***Respondents*.**

APPLICATION FOR EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE FOURTH CIRCUIT

To the Honorable John G. Roberts, Jr., Chief Justice of the United States and Circuit Justice for the Fourth Circuit:

Pursuant to Supreme Court Rule 13.5, Applicant Mar-Bow Value Partners, LLC ("Mar-Bow") requests a 45-day extension of time, to and including January 22, 2019, within which to file a petition for a writ of certiorari in this case. Mar-Bow has not previously requested an extension.

The Fourth Circuit issued its decision on September 6, 2018. *See* Appendix A. Absent an extension of time, Applicant's petition for a writ of certiorari would be due on or before December 5, 2018. This application complies with Rules 13.5 and 30.2 because it is being filed ten days or more before the petition is due. This Court will have jurisdiction over the petition pursuant to 28 U.S.C. § 1254(1).

1. This case presents an important question as to whether the Article III federal courts may apply a judge-made prudential standing doctrine known as the "persons aggrieved" standard to preclude judicial review of orders entered by an Article I bankruptcy court when the appellant cannot demonstrate harm to a "pecuniary interest." The "persons aggrieved" test was codified in § 39(c) of the 1898 Bankruptcy Act, but that statutory provision was eliminated when Congress repealed that section in 1978. *See* 11 U.S.C. § 67(c) (repealed 1978). Nonetheless, the test is still applied by many lower courts, including the Fourth Circuit in this case.
2. Mar-Bow suffered an inherently non-pecuniary injury arising from what it alleged to be an impairment of the bankruptcy system's integrity by respondent McKinsey Recovery & Transformation Services US LLC ("McKinsey"). McKinsey was employed to assist a debtor in a bankruptcy reorganization, and Mar-Bow alleges that it failed to disclose information during bankruptcy proceedings that Bankruptcy Rule 2014

required it to disclose, including information relating to potential conflicts of interest. McKinsey thereby injured the public's interest in the fairness and integrity of the bankruptcy process.

3. The Bankruptcy Court rejected Mar-Bow's objections in part and ordered the additional disclosures it did require to be provided *in camera* without access to Mar-Bow. This aspect of the order did not comply with Bankruptcy Code requirements for keeping court records out of public view, another non-pecuniary harm to Mar-Bow. The U.S. District Court for the Eastern District of Virginia dismissed Mar-Bow's appeal of the Bankruptcy Court's ruling because it found that Mar-Bow lacked a pecuniary interest in the outcome of the appeal and therefore could not meet the "persons aggrieved" test for prudential standing in the bankruptcy context. *See* Appendix B, at 45-48. The District Court explained that "[t]he 'person aggrieved' test was originally codified in the original Bankruptcy Code, but abandoned when Congress repealed it in 1978. Courts, however, continue to use the test." *Id.* at 45 (citing *In re Clark*, 927 F.2d 793, 795 (4th Cir. 1991)). The District Court explained that "in order to have standing to appeal a bankruptcy court order, the appellant must show that the order ... diminishes [its] property, increases [its] burdens[,] or impairs [its] rights." *Id.* at 45 (citation

omitted and internal quotation marks omitted; brackets in original). The District Court found that Mar-Bow could not meet this standard "because Mar-Bow seeks nothing that would necessarily result in a pecuniary gain," *id.*, particularly after the confirmation of the debtor's reorganization plan. *Id.* at 47. The District Court concluded that Mar-Bow lacked prudential standing and dismissed its appeal.

4. In an unpublished per curiam decision dated September 6, 2018, the Fourth Circuit summarily affirmed the District Court's decision, "for the reasons stated by the district court." Appendix A, at 3.

5. The Fourth Circuit's decision presents an important question of federal law as to which this Court's review is amply warranted: whether Article III courts may continue to apply the "persons aggrieved" test as a matter of prudential standing, even after Congress' deletion of that test from the Bankruptcy Code, and even when the test would prevent Article III federal courts from reviewing orders entered by an Article I bankruptcy court. *See* S. Todd Brown, *Non-Pecuniary Interests and the Injudicious Limits of Appellate Standing in Bankruptcy*, 59 BAYLOR L. REV. 569, 571 (2007) (attempts to sustain the person aggrieved standard are "strained" and the "time to reframe bankruptcy appellate standing has arrived").

6. This Court has cast grave doubt on the viability of "prudential" doctrines that abdicate federal courts' "virtually unflagging" obligation to resolve cases within their jurisdiction. *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 77 (2013) (quoting *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821)). In *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014), this Court rejected an attempt to use "prudential standing" to preclude a Lanham Act cause of action for false advertising. This Court explained that, "[j]ust as a court cannot apply its independent policy judgment to recognize a cause of action that Congress has denied, it cannot limit a cause of action that Congress has created merely because 'prudence dictates.'" *Id.* at 128.
7. In addition, this Court has emphasized the need under the separation of powers for Article III judges to supervise Article I courts, particularly in the bankruptcy context. *See Wellness Int'l Network Ltd. v. Sharif*, 135 S. Ct. 1932, 1944 (2015); *Stern v. Marshall*, 564 U.S. 462, 484 (2011). The "persons aggrieved" standard, however, renders bankruptcy court determinations unreviewable where (as in this case) they do not have a measurable impact on an objector's pecuniary interest.
8. Moreover, the Fourth Circuit's judgment conflicts with the Third Circuit's decision in *In re Congoleum Corp*., 426 F.3d 675, 687 (3d Cir.

2005), which recognized standing where the appellant sought to preserve the integrity of the bankruptcy process and no other party was likely to appeal. The debtor in *Congoleum* was an asbestos supplier. One of the law firms representing the debtor in negotiating its plan, to be funded by insurance proceeds, also served as co-counsel with the asbestos claimants' counsel on other asbestos insurance recovery matters. *Id.* at 681. The insurers challenged the application to retain the law firm because of that conflict of interest. *Id*. at 683. The bankruptcy court granted the application, and on appeal, the debtor argued that the insurance companies lacked standing as not "aggrieved" by the retention order. The Third Circuit held that the insurers had standing, despite the lack of a direct pecuniary harm, because the appealed order "will affect the fairness of the entire bankruptcy proceeding." *Id.* at 685. The court opined that a person can be aggrieved by actions "implicat[ing] the integrity of the bankruptcy court proceeding," whether or not they can identify a monetary impact. *Id.* The Fourth Circuit's decision is irreconcilable with *Congoleum* because Mar-Bow is attempting to do the same thing as the insurers in *Congoleum* – to ensure the "fairness of the entire bankruptcy proceeding" and protect the "integrity of the bankruptcy court proceeding" by demanding that McKinsey make

adequate disclosures in the public record. The Third Circuit in *Congoleum* found standing to assert such a claim; the Fourth Circuit, in the decision below, did not.

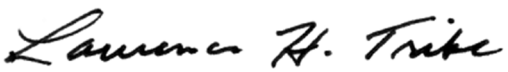
9. There are no vehicle issues. The decision below relies squarely on the "persons aggrieved" test, and that principle is settled law within the Fourth Circuit. *See In re Urban Broad. Corp*., 401 F.3d 236, 243 (4th Cir. 2005); *In re Clark*, 927 F.2d at 795. While the District Court also referred to equitable mootness in its opinion, the plan confirmation order provision held to be equitably moot was not further appealed by Mar-Bow.

10. Accordingly, Applicant requests a 45-day extension of time to file a petition for a writ of certiorari, to and including January 22, 2019. This extension is requested because Applicant's Supreme Court counsel was not counsel below, has only recently been engaged, and needs time to review the case and the record. Counsel of Record for Mar-Bow also has several other pressing professional commitments in the period surrounding the current deadline. Counsel has a brief due December 6 in a case set for argument in the U.S. District Court for the District of Maryland on December 19. In addition, Counsel has a publisher's deadline of December 7 for a new edition of a previously published book.

Further, Counsel must complete by December 13 a syllabus for a new Spring 2019 advanced constitutional law course at Harvard Law School, with the first session to be held January 30, 2019.

For the foregoing reasons, Applicant requests that the time for filing a petition for a writ of certiorari in this case be extended to and including January 22, 2019.

Respectfully submitted,



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RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Counsel for Mar-Bow Value Partners, LLC certifies that there are no owners or members of Mar-Bow that have issued shares or debt securities to the public. The sole member of Mar-Bow is Compliance Investigations, LLC.