No. ________

In The
Supreme Court of the United States

MAR-BOW VALUE PARTNERS, LLC,

Petitioner,

v.

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

Respondents.

On Petition For A Writ Of Certiorari To The Fourth Circuit Court Of Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Respondent McKinsey Recovery & Transformation Services US LLC ("McKinsey") was employed to assist debtors in a bankruptcy reorganization. Petitioner and creditor Mar-Bow Value Partners, LLC ("Mar-Bow") alleges that McKinsey failed to disclose information during bankruptcy proceedings required by Bankruptcy Rule 2014 relating to potential conflicts of interest and bias, and thereby injured the interests of parties and the public in the fairness and integrity of the bankruptcy process. The Bankruptcy Court granted Mar-Bow's objection in part and denied it in part, ordering that certain disclosures be *in camera* despite no evidence supporting sealing. The District Court dismissed Mar-Bow's appeal because it found that Mar-Bow lacked a pecuniary interest in the outcome and therefore could not meet the prudential "persons aggrieved" test for bankruptcy appellate standing. The Fourth Circuit summarily affirmed the District Court's decision "for the reasons stated by the district court."

The Question Presented is whether Article III federal courts may apply the "persons aggrieved" pecuniary-interest test (a judge-made prudential standing doctrine) to preclude judicial review of orders entered by an Article I bankruptcy court when an appellant suffers an inherently non-pecuniary injury that arises from impairment of the integrity of the bankruptcy process and inaccessibility of court records.

PARTIES TO THE PROCEEDING

The caption to the case contains the names of all parties.

RULE 29.6 STATEMENT

Mar-Bow Value Partners, LLC is a limited liability company, the sole member of which is Compliance Investigations, LLC. Mar-Bow is beneficially owned by Jay Alix. No owners or members of Mar-Bow have issued shares or debt securities to the public.

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Mar-Bow petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the Fourth Circuit is unpublished, but can be found at 736 F. App'x 412 (4th Cir. 2018), and is attached in the Petition Appendix ("App.") 1-4. The September 30, 2017 orders of the United States District Court for the Eastern District of Virginia are reported at 578 B.R. 325 (E.D. Va. 2017) and 2017 WL 4414155 (E.D. Va. Sept. 30, 2017), and set forth as App.5-128. The Bankruptcy Court order and memorandum opinion are attached as App.129-46.

JURISDICTION

The Fourth Circuit issued its decision on September 6, 2018. On November 26, 2018, the Chief Justice extended the time for filing a petition for writ of certiorari to January 22, 2019. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). The District Court and Bankruptcy Court had jurisdiction under 28 U.S.C. §§ 157, 158, and 1334, and the Fourth Circuit had jurisdiction under 28 U.S.C. § 158(d)(1).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

This case involves U.S. CONST. art. III, § 2, cl. 1; 11 U.S.C. §§ 101(14), 107, 307, 327(a), 328(c), 1109(a)-(b); 28 U.S.C. §§ 157(a), 158(a); and Federal Rule of Bankruptcy Procedure 2014. The relevant provisions of the Constitution, Bankruptcy Code, and Bankruptcy Rules are set forth in App.147-54.

STATEMENT OF THE CASE

This case presents an important question of federal law as to which this Court's review is amply warranted: whether Article III courts may apply the "persons aggrieved" pecuniary-interest test to bar an appeal of a bankruptcy court order by an appellant who suffers an inherently non-pecuniary injury arising from impairment of the integrity of the bankruptcy process. Even though (as the District Court recognized) the "persons aggrieved" test was "abandoned when Congress repealed [the 1898 Bankruptcy Act] in 1978," App.68, the Fourth Circuit applied the test to bar Mar-Bow's appeal.

The Fourth Circuit's decision warrants this Court's review because it: (1) is inconsistent with this Court's precedent, (2) deepens a circuit split and conflicts with the decisions of four circuits recognizing an exception to the "persons aggrieved" test for appeals vindicating the public interest, especially when the integrity of the judicial system is at stake, and (3) involves an important question of federal law that should be resolved by this Court.

A. Statutory Background of the "Persons Aggrieved" Test.

"The jurisdiction of the bankruptcy courts, like that of other federal courts, is grounded in, and limited by, statute." *Celotex Corp. v. Edwards*, 514 U.S. 300, 307 (1995). District courts have original jurisdiction over bankruptcy cases. 28 U.S.C. § 1334(a). They can (and do) refer bankruptcy cases to bankruptcy courts. *Id.* § 157(a). Bankruptcy judges may enter orders and judgments, "subject to review" by the district court. *Id.* §§ 157(b)(1), 158. The district courts "shall have jurisdiction to hear appeals" from final orders of bankruptcy judges. *Id.* § 158(a).

Congress provided that creditors such as Mar-Bow "may raise and may appear and be heard on any issue" in a Chapter 11 case. 11 U.S.C. § 1109(b). By its terms, § 1109(b) is not limited to pre-appellate proceedings, unlike other provisions of the Bankruptcy Code. *Id.* § 1109(a) (addressing the Securities and Exchange Commission). The United States Trustee (a unit of the Department of Justice) likewise is authorized to "appear and be heard" on any bankruptcy issue, subject to an express prohibition against filing a plan. 11 U.S.C. § 307. Because the Code does not expressly restrict U.S. Trustee appearances on appeal, its appellate standing has been recognized to present arguments in the public interest. *In re Revco D.S., Inc.*, 898 F.2d 498, 500 (6th Cir. 1990).

Nevertheless – despite the unrestricted right to appeal for creditors under § 1109(b) and 28 U.S.C. § 158(a) and despite the similarity in language governing the rights of the U.S. Trustee – the Fourth Circuit, like several other circuits, has limited bankruptcy appeals by creditors to "persons aggrieved" by the appealed orders. As the District Court noted in this case, "[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." App.68 (citing *In re Clark*, 927 F.2d 793, 795 (4th Cir. 1991)).

The "persons aggrieved" standard is stricter than Article III standing requirements. *In re C.W. Mining Co.*, 636 F.3d 1257, 1260 n.5 (10th Cir. 2011). It requires an appellant in a bankruptcy case to demonstrate that it is "directly and adversely affected *pecuniarily*" by the bankruptcy court order it is appealing. *In re Point Ctr. Fin., Inc.*, 890 F.3d 1188, 1191 (9th Cir. 2018) (emphasis added). "An order that diminishes one's property, increases one's burdens, or detrimentally affects one's rights has a direct and adverse pecuniary effect for bankruptcy standing purposes." *Id.*

The courts of appeals have acknowledged that the "persons aggrieved" test is grounded in pragmatic considerations and by its nature excludes some litigants whose injuries suffice to meet the standing requirements of Article III. Such litigants are nonetheless precluded from appellate review to further "[e]fficient judicial administration," which is professed to be good "public policy." *Point Ctr.*, 890 F.3d at 1191-92 (quoting *In re Ray*, 597 F.3d 871, 874 (7th Cir. 2010)); *Fondiller v. Robertson* (*In re Fondiller*), 707 F.2d 441, 443 (9th Cir. 1983). Courts have also stated that the doctrine "fill[s] the need for an explicit limitation on standing to appeal in bankruptcy proceedings." *Fondiller*, 707 F.2d at 443. The test is applied arbitrarily. *See In re EuroGas, Inc.*, ___ F. App'x ___, 2019 WL 103891, at *4 (10th Cir. Jan. 4, 2019) (addressing merits and declining to address persons aggrieved test even though bankruptcy appellate panel had found no appellate standing); *Nisselson v. Lernout*, 469 F.3d 143 (1st Cir. 2006) (merits may be addressed before addressing prudential standing); *Kennedy v. Allera*, 612 F.3d 261, 270 n.3 (4th Cir. 2013) ("While a court may not, of course, simply assume the existence of Article III standing, prudential standing questions may be avoided in order to decide a case on the merits." (citation omitted)).

B. Procedural History of this Case.

The Bankruptcy Code authorizes trustees and debtors-in-possession to employ professionals with court approval only when they do not hold or represent an interest adverse to the bankruptcy estate and are "disinterested." 11 U.S.C. §§ 327(a), 101(14) (defining "disinterested"). The Bankruptcy Rules adopted by this Court require professionals seeking court approval to file verified statements "setting forth all of [their] connections with the debtor, creditors, or any other party in interest, their respective attorneys and accountants" and others. Fed. R. Bankr. P. 2014(a) ("Rule 2014"). The Bankruptcy Code also provides that, subject to limited exceptions inapplicable here, papers filed in a bankruptcy case "are public records and open to examination by an entity." 11 U.S.C. § 107(a).

Alpha Natural Resources ("ANR"), a substantial coal supplier, filed for Chapter 11 bankruptcy and sought to employ McKinsey as a "turnaround advisor." App.9-10, 13-15. Without opposition, the court found McKinsey disinterested and approved the employment. App.15, 18. McKinsey's initial and two supplemental Rule 2014 disclosure declarations admitted that McKinsey had connections with 138 parties on an ANR list of 884 "interested parties" but generically described them (*e.g.*, "one Major Unsecured Noteholder"), contrary to uniform caselaw requiring that connections be named and the nature of connections described. App.17.

Months later after a thorough review, the U.S. Trustee moved to compel McKinsey to comply with Rule 2014, stating that McKinsey's disclosures "give the appearance of compliance without actually complying" with the Rule. App.20-22; 4th CA4 App.1642. Given McKinsey's role in negotiating ANR's financing and restructuring strategy, the U.S. Trustee sought to enable interested parties to consider meaningfully whether proposed reorganization plan transactions "may be tainted by divided loyalties." App.21-22. It then withdrew its motion under a stipulation with McKinsey pursuant to which McKinsey disclosed the names of 17 interested parties it had "served" within the past two years on matters it said were "unrelated to the Debtors and their chapter 11 cases." App.22.

Mar-Bow, beneficially owned by Jay Alix, founder of AlixPartners, which competes with McKinsey in turnaround consulting, filed a $1.25 million proof of claim six months after the ANR case began. App.9-10. After reviewing McKinsey's post-stipulation declaration, Mar-Bow moved to compel further disclosures, citing extensive Rule 2014 caselaw. App.23-25. It also argued that McKinsey's connections search process was inadequate because (*inter alia*) it relied on emails to only some McKinsey professionals and asked them only about their work for clients that "focused on a direct commercial relationship or transaction with the Debtors," not all "connections" as Rule 2014 requires. App.16-17 nn.15, 24. McKinsey does not maintain a database listing adverse parties on its matters, so it had no record whether, for example, its professionals provided expert testimony against ANR or advised competitors on diverting business from ANR, or whether any McKinsey affiliate was itself a creditor or equity interest holder in ANR. App.24 n.22.

Problematic McKinsey disclosures included that it "served one Major Customer of the debtors on procurement in the coal sector generally but with no *specific focus* on the Debtors or these chapter 11 cases," and no representation that its professionals working for ANR were screened from contemporaneously working for clients with interests adverse to ANR. CA4 App.318 (emphasis added). Subsequent litigation commenced by Mar-Bow asserting that McKinsey committed fraud on the Bankruptcy Court alleges that McKinsey professionals were engaged by ANR customer United States Steel during the ANR case about reducing payments to ANR. CA4 Dkt.49 at 39.

McKinsey also disclosed the existence of a pension affiliate that "primarily use[d] third-party fund managers who make investment decisions independently of" McKinsey and acknowledged that members of the pension affiliate's board were McKinsey employees and one was a McKinsey officer and director who was also a director of the pension affiliate. CA4 App.1655-56. The subsequent litigation shows that McKinsey's pension affiliate, managed by McKinsey partners, owned secured claims against ANR that resulted in a McKinsey pension fund investment owning 10% of ANR's assets under the reorganization plan McKinsey helped to confirm, to its substantial profit (along with profiting McKinsey's significant lender clients). CA4 Dkt.39 at 4-5; Dkt.40 at 16-27, 34; Dkt.49 at 24-25, 28-31.

The Bankruptcy Court granted Mar-Bow's motion in part, ordering McKinsey to comply with Rule 2014 by providing additional disclosures and holding that McKinsey is bound to the same disclosure standards as lawyers and other professionals. App.25-29; CA4 App.3183-84. The Bankruptcy Court required McKinsey to (a) name 121 acknowledged actual clients who were interested parties in the bankruptcy, with sufficient information to determine whether the connections constituted an interest adverse to the estate and whether McKinsey was disinterested; (b) identify interested parties managing investments for McKinsey's pension affiliates; (c) identify interested parties in which McKinsey's pension affiliates owned securities, specifying that, where McKinsey had no input over investment decisions of third-party managers, McKinsey was to disclose those managers listed as interested parties; and (d) provide response rates to McKinsey's email surveys and any responses showing a connection to an interested party, with sufficient information for the court to determine McKinsey's disinterestedness and whether the connections were adverse to the estate. *Id.*

The Bankruptcy Court ordered that McKinsey's additional disclosures be *in camera* with no Mar-Bow or public access. App.27-28; CA4 App.3185, 3674-75, 3701-12. The court justified its decision as designed to avoid giving a competitive advantage to any McKinsey competitor and to preserve McKinsey's business model of maintaining confidentiality of its work for clients. App.27-28. McKinsey never moved for sealing any particular connections under 11 U.S.C. § 107(b), and no sealing order was entered. The court received *no* evidence of cause for sealing any McKinsey disclosures except that AlixPartners is a McKinsey competitor. Ordinarily, disclosures by all court-appointed professionals in bankruptcy cases are publicly available to all competitors.

After the U.S. Trustee reviewed McKinsey's disclosures, it recommended that only some be filed publicly, and McKinsey complied. App.32-34. The Bankruptcy Court stated that it was satisfied with the information provided *in camera* and, based on that information, was satisfied with McKinsey's disinterestedness. App.31. McKinsey's filings omitted such disclosures as (for example) information about McKinsey's pension affiliate's substantial interest in ANR's secured lenders, which resulted in McKinsey's acquisition of substantial ANR assets under the plan. CA4 Dkt.49 at 4, 12.

Mar-Bow appealed the Bankruptcy Court's orders limiting McKinsey's disclosure obligations and directing *in camera* filing. App.65-67; CA4 App.5010. The District Court dismissed Mar-Bow's appeal on the ground 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. App.68. 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," App.69, particularly after the confirmation of the debtor's reorganization plan. App.70-71. The court rejected Mar-Bow's argument that the prudential, non-Article III limitation cannot properly bar appellate standing to preserve the integrity of the bankruptcy system and vindicate the public interest. App.67.[1]

[1] Mar-Bow objected to the order confirming ANR's plan but did not pursue that objection at the Fourth Circuit after the District Court ruled it equitably moot. App.54-65, 71; CA4 App.5011-12. Mar-Bow also objected to McKinsey's fee applications in the Bankruptcy Court, asserting the fees should be reduced as a sanction for Rule 2014 violations, but the court rejected Mar-Bow's arguments. App.111, 116-17. The District Court dismissed Mar-Bow's appeal of the fee orders – docketed and briefed separately

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." App.3.

REASONS FOR GRANTING THE WRIT

This Court's review is warranted for three reasons:

(1) The Fourth Circuit's decision conflicts with precedent of this Court casting grave doubt on the viability of "prudential" doctrines that abdicate federal courts' "virtually unflagging" obligation to resolve cases within their Article III jurisdiction, including *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014). *See also Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 77 (2013) (federal courts have "'no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given'" (quoting

– for lack of prudential standing under the pecuniary-interest test. App.120-22. It further noted its view that Mar-Bow likely lacked Article III standing as to the fee appeal alone. App.123-27. Neither the District Court nor the Fourth Circuit expressed any reservations regarding Mar-Bow's Article III standing (as a directly affected creditor in the proceeding) to pursue its objections regarding the integrity of the bankruptcy process and access to court records. While the inadequate *in camera* disclosures were finally filed on January 16, 2019 (*see* n.8, *infra*), it was long after creditors voted on and the Bankruptcy Court confirmed the plan and the Fourth Circuit mandate issued, and Mar-Bow's requested sanctioning of McKinsey's fees remains blocked on prudential standing grounds.

Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821))). Moreover, the continued application of the "persons aggrieved" test by courts after Congress' elimination of that standard implicates fundamental separation-of-powers principles: it is Congress that has constitutional authority to decide what constitutes good "public policy" in a context like this. Here, far from delegating to the judiciary the authority to apply the "persons aggrieved" test, Congress repealed the relevant statutory language in 1978. In addition, the "persons aggrieved" standard renders bankruptcy orders unreviewable in the absence of an objector's pecuniary interest, which abrogates the duty of Article III courts to supervise Article I bankruptcy judges, contrary to the decisions of this Court.

(2) The Fourth Circuit's decision deepens a circuit split on the "persons aggrieved" pecuniary-interest test and conflicts with rulings in four other circuits holding that there is an exception to the test for appeals brought by parties with Article III standing in order to vindicate the public interest, especially when the integrity of the judicial system is at stake.

(3) This case involves an important question of federal law that ought to be resolved by this Court. Full disclosure and public access to court records are critical to ensuring the integrity and transparency of the bankruptcy system.

This case is an excellent vehicle for reviewing the Question Presented. Mar-Bow alleged an injury to itself plainly sufficient to give it Article III standing, but one whose connection to an impairment of judicial system integrity made it inherently non-pecuniary in character. The Fourth Circuit, in adopting the District Court's reasoning, did not deny that the "persons aggrieved" pecuniary-interest test was "abandoned when Congress repealed [the 1898 Bankruptcy Act] in 1978." App.3-4, 68. Yet the Fourth Circuit relied solely on that judge-made test to bar Mar-Bow's appeal. The "persons aggrieved" standard thereby invoked to override Congress' repeal is settled law within the Fourth Circuit. *See In re Urban Broad. Corp.*, 401 F.3d 236, 243 (4th Cir. 2005); *Clark*, 927 F.2d at 795.

I. This Court's Review Is Warranted Because the Fourth Circuit's Decision Conflicts with this Court's Precedent.

A. This Court Has Expressed Doubt About the Continued Vitality of Prudential Standing Doctrines, Such as the "Persons Aggrieved" Test.

This Court has questioned the "continuing vitality" of doctrines that allow courts to decline to address matters on "prudential" grounds, rather than statutory or constitutional grounds. *See Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 167 (2014) (prudential ripeness); *Lexmark*, 572 U.S. at 125-26 (prudential standing); *cf. Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 194-95 (2012) (narrowly construing political question exception to rule requiring federal courts to decide cases before them).

This Court has instructed that federal courts "have 'no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.'" *Sprint*, 571 U.S. at 77 (quoting *Cohens*, 19 U.S. (6 Wheat.) at 404). Federal courts have a "'virtually unflagging' obligation to resolve cases and controversies that come before them," and prudential standing doctrines impermissibly allow courts to abdicate that obligation. *See Lexmark*, 572 U.S. at 125-26 (quoting *Sprint*, 571 U.S. at 591); *see also Zivotofsky*, 566 U.S. at 194-95 (noting that the "Judiciary has a responsibility to decide cases properly before it, even those it 'would gladly avoid'" (quoting *Cohens*, 19 U.S. (6 Wheat.) at 404)). Thus, in *Lexmark* this Court rejected an attempt to use "prudential standing" to preclude a Lanham Act cause of action for false advertising: "[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.'" 572 U.S. at 128.

This must especially be the case when Congress has repealed the statutory language creating the particular prudential limit a federal court purports to identify. This Court has instructed that the judiciary may not invoke judge-made rules to bar legal relief otherwise available under a statutory scheme, because "courts are not at liberty to jettison Congress' judgment." *Petrella v. Metro-Goldwyn-Mayer, Inc*., 572 U.S. 663, 667 (2014). Applying the "persons aggrieved" standard after Congress repealed that test in 1978 "would give judges a 'legislation-overriding' role that is beyond the Judiciary's power." *SCA Hygiene Prods. v. First Quality Baby Prods., LLC*, 137 S. Ct. 954, 960 (2017) (citation omitted).

Some circuit courts have recognized the implications of this Court's decisions for prudential standing doctrines. *See Miller v. City of Wickliffe*, 852 F.3d 497, 503 n.2 (6th Cir. 2017) (in light of this Court's "questioning of the continued vitality of the prudential-standing doctrine," courts have been "hesitant to ground [their] decision[s] in prudential-standing principles").

However, other circuit courts – including the Fourth Circuit – have failed to appreciate the significance of *Lexmark*'s holding. 15 MOORE'S FEDERAL PRACTICE § 101.50A, at 101-45 to -46 (3d ed. 2018) ("[I]t is difficult to see how the concept of prudential standing can retain viability following *Lexmark*, regardless of the apparent inability of some courts of appeals to grasp that decision's full impact."). Particularly in bankruptcy appeals, prudential standing continues to be repeatedly applied. "Nowhere is [the courts'] tendency to modify substantive rights through the prudential standing doctrine more obvious than the widespread adoption of the pecuniary interest test for bankruptcy appeals." S. Todd Brown, *The Story of Prudential Standing*, 42 HASTINGS CONST. L.Q. 95, 120 (2014). When federal courts refuse to hear bankruptcy appeals within their Article III jurisdiction, they do exactly what this Court has said they may not do – "limit a cause of action that Congress has created merely because 'prudence dictates.'" *Lexmark*, 572 U.S. at 128.

Lexmark makes clear that courts are not allowed to "fill the need for an explicit limitation on standing to appeal in bankruptcy proceedings." *Fondiller*, 707 F.2d at 443. Only Congress can do that. *Lexmark*, 572 U.S. at 128 (courts cannot ask whether "Congress *should* have authorized" a cause of action, they should ask "whether in fact Congress did so").

The Fourth Circuit's decision fails to comport with this Court's teaching. In invoking the "persons aggrieved" pecuniary-interest test, the Fourth Circuit applied caselaw asking open-endedly whether a bankruptcy appeal would be consistent with "public policy" or "efficient judicial administration." The Fourth Circuit failed to analyze what this Court has established as the relevant standard: whether the appellant falls within the "zone of interests" protected by the statute at issue (here, Bankruptcy Code and Rules). *Lexmark*, 572 U.S. at 127-28. The Fourth Circuit never applied that standard, and hence failed to recognize that the Bankruptcy Code and Rules not only protect financial interests, but also provide an untainted process for creditors, with disinterested court-approved fiduciaries fairly treating rights and claims without favoring themselves or their other clients. The purpose of Bankruptcy Code § 327 and Bankruptcy Rule 2014, at issue here, "is to assure that both the court and parties in interest receive full disclosure of all actual or potential conflicts that might affect the professional's representation of a trustee, committee or debtor in possession." *In re Wheatfield Bus. Park, LLC*, 286 B.R. 412, 419 (Bankr. C.D. Cal. 2002). That interest in transparency and disinterestedness of professionals serving the bankruptcy estate as fiduciaries is, of course, not financial. But that does not prevent it from taking particularized form affecting the concrete and individuated concerns of specific parties in bankruptcy matters.

Likewise, Bankruptcy Code § 107, also at issue here, expressly provides for a presumption of access to court records, thus protecting a non-financial interest. 11 U.S.C. § 107(a) ("[A] paper filed in a case under this title and the dockets of a bankruptcy court are public records and open to examination by an entity at reasonable times without charge."). The right to access court records is fundamental and cannot be denied simply because a case happens to be in bankruptcy court. *See Public Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 449-50 (1989) (citizens have standing to compel Justice Department to provide public documents they have sought under Freedom of Information Act, even though other persons might claim the same injury); *Leucadia, Inc. v. Applied Extrusion Techs., Inc.*, 998 F.2d 157, 167 (3d Cir. 1993) ("The Supreme Court has made it plain that all persons seeking to inspect and copy judicial records stand on an equal footing, regardless of their motive for inspecting such records."). Even news organizations (as non-party intervenors) suffering no pecuniary loss have standing to litigate denial of public access they have sought to particular judicial records.[2]

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[2] A directly affected creditor with concrete and particularized interests in a bankruptcy proceeding is wholly unlike a citizen

Article III standing analyses and the zone of interests test are up to the task of dealing with any speculative concerns about a hypothetical flood of appeals from people spending money to appeal bankruptcy court orders that affect them only indirectly or at best marginally. *See Lexmark*, 572 U.S. at 131-32. In other contexts where extensive litigation is possible, such as administrative agency decisions, the Court has refused to limit appeals to parties who have suffered an economic injury. *See, e.g.*, *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181-83 (2000) (plaintiff who uses an area affected by pollution and is a person "for whom the aesthetic and recreational values of the area will be lessened" has standing (quoting *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972)); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 571-72 & n.7 (1992) (plaintiff would have had standing for "procedural injury" if he had challenged the failure of EPA to prepare environmental impact statement); *Public Citizen*, 491 U.S. at 449-50 (citizens have standing to compel production of public records under the Freedom of Information Act). Indeed, the Administrative Procedure Act at issue in *Lexmark* includes language similar to the pre-1978 Bankruptcy Act "persons aggrieved" standard. *See* 5 U.S.C. § 702 ("A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."). Yet this Court held that such language

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with a "general grievance" in cases such as *United States v. Richardson*, 418 U.S. 166 (1974).

did not limit "persons aggrieved" status to those suffering economic harm. *Sierra Club*, 405 U.S. at 734, 738 (explaining that "[t]he trend of cases arising under the APA and other statutes authorizing judicial review of federal agency action has been toward recognizing that injuries other than economic harm are sufficient to bring a person within the meaning of the statutory language" and holding that allegations that the Department of the Interior's actions would adversely affect aesthetic and environmental well-being were sufficient to demonstrate standing, so long as the party seeking review was "among the injured").

Appellate standing is particularly appropriate when the integrity of the court and the fairness of a court proceeding are at stake. *See, e.g.*, *Powers v. Ohio*, 499 U.S. 400, 411-12 (1991) (criminal defendant has standing to raise constitutional rights of jurors struck on the basis of race because "racial discrimination in the selection of jurors 'casts doubt on the integrity of the judicial process' and places the fairness of a criminal proceeding in doubt" (quoting *Rose v. Mitchell*, 443 U.S. 545, 556 (1979))); *In re Cendant Corp. PRIDES Litig.*, 243 F.3d 722, 731 (3d Cir. 2001) (applying *Powers* in a class action case and holding that "the integrity and fairness of class settlements is threatened by excessive attorneys' fee awards such that class plaintiffs have standing to challenge excessive fee awards, even when they have received dollar-for-dollar recovery in the class settlement"). And standing is especially important to recognize when a party questioning the integrity of the court is likely to be the only one to do it.

See Powers, 499 U.S. at 414 (noting that excluded potential jurors were unlikely to assert their own rights, so defendant had standing to assert them).

It is irrelevant to the standing analysis that it may never be known whether the outcome would have been different, or even whether McKinsey had an actual conflict of interest. The damage to the court's integrity results from the lack of disclosure of connections that may constitute conflicting interests, and lack of public access to court filings on which opinions are rendered. *See Lujan*, 504 U.S. at 571-72 & n.7 (plaintiff would have had standing to challenge failure to prepare environmental impact statement "even though he cannot establish with any certainty that the statement will cause the license to be withheld or altered").[3]

[3] Cases like *Carey v. Piphus*, 435 U.S. 247 (1978) (plaintiff asserting procedural due process claim under 42 U.S.C. § 1983 must prove actual injury in order to recover compensatory damages), are not to the contrary. Such cases involve the proof requirements for compensatory damages under Section 1983, not prudential standing. In fact, *Carey* specifically reaffirmed the principle that "[i]t is enough to invoke the procedural safeguards of the Fourteenth Amendment that a significant property interest is at stake, whatever the ultimate outcome of a hearing." *Id.* at 266 (internal quotation marks and citation omitted). The Court opined that "the right to procedural due process is 'absolute' in the sense that it does not depend upon the merits of a claimant's substantive assertions," and noted "the importance to organized society that procedural due process be observed." *Id.* The Court concluded "we believe that the denial of procedural due process should be actionable for nominal damages without proof of actual injury." *Id.*

Commentators have concluded that courts' attempts to sustain the persons aggrieved standard are "strained" and the "time to reframe bankruptcy appellate standing has arrived." S. Todd Brown, *Non-Pecuniary Interests and the Injudicious Limits of Appellate Standing in Bankruptcy*, 59 BAYLOR L. REV. 569, 571 (2007). The Court should grant review to ensure that bankruptcy appeals are treated in accordance with this Court's decision in *Lexmark*, and that parties to bankruptcy cases are not improperly denied their statutory right to appeal. *See* Brown, *supra*, 42 HASTINGS CONST. L.Q. at 101 (noting parallels between *Lexmark* and bankruptcy appeals and stating that prudential standing doctrine has indefensibly captured "certain specialized tests, such as those developed in connection with Lanham Act false advertising cases and bankruptcy appeals" (footnotes omitted)).

B. The "Persons Aggrieved" Standard Makes Bankruptcy Orders Unreviewable Absent a Pecuniary Interest, Which Abrogates the Duty of Article III Courts to Supervise Article I Bankruptcy Judges.

The Fourth Circuit's decision is inconsistent with this Court's precedent in another respect: it fails to recognize that Article III courts must have jurisdiction to review the decisions of Article I tribunals, even when (as here) those decisions do not have a measurable financial impact on an objector's pecuniary interest. "Article III is 'an inseparable element of the constitutional system of checks and balances' that 'both defines the power and protects the independence of the Judicial Branch.'" *Stern v. Marshall*, 564 U.S. 462, 482-83 (2011) (quoting *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 58 (1982)). This Court has jealously guarded the "'institutional integrity of the Judicial Branch.'" *Wellness Int'l Network Ltd. v. Sharif*, 135 S. Ct. 1932, 1944 (2015) (quoting *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 851 (1986)). "[I]t is the obligation of the Judiciary not only to confine itself to its proper role, but to ensure that the other branches do so as well." *City of Arlington v. F.C.C.*, 569 U.S. 290, 327 (2013) (Roberts, C.J., dissenting).

The separation of powers compels that Article I bankruptcy judges be supervised by Article III judges. *See Wellness*, 135 S. Ct. at 1944 (holding that "allowing Article I adjudicators to decide claims submitted to them by consent does not offend the separation of powers," but only "so long as Article III courts retain supervisory authority over the process"); *Stern*, 564 U.S. at 484 (holding that when a suit "is brought within the bounds of federal jurisdiction, the responsibility for deciding that suit rests with Article III judges in Article III courts"). The rule requiring Article III oversight of Article I judges is not unique to bankruptcy. It has been applied in a variety of other contexts. *See Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 593 (1985) (agency adjudications); *Schor*, 478 U.S. at 593 (agency adjudications); *United States v. Raddatz*, 447 U.S. 667 (1980) (decisions of magistrate judges).

The prudential standing doctrine "threatens a far greater impermissibl[e] intru[sion] on the province of the judiciary . . . than the Court confronted in *Northern Pipeline*, *Stern*, or *Wellness International*." *In re One2One Commc'ns, LLC*, 805 F.3d 428 (2d Cir. 2015) (Krause, J., concurring) (discussing bankruptcy appellate doctrine of equitable mootness) (internal citation and quotation marks omitted). It also undermines public confidence in the independence and uniformity of the federal judicial process, which in turn threatens the success of the bankruptcy system. *See* Brown, *supra*, 59 BAYLOR L. REV. at 586, 617 (noting that "as bankruptcy continues to expand into more aspects of our personal and professional lives, the supervision of less specialized Article III judges becomes even more critical").

This case demonstrates just how far the prudential appellate standing doctrine goes in undermining Article III. The Bankruptcy Court reviewed McKinsey's disclosures of professional connections required by Bankruptcy Rule 2014 *in camera* and decided McKinsey had no conflicts and was qualified based on those secret documents. Then the District Court and the Fourth Circuit refused to review that decision even though no evidence to support sealing the court files was ever provided. 11 U.S.C. § 107. Deeming unreviewable an Article I judge's decision based on secret documents cannot be squared with basic constitutional principles. The very idea of "secret law" is anathema to the rule of law.

The lack of review also has an adverse effect on the substantive development of bankruptcy law. The number of bankruptcy appeals is miniscule compared to traditional litigation. *See* McKenzie, *supra* at 783 ("[A]lmost no bankruptcy litigation goes farther than the bankruptcy court, and only the rare case will make it all the way to decision in a court of appeals."). In 2005, Congress enacted 28 U.S.C. § 158(d)(2), which allows for certification of bankruptcy appeals directly to the court of appeals, in part "to generate binding appellate precedent in bankruptcy, whose caselaw has been plagued by indeterminacy." *In re Pac. Lumber Co.*, 584 F.3d 229, 241 (5th Cir. 2009) (citing H.R. REP. NO. 109–31, pt. I, at 148 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 88, 206). When appellate review is denied, it "not only tends to insulate errors by bankruptcy judges or district courts, but also stunts the development of uniformity in the law of bankruptcy." *One2One*, 805 F.3d at 447 (Krause, J., concurring) (discussing equitable mootness). Appellate courts that refuse to hear bankruptcy appeals on the basis of judge-made prudential doctrines frustrate Congress' intent to *increase* bankruptcy appeals – dramatically so when Congress in 1978 eliminated the "persons aggrieved" test invoked by the Fourth Circuit in this case.

II. This Court's Review Is Warranted Because the Fourth Circuit's Decision Deepens a Circuit Conflict Regarding the "Persons Aggrieved" Test.

The Fourth Circuit's ruling deepens a circuit split over the "persons aggrieved" pecuniary-interest test and conflicts with decisions in four other circuits holding that there is an exception to the test for appeals brought to vindicate the public interest, especially when the integrity of the judicial system is at stake.

A. The Fourth and Seventh Circuits Have Held and the Fifth Has Implied that the Pecuniary-Interest Test Is the Only Test to Determine Bankruptcy Appellate Standing.

The Fourth Circuit affirmed the dismissal of Mar-Bow's appeals for lack of appellate standing *solely* because Mar-Bow did not demonstrate a pecuniary injury. That decision is consistent with rulings in the Seventh and Fifth Circuits.

The Seventh Circuit likewise refused to acknowledge any exceptions to the pecuniary injury test. *See In re Cult Awareness Inc.*, 151 F.3d 605, 609 (7th Cir. 1998) ("Making exceptions would complicate the process unnecessarily."). The Seventh Circuit therefore refused to consider a debtor's argument that a Chapter 7 trustee's sale of the debtor's trademark violated the Lanham Act, stating that

> [i]f we except the Cult Awareness Network from the pecuniary interest rule, it is unforeseeable how many other exceptions would have to be made for *other debtors with substantial but nonpecuniary interests*. We see no logical reason to make an exception for a debtor with a Lanham Act interest and not a debtor with an antitrust concern, or an

> environmental concern, *or* ***any one*** *of countless other important but nonpecuniary concerns*.

Id. at 609 (emphasis added).

Similarly, the Fifth Circuit denied bankruptcy standing to an appellant alleging that an attorney had a conflict of interest because the appellant was not pecuniarily affected by the order appointing counsel. *In re Technicool Sys., Inc.*, 896 F.3d 382, 386 (5th Cir. 2018). The court of appeals held that the creditor could not show that the appointment would "burden his pocket," even though he alleged that the appointed counsel suffered from a conflict of interest, and therefore could not meet the "persons aggrieved" test. *Id.*

The Fourth Circuit's decision in this case is thus consistent with precedent in the Seventh and Fifth Circuits.

B. Four Circuits Have Held that There Is an Exception for Appeals Brought by Parties with Article III Standing in Order to Vindicate the Public Interest, Especially When the Integrity of the Judicial System Is at Stake.

Four other circuits (the Second, Third, Sixth, and Eleventh) have held that the pecuniary-interest test "'is not the only test.'" *In re Zarnel*, 619 F.3d 156, 162 (2d Cir. 2010) (quoting *In re Revco D.S., Inc.*, 898 F.2d 498, 499 (6th Cir. 1990)). They hold that, even absent a pecuniary interest, "a *public* interest may also give a sufficient stake in the outcome of a bankruptcy case to confer appellate standing," especially when the integrity of the court is at stake. *Revco*, 898 F.2d at 499 (citing *S.E.C. v. U.S. Realty & Improvement Co.*, 310 U.S. 434, 460 (1940)); *see also In re Colony Hill Assocs.*, 111 F.3d 269, 274 (2d Cir. 1997) (finding standing when appellant questioned "intrinsic fairness" of bankruptcy proceeding); *In re Ernie Haire Ford, Inc.*, 764 F.3d 1321, 1327 n.4 (11th Cir. 2014) (citing *Colony Hill* and noting that appellant may establish standing if it "attempts to defend an interest that is protected by the Bankruptcy Code").

The circuit split is most clearly demonstrated by a Third Circuit case that (like this case) involved employment of bankruptcy estate professionals, *In re Congoleum Corp.*, 426 F.3d 675, 687 (3d Cir. 2005). In *Congoleum*, the Third Circuit recognized standing by an appellant seeking to preserve the integrity of the bankruptcy process, especially when no other party was likely to appeal. The debtor 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, and despite the insurers' motivation to obstruct the bankruptcy, because the appealed order "will affect the fairness of the entire bankruptcy proceeding." *Id.* at 684-85. The court opined that a person can be aggrieved by actions "implicat[ing] the integrity of the bankruptcy court proceeding," whether or not monetarily impacted, because the retention of professionals "will affect the resolution of issues that may directly affect the rights of insurers and fairness to [ ] claimants." *Id.* The court also noted that the insurers' lawyers, who had no *pecuniary* interest in the retention of other professionals, had standing to challenge the bankruptcy court's retention decision. *Id.* at 687; *see also In re Global Indus. Techs.*, 645 F.3d 201, 214 (3d Cir. 2011) (addressing only standing in the bankruptcy court, but noting that under *Congoleum*, bankruptcy appellate standing would be established when "the integrity of the bankruptcy proceeding is called into question" by nonfrivolous allegations "that [the Debtor] sold out Hartford, Century, and similarly-situated insurers by setting up a system in which they would pay for newly ginned-up silica claims in exchange for the asbestos claimants casting their votes in favor of the" Debtor's plan and "no one else ha[d] an incentive to pursue" the charge).

The decision below conflicts with *Congoleum* because Mar-Bow, as a party directly impacted albeit not financially, is attempting to do the same thing as the insurers in *Congoleum* – ensure the "fairness of the entire bankruptcy proceeding" and protect the "integrity of the bankruptcy court proceeding" by demanding that McKinsey make adequate disclosures and that the Bankruptcy Court be forced to place the *in camera* documents into the public record. The Third Circuit in *Congoleum* found standing to assert such a claim; the Fourth Circuit, in the decision below, did not.

Like the Third Circuit in *Congoleum*, other circuit courts have recognized (in various contexts) an exception to the persons aggrieved standard for affected parties whose appeal serves to protect the public interest, even though they did not suffer a pecuniary injury. For example, in *Colony Hill*, 111 F.3d at 274, the Second Circuit held that an unsuccessful bidder at a bankruptcy auction was a person aggrieved, even though his only potential pecuniary loss was the speculative profit he might have made if successful in purchasing at an auction, because he called into question the "intrinsic fairness" of the sale hearing. *See also Ernie Haire*, 764 F.3d at 1327 n.4 (citing *Colony Hill* and noting that an appellant may establish standing if it "attempts to defend an interest that is protected by the Bankruptcy Code"); *In re Moran*, 566 F.3d 676, 682 (6th Cir. 2009) (stating rule established in *Colony Hill*); *In re Gucci*, 126 F.3d 380, 389 (2d Cir. 1997) (following *Colony Hill* and holding that standing was established where "[t]he allegation that the Gucci companies acted in bad faith by usurping Design Studio's assets in the bankruptcy estate implicates the intrinsic fairness of the sale"); *In re Beck Indus., Inc.*, 605 F.2d 624, 634 n.13 (2d Cir. 1979) (presaging *Lexmark* and noting that when an unsuccessful bidder attacks a sale "'on equitable grounds relating to the intrinsic structure of the sale'" it has standing because it brings itself "'within the zone of interests which the Bankruptcy Act seeks to protect and to regulate'" (quoting *In re Harwald Co.*, 497 F.2d 443, 444-45 (7th Cir. 1974)).

In *In re DBSD North America, Inc.*, 634 F.3d 79 (2d Cir. 2011), the Second Circuit held that a creditor had appellate standing to challenge a bankruptcy court order even though it would never receive any money from the bankruptcy estate. The court said "none of [its] prior appellate standing decisions – at least none involving creditors – have turned on estimations of valuations, or on whether a creditor was in the money or out of the money. We have never demanded more to accord a creditor standing than that it has a valid and impaired claim." *Id.* at 90. The court refused to deny out-of-the-money creditors the right to appeal because "[s]uch a rule would bar a large percentage of creditors in bankruptcy court, perhaps a majority of them, from ever reaching the district court or this Court, however erroneous the orders of the bankruptcy court might be." *Id.* at 91. The court also opined that the fact that some other creditors might be able to appeal was not a basis to reject standing by the appealing creditor. *Id.* Although finding a lack of standing might have benefited the court's docket, the court refused to "raise the standing bar so high, especially when it was a bar of [the court's] own creation and not one required by the language of the Code" because it would "disserve the protection of the parties' rights and the development of the law." *Id.*

Protecting the public interest and ensuring the integrity of the bankruptcy system (*i.e.*, its "intrinsic fairness") is exactly what Mar-Bow is doing as a creditor, directly affected as such in this case.[4] Thus, the circuit split is clear. In the Second, Third, Sixth, and Eleventh Circuits, Mar-Bow would have had standing to pursue its appeal of the Bankruptcy Court order. But the Fourth Circuit – like the Seventh Circuit and apparently the Fifth Circuit – does not recognize any "public interest" or "intrinsic fairness" exceptions to the "persons aggrieved" standard.

III. This Court's Review Is Warranted Because This Case Involves an Important Issue of Federal Law That Should Be Resolved by This Court.

This Court should ensure that prudential standing rules do not preclude federal courts from hearing otherwise proper appeals implicating the institutional integrity of the bankruptcy system.

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[4] McKinsey has demeaned Mar-Bow as acting for competitive advantage, but as this Court held in another bankruptcy case where the petitioner sought relief benefiting all stockholders, relief should not be denied on "allegations that [petitioner's] motive in bringing the proceeding is an unworthy one." *Young v. Higbee Co.*, 324 U.S. 204, 218 (1945). Moreover, it is passing strange to see a party denied standing for lack of a selfish pecuniary stake in the matter being criticized for seeking an edge over competitors.

A. Bankruptcy Professionals Are Fiduciaries Held to the Highest Standard of Loyalty and Disinterestedness, Which Requires Full Disclosure of Potential Conflicts.

The Question Presented implicates fundamental bankruptcy principles. All professionals employed under § 327(a) "are hired to serve the administrator of the estate for the benefit of the estate." *Baker Botts L.L.P. v. ASARCO LLC*, 135 S. Ct. 2158, 2164 (2015). Their compensation from estate assets "'necessarily implies loyal and disinterested service in the interest of' a client." *Id.* at 2165 (quoting *Woods v. City Nat'l Bank & Trust Co. of Chicago*, 312 U.S. 262, 268 (1941)); *Wolf v. Weinstein*, 372 U.S. 633, 641-43 (1963) (historic maxim of equity that bankruptcy fiduciary "may not receive compensation for services tainted by disloyalty or conflict of interest"; fiduciary "trading in the Debtor's stock [is] particularly pernicious"); *Brown v. Gerdes*, 321 U.S. 178, 182 (1944) ("In all cases persons who seek compensation for services or reimbursement for expenses are held to fiduciary standards.").

Fiduciary obligations of bankruptcy professionals impose a standard of conduct "'at a level higher than that trodden by the crowd.'" *Woods*, 312 U.S. at 269 (quoting *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928)); *see also Meinhard*, 164 N.E. at 546 ("Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior."). Fiduciary duties must be rigorously enforced, even when no pecuniary harm is shown, because what is at stake "'is not only actual evil results but their tendency to evil in other cases.'" *Woods*, 312 U.S. at 268 (quoting *Weil v. Neary*, 278 U.S. 160, 173 (1929)); *see also Mosser v. Darrow*, 341 U.S. 267, 273 (1951) (noting that it "is often difficult to trace [the effect of transactions that violate trustee's fiduciary duties], and the prohibition is not merely against injuring the estate – it is against profiting out of the position of the trust"). Fiduciaries of a bankruptcy estate are prohibited from holding an interest adverse to the estate "not because such interests are always corrupt but because they are always corrupting." *Mosser*, 341 U.S. at 271.

Bankruptcy professionals accordingly have obligations of "full, unequivocal disclosure . . . not dependent on express statutory provisions" before a plan is confirmed or the professional is paid. *Am. United Mut. Life Ins. Co. v. City of Avon Park*, 311 U.S. 138, 146-47 (1940); *id.* at 142-43 (bankruptcy debtor's fiscal agent should have disclosed that it was also a creditor, "the extent of claims held by it and its affiliate, the circumstances surrounding their acquisition, and its intent to vote those claims in favor of the plan" to other creditors voting on the plan); *Weil*, 278 U.S. at 167-68, 171-74 (discussing failure by attorney to disclose facts demonstrating conflict of interest to the court and holding secret fee agreement void as against public policy). This Court has "emphasized that full disclosure [by a bankruptcy fiduciary] is the minimum requirement in order not to imply that it is the limit of the power and duty of the bankruptcy court in these situations." *Am. United*, 311 U.S. at 145.

The Bankruptcy Code provides that trustees and debtors-in-possession may employ professionals only if they "do not hold or represent an interest adverse to the estate, and . . . are disinterested persons." 11 U.S.C. § 327(a). The court may deny all compensation to professionals violating that requirement. 11 U.S.C. § 328(c). "The Code reflects Congress' concern that any person who might possess or assert an interest or have a predisposition that would reduce the value of the estate or delay its administration ought not have a professional relationship with the estate." *United States v. Gellene*, 182 F.3d 578, 588 (7th Cir. 1999).

Rule 2014 mandates comprehensive and timely disclosure obligations enabling courts and parties to evaluate professionals' disinterestedness. *See In re Jade Mgmt. Servs.*, 386 F. App'x 145, 150 (3d Cir. 2010) (Rule 2014 "effectuates § 327(a)'s disinterestedness requirement"). The Rule requires a professional to disclose "*all* of the person's connections with" parties in interest. Fed. R. Bankr. P. 2014 (emphasis added); *In re Citation Corp.*, 493 F.3d 1313, 1322 (11th Cir. 2007) (professional must "disclose all of its previous contacts with any party in interest").

Moreover, the right of public access to such disclosures, on the basis of which the bankruptcy court approves professional employment, is codified in a specific Bankruptcy Code provision, 11 U.S.C. § 107. The interest in public access "'is of special importance in the bankruptcy arena, as unrestricted access to judicial records fosters confidence among creditors regarding the fairness of the bankruptcy system.'" *In re Gitto*

Global Corp., 422 F.3d 1, 7 (1st Cir. 2005) (quoting *In re Crawford*, 194 F.3d 954, 960 (9th Cir. 1999)). The statute is "rooted in the right of public access to judicial proceedings, a principle long-recognized in the common law and buttressed by the First Amendment." *Gitto Global*, 422 F.3d at 7 (quoting *Crawford*, 194 F.3d at 960). The limited disclosures by McKinsey were bad enough, but the Bankruptcy Court's review of the disclosures *in camera*, preventing creditor and public review, made things even worse. The oxymoron of keeping professionals' "disclosures" secret from creditors and the public, authorized by the Bankruptcy Court below without any evidence to support sealing under Section 107, is bound to undermine public confidence in the fairness of the bankruptcy system.

The Question Presented thus implicates fundamental bankruptcy interests. The prohibition on adverse interests, the requirement of "disinterestedness" and Rule 2014 public disclosure requirements go to "the heart of the integrity of the administration of the bankruptcy estate." *Gellene*, 182 F.3d at 588. And because the integrity of the court is at stake as well, the law itself and public confidence in the law are at stake, too. As Justice Frankfurter observed, "[t]o a wide and deep extent, the law depends upon the disciplined standards of the profession and belief in the integrity of the courts." *Schware v. Bd. of Bar Exam'rs*, 353 U.S. 232, 249 (1957) (Frankfurter, J., concurring).

B. This Case Underscores the Importance of the Question Presented.

This case is a perfect illustration of the significance of the Question Presented. The Bankruptcy Court erroneously discounted fiduciary obligations McKinsey owed to the bankruptcy estate and allowed McKinsey to keep its conflicts of interest secret. McKinsey obtained over 10% of ANR's assets, and McKinsey's clients obtained the bulk of the rest under the ANR plan, but creditors voting on the plan did not know about McKinsey's interests and conflicts.

In a related proceeding in this very case, the U.S. Trustee recently asked the Bankruptcy Court to claw back bankruptcy fees paid to McKinsey. The U.S. Trustee stated in its filing that McKinsey's disclosures regarding ANR remain incomplete and undermine "public confidence in the bankruptcy system."[5] The Bankruptcy Court ordered the case reopened, noting that McKinsey did not disclose *in camera* its pension fund investment in creditor claims that resulted in McKinsey's acquisition of a significant share of the Debtor's reorganization value.[6] It ordered briefing on whether the Fourth Circuit's order denying Mar-Bow standing precluded the Bankruptcy Court from hearing Mar-Bow's fraud-on-the-court claims.[7] And the Bankruptcy Court ordered that the *in camera* filings,

[5] *Alpha Natural Resources*, U.S. Bankr. E.D. Va. No. 15-33896, Dkt.4164 at 10.

[6] *Id.* Dkt.4182 (transcript of January 9, 2019 hearing) at 24-25, 32; Dkt.4194 (reopening order).

[7] *Id.* Dkt.4182 at 32.

showing no disclosure of McKinsey interests in the Debtor or in creditors' claims resulting in McKinsey's acquisition of property under the plan, be publicly filed.[8]

In another bankruptcy proceeding involving Westmoreland Coal Co., the U.S. Trustee asked that bankruptcy court to withhold payment to McKinsey because its disclosures were inadequate: "McKinsey RTS does not even try to address its pervasive disclosure deficiencies that cover about one-fifth of its annual revenues. . . . No other professional would be allowed to do this."[9] The bankruptcy judge in *Westmoreland Coal*, who took the unusual step of ordering McKinsey officials (as well as lawyers) to attend the hearing, expressed concern about the firm's disclosure practices: "I don't like being . . . misled, and transparency and honesty are things I believe in."[10] These criticisms

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[8] *Id.* Dkt.4193 (transcript of January 15, 2019 hearing) at 30; Dkt.4195 (*in camera* disclosures).

[9] *Westmoreland Coal Company*, U.S. Bankr. S.D. Tex. No. 18-35672, Dkt.785 at 6, 14.

[10] *Id.* Dkt.868 (transcript of December 18, 2018 hearing) at 143. It is not sufficient, however, for courts to rely on governmental agencies like the U.S. Trustee to adequately police bankruptcy cases. *See In re Busy Beaver Bldg. Ctrs., Inc.*, 19 F.3d 833, 842-43 (3d Cir. 1994) (noting that bankruptcy courts may not always be able to rely on the U.S. Trustee to review fee applications "with sufficient uniformity and zeal" because of insufficient resources or competing demands, and that debtors and creditors, who want a plan confirmed, likely lack an incentive to challenge orders pertaining to professionals); *McGuirl v. White*, 86 F.3d 1232, 1236 (D.C. Cir. 1996) ("Although Congress has given the United States Trustee authority to monitor applications for compensation and reimbursement, the Trustee is not obligated to do so, and perhaps

followed a Wall Street Journal investigation revealing a pattern of inadequate disclosures by McKinsey in bankruptcy proceedings.[11]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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because of insufficient resources, the Trustee's system of review is generally inadequate." (citation omitted)).

[11] "McKinsey Is Big in Bankruptcy – and Highly Secretive; Huge consulting firm has drawn criticism for routinely making far fewer disclosures of potential conflicts of interest than other advisers," Wall St. J., April 27, 2018, *available at* https://www.wsj.com/articles/mckinsey-is-big-in-bankruptcyand-highly-secretive-1524847720.