No. 22-1079

In the Supreme Court of the United States

TRUCK INSURANCE EXCHANGE,
Petitioner,

v.

KAISER GYPSUM COMPANY, INC., ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR *AMICI CURIAE* PROFESSORS ANTHONY J. CASEY, LAURA COORDES, DIANE LOURDES DICK, JARED ELLIAS, BROOK E. GOTBERG, JOSHUA C. MACEY, SAMIR D. PARIKH, AND ROBERT K. RASMUSSEN IN SUPPORT OF PETITIONER

ANDREW BASTNAGEL
HILGERS GRABEN PLLC
601 Pennsylvania Ave. N.W.,
South Building, Suite 900
Washington, DC 20004
(202) 985-4735
abastnagel@hilgersgraben.com

CAROLINE C. LINDSAY
Counsel of Record
ALYSSA HELFER
HILGERS GRABEN PLLC
332 S. Michigan Ave.,
Suite 121 #5612
Chicago, IL 60604
(402) 313-3480
clindsay@hilgersgraben.com
ahelfer@hilgersgraben.com

Counsel for Amici Curiae

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INTEREST OF *AMICI CURIAE*[1]

The amici curiae are nationally recognized professors of law (collectively, the "Law Professors") who teach courses and seminars in bankruptcy law and reorganization, corporate governance, and business law. Anthony J. Casey is the Deputy Dean, Donald M. Ephraim Professor of Law and Economics, and Faculty Director of the Center on Law and Finance at the University of Chicago Law School. Laura Coordes is a Professor of Law at Arizona State University Sandra Day O'Connor College of Law. Diane Lourdes Dick is a Professor of Law at Iowa College of Law. Jared Ellias is a Professor of Law at Harvard Law School. Brook E. Gotberg is the Francis R. Kirkham Professor of Law at Brigham Young University J. Reuben Clark Law School. Joshua C. Macey is an Assistant Professor at the University of Chicago Law School. Samir D. Parikh is a Professor of Law at Lewis & Clark Law School. Robert K. Rasmussen is the J. Thomas McCarthy Trustee Chair in Law and Political Science at the University of Southern California Gould School of Law.

The Law Professors have published numerous articles and treatises that focus on the text, structure, legislative history, and policy objectives of title 11 of the United States Code (the "Bankruptcy Code") and the practical economic implications of the bankruptcy system. Accordingly, the Law Professors have a strong

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[1] No counsel for any party authored this brief in whole or in part, and no person or entity other than *amici* or their counsel made any monetary contribution intended to fund the preparation or submission of this brief. All parties received timely notice of *amici*'s intent to file this brief as required by Rule 37.

interest in the correct interpretation of the Bankruptcy Code and the effective implementation of the public policies bankruptcy law is designed to promote.

SUMMARY OF ARGUMENT

In 11 U.S.C. § 1109(b), Congress granted broad access to bankruptcy proceedings, providing that all "part[ies] in interest" may be heard "on any issue." This language guarantees the widespread participation necessary to ensure that Chapter 11 proceedings facilitate fair, efficient, and global resolutions to multiparty disputes involving financially distressed firms. But in the decision below, the Fourth Circuit disregarded the plain text of this provision in favor of the judge-made "neutrality doctrine," holding that a debtor's insurer is not a "party in interest" under § 1109(b) when the reorganization plan is "insurance neutral." Pet. App. 24a.

By elevating prudential considerations over the statutory text, the Fourth Circuit joined the Ninth and Seventh in holding that a party must establish something more than Article III standing to qualify as a "party in interest" under § 1109(b). This decision deepened a circuit split with the Third Circuit, which holds that § 1109(b) and Article III are coextensive.

To the extent prudential doctrines have a role to play in Chapter 11 proceedings, it must be consistent with both the text and purpose of the Bankruptcy Code. The Fourth Circuit's reliance on the "insurance neutrality" doctrine here is neither. It plainly contradicts the text and history of § 1109(b), which make clear that Congress intended to *expand* access to bankruptcy proceedings, not erect obstacles for parties with substantial financial stakes in a dispute's resolution.

And by excluding interested parties and opening the door for collusion against them, the Fourth Circuit's decision frustrates a core purpose of the Bankruptcy Code: to facilitate the fair and global resolution of these disputes.

In addition to impacting the essential function of Chapter 11, the question presented also has substantial implications for the growing number of bankruptcy proceedings arising in the mass tort context. Bankruptcy provides a valuable and desirable venue for the resolution of such disputes, ensuring equitable recovery for all tort claimants and preventing many of the inefficiencies that otherwise result from races to the courthouse. Because such bankruptcies will almost always implicate interested liability insurers, their right to be heard has never been more important.

This Court should grant certiorari on this important question and resolve the circuit split in accordance with the text, history, and purpose of § 1109(b). Doing so will not only restore uniformity to bankruptcy proceedings—an essential feature of the Code—but also ensure the widespread participation necessary for fair, efficient, and global resolutions of these disputes.

ARGUMENT

I. This Court's Intervention Is Necessary to Resolve an Entrenched Circuit Split and Restore Uniformity to Bankruptcy Proceedings.

As the decision below recognizes, there is a clear circuit split regarding the scope of § 1109(b). See Pet. App. 25a n.10. The Third Circuit has held that § 1109(b) and Article III are coextensive, while the

Ninth, Seventh, and now Fourth Circuits have interpreted the statute to permit the consideration of additional prudential doctrines in determining "bankruptcy standing." Because uniformity is a cornerstone of bankruptcy law, it is critical that this Court grant certiorari to resolve the circuit split.

In *In re Global Industrial Technologies, Inc.*, 645 F.3d 201 (3d Cir. 2011), the Third Circuit addressed whether a debtor's insurers were "parties in interest" under § 1109(b) entitled to challenge the reorganization plan based on allegations of collusion between the debtor and its creditors. In holding that the insurers had the right to be heard, the court interpreted § 1109(b) "to create a broad right of participation in Chapter 11 cases," concluding that a "party in interest" is anyone with Article III standing. *Id.* at 211. To hold otherwise, the court explained, would render § 1109(b) "an additional obstacle to bankruptcy standing," frustrating the provision's purpose to confer broad access to and encourage "greater participation in reorganization cases." *Id.* (citation omitted).

The Ninth Circuit has expressly rejected this interpretation of § 1109(b). See *In re Tower Park Props., LLC*, 803 F.3d 450 (9th Cir. 2015). In concluding that the beneficiary of a creditor trust was not a "party in interest" entitled to challenge a reorganization plan approved by the trust, the Ninth Circuit held that § 1109(b) and Article III are *not* coextensive. *Id.* at 457 & n.6. Rather, in an effort to "give some effect to Congress's words," the court interpreted a "party in interest" under § 1109(b) to be one with a "legally protected interest" in the proceedings beyond that required by the Constitution. *Id.* (quoting *In re Thorpe Insulation Co.*, 677 F.3d 869, 884 (9th Cir. 2012)). For example,

the Ninth Circuit has applied the prudential "insurance neutrality" doctrine to hold that when a reorganization plan is "insurance neutral," an insurer cannot be considered a "party in interest" under § 1109(b). *In re Thorpe*, 677 F.3d at 885–87.

The Seventh Circuit has likewise condoned the consideration of prudential doctrines in determining bankruptcy standing. In *In re James Wilson Associates*, the court declined to adopt what it considered to be a "literal" reading of § 1109(b)—that is, that any party with Article III standing could be heard—holding instead that § 1109(b) was not "intended to waive other [prudential] limitations on standing, such as that the claimant be within the class of intended beneficiaries of the statute that he is relying on for his claim." 965 F.2d 160, 169 (7th Cir. 1992). Applying this interpretation of § 1109(b) to a debtor's insurer, the Seventh Circuit has found that the insurer was not a "party in interest" where it was "just a firm that may suffer collateral damage from a ruling in a bankruptcy proceeding." *In re C.P. Hall Co.*, 750 F.3d 659, 661 (7th Cir. 2014); see also *In re Tower Park Props.*, 803 F.3d at 457 ("[A]n entity 'that may suffer collateral damage' but does not have a legally protected interest does not have standing under § 1109(b)." (citing *In re C.P. Hall Co.*, 750 F.3d at 661)).

In its decision below, the Fourth Circuit joined the Ninth and Seventh, applying the judge-made "insurance neutrality" doctrine to its standing analysis under § 1109(b). Pet. App. 24a. Although the court claimed to withhold judgment on the relationship between § 1109(b) and Article III, see Pet. App. 25a n.10, it *did* "choose a side" in this circuit split when it held that petitioner, "in its capacity as an insurer, is not a

party in interest under § 1109(b)." Pet. App. 24a–25a & n.10. That is because the court based that holding, not on Article III, but solely on its conclusion that the plan was "insurance neutral." Pet. App. 24a. By allowing prudential considerations like the "insurance neutrality" doctrine to determine whether an entity has bankruptcy standing as a "party in interest," the Fourth Circuit joined the Ninth and Seventh in treating § 1109(b) as posing (or at least permitting) additional obstacles to standing beyond those of Article III.

This three-to-one circuit split undermines a vital aspect of bankruptcy law: uniformity. This Court has recognized time and again that uniform interpretation and application of the complex Bankruptcy Code is crucial. See, *e.g.*, *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 649 (2012) ("The Bankruptcy Code standardizes an expansive (and sometimes unruly) area of law."); *McKenzie v. Irving Tr. Co.*, 323 U.S. 365, 370 (1945) (noting that bankruptcy law is "intended to have uniform application throughout the United States"); see also Anthony J. Casey, *Chapter 11's Renegotiation Framework and the Purpose of Corporate Bankruptcy*, 120 Colum. L. Rev. 1709, 1715–16 (2020) ("Where every relationship of a certain type is incomplete and requires judicial intervention upon the occurrence of the same event, a uniform bankruptcy system that deals with those relationships will produce consistency, efficiency, and market predictability."). "[D]ifferences in precedent" lead to inconsistent results and can "distort incentives for venue choice in certain cases." Anthony J. Casey & Joshua C. Macey, *Bankruptcy Shopping: Domestic Venue Races and Global Forum Wars*, 37 Emory Bankr. Dev. J. 436, 480 (2021); see also Michael A. Francus, *Texas Two-Stepping Out of Bankruptcy*, 120

Mich. L. Rev. Online 38, 49–50 (2023) (explaining that "precedent-based forum shopping can give short shrift" to certain creditors like "tort claimants"); Adam J. Levitin, Purdue*'s Poison Pill: The Breakdown of Chapter 11's Checks and Balances*, 100 Tex. L. Rev. 1079, 1128–50 (2022) (describing the various ways in which forum shopping "upsets Chapter 11's carefully calibrated balance between debtor and creditor rights"); Brook E. Gotberg, *The Market for Bankruptcy Courts: A Case for Regulation, Not Obliteration*, 49 BYU L. Rev. ___, ___ (forthcoming 2024) (available online at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4416356) ("If the underlying problems regarding lack of uniformity among the courts are not resolved, the incentive to plan around legal constraints to reach a favorable forum will remain." (footnote omitted)).

Here, the division of the circuits over the scope of § 1109(b) allows certain debtors' insurers greater access to bankruptcy proceedings than others, simply because the proceedings take place in Pennsylvania as opposed to California, Illinois, or Virginia. Indeed, the debtor's insurers in *In re Global Industrial Technologies* were permitted to raise a challenge to the reorganization plan that was nearly identical to the one petitioner was prohibited from bringing in this case. 645 F.3d at 214. That is not how the "one unified legal system" of bankruptcy law is supposed to function. Casey & Macey, 37 Emory Bankr. Dev. J. at 480. This Court should grant certiorari to resolve the circuit split and restore uniformity to the Code.

II. The Fourth Circuit's Erroneous Ruling Contradicts the Statutory Text and Frustrates a Core Purpose of the Bankruptcy Code.

In its decision below, the Fourth Circuit disregarded the plain meaning of § 1109(b), adopting a narrower reading that limits access to bankruptcy proceedings pursuant to the "insurance neutrality" rule. Applying this prudential doctrine, the Court held that a debtor's insurer is not a party in interest unless the reorganization plan "materially alter[s] the quantum of liability that the insurer would be called to absorb." Pet. App. 16a (cleaned up).

But "[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." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 128 (2014) (citation omitted). Thus, to the extent prudential doctrines like the "insurance neutrality" rule have any role to play in proceedings under the Bankruptcy Code, that role must be consistent with the statutory text and the Code's overarching purpose. By invoking the "insurance neutrality" rule to narrow access to bankruptcy proceedings under § 1109(b), the Fourth Circuit has contradicted both.

A. Section 1109(b)'s Text Mandates Broad Access to Bankruptcy Proceedings.

Section 1109(b)'s text is clear: "A party in interest, including the debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor, an equity security holder, or any indenture trustee, may raise and may appear and be heard on any issue

in a case under [Chapter 11]." This unambiguous language broadly grants "anyone holding a direct financial stake in the outcome of the case" the opportunity to participate "in the adjudication of any issue that may ultimately shape the disposition of his or her interest." 7 Collier on Bankruptcy P 1109.01 (16th 2023).

Although the Bankruptcy Code does not specifically define a "party in interest," the term "is not limited by the small list of examples in § 1109(b)." *In re Amatex Corp.*, 755 F.2d 1034, 1042 (3d Cir. 1985). Rather, the use of the word "including" signals that the list of potential parties in the statute is merely illustrative, not exclusive. See *Fed. Land Bank of St. Paul v. Bismarck Lumber Co.*, 314 U.S. 95, 100 (1941) ("[T]he term 'including' is not one of all-embracing definition, but connotes simply an illustrative application of the general principle."). The Bankruptcy Code's own rules of construction confirm this, clarifying that the word "'including' [is] *not* limiting." 11 U.S.C. § 102(3) (emphasis added).

This broader reading finds further support in the statute's history. Section 1109(b) traces its roots to § 77B of the Bankruptcy Act of 1898, which gave debtors the right to be heard on any issue but otherwise limited access to creditors and stockholders who could be heard only on a limited set of issues. See *In re Amatex Corp.*, 755 F.2d at 1042 (discussing the origins of § 1109(b)); 7 Collier on Bankruptcy P 1109.LH (16th 2023) (same). Congress subsequently expanded access to bankruptcy proceedings through the introduction of § 206 of the Bankruptcy Act of 1938, which extended the right to be heard to indenture trustees and, on plans affecting the interests of the debtor's employees, to labor unions or employees' associations. See *In re*

Amatex Corp., 755 F.2d at 1042. According to the Advisory Committee's Note to Chapter X Rule 10-210(a), which implemented § 206, this amendment to the Code was intended to "broaden" access, to provide "fair representation and to prevent excessive control over the proceedings by insider groups." 7 Collier on Bankruptcy P 1109.LH (16th 2023) (quotation omitted). By expanding the categories of persons with access to bankruptcy proceedings to include any "party in interest," § 1109(b) "continues in this tradition and should be understood in the same way." *In re Amatex Corp.*, 755 F. 2d at 1042.

The history of § 1109(b) thus confirms that the statute means precisely what it says: anyone with "a sufficient stake in the proceeding" has the right to be heard. *In re Glob. Indus. Techs.*, 645 F.3d at 210. By requiring insurers like petitioner here to jump through additional hoops before they are permitted to challenge a reorganization plan that substantially affects their interests, the Fourth Circuit has elevated judge-made doctrine above—and at the expense of—the statutory text.

B. Restricting Access to Bankruptcy Proceedings Impedes Global Settlements.

The Fourth Circuit's invocation of the "insurance neutrality" doctrine here impedes access to bankruptcy proceedings, which in turn impairs an essential function of the proceedings themselves. A core purpose of the Bankruptcy Code is "providing a collective forum where parties can coordinate to resolve multiparty disputes that involve distressed firms." Anthony J. Casey & Joshua C. Macey, *The Bankruptcy Tribunal*, 96 Am. Bankr. L. J. 749, 750 (2022); see also Lindsey Simon, *The Settlement Trap*, 96 Ind. L. J. 661,

668 (2021) (explaining that every stakeholder "plays an important role in the process Congress designed through the Code"); Elizabeth Warren, *Bankruptcy Policy*, 54 U. Chi. L. Rev. 775, 785–89 (1987) (discussing how the distributional scheme of bankruptcy accommodates many parties' interests in an effort to address the "larger implications of a debtor's widespread default"). To facilitate this "essential function" and "bring the parties toward one global resolution," the Code's provisions "displace a substantial portion of non-bankruptcy law." Casey & Macey, 96 Am. Bankr. L. J. at 750–51; see also generally Casey, 120 Colum. L. Rev. 1709.

Section 1109(b) is no exception. By ensuring broad access to bankruptcy proceedings, the statute "encourag[es] and promot[es] greater participation in reorganization cases." *In re Glob. Indus. Techs.*, 645 F.3d at 211. In many if not most cases, global resolution would not be possible without this widespread participation.

By layering onto the statutory text additional prudential requirements that restrict access and exclude interested parties, the Fourth Circuit's decision thwarts Congress's goal of facilitating global resolutions through bankruptcy proceedings. It also opens the door for participating parties to engage in collusion and fraud against excluded parties, like the debtor's insurers, which is precisely what petitioner objects to in this case. See Diane Lourdes Dick, *The Chapter 11 Efficiency Fallacy*, 2013 BYU L. Rev. 759, 816 (2014) ("dominant stakeholders are able to essentially operate as a cartel, colluding to restrict access to, and raise the price of, restructuring outcomes"). A party sufficiently impacted by a reorganization must

have the chance to be heard on any issue to ensure that the plan is not only productive and efficient, but also the result of a good-faith negotiation process. See Douglas G. Baird, *Bankruptcy's Quiet Revolution*, 91 Am. Bankr. L. J. 593, 616 (2017) (bankruptcy maneuvers that "freeze[] others out of the process" are "suspect").

The ability of any party in interest to raise issues and be heard is particularly important when the party seeks to object to the confirmation of a reorganization plan. As the Third Circuit succinctly stated, "when a federal court gives its approval to a plan that allows a party to put its hands into other people's pockets, the ones with the pockets are entitled to be fully heard and to have their legitimate objections addressed." *In re Global Indus. Techs., Inc.*, 645 F.3d at 204. Indeed, when an insurer faces millions of dollars in financial liability—like petitioner does here—common sense and fundamental bankruptcy policy dictate that it be considered a party in interest in the bankruptcy proceeding.

By construing § 1109(b) narrowly, the Fourth Circuit has transformed a provision "intended to confer broad [access]" to bankruptcy proceedings into an "additional obstacle to bankruptcy standing." *Id.* at 211 (cleaned up). This frustrates the purpose not only of § 1109(b) but of the Bankruptcy Code itself. To ensure that bankruptcy proceedings can effectively facilitate global settlements, judges cannot pick and choose which interested parties get to participate based on atextual doctrines that serve to further restrict access. Rather, judges must apply § 1109(b) as written,

allowing any party with an Article III stake in the proceedings to be heard "on any issue." 11 U.S.C. § 1109(b).

III. The Question Presented Is Important.

Whether a debtor's insurers are entitled to be heard in bankruptcy proceedings is a question of vital importance—particularly in the context of bankruptcies arising from mass torts, which almost always implicate interested liability insurers.

When a corporation is faced with mass tort liability, Chapter 11 provides a valuable alternative to the otherwise-inevitable "race to the courthouse," which can often create huge disparities in claimant recoveries and imperil the economic viability of debtor firms. Anthony J. Casey & Joshua C. Macey, *In Defense of Chapter 11 for Mass Torts*, 90 U. Chi. L. Rev. 973, 998–99 (2023); see also Samir D. Parikh, *Bankruptcy Is Optimal Venue for Mass Tort Cases*, Law360 (Feb. 28, 2022). Bankruptcy proceedings can "reduce inequities among tort claimants by ensuring that similarly situated claimants receive similar compensation" while also reducing "economic inefficiencies that arise when a company has no way of escaping its debts." Casey & Macey, 90 U. Chi. L. Rev. at 999–1000; see also Francus, 120 Mich. L. Rev. Online at 50 (by "conven[ing] these mass torts in a single forum [and] providing an orderly process and distribution of [the debtor's] assets to its tort creditors," the bankruptcy forum "saves tort claimants litigation time and expense" while "provid[ing debtors with] certainty, confining liability to the amount determined in the bankruptcy").

But to curtail "potential for abuse" and facilitate a fair and global resolution, *all* interested parties must

be given access to the proceedings. Casey & Macey, 90 U. Chi. L. Rev. at 979; see also Pamela Foohey, *Jevic's Promise: Procedural Justice in Chapter 11*, 93 Wash. L. Rev. Online 128 (2018) ("giv[ing] a voice to all parties involved in corporate reorganizations . . . increases parties' confidence in outcomes . . . and engenders trust in the legal institution as a whole"). When a debtor's insurer bears the ultimate fiscal responsibility for tort claims, excluding that insurer from the process perverts the incentives of plan participants and opens the door for collusion, which is precisely what petitioner alleges happened here. See Dick, 2013 BYU L. Rev. at 816.

Given the growing prevalence of Chapter 11 proceedings involving mass tort liability, see Casey & Macey, 90 U. Chi. L. Rev. at 974, the need for insurer access to such proceedings has never been more important. This Court should grant certiorari to safeguard the broad access that Congress granted insurers like petitioner and all "parties of interest" in § 1109(b) so that Chapter 11 proceedings may continue to provide for the fair, efficient, and global resolution of these disputes.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

June 5, 2023

ANDREW BASTNAGEL
HILGERS GRABEN PLLC
601 Pennsylvania Ave. N.W.,
South Building, Suite 900
Washington, DC 20004
(202) 985-4735
abastnagel@hilgersgraben.com

CAROLINE C. LINDSAY
Counsel of Record
ALYSSA HELFER
HILGERS GRABEN PLLC
332 S. Michigan Ave.,
Suite 121 #5612
Chicago, IL 60604
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clindsay@hilgersgraben.com
ahelfer@hilgersgraben.com