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

REPLY BRIEF FOR PETITIONER

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RULE 29.6 STATEMENT

The disclosure statement included in the petition remains accurate.

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REPLY BRIEF FOR PETITIONER

The decision below exacerbates a conflict among the circuits and defies the straightforward text of the Bankruptcy Code. A "party in interest" has the right to "raise and * * * appear and be heard on any issue" in a Chapter 11 reorganization. 11 U.S.C. § 1109(b). This expressly includes the right to "object to confirmation of a plan." *Id.* § 1128(b). Under this plain text, a debtor's insurer may object to confirmation where, as here, that insurer will pay the vast majority of claims and so has a direct financial stake in the bankruptcy.

As the Third Circuit holds, "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 Industrial Technologies, Inc.*, 645 F.3d 201, 204 (3d Cir. 2011) (en banc).

Rejecting this plain text (and common sense) reading of Section 1109(b), the Fourth Circuit joined the Seventh (and some decisions of the Ninth). These courts impose an additional prudential hurdle with no basis in the Code's text—prohibiting an insurer from being heard if the plan is "insurance neutral."

Respondents deny this split and attempt to frame "a circuit consensus on who can be a party-in-interest." Kaiser Opp. 12; Claimants Opp. 7. But there's no papering over that three courts of appeals disagree and have acknowledged the conflict. The Fourth Circuit below "recognize[d] that courts are split on the interplay of Article III and § 1109(b)." Pet. App. 25a n.10. The Ninth Circuit, too, has expressly noted the

different rule followed in the Third Circuit and declined to adopt it. *In re Tower Park Properties, LLC*, 803 F.3d 450, 457 n.6 (9th Cir. 2015) (rejecting Third Circuit's approach treating Section 1109(b) and Article III as "effectively coextensive"). The Sixth Circuit, without taking a side, has observed that circuits are divided on "whether this party-in-interest language demands only Article III standing," as *Global* holds, "or a more direct interest," as *Tower Park* requires. *In re Capital Contracting Co.*, 924 F.3d 890, 895 (6th Cir. 2019).

This conflict has real consequences. Kaiser, protected by insurance without aggregate caps, collaborated with asbestos claimants to craft a plan with no fraud protection for insured claims—*all* of the 14,000 known asbestos bankruptcy claims. Pet. 9. Evidence from landmark asbestos bankruptcies—and expert reports in this case—confirm that a substantial portion of these may be fraudulently inflated. Pet. 7-8.

Under a proper reading of Section 1109(b), like that adopted by the Third Circuit in *Global*, Truck's objection would be heard. Here, it wasn't. As more and more mass tort debtors end up in bankruptcy, see Professors *Amici* Br. 13-14, hearing *all* interested parties—including insurers—will become ever more important. Often, as here, it is "highly unlikely that any of the parties other than the insurers would raise" critical issues like fraud prevention. *Global*, 645 F.3d at 214 (quotation marks omitted). That makes it all the more crucial that this Court restore the broad participatory rights Congress enacted in Section 1109(b)'s text.

I. The Decision Below Exacerbates The Conflict Among The Circuits

The courts of appeals are all over the map on the interpretation of Section 1109(b), giving rise to untenable confusion. This conflict is not simply, as respondents suggest, fact-based. Claimants Opp. 7; Kaiser Opp. 12-14. It is a difference in legal standards. These cases apply different, outcome-determinative tests even while using similar language and, at times, purporting to agree about some aspects of an "insurance neutrality" test. That makes this Court's review to resolve the conflict and clarify the proper legal standard even more important.

In *Global*, the Third Circuit considered a plan to resolve the debtors' asbestos and silica-related mass tort debts. Insurers with exposure to the silica liabilities objected, arguing the claims-processing system failed to prevent fraudulent claims. The Third Circuit explicitly held that an insurer who claimed collusion between the debtors and creditors had "bankruptcy standing"—that is, Section 1109(b) standing—to object because the insurers were the "funding sources who will have to address" the debtor's "liabilities," and those liabilities are affected by the plan. 645 F.3d at 210-13; see also Pet. 13-14.

Truck occupies the same position here, yet the decision below found it irrelevant that Truck was the funding source for these liabilities—instead, it embarked on an inquiry limited solely to whether the "quantum" of liability was changed under the plan.[1]

[1] While *Global* used the same term—"quantum of liability"—its use of the phrase reflects the insurers' expectations about the impact of fraud facilitated by the plan. 645 F.3d at 212-14. The

The Fourth Circuit ultimately held that Truck wasn't affected because the plan "expressly preserved Truck's coverage defenses and the Debtors' assistance-and-cooperation obligations under the policies." Pet. App. 16a. That is exactly the policy-oriented reasoning adopted by the en banc *dissent* in *Global*, which stressed that "the contractual relationship between the insurers and insured emerge[d] post-reorganization unchanged" because of the preservation of coverage defenses. 645 F.3d at 217 (Nygaard, J., dissenting). While both courts purport to measure "legally protected interests," the two circuits are employing entirely different standards.

Nor are respondents correct to chalk the opposing holdings down to factual differences. Kaiser Opp. 1-2, 10. Insurers play a vital role when it's "highly unlikely that any of the parties other than the insurers" would raise an issue—like fraud—that doesn't affect them. *Global*, 645 F.3d at 214. Here, Truck is the only party with a financial interest in preventing fraudulent bankruptcy claims.[2] It presented unrebutted expert evidence showing that the same fraudulent scheme uncovered in *Garlock* had been deployed against Kaiser. C.A. J.A. 5187-5195. That's the same type of evidence offered in *Global,* where the insurers used findings uncovered in the Johns-Manville and

insurers' contractual coverage obligations didn't change at all, *id.* at 218 (Nygaard, J., dissenting), but that's what the Fourth Circuit demanded Truck show.

[2] Section 524(g) plans require support from a super-majority of claimants not demanded for other Chapter 11 plans. See 11 U.S.C. § 524(g)(2)(B)(ii)(IV)(bb). So asbestos debtors and claimants will often be aligned, making the involvement of interested third parties—including insurers—all the more important. See *In re Congoleum Corp.*, 426 F.3d 675, 687 (3d Cir. 2005).

silica multi-district-litigation proceedings to assess the frequency of fraud among Global's claimants. 645 F.3d at 207. So the same comparative evidence—evidence identifying bad actors and statistical findings of known fraud in prior similar cases—that satisfied the Third Circuit's standard didn't satisfy the Fourth Circuit's standard here.

Decisions from other circuits highlight the widespread confusion about Section 1109(b). The Ninth Circuit acknowledged that "at least one circuit" (the Third) adopted a "broader reading" of Section 1109(b) that treats it as "effectively coextensive" with Article III standing. *Tower Park*, 803 F.3d at 457 n.6. But the Ninth Circuit expressly rejected this approach, instead insisting that Section 1109(b) demands more than Article III. *Ibid.*[3] Even though all three courts—the Third, Fourth, and Ninth Circuits—use the same "legally protected interest" terminology to describe their standard, these courts recognize that they are, in fact, applying *different* (and conflicting) standards.[4]

The Seventh Circuit, for its part, downplayed the extent of the split by noting, as respondents do, the cross-citation among decisions. *In re C.P. Hall Co.*, 750 F.3d 659, 662 (7th Cir. 2014). But *Hall* itself makes clear its conflict with *Global*. It holds that an insurer wasn't a party in interest even though its alleged harm was of the kind that "suffices for Article

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[3] In another opinion in tension with *Tower Park*, the Ninth Circuit recognized that an insurer can be a party-in-interest even under a plan that purports to be insurance neutral—echoing *Global*. *In re Thorpe Insulation Co.*, 677 F.3d 869, 884-85 (9th Cir. 2012).

[4] To quote Inigo Montoya from *The Princess Bride*, "You keep using that word. I do not think it means what you think it means."

III standing." *Id.* at 660; see also *id.* at 663 ("Pecuniary interest is a necessary rather than a sufficient condition"). In the Third Circuit, that injury would have made the insurer a party in interest. *Global*, 645 F.3d at 211 ("Article III standing and standing under the Bankruptcy Code are effectively coextensive.").

This conflict is squarely implicated in the decision below. While the Fourth Circuit purported not to "choose a side," Pet. App. 25a n.10, it did. It concluded that Truck wasn't a "party in interest" under Section 1109(b) based solely on the same analysis adopted by the *Global* dissenters. Pet. App. 24a. Only after concluding that Truck's status as an *insurer* didn't make it a party in interest did the Fourth Circuit, in a new subsection of its opinion, address Truck's Article III standing as a *creditor*. Pet. App. 25a. And there, it simply held that Truck's status as a creditor didn't give it Article III standing to object to confirmation. *Ibid.* The Fourth Circuit's interpretation of Section 1109(b)—not its Article III analysis—was the sole basis for rejecting Truck's insurance-based arguments.

Kaiser also suggests (at 31) that the split was "not addressed below" because Truck didn't preserve it. That's wrong. Truck argued at every stage—citing *Global* and *Thorpe*—that it's a party in interest because it has near-exclusive financial responsibility for the asbestos claims in the bankruptcy, including the fraudulent claims enabled by the plan's design. See, *e.g.*, C.A. Dkt. 55 at 29, 31-33. In the passage Kaiser misleadingly quotes (at 31), Truck was refuting *Kaiser's* argument that the principle about Article III standing not being "dispensed in gross" should be imported to Section 1109(b) without any textual hook. C.A. Dkt. 64 at 8. Section 1109(b) allows a party in

interest to be heard on "*any* issue," 11 U.S.C. § 1109(b) (emphasis added), so the statutory inquiry doesn't implicate the constitutional doctrine about standing in gross. That question is an entirely different one than the question presented here—whether Section 1109(b) imposes a *higher* threshold than Article III. See Pet. 17.

II. The Decision Below Is Wrong

This case is also an appropriate vehicle because the decision below is wrong.

In Section 1109(b), Congress enacted text granting a broad right for any party in interest to raise and be heard on any issue. Congress used expansive language to allow a party in interest to be heard on "any issue." Its use of "including" shows that the list isn't exclusive and the type of parties in the list—"a creditors' committee, an equity security holders' committee, a creditor, an equity security holder, or any indenture trustee"—shows that "party in interest" must be read expansively to include any party with a financial stake in the reorganization. Pet. 17-21. Truck is just such a party.

There are more than 14,000 active asbestos claims against Kaiser in this bankruptcy. Pet. App. 42a. As Kaiser's liability insurer, other than a small deductible, Truck will pay all of these claims, up to $500,000 per claim. *Ibid.* So Truck is the only party with any interest in avoiding fraudulently inflated claims—and, indeed, the only party with any meaningful pecuniary interest in the bankruptcy court's handling of the 14,000 claims.[5] See *Global*, 645 F.3d

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[5] Contrary to claimants (at 20-21), Truck doesn't seek an improper intrusion on state courts. Every claim affected is a federal

at 214. Truck—as the party with by far the greatest financial stake in the bankruptcy court's handling of the overwhelming majority of claims against Kaiser—is plainly a party in interest under Section 1109(b) (properly construed).

Respondents suggest that the decision below was correct because Truck wasn't affected by the bankruptcy. Kaiser Opp. 24; Claimants Opp. 12. That is wrong. Truck *is* financially impacted by confirmation because the plan is the only meaningful opportunity Truck will have to reduce its exposure to rampant fraud. Minimal protection against fraudulent claims is hardly a "windfall," as Kaiser would have it (at 16). It's the least a litigant should expect in a plan of reorganization ordered by a federal court. After all, the anti-fraud protections Truck seeks here have been included in every asbestos trust created under Section 524(g) in the past decade. Pet. 8. Those protections even apply in *this case* to any uninsured claims. Pet. 9.[6]

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bankruptcy claim. That claims may be adjudicated through a trust process or in state court "does not mean that th[e bankruptcy court] does not have jurisdiction over these claims, nor that it can allow facially invalid or fraudulent claims to be paid out" without adequate safeguards. *In re Diocese of Camden, New Jersey*, — B.R. —, 2023 WL 5605156, at *33 (Bankr. D.N.J. Aug. 29, 2023); see also 11 U.S.C. § 362 (automatic stay); *id*. § 524 (discharge bars state court litigation).

[6] Kaiser also concedes (at 7) that the district court made a coverage determination that is "preclusive." At the very least, this binding coverage determination has a direct impact on Truck.

III. This Case Is An Ideal Vehicle To Address An Important And Recurring Issue

A. The question is cleanly presented

Respondents argue that Truck lacks Article III standing.[7] Kaiser Opp. 32-33; Claimants Opp. 15-17. Not so. The bankruptcy proceeding offered a one-time opportunity to prevent fraudulent claims through claims procedures that are standard in other plans. Had the bankruptcy court ordered those procedures for all claims, whether insured or not, they would have reduced Truck's liability by hundreds of millions of dollars. Victory on appeal could result in an amended plan that includes anti-fraud protections for all claims, significantly reducing Truck's exposure. This Court has already held that a party has Article III standing to challenge confirmation when that party "lost a chance to obtain" more favorable treatment under a different plan. *Czyzewski* v. *Jevic Holding Corp.*, 580 U.S. 451, 464 (2017). That puts to rest any question of Truck's Article III standing.

Kaiser resorts to two further prudential doctrines (bringing the grand total up to three, including insurance neutrality) to bar *any* appellate consideration of the plan. That so many barriers to appellate review of Chapter 11 plans exist—none with a basis in the Code—further highlights the need for this Court's intervention. Pet. 24. Kaiser concedes none of these barriers is jurisdictional. Opp. 33. And none is a barrier to this Court's review.

First, the doctrine of so-called bankruptcy appellate standing is "a form of prudential standing which

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[7] The Fourth Circuit didn't examine Truck's Article III standing as an insurer—its Article III holding was limited to Truck's standing as a creditor. Pet. App. 25a.

is more confined than Article III standing" and permits only a "person aggrieved" to appeal. *In re Ray*, 597 F.3d 871, 875 (7th Cir. 2010). The Bankruptcy Act expressly limited appellate rights to "persons aggrieved by an order of a referee." 11 U.S.C. § 67(c) (1976). But Congress "abandoned" that limitation by "repeal[ing] that section" when it enacted the Bankruptcy Code. *In re Clark*, 927 F.2d 793, 795 (4th Cir. 1991). The Code now has no language limiting appeals to "persons aggrieved." That is dispositive, and the doctrine should have no place in bankruptcy law. See *Lexmark International, Inc.* v. *Static Control Components, Inc.*, 572 U.S. 118, 128 (2014); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* § 40, at 256 (2012) ("If a legislature amends or reenacts a provision * * * a significant change in language is presumed to entail a change in meaning"). In any event, Truck is a "person aggrieved" because the plan leaves it with sole financial responsibility for fraudulent claims and precludes it from raising coverage defenses. Pet. 2.

Second, the appeal isn't "equitably moot." Respondents don't suggest the appeal is moot in the Article III sense—only that it is "equitably moot." Kaiser Opp. 34. Under that doctrine, appellate courts "refuse to entertain the merits of live bankruptcy appeals over which they indisputably possess statutory jurisdiction and in which they can plainly provide relief." *In re Continental Airlines*, 91 F.3d 553, 567 (3d Cir. 1996) (en banc) (Alito, J., dissenting). The doctrine's scope is sharply contested, see *In re VeroBlue Farms USA, Inc.*, 6 F.4th 880, 891 (8th Cir. 2021), but it doesn't apply here regardless. Truck's appeal challenges only the terms of the asbestos trust procedures. Modifying or vacating those terms is indisputably within the power of the court. The relief Truck seeks

wouldn't require any clawbacks or modifications from Kaiser's other non-asbestos creditors.

Finally, Kaiser suggests that Truck's arguments fail on the merits. Opp. 35. That is wrong and irrelevant. No appellate court has considered these arguments. If this Court reverses on the antecedent question of Section 1109(b), it can simply follow its ordinary practice and remand for the Fourth Circuit to consider Truck's merits arguments in the first instance. See, *e.g.*, *Brownback* v. *King*, 141 S. Ct. 740, 748 n.4 (2021); *United States* v. *Stitt*, 139 S. Ct. 399, 407-08 (2018); *BNSF Railway Co.* v. *Tyrrell*, 581 U.S. 402, 415 (2017).

B. The question presented is important

If left to stand, the circuit split on Section 1109(b) will have stark consequences. Mass tort claims increasingly drive Chapter 11 reorganizations because the Chapter 11 system can both "reduce inequities among tort claimants by ensuring that similarly situated claimants receive similar compensation" and also minimize "economic inefficiencies that arise when a company has no way of escaping its debts." Professors *Amici* Br. 13. But the conflict exacerbated by the decision below creates a "race to the courthouse" that would allow sophisticated creditors or debtors to force the inclusion or exclusion of others—like insurers. Professors *Amici* Br. 6-7, 13.

Insurers are often the only party with a financial stake in preventing fraudulent claims—their full participation in bankruptcy proceedings is vital. Imposing judicially created barriers with no basis in the Bankruptcy Code's text to thwart that crucial participation serves no one well.

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The petition for a writ of certiorari should be granted.

Respectfully submitted,

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