No. 22-1079

IN THE

Supreme Court of the United States

TRUCK INSURANCE EXCHANGE,

Petitioner,

v.

KAISER GYPSUM COMPANY, INC., *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF *AMICI CURIAE* CO-CHAIRS OF THE AMERICAN BANKRUPTCY INSTITUTE'S COMMISSION TO STUDY THE REFORM OF CHAPTER 11 IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE[1]

The American Bankruptcy Institute ("ABI") is a national organization with nearly 10,000 members from all sectors of the restructuring community. In 2012, the ABI formed and funded a commission[2] (the "Commission") to evaluate and propose possible changes to reorganization laws, especially chapter 11 of the Bankruptcy Code. After over two years of intensive study by the Commission and multiple advisory committees, including gathering testimony at field hearings throughout the United States and input from experts from all sides of various issues, the Commission issued a formal report containing its findings

1. No counsel for a party authored this brief in whole or in part, and no person or entity, other than amici curiae and their counsel, has contributed money to fund the preparation or submission of the brief. *See* Sup. Ct. R. 37(6).

2. The Commissioners included the Chair and former Chair of the influential National Bankruptcy Conference, the immediate past Chair and former President of the prestigious American College of Bankruptcy, two past Chairs of the New York City Bar Committee on Bankruptcy and Reorganization, the former Chief Restructuring Officer of the United States Treasury, a past Chair of the Turnaround Management Association, three prominent turnaround consultants, a past member of the National Bankruptcy Review Commission, a former Chief Bankruptcy Judge of the Southern District of New York, the two principal draftsmen of the 1978 Bankruptcy Code, several past members of the Advisory Committee on Bankruptcy Rules of the Judicial Conference of the United States, the then current President of INSOL International, the Director of the Executive Office for U.S. Trustees in the Department of Justice, five past Presidents of the American Bankruptcy Institute, and nine current and former global heads of the bankruptcy departments at major U.S. law firms.

and recommendations (the "Report").[3] Amici curiae (the "Amici") served as co-chairs of the Commission.[4]

An impetus behind the formation of the Commission and a guiding principle in its work was the fundamental goal to "make the chapter 11 process more efficient and cost-effective." Report, *supra* note 2, at 59. As the Commission observed, "Chapter 11 . . . needs to offer tools to resolve a debtor's financial distress in a cost-effective and efficient manner." *Id.* at 6. One of the themes that arose from the Commission's investigation, and which the Report sought to address, was the "perceived increase in the costs associated with chapter 11." *Id.* at 15. The Commission specifically worked to propose reforms that enhanced "case efficiencies." *Id.* at 17.

One of the many concerns addressed by the Commission was the presence of parties "seeking to delay or disrupt [plan] confirmation," including parties who "strategically purchase claims so that they hold blocking positions in one or more classes [voting for the plan]." *Id.* at 259. The Commission noted: "In sum, claims classification and voting under section 1122 and 1126 [of the Bankruptcy Code] are subject to significant gamesmanship." *Id.* Indeed, one of the Commission's proposals was that a court should have the authority to "designate a party's vote in one or more classes under section 1126(e) of the

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3. Am. Bankr. Inst., Commission to Study the Reform of Chapter 11: 2012 2014 Final Report and Recommendations (2014), http://commission.abi.org/full-report [also at 23 ABI L. Rev. 1 (Winter 2015)] [hereinafter, the "Report"].

4. The Amici emphasize that this brief is filed in their individual capacity and does not constitute the views of the ABI.

Bankruptcy Code based on evidence presented at the hearing that such party voted in a manner manifestly adverse to the economic interests of the other creditors in the class or did not act in good faith." *Id.* at 264. In this section, "designate" means disqualify, and the remedy was to be used when the creditor voted on its claims, often claims purchased for voting, not in furtherance of its interest as a creditor, but to achieve an ulterior motive (such as to destroy the debtor's reorganization, achieve a hostile takeover, or enhance a short position in debt trading) or to extract an enhancement to which the creditor was not otherwise entitled.

The question presented in this case is of interest to the Amici because reversal of the decision below and adoption of the Petitioner's and the government's radical and unprecedented positions, using a wholly non-contextual reading of section 1109(b) of the Bankruptcy Code, would be detrimental to the fair and efficient administration of the bankruptcy system. The Petitioner's arguments, if adopted, represent a clear threat to the integrity of the confirmation process in chapter 11 cases.

At its core, the position advocated by the Petitioner and its allies is contrary to the statutory scheme of the Bankruptcy Code and conflicts with decades of well-established precedent about who has standing in bankruptcy cases and proceedings. Allowing parties wholly unaffected by a proposed plan of reorganization to object to the plan—on grounds wholly unrelated to their particular status and interest—has a destructive effect on the entire chapter 11 restructuring process, unnecessarily consuming the time of the court and inviting chaos and abuse by parties bent on defeating plans for

reasons having nothing to do with how the plan affects their individual interests.

The Petitioner's and the government's wholesale abandonment of statutory, constitutional, and other well-established limits on the ability of alleged parties in interest to contest plan confirmation will incentivize the purchase of claims by parties with ulterior motives and agendas contrary to the interests of all other stakeholders in the chapter 11 case, for the sole purpose of objecting to confirmation to achieve goals at odds with the very purpose of chapter 11. Allowing parties to object to a chapter 11 plan on grounds unrelated to their particular status and legal interest at issue in the case—including, as here, where that party's interest is wholly unaffected by the plan—is as much a threat to the chapter 11 process as the purchase and voting of claims for similar purposes, and perhaps a greater threat, because easier to accomplish.

The chapter 11 process is, by design, collaborative and collective–involving input from the debtor, creditors, and other entities to fairly allocate value among stakeholders in the debtor's limited estate. Consensus is its goal. But chapter 11 has too often become a vehicle for excessive and baseless litigation, not to further the reorganization but instead to impede its progress. Such litigation has become so expensive that for too many debtors, the cost of the case serves as a bar to entry to chapter 11.

The case now before this Court makes this point in the extreme. A party that is wholly unaffected by the chapter 11 plan and has no pecuniary interest in its success seeks to not only litigate extraneous issues, but to upset the carefully crafted settlement that benefits true parties in

interest. The plan below had 100 percent support from its only voting class of creditors (asbestos claimants) and the unanimous support of all other entities (including excess insurers) involved in the case. The plan below was confirmed by the district court upon the recommendation of the bankruptcy court. The Fourth Circuit affirmed, as should this Court. Reversal of the Fourth Circuit's decision would be a clarion call to all who would, in pursuit of personal agendas at odds with reorganization, interrupt and prevent global settlements in chapter 11 by which creditors are paid more than if a debtor is liquidated.[5]

Although the collective and participatory nature of the process is critical to a successful reorganization, it is not without limits. Critical to an effective, efficient, and economical restructuring is the rule that only a party that is impaired by a plan may object to confirmation–and only to that portion of the plan that directly affects that objecting party.

If the Petitioner's position is adopted, the plan confirmation process will be open to abuse and overwhelmed by objections of entities that are not impaired by the plan itself and that have no interest in an efficient, successful, and fair reorganization. The result will be unnecessary delay and cost to the chapter 11 process to the detriment of the debtor, and ultimately, its creditors, employees and other stakeholders—exactly what concerned the Commission and what it sought to address in the Report.

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5. For a chapter 11 plan to be confirmed, creditors must receive more in a chapter 11 plan than they would in a chapter 7 liquidation. *See* 11 U.S.C. § 1129(a)(7)(A)(ii).

No court has ever adopted the unduly broad and untethered interpretation of section 1109(b) and standing in the confirmation process argued for by the Petitioner and the government here, and the Amici urge this Court not to be the first.

SUMMARY OF ARGUMENT

Section 1109(b) of the Bankruptcy Code, providing that "part[ies] in interest" may be heard on "any issue" in a chapter 11 case, reflects Congress's intent that a chapter 11 reorganization should be a collective process, involving participation from an array of affected stakeholders. A party in interest's ability to "raise" and "appear and be heard" is not without its limits, however. Constitutional and other limiting principles, in addition to other statutory provisions, provide necessary restrictions on who may be considered a party in interest and in what contexts such party may participate in a debtor's bankruptcy case. As the Fourth Circuit correctly held, a plan must affect and alter an entity's pre-petition rights in order for that entity to file an objection to its confirmation, and the Petitioner failed to show how this plan directly affected its rights in its status as either a creditor or an insurer.

First, in response to the Petitioner's position that its status as a creditor empowers it to object to the plan, the very text of the Bankruptcy Code cuts off this argument. Under the Bankruptcy Code, a creditor whose claim is unimpaired—like the claim of the Petitioner's here—is conclusively deemed to accept the plan in all respects and may neither vote on nor file an objection to the plan.

Second, the Petitioner's argument that its status as an insurer grants it party-in-interest status to object

to the plan also fails. An insurer can be considered a party in interest with standing to object to a plan only if it can prove that the plan increases its pre-petition burdens or otherwise alters its pre-bankruptcy rights. The Petitioner cannot do so. An insurer does not become a party in interest with standing to object to a plan based on mere speculation about outcomes or the "loss" of desired enhancements to its existing rights that the plan does not provide. The plan here leaves the Petitioner no worse and no better than its pre-petition position, and the Constitution, the courts, and the Bankruptcy Code do not confer standing in that circumstance.

No court has adopted the sweeping view of standing advocated by the Petitioner and the government, and for good reason. The checks in place on standing in the bankruptcy process, and in the confirmation context in particular, are critical for the efficient and cost-effective resolution of chapter 11 cases. If the position of the Petitioner is adopted, it would frustrate the utility of the bankruptcy process in general, causing unnecessary delay and substantial cost to chapter 11 cases, to the detriment of debtors and their businesses and employees, creditors, and other stakeholders. It would do so, further, by expanding the jurisdiction of the bankruptcy courts to resolve hypothetical issues well beyond the reach of their statutory authority.

ARGUMENT

I. SECTION 1109(b) DOES NOT PERMIT THE PETITIONER TO OBJECT TO CONFIRMATION OF THE PLAN AS A CREDITOR.

Because chapter 11 cases are collective processes, involving the allocation of the value of the debtor's estate to all of the claims against the debtor and, potentially, all of the equity interests in the debtor, Congress, in section 1109(b), enacted a broad starting point from which certain members of the collective group may participate in the bankruptcy case. *See In re Ionosphere Clubs, Inc.*, 101 B.R. 844, 849 (Bankr. S.D.N.Y. 1989) (noting that the "legislative history indicates that Congress sought to encourage and promote greater participation in reorganization cases"). The statute specifically lists "the debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor, an equity security holder, or an indenture trustee" as parties in interest, *see* 11 U.S.C. § 1109(b), but courts have held that the list is non-exhaustive,[6] *see Ionosphere Clubs*, 101 B.R. at 849.

If considered a party in interest, section 1109(b) provides, in seemingly broad terms, that such entity "may raise and may appear and be heard on any issue in a case under [chapter 11]." 11 U.S.C. § 1109(b). By using the word "may," however, Congress retained in the courts the discretion to limit standing in bankruptcy cases, consistent with constitutional principles and the purpose of section 1109(b), which is to protect participants

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6. The specifically-listed parties in section 1109(b) are sometimes referred to as "statutory" parties in interest.

in chapter 11 cases from proceedings and decisions that directly affect their legal rights against the estate in the case. *See Biden v. Texas*, 597 U.S. 785, 802 (2022) (noting that this Court "has repeatedly observed that the word 'may' *clearly* connotes discretion") (internal quotation omitted) (emphasis in original).

Consistent with Congress's use of the word "may" in section 1109(b), courts have long and properly recognized constraints on the reach of section 1109(b); in addition to establishing itself as a party in interest under section 1109(b), an entity must also satisfy the Article III "case or controversy" standing requirement as well as the "zone of interest" standing requirement.[7] *See, e.g.*, *In re Thorpe Insulation Co.*, 677 F.3d 869, 884 (9th Cir. 2012); *In re Old Carco LLC*, 500 B.R. 683, 690 (Bankr. S.D.N.Y. 2013); *see also* 7 Collier on Bankruptcy ¶ 1109.04[4] (16th ed. 2023).

The Petitioner argues that its status as an unsecured creditor—one of the entities specifically listed as a party in interest in section 1109(b)—provides it unlimited authority to insert itself into the Debtor's restructuring case on any issue whether or not the issue is connected to or affects its unsecured claim. By making this argument, the Petitioner would have this Court read away the constitutional and other long-established standing requirements, as if Congress had instead provided in section 1109(b) that

7. In the appellate context, a party must also satisfy the appellate "person aggrieved" standard, but as the Fourth Circuit correctly concluded, an entity that was denied standing to object to a plan is a "person aggrieved" as to the standing determination and has standing to appeal that determination. *See In re Kaiser Gypsum Co.*, 60 F.4th 73, 82 (4th Cir. 2023), *cert. granted sub nom. Truck Ins. Exch. v. Kaiser Gypsum Co.*, 144 S. Ct. 325 (2023).

"parties in interest" "*shall*" have standing "*to advocate any position*" on any issue in a chapter 11 case. Section 1109(b) does not provide for a free for all.

Indeed, appellate and lower courts have long recognized that section 1109(b)'s text is the beginning, not the end, of the analysis. *See, e.g.*, *In re James Wilson Assocs.*, 965 F.2d 160, 169 (7th Cir. 1992) (explaining that the court "do[es] not think that [section 1109(b)] was intended to waive other limitations on standing"). In addition to demonstrating party-in-interest status under section 1109(b), a party "invoking the jurisdiction of the federal courts," including the bankruptcy court, "must meet the constitutional requirements of Article III and the prudential limitations crafted by the courts." *In re A.P.I., Inc.*, 331 B.R. 828, 856 (Bankr. D. Minn. 2005), *aff'd sub nom. One Beacon Am. Ins. Co. v. A.P.I., Inc.*, No. CIV. 06-167 (JNE), 2006 WL 1473004 (D. Minn. May 25, 2006) (quoting *United States v. United Sec. Sav. Bank*, 394 F.3d 564, 567 (8th Cir. 2004)). Satisfying such requirements is a prerequisite to objecting to a chapter 11 plan. *See In re Glob. Indus. Techs., Inc.*, 645 F.3d 201, 210 (3rd Cir. 2011) (en banc) ("To object to the confirmation of a reorganization plan in bankruptcy court, a party must, in the first instance, meet the requirements for standing that litigants in all federal cases face under Article III of the Constitution."); *A.P.I.*, 331 B.R. at 856 ("Injecting oneself into a Chapter 11 case and objecting to confirmation of a plan is certainly an invocation of the federal courts' jurisdiction over 'a case under' the Bankruptcy Code and a proceeding 'arising under' the Bankruptcy Code."). Accordingly, an entity seeking to object to the confirmation of a plan of reorganization "must establish its standing to be heard under the bedrock

principles that apply to *all* federal courts, as well as its statutory right to participate in the case under § 1109(b)." *A.P.I.*, 331 B.R. at 856 (emphasis in original).

Article III of the Constitution limits the judicial power of federal courts to cases and controversies. U.S. Const. art. III. In order to satisfy the standing requirements of Article III, a party must "demonstrate an 'injury in fact' that is 'concrete', 'distinct and palpable', and 'actual or imminent.'" *Glob. Indus. Techs.*, 645 F.3d at 210 (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)). In practice, this means that a party must show "*a personal stake* in the outcome of the controversy as to assure . . . concrete adverseness." *A.P.I.*, 331 B.R. at 858 (emphasis in original) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)).

In addition to the constitutional requirements of standing, an entity must show that it meets certain standing requirements outlined by the courts, including that the injury must be particular to the entity itself—as opposed to a general one—and must be within the "zone of interest" the particular statute was designed to protect. *See A.P.I.*, 331 B.R. at 858 (explaining that a "bid for standing may be defeated if: (a) it is asserting a third party's rights; (b) it alleges a generalized grievance rather than an injury particular to it; or (c) it asserts an injury outside the zone of interest the statute was designed to protect."). As the Seventh Circuit explained, reading section 1109(b) together with the zone of interest standing requirement, "all [section 1109(b)] means is that anyone who has a legally protected interest that could be affected by a bankruptcy proceeding *is entitled to assert that interest with respect to any issue to which it pertains*." *James Wilson Assocs.*, 965 F.2d at 169 (emphasis added).

However, even if, as the Petitioner contends, section 1109(b) was fully coextensive with constitutional standing requirements—and it is not—as with any general statutory grant of standing, other specific statutory provisions may limit the general grant in section 1109(b) of leave to appear and be heard, as this Court has recognized. *See Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 8 (2000) ("[W]e do not read § 1109(b)'s general provision of a right to be heard as broadly allowing a creditor to pursue substantive remedies that other Code provisions make available only to other specific parties."); *In re Wonder Corp. of Am.*, 70 B.R. 1018, 1023 (Bankr. D. Conn. 1987) ("It is a well established rule of statutory construction that wherever possible, separate parts of a statute should be reconciled to avoid rendering any portion of the statute meaningless."); *see also In re E.S. Bankest, L.C.*, 321 B.R. 590, 595 (Bankr. S.D. Fla. 2005) (explaining that, when determining whether an entity is a party in interest under section 1109(b), other Bankruptcy Code sections must be considered, as "[t]he Bankruptcy Code is replete with examples where a creditor may not have standing to object").

One such provision is section 1126(f) of the Bankruptcy Code. That section provides, in pertinent part, that "[n]otwithstanding any other provision of this section, a class that is not impaired under a plan, *and each holder of a claim or interest of such class*, are conclusively presumed to have accepted the plan." 11 U.S.C. § 1126(f) (emphasis added). Pursuant to section 1124 of the Bankruptcy Code, impairment occurs when *the plan* materially alters the claimant's "legal, equitable, and contractual rights" under its contract or applicable non-bankruptcy law to the extent that such rights existed prior to the filing of the

bankruptcy case, as such rights may also be limited by specific sections of the Bankruptcy Code. 11 U.S.C. § 1124 (defining impairment); *see also In re LATAM Airlines Grp. S.A.*, 55 F.4th 377, 384-85 (2d Cir. 2022) (explaining that a claim is impaired only when *the plan*, rather than the Bankruptcy Code, alters the creditor's rights); *In re Ultra Petroleum Corp.*, 943 F.3d 758, 763 (5th Cir. 2019) (same). Critically, section 1126 is concerned only about impairment caused by the specific terms of the plan; if a provision of the Bankruptcy Code affects the claimant's rights or if the claimant's contract or applicable non-bankruptcy law or practice limits its rights, treatment under the plan can account for those limitations and still leave the claim unimpaired. *See LATAM Airlines*, 55 F.4th at 384-85; *Ultra Petroleum*, 943 F.3d at 763. A plan that leaves the claimant's pre-bankruptcy rights unaltered does not impair that claimant's claim or interest; that claim is unimpaired and the claimant is deemed to accept the plan in all respects. *See LATAM Airlines*, 55 F.4th at 384-85; *Ultra Petroleum*, 943 F.3d at 763; *see also* 11 U.S.C. § 1126(f).

Courts have properly interpreted sections 1109(b) and 1126(f) in tandem to mean that, despite being a statutory "party in interest" under section 1109(b), creditors who are unimpaired by a plan may not object to the plan in any respect. *See, e.g.*, *Ultra Petroleum,* 943 F.3d at 761 (holding that unimpaired creditors "could not object to the plan"); *In re Morris Publ'g Grp. LLC*, No. 10-10134, 2010 WL 599393, at *3 (Bankr. S.D. Ga. Feb. 10, 2010) ("Creditors in unimpaired classes . . . lack standing to object to confirmation."); *E.S. Bankest*, 321 B.R. at 595 (explaining that "creditors whose rights are unimpaired under a plan have no right to vote on the plan, 11 U.S.C.

§ 1126(f), and lack standing to object to a chapter 11 confirmation process"); *A.P.I.*, 331 B.R. at 862 ("Holders of unimpaired claims lack standing to vote and to object to confirmation."); *In re Orlando Inv'rs, L.P.*, 103 B.R. 593, 596 (Bankr. E.D. Pa. 1989) (explaining that "creditors whose rights are unimpaired under the plan . . . possess no right to object to confirmation"); *Wonder Corp.*, 70 B.R. at 1023 ("To allow claimants who are conclusively presumed to have accepted a reorganization plan to object to that plan at the confirmation hearing would vitiate the effectiveness of § 1126(f).").[8]

8. Section 1126(f) is equally limiting to section 1128, which allows a party in interest to object to confirmation of a plan. *See* 11 U.S.C. § 1128(b); *see also A.P.I.*, 331 B.R. at 854; *Wonder Corp. of Am.*, 70 B.R. at 1022-23. There are also other statutory limitations to an entity's standing to participate in bankruptcy proceedings. For example, section 307 of the Bankruptcy Code contains language similar to section 1109(b) pertaining specifically to the U.S. Trustee, stating that it "may raise and may appear and be heard on any issue in any case or proceeding under [the Bankruptcy Code]." 11 U.S.C. § 307. The U.S. Trustee's empowering statute, 28 U.S.C. § 581 et seq., on the other hand, provides certain limitations to the broad grant of section 307: section 586(a)(3)(B) of title 28 provides that the U.S. Trustee shall "monitor[]" plans in cases under chapter 11 and "fil[e] . . . comments with respect to such plans," while section 586(a)(3)(A)(ii) of that statute states that the U.S. Trustee shall "fil[e] . . . comments . . . and, if the United States Trustee considers it to be appropriate, objections" to fee applications. Congress thus believed that the U.S. Trustee's ability to "comment" at the plan stage in a chapter 11 case would be sufficient in its role as "watchdog," as opposed to empowering it to object to plans or disclosure statements. Section 307's broad language must be read and harmonized with the scope of the U.S. Trustee's duties set forth in 28 U.S.C. § 586 and the limitations contained therein. *Cf. In re Wash. Mfg. Co.*, 123 B.R. 272, 275-

The Petitioner, therefore, lacks standing to object to the Debtors' plan based on its status as an unimpaired, unsecured creditor. The plan is clear: claims of a general unsecured creditor, like the Petitioner, are unimpaired. Pet.App.214a. The Petitioner's claim was to be promptly paid in full and, apparently, is now paid in full. Debtors' Br. at 47. Although the Petitioner may be a statutory party in interest under section 1109(b) in its capacity as creditor, the Bankruptcy Code itself, through section 1126(f), deprives the Petitioner of standing to object to a plan that does not impair its claim in any way. *See Ultra Petroleum,* 943 F.3d at 761; *A.P.I.*, 331 B.R. at 862; *Orlando Inv'rs*, 103 B.R. at 596; *Wonder Corp.*, 70 B.R. at 1023. As an unimpaired creditor whose claim was to be paid in full on the petitioner date (and whose claim was so paid), the Petitioner cannot object to any aspect of the plan below, and cannot use its status as a creditor to object to the plan in its capacity as an insurer either. Indeed, allowing the Petitioner to use its unimpaired creditor status to extort enhancements to its position as an insurer would violate fundamental principles of bankruptcy law designed to preserve the integrity of the plan confirmation process.

In an analogous context, section 1126(e) of the Bankruptcy Code allows the court, in overseeing the plan confirmation process, to designate—meaning to disqualify and disallow the vote of—"any entity whose acceptance or rejection of such plan was not in good faith." 11 U.S.C. § 1126(e). This protection is essential to the

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76 (Bankr. M.D. Tenn. 1991) (noting that that section 307 of the Bankruptcy Code and 28 U.S.C. § 586 do not provide the U.S. Trustee with an "unconditional right to intervene" in an adversary proceeding) (internal quotation omitted).

preservation of the chapter 11 voting process, indeed the entire confirmation process:

> where the record contains evidence that the creditor has voted without regard to the treatment of its claim, but instead, to achieve some benefit or goal inconsistent with the interests of the estate and its creditors, the court must inquire into those motives in order to preserve the integrity of the Chapter 11 process.

In re Dune Deck Owners Corp., 175 B.R. 839, 845 (Bankr. S.D.N.Y. 1995). Courts applying section 1126(e) find an absence of good faith when votes are cast against a plan—particularly when claims are acquired for voting and voted against a plan—to further "an interest other than an interest as a creditor." *In re DBSD N. Am., Inc.,* 634 F.3d 79, 102 (2d Cir. 2011) (internal quotation omitted); *see In re Bataa/Kierland, LLC*, 476 B.R. 558, 566 (Bankr. D. Ariz. 2012) ("Other modern cases applying section 1126(e) concur that bad faith is primarily to be found in ulterior motives, and that motives are deemed 'ulterior' only when they are ulterior to the creditor's capacity as a creditor."); *In re GSC, Inc.*, 453 B.R. 132, 159 (Bankr. S.D.N.Y. 2011) (explaining that bad faith for purposes of section 1126(e) "has most recently been described as a party acting with 'an interest other than an interest as a creditor'") (quoting *DBSD*, 634 F.3d at 102); *In re Allegheny Int'l, Inc.*, 118 B.R. 282, 289 (Bankr. W.D. Pa. 1990) (finding bad faith and disqualifying votes because the court found that "Japonica acted in aid of an interest other than an interest as a creditor") (internal quotation omitted); *see also Young v. Higbee Co.*, 324 U.S. 204, 210-11 (1945) (discussing the

predecessor to section 1126(e) and stating that if certain persons had "declined to accept th[e] plan in bad faith, the court, under Section 203 could have denied them the right to vote on the plan at all" and further noting that the provision was designed to apply to those "whose selfish purpose was to obstruct a fair and feasible reorganization in the hope that someone would pay them more than the ratable equivalent of their proportionate part of the bankrupt assets"). The importance of these forms of protection guided the Commission in its recommendations regarding the confirmation process. *See supra* at 2-3.

Bankruptcy standing rules applicable to the plan confirmation process exist for the same purpose as section 1126(e): to ensure the integrity of the process. Those rules—which bar an unimpaired creditor from objecting to a plan, and which prevent use of creditor status to object to a plan provision that does not impact the treatment of the creditor's claim—ensure that putative (and often newly-minted) creditors will not abuse that status to prevent confirmation for ulterior motives, including to extort a benefit to which that entity, in its status as something other than a creditor, is not entitled. That is precisely the Petitioner's goal here: to extract enhancements to its pre-bankruptcy rights as an insurer even if it means defeating a plan that pays its claim, and the claims of its supposedly like creditors, one hundred cents on the dollar. The language of the Bankruptcy Code, and the immutable policies behind it, prevent such an attack.

II. THE PETITIONER DOES NOT HAVE STANDING TO OBJECT TO CONFIRMATION OF THE INSURANCE-NEUTRAL PLAN BELOW BECAUSE THE PETITIONER QUA INSURER IS NOT A PARTY IN INTEREST UNDER SECTION 1109(b) IN THIS CASE.

The Petitioner also argues that its role as insurer makes it a party in interest under section 1109(b) and therefore provides it standing to object to confirmation of the plan. Since the Petitioner qua insurer/future funder is not an entity specifically listed in section 1109(b), Petitioner must first establish that it is a "party in interest" under that section, which is determined on a case-by-case basis. *See Ionosphere Clubs*, 101 B.R. at 849. To do so, the Petitioner must establish that it has an interest that is directly or adversely affected by the plan. *See In re Alpex Computer Corp.*, 71 F.3d 353, 356 (10th Cir. 1995); *Morris Publ'g Grp.*, 2010 WL 599393, at *4; *In re Stone Barn Manhattan LLC*, 405 B.R. 68, 74 (Bankr. S.D.N.Y. 2009).

But the plan below did not affect the Petitioner's position as an insurer. The plan preserved all of the Petitioner's contractual and other rights as an insurer and left it in exactly the same position, legally and financially, that it inhabited prior to the chapter 11 filing. The Petitioner's rights as an insurer were completely unimpaired by the plan. As such, the Petitioner cannot qualify as a party in interest under section 1109(b)—or under section 1128—and does not have standing to object to the plan.

Courts have consistently held that if a plan is "insurance neutral"—where the plan "does not materially

alter the quantum of liability that the insurers would be called to absorb"—an insurer is not a party in interest under section 1109(b) and does not have standing to object to the plan. *Glob. Indus. Techs.*, 645 F.3d at 212; *see generally In re Combustion Eng'g, Inc.*, 391 F.3d 190 (3d Cir. 2004) *as amended* (Feb. 23, 2005); *see also Mt. McKinley Ins. Co. v. Pittsburgh Corning Corp.*, 518 B.R. 307, 329 (W.D. Pa. 2014) (holding that "[b]ecause the plan does not harm [insurer], it lacks standing to object to the plan").

In this case, the bankruptcy court "found that the Plan didn't alter [the Petitioner's] rights or obligations under the policies and therefore deemed the Plan insurance neutral," and the district court adopted and the Fourth Circuit affirmed this finding. *Kaiser Gypsum*, 60 F.4th at 80-81, 83, 86-87.

Finding the plan to be insurance-neutral is merely another way of stating that a plan does not "diminish[] [insurers'] property, increase[] their burdens, or impair[] their rights". *See Combustion Eng'g*, 391 F.3d at 218 (internal quotation omitted). Notably, a plan does not lose its neutrality if it fails to *improve* or *enhance* the position of the insurer. Just as an unimpaired creditor cannot object to a plan, a plan must injure the insurer for the insurer to have standing to object to it. *See id.*; *Mt. McKinley Ins.*, 518 B.R. at 328-29 (holding that certain insurers do not have standing to object to a plan because the "allegations and evidence do not convince the court that the plan injures" the insurers). If an insurer can prove that a plan is not insurance neutral, it can establish party-in-interest status under section 1109(b) and standing to object to that portion of the plan that directly affects its

rights as an insurer. *See, e.g.*, *Thorpe Insulation*, 677 F.3d at 887 (explaining that the plan is "not insurance neutral, which provides the . . . insurers with party in interest standing under § 1109(b)"); *James Wilson Assocs.*, 965 F.2d at 169 (explaining that "all [section 1109(b)] means is that anyone who has a legally protected interest that could be affected by a bankruptcy proceeding *is entitled to assert that interest with respect to any issue to which it pertains*") (emphasis added); *see also* 11 U.S.C. § 1128(b) ("A party in interest may object to confirmation of a plan."). The Petitioner cannot make such a showing.[9]

The Petitioner's complaint is merely that the plan does not *enhance* its pre-bankruptcy rights by imposing upon the non-bankruptcy tort system certain anti-fraud protections to which the trust, created under the plan, will be subject. But the Petitioner's policies and contractual rights do not entitle it to such enhancements, even if the bankruptcy (or any federal) court had the authority

9. The plan at issue in this case differs greatly from the plans at issue in cases where courts have found that insurers are parties in interest and have standing to object to the plan. Unlike this plan that left the Petitioner's quantum of liability unchanged, the plan in *Global Industrial Technologies* increased the insurer's liability to 27 times its pre-petition liability exposure, which the Third Circuit determined resulted in a plan that was not insurance neutral. *See Glob. Indus. Techs.*, 645 F.3d at 212. Likewise, the court in *Thorpe Insulation* also determined that the plan was not insurance neutral given that it altered indemnification provisions and the insurer's contracts in a way that greatly affected the insurer's rights. *See Thorpe Insulation*, 677 F.3d at 885-87. These concerns are not present in the plan here, and thus the holdings of *Global Industrial Technologies* and *Thorpe Insulation* as to insurer standing are fact-dependent and should not influence the result in this case.

to impose them (which it likely does not). Moreover, the Petitioner's complaint is essentially premised upon the assumption—indeed the rank and unsupported speculation—that the non-bankruptcy tort system will be infused with fraudulent conduct and that the courts that comprise that system will fail to or be unable to deal with such fraud. Such unbridled speculation about the future rulings, practice before or decisions of courts in future proceedings has never been a basis for standing; the Petitioner's imagined possible future injury is not an injury in fact. *See Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 414 (2013) (explaining that this Court is "reluctan[t] to endorse standing theories that rest on speculation about the decisions of independent actors"); *Whitmore v. Arkansas*, 495 U.S. 149, 159 (1990) (holding that a petitioner lacked standing and explaining that it is "not possible for a litigant to prove in advance that the judicial system will lead to any particular result"); *see also Mt. McKinley Ins.*, 518 B.R. at 325 (citing *Clapper* and *Whitmore* and explaining that an insurer's "speculation about how a court may rule in coverage litigation does not establish an imminent injury, much less one that is fairly traceable to the plan" for the purposes of standing to object to a plan).

Denying the Petitioner party-in-interest status and standing as an insurer is consistent with the principle embodied in section 1126(f) that unimpaired creditors cannot object to plans, as well as constitutional standing concerns. Entities not expressly listed in section 1109(b) seeking party in interest status to object to plan confirmation must establish both a plan-inflicted injury and that the party seeking standing is within the zone of interest of the statutory provisions in question, in this

case the Bankruptcy Code's requirements for confirmation of a plan. Since the plan below left the pre-bankruptcy contractual and legal rights of the Petitioner intact and unaltered—in no way affecting the Petitioner—the Petitioner is outside the zone of interests protected by the confirmation requirements found in the Bankruptcy Code; just as an unimpaired creditor cannot object to a plan, neither can an unimpaired insurer.[10] Here the Petitioner's complaints and fears spring from the deficiencies of its own contract, not from anything that the plan is doing to it or its pre-bankruptcy rights.

For the foregoing reasons, the Petitioner lacks standing to object to the plan in this case, as either a creditor or an insurer.

III. REVERSING THE FOURTH CIRCUIT WOULD HAVE SERIOUS CONSEQUENCES FOR THE CHAPTER 11 RESTRUCTURING PROCESS.

"In a Chapter 11 case, the need to establish standing is especially pronounced in the area of objections to plan confirmation." *A.P.I.*, 331 B.R. at 854 (internal quotation omitted). This is primarily because "a plan of reorganization enables a collective remedy for systemic financial failure, having simultaneous effect on multiple creditors and other parties in interest." *Id.* At such a

10. Courts have placed limits on the circumstances in which a party in interest may participate in other contexts as well. For example, a court has the discretion to limit and tailor how a creditor may intervene in an adversary proceeding, even though a creditor is a "party in interest" under section 1109(b) and possibly entitled to intervene as of right. *See In re Fin. Oversight & Mgmt. Bd. for P.R.*, 297 F. Supp. 3d 261, 266 (D.P.R. 2017).

critical point in the restructuring process, without careful consideration of standing, it could be rife with cases of abuse. Unaffected but tangential entities could insert themselves into the plan confirmation process, resulting in undue delay in the resolution of a case and increased costs to the estate. *See In re Deist Forest Prods., Inc.*, 850 F.2d 340, 341 (7th Cir. 1988) ("The limits on standing are vital in bankruptcy, where clouds of persons indirectly affected by the acts and entitlements of others may buzz about, delaying final resolution of cases.").

Beyond just the confirmation context, "[o]verly lenient standards may potentially overburden the reorganization process by allowing numerous parties to interject themselves into the case on every issue, thereby thwarting the goal of a speedy and efficient reorganization." *Ionosphere Clubs*, 101 B.R. at 850. Granting "peripheral parties" standing and status as "parties in interest thwarts the traditional purpose of bankruptcy laws which is to provide reasonably expeditious rehabilitation of financially distressed debtors with a consequent distribution to creditors who have acted diligently." *Id.* at 851 (internal quotation omitted). It is easy to imagine cases involving

> well-funded, very active, and aggressive parties . . . rais[ing] a myriad of objections to confirmation, with many of them going to aspects of the plan that do not by their terms affect the legal or contractual basis of their relationships with the [d]ebtor, or those parties' own options in those relationships.

A.P.I., 331 B.R. at 855. Responding and addressing the concerns of any purported "party in interest" without

a direct stake in the particular issue would saddle the estate with increased costs—not to mention delay—that would ultimately harm creditors. *See Ionosphere Clubs*, 101 B.R. at 850-51. It is easy to see how "[p]roceedings would quickly grind to a halt if the court had to hear every party on every issue." *In re Quigley Co.*, 391 B.R. 695, 703 (Bankr. S.D.N.Y. 2008). This would be particularly problematic in the context of mass tort cases, where innumerable entities could attempt to object to a plan of reorganization as so-called "parties in interest."

Further, the adoption of the Petitioner's interpretation of standing in bankruptcy cases would be an invitation to strategic and tactical conduct by competitors of the debtor seeking to end it as a going concern, parties pursuing hostile takeovers of debtor entities, and debt traders establishing short positions or seeking to profit from interests in default or other swaps. The threat is not, however, limited to private parties acting with ill intent to achieve selfish economic goals. The abandonment of standing principles could be especially pernicious when applied to the government in a bankruptcy case, and that the government has adopted (and even arguably expanded) the Petitioner's proposed interpretation of section 1109(b) in its *amicus* brief is troubling.

That interpretation would permit the executive branch to use its substantial resources to fight a chapter 11 plan overwhelmingly accepted by the other parties in interest whenever one of its agencies was a creditor, and thus a party in interest under section 1109(b), solely to achieve its own policy objectives. For example, this interpretation would enable an administration opposed to a particular industry or for some political reason to assert *all* possible

objections available to *all* creditors to the chapter 11 reorganization plan (through the appellate process without having to post a bond), even if all other parties had fairly negotiated and widely supported the plan, whenever the government in *any* of its capacities was a creditor (or perhaps even simply a contract counterparty).

Assume, for example that an administration was opposed to coal mining, a coal mining company's reorganization plan was accepted overwhelmingly by all other parties in interest, and no other party objected to confirmation. If the Internal Revenue Service (the "I.R.S.") was a creditor, according to the Petitioner and the government, the I.R.S. would have standing to object to confirmation of that plan on any basis available to any creditor, and even if the plan provided (as it must) for the payment of the I.R.S.'s claim in full. *See* 11 U.S.C. §1129(a)(9)(C). That approach simply does not comport with the Court's zone of interests standing doctrine, and, more critically, it offends fundamental principles designed to protect the integrity of the chapter 11 process and to ensure that process works for its intended beneficiaries.

Even as applied to the U.S. Trustee's grant of standing in section 307 of the Bankruptcy Code, the government and Petitioner's omission or misapplication of the "zone of interest" standing doctrine would lead to results contrary to congressional intent and the Constitution. Congress, as noted above, *supra* at 14 n.8, cabined the U.S. Trustee's "watchdog" function in 28 U.S.C. 586. Moreover, the government as watchdog goes beyond its prescribed zone when it attacks a plan that has been fully and fairly negotiated, widely accepted, and is otherwise unopposed, merely because the government disagrees

with the congressional *policy* underlying the plan, as determined by the clear majority of courts. At that point, the purported watchdog becomes a gadfly arguing bankruptcy policy in the abstract since it possesses no financial stake to protect. But if empowered to use the unlimited resources of the federal government, without, for example having to post a bond to mitigate against the adverse impact (financial and societal) of a stay pending appeal, this gadfly position could kill a reorganization.

Congress quite clearly chose not to insert such a regulator into the Bankruptcy Code by turning away from the regulatory framework of Chapter X of the Bankruptcy Act when it drafted the Code in 1978 and established the U.S. Trustee program with a more limited mandate to investigate and comment on actual misconduct in bankruptcy cases, and, authorized it only at specified times (not including to plan confirmation generally) to file objections to such conduct. *See* 28 U.S.C. § 586 *generally*; *see also* Report, *supra* note 2, at 9-10. Congress did not want a regulator empowered with a broad mandate to inject itself in the negotiation paradigm of chapter 11 whenever the regulator might broadly define an "abuse" of what it perceived to be proper bankruptcy policy. Yet that is what the Petitioner and the government's new proposed standard would allow.

As noted above, *supra* at 2, a fundamental goal of the Commission was that the bankruptcy system, and chapter 11 in particular, "offer tools to resolve a debtor's financial distress in a cost-effective and efficient manner." Report, *supra* note 2, at 6. The Commission also sought to prevent abusive tactics by parties using creditor standing to achieve ulterior motives. Reversing the Fourth Circuit

here would greatly frustrate those goals, resulting in more costly and time-consuming restructurings and granting license for incentivized parties to abuse the system. The Amici strongly urge this Court to reject the arguments of the Petitioner and its ally and affirm the Fourth Circuit's decision.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the Fourth Circuit.

Respectfully submitted,

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