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 U.S. COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF *AMICI CURIAE* OF BANKRUPTCY EXPERTS IN SUPPORT OF RESPONDENTS

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January 31, 2024

QUESTION PRESENTED

Whether an insurer whose legally protected interests are not affected by a Chapter 11 plan of reorganization is nevertheless a "party in interest" entitled to raise "any issue" in that case under 11 U.S.C. § 1109(b).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

INTEREST OF AMICI CURIAE[1]

The amici curiae are bankruptcy specialists (including professors and former Bankruptcy Judges) who have expertise bearing directly on the purposes of the Bankruptcy Code. Melanie L. Cyganowski, a Member at Otterbourg P.C. and Chair of the firm's Bankruptcy Practice, served for 14 years as a Bankruptcy Judge in the Eastern District of New York (1993-2007) and was Chief Judge of the Court (Nov. 2005 until the end of her term). She is a Fellow in the American College of Bankruptcy, on the Editorial Advisory Board of Norton Journal of Bankruptcy Practice & Law, and a retired adjunct professor at St. John's University School of Law. Professor Nancy B. Rapoport is a UNLV Distinguished Professor, the Garman Turner Gordon Professor of Law at the William S. Boyd School of Law, University of Nevada, Las Vegas, and an Affiliate Professor of Business Law and Ethics in the Lee Business School at UNLV. Thomas W. Waldrep, Jr., a partner at Waldrep, Wall, Babcock, & Bailey PLLC, was a United States Bankruptcy Judge with the U.S. Bankruptcy Court for the Middle District of North Carolina from 2004 to 2013.

Amici have taught courses in bankruptcy law and principles, and have authored numerous articles, textbooks, and treatises on bankruptcy-related matters. As experts in the field of bankruptcy law and ethics, amici have a professional interest in ensuring that this Court is fully informed of the fundamental purpose and practical

[1] Pursuant to Rule 37.6, amicus certifies that no counsel for any party authored this brief in whole or in part, no party or party's counsel made a monetary contribution to fund its preparation or submission, and no person other than amicus or its counsel made such a monetary contribution.

limitations of the Bankruptcy Code and the Federal Rules of Bankruptcy Procedure.

SUMMARY OF ARGUMENT

1. Petitioner's broad definition of "party in interest" to cover entities without a genuine economic stake in the litigation is inconsistent with the fundamental precept that a person or entity seeking to join litigation as a party must have a concrete stake in the litigation and a risk of injury. Courts routinely interpret the term "party in interest" in other parts of the U.S. Code to hold that parties who would have been "interested" under the Petitioner's interpretation do not meet the statutory definition of "party in interest." Those cases make clear that a party is "interested" only if it faces the potential of a direct loss and where the challenged action threatens its welfare.

Here, Petitioner does not have the potential for a direct economic loss or any action that threatens its welfare. As an "insurance neutral" bankruptcy, it will have no financial effect on Petitioner, who is bound to pay claims up to the insurance limits in any event. Petitioner's only claim of "injury" is the lost opportunity to emerge from the bankruptcy in a better position. That is not a sufficient injury to render Petitioner a "party in interest."

2. Granting "party-in-interest" status to insurers with no genuine economic stake in the case would disserve the interests of the bankruptcy system and hinder consensual settlements of complex disputes. The central purpose of the bankruptcy system is to provide expeditious resolution of claims—a purpose that is particularly important in asbestos bankruptcies, where sick and dying claimants may never receive an opportunity to resolve their claims unless the proceedings move promptly and efficiently. Yet Petitioner's approach would empower holdouts and dissenters with no financial stake to engage in obstructionist tactics and strategic maneuvering in

order to advance their own individual interests. The Bankruptcy Code should not be used to allow an interloper with only an abstract stake to disrupt a creative and practical solution to asbestos liabilities, where the parties with the genuine interests in the proceeding uniformly support the plan.

3. The Government's contention (U.S. Br. at 16) that Petitioner is a party in interest because its insurance contracts are "property of the estate" fails for three reasons. First, the argument was neither raised nor addressed below. An amicus cannot resurrect arguments that the parties themselves have waived. Second, the existence of Petitioner's contracts cannot make it a "party in interest" where the bankruptcy will have no economic impact on the insurer. The *proceeds* of an insurance policy (as opposed to the policy itself) are not property of the estate unless the proceeds go directly to the debtor or the covered claims dramatically exceed the policy limit. Petitioner has neither alleged nor shown that those situations are present here. Third, the Government offers no support for the suggestion that an insurance company facing no prospect of economic or other loss is a "party in interest" merely because its policy might be property of the estate.

ARGUMENT

I. An Entity Must Have a Concrete Stake in the Litigation to Qualify as a "Party-in-Interest" Under Section 1109(b) of The Bankruptcy Code.

Petitioner and amicus United States offer a broad interpretation of "party in interest" that encompasses entities that have no prospect of harm from an adverse decision in the litigation in which they seek to participate. They cobble together dictionary definitions of "interest" to cover any issue in which a party is "concerned" or

"affected," and would extend not only to a case in which a party might be disadvantaged, but also to any cases involving potential "advantage" to the party. *See* Pet. Br. at 22, U.S. Br. at 18. Petitioner's broad definition is inconsistent with the fundamental precept that a person or entity seeking to join litigation as a party must have a concrete stake in the litigation and have suffered or is at risk of suffering a loss rather than merely a prospect of enhancing one's previous position.

As Petitioner acknowledges (Pet. Br. 26), "party in interest" must be interpreted at least as requiring the same standards for Article III standing. The party "must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016).[2] And injury in fact requires "an invasion of a legally protected interest" that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (internal quotation marks and citations omitted). The plaintiff must "personally [have] suffered some actual or threatened injury." *Valley Forge Christian Coll. v. Amns. United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982) (internal quotation marks and citation omitted).

The "party in interest" requirement in Section 1109(b) reflects (and adds to) these requirements. Far from requiring merely a "concern" or the potential for an

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[2] Congress cannot bypass constitutional standing requirements by conferring the right to sue upon a litigant. *Spokeo*, 578 U.S. at 339. It is "'settled that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing.'" *Id.* (quoting *Raines v. Byrd*, 521 U.S. 811, 820 n. 3 (1997)).

"advantage," as Petitioner and the Government argue, a "party in interest" must have a concrete stake in the outcome of the litigation, that is, the party must face the direct prospect of concrete injury.

Courts routinely interpret the term "party-in-interest" in other parts of the U.S. Code as requiring a concrete stake in a matter whose outcome will directly injure the person or entity seeking to join the litigation.[3] For instance, both Petitioner and the Government invoke the Transportation Act of 1920, 29 U.S.C. § 1 (repealed 1976), which permitted a "party in interest" to sue to enjoin the extension of a railroad where the builder lacked a certificate from the Interstate Commerce Commission. (Pet. Br. 23; U.S. Br. 19).

However, status as a "party in interest" under that statute required a peculiar interest, as well as a direct and serious potential for economic loss from the litigation. *Western Pac. Cal. R.R. v. Southern Pac. Co.*, 284 U.S. 47 (1931), upon which both Petitioner and the Government

[3] As the Government notes (U.S. Br. at 19 n.2), "party in interest" is used in numerous federal statutes. Many of those statutes use the phrase in contexts that do not involve a party seeking to join litigation, such as (a) prohibiting fiduciaries from engaging in certain transactions with interested parties, *see, e.g.,* 29 U.S.C. §§ 1002(14), 1106 (ERISA); 5 U.S.C. § 8477 (Federal employee Thrift Savings Plan); (b) notification requirements, *see, e.g.,* 42 U.S.C. § 300e-17 (requiring health maintenance organizations to report transactions involving "parties in interest."); 38 U.S.C. § 7105A (notification of "interested parties" with simultaneously contested claims to veteran's survivor benefits); and (c) protecting persons affected by government action, *see, e.g.,* 30 U.S.C. § 1017(b)(1)-(2) (requiring the new geothermal leases have plans that "adequately protect the rights of all parties in interest"); 15 U.S.C. § 1195 (consolidation of Consumer Product Safety Commission proceedings for seizure of flammable fabrics upon application of one "party in interest" after notice to "all other parties in interest."). This brief focuses on "party in interest" provisions that address the ability of persons or entities to participate in litigation.

rely, illustrates this point. In that case, a railroad challenged a competing railroad's plan to build an extension of its line that would cross the plaintiff's railroad line. The plaintiff alleged that the defendant railroad failed to obtain permission from the Interstate Commerce Commission, seeking to maintain the suit as a "party in interest" under the Transportation Act. *Id*. at 49-50.

As Petitioner and the Government point out, the Court stated that "party in interest" did not require a "clear legal right for which it might ask protection," although the complaining party "must possess something more than a common concern for obedience to law." *See id*. at 51. But the Court did not dispense with the requirement to show "an invasion of a legally protected interest" that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560 (cleaned up).

Indeed, the Court made clear that the statute required a direct and serious injury to the claimant: "It will suffice, we think, if the bill discloses that some definite legal right possessed by complainant is seriously threatened, or that the unauthorized and therefore unlawful action of the defendant carrier may *directly and adversely affect the complainant's welfare* by bringing about some material change in the transportation situation." *Western Pac.*, 284 U.S. at 51-52 (emphasis added).

The Court did not simply rely on an abstract interest. Rather, the Court found the plaintiff was a party in interest because its "welfare was *seriously threatened*." *Id*. at 52 (emphasis added). The plaintiff could sue because it had adequately alleged that the defendant's action "might directly and seriously affect" the plaintiff's ongoing railroad project. *Id*.

In contrast, in the absence of a threat of direct and concrete injury, this Court has held that parties who would

have been "interested" under the Petitioner's interpretation are not "parties in interest" under the Transportation Act.

The Court made that clear in *L. Singer & Sons v. Union Pac. R. Co*., 311 U.S. 295, 303–04 (1940). In *Singer*, the fact that the plaintiff would suffer losses from the extension of rail services to a competitor was not enough to make the plaintiffs a "party in interest" because the change in the transportation situation was insufficient to "directly affect[] their peculiar interest." *Id*. at 304. Where the party is merely "indirectly and consequently affected" by the defendant's action, it is not a party-in-interest. *Id*. at 304.

The *Singer* Court distinguished *Western Pacific*, noting that the plaintiffs there had "a special interest in that complainant with probability of direct loss" from the competition. *Id*. at 303. And the Court adopted a narrow interpretation of "party in interest," requiring a "special and peculiar interest" in the litigation. *See id.* at 304 (noting that an individual with "some special and peculiar interest which may be directly and materially affected by alleged unlawful action" is a party in interest but that "[i]n the absence of these circumstances he is not such a party."); *see also Atchison, T. & S. F. Ry. Co. v. United States*, 130 F. Supp. 76, 78 (E.D. Mo.), *aff'd sub nom. Atchison, Topeka & Santa Fe Ry. Co. v. United States*, 350 U.S. 892 (1955) (plaintiff was not a party in interest because it "does not allege that any definite legal right of the plaintiffs has been violated, nor that the order of the Commission has created any additional motor carrier service, or increased competition for the plaintiffs.").

Similar transportation-related statutes allowing a "party in interest" to participate in litigation have yielded the same results. Thus, in *Alton R. Co. v. United States*, 315 U.S. 15, 19 (1942), the Court held that railroad companies

were "parties in interest" under the Motor Carriers Act, 49 U.S.C. § 305(g) (1976) (repealed 1978), to challenge an order of the Interstate Commerce Commission granting a certificate to an automobile "driveaway" service because they were "directly affected" by the resulting competition. They faced the clear and direct potential of lost business, and hence lost revenue, from the competition. *Id.*; *see also Am. Trucking Ass'ns, Inc. v. United States,* 364 U.S. 1, 17–18 (1960) (trucking companies were parties in interest to certificate granting motor carrier owned by railroad to extend service because they were in direct competition); *Claiborne-Annapolis Ferry Co. v. United States*, 285 U.S. 382, 390 (1932) (ferry company was a "party in interest" under the Interstate Commerce Act to challenge proposed rival ferry because "the proposed and permitted action might directly and adversely affect its welfare by changing the transportation situation.").

Courts interpreting the "party in interest" provision of the former Federal Aviation Act, 49 U.S.C. § 1487(a) (repealed 1994), and its predecessors, also required a showing of concrete loss. That provision allowed a "party in interest" to seek judicial enforcement of the prohibition against noncertified carriers from engaging in air transportation. In *World Airways, Inc. v. Ne. Airlines, Inc.*, 349 F.2d 1007 (1st Cir. 1965), for instance, the court found that an air carrier could challenge allegedly unlawful charter operations serving the East Coast and Florida because the carrier directly competed on those routes. *Id*. at 1010. But the court held that a greater showing of competition would be required to challenge charter service to Hawaii (which the plaintiff did not serve), *id.* at 1013, later clarifying that "'party in interest' requires competition of a demonstrably direct sort." *World*

Airways, Inc. v. Ne. Airlines, Inc., 358 F.2d 691, 692 (1st Cir. 1966).[4]

As one court has observed in the aviation context, *Western Pacific*, *Singer*, and related cases dictate that the "party in interest" question turns on "whether or not a party has a clear legal right which will be directly affected," or "whether or not the parties stand in a competitive relationship to one another so that the threatened acts of a defendant will directly and seriously affect a plaintiff by changing the transportation situation." *Flying Tiger Line v. Atchison, T. & S. F. Ry. Co.*, 75 F. Supp. 188, 193 (S.D. Cal. 1947) (air carrier was party in interest because the parties "occupy a competitive relationship towards each other" and the defendant "has taken some 30-odd customers of the plaintiffs"); *see also Monarch Travel Servs., Inc. v. Associated Cultural Clubs, Inc.*, 466 F.2d 552, 554 (9th Cir. 1972) (travel agency was party in interest where it had "suffered economic loss" from entity organizing unlawful charter flights "because some clients who otherwise would have patronized Monarch were diverted to ACCI.").

Other statutes authorizing parties in interest to participate in litigation required a concrete stake in the litigation and the potential for a direct loss. The Communications Act permits a "party in interest" to file a petition to deny any application for a license for a broadcasting station. 47 U.S.C. § 309(d)(1). Courts have uniformly recognized that, to qualify under this provision, "the party must show a direct and immediate injury and not merely nominal or speculative injury." *WLVA, Inc.*

[4] The court of appeals subsequently accepted the district court's factual findings that the two airlines were in direct competition between Hawaii charter flights and the plaintiff's Florida flights during the winter season. *Ne. Airlines, Inc. v. Nationwide Charters & Conventions, Inc.,* 413 F.2d 335, 338 (1st Cir. 1969).

(WLVA-TV), Lynchburg, Va. v. F.C.C., 459 F.2d 1286, 1298 n.36 (D.C. Cir. 1972); *see Clarksburg Publ'g Co. v. F.C.C.*, 225 F.2d 511, 523 n.8 (D.C. Cir. 1955) (party in interest due to "direct competitive injury" from potential loss of advertising).

As these cases make clear, it is not enough that a party without injury might *improve* its position by participating in the litigation. The party is "interested" if it faces the potential of a "direct loss" and where the challenged action "seriously threaten[s]" its welfare. *Western Pac.*, 284 U.S. at 52; *Singer*, 311 U.S. at 303-04.

The term "party in interest" in Section 1109(b) should be construed, consistent with the same language in other statutes, as requiring a concrete stake in the bankruptcy and a direct loss. As Petitioner points out (Pet. Br. 22-23), the "party in interest" language in the Bankruptcy Code should carry with it the settled meaning recognized in these cases, especially where (as here) they address the right of a person or entity to participate in litigation. *See Field v. Mans*, 516 U.S. 59, 69 (1995) ("Where Congress uses terms that have accumulated settled meaning under ... the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms.") (internal quotation marks and citation omitted). Petitioner, however, misinterprets the import of that settled interpretation.

Here, although Petitioner claims "injury," it cannot assert the potential for a direct harm or any action that seriously threatens its welfare. The bankruptcy will have no financial effect on Petitioner, who is bound to pay claims up to the insurance limits in any event. That is, the bankruptcy plan at issue here is insurance neutral—it does nothing to alter Truck's pre-petition interest. Indeed, Petitioner's brief betrays the true nature of its claim of

"injury"—that of lost *opportunity* to emerge from the bankruptcy in a better position. *See* Pet. Br. 32-33 (asserting injury because the bankruptcy proceeding "presented a crucial opportunity" to protect Petitioners from fraudulent claims); *id*. at 35. That is not a sufficient injury to render Petitioner a "party in interest."[5]

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[5] Petitioner errs in relying on case law finding standing when a person is deprived of "a chance to obtain a benefit" (Pet. Br. 35). The cases Petitioner cites do not sanction standing for a party who suffers no harm merely because participation in litigation might enhance the party's position. *Robertson v. Allied Solutions, LLC*, 902 F.3d 690, 694 (7th Cir. 2018), did not involve a plaintiff with no financial stake who merely sought to use the litigation as an opportunity to improve its position. The plaintiff there was a job applicant alleging that the unlawful failure to provide her with information required by the Fair Credit Reporting Act deprived her of the opportunity to challenge the rescission of an employment offer. The "benefit" she pursued was the chance to obtain redress for that injury. *See id*. at 697. Moreover, *Robertson* relied on this Court's decision in *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville, Fla.*, 508 U.S. 656, 666 (1993), which recognized merely that a party suffers injury "[w]hen the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group." In *Robertson*, the "barrier" was the failure to provide required information that would aid her attempt to challenge the job rescission. Here, Petitioner is not the victim of an unlawful barrier that prevents it from seeking a benefit, nor is it seeking a benefit that would help it redress an injury. Petitioner has no financial stake in the litigation, and merely attempts to use it to make its general position more favorable.

Petitioner's reliance on *Czyzewski v. Jevic Holding Corp.*, 580 U.S. 451 (2017), fares no better. The plaintiffs there were former employees of the debtor who obtained a judgment but were nonetheless excluded from the bankruptcy settlement (receiving nothing). *Id*. at 460. They had obviously suffered a loss from being unable to collect on their judgment. *Id*. at 464. The "chance" they sought from the case was simply to be included in the bankruptcy settlement so they could recover on their successful claim. *Id.* And *Teton Historic Aviation Found. v. U.S. Dep't of Def.*, 785 F.3d 719, 724–25 (D.C. Cir. 2015), involved a policy change by a government agency

II. Watering Down the "Party in Interest" Standard Would Risk Disrupting the Bankruptcy System.

Granting "party in interest" status with insurers with no genuine economic stake into the case would disserve the interests of the bankruptcy system and hinder consensual settlements of complex disputes like this one. Bankruptcy is an intensely practical system aimed at resolving claims expeditiously, minimizing transaction costs, and implementing sensible solutions. These goals are particularly important in asbestos bankruptcies, where sick and dying claimants may never receive an opportunity to resolve their claims unless the proceedings move promptly and efficiently. Yet Petitioner's approach would empower holdouts and dissenters to engage in obstructionist tactics and strategic maneuvering in order to advance their own individual interests. Giving parties like Petitioner additional leverage in a bankruptcy is a recipe for delay and an invitation for abusive behavior.

Parties in interest can exercise various rights in bankruptcy proceedings that have the potential to consume large amounts of time and judicial resources. They can object to a claim, 11 U.S.C. § 502(a); request appointment of a trustee under certain circumstances, *id*. at § 1104(a); request a change to membership of a committee, *id.* § 1102(a)(4); request conversion of a Chapter 11 case into a Chapter 7 case, or dismissal; *id.* § 1112; file a reorganization plan, *id.* § 1121(c); propose

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that already had prevented the plaintiff from receiving the benefit of the bargain on a contract to purchase surplus aircraft parts, and that the plaintiff sought to prevent happening again. In short, none of Petitioner's cases support its wide-ranging argument that a party with no actual or threatened loss has standing merely because participation in the litigation presents an opportunity to enhance its position.

modifications to another's plan; *id.* § 1127(b)-(c); object to plan confirmation, *id.* § 1128(b); request liquidation, *id*. § 1174; and "appear and be heard on any issue in a case under [Chapter 11]." 11 U.S.C. § 1109(b).

All these powers can be used for their legitimate purposes as well as for the less legitimate purpose of delaying bankruptcy proceedings. As the highly experienced Chief Bankruptcy Judge Burton Lifland warned, "overly lenient standards may potentially over-burden 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.... Granting peripheral parties 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." *In re Ionosphere Clubs, Inc.*, 101 B.R. 844, 850–51 (Bankr. S.D.N.Y. 1989) (cleaned up); *see also In re Public Serv. Co. of N.H.*, 88 B.R. 546, 554 (Bankr. D.N.H. 1988) ("it is ... important that the court take care not to be so liberal in granting [party in interest and/or intervenor] applications as to over-burden the reorganization process by allowing numerous parties to interject themselves into the case on every issue, to the extent that the goal of a speedy and efficient reorganization is hampered.").[6]

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[6] *See also In re Teligent, Inc.*, 640 F.3d 53, 61 (2d Cir. 2011) (law firm "had too remote an interest in the settlement agreement to have been considered a party in interest for the purposes of being heard before the bankruptcy court on the agreement's approval"); *In re Refco Inc.*, 505 F.3d 109, 119 (2d Cir. 2007) ("Had the bankruptcy court permitted Investors to object to the Settlement and conduct discovery on the numerous factual issues that, according to Investors, would prove that the Settlement 'was the product of tortious misconduct, collusion, and fraud by a faithless fiduciary,' the Code's

Of course, all parties with genuine, concrete injury are entitled to participate in plan confirmation. It is precisely because they have an important role to play in that process that entities like Petitioner that do not satisfy the "party in interest" test should not be permitted to interfere. These concerns are particularly salient in this case, where the plan is the product of extensive negotiations between the debtors and the court-appointed representatives of present and future asbestos creditors, with the participation of state and federal government agencies. Pet. App. 5a. The proposed plan in this case received overwhelming support, with 100% of current asbestos claimants voting to accept it. It also received "unanimous support from all the other parties involved in the bankruptcy, save one—[Petitioner]." Pet. App. at 8a. None of the 16 other insurers in the case objected to the plan at confirmation.

The plan provides that, with respect to the debtors' insured asbestos liabilities, asbestos claimants may continue to file lawsuits in state and federal courts naming the reorganized debtors as defendants, as they have done for decades. To satisfy any claims that fall outside of the

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goal of a 'speedy and efficient reorganization,' would have been frustrated.") (citations omitted); *In re Matter of Certain Claims and Noticing Agents' Receipt of Fees in Connection With Unauthorized Arrangements With Xclaim Inc.*, 647 B.R. 269, 280 (Bankr. S.D.N.Y. 2022) ("an indirect interest is insufficient to confer party-in-interest status"); *In re Cape Quarry, LLC*, Case No. 19-12367, 2020 WL 6749334, *5 (E.D. La. Nov. 17, 2020) (quoting Judge Lifland); *S. Blvd., Inc. v. Martin Paint Stores (In re Martin Paint Stores)*, 207 B.R. 57, 61 (S.D.N.Y. 1997) ("The term 'party in interest' [in § 1109(b)] is broadly interpreted, but not infinitely expansive."); *In re Addison Comty. Hosp. Auth.*, 175 B.R. 646, 650 (Bankr. E.D. Mich. 1994) ("This Court should not be so liberal in granting applications to be heard as to overburden the debt adjustment process. . . . By allowing a large number of non-creditors to be heard in this action, the Court would be granting a blanket invitation to all parties in the area serviced by Addison. This would hamper, and unduly delay, the debt adjustment process.").

available insurance coverage, as well as uninsured portions of claims (like deductibles), the plan also creates a trust pursuant to 11 U.S.C. § 524(g).[7] It is especially unfortunate to allow an interloper with only an abstract stake to disrupt a creative and practical solution to asbestos liabilities, where the parties with the genuine interests in the proceeding uniformly support the plan.

III. The Government Is Wrong in Contending that Petitioner is a "Party in Interest" Because Its Insurance Contracts Are Property of the Estate.

The Government argues that Petitioner is a party in interest because its insurance contracts are "property of the estate." U.S. Br., at 16. But Petitioner failed to preserve that argument below, and amicus curiae cannot revive an argument that has been waived (or, as in this case, never made by the parties). *See, e.g., Holguin-Hernandez v. United States*, 140 S. Ct. 762, 767 (2020) (declining to consider arguments raised by Government and amicus that the court of appeals did not consider); *Santomenno ex rel. John Hancock Tr. v. John Hancock Life Ins. Co. (U.S.A)*, 768 F.3d 284, 300 (3d Cir. 2014) (amicus cannot "resurrect on appeal issues waived by Participants."); *Justice v. CSX Transp., Inc.*, 908 F.2d 119, 125 (7th Cir. 1990) (Amicus cannot "unwaive" issues waived by the parties); *Food & Water Watch v. FERC*, 28 F.4th 277, 290

[7] Section 524(g) of the Bankruptcy Code represents a "creative solution to help protect ... future asbestos claimants." H.R. Rep. No. 103–835, at 47 (1994). The statute provides a special form of relief "for an insolvent debtor facing the unique problems and complexities associated with asbestos liability." *In re Combustion Eng'g*, 391 F.3d 190, 234 (3d Cir. 2005). Section 524(g) is modeled on the trust developed during the bankruptcy of the Johns–Manville Corporation. *In re Federal–Mogul Global, Inc.*, 684 F.3d 355, 359 (3d Cir. 2012). It enables bankruptcy courts to establish a trust for present and future claimants as part of a debtor company's reorganization plan.

(D.C. Cir. 2022) (holding that "amici are powerless to revive an argument the parties failed to preserve."). The Court therefore should not consider the Government's argument.[8]

In any event, the Government is wrong. "The fact that the insurance policy is property of the bankruptcy estate, however, does not necessarily mean that the proceeds from that policy are also property of the estate." *In re Stevens*, 130 F.3d 1027, 1029–30 (11th Cir. 1997). "The question is not who owns the policies, but who owns the … proceeds." *In re Louisiana World Exposition, Inc.,* 832 F.2d 1391, 1399 (5th Cir. 1987).

Thus, in *In re Edgeworth*, 993 F.2d 51, 55-56 (5th Cir. 1993), the court held that the proceeds of a bankrupt doctor's medical malpractice policy were not property of the estate. The court observed that the "overriding question when determining whether insurance proceeds are property of the estate is whether the debtor would have a right to receive and keep those proceeds when the insurer paid on a claim." *Id.* at 55. When the insurer's payment cannot go to the debtor, "those proceeds are not property of the estate." *Id*. at 55-56; *see also First Fid. Bank v. McAteer*, 985 F.2d 114, 118 (3d Cir. 1993) (proceeds of life insurance policy not property of the estate).

Proceeds can be part of the estate only in limited circumstances not present here. In *In re OGA Charters, L.L.C.*, 901 F.3d 599, 604 (5th Cir. 2018), for instance, the court explained that when the proceeds or the policy are payable to persons other than the debtor, those proceeds are not estate property unless the covered claims

[8] The Government asserts that the court of appeals "did not deny" that Petitioner is a party to insurance contracts that are property of the estate. U.S. Br. at 27. This is hardly surprising, since the issue was not presented to it.

dramatically exceed the policy limit. *See also First Fid. Bank*, 985 F.2d at 118. Proceeds may also be property of the estate if they replace the debtor's property or go directly to the debtor. *See, e.g., In re Stevens*, 130 F.3d at 1029–30 (insurance proceeds of policy covering the debtor's truck because "the proceeds act as a substitute for the insured collateral").[9]

Here, Petitioner has not alleged or shown that the proceeds of the policies are payable to the debtor or that the claims dramatically exceed the policy limits. Thus, this Court should not find (especially in the absence of an argument from Petitioner itself) that the proceeds of the insurance policies here are "property of the estate."[10]

[9] The Government's reliance on *In re Vitek*, 51 F.3d 530 (5th Cir. 1995), is misplaced. Although the *Vitek* court "questioned *Edgeworth*'s policy/proceeds distinction," the Fifth Circuit in *OGA Charters* made clear that the distinction remains and that *Vitek*'s discussion is not controlling. *OGA Charters*, 985 F.3d at 603.

[10] In *Tringali v. Hathaway Mach. Co.*, 796 F.2d 553, 560 (1st Cir. 1986), the court stated that "proceeds of a liability insurance policy are 'property of the estate.'" But in that case the proceeds of the insurance policy were inadequate to satisfy the claims. *See id.* at 556; *see also In re Titan Energy, Inc.,* 837 F.2d 325, 330–31 (8th Cir. 1988) (distinguishing *Tringali*). *Tringali* thus falls comfortably within the exception recognized in *OGA Charters*.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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Dated: January 31, 2024