

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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TRUCK INSURANCE EXCHANGE,)
) Petitioner,)
) v.) No. 22-1079
KAISER GYPSUM COMPANY, INC.,)
ET AL.,)
) Respondents.)
- - - - -

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TRUCK INSURANCE EXCHANGE,)

Petitioner,)

v.) No. 22-1079

KAISER GYPSUM COMPANY, INC.,)

ET AL.,)

Respondents.)

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Washington, D.C.

Tuesday, March 19, 2024

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:37 a.m.

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11 behalf of the Claimant Respondents.

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P R O C E E D I N G S

(11:37 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 22-1079, Truck Insurance Exchange versus Kaiser Gypsum Company.

Ms. Ho.

ORAL ARGUMENT OF ALLYSON N. HO
ON BEHALF OF THE PETITIONER

MS. HO: Thank you, Mr. Chief Justice, and may it please the Court:

If anyone is a party in interest entitled to be heard in this Chapter 11 case, it's the insurer, Truck, who will pay virtually every dollar the debtors owe the asbestos claimants.

Yet, the Fourth Circuit's rule denies that insurer a voice. That rule, which my friends barely defend, violates the text, context, and history of 1109(b).

It also defies the practical reality that Chapter 11 cases are, as this Court has recognized, collaborative, working best when all stakeholders come together at the outset to hash things out.

Congress recognized that reality and

1 spoke expansively in 1109(b) to extend the right
2 to be heard to any issue. Congress also gave
3 courts a duty to ensure compliance with the code
4 and invited broad participation to help
5 discharge that duty. 1109(b)'s breadth is a
6 feature, not a bug.

7 It's now common ground that a party in
8 interest is one who could be directly and
9 adversely affected by the case. That's Truck in
10 at least two ways.

11 First, it's the insurer paying the
12 vast bulk of claims against the debtors. In the
13 government's terms, it's a contracting party.
14 From the start then, Truck's rights could have
15 been directly and adversely affected by this
16 case. The proof of that pudding is in the plan
17 finding, which resolved key -- a key coverage
18 dispute against Truck.

19 Second, Truck's a creditor for
20 millions in insurance deductibles.

21 For both reasons, 1109(b)'s plain
22 terms entitle Truck to be heard on any issue.

23 In silencing Truck, the Fourth Circuit
24 violated those terms by limiting who a party in
25 interest is and what issues they can raise.

1 I welcome the Court's questions.

2 JUSTICE THOMAS: Ms. Ho, at what point
3 do you determine the status of party in
4 interest?

5 MS. HO: Thank you, Justice Thomas.
6 At the -- at the outset. Section 1109(b)'s text
7 refers to "be heard under any issue in [this]
8 case." So we think that has to be an ex ante
9 inquiry, in part because there are other
10 provisions of the code apart from 1109(b) that
11 affect parties in interest that don't depend on
12 a specific plan or any plan.

13 JUSTICE THOMAS: Well, the -- in this
14 case, the -- the determination at the end or --
15 or in -- was that Truck was not negatively
16 affected. How could you determine that at the
17 -- at the beginning of the proceedings?

18 MS. HO: Yes, Your Honor, because I
19 think the question should be "could," could --
20 could the entity be affected by the Chapter 11
21 case. And as the insurer, there are any number
22 of ways that Truck could have been affected. It
23 could have been affected by a plan that -- that
24 resulted in one, as we were seeking, with fraud
25 prevention measures, or it could have resulted,

1 as had happened, in a plan that didn't include
2 those.

3 We -- we came into this Chapter 11
4 proceeding as a creditor. The proceeding could
5 have resulted in our claims being impaired or
6 unimpaired. And you don't know that until the
7 end, but that doesn't -- the -- the language of
8 1109(b) speaks to a creditor. So, if you're a
9 party in interest in the beginning with a right
10 to be heard under 1109(b), then you're a party
11 in interest all the way through --

12 CHIEF JUSTICE ROBERTS: What if --

13 MS. HO: -- Justice Thomas.

14 CHIEF JUSTICE ROBERT: I -- I -- I
15 know there's -- we could have some back and
16 forth about the facts, but in a hypothetical,
17 let's assume that your client, whichever plan --
18 you know, there's three different plans on the
19 table, and under every one, your client gets --
20 you know, the -- his exposure is exactly the
21 same. It makes no difference to him which
22 particular creditors are going to get what.
23 He's -- just given the factual situation, he's
24 going to walk away with exactly what he has or
25 what he doesn't have when it's all done.

1 In what sense is -- does he have an
2 interest in how his assets are distributed or --
3 or what the liabilities are? In other words,
4 although he is -- you could identify where he is
5 going to, you know, be on the hook or not on the
6 hook, but at the end of the day, everybody
7 agrees it's not going to make any difference.

8 Now does he get -- still get to
9 participate because his assets are going to be
10 used in some form or another?

11 MS. HO: Yes, Your Honor. And this
12 goes -- Mr. Chief Justice, this goes to, I
13 think, the colloquy I was having with Justice
14 Thomas about the importance of the ex ante
15 determination of who a party in interest is,
16 right? It's somebody who could be directly and
17 adversely affected. And I think one may --

18 CHIEF JUSTICE ROBERTS: Well, under my
19 hypothetical, he -- he's going -- I guess my
20 hypothetical, he's going to be adversely
21 affected to exactly the same extent or not
22 affected at all.

23 MS. HO: I think, as -- as long as --
24 as -- as -- as -- as in the course of the case
25 that -- that entity is directly and adversely

1 affected, and I think one -- one way that we
2 know that, Mr. Chief Justice, is because, if you
3 look at 1109(b), one of the entities that's
4 expressly listed is a creditor.

5 And we also know that different
6 provisions of the code, it matters whether you
7 are impaired or unimpaired, right? So, in other
8 words, you don't get a vote on a plan if your
9 interests are not impaired.

10 CHIEF JUSTICE ROBERTS: Yeah, and we
11 also know --

12 MS. HO: But that is different than
13 being heard, Mr. Chief Justice.

14 CHIEF JUSTICE ROBERTS: Yeah. We also
15 know that in these proceedings, there are some
16 creditors that are just not going to get
17 anything because of their particular status and
18 all that. Now I suppose you want to say these
19 -- technically, under the rule, he can go in,
20 and maybe that's a difference in this case. But
21 is -- is the -- a party in interest, is the same
22 test for that Article III?

23 MS. HO: That's our position. Our --
24 our position, which is the position adopted by
25 the Third Circuit, is that the test for that is

1 Article III, which -- which --

2 CHIEF JUSTICE ROBERTS: Well, under
3 Article III, if you're not going to be injured
4 at all because the proceedings -- you know
5 you're not going to get any money or you know
6 you're not going to have any left or whatever it
7 is, I don't know that that would satisfy Article
8 III just because people are going to be fighting
9 about who gets your money. But the one thing
10 that's clear, it's not going to be you.

11 MS. HO: Well, I think, though, you
12 don't know that. You don't know that at the
13 outset of -- of -- of the -- of -- of the
14 proceeding, right? So a creditor does not know,
15 a party in interest or an equity holder does not
16 know, and even the debtor doesn't know --

17 CHIEF JUSTICE ROBERTS: Okay. Well,
18 that, I think, is --

19 MS. HO: -- until the very end.

20 CHIEF JUSTICE ROBERTS: -- is fighting
21 my hypothetical. And, you know, maybe it's not
22 a good hypothetical, but -- but assume that that
23 is the fact, that -- that they're not going to
24 be affected one way or another. They're just so
25 far down the line of, you know, people who can

1 recover or so far down the line of people who
2 are responsible that they're really not going to
3 get anything else.

4 MS. HO: I -- I do hate to fight your
5 hypothetical, Mr. Chief Justice, but I -- I -- I
6 do think such a person -- I think it's -- I
7 guess maybe I'm fighting it because it's hard to
8 know, it's maybe impossible to know at the
9 outset of any proceeding whose ox is going to be
10 gored and -- and how much. That is very much an
11 open question.

12 That -- that is why Congress, in
13 1109(b), spread -- spread a -- set a big table
14 so that all parties in interest can come and
15 participate and be heard and work -- work out
16 the negotiation among the parties who have a
17 stake, who could be directly --

18 JUSTICE KAGAN: I -- I guess I'm --

19 MS. HO: -- affected by the
20 proceedings --

21 JUSTICE KAGAN: -- I'm -- I'm not
22 sure, Ms. Ho, how your "at the outset" rule fits
23 with your Article III rule --

24 MS. HO: Mm-hmm.

25 JUSTICE KAGAN: -- because, as -- as

1 you just suggested, at the outset, there's going
2 to be a lot of things you don't know. You don't
3 know what the plan is going to be. You don't
4 know whether the plan is going to affect you,
5 injure you or not. You don't know -- you know,
6 all the things that we think of in the standing
7 context: Is there imminent injury? Is there
8 some traceability? At the outset, many people
9 won't have the answers to those questions.

10 So I guess I can understand an "at --
11 at the outset" rule, and I can understand an
12 Article III rule, but I'm not sure I can
13 understand both of them together.

14 MS. HO: Sure. Two points to that,
15 Justice Kagan.

16 To -- to start, you know, we -- we do
17 think that party in interest is coextensive with
18 Article III, but you -- you wouldn't -- you
19 wouldn't have to agree with me on that to agree
20 in terms of what -- who a party in interest is
21 under -- under the statute.

22 But, secondly, I -- I do think there
23 is a good fit --

24 JUSTICE KAGAN: So your first answer
25 is you're willing to give up the Article III?

1 MS. HO: Well, I don't think my -- I
2 just wanted to make clear, Your Honor, I don't
3 think -- you don't have to agree with me --

4 JUSTICE KAGAN: Yeah. That's --
5 that's a fine answer.

6 MS. HO: -- on -- on -- on -- on
7 Article III. We do think it's -- it is -- it is
8 coextensive, as the Third Circuit has held for a
9 dozen years, and I don't -- I don't think
10 there's any tension between that and ex-ante.

11 I think the -- the way to think about
12 it is it's -- it's -- it's basically do you have
13 standing and does disaggregating that from the
14 merits, right, what a plan will actually do or
15 how the proceeding will actually unfold.

16 In the same way that this Court, you
17 know, doesn't let the standing inquiry determine
18 the merits, I think this -- it operates the same
19 way in 1109(b) in the party in interest
20 discussion and analysis, is that you're looking
21 to see could -- could these proceedings directly
22 and adversely affect it.

23 I think, as to traceability and
24 redressability, I think those -- those
25 requirements of Article III will virtually

1 always be satisfied in -- in every case where
2 there's a party in interest, right?

3 JUSTICE SOTOMAYOR: Can we -- can I --

4 MS. HO: Yes, Justice Sotomayor.

5 JUSTICE SOTOMAYOR: -- break this
6 down?

7 There are various points at which you
8 decide standing. One is at the beginning of the
9 suit. And I think what -- this is not an
10 Article III court. This is an Article II court.
11 And it's not even a full court because it can't
12 do everything an Article III court can do.

13 It's closer, not quite, to an
14 administrative proceeding. But it's an Article
15 II court. And, generally, a -- a party in
16 interest is anyone that could be affected by a
17 plan. The plan hasn't come into effect, but you
18 could posit a thousand different ways that a
19 plan could directly financially injure someone.

20 The Chief is positing a case where
21 there's just not enough money, they're never
22 going to reach down here, but you don't know
23 that because you don't know what claims are
24 going to be disallowed, whether some priority
25 claims are not going to be accepted. There's

1 just too -- that's what you're saying about the
2 unknown?

3 MS. HO: Yes.

4 JUSTICE SOTOMAYOR: Now the question
5 becomes when you get to the point that a plan --
6 and this is the point we're at -- when we get to
7 the point that a plan is in place, now the
8 question is who can object to that plan,
9 correct? And now the question becomes what are
10 the reasons you can object?

11 And you're saying, because this plan
12 as structured not only violates the terms of our
13 contract, it also violates the terms of the
14 bankruptcy court -- court. You're saying that
15 there's a separate good faith and fair dealing,
16 an equal treatment requirement under the
17 Bankruptcy Code and that this plan violated
18 that, correct?

19 MS. HO: Correct, Your Honor.

20 JUSTICE SOTOMAYOR: Now the net -- the
21 net neutrality test doesn't answer that second
22 question, correct?

23 MS. HO: Correct.

24 JUSTICE SOTOMAYOR: Because whether or
25 not, if this plan in some way has treated you

1 differently from the Debtors' other debts with
2 no reasonable basis to do so, that could breach
3 the Bankruptcy Code, good faith and fair
4 dealing, correct?

5 MS. HO: Correct.

6 JUSTICE SOTOMAYOR: All right. So now
7 it's possible after we go through all of this
8 that the court below will say: No, it doesn't
9 breach it, but you have a right to be heard on
10 that. That's what you're saying. That's the
11 standing, correct?

12 MS. HO: Yes, yes.

13 JUSTICE SOTOMAYOR: So that's the
14 difference between you can't flip things and get
15 to the merits in that way, you have to look at
16 that standing issue on the basis of the moment
17 the plan is there, I am being affected by the
18 plan.

19 It's possible that that affect won't
20 rise to the level of something that I will be
21 given something to, but I have a right for them
22 to hear me out on this, correct?

23 MS. HO: Correct.

24 JUSTICE JACKSON: Can I ask you about
25 the difference between your view and the

1 government's view? I understood the
2 government's view to be narrower but that you
3 would also be covered by it.

4 So do you reject their sort of
5 contract-based determination here?

6 MS. HO: No, not at all, Justice
7 Jackson. And I -- I -- I don't see the
8 government's position as -- as a different -- as
9 a different test. I --

10 JUSTICE JACKSON: Do you agree it's
11 narrower than yours?

12 MS. HO: I think I -- I think I would.
13 I think I would agree that it's -- that it's
14 narrower.

15 JUSTICE JACKSON: So why is yours
16 better?

17 MS. HO: I actually don't know that --
18 that one is -- is -- is -- is better or the
19 other. I think what the government is saying is
20 we -- we both agree that 1109(b), that the text
21 is broad and expansive.

22 JUSTICE JACKSON: Right.

23 MS. HO: We -- we -- we both agree
24 that we are -- we are a creditor --

25 JUSTICE JACKSON: Right.

1 MS. HO: -- and that we were entitled
2 to be heard that way.

3 JUSTICE JACKSON: But setting aside
4 the --

5 MS. HO: And I think -- I think the
6 government's position is they're focusing on the
7 -- anyone who holds an executory contract.
8 And -- and we do.

9 JUSTICE JACKSON: Right.

10 MS. HO: So that -- that -- that
11 brings us -- that brings us in. So I don't -- I
12 don't see that as --

13 JUSTICE JACKSON: I guess what I'm
14 worried about a little bit --

15 MS. HO: Yes.

16 JUSTICE JACKSON: -- is that if we go
17 beyond people who hold a contract and just to
18 anyone who's adversely affected, I guess you
19 could imagine that a competitor in this
20 environment would say, I'm adversely affected,
21 you know, by what is happening with the
22 bankruptcy of this other business.

23 Would -- would we be opening the door
24 to allowing in the kinds of entities on the
25 basis of your broad test that you would

1 otherwise think Congress would not have wanted
2 to be a party in interest?

3 MS. HO: No, Your Honor. And --
4 and -- and to be clear, we are -- we are more
5 than happy to embrace a holding of this Court
6 that we are a party in interest who can be heard
7 on any issue because of the insurance contract
8 that we hold. So I want to be clear on that.

9 But I think, to your point about
10 the -- the floodgates argument that my friends
11 raise, I don't think so, because I think the
12 direct and adverse test which we believe is
13 coextensive with Article III, it -- it has
14 teeth. Again, it has been the rule in the
15 Twelfth Circuit for over a dozen years. And I
16 -- I -- my friends on the other side really
17 can't point to any sort of chaos that has
18 resulted from it.

19 So I -- I think our -- our test has
20 teeth. And I -- and I also think that Congress,
21 again, as I started by saying, I think the
22 breadth is -- is a feature and not a bug here,
23 that Congress wanted to bring stakeholders to
24 the table, parties in interest who had a stake.
25 And if anyone -- if anyone has a stake in this

1 Chapter 11 proceeding, it is the insurer who
2 will be paying the vast bulk of claims --

3 JUSTICE KAVANAUGH: Isn't that --

4 MS. HO: -- against the Debtors.

5 JUSTICE KAVANAUGH: This doesn't hurt
6 your argument, but isn't it true that the
7 insurer will, who's responsible for the claims,
8 will always or almost always be a party in
9 interest then in bankruptcies --

10 MS. HO: I -- I -- I --

11 JUSTICE KAVANAUGH: -- mass tort
12 bankruptcies?

13 MS. HO: I -- I -- I think that's -- I
14 think that's right. And when -- when I sort of
15 think through my -- to myself, you know, what --
16 who -- who else could be brought in under our
17 test, I -- I -- I do think the -- the single
18 largest group are the -- are -- are insurers and
19 who will also often come in as creditors as
20 well, as -- as we do -- as we do too.

21 JUSTICE GORSUCH: Counsel, just on the
22 Article III point, I wonder whether we need to
23 tangle or should tangle with it because I think
24 of Article III as the -- the plaintiff coming to
25 court has to establish an injury.

1 And -- and who the plaintiff is in a
2 bankruptcy case, I don't know, maybe the
3 petitioner, right, but normally we say someone
4 objecting to relief under Bond, under Clapper,
5 doesn't have to establish Article III standing.
6 And that would seem to be a closer fit to a
7 party or a group like yours seeking to object to
8 a plan.

9 MS. HO: I certainly don't disagree
10 that in -- in -- in the context where what you
11 have is someone who is only objecting, right, to
12 the relief being sought, and -- and that is us
13 to a T, right? We are -- we are objecting to
14 the plan.

15 I think there may be a different issue
16 raised when you get to, say, appellate standing,
17 but -- but in terms of 1109(b) party in
18 interest, we -- we do -- we do agree that as we
19 are the -- we are opposing through -- yes, thank
20 you.

21 CHIEF JUSTICE ROBERTS: Thank you,
22 counsel.

23 Justice Thomas?

24 Justice Sotomayor?

25 JUSTICE SOTOMAYOR: I'm assuming if we

1 reach it on the government's theory or in your
2 theory, that directly and adversely means an
3 insured, because they have a contract --

4 MS. HO: Yes.

5 JUSTICE SOTOMAYOR: -- is -- is a
6 party in interest --

7 MS. HO: Yes.

8 JUSTICE SOTOMAYOR: -- that should be
9 heard, that we don't have to reach the creditor
10 issue or the Article III issue?

11 MS. HO: That's correct, Your Honor.

12 JUSTICE SOTOMAYOR: Okay.

13 CHIEF JUSTICE ROBERTS: Justice Kagan?
14 Justice Gorsuch?

15 Justice Kavanaugh?

16 Justice Barrett?

17 JUSTICE BARRETT: Well, let's see.

18 It -- it seems to me that maybe we would have to
19 at least say Article III doesn't apply because
20 you're not -- because someone like the insurer
21 is not the one invoking it.

22 I guess I'm -- I would be a little bit
23 worried, as you say, if Congress is setting the
24 table broadly and parties in interest cut
25 broadly, it's speculative, right? I mean, it --

1 it's pretty speculative.

2 You might be able to articulate a way
3 that the plan could adversely affect your
4 interests, but it would be speculative. And so
5 maybe we don't have to say whether Article III
6 applies in Article I courts, but if I think you
7 might have a problem satisfying Article III, I
8 think I would still have to say you have
9 statutory standing, right?

10 MS. HO: Yes. I -- I think there's no
11 -- there -- I don't believe there's any dispute
12 that we have Article III standing here and in
13 the court below because we weren't heard, and so
14 we're challenging that we -- we were not -- were
15 not heard.

16 JUSTICE BARRETT: Yes.

17 MS. HO: I do think, in terms of the
18 Article III issue, the Fourth Circuit did
19 address our creditor issue in Article III terms,
20 but I think what that court was really doing was
21 it was reading any issue out of the statute.

22 So I think from the -- this Court's
23 perspective, I don't think there's any question
24 about our Article III status. I think the
25 question is, are we a party in interest? We --

1 we say --

2 JUSTICE BARRETT: Right.

3 MS. HO: -- that's directly and
4 adversely affected. The government says it's
5 because we have an executory contract. Either
6 way, I think we -- we satisfy the statutory
7 standing and we also satisfy Article III
8 standing here.

9 JUSTICE BARRETT: Oh, I see what
10 you're -- I mean, I get what you're saying. I'm
11 just saying, if I don't want your test, if I
12 don't want to say that the statutory standard is
13 coextensive with Article III --

14 MS. HO: Yes.

15 JUSTICE BARRETT: -- that's -- that's
16 the issue that I might have.

17 And then just very briefly, could you
18 describe for me for the uninsured claims what
19 exactly -- I mean, you know, the -- you know,
20 Kaiser and the -- the Claimants are fighting
21 pretty hard to keep the insured claimants out.

22 So what exactly are the fraud
23 protection measures that would apply to the
24 uninsured claims, the ones that you want to
25 apply to the insured claims as well?

1 MS. HO: Sure. There are essentially
2 two, Justice Barrett. The first would require
3 all claimants to disclose all known exposures --

4 JUSTICE BARRETT: Right.

5 MS. HO: -- right, to all defendants.

6 And the second primary requirement or
7 measure would be a release that would allow the
8 trust to obtain information from the other
9 trusts on that.

10 JUSTICE BARRETT: Okay. Thank you.

11 CHIEF JUSTICE ROBERTS: Justice
12 Jackson?

13 Thank you, counsel.

14 MS. HO: Thank you.

15 CHIEF JUSTICE ROBERTS: Mr. Yang.

16 ORAL ARGUMENT OF ANTHONY A. YANG
17 FOR THE UNITED STATES, AS AMICUS CURIAE,
18 SUPPORTING THE PETITIONER

19 MR. YANG: Mr. Chief -- Mr. Chief
20 Justice, and may it please the Court:

21 Both counterparties to executory
22 contracts and creditors are parties in interest
23 that may be -- appear and be heard on any issue
24 in a Chapter 11 bankruptcy case. If a party is
25 a party in interest, they get a seat at the

1 reorganization table, and once they're at the
2 table, they can be heard on any issue in the
3 case. And that status must be determined ex
4 ante, that is, before the court considers the
5 questions, because the right is to be heard in
6 advance.

7 That doesn't depend on the merits of
8 the position, and it cannot be determined based
9 on what a plan proposes because a party in
10 interest under 1121(c) can itself propose a
11 plan. Moreover, the plan is never final until
12 all appellate proceedings have -- on the
13 confirmation are ended. And so they can
14 participate all the way through.

15 The code contemplates that every
16 executory contract must either be assumed or
17 rejected. Either way -- and I'd like to develop
18 that in our conversation -- but either way, a
19 party -- a counterparty is a party in interest.

20 I'd be happy to -- to follow up on
21 that.

22 JUSTICE THOMAS: Mr. Yang, what's the
23 difference between your view and -- or your
24 approach to 1109 and Petitioner's?

25 MR. YANG: Well, I think Petitioner's

1 view, while -- it appears to me that they are
2 interpreting "party in interest" based on some
3 older Interstate Commerce Act cases that
4 borrowed some Article III concepts when
5 interpreting "party in interest."

6 We just don't think that's a term of
7 art. It's not clear to me that they actually
8 say that you have to have Article III standing
9 to raise an objection. I think it's more based
10 on the term, and the -- the Article III ideas
11 were incorporated by reference to the cases.

12 So I'm not sure we disagree about
13 Article III. We just disagree about the
14 interpretive method. Our interpretive method
15 just goes to the text. The text is broad. It's
16 not so broad as to get amici or, you know,
17 people with very tangential views in the case.

18 But, in this case, it certainly
19 applies expressly to creditors, and we say -- we
20 think it applies to parties with executory
21 contracts because, remember, executory contracts
22 under 365 are either going to be assumed
23 affirmatively or rejected, and if assumed,
24 sometimes they're assigned to somebody else.

25 Now, if the debtor seeks to assume a

1 contract, they have to satisfy Section 365's
2 standards that protect the counterparty. If
3 there has been some kind of breach, it has to be
4 cured. Certain contracts cannot be assumed.
5 And the counterparty can object. Among other
6 things, the counterparty has an interest in the
7 debtor's ability to fulfill that contract going
8 forward. And the debtor has to move to assume a
9 contract. It has to show that the business
10 judgment standard has been met. A counterparty
11 can object.

12 Now, if the debtor wants to reject the
13 contract -- Justice Kagan, your -- your opinion
14 in Mission Products Holdings addresses this --
15 that results in a breach of contract. It
16 results in a claim, and then the creditor is a
17 claimant and not in a real good position because
18 it's usually a pre-petition plain -- claim, and
19 you get pennies on the dollar in most contexts.

20 Either way, assumed or rejected, they
21 have an interest. Now that's reflected not only
22 --

23 JUSTICE KAGAN: Mr. Yang, in an -- in
24 an old case of ours, we used the term "adversely
25 and directly affected." Do you accept that

1 standard, or do you think we should not have a
2 standard like that?

3 MR. YANG: You know, I'm not really
4 sure where that standard comes from except
5 unless you -- are drawing from Article III. We
6 don't really object, I think, to the outcome of
7 having some direct effect. Whether you're
8 adversely affected, though, you don't -- I think
9 is the wrong question.

10 You have to have the potential to be
11 adversely affected in a bankruptcy because
12 that's what the reorganization is. You bring
13 everybody in who has a potential to be affected
14 and you work it out.

15 So going back to the pre-code
16 Bankruptcy Act, and --

17 JUSTICE KAGAN: And -- and -- and --
18 sorry.

19 MR. YANG: Sure.

20 JUSTICE KAGAN: If I could just follow
21 up. You -- you too -- and this is just like Ms.
22 Ho -- said at the outset this is --

23 MR. YANG: Yeah.

24 JUSTICE KAGAN: What if you don't
25 really know whether your -- you have any

1 interest in this until the middle of the thing?
2 I mean, I can imagine many -- many events taking
3 place, including there's now a plan on the table
4 and now you look at the plan on the table and
5 you think: Oh, my gosh, I could be affected.

6 It just seems a strange thing in a
7 bankruptcy proceeding, which is fluid and has
8 many twists and turns, that you would say do
9 this at the outset and -- and apparently only at
10 the outset.

11 MR. YANG: Let me answer that, and I
12 think it's easiest to answer it in the context
13 of executory contracts and creditors, right?
14 Executory contracts, they're always going to
15 have potentially some effect. Maybe you just,
16 you know, don't know what the effect is going to
17 be, and a lot of people who could be parties in
18 interest, just because it doesn't fit into the
19 -- it doesn't make rational economic sense, they
20 don't participate, right? They just don't
21 participate until -- they have a right to, but
22 they don't until it becomes relevant.

23 The pre-Bankruptcy Act -- Code Act
24 labels executory contractors as parties in
25 interest. Why? It's because they had to get

1 advance notice of rejection. And there's a case
2 called King versus Baer of the Tenth Circuit,
3 1973, it explains that -- you give them notice
4 in a hearing so they can be heard.

5 Currently, the current code says that
6 the -- the counterparty can seek an order to set
7 a period to assume or reject. That's 365(d)(2).
8 Other parties in interest may similarly set --
9 set that same period, but they can only do so in
10 the context of status conferences. That's
11 105(d)(2)(A). All of this is showing that
12 parties in interest -- that -- that executory
13 counter -- contract counterparties are parties
14 in interest.

15 Now there's a few things that I'd like
16 to address. One is there's a question about
17 having a voice and not a vote. I think that
18 goes to the question of being impaired.
19 Impaired is what the plan under Section 1124
20 proposes. But there are other requirements for
21 a plan. For instance, a plan needs to be
22 feasible. So, if you're a creditor and the plan
23 proposes satisfying everything, but it satisfies
24 it in a way that's not likely to end up being
25 implemented -- you can object under 1129(a), I

1 think it's (a)(11), that the plan's not
2 feasible.

3 So the impairment just talks about the
4 separate requirement that the classes vote. It
5 doesn't set -- address your right to be heard,
6 which, by the way, is not only a right to be
7 heard to object, but it's a right to be heard to
8 support the plan, right? If you're not
9 impaired, you may well want to come in and
10 support the plan.

11 The floodgates question, it largely
12 turns, I think, on the question of any issue,
13 not the problem of party in interest. Like
14 take, for instance, the vending contractor that
15 -- that everyone's talking about. The problem
16 is not that a vending contractor gets to come in
17 and be a party in interest and participate with
18 respect to the vending contract, whether it's
19 assumed or rejected or interpreted in a way it
20 doesn't like. The concern is that it's also
21 heard on any issue.

22 But the text of 1109(b) and its
23 history, the evolution of expanding those groups
24 that can speak on any issue, foreclose any real
25 textual ability to say, oh, you can only

1 participate on certain issues. "Any issue"
2 means what it says.

3 Secondly, the concerns about
4 floodgates, I think, are totally overstated.
5 Litigants make rational economic choices where
6 they have a stake in reasonable arguments. The
7 right to be heard doesn't impose on the courtan
8 -- any burden to -- to speak at length if it
9 doesn't think there's much to say about the
10 issue.

11 And the court has to decide the
12 question anyway in terms of confirmation because
13 this Court, in United Student Aid Funds,
14 determined that the court has to decide whether
15 the plan complies with the code even if no one
16 objects.

17 And, finally, sanctions deters any
18 kind of bad-faith conduct. Ultimately, this is
19 a balancing question, does it make sense to
20 bring everybody in, we're going to weigh it
21 against maybe some burden of having their voices
22 heard, we're going to balance it against the
23 waste of resources of trying to decide who gets
24 to be heard, and Congress struck that choice in
25 1109(b).

1 JUSTICE KAVANAUGH: Does -- does your
2 position just boil down to the common-sense
3 point that an insurer is on the hook for the
4 claims in a mass tort bankruptcy as a party in
5 interest?

6 MR. YANG: I think that's a subset of
7 our point, and our -- our -- our -- our primary
8 point is --

9 JUSTICE KAVANAUGH: Well, all -- all
10 we need is that subset. Don't we? I mean,
11 isn't that just kind of common -- I just thought
12 that is the common-sense point.

13 MR. YANG: I -- I agree. But I
14 actually don't think it's that much different
15 than saying that a counterparty to an executory
16 contract is always going to have an interest.

17 JUSTICE JACKSON: Mr. Yang?

18 MR. YANG: I -- I just don't think
19 that that's different. And -- and the idea was
20 that Congress --- the legislative history
21 reflects that the idea here is to hear all sides
22 of an issue and then let the court decide.

23 JUSTICE JACKSON: Mr. Yang --

24 JUSTICE KAVANAUGH: And the insurer is
25 kind of obvious, right? That's your point.

1 MR. YANG: Insurer's an obvious one.

2 JUSTICE KAVANAUGH: Yeah.

3 MR. YANG: I mean, it -- it -- but it
4 would have included even the vending contractor.
5 Now the vending contractor might not have
6 participated? Why? Because, you know what, it
7 didn't matter. It's like small steaks,
8 potatoes. The vending contractor is just not
9 going to participate.

10 There's a lot of people in the
11 periphery that just don't participate. The 10
12 cent creditor, unimpaired, unsecured 10 cent
13 creditor is expressly a party in interest,
14 right?

15 JUSTICE JACKSON: What about an
16 employee? You know, if we're going with your
17 definition, which has to do with contracts --

18 MR. YANG: Yep.

19 JUSTICE JACKSON: -- I suppose an
20 employee has a contract, so are you saying that
21 they would be a party in interest?

22 MR. YANG: An -- an employee can be a
23 party in interest as a party to an executory
24 contract. Now there are certain code provisions
25 that deal with employees and unions and things

1 like that, but as a general matter, yes.

2 JUSTICE JACKSON: Okay.

3 MR. YANG: That's true.

4 JUSTICE JACKSON: And just in response
5 to Justice Kagan, I -- I guess I didn't
6 understand you to be making a statement that the
7 parties couldn't be recognized on a rolling
8 basis, right? Like, if someone determines or
9 decides in the middle of it that they have an
10 interest, they can ask to come in?

11 MR. YANG: Yes. But --

12 JUSTICE JACKSON: Is that right?

13 MR. YANG: Yes, I think that's true.
14 The -- the -- the reality is is they've always
15 had the interest to be potentially affected.
16 They might not have realized it --

17 JUSTICE JACKSON: Right.

18 MR. YANG: -- until later --

19 CHIEF JUSTICE ROBERTS: Thank -- thank
20 --

21 MR. YANG: -- but, when they realize
22 it, they come in and, you know, they are given a
23 right to be heard.

24 CHIEF JUSTICE ROBERTS: Thank you,
25 counsel.

1 MR. YANG: Thank you.

2 CHIEF JUSTICE ROBERTS: Justice
3 Thomas?

4 Justice Sotomayor?

5 JUSTICE SOTOMAYOR: Your -- in your
6 brief, you say this case presents no occasion
7 for the Court to determine the phrase -- the
8 phrase's outermost -- party in interest's
9 outermost boundaries. And you repeat that
10 today, that we should just say clearly insurers
11 or people with executory contracts, et cetera.

12 But don't we have to say a little bit
13 more? Don't -- don't we have to say something
14 like "directly and adversely affected" to -- to
15 quantify --

16 MR. YANG: I'm not sure --

17 JUSTICE SOTOMAYOR: -- to take away
18 the employee who doesn't -- who doesn't have a
19 contract with the Debtor, but the employee who
20 has a contract with the Petitioner, Truck?

21 Could he sue and say my salaries and
22 benefits are going to go down because this
23 doesn't have an anti-fraud provision and the
24 company's going to lose more money?

25 MR. YANG: Well, I don't --

1 JUSTICE SOTOMAYOR: So I'm going to
2 make less?

3 MR. YANG: The Court might well want
4 to say more. The Court -- but the Court
5 certainly doesn't have to to resolve the issue
6 with respect to whether Truck is a party in
7 interest.

8 Now, if the Court were wanting to
9 explore the text of party in interest more, I
10 think what I would suggest is that the Court can
11 explain that a party is a participant on one or
12 -- one of the sides of an action or an affair.

13 It's not a person in interest. It's a
14 party in interest. And context matters here.
15 Bankruptcies are aggregations of individual
16 controversies, and the participants there have
17 an interest in the proceedings' exercise of
18 jurisdiction over the debtor's property and the
19 distribution.

20 If the proceeding has a potential to
21 affect their interests, and it's not necessarily
22 an interest in the entitlement to specific
23 debtor properties, if the proceeding has the
24 potential to affect their interests, that is
25 enough to be a party in interest.

1 Now things that I think you're talking
2 about kind of two orders of steps out have never
3 been thought to be people who can come in with
4 an interest. And -- and you --

5 JUSTICE SOTOMAYOR: But -- but how do
6 I --

7 MR. YANG: Right.

8 JUSTICE SOTOMAYOR: I love asking this
9 question. How do I write this so that there is
10 a difference between that employee and the truck
11 company? I can write it to say the truck
12 company because it's affected, but what -- but I
13 have to say something more to take care of those
14 two and three down.

15 MR. YANG: The employee of Truck?

16 JUSTICE SOTOMAYOR: Yeah.

17 MR. YANG: Well, certainly, the Court
18 would have to decide how far it wants to go. I
19 don't think you have to decide employees of
20 Truck since the question before the Court is not
21 employees of Truck.

22 But, if you wanted to, we don't object
23 to the idea that the participants in the -- that
24 have an interest in the proceeding have always
25 been those that have a direct kind of not

1 attenuated effect. It's not amici. It's not
2 some law professor. It's not employees of
3 somebody else. It's someone with a more direct
4 effect.

5 I don't think that derives from
6 Article III, but I think you can derive it from
7 kind of looking more generally at -- at
8 bankruptcy practice.

9 CHIEF JUSTICE ROBERTS: Justice Kagan?
10 Justice Gorsuch?
11 Justice Kavanaugh?
12 Justice Barrett?
13 Justice Jackson?
14 Okay. Thank you, counsel.

15 MR. YANG: Thank you, Your Honor.

16 CHIEF JUSTICE ROBERTS: Mr. Marshall.

17 ORAL ARGUMENT OF C. KEVIN MARSHALL
18 FOR THE DEBTOR RESPONDENTS

19 MR. MARSHALL: Mr. Chief Justice, and
20 may it please the Court:

21 A party in interest is someone who has
22 a legal interest in a debtor's bankruptcy
23 estate, its property, not someone who is merely
24 concerned about the debtor's bankruptcy more
25 generally.

1 The list of parties in interest in
2 Section 1109(b) shows this. Settled usage of
3 the term in bankruptcy confirms it. And the
4 government, at least in its brief, agrees with
5 it.

6 At the outset of the case, the parties
7 in interest will ordinarily be the debtor with
8 its creditors and shareholders, those whom
9 Section 1109(b) lists.

10 Others, as Justice Thomas was asking
11 about, may come to have an interest in the
12 estate and, thus, can show that the bankruptcy
13 will directly affect their rights or
14 obligations. For example, if a plan would
15 breach an insurer's policy, altering its
16 contract rights or obligations, then it would
17 become a party in interest.

18 But, if a plan preserves the insurer's
19 status quo, it is insurance neutral, in that
20 case, the insurer is not a party in interest and
21 it has no right to object to plan confirmation.

22 Here, the plan does not alter Truck's
23 contract rights or obligations. It breaches
24 nothing. It does not do anything to put Truck
25 on the hook. That is what the lower courts

1 uniformly found, and Truck here does not
2 challenge that finding. Truck, therefore, has
3 no right to challenge plan confirmation.

4 Truck invokes policy concerns that
5 would supplant this settled clear rule with a
6 novel expansive framework that would give
7 insurers greater rights to challenge plan
8 confirmation than even a creditor has. But
9 bankruptcy law already addresses these concerns
10 by allowing interested entities that are not
11 parties in interest to pursue permissive
12 intervention. Truck simply ignores that tool.

13 I welcome the Court's questions.

14 JUSTICE THOMAS: Mr. Marshall, the --
15 at the beginning, at the outset of these
16 proceedings, bankruptcy proceedings, Truck was a
17 creditor and Truck certainly from its vantage
18 point was a party in interest because of the --
19 being the one insurer for all of the claims --
20 many of the claims here.

21 So do you think we should look at the
22 filing period as the point to -- to determine
23 party of interest, or should we do it at a later
24 point?

25 It would seem that you can't do

1 insurance neutrality at the beginning. I don't
2 know how you would do that.

3 MR. MARSHALL: If one is in the list
4 of entities in Section 1109(b), it's possible to
5 answer that question at the outset.

6 JUSTICE THOMAS: So they would be a
7 creditor?

8 MR. MARSHALL: They were -- they were
9 a creditor, yes, but as to their status as an
10 insurer, the question is, do they have an
11 interest in the debtor's bankruptcy estate? And
12 at the outset of the case, it was obviously a
13 no, but then, when a plan is submitted and they
14 want to claim that that would breach their
15 policy rights and give them interest in the
16 estate, then that would be the point at which --

17 JUSTICE THOMAS: Well, let me --

18 MR. MARSHALL: -- the threshold
19 question would need to be decided.

20 JUSTICE THOMAS: Well, let me -- let's
21 go back a second.

22 As a creditor, at the beginning, if
23 they are considered a party in interest, can
24 they raise any issue in the proceedings?

25 MR. MARSHALL: Under 1109(b), they

1 generally can. In the context of a plan
2 confirmation, if they're unimpaired, they don't
3 have the right to object.

4 JUSTICE KAVANAUGH: Isn't it just
5 common sense that an insurer at the outset is
6 going to have an interest in this because how
7 much the insurer will have to pay will be
8 affected by how the plan is structured?

9 MR. MARSHALL: Justice Kavanaugh, they
10 could be interested in the general sense of
11 being concerned, which was the phrase Truck
12 tended to use.

13 JUSTICE KAVANAUGH: No, not just
14 concerned but how much they owe -- how much
15 they're going to have to pay. It's not just I'm
16 concerned about things. How much I'm going to
17 have to pay.

18 MR. MARSHALL: And so then the
19 question is, at what point do they come to have
20 an interest in the estate? And if a plan is
21 proposed that would -- that in their view would
22 breach their policy, they certainly have the
23 right to be heard on whether it would, in fact,
24 breach their policy rights, and they were heard
25 here.

1 And the courts, all the courts, all
2 three lower courts held their policy rights were
3 not breached. And so there's nothing about the
4 bankruptcy case that puts the insurer on the
5 hook. That can happen in cases. It happened in
6 a Ninth Circuit case that's in the briefs.

7 And if -- if the plan actually --
8 JUSTICE KAVANAUGH: But -- you're
9 saying put them on the hook, but for how much
10 they're going to be on the hook, that will be
11 affected, right?

12 MR. MARSHALL: I'm not sure I followed
13 that. The -- the -- nothing about the
14 bankruptcy case changes Truck's position. If
15 the bankruptcy case were to -- to change an
16 insurer's position, it would be a party in
17 interest and have a right to object to the plan.

18 JUSTICE JACKSON: But isn't --

19 JUSTICE KAVANAUGH: But they want the
20 fraud prevention provisions. What's your
21 response to that as -- as, you know, their
22 interest in having those established?

23 MR. MARSHALL: There's a threshold
24 question whether they are a party in interest or
25 not, and that depends on whether they have an

1 interest in the bankruptcy estate. If they are
2 a party in interest, then they would have the
3 right to come in and raise the issues of
4 concern, including the fraud prevention
5 measures.

6 But it's a threshold question.
7 Perhaps it's helpful to think of an analogy. A
8 creditor, as we were discussing with Justice
9 Thomas, has a right to raise any issue under
10 1109(b), but there's a threshold question
11 whether you actually are a creditor. So you can
12 come in and you can say you're a creditor. You
13 don't actually have to move to intervene. And a
14 court -- if somebody challenges that, then the
15 court has to decide, are you a creditor or not?
16 That's --

17 JUSTICE BARRETT: Why are you --

18 CHIEF JUSTICE ROBERTS: Well --

19 JUSTICE BARRETT: -- fighting this so
20 hard? Why -- why do you want Truck to not even
21 be heard? Just what is your motivation to be
22 fighting this so hard?

23 MR. MARSHALL: We have a deal with the
24 creditors. We think it's a valid deal and a
25 good deal, and we want to be done with

1 bankruptcy. And we don't -- Truck has -- Truck
2 is coming in to try to blow up the deal that we
3 have.

4 JUSTICE SOTOMAYOR: Can I stop you a
5 moment? I am looking at the brief of amici
6 American Prosperity Casualty Insurance, and on
7 page 15, they explain that once the plan is
8 approved, this plan, under your terms, it
9 obtains a discharge, the Debtor, and the
10 protection of a channeling injunction, now all
11 the claims are going to go through the trust and
12 not to you.

13 The Debtor has no ongoing incentive
14 after the plan is approved to limit the cost of
15 defending, paying claims, and any liability on
16 those claims. You lose it. That's the benefit
17 bankruptcy gives -- giving you. And the
18 Claimants, their incentive for this plan is that
19 they don't want the anti-fraud provisions.

20 So who's protecting the insured? If
21 -- if it -- the -- the insured can't protect
22 itself because you say it can't go to the
23 bankruptcy court, how is it being heard?

24 MR. MARSHALL: Nothing --

25 JUSTICE SOTOMAYOR: Because what

1 you're suggesting to us is that they don't have
2 a right to say the plan is violating a bunch of
3 other provisions of the code, 1129(a), or
4 permitting the differential treatment of -- of
5 -- of people who are owed money or of Claimants.
6 I mean, I -- I -- I just don't understand your
7 argument.

8 MR. MARSHALL: They have --

9 JUSTICE SOTOMAYOR: I can argue that
10 the plan is breached, and once they say the
11 plan's not reached -- breached, I can't argue
12 that the plan violates the code? I -- I've just
13 never heard of --

14 MR. MARSHALL: If --

15 JUSTICE SOTOMAYOR: -- parsing
16 standing in that way.

17 MR. MARSHALL: Justice Sotomayor, if
18 one is not a party in interest, there's no right
19 to raise issues. Party-in-interest status is a
20 threshold question.

21 And, here, as to Truck as an insurer,
22 they need to show they have an interest in the
23 bankruptcy estate to get in, to answer the
24 threshold question.

25 JUSTICE SOTOMAYOR: But they do.

1 MR. MARSHALL: And -- and to --

2 JUSTICE KAGAN: But I guess the
3 question --

4 MR. MARSHALL: -- to do that --

5 JUSTICE KAGAN: -- Mr. Marshall, is I
6 think what everybody is saying to you is, well,
7 they do have an interest in these anti-fraud
8 provisions. Not just a concern, they have an
9 interest, a material interest. If they get the
10 anti-fraud provisions, they're better off. If
11 they don't get the anti-fraud provisions,
12 they're worse off.

13 Now what I hear you saying back is
14 they had no preexisting entitlement to the
15 anti-fraud provisions, and your test is one that
16 says, if they're not being made worse off by the
17 plan, then they're not an interested party.

18 But I -- I don't know why that should
19 be the test. If I look at the language, that's
20 not the test. If I think about what the
21 ordinary meaning of being a party who's
22 interested is, that's not the test.

23 Why -- why is your test so long as
24 they're not being made worse off, they're not an
25 interested party?

1 MR. MARSHALL: Well, the -- the test
2 of whether I -- there is a benefit I would like
3 to get out of the bankruptcy case, which is
4 Truck's test, is unlimited. Anytime you can
5 imagine a hypothetical plan that would be better
6 off for you --

7 JUSTICE KAGAN: Well, okay. Well,
8 that's a practical concern.

9 MR. MARSHALL: Well, it -- it --

10 JUSTICE KAGAN: And I think, you know,
11 the practical argument against it is it's pretty
12 costly to enter into these proceedings, and
13 nobody really does it unless they have a serious
14 interest, and, anyway, bankruptcy courts have
15 docket management techniques.

16 And, anyway, just putting aside the
17 practical concerns, is this a floodgates problem
18 or is it not a floodgates problem, I don't
19 really see why your test, which is are you being
20 made worse off or are you being made -- or -- or
21 is it -- you know, are you just being held to
22 the bargain that you initially had, I don't see
23 why anybody would think that that's the way to
24 answer a question of whether you're interested
25 in a proceeding.

1 MR. MARSHALL: "Party in interest" is
2 a term of art that means you have an interest in
3 the debtor's bankruptcy estate. That's been the
4 meaning for a hundred years. And so that's the
5 way to start.

6 But, if we're going to think in terms
7 of seeking to obtain a benefit, in the context
8 of causes of action, Lexmark zone of interests,
9 the question is always, have you suffered a
10 loss? If you've suffered a loss, you come in
11 and you try to get a remedy.

12 What Truck is saying here is, I can
13 come in, even though I'm suffering no loss at
14 all to my legal rights, and just seek to obtain
15 a benefit because it's very nice that this
16 bankruptcy is here and maybe I can get something
17 out of it.

18 But even if they don't have the right
19 to come in, there's always permissive
20 intervention. So there's the right to -- to
21 come in as an interested entity that's not a
22 party in interest. The benefit of that is it's
23 in the discretion of the bankruptcy court. You
24 have to show cause. The bankruptcy court can
25 decide whether you come in for all issues or

1 just some.

2 The question is, who has the right to
3 intervene in the case? And it --

4 JUSTICE JACKSON: So --

5 JUSTICE KAVANAUGH: Would you object
6 to permissive intervention in a situation like
7 this where the insurer is seeking fraud
8 prevention?

9 MR. MARSHALL: We would have objected
10 to their attempt to come in and object to the
11 merits of the plan, but they certainly have the
12 right --

13 JUSTICE KAVANAUGH: That wasn't the
14 question.

15 MR. MARSHALL: Yeah.

16 JUSTICE KAVANAUGH: The question
17 was object --

18 MR. MARSHALL: They -- they could have
19 sought to pursue inter- -- permissive
20 intervention under 2018 to get to the merits of
21 the plan.

22 JUSTICE KAVANAUGH: And would you have
23 objected to that?

24 MR. MARSHALL: We probably would have
25 opposed that.

1 JUSTICE KAVANAUGH: Why?

2 MR. MARSHALL: For all the reasons
3 that we're otherwise opposing.

4 JUSTICE KAVANAUGH: You just don't
5 want them to be heard.

6 MR. MARSHALL: We want -- they have
7 the right to be heard, to make a showing they
8 are --

9 JUSTICE KAVANAUGH: You don't want the
10 fraud prevention provisions, but you don't want
11 them to be heard on that. Is that -- I mean,
12 that's okay.

13 MR. MARSHALL: Well, the -- all the
14 lower courts --

15 JUSTICE KAVANAUGH: I just want --

16 MR. MARSHALL: I mean -- I mean, they
17 were heard on that. All the lower courts ruled
18 against them on the merits as well, both the
19 bankruptcy and the district court, although the
20 Fourth Circuit --

21 JUSTICE KAVANAUGH: Yeah.

22 MR. MARSHALL: -- didn't get to it.

23 It's good to keep in mind if we're
24 going to be talking about the policy concerns
25 that bankruptcy is just not about get everybody

1 to the table. It's also about having an
2 efficient and expeditious proceeding that makes
3 it possible to resolve what is ultimately a
4 question about the debtor and its creditors or,
5 in some cases, its shareholders.

6 CHIEF JUSTICE ROBERTS: Well --

7 JUSTICE JACKSON: Can I --

8 CHIEF JUSTICE ROBERTS: -- it may not
9 be about getting everybody at the table, but you
10 do want all the creditors there, don't you?

11 MR. MARSHALL: Yes, you do want all
12 the creditors there.

13 CHIEF JUSTICE ROBERTS: Well, they're
14 a creditor.

15 MR. MARSHALL: As to the plan that's
16 at issue here, they were an unimpaired creditor,
17 and an unimpaired creditor does not have the
18 right to object to a plan. That's Section
19 1126(f).

20 JUSTICE BARRETT: Mr. Marshall --

21 JUSTICE JACKSON: But at the time --

22 JUSTICE BARRETT: Mr. Marshall, the --
23 the language -- you agree that they had an
24 interest in the plan finding, right, about the
25 good faith and about whether this was going to

1 be collusive? Everybody said below that they
2 had an interest in the plan finding.

3 MR. MARSHALL: The plan finding was a
4 threshold question that they certainly had the
5 right to litigate.

6 JUSTICE BARRETT: Right. And they did
7 have an interest as a creditor because of the
8 deductibles that were due, right?

9 MR. MARSHALL: They were a creditor.
10 As to the plan at issue here, they were
11 unimpaired --

12 JUSTICE BARRETT: Okay. But --

13 MR. MARSHALL: -- and didn't have the
14 right to object.

15 JUSTICE BARRETT: -- that's looking
16 ahead to the plan. I guess what I want to say
17 is that 1109(b) says that "a party in interest,"
18 including our list, "may be heard on any issue"
19 in a case under this chapter. So, if they can
20 be heard on the plan finding or if they're a
21 creditor, I guess I don't understand why, on the
22 text of that provision, they can be so limited
23 and say, well, you can't bring up anything else,
24 even though the -- the text says "any issue."
25 It doesn't limit it in that way.

1 MR. MARSHALL: I'll address that in --
2 in two respects. So the plan finding, again, is
3 the question of whether they are a party in
4 interest in the first place. It's a threshold
5 question. It's like deciding jurisdiction or
6 statutory standing. And you have to get through
7 that to get to the merits.

8 So, as an insurer, nothing about the
9 plan finding changes whether or not Truck is a
10 party in interest. They're not. As to a
11 creditor, we're talking about the right to
12 object to a particular plan that leaves them
13 unimpaired. And although 1109(b) has that
14 general language, 1126(f) more specifically says
15 that an unimpaired creditor is presumptively --
16 is conclusively presumed to have accepted --

17 JUSTICE BARRETT: Well, Mr. Marshall,
18 maybe I'm not understanding about the plan
19 finding. I mean, it's true that, at the end,
20 the court said that Truck wasn't harmed. But,
21 you know, what if the -- what if the court had
22 decided otherwise? In the beginning, they don't
23 know whether it's going to be collusive or
24 violate Kaiser's duty of good faith, right?

25 Maybe I'm just misunderstanding. I

1 mean, it went in your favor, but --

2 MR. MARSHALL: Party-in-interest
3 status is a threshold question. You have the
4 right to come in and litigate whether you're a
5 party in interest or not. And that's all the
6 plan finding did. It determined that their
7 rights were not abridged and, therefore, they
8 were not a party in interest.

9 JUSTICE JACKSON: So -- but, Mr. --
10 Mr. Marshall --

11 MR. MARSHALL: If that had gone
12 differently, then, yes, they could have objected
13 --

14 JUSTICE GORSUCH: Mr. Marshall --

15 MR. MARSHALL: -- to the rest of the
16 plan, to the merits.

17 JUSTICE GORSUCH: Mr. Marshall, you've
18 agreed that they're -- they were a party in
19 interest to the extent they were a creditor,
20 right?

21 MR. MARSHALL: Yes.

22 JUSTICE GORSUCH: And normally a
23 creditor or a party in interest can be heard on
24 any issue. You agree with that?

25 MR. MARSHALL: That's the text of

1 1109(b).

2 JUSTICE GORSUCH: Okay. And you've
3 been citing 1124 and 1126 to us, I understand
4 and appreciate that, but that -- that governs
5 who can vote, right?

6 MR. MARSHALL: That is what it
7 explicitly says, yes.

8 JUSTICE GORSUCH: It doesn't talk
9 about what they can argue about or be heard on,
10 right?

11 MR. MARSHALL: It says they're
12 conclusively presumed to have accepted the plan.

13 JUSTICE GORSUCH: Right.

14 MR. MARSHALL: And an inference from
15 that is that it would be --

16 JUSTICE GORSUCH: So -- but who can --

17 MR. MARSHALL: -- absurd to vote to --
18 in favor --

19 JUSTICE GORSUCH: So, if you can't
20 vote, you can't be heard? Is that -- is that
21 your argument then?

22 MR. MARSHALL: You can't be heard on
23 the merits of the plan. And that's what the
24 circuit courts have said. We cited cases and
25 Truck cited some cases allegedly to the

1 contrary, but they're actually not, because all
2 they do is determine where -- whether the
3 creditor that wants to object to the merits of
4 the plan is actually impaired.

5 CHIEF JUSTICE ROBERTS: Thank you,
6 counsel.

7 Justice Thomas?

8 JUSTICE THOMAS: No.

9 CHIEF JUSTICE ROBERTS: Justice
10 Sotomayor?

11 Justice Kagan?

12 Justice Gorsuch?

13 JUSTICE KAVANAUGH: No.

14 CHIEF JUSTICE ROBERTS: Justice
15 Kavanaugh?

16 Justice Jackson?

17 JUSTICE JACKSON: Can I just ask one
18 question? At the threshold, you keep saying at
19 the threshold they have no interest in the
20 estate property.

21 Do you dispute that they have a
22 potential to have an interest in the estate
23 property, that insurers do? Because the plan
24 isn't in existence yet. Do you -- do you
25 dispute that they have the potential?

1 MR. MARSHALL: Borrowing from
2 intervention law, the question would be when is
3 their interest put at issue. And it's -- it's
4 somewhat like the -- which would be is a plan
5 proposed that would breach your contract and
6 give you an interest in the estate. And it's
7 analogous to what the actual history is with
8 executory contracts.

9 So the -- the -- the -- the -- the
10 statutory history that the government invokes
11 actually says -- suggests you're a party in
12 interest when there is a motion to reject an
13 executory contract because that would create a
14 claim, a breach, and make you a creditor.

15 JUSTICE JACKSON: I guess I don't
16 understand your answer, and I --

17 MR. MARSHALL: So when -- when it's
18 put at issue.

19 JUSTICE JACKSON: When it is put --
20 why isn't it put --

21 MR. MARSHALL: If you're an insurer,
22 you're not on the list. Nothing makes you --

23 JUSTICE JACKSON: Right --

24 MR. MARSHALL: -- a party in interest.

25 JUSTICE JACKSON: -- but the list says

1 "including," so we know there are things that
2 are -- that are -- there are entities that may
3 not be in the list, right?

4 MR. MARSHALL: Correct.

5 JUSTICE JACKSON: Okay. So the
6 question is they come to the table at the
7 beginning and they say: We think we should be
8 in the list because we have a potential through
9 the reorganization plan that will be adopted to
10 be affected.

11 And you say not party in interest
12 because you're not already affected or it's not
13 clear to us right now that you're affected. Is
14 that your position?

15 MR. MARSHALL: If we're talking about
16 Truck as insurer --

17 JUSTICE JACKSON: Yes.

18 MR. MARSHALL: -- yes.

19 JUSTICE JACKSON: All right. So --

20 MR. MARSHALL: But once a plan is
21 proposed --

22 JUSTICE JACKSON: Right.

23 MR. MARSHALL: -- that would breach
24 your contract --

25 JUSTICE JACKSON: So can I ask you, if

1 people who are not potentially affected are not
2 parties in interest, I guess I don't understand
3 Congress's suggestion that parties in interest
4 should be a part of the reorganization.

5 In other words, the context in which
6 their -- what -- what's valuable to them about
7 being a party in interest is the fact that they
8 then get to talk with everybody about how this
9 is going to go.

10 And the problem I'm having with your
11 argument is it suggests that it's only after we
12 know or after they know that they're definitely
13 affected that they get a -- a seat at the table,
14 but the whole point of it is that the parties in
15 interest get to talk about it.

16 So it seems to me it would have to
17 include people who have a clear potential for
18 being affected by the plan that we're all
19 hammering out in this discussion.

20 MR. MARSHALL: There's nothing in
21 1109(b) itself that says that has to be
22 determined once and for all at the outset. And
23 if we're talking about someone who's not in the
24 list, the only way to know if you're a party in
25 interest is do you have an interest in the

1 bankruptcy estate.

2 JUSTICE JACKSON: Thank you.

3 CHIEF JUSTICE ROBERTS: Thank you,
4 counsel.

5 Mr. Frederick.

6 ORAL ARGUMENT DAVID C. FREDERICK

7 ON BEHALF OF THE CLAIMANT RESPONDENTS

8 MR. FREDERICK: Thank you, Mr. Chief
9 Justice, and may it please the Court:

10 There are a number of questions I'd
11 like to address that you posed this morning, but
12 I want to start with one principle, which is
13 that the Bankruptcy Code was not intended to
14 protect insurers, except in a couple of places
15 where asbestos-related trusts are created, those
16 are in Section 524(g) principally, but in 109,
17 Congress said an insurer can't invoke bankruptcy
18 for protections under the code.

19 So, Justice Kavanaugh, to your
20 question about the text and practicalities,
21 Congress answered the question of whether an
22 insurer should be permitted to butt into a
23 debtor's bankruptcy and try to use it to protect
24 its own financial interests. The bankruptcy
25 process is designed to ensure that the debtor

1 can maximize its assets for the benefit of
2 creditors.

3 And so what the insurer as insurer is
4 doing here is seeking to co-opt the debtor's
5 bankruptcy for the purpose of protecting its own
6 interests.

7 Justice Thomas, I can start with the
8 timing question if you like.

9 JUSTICE THOMAS: Well, let -- well,
10 you can start with that, but also I think that
11 the -- their interest isn't so much in
12 feathering their own nest per se but, rather,
13 that they be treated with the anti-fraud
14 provisions the same way that the claims under
15 the trust are being treated.

16 MR. FREDERICK: Yes. And let me start
17 with -- the -- the -- I'm going to call these
18 pretrial disclosure requirements because Truck
19 had six months of discovery to try to prove any
20 fraud with the Kaiser claimants and came up with
21 crickets.

22 What they are calling anti-fraud
23 prevention measures are really requirements to
24 impose on state courts that before a claimant
25 can file a claim, a claimant has to comply with

1 what Truck wants for information that a state
2 court might or might not require under state
3 court rules of procedure.

4 So, if you were to accept the idea
5 that their nomenclature drives the outcome here,
6 you're essentially saying bankruptcy courts have
7 the authority to tell state courts how to do
8 their discovery process.

9 And, Justice Barrett, that's why we're
10 fighting this, because the claimants shouldn't
11 be required to impose on themselves and their
12 families a lot of information that if Truck
13 really wanted it, it could ask for it in state
14 court discovery proceedings and state court
15 judges could decide --

16 JUSTICE SOTOMAYOR: Mr. Frederick --

17 MR. FREDERICK: -- is that relevant or
18 burdensome or not.

19 JUSTICE SOTOMAYOR: -- why do all
20 these other circuits and other bankruptcy courts
21 impose it? If they felt the same way that
22 you're arguing, are they violating the
23 Bankruptcy Code by -- or -- or disrespecting
24 state courts because that's what they require?

25 MR. FREDERICK: No. The requirements

1 here are only for a very small class of claims
2 that are called extraordinary claims. And they
3 are extraordinary claims, it's defined at JA
4 427, under the plan. These are not insured
5 claims where the claimant is seeking to say that
6 Kaiser was responsible for the vast bulk of its
7 exposure to asbestos.

8 And in that very unusual circumstance,
9 which actually in the implementation of this
10 plan hasn't arisen yet, the requirement is for
11 that claimant to come forward with proof of a
12 negative, that it hadn't been exposed to
13 asbestos by any other potential tortfeasor. And
14 so we're talking about a very narrow class with
15 a description for a very particularized purpose
16 that Truck wants to appropriate and force so
17 that claimants will have less of an opportunity
18 to invoke their jury trial rights in state
19 court, which are protected under the U.S. Code.

20 JUSTICE SOTOMAYOR: But why -- why
21 should you as the debtor trust have that
22 advantage and not give it to them?

23 MR. FREDERICK: Because --

24 JUSTICE SOTOMAYOR: That -- that's the
25 difference in treatment that they're claiming is

1 contrary to the plan.

2 MR. FREDERICK: It's not for this
3 reason. The -- the treatment by Kaiser of Truck
4 is exactly the same before bankruptcy as it was
5 now. Truck agreed contractually --

6 JUSTICE SOTOMAYOR: But bankruptcy
7 changes everyone. It changes who the debtor is
8 to the trust. It -- by its own terms, it's
9 extinguishing the debtor's obligation --
10 obligations to anyone, except under the extant
11 contract, but the incentives are different.
12 There is inherent change.

13 MR. FREDERICK: That's why the
14 principle of insurance neutrality, which was
15 developed 30 years ago in the courts of appeals
16 and has actually followed in every single court
17 of appeals that has addressed this question, has
18 looked at whether the insurers' legal
19 obligations are altered, and if they are not --

20 JUSTICE SOTOMAYOR: You're still --
21 then circle back to my initial question. Other
22 bankruptcy courts have imposed these same
23 requirements and they've done it. Are they
24 breaching bankruptcy law? Are they stepping on
25 state courts in an improper way? What are they

1 doing? And why are you fighting something that
2 you admit your claimants in discovery might well
3 have to give up?

4 MR. FREDERICK: Because it's up to the
5 state court to decide that.

6 JUSTICE SOTOMAYOR: Why?

7 MR. FREDERICK: Because they are the
8 ones that will be superintending discovery.

9 JUSTICE SOTOMAYOR: But what -- what
10 does that have to do with the --

11 MR. FREDERICK: Because the -- because
12 --

13 JUST SOTOMAYOR: What does that have
14 to do with anything? Meaning, you know, if --
15 if -- you eventually in -- in most jurisdictions
16 will have to give up something like that because
17 there is very few jurisdictions who would say
18 they have to pay the entire cost if there's
19 multiple exposures or they have to pay the
20 entire cost if other people have paid you.
21 That's all that's being sought.

22 MR. FREDERICK: It's more than that,
23 Justice Sotomayor, which is why they're fighting
24 so hard for it. And -- and I want to make this
25 very clear, that the point of the extraordinary

1 procedure is because the trust itself is having
2 to pay the claims. They are not insured by
3 definition. And to protect --

4 JUSTICE SOTOMAYOR: That's the whole
5 point.

6 MR. FREDERICK: No.

7 JUSTICE SOTOMAYOR: You're trying to
8 give yourself something more than you're giving
9 someone else, and you want to reach into their
10 pocket and say I'll give myself more than you.

11 MR. FREDERICK: Because the contract
12 of insurance, which they litigated for 19 years
13 in California state courts, definitively
14 determined they will have to pay the claimants
15 who are insured --

16 JUSTICE GORSUCH: Mr. Frederick --

17 JUSTICE KAGAN: So I think I'm getting
18 the equities of this, Mr. Frederick, as you
19 describe it, is that they had a contract and
20 they've been protected as to that contract, and
21 they're just looking to get a better deal now
22 and to kind of take advantage of the bankruptcy.
23 So I'm getting the equities here.

24 I'm not getting where you derive from
25 the text the idea that they're not parties in

1 interest because they have a material interest
2 in what comes out of the bankruptcy proceeding,
3 and they can improve their position materially
4 in the bankruptcy proceeding.

5 MR. FREDERICK: The cases that we cite
6 historically under the Transportation Act of
7 1920 make very clear that if you're just seeking
8 a benefit, you don't get party-in-interest
9 status. You have to show aggrievement and harm
10 to your pre-position.

11 JUSTICE KAGAN: So those are some
12 1920s cases. Do you have anything in the text
13 that can suggest that the text has incorporated
14 that view?

15 MR. FREDERICK: We don't have anything
16 like that, although I would point to the history
17 that the Debtors' brief very helpfully lays out,
18 which explains how the original -- origination
19 of the Bankruptcy Code went through these
20 iterations and accepted those principles for
21 party in interest.

22 And -- and I think that it makes sense
23 from an Article III perspective too because the
24 other side is essentially saying Article III has
25 no role to play here, where a bankruptcy process

1 is a multifaceted fight over a res. What is the
2 debtor's estate? Who gets that property?

3 And so those claims are going to be
4 somewhat flowing in and out. And it is
5 imperative in the 524(g) context that you
6 recognize Article III has a role to play. Why?
7 Because the district court has to enter the
8 final injunction. The bankruptcy court does not
9 have the authority to do that under the statute.

10 JUSTICE GORSUCH: Mr. Frederick, I
11 certainly get your arguments and why they might
12 persuade a bankruptcy court to rule for you and
13 not require these anti-fraud provisions.

14 But I think you've admitted that a
15 court can do those provisions and they have done
16 them in other cases lawfully, right?

17 MR. FREDERICK: For the trust's
18 benefit, but not where there's an insurance
19 neutrality --

20 JUSTICE GORSUCH: Okay.

21 MR. FREDERICK: -- clause.

22 JUSTICE GORSUCH: So -- so -- so the
23 question becomes, can they be heard? That --
24 that's the only question before us. Can they be
25 heard at all? And I -- I guess I'm -- I'm

1 struggling on that one.

2 We're not discussing the power of the
3 court. We're not discussing what it might rule.
4 We're only discussing who can be heard. And I
5 think you -- you have to acknowledge that there
6 are creditors who can be heard, even if it's a
7 virtual certainty that they will get nothing or
8 a virtual certainty they will get a hundred
9 cents on the dollar.

10 MR. FREDERICK: Right.

11 JUSTICE GORSUCH: They still can be
12 heard.

13 MR. FREDERICK: They can be heard
14 until the point where their impairment is
15 determined.

16 JUSTICE GORSUCH: Well, they -- they
17 -- they -- they may not have a vote, but they
18 can be heard on any issue. No?

19 MR. FREDERICK: Until their impairment
20 has been determined, Justice Gorsuch. That's
21 the key point. That's --

22 JUSTICE GORSUCH: Where do you get
23 that from?

24 MR. FREDERICK: 1126(f).

25 JUSTICE GORSUCH: That's -- that's who

1 votes.

2 MR. FREDERICK: But the point of
3 voting is who can hear, and the whole point of
4 the chart which you can see the bankruptcy
5 court's determination, is who's impaired or not
6 because the bankruptcy court has to get to an
7 end place. There were a dozen insurers here,
8 and under their position, there is no limiting
9 principle to any of those insurers who could
10 continue to fight because they want to get
11 benefits out of a bankruptcy process that
12 Congress foreclosed to them.

13 JUSTICE GORSUCH: Do you agree on
14 Article III that -- that that's with respect to
15 a plaintiff coming to court and not with respect
16 to those who object under Bond and Clapper?

17 MR. FREDERICK: No, I don't agree with
18 that.

19 JUSTICE GORSUCH: You disagree with
20 Bond and Clapper on that?

21 MR. FREDERICK: I think that -- I
22 think Clapper is actually more helpful for our
23 side, Justice --

24 JUSTICE GORSUCH: What about Bond?

25 MR. FREDERICK: Bond, I think that the

1 point is where the effort by the objector in
2 this situation is seeking to get a benefit and
3 must show under Article III that it has injury
4 in fact that is redressable and traceable to the
5 plan.

6 Here, Truck can't satisfy either
7 because its redressability problem is really
8 because they think state courts are not going to
9 be adequate to police fraud, and they don't --
10 they are not able to trace their harm as insurer
11 to the plan because of the insurance neutrality
12 provision.

13 And so I think there's a very serious
14 Article III question here that Truck has
15 essentially glided by in this argument this
16 morning, but I want to urge you to take that
17 very seriously because it can't be the case that
18 we have, like, a law school seminar or anybody
19 who wants to come and talk gets to talk. The
20 whole point of a bankruptcy proceeding is get to
21 a confirmed plan, and the only way to do that is
22 to weed out the people who have something that
23 they want to say and to have different threshold
24 provisions.

25 So, Justice Thomas, I wanted to get

1 back to your timing question. At the disclosure
2 statement, the -- the -- the debtor has to
3 present a plan. That is where the issues of
4 insurance neutrality typically are going to be
5 addressed. And at confirmation, we are knowing
6 then that the creditor is impaired or not
7 impaired.

8 So those are the two key timing
9 mechanisms. It can't be at the outset of a
10 bankruptcy because there isn't enough known
11 about the nature of the estate --

12 CHIEF JUSTICE ROBERTS: Well, if he's
13 not impaired, doesn't he have an interest in
14 making sure that doesn't change?

15 MR. FREDERICK: He does, but that's
16 where the confirmation of the plan comes in.
17 And that's why, if you look at the chart, Mr.
18 Chief Justice, there's a -- this group is
19 unimpaired, this group is unimpaired because
20 they are paid in full.

21 And Truck was paid in full for its
22 premiums. So it is not an executory contract,
23 which, under the Vern Countryman definition, was
24 where there was -- lack of performance on both
25 sides of the contract. Here, the Debtor

1 performed on the contract. The Debtor paid all
2 the premiums.

3 And so it is a non-executory contract,
4 which I think helps give the lie to the
5 government's position that calling something an
6 executory contract is somehow going to solve the
7 problem here, where you've got performance that
8 is occurring at different levels and at
9 different stages.

10 And that's why the DOJ policy manual
11 itself says be very careful about invoking
12 executory contracts because they're not defined
13 in the bankruptcy code and it's very difficult
14 to know how to administer them in practice.

15 And so for the government to be
16 suggesting that you have a test here that is so
17 malleable, where the interests of claimants and
18 creditors is critically important to
19 understanding how to weed out the various
20 muckrakers, where the United -- and I would
21 point you to the policyholders' brief, pages 12
22 to 14, which talks about just how long the
23 insurers have an interest. Why? Delay is
24 profit-maximizing. Every day insurers do not
25 have to pay on their claims is a good day for

1 the insurers, and so they have every incentive
2 to tell their lawyers: Go in and object to
3 everything because that will delay the process.

4 We could have had this plan confirmed
5 five years ago. The only objector was Truck.
6 Every other insurance company agreed to the
7 plan. And so, by adopting some rule that
8 everybody gets to be heard and everybody gets to
9 participate --

10 JUSTICE BARRETT: Truck -- isn't Truck
11 on the hook for the majority of claims?

12 MR. FREDERICK: Truck and other
13 insurers.

14 JUSTICE BARRETT: But doesn't -- isn't
15 Truck responsible for the lion's share?

16 MR. FREDERICK: That's what they say,
17 and I have no reason to doubt it. But, Justice
18 Barrett, where do you draw the line there? Do
19 you say they're an insurer that's responsible
20 for two-thirds gets it? We heard the --

21 JUSTICE BARRETT: I -- I -- I was just
22 saying that it means less that other insurers
23 didn't object if they didn't have the same stake
24 in the claims.

25 MR. FREDERICK: We don't know what the

1 comparative issues are. The excess insurance
2 part is under a confidentiality standard that I
3 have not seen, and I can't tell you in court
4 what that entails.

5 JUSTICE BARRETT: Could you be a party
6 in interest at the --

7 MR. FREDERICK: But what I can say,
8 Justice Barrett, is that it can't be a size
9 issue because there's no way to draw a line on a
10 size issue. What do you say? It's a quarter is
11 enough, or six insurance companies, that each
12 have an equal stake, is enough? How do you --
13 there's no --

14 JUSTICE BARRETT: Can I ask you a
15 timing question? Can you be a party in
16 interest -- I'm just trying to understand your
17 point about how things change as the -- as the
18 plans develop.

19 Chief, do you want me to --

20 CHIEF JUSTICE ROBERTS: Sure. No.

21 JUSTICE BARRETT: -- stop?

22 CHIEF JUSTICE ROBERTS: Go ahead.

23 JUSTICE BARRETT: Can you be a party
24 in interest at the beginning and then not be a
25 party in interest as it becomes clear your

1 interest isn't impaired? Is that what you're
2 saying?

3 MR. FREDERICK: I'm saying that
4 impairment is treated differently. So you can
5 be a creditor --

6 JUSTICE BARRETT: Yeah.

7 MR. FREDERICK: -- and a party in
8 interest, but you are not allowed then to vote
9 on a plan and thereby exercise your voice
10 through your vote.

11 JUSTICE BARRETT: Okay.

12 MR. FREDERICK: The -- the code treats
13 that differently. And it's odd to suppose that
14 an unenumerated party like an insurance company
15 is treated better than an insurance -- than a --
16 than a creditor.

17 CHIEF JUSTICE ROBERTS: Thank you,
18 counsel.

19 I just want to follow up. You were
20 just making the point that you can't draw that
21 line.

22 I mean, the law does that all the
23 time, right? I don't care where it is and it
24 may be the majority or a significant part of it
25 or whatever.

1 MR. FREDERICK: And -- and that's why
2 I think looking to the guidance of the courts of
3 appeals is actually humbling at one level but
4 also instructive.

5 For 30 years, courts of appeals have
6 looked at this idea of insurance neutrality to
7 determine whether a plan is materially altering
8 preexisting legal obligations.

9 In those cases where the court has
10 said yes, it is, insurance companies are allowed
11 to be parties in interest. That's the Thorpe
12 case out of the Ninth Circuit, the Global case
13 out of the Third Circuit.

14 But, in those situations where there's
15 an insurance neutrality provision and the
16 insurance company is not able to say with any
17 proof that its legal obligations are materially
18 altered, the courts of appeals have said:
19 You're not a party in interest.

20 CHIEF JUSTICE ROBERTS: Well, wouldn't
21 Truck want to have something to say about the --
22 the division that you've just cited?

23 MR. FREDERICK: And they do, Mr. Chief
24 Justice, because that issue is litigated. When
25 my friend was talking about this being at the

1 threshold, the whole question is, is the
2 insurance company's legal obligations, are they
3 impaired or not? And that fight is a very
4 vigorous fight in --

5 CHIEF JUSTICE ROBERTS: But -- but
6 it's -- it -- that fight continues beyond what
7 you're calling the threshold.

8 MR. FREDERICK: It -- it -- it does
9 and it is. But, at a point where the plan is
10 confirmed and we know there will be insurance
11 neutrality, and we know that their rights as a
12 creditor are not giving them a right to vote, at
13 that point, it should stop and the four years
14 that we spent doing appellate litigation here
15 ought not to be necessary.

16 CHIEF JUSTICE ROBERTS: Justice
17 Thomas?

18 Justice Sotomayor?

19 Justice Kagan?

20 JUSTICE KAVANAUGH: Can I just ask
21 because you called them muckrakers?

22 (Laughter.)

23 JUSTICE KAVANAUGH: The -- the amicus
24 brief for the professors on the other side, and
25 you can just respond to this, says, "Indeed,

1 when an insurer faces millions of dollars in
2 financial liability, like Petitioner does here,
3 common sense and fundamental bankruptcy policy
4 dictate that it be considered a party in
5 interest in the bankruptcy proceeding."

6 So you can just -- I mean, this is
7 repeating what you've said probably, but that
8 sounds different from muckrakers.

9 MR. FREDERICK: Well, what I would
10 say, Justice Kavanaugh, is that a party in
11 interest has extraordinary rights. They have
12 the right to contest the trustee, the
13 appointment, the powers of the trustee. They
14 can object to the lifting of the automatic stay.
15 They can ask for the elimination of a plan.
16 They can ask for the transformation of it from a
17 Chapter 11 to a Chapter 7.

18 And those powers are -- are -- are and
19 rights are very powerful and they take
20 bankruptcy courts an enormous amount of time to
21 thoughtfully and conscientiously work their way
22 through.

23 JUSTICE KAVANAUGH: Thank you.

24 CHIEF JUSTICE ROBERTS: Justice
25 Barrett?

1 JUSTICE BARRETT: No.

2 CHIEF JUSTICE ROBERTS: Justice
3 Jackson?

4 Thank you, counsel.

5 MR. FREDERICK: Thank you.

6 CHIEF JUSTICE ROBERTS: Ms. Ho, you
7 have rebuttal.

8 REBUTTAL ARGUMENT OF ALLYSON N. HO
9 ON BEHALF OF THE PETITIONER

10 MS. HO: Thank you, Mr. Chief Justice.
11 Three points. Two quick and one a little bit
12 longer.

13 One, just to really underscore
14 1126(f), that is about voting. That is not
15 about what 1109(b) about, which is being heard,
16 two very different things.

17 Number two, on intervention, Congress
18 did away with the requirement that parties in
19 interest must intervene when it replaced 206 and
20 207 with 1109(b).

21 And three, my -- my friends have
22 talked a lot about the insurer in this case
23 trying to get something out of the bankruptcy or
24 seek a benefit.

25 Trying to stem the tide of over

1 inflated claims is not seeking a benefit. It's
2 just trying to make sure that the plan complies
3 with the code as bankruptcy judges have an
4 independent duty to ensure.

5 And even if you disagree with me on
6 that, it's -- it's undisputed that Truck is
7 going to pay the vast bulk of claims in this
8 case, that the plan finding adjudicates Truck's
9 insurance rights, that Truck is a creditor
10 because the insurance deductible, so it really
11 is a party in interest several times over. And
12 I haven't heard from my friends on the other
13 side any justification for reading any issues
14 out of the text.

15 1109(b) gives stakeholders a voice,
16 not a vote and certainly not a veto. We would
17 respectfully ask the Court to reverse and
18 remand.

19 CHIEF JUSTICE ROBERTS: Thank you,
20 counsel.

21 MS. HO: Thank you.

22 CHIEF JUSTICE ROBERTS: The case is
23 submitted.

24 (Whereupon, at 12:50 p.m., the case
25 was submitted.)

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