No. 22-733

In the Supreme Court of the United States

PACIFIC GAS & ELECTRIC COMPANY, PETITIONER

v.

AD HOC COMMITTEE OF HOLDERS OF TRADE CLAIMS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONER

THEODORE E. TSEKERIDES
JESSICA LIOU
MATTHEW GOREN
COLIN MCGRATH
A.J. GREEN
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, NY 10153

ZACHARY D. TRIPP
Counsel of Record
WEIL, GOTSHAL & MANGES LLP
2001 M Street NW
Washington, DC 20036
(202) 682-7000
zack.tripp@weil.com

TABLE OF CONTENTS

Introduction 1
Argument 2
I. The questions presented are fully preserved 2
II. The majority's decision conflicts with this Court's precedents 4
III. The conflict between the Ninth and Fifth Circuits over what rate to apply further confirms the error and the need for review 9
IV. The issues are important and recurring 10

TABLE OF AUTHORITIES

Cases **Page(s)**

Bartenwerfer v. *Buckley*,
No. 21-908 (U.S. Feb. 22, 2023) 5, 6
In re Cardelucci,
285 F.3d 1231 (9th Cir. 2002) 3
Cohen v. *de la Cruz*,
523 U.S. 213 (1998) 6
Dahda v. *United States*,
138 S. Ct. 1491 (2018) 3, 4
Dewsnup v. *Timm*,
502 U.S. 410 (1992) 10
Hartford Underwriters Ins. Co. v. *Union Planters Bank, NA*,
530 U.S. 1 (2000) 1, 4
In re Hertz Corp.,
637 B.R. 781 (Bankr. D. Del. 2021) 11
Milner v. *Department of Navy*,
562 U.S. 562 (2011) 8
Oklahoma v. *Castro-Huerta*,
142 S. Ct. 2486 (2022) 8
In re PPI Enters. (U.S.), Inc.,
324 F.3d 197 (3d Cir. 2003) 5
RadLAX Gateway Hotel v. *Amalgamated Bank*,
566 U.S. 639 (2012) 1, 4, 6
In re Ultra Petroleum Corp.,
51 F.4th 138 (5th Cir. 2022) 1, 2, 6, 7, 9, 11
In re Ultra Petroleum Corp.,
943 F.3d 758 (5th Cir. 2019) 5, 9
United States v. *Ron Pair Enters., Inc.*,
489 U.S. 235 (1989) 1, 4
Verizon Commc'ns, Inc. v. *FCC*,
535 U.S. 467 (2002) 1, 2

Ysleta del Sur Pueblo v. *Texas*,
No. 20-493 (U.S. Feb. 22, 2022) 10

Statutes

Bankruptcy Code, 11 U.S.C. 101 *et seq*.
11 U.S.C. 101(5) 7
11 U.S.C. 502(b)(2) 3, 5, 7
11 U.S.C. 726(a)(5) 8, 10
11 U.S.C. 1124(1) 5
11 U.S.C. 1129(a)(7) 8
11 U.S.C. 1129(a)(7) (1982) 8
Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 512(a)(7), 98 Stat. 333 8

INTRODUCTION

This Court should grant certiorari to confirm that there is no bankruptcy-specific exception to textualism. As this Court has put it, "pre-Code practices … can be relevant to the interpretation of an ambiguous text." *RadLAX Gateway Hotel* v. *Amalgamated Bank*, 566 U.S. 639, 649 (2012) (Scalia, J.). But without "textual ambiguity," the text controls. *Ibid.* Historical practice "is a tool of construction, not an extratextual supplement." *Hartford Underwriters Ins. Co.* v. *Union Planters Bank, NA*, 530 U.S. 1, 10 (2000). "[A]s long as the statutory scheme is coherent and consistent, there generally is no need for a court to inquire beyond the plain language of the statute." *United States* v. *Ron Pair Enters., Inc.*, 489 U.S. 235, 240-41 (1989).

As Judges Ikuta and Oldham explained in their forceful dissents, the Ninth Circuit's decision, as well as the Fifth Circuit's decision in *In re Ultra Petroleum Corp.*, 51 F.4th 138 (2022), pet'n for cert. pending, No. 22-772 (filed Feb. 13, 2023), cannot be squared with those precedents because they raise the bar for Congress. They require more than unambiguous text; they require Congress to provide a clear statement to depart from past bankruptcy practice. This petition gives the Court a perfect opportunity to confirm that no such clear statement rule exists.

Respondents have no sound response. They do not deny that a clear statement rule conflicts with this Court's precedents and do not deny that the questions presented are important and recurring. They instead primarily argue that the questions presented are not preserved. But the Ninth Circuit clearly passed upon the questions below, which is enough to fully preserve them for this Court's review. *E.g.*, *Verizon Commc'ns, Inc.* v. *FCC*, 535 U.S. 467, 530 (2002). Respondents also assert

that the Ninth Circuit merely used past practice to construe ambiguity. But the majority's opinion shows otherwise. The majority started with history (not text). And it viewed the Code as "silent" and as leaving a "statutory vacuum," Pet. App. 16a, 25a, even though the Code flatly disallows all post-petition interest and no Code exception even arguably applies. The majority thus treated an unambiguous general rule as insufficiently specific to overcome the historical solvent-debtor exception. That is a demand for a clear statement.

Respondents elsewhere confirm the point. They admit (Opp. Br. 32) that the Ninth Circuit applied "the same sensible approach" as the Fifth Circuit. And the Fifth Circuit plainly applied a clear statement rule: It avowedly applied a "substantive canon of interpretation" that pre-Code practice controls "*unless expressly abrogated*." *Ultra*, 51 F.4th at 153 (emphasis added). The fundamental question in this case is whether that bankruptcy-specific canon of interpretation exists. This Court should grant certiorari to confirm that it does not.

ARGUMENT

I. The Questions Presented Are Fully Preserved

Respondents' primary argument against certiorari (Opp. Br. 15-18) is that PG&E waived the argument that the Code disallows payment of post-petition interest by arguing below that interest was due at the federal judgment rate. But both questions presented are fully preserved for this Court's review.

It is well-settled that "[a]ny issue 'pressed or passed upon below' by a federal court is subject to this Court's broad discretion over the questions it chooses to take on certiorari." *Verizon Commc'ns, Inc.* v. *FCC*, 535 U.S. 467, 530 (2002) (quoting *United States* v. *Williams*, 504 U. S. 36, 41 (1992)). And respondents do not dispute that the

court of appeals "passed on" both questions. See Opp. Br. 15-18. The majority and dissent divided over whether post-petition interest was due, and that divide was the result of their methodological disagreement. *E.g.*, Pet. App. 22a ("We are not persuaded" by "[t]he Dissent."). Indeed, an entire section of the majority opinion is devoted to responding to the dissent. See *id.* at 28a-31a. Those issues are therefore fully preserved.

This case in turn does not implicate the adage (Opp. Br. 17) that this is a Court of "review, not first view." The court of appeals already gave "first view" to the arguments, with the majority and dissent dividing over their resolution. Moreover, the same issues divided the Fifth Circuit in *Ultra*. The Court thus would have the benefit of the majority and dissent in that case as well.

The court of appeals also comported with principles of party presentation. See Opp. Br. 17. In the bankruptcy court, PG&E paid respondents post-petition interest at the federal judgment rate because it understood the Ninth Circuit's decision in *In re Cardelucci*, 285 F.3d 1231 (2002), to require that payment. The district court agreed, and PG&E was the appellee in the Ninth Circuit. PG&E argued that the court of appeals should affirm because respondents were not entitled to interest at higher state-law rates. See Pet. 9. Judge Ikuta in dissent merely advanced an alternative rationale for why the district court was correct to reject respondents' demand for additional interest: The Code entirely disallows post-petition interest, 11 U.S.C. 502(b)(2), and no Code exception applies here. And it is well-settled that an appellate court can "affirm a lower court judgment on any ground permitted by the law and the record." *Dahda* v. *United States*, 138 S. Ct. 1491, 1498 (2018) (citation omitted). That is all that PG&E is urging.

Moreover, PG&E raised at the en banc stage the argument that the Code disallows all payment of post-petition interest. See C.A. Doc. No. 50. And that argument is purely legal and "closely related" to the position PG&E had previously advanced. *Dahda*, 138 S. Ct. at 1498. A court cannot determine at what rate post-petition interest must be paid without first identifying the source of an obligation to pay post-petition interest in the first place. As Judge Ikuta explained, no such obligation exists because history cannot trump unambiguous Code text, Section 502(b)(2) unambiguously disallows all post-petition interest, and no Code exception to that rule even arguably applies.

The questions presented are thus fully preserved for this Court's review. This entire appeal is about post-petition interest. The court of appeals not only had the opportunity to resolve the questions presented, it actually resolved them, just as the Fifth Circuit did in *Ultra*.

II. The Majority's Decision Conflicts With This Court's Precedents

1. This Court's review is warranted because of the conflict with this Court's own precedents, including *RadLAX*, *Hartford Underwriters*, and *Ron Pair*. The court of appeals started with history—not text—and demanded a clear statement from Congress to depart from past bankruptcy practice.

Respondents do not even try to defend a clear-statement rule or to square such a bankruptcy-specific canon with this Court's precedents. Instead, they try to repackage (Opp. Br. 29-33) the court of appeals' decision as merely relying on past practice to construe an identified ambiguity in the Code.

But tellingly, respondents fail to identify any textual ambiguity. Respondents never even quote the statutory

language disallowing any claim to the extent it "is for unmatured interest." 11 U.S.C. 502(b)(2). That language is categorical and clear. And respondents fail to identify any Code provision that makes an exception to that rule for unimpaired creditors. None exists.

The closest respondents come is to invoke 11 U.S.C. 1124(1), which they describe in the passive voice as "requir[ing] that an unimpaired creditor's rights remain 'unaltered.'" Opp. Br. 2; see *id.* at 4 ("an unimpaired creditor's rights must remain 'unaltered'"); *id.* at 28 ("An unimpaired creditor's rights should sail through bankruptcy as if no petition had been filed."). But the courts of appeals have unanimously rejected that position because it flouts the text. Congress wrote Section 1124(1) in the active voice and specified the relevant actor: "*the plan* [must] leave[] unaltered" the creditor's rights. 11 U.S.C. 1124(1) (emphasis added); compare *Bartenwerfer* v. *Buckley*, No. 21-908 (U.S. Feb. 22, 2023), slip op. 4-6 (discussing active and passive voice).

Accordingly, when the Code itself alters a creditor's rights, that does not "impair" the creditor. *See, e.g.*, Pet. App. 19a; *In re Ultra Petroleum Corp.*, 943 F.3d 758, 763 (5th Cir. 2019) ("All agree that '[i]mpairment results from what the *plan* does, not what the statute does.'"); *In re PPI Enters. (U.S.), Inc.*, 324 F.3d 197, 204 (3d Cir. 2003). And here, the Code itself disallows payment of post-petition interest at state-law rates because Section 502(b)(2) unambiguously disallows post-petition interest. Respondents thus are unimpaired.

2. Respondents cherry-pick language from the court of appeals' decision that is consistent with the correct methodology that unambiguous text controls. See Opp. Br. 29-30. But as this Court recently demonstrated in *Bartenwerfer*, the way to determine whether a court has applied a clear-statement rule is to look at what the

court *actually did*, to see whether it has "artificially narrow[ed] ordinary meaning." *Bartenwerfer*, slip op. 6.

This Court has never used past bankruptcy practice in that way. For example, in *Cohen* v. *de la Cruz*, 523 U.S. 213, 221 (1998), this Court started with the text, identified "[t]he most straightforward" reading of it, and relied on past bankruptcy practice merely to "reinforce[]" that interpretation. *Id.* at 218, 221. This Court subsequently reaffirmed in *RadLAX* that history is not "relevant" without "textual ambiguity." 566 U.S. at 649. This Court thus has consistently given primacy to text.

In stark contrast, the court of appeals relied on history to artificially narrow ordinary meaning. The majority started with history, not text. See Pet. App. 11a-14a. The majority then described the Code as "silent" as to whether unimpaired creditors are entitled to post-petition interest, and emphasized that "[n]o provision of the Code specifies the rate of postpetition interest a creditor must receive from a solvent debtor to be unimpaired." Pet. App. 16a. But as Judges Ikuta and Oldham explained, the Code is not silent: It "goes for the jugular by flatly disallowing 'claim[s] for unmatured interest.'" *Ultra*, 51 F.4th at 163 (Oldham, J., dissenting); see also Pet. App. 39a (Ikuta, J., dissenting) ("In light of § 502(b)(2), there is no dispute that an allowed claim stops accruing interest as of the date the debtor files a petition in bankruptcy."). The majority thus refused to read the Code's unambiguous text to mean what it says because it did not specifically address the solvent-debtor exception. That is the very definition of a clear statement rule.

Respondents even admit (Opp. Br. 32) that the court of appeals applied "the same sensible approach" as the Fifth Circuit majority in *Ultra*. That gives away the game. The Fifth Circuit openly applied a bankruptcy-

specific "substantive canon of interpretation" that pre-Code practice controls "unless expressly abrogated." *Ultra*, 51 F.4th at 153. The key, dispositive question in this case is whether that bankruptcy-specific canon of interpretation exists. This Court should grant certiorari to confirm that it does not.

3. This Court's precedents establish that the court of appeals' decision was wrong because the majority's history-first methodology conflicts with this Court's text-first methodology.

Respondents assert that the text supports them. But as noted above, respondents have no textual basis for requiring unimpaired creditors to receive post-petition interest at state law rates, when Section 502(b)(2) disallows all post-petition interest and no Code exception even arguably applies to unimpaired creditors. For example, respondents distinguish between payment of interest as "*part of*" a claim and interest "*on*" a claim. Opp. Br. 26-27 (emphasis added). But that distinction has no textual basis either. Section 502(b)(2) disallows any claim to the extent it "is *for* unmatured interest." 11 U.S.C. 502(b)(2) (emphasis added). And a demand for unmatured interest is plainly a "claim": A claim includes any "right to payment," whether "matured" or "unmatured," as well as any "right to an equitable remedy for breach of performance" that gives rise to a right to payment. 11 U.S.C. 101(5). Section 502(b)(2) thus disallows any demand for post-petition interest, including any demand for such payment as an equitable remedy.

Lacking a textual hook, respondents turn to legislative history. Opp. Br. 28-29. They assert that "[t]he legislative record reflects that Congress was acutely aware" of a prior bankruptcy court decision holding that post-petition interest was barred, and that it acted to "'preclude th[at] unfair result'" by repealing an entirely

different provision. *Id.* at 29 (quoting H.R. Rep. No. 835, 103d Cong., 2d Sess. 48 (1994), reprinted in 1994 U.S.C.C.A.N. 3340, 3356-3357). But this Court's precedents prohibit using the "legislative record" to override an otherwise unambiguous text. "Legislative history, for those who take it into account, is meant to clear up ambiguity, not create it." *Milner* v. *Department of Navy*, 562 U.S. 562, 574 (2011). The 1994 amendments did not change Section 502(b)(2) or add an exception for unimpaired creditors. Accordingly, the text as amended still plainly prohibits payment of post-petition interest here.

Respondents also have no answer to the Code's *statutory* history, which is a textual source of meaning that confirms that post-petition interest is disallowed. See Pet. 20-21. The Code's original 1978 text provided that "each class" of creditors in a solvent-debtor case was entitled to post-petition interest at the uniform federal rate set forth in 11 U.S.C. 726(a)(5). 11 U.S.C. 1129(a)(7) (1982). In 1984, Congress changed that language to provide only that "each *impaired* class" is entitled to such interest. Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 512(a)(7), 98 Stat. 333 (emphasis added); see 11 U.S.C. 1129(a)(7) (same today). The change from "each class" to "each impaired class" can only be understood to narrow the set of creditors who are entitled to post-petition interest when the debtor is solvent: Impaired creditors are. Unimpaired creditors are not.

Respondents thus cannot prevail on the merits without relying on past practice or legislative history to override unambiguous statutory text. But this Court's precedents establish that "the text of a law controls over purported legislative intentions unmoored from any statutory text." *Oklahoma* v. *Castro-Huerta*, 142 S. Ct. 2486, 2496 (2022).

III. The Conflict Between the Ninth and Fifth Circuits Over What Rate to Apply Further Confirms the Error and the Need for Review

Respondents describe (Opp. Br. 3) as "an illusion" the conflict between the Ninth Circuit's rule (that the rate is based on equitable considerations) and the Fifth Circuit's rule (that the rate is set by state law). But that divide appears on the face of the rule that each court announced as binding precedent. The Ninth Circuit remanded for the district court "*to weigh the equities* and determine what rate of interest [respondents] are entitled to in this instance." Pet. App. 33a (emphasis added). The Fifth Circuit, by contrast, did not ask the district court to weigh the equities. It remanded to apply "the contractual interest rate." *Ultra*, 51 F.4th at 160; see *ibid.* ("Creditors are entitled to what they bargained for with this solvent debtor" because "the Code does not preclude the contractual interest rate.").[1]

Respondents also overlook the most important point about the circuit conflict: It is a symptom of the problem of disregarding unambiguous text and the need for this Court's review. Without a textual basis for demanding payment of post-petition interest, courts have no textual basis for selecting any particular interest rate. And that problem is particularly glaring where a court disregards both Section 502(b)(2) *and* the lone Code provision that

---

[1] Respondents note (Opp. Br. 21-22) that the Ninth Circuit borrowed the phrase "compelling equitable considerations" from the Fifth Circuit's prior decision in *Ultra*, 943 F.3d at 765. But when the Fifth Circuit subsequently decided that the solvent-debtor exception survives, it did not choose a rate that depends on equity. Rather, the court stated flatly that interest was due at "the contractual interest rate." *Ultra*, 51 F.4th at 160.

codifies an exception to that rule when the debtor is solvent, 11 U.S.C. 726(a)(5).

The whole point of requiring fidelity to statutory text is so that Congress, not courts, can make the key policy determinations. Yet here, the Ninth Circuit rejected Congress's unambiguous answers to both whether post-petition interest must be paid and, if so, what the interest rate should be when such interest is due.

IV. The Issues Are Important and Recurring

Respondents do not dispute that the questions presented are both important and recurring. As the petition explained, the "greater and more enduring damage" of giving unambiguous text a secondary role "consists in its destruction of predictability, in the Bankruptcy Code and elsewhere." *Dewsnup* v. *Timm*, 502 U.S. 410, 435 (1992) (Scalia, J., dissenting). This case provides the Court a perfect opportunity to provide clear rules of the road to debtors, creditors, and courts, by rejecting a bankruptcy-specific substantive canon of interpretation that respondents cannot defend. More broadly, this case gives the Court an opportunity to cut back on clear-statement rules or substantive canons that lack constitutional underpinnings. Cf. Oral Arg. Tr. 60, *Ysleta del Sur Pueblo* v. *Texas*, No. 20-493 (U.S. Feb. 22, 2022) (Kagan, J.).

Respondents also do not dispute that the underlying question about the solvent-debtor exception is important and recurring. Particularly when market volatility increases, a debtor that is insolvent or in financial distress at the outset of bankruptcy can later become solvent before the bankruptcy finishes. The issue in turn has arisen in numerous bankruptcies, with many millions of dollars riding on the difference between the com-

peting positions. *E.g.*, Pet. App. 8a (estimating the difference at "roughly $200 million"); *Ultra*, 51 F.4th at 145 ("$387 million"); *In re Hertz Corp.*, 637 B.R. 781, 784 (Bankr. D. Del. 2021) ("approximately $272 million"). And particularly under the Ninth Circuit's atextual "compelling equitable considerations" rule, the debtor cannot know in advance how much any given creditor must be paid to remain unimpaired. The questions presented accordingly warrant this Court's review.

* * * * *

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted. At a minimum, this Court should hold this petition pending the resolution of the petition for a writ of certiorari in *Ultra*.

Respectfully submitted.

THEODORE E. TSEKERIDES
JESSICA LIOU
MATTHEW GOREN
COLIN MCGRATH
A.J. GREEN
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, NY 10153

ZACHARY D. TRIPP
Counsel of Record
WEIL, GOTSHAL & MANGES LLP
2001 M Street NW
Washington, DC 20036
(202) 682-7000
zack.tripp@weil.com

MARCH 2023