No. 22-772

IN THE

# Supreme Court of the United States

ULTRA PETROLEUM CORPORATION, ET AL.,
*Petitioners*,

v.

AD HOC COMMITTEE OF OPCO UNSECURED CREDITORS, ET AL.,
*Respondents*.

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

**BRIEF IN OPPOSITION FOR RESPONDENT AD HOC COMMITTEE OF OPCO UNSECURED CREDITORS**


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## QUESTION PRESENTED

Whether the court of appeals, in agreement with all other appellate courts to consider the question, correctly applied this Court's longstanding interpretive principles and concluded that a debtor able to pay its debts in full should do so even if it has entered bankruptcy.

## RULE 29.6 DISCLOSURE STATEMENT

Each of the following entities, which are controlled or managed by members of the Ad Hoc Committee of Unsecured Creditors of Ultra Resources, Inc. ("OpCo Committee"), [1] has no parent corporation and no publicly held corporation holds 10% or more of its stock: Anchorage Capital Master Offshore, Ltd. and investors therein from time to time; Bain Capital Distressed and Special Situations 2013 (AIV II Master), L.P.; Bain Capital Distressed and Special Situations 2016 (A), L.P.; Bain Capital Distressed and Special Situations 2016 (B Master), L.P.; Bain Capital Distressed and Special Situations 2016 (EU Master), L.P.; Bain Capital Distressed and Special Situations 2016 (F), L.P.; Bain Capital Distressed and Special Situations 2016 (G), L.P.; Bain Capital Credit Managed Account (E), L.P.; CAZ Halcyon Offshore Strategic Opportunities Fund, L.P. and investors therein from time to time; CAZ Halcyon Strategic Opportunities Fund, L.P. and investors therein from time to time; HLDR Fund I NUS LP and investors therein from time to time; HLDR Fund I TE LP and investors therein from time to time; HLDR Fund I UST LP and investors therein from time to time; Gryphon Hidden Values VIII Ltd. and investors therein from time to time; HDML Fund II LP and investors therein from time to time; Halcyon Vallée

[1] Petitioners previously agreed that the OpCo Committee has standing to file briefs on behalf of the OpCo Committee members and that such briefs shall be treated as though filed by each member of the OpCo Committee.

Blanche Master Fund LP and investors therein from time to time; HCN LP and investors therein from time to time; Halcyon Eversource Credit LLC and investors therein from time to time; Knighthead Master Fund, LP and investors therein from time to time; Knighthead (NY) Fund, LP and investors therein from time to time; Knighthead Annuity & Life Assurance Company and investors therein from time to time; Raptor Energy, LP and investors therein from time to time.

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## BRIEF IN OPPOSITION

From the Founding of the United States until 1978, all courts—including this Court—agreed, as had our English forebears, that a company able to pay its debts in full, including contracted-for interest, should do so, and that a good-faith bankruptcy filing before the debtor returned to solvency did not alter that simple legal (and moral) proposition. This has come to be known as the "solvent-debtor exception" to prohibitions found elsewhere in bankruptcy law on the payment of post-petition interest.

In 1978, Congress passed a new statute, the Bankruptcy Code. Both early and recent decisions interpreting the Code have held that Congress should be presumed, in enacting the Code, *not* to have altered settled prior bankruptcy practice unless it gave some affirmative indication of an intent to do so. *Application* of this rule of interpretation, as opposed to the rule itself, can occasionally be controversial. But no one—no majority or dissenting judge in the relevant cases in the courts of appeals, and no Justice of this Court—has ever questioned the interpretive rule itself.

This case presents the application of that settled interpretive rule to the equally settled and uncontroversial pre-Code "solvent-debtor exception," according to which a solvent debtor, even in bankruptcy, must pay its debts in full. Every court of appeals to have considered the question has agreed that the solvent-debtor exception survived the enactment of the Code, including with respect to Section 502(b)(2), on which Petitioners so heavily rely.

Petitioners now ask this Court to upend settled practices without awaiting a conflict in the circuits. Petitioners dramatically insist that "[t]his Court's review is urgently warranted" (Pet. 1) because the court of appeals "conjure[d] the spirit of the *Church of the Holy Trinity*" (Pet. 18) and erred on a "consequential question at the heart of bankruptcy law" (Pet. 37)—to wit, whether and how to apply a doctrine that is relevant only in ultra-rare circumstances. The petition produces more heat than light; if the stakes were as Petitioners profess, it is hard to see why no judge of the Fifth or Ninth Circuit, save the sole dissenters, even called for a response or a vote on rehearing en banc and no amicus curiae has filed in support of the petition.

The petition presents no issue ripe for this Court's review on this record and at this stage in the development of the case law. First, notwithstanding the coincidence that several cases have recently and near-simultaneously raised this issue, it comes up quite rarely. Petitioners' fortuitous return to solvency was, as the court of appeals observed in the first of two appeals in this case, "as rare as the proverbial rich man who manages to enter the Kingdom of Heaven." Pet. App. 106. Second, if a conflict in the circuits does develop, then this Court will have the opportunity to address the issue after appropriate percolation in the courts below.

## STATEMENT

### A. Legal Framework

The Bankruptcy Code's claim-allowance provision creates a "general rule disallowing postpetition interest." *United Sav. Ass'n of Texas* v. *Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 373 (1988). If another party objects to a proof of claim, "the court, after notice and a hearing, shall determine the amount of such claim in lawful currency of the United States as of the date of the filing of the petition, and shall allow such claim in such amount, except to the extent that * * * such claim is for unmatured interest." 11 U.S.C. § 502(b)(2).

This rule has deep roots in Anglo-American bankruptcy practice. "For more than a century and a half[,] the theory of the English bankrupt system has been that everything stops at a certain date"—"[i]nterest was not computed beyond the date of the commission." *Sexton* v. *Dreyfus*, 219 U.S. 339, 344 (1911). If interest kept running, and if there were insufficient assets to pay all debts in full, then some creditors would be advantaged over others; but the delay occasioned by the estate's administration is supposed to benefit all creditors alike. See *American Iron & Steel Mfg. Co.* v. *Seaboard Air Line Ry.*, 233 U.S. 261, 266 (1914); *Vanston Bondholders Protective Comm.* v. *Green*, 329 U.S. 156, 163-164 (1946).

The rule was codified in Section 63 of the Bankruptcy Act of 1898, which limited interest on provable claims to interest "which would have been recoverable" when the petition was filed, and subtracted "interests accrued after the filing of the petition." Bankruptcy Act of 1898, ch. 541, § 63, 30 Stat. 544, 563. Today, the rule against post-petition interest is codified at 11 U.S.C. § 502(b)(2). See *Timbers*, 484 U.S. at 372-373.

In the unusual case of a *solvent* debtor, though, courts for centuries recognized an exception to the post-petition interest bar. "Unlike the typical insolvent bankrupt, a solvent debtor's pie is large enough for every creditor to have his full slice." Pet. App. 22. So the practice in England, "carried over into our system" under the Bankruptcy Act, was that, "if the alleged 'bankrupt' proved solvent, creditors received post-bankruptcy interest before any surplus reverted to the debtor." *City of New York* v. *Saper*, 336 U.S. 328, 330 n.7 (1949); see *United States* v. *Ron Pair Enters., Inc.*, 489 U.S. 235, 246 (1989).

This case concerns just such a "rare instance[ ] where the assets ultimately proved sufficient" for creditors to receive "interest accruing after adjudication." *American Iron & Steel*, 233 U.S. at 266-267. The court of appeals held, in lockstep with every other circuit to consider the question, that the Bankruptcy Code did not abrogate the solvent-debtor exception. Pet. App. 32. In reaching that conclusion, the appellate courts faithfully applied this Court's well-worn interpretive prescription: a court should not interpret the Code to abrogate well-established pre-Code practice without a clear indication from Congress. *E.g.*, *Hamilton* v. *Lanning*, 560 U.S. 505, 517 (2010).

### B. Factual Background

After a drop in commodities prices drove Petitioners into insolvency and Chapter 11 proceedings, something peculiar happened. Those same prices spiked and Petitioners became solvent once more—a corporate feat acknowledged in the first appeal, by the judge who dissented in the second appeal, to be exptremely rare. Pet. App. 106. Petitioners were not just solvent but "massively" so. Pet. App. 3. The upshot: Petitioners would, after all, be able to make good on the promises that *they* had voluntarily made several years ago to secure their access to capital.

As relevant here, those promises were made in two credit transactions. From 2008 to 2010, Petitioners issued nearly $1.5 billion in unsecured notes. Pet. App. 5, 54. A year later, they secured just under one billion dollars in credit via a revolving credit facility. *Ibid.* Of course, access to credit requires assurances in favor of the lender. So both the note agreement and the revolver provided for acceleration of principal, and a higher rate of interest, on Petitioners' default. Pet. App. 6-7.

The note agreement also provided for the payment of a contingent "Make-Whole" amount designed to compensate for the cost of lending in an inferior creditors' market, should a default by Petitioners force them to do so. See genearlly Douglas G. Baird, *Making Sense of Make-Wholes*, 94 Am. Bankr. L.J. 567, 581 (2020). The Make-Whole compares the remaining principal on a defaulted Note to the discounted present value of the remaining payments on that

Note. If Treasury yields are very high, the present value of future payments is very low, because they are discounted very heavily. Indeed, given a high enough risk-free rate, the Make-Whole formula can yield a payment of $0. That's not implausible, given that the Make-Whole figure approaches nil at the interest rates that prevailed from 2006 to 2007.[1] Conversely, at low Treasury yields, the present value is high, and the Make-Whole is owed to compensate the note claimants for having to reinvest in a less favorable lending environment. Petitioners' Chapter 11 filing triggered the principal-acceleration, default-rate, and Make-Whole provisions.

Happily, Petitioners' newfound solvency meant that all creditors could receive the benefit of their bargains. But Petitioners had something else in mind.

Ordinarily, equity owners stand *last* in line for bankruptcy distributions. *Czyzewski* v. *Jevic Holding Corp.*, 580 U.S. 451, 457 (2017); *Norwest Bank Worthington* v. *Ahlers*, 485 U.S. 197, 208 (1988). Yet Petitioners cynically saw a chance to argue that the Bankruptcy Code contains a loophole allowing their shareholders to keep money that was fully available and had been voluntarily promised to creditors.

Relying on that clever but highly improbable interpretation of the Code, Ultra proposed a plan that would not pay what it undisputedly owed under its own contracts. Instead, Ultra's plan proposed to pay Respondents' allowed claims, *pre*-petition interest on

[1] This example uses the 5.6% Series 2010-C notes due 2022 for illustrative purposes. See OpCo Comm. CA5 Br. 39-40.

those claims, *post*-petition interest at the miserly Federal Judgment Rate, and no Make-Whole at all. Pet. App. 3-4. Meeting its contractual obligations is what the petition now calls a "draconian consequence[]" "inflict[ed]" on "the filing of a bankruptcy petition." Pet. 5. Requiring a sophisticated and solvent debtor to keep its promises is, according to Petitioners, a "harsh consequence[]" flatly prohibited by the unambiguous terms of the Bankruptcy Code. *Ibid.*

### C. Procedural History

1. Petitioners' proposed plan treated Respondents as "unimpaired," thus depriving them of their right to vote on the plan and "conclusively presum[ing]" them to accept it. 11 U.S.C. § 1126(f). The concept of "impairment" is central to the Code's scheme for Chapter 11 reorganization. See *Czyzewski* v. *Jevic Holding Corp.*, 580 U.S. at 464. Because "unimpaired" creditors are deprived of their right to vote (as well as other important protections), Congress defined impairment "in the broadest possible terms." *In re Madison Hotel Assocs.*, 749 F.2d 410, 418 (7th Cir. 1984). Section 1124, which governs impairment, provides that a class of creditors is impaired unless the Plan leaves "unaltered" those creditors' "legal, equitable, and contractual rights." 11 U.S.C. § 1124(1).

Petitioners asserted that, despite stripping Respondents of their right to a Make-Whole and a contractual rate of post-petition interest, Petitioners' plan nevertheless left "unaltered" Respondents' equitable rights under Section 1124(1). Here's how Petitioners squared the circle: They pointed, first, to Section 726(a), which governs the order of distribution in a Chapter 7 liquidation (not, as here, a Chapter 11 reorganization). Section 726(a)(5), Petitioners began, entitles creditors to "interest *at the legal rate* from the date of the filing of the petition" after the payment of other allowed claims (emphasis added). Petitioners then pivoted to Section 1129(a)(7), which requires that impaired creditors in a Chapter 11 reorganization receive "not less than" they would in a Chapter 7 liquidation. Marrying the two provisions, Petitioners concluded that, so long as their plan gave Respondents post-petition interest (but no Make-Whole) at "the legal rate" (which they equated to the paltry Federal Judgment Rate), the plan passed muster under the Code.

Petitioners never explained, and still have not, why either Section 726(a) (which governs Chapter 7 liquidations) or Section 1129(a)(7) (which applies only to *impaired* creditors, allowed to vote on the plan) has any bearing on *un*impaired creditors in a *Chapter 11* plan. Nor did they explain how stripping Respondents of their bargained-for rights, when Petitioners had the wherewithal to pay all their creditors in full, honored Section 1124(1)'s dictate that creditors' equitable rights be "unaltered"—or else they must be treated as impaired and allowed to vote.

Respondents objected to confirmation, explaining that they could not be deemed unimpaired so long as Ultra refused to pay them in full. The parties stipulated that a decision could wait until after plan confirmation; Ultra set aside $400 million to cover the shortfall; and the bankruptcy court confirmed the plan. Pet. App. 5.

With the plan confirmed, the bankruptcy court turned to Petitioners' ploy to "unimpair" Respondents and shift to shareholders value that—undisputedly—had been promised instead to creditors. Rejecting that gambit, the bankruptcy court held that, to be unimpaired, creditors must receive "all that they are entitled to under state law." Pet. App. 110-111. Accordingly, the court concluded, Petitioners must pay default-rate post-petition interest and the Make-Whole. Pet. App. 111.

2. The court of appeals reversed in part and vacated in part. In that first appeal, the court held that, when creditor rights are trimmed by the Code rather than the plan, those rights are not "impaired" for purposes of 11 U.S.C. § 1124(1). Pet. App. 145-150. To reach that conclusion, the court of appeals *assumed*—but did not hold—that the Code trimmed Respondents' rights. Whether the Code actually does so was a question to be answered on remand.

The court of appeals remanded for the bankruptcy court to decide the allowability of the Make-Whole, "the appropriate post-petition interest rate, and the applicability of the solvent-debtor exception." Pet. App. 152. With respect to the Make-Whole, the court of appeals cautioned that "much depends on the dynamics of the individual case." Pet. App. 151. The Court added that the bankruptcy court was "best equipped" to decide these questions, which depended on "multifarious, fleeting, special, narrow facts that utterly resist generalization." *Ibid.*

As for the solvent-debtor exception, the court of appeals observed that "absent compelling equitable considerations, when a debtor is solvent, it is the role of the bankruptcy court to enforce the creditors' contractual rights." Pet. App. 151. On this record, the court continued, it could see "no reason why the solvent-debtor exception could not apply." *Ibid.*

3. That proved prescient. On remand, the bankruptcy court held that the solvent-debtor exception had survived the Code's adoption and required full payment of post-petition interest. Current Section 502(b)(2), the court reasoned, is "closely analogous" to Section 63 of the Bankruptcy Act. Pet. App. 89. Nothing suggested "that Congress intended to defang the solvent-debtor exception." Pet. App. 90. So, given this lack of "clear Congressional intent," the court held that the "universally recognized" solvent-debtor exception retained its vitality.

As for the Make-Whole, the bankruptcy court allowed that sum, rejecting the argument that it represented the "economic equivalent of unmatured interest." Pet. App. 82. The bankruptcy court explained that the Make-Whole, unlike interest, is not earned over time and does not compensate for the use or forbearance of Respondents' money. Pet. App. 82-83. Instead of "compensat[ing] the [Respondents] for [Petitioners'] use or forbearance of the [Respondents'] money, it compensates the [Respondents] for [Petitioner's] *breach* of a promise to use money." Pet.

App. 60 (emphasis added). The provision is thus a valid liquidated damages clause. Pet. App. 62-63. See also Baird, 94 Am. Bankr. L.J. 567.

4. The court of appeals again allowed a direct appeal. By a divided vote, it affirmed. Pet. App. 40-41.

In the court of appeals, Petitioners contended that, notwithstanding the deep pedigree of the solvent-debtor exception, the text of Section 502(b)(2) entitled them to avoid both the Make-Whole and post-petition interest at the contractual rate. Petitioners also "urge[d] the court to draw negative [inferences] from the Code's provision for *impaired* creditors to receive interest at 'the legal rate' when a debtor proves sufficiently solvent." Pet. App. 24 (emphasis added).

In making the latter point, Petitioners reiterated their Section 726(a)(5)/Section 1129(a)(7) alchemy. According to Petitioners, Section 726(a)(5)—a provision made applicable to Chapter 11 by Section 1129(a)(7), and thus only to *impaired* creditors (which are entitled to vote on the Plan)—should be extended to *unimpaired* creditors as well (like Respondents), thereby restricting Respondents to post-petition interest only at the very same "legal" rate, not the rate prescribed by the contracts (let alone a Make-Whole).

Respondents explained that this chain of inference was far too fragile to constitute clear abrogation of the solvent-debtor exception. After all, Respondents noted, even Petitioners were admitting that creditors must receive *some* post-petition interest, notwithstanding Section 502(b)(2)'s supposed "unqualified prohibition" (Pet. 17) of post-judgment interest to *any* extent. See Ultra CA5 Br. 38

(Respondents "are entitled to receive *some* post-petition interest"); *id.* at 42 ("Congress * * * confirmed that unsecured creditors in solvent-debtor Chapter 11 cases must receive *some* post-petition interest"). Respondents also explained that the similarly worded Bankruptcy Act had likewise contained a no-less-textually-"unqualified" bar on post-petition interest—and yet courts, including this Court, universally applied the solvent-debtor exception.

The court of appeals agreed: "If Congress legislated cognizant of courts' practice of excepting solvent debtors from the generally applicable statutory disallowance of § 63, one would expect it to have *expressly* abrogated the judicial exception if it intended to do so." Pet. App. 26. This was not a "case in which 'the language of the Code leaves no room for clarification by pre-Code practice.'" Pet. App. 29 n.21 (quoting *Hartford Underwriters Ins. Co.* v. *Union Planters Bank, N.A.,* 530 U.S. 1, 11 (2000)).

Because this case, the court of appeals believed, involved a "plain judicial *exception* to the prior acts," rather than a pre-Code gloss on open-ended rules, "Congress was not writing upon a clean slate" in enacting Section 502(b)(2). Pet. App. 29 n.21. "Had Congress intended to do away with this practice, it would have said so directly." *Ibid.*

The court of appeals also adverted to Section 1124(a)'s protection of unimpaired creditors' equitable rights. Rejecting Petitioners' attempt to shave their interest rate down to "the legal rate," the court explained that, even if the undefined "legal rate" were in fact the Federal Judgment Rate, and even if

Chapter 7's waterfall provision applied to unimpaired creditors (though Section 1129(a)(7) cross-rerferences it only for impaired creditors), that would not foreclose full contractual satisfaction for the simple reason that Section 1129 sets only a *floor*; creditors must receive "not less than" what they would in liquidation. Pet. App. 38-39.

With no countermanding provision specifying a *maximum* rate of interest, and with Section 1124(1) requiring that unimpaired creditors' equitable rights remain "unaltered," the equitable right to "contractually specified rates of interest 'on' their claims when a solvent debtor is fully capable of paying up"—the equitable right at the "root of the solvent-debtor exception"—takes the fore. Pet. App. 39.

Judge Oldham dissented. He agreed with the bedrock principle that, "[i]f the Code is *not* unmistakably clear, then the prior practice survives." Pet. App. 41 n.29. By his lights, however, Section 502(b)(2) more clearly bars unmatured interest than did its predecessors in the 1898 and 1938 Bankruptcy Acts. Pet. App. 44-46. At bottom, then, the majority and dissent disagreed not about proper interpretive methodology, but about the application of well-established principles of statutory interpretation to this particular case.

## REASONS FOR DENYING THE PETITION

Petitioners argue that the decision below was "grievously wrong" (Pet. 1); conflicts with this Court's cases and creates "a three-way conflict" (Pet. 33); sows "rapidly growing confusion" on "an important and recurring issue" (Pet. 1); and is a good vehicle for review (Pet. 36). None of those contentions bears scrutiny.

In truth, the court of appeals' decision faithfully applied this Court's precedents (with the "sharply divided" panel, Pet. 2, disagreeing only about application, not overarching interpretive principles); the decision creates *no* circuit division; the issue arises so infrequently that the phrase "solvent debtor" is nearly oxymoronic; and Petitioners confront substantial vehicle problems.

To be sure, judges trying their level best to interpret the Code can and do disagree about the application of the settled ground rules. Compare *United States* v. *Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989) ("The language before us expresses Congress' intent—that postpetition interest be available—with sufficient precision so that reference to legislative history and to pre-Code practice is hardly necessary."), with *id.* at 250 (O'Connor, J., dissenting) (rejecting "[t]he Court's reliance on [a] comma" to find the Code unambiguous and to depart from pre-Code practice). Such challenges come with the judicial commission. But the decision below does not remotely disparage this Court or its precedents. Contra Pet. 1, 3, 14, 27, 36. If any court has come in for unwarranted "opprobrium" (Pet. 14), it is the court of appeals—which got this case right and which "does not deserve" (*ibid.*) Petitioners' vitriol. The Court should deny the petition.

## I. The Court Of Appeals' Decision Does Not Conflict With Sister-Circuit Precedent Or This Court's Precedents

The court of appeals' decision does not diverge from any other circuit's law. Nor, for all the petition's *sturm und drang*, does it create a "bankruptcy exception to textualism." Pet. 36. This case is a mine-run application of uncontroversial principles.

### A. There Is No Circuit Split

"A principal purpose" for this Court's certiorari jurisdiction is "to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law." *Braxton* v. *United States*, 500 U.S. 344, 347 (1991). There is no conflict here.

1. Each circuit to consider the issue agrees that the solvent-debtor exception survived the Code's enactment. As the Petition laments (Pet. 31), the Ninth Circuit recently held that the "passage of the Code did not abrogate the solvent-debtor exception, any more than passage of the Bankruptcy Act did so." *In re PG&E Corp.*, 46 F.4th 1047, 1057 (2022), petition for cert. pending, No. 22-733 (filed Feb. 6, 2023). Much like the court of appeals here, the Ninth Circuit panel majority and dissent disagreed on the application of this Court's precedents, not on first principles. The majority agreed that "pre-Code practice cannot abrogate the Code's plain text." *Id.* at 1058 n.4. As here, the majority and dissent simply disagreed on whether the Code's text was plain. *Ibid.*

The Sixth Circuit, too, applies the solvent-debtor exception. *In re Dow Corning Corp.*, 456 F.3d 668, 680 (2006). Petitioners' account of that case does not hold water. See Pet. 33. The court stated with surpassing clarity that, "in solvent debtor cases," courts "have generally confined themselves to *determining and enforcing whatever pre-petition rights a given creditor has against the debtor*." *Id.* at 679 (emphasis added).

As for other provisions of Section 502(b), the Sixth Circuit held that an unsecured creditor can "recover those costs to which it has a state-law-based right against a solvent debtor, regardless of the nature of the federal proceedings." *Dow Corning*, 456 F.3d at 686. The court went on to explain that "[b]ankruptcy courts remain *free* * * * to limit recovery to those [fees and costs] which are *reasonable* under the circumstances." *Id.* at 686 n.4 (first emphasis added). The court remanded for "consideration of exactly what fee arrangements are permitted under the relevant state laws and under each contract at issue." *Id.* at 686.

The Second Circuit has also signaled its approval of the solvent-debtor exception. That court "reject[ed] the argument that post-petition interest must be paid regardless of solvency" but endorsed the proposition that creditors of solvent debtors may have an "'equitable' right to post-petition interest under the solvent-debtor exception, which Section 1124(1) would protect." *In re LATAM Airlines Grp. S.A.*, 55 F.4th 377, 385 (2d Cir. 2022). Because the appellant's challenges to the bankruptcy court's solvency determination failed, the Second Circuit held that it was not entitled to post-petition interest. See *id*. at 387-389.

2. Petitioners try, and fail, to conjure a split as to the *rate* of interest under the solvent-debtor exception. See Pet. 32-33. If there is any daylight between the Fifth and Ninth Circuits' approaches, however, it is not yet visible.

The Ninth Circuit held that creditors have an equitable right "to recovery of interest pursuant to their contracts, subject to any countervailing equities, before [the debtor's] shareholders receive[ ] surplus value." *PG&E*, 46 F.4th at 1064. To hear Petitioners tell it, the Ninth Circuit greenlit a free-floating, equitable power to choose whatever interest rate strikes a judge as fair. See Pet. 32. Here is what the court really said: "we acknowledge the possibility that cases could arise where payment of contractual or default interest could impair the ability of other similarly situated creditors to be paid in full, or where other 'compelling equitable considerations' could counsel in favor of payment of postpetition interest at a different rate." *PG&E*, 46 F.4th at 1064.

The Fifth Circuit likewise recognized "a gray area" "where a debtor is solvent enough to pay in full all allowed claims, but the surplus is not enough to cover all creditors' otherwise disallowed interest." Pet. App. 23 n.16. "In such a case, legitimate bankruptcy interests may well warrant a more nuanced application of the solvent-debtor exception." *Ibid.*

As for other "compelling equitable considerations"—first among which is the core bankruptcy policy of equitable treatment among creditors—there is no reason to think they are different from those that the court of appeals recognized, but had no need to address, here. Indeed, the Ninth Circuit cited the court of appeals' first opinion in this case for the very proposition. *PG&E*, 46 F.4th at 1064; see Pet. App. 151 ("Our review of the record reveals no reason why the solvent-debtor exception could not apply. As other circuits have recognized, absent compelling equitable considerations, when a debtor is solvent, it is the role of the bankruptcy court to enforce the creditors' contractual rights." (internal quotation marks omitted)). Most importantly, both approaches are *dicta* because neither court saw any reason to diverge from the presumptive, contract rate. And, even if the Fifth and Ninth Circuit approaches *do* diverge in some as-yet imperceptible way, this Court can step in, if it deems this minor and rarely arising isssue worthy of review, in a future case.[2]

[2] Petitioners suggest that *PG&E* conflicts with *In re Cardelucci*, 285 F.3d 1231 (9th Cir. 2002), which held that the term "legal rate" refers to the Federal Judgment rate. See Pet. 31; 285 F.3d at 1234. The Ninth Circuit correctly rejected that argument because *Cardelucci* "interpreted a statutory provision inapplicable to unimpaired creditors." *PG&E*, 46 F.4th at 1053. In any case, this Court "usually allow[s] the courts of appeals to clean up intra-circuit divisions on their own." *Joseph v. United States*, 574 U.S. 1038 (2014) (Kagan, J., respecting denial of certiorari).

### B. The Court Of Appeals Properly Applied This Court's Settled Precedents

Until now, Petitioners always conceded that unimpaired creditors of solvent debtors are entitled to *some* post-petition interest. But Petitioners go much further in this Court. Retreating from their concession, *e.g.*, Pet. App. 35, Petitioners now fault the court of appeals for failing to heed an "unqualified prohibition" on post-petition interest, Pet. 17. And, with a flair for the dramatic, Petitioners insist that the panel's work brought "opprobrium" on this Court. Pet. 14.

What Petitioners tar the court of appeals with is, as Justice Gorsuch recently put it, "stray[ing] from its commitment to textualism by relying on a clear-statement rule." *West Virginia* v. *Envtl. Prot. Agency*, 142 S. Ct. 2587, 2625 & n.7 (2022) (Gorsuch, J., concurring). But, as he correctly observed in the same opinion, "our law is full of clear-statement rules"—including the "presumption that [the] Bankruptcy Code didn't erode past practice"—"and has been since the founding." *Id.* at 2625 & n.7.

Furthermore, although the presumption against departure from past practice is applied *most often* in the bankruptcy context, it is *not* a bankruptcy-specific rule. This Court has observed in another context that "[s]tatutes which invade the common law . . . are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident." *United States* v. *Texas*, 507 U.S. 529, 534 (1993) (alterations in original). And, as the court of appeals correctly noted, this Court has very recently applied the same presumption in a patent case. Pet. App. 30-31 (citing *Minerva Surgical, Inc.* v. *Hologic, Inc.*, 141 S. Ct. 2298, 2307-2308 (2021)).

"The Court has followed this rule with particular care in construing the scope of bankruptcy codifications." *Kelly* v. *Robinson*, 479 U.S. 36, 47 (1986) (quoting *Midlantic Nat'l Bank* v. *New Jersey Dep't of Envtl. Prot.*, 474 U.S. 494, 501 (1986)). Indeed, this Court has long presumed that Congress did not intend to abrogate well-established bankruptcy practice in the absence of any clear statement to that effect. *E.g.*, *Hamilton* v. *Lanning*, 560 U.S. 505, 517 (2010); *Travelers Cas. & Sur. Co. of Am.* v. *Pacific Gas & Elec. Co.*, 549 U.S. 443, 454 (2007); *Lamie* v. *U.S. Tr.*, 540 U.S. 526, 539 (2004); *Cohen* v. *de la Cruz*, 523 U.S. 213, 222 (1998); *United States* v. *Noland,* 517 U.S. 535, 539 (1996); *BFP* v. *Resolution Tr. Corp.*, 511 U.S. 531, 543 (1994); *Grogan* v. *Garner*, 498 U.S. 279, 290 (1991); *Timbers*, 484 U.S. at 380; *Kelly* v. *Robinson*, 479 U.S. at 47; *Midlantic,* 474 U.S. at 501.

This rule makes sense—after all, the Bankruptcy Code's interaction with the common law and state-created property rights counsels caution. And, eliminating any opportunity for mischief, the rule is limited to very well-established pre-Code practice. See *Hartford Underwriters Ins. Co.* v. *Union Planters Bank, N.A.*, 530 U.S. 1, 10 (2000) (doubting whether scattered lower court precedents "establish a bankruptcy practice sufficiently widespread and well recognized to justify the conclusion of implicit adoption by the Code"); *Ron Pair*, 489 U.S. at 246 (contrasting the solvent-debtor exception and one other pre-Code exception with a third doctrine "of more doubtful provenance"). Cf. *PG&E*, 46 F.4th at 1064 ("We join our sibling circuits, however, in emphasizing that the solvent-debtor exception, though equitable in nature, does not give bankruptcy judges 'free-floating discretion to redistribute rights in accordance with [their] personal views of justice and fairness.'").

The panel's divison in this case demonstrates that judges won't always agree on whether the text is clear enough to satisfy a clear-statement rule. But such rules have the advantage of tightening the scope of inquiry and avoiding the thorny problem of defining ambiguity. See Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118, 2156 (2016) (reviewing ROBERT A. KATZMANN, JUDGING STATUTES (2014)).

For all the petition's rhetoric, the reality is mundane. In a "close" case, Pet. App. 19, the court of appeals relied on longstanding prior bankruptcy practice to "break[ ] the tie," Pet. App. 27, where the statutory text left "room for clarification by pre-Code practice," Pet. App. 29 n.21 (quoting *Hartford Underwriters*, 530 U.S. at 11). The dissent thought the Code "unmistakably clear" on the question of unimpaired creditors' right to post-petition interest. Pet. App. 41 & n.29 (quoting *Cohen*, 523 U.S. at 221-222). The court of appeals' workaday application of this Court's precedents to a rarely occurring situation does not merit review in the absence of a circuit conflict.

## II. This Case Is A Poor Vehicle

Should the Court wish to take up the question presented, it ought to do so in a different case. Here, Petitioners raise their primary argument for the first time before this Court. And deciding the question presented may not even be dispositive; there are at least two alternative grounds for full or partial affirmance.

### A. Petitioners Conceded That Respondents Are Entitled To *Some* Post-Petition Interest In The Bankruptcy Court, In The Court Of Appeals, And In Seeking En Banc Review

Petitioners make a bold argument, with rhetoric to match, that Respondents are entitled to *no* post-petition interest. See Pet. 13-19. But they lacked the courage of those convictions below; indeed, Petitioners have *always*, until now, conceded that Respondents are entitled to *some* post-petition interest. See Ultra CA5 Br. 38. In their court of appeals briefing, Petitioners agreed with every court on record that "Congress * * * confirmed that unsecured creditors in solvent-debtor Chapter 11 cases must receive *some* post-petition interest." *Id.* at 42.

On the merits, this concession has always presented a problem for Petitioners' theory that Section 502(b)(2) is absolute. See *infra* p. 28. But it is also a reason for this Court to follow its usual practice and decline to answer a question not first put to the court of appeals. *E.g.*, *Leonard* v. *Texas*, 137 S. Ct. 847 (2017) (Thomas, J., respecting denial of certiorari);

*Calhoun* v. *United States*, 568 U.S. 1206 (2013) (Sotomayor, J., respecting denial of certiorari); see also *Arkansas Game & Fish Comm'n* v. *United States*, 568 U.S. 23, 37-38 (2012); *Rita* v. *United States*, 551 U.S. 338, 360 (2007); *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

### B. There Are At Least Two Alternative Grounds For Affirmance

There is yet another vehicle problem: the alternative grounds for full or partial affirmance.

1. The court of appeals, unlike the bankruptcy court, did not fully ground its holding in Section 1124(1)'s protection of unimpaired creditors' equitable rights. But it would have been on firm ground if it had. See Pet. App. 101 ("Because an unimpaired creditor has equitable rights to be treated no less favorably than an impaired creditor and to be paid in full before the debtor realizes a recovery, a plan denying post-petition interest in a solvent debtor case alters the equitable rights of an unimpaired creditor under § 1124(1)."); *PG&E*, 46 F.4th at 1060 ("the solvent-debtor exception fits comfortably within the text of the Code—specifically, its requirement that a debtor's plan leave unaltered a creditor's 'legal, *equitable*, and contractual rights.'" (quoting 11 U.S.C. § 1124(1)).

2. But there is yet an another alternative path to at least partial affirmance that the court of appeals declined to take. The bankruptcy court had held that the Make-Whole was simply *not* the economic equivalent of interest (and thus could not constitute "unmatured interest" within the meaning of Section

502(b)(2)). Of course, the court of appeals applied the solvent-debtor exception to require the Make-Whole's payment. But, as explained by the bankruptcy court and adumbrated in this brief's Statement, the Make-Whole is decidedly *not* the equivalent of interest (among other reasons, because the Make-Whole formula makes it entirely contingent whether any amount will be paid, unlike "interest," which is fixed and assured). A ruling in Petitioners' favor on the question presented would thus not be dispositive of Respondents' entitlement to the Make-Whole.

## III. The Petition Does Not Present An Important Or Recurring Issue

1. Because the phrase "solvent debtor" is a near contradiction in terms for a company that has entered bankruptcy, it is unsurprising that the question presented does not arise frequently. To the contrary, this case presents exactly the sort of "episodic" issue that this Court generally declines to review. See *Rice* v. *Sioux City Mem'l Park Cemetery*, 349 U.S. 70, 74 (1955). Though several such cases have arisen in recent years, a solvent debtor is "unusual," *Littleton* v. *Kincaid*, 179 F.2d 848, 852 (4th Cir. 1950), and "admittedly rare," *Timbers*, 484 U.S. at 379.

2. Nor is the issue presented especially pressing. Petitioners fret that the court of appeals' logic would, in solvent-debtor cases, supersede the Code's prohibitions against, for example, unreasonable attorneys fees (Section 502(b)(4)) or future rent (Section 502(b)(6)). Not so. The court of appeals itself reasoned that Section 502(b)(1) would constrain any

recovery. Pet. App. 33 ("If New York law would prohibit enforcement of the Make-Whole Amount as an unenforceable penalty, the Code would not allow it as a claim, and the solvent-debtor exception could not resuscitate it."). And, as the bankruptcy court explained, "[w]hile the solvent-debtor exception is rooted in a court's duty to enforce creditors' contractual rights, the exception has traditionally been utilized only to award post-petition interest." Pet. App. 83 n.3.

Petitioners' double-counting concern (see Pet. 26-27) is equally unfounded. Petitioners take as given that Section 726(a)(5)'s "legal rate" is the Federal Judgment Rate; having stolen that base, Petitioners ignore the critical "not less than" qualifier in Chapter 11, which makes (a single) contract-rate recovery entirely consistent with Section 726. Put differently, there is no contradiction in granting post-petition interest *under* the solvent-debtor exception at a (contract) rate that is "not less than" the legal rate. As for Chapter 7—an entirely different statutory regime not implicated here—it strains credulity that any court would recognize an equitable right to double recovery.

To be sure, this case is of great financial import to Petitioners. And so, for the parties, are the handful of other solvent-debtor cases that arise from time to time. But this Court reserves discretionary review for "cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals." *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U.S. 387, 393 (1923) (Taft, C.J.). This case presents neither.

**IV. This Case Was Correctly Decided**

Petitioners argue that the panel erred in beginning its analysis with history and charge that "the panel majority made no attempt to identify any actual ambiguity in the text of § 502(b)(2) that pre-Code practice could clarify." Pet. 17. As Justice Scalia stated for a unanimous Court, however—in a case that itself involved the interpretation of Section 502(b)(2) and arose from the Fifth Circuit—"[s]tatutory construction * * * is a holistic endeavor." *Timbers*, 484 U.S. at 371. "[T]he good textualist," the same late Justice observed, "is not a literalist." Pet. App. 31 (quoting ANTONIN SCALIA, *Common-Law Courts in a Civil-Law System*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 24 (new ed. 2018)).

Starting with history was appropriate. If the pre-Code practice is sufficiently well established (a historical question), then a court must find a clear textual expression of intent to abrogate it. *E.g.*, *Kelly* v. *Robinson*, 479 U.S. at 47.

As Justice Scalia explained (to repeat, for a unanimous Court), "a major change in the existing rules would not likely have been made without specific provision in the text of the statute." *Timbers*, 484 U.S. at 380. That inference is especially strong when the result of an abrogation of existing rules—a cash-grab by shareholders at the expense of creditors—dishonors the most fundamental principles of bankruptcy law. See Pet. App. 29 n.22 ("There is no reason why Congress would allow solvent debtors to wield bankruptcy as a sword to slash valid debts"—an "observation [that] applies as persuasively to Congress['s] deliberation of the Bankruptcy Code as it did to deliberations of the Bankruptcy Act."); cf. *Timbers*, 484 U.S. at 373 ("We think it unlikely that § 506(b) codified the pre-Code rule with the intent, not of achieving the principal purpose and function of that rule, but of providing over-secured creditors an alternative method of compensation.").

There is no provision that clearly abrogates the solvent-debtor exception. For one thing, "[t]he Code's most relevant section, § 502(b)(2), tersely recodified § 63 of the preceding Chandler Act (and the 1898 Bankruptcy Act before it)," Pet. App. 28; yet courts construing the Act held that "the traditional rule would continue to apply absent an 'express provision . . . allowing interest that accrues after the filing of the petition to be paid out of a surplus . . . to the bankrupt,'" Pet. App. 30 (quoting *Johnson* v. *Norris*, 190 F. 459, 463 (5th Cir. 1911)).

And, as the court of appeals explained, "Section 502(b)(2) operates to disallow 'unmatured interest' that is *part of* a claim—not interest *on* a claim, which is what the contractual default rates here specify." Pet. App. 39 n.27. "A broader reading of § 502(b)(2) to disallow *all* post-petition interest, whether as *part of* a claim or *on* a claim, would plainly conflict with § 1129(a)(7)(A)(ii) and § 726(a)(5), which expressly operate to *allow* post-petition interest *on* claims." *Ibid*. So, as in *Kelly* and *Midlantic*, the court of appeals properly "declined to hold that the new Bankruptcy Code silently abrogated another exception created by courts construing the old Act." *Kelly* v. *Robinson*, 479 U.S. at 47.

If that weren't enough, Petitioners themselves bring a heaping portion of ambiguity to the table in service of their secondary argument—that "unimpaired creditors are at most entitled to post-petition interest at the federal judgment rate." Pet. 23. Ambiguity one: the Code's text makes no mention of post-petition interest for unimpaired creditors; yet all the world acknowledges[3] that they are entitled to some amount of post-petition interest. Ambiguity two: it is not clear that "the legal rate" is the Federal Judgment Rate. See Pet. App. 37-38. After all, if that's what Congress meant, one might expect that it would have said so—as it has, expressly, in other statutes. Pet. App. 38 n.26 (collecting statutes).

Setting aside those ambiguities, Petitioners "overlook[ ] the logically prior textual fact that 'the legal rate' only sets a *floor*—not a ceiling—for what an impaired (and by implication, unimpaired) creditor is to receive in a cramdown scenario." Pet. App. 38. Nor is it clear (at least not in Petitioners' favor) whether the core right of creditors—to receive the benefit of their bargain when the debtor is flush, else the debtor keeps the surfeit—is one of the "equitable rights" that must remain "unaltered" for a class to be unimpaired under Section 1124(1). Application of the bankruptcy

[3] Even Petitioners were for that proposition before they were against it.

clear-statement rule and of the solvent-debtor exception yields appropriate and sensible answers to those textually open questions.

If not, and if the issue is sufficiently recurring to merit this Court's attention eventually, then surely *some* court of appeals will eventually accept the argument Petitioners now make. This Court could review the issue then.[4] But odds are, that will never happen. The Fifth and Ninth Circuit majorities got it right.

[4] The issue is currently before the Third Circuit, in a case that has not yet been briefed or set for oral argument. *In re Hertz Corp.*, 637 B.R. 781 (Bankr. D. Del. 2021), appeal pending, No. 23-1169 (docketed Jan. 27, 2023).

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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