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 Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

## REPLY BRIEF FOR PETITIONER


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April 5, 2023

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## REPLY BRIEF

The divided decision below holds that an unwritten "solvent-debtor exception" drawn from judicial gloss on since-repealed bankruptcy statutes overrides the clear and unambiguous text of the Bankruptcy Code. That decision cannot be reconciled with this Court's bankruptcy-specific precedent, let alone with bedrock principles of statutory construction. It also conflicts with numerous lower-court decisions, and adds to growing confusion on a critically important and recurring question of bankruptcy law. This Court should not allow the serious errors in the decision below to stand.

Respondents have no persuasive response. Like the panel majority, they do their best to shift the blame, asserting that this Court has embraced a "substantive canon of Bankruptcy Code interpretation" that elevates pre-Code practice over explicit statutory text. That claim only underscores the need for this Court's intervention to reaffirm that there is no bankruptcy exception to sound statutory construction. Statutory construction begins and often ends with the statutory text, even when it is located in the Bankruptcy Code. Respondents suggest that it is only fair for a solvent-debtor to honor its pre-bankruptcy commitments. But that ignores that both the steep default interest rates and the make-whole were triggered by the bankruptcy filing. When, as here, the filing is in good faith, there is nothing fair about forcing the debtor to pay those exactions. The Code wisely, clearly and categorically disallows such claims. Respondents fare no better in disputing the serious and growing confusion in the lower courts.

Respondents' remaining attempts to avoid review are equally unavailing. Their claim that solvent-debtors are rare to the point of being oxymoronic is belied by four separate cases in four different courts of appeals in just the past twelve months, and it ignores that insolvency is not a pre-condition for a good-faith bankruptcy filing and economic fortunes can change quickly in tumultuous times. Respondents' attempt to deny the petition's importance obscures the serious practical and jurisprudential consequences of the panel majority's methodology (and the hundreds of millions of dollars they stand to win if the atextual result below stands). Respondents' last-ditch effort to avoid scrutiny by invoking alternative arguments on which they lost below unanimously is just as misguided. This Court should grant review, reaffirm the primacy of the Bankruptcy Code's text, and end the growing confusion on the critically important and recurring question presented.

## I. The Decision Below Contravenes The Clear Text Of The Bankruptcy Code And Settled Precedent.

1. This case should have been resolved by the plain statutory text, which provides a clear answer. The Bankruptcy Code is unambiguous: a claim must be disallowed "to the extent that … such claim is for unmatured interest." 11 U.S.C. §502(b)(2). That provision explicitly disallows all claims for unmatured interest in all bankruptcy cases, full stop, without regard to solvency or anything else.

The panel majority did not dispute that the Code expressly disallows *all* claims for unmatured interest and "does not distinguish solvent and insolvent

debtors." App.24. But instead of resolving the case based on that clear statutory text, the panel majority invoked a bankruptcy-specific "substantive canon of interpretation"—which it attributed to this Court—to make pre-Code practice controlling "unless expressly abrogated." App.27. Under that rule, the Code's explicit and unambiguous disallowance of *all* claims for unmatured interest was no match for judicial gloss on since-repealed text, because the Code does not "specifically address the solvent-debtor scenario." App.19.

Respondents cannot meaningfully defend that reasoning as a matter of first principles, so like the panel majority, they shift the blame to this Court, asserting that the panel majority "properly applied this Court's settled precedents" by elevating pre-Code practice over unambiguous statutory text. Committee.BIO.19 (capitalization altered); *see* Noteholders.BIO.17-18, 20. That is neither true nor a reason to deny review. This Court has repeatedly made clear that statutory interpretation "begins with the statutory text" and "ends there as well" when the text is clear, *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S.Ct. 617, 631 (2018), including when the text is housed in the Bankruptcy Code, *see* Pet.14-15. While pre-Code practice "can be relevant" when the Code is ambiguous, it cannot supplant statutory text when there is "no textual ambiguity" to resolve. *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 649 (2012). If some of this Court's bankruptcy precedents could be read to suggest otherwise, it would be a reason to *grant*, not deny, plenary review. There is no role for a bankruptcy exception to textualism, and to the extent lower courts and

litigants attribute such an exception to this Court, only this Court can set them straight. *See* Pet.16-17.

Respondents next assert that the sharp disagreement between the panel majority and the dissent below was not over whether pre-Code practice supersedes unambiguous statutory text, but whether the text here was unambiguous. Committee.BIO.21; Noteholders.BIO.18-19. But like the panel majority, respondents never identify any *textual* ambiguity in §502(b)(2)'s categorical disallowance of all claims for unmatured interest. After all, §502(b)(2) disallows claims not to the extent that the debtor is solvent, but "to the extent that … such claim is for unmatured interest." 11 U.S.C. §502(b)(2). The plain text "offers no alternative interpretation." App.42 (Oldham, J., dissenting). The panel majority conjured ambiguity not from the text, but from "the context of what came before," App.31. Needless to say, only the text complied with bicameralism and presentment.

The dangers of relying on judicial interpretations of different (and since-repealed) text to create ambiguity in otherwise clear superseding text are well illustrated here. *Contra* App.31. As Judge Oldham explained in detail, the pre-Code statutes on which the panel majority relied did *not* contain any explicit "blanket bar on all unmatured interest," while §502(b)(2) very much does. App.45; *see* App.42-48. The existence of a judicially created solvent-debtor exception to far less definitive text hardly undermines the clarity of §502(b)(2)'s far different language under any normal or correct principles of statutory construction. The clear language Congress employed in §502(b)(2)—not to mention the express repeal of the

earlier statutes that gave rise to the judicial gloss—"clearly abrogates" any contrary prior practice. *Contra* Committee.BIO.27.

2. For much the same reasons, the panel majority erred by invoking the same purported pre-Code solvent-debtor exception to hold that respondents were entitled to post-petition interest at their steep contractual default rates. App.35-40.[1] Section 502(b)(2) explicitly and categorically disallows *any claim* for such interest, leaving creditors entitled at most to post-petition interest *under the Code* (i.e., not as a contractual claim that somehow survives disallowance by §502(b)(2)) "at the legal rate" (i.e., the federal judgment rate) when the debtor is solvent. 11 U.S.C. §726(a)(5); *see* Pet.20-22. The panel majority nevertheless allowed respondents to demand post-petition interest at their steep contractual default rates, relying solely on the conclusion that "the solvent-debtor exception survived the Bankruptcy Code's enactment." App.39-40. That conclusion cannot be squared with §502(b)(2), which expressly disallows *claims for* such interest, and with the Code's

[1] The Noteholders' claim that the decision below presents "two distinct holdings," Noteholders.BIO.12-13, is a red herring. As the panel majority made clear, both holdings stemmed from its mistaken view that the pre-Code solvent-debtor exception supersedes the Code's plain text. *See* App.39-40. And the Noteholders' footnote asserting that the question presented does not encompass post-petition interest, Noteholders.BIO.13 n.3, is inexplicable: The panel majority explicitly relied on the solvent-debtor exception to allow respondents to recover post-petition interest at their contractual default rates, which (as Ultra has *always* contended) is an "amount[] that the Code disallows." Pet.i; *see* §502(b)(2).

broader post-petition interest structure, which deems the federal judgment rate, not "miserly," Committee.BIO.6-7, but fully sufficient whenever a debtor has sufficient funds to cover post-petition interest *on* allowed claims. Pet.20-22.

Respondents again have no persuasive defense of the panel majority's reasoning. They contend that because no Code provision explicitly awards unimpaired Chapter 11 creditors post-petition interest, the Code must be ambiguous. Committee.BIO.28; Noteholders.BIO.19. But the Code *does* explicitly preclude *claims* for post-petition interest at contractual rates, 11 U.S.C. §502(b)(2), and it requires at most post-petition interest at the federal judgment rate, *id.* §§726(a)(5), 1129(a)(7)(A)(ii); *see* Pet.20-22. Those provisions unambiguously bar respondents' demand for post-petition interest at their exorbitant contractual default rates. Any ambiguity concerns only whether they are entitled to the federal judgment rate or nothing, and they cannot complain about a plan that gives them the former.

Respondents argue that §502(b)(2) disallows only claims "for" unmatured interest, 11 U.S.C. §502(b)(2), not interest "on" a claim. Committee.BIO.27; *see* Noteholders.BIO.20 n.7. Just so. Section 502(b)(2) disallows respondents' claims *for* post-petition interest at their contractual rates, leaving respondents—like all other creditors—with at most the right *under the Code* to post-petition interest *on* allowed claims at the federal judgment rate. *See* Pet.20-22; 11 U.S.C. §§726(a)(5), 1129(a)(7)(A)(ii). Respondents' effort to revert back to a higher, contractually specified interest rate is precisely the

kind of "claim … for unmatured interest" that §502(b)(2) disallows. *See* 11 U.S.C. §101(5) (defining "claim").

Quoting the panel majority, respondents contend that the Code "only sets a *floor*" for the rate of post-petition interest. Committee.BIO.28 (quoting App.38). That misses the point. The question is not whether the Code *precludes* creditors from receiving more than the federal judgment rate, but whether it entitles them to insist on contractual post-petition interest that the Code expressly disallows. Pet.22-23. The answer to that question is plainly no.

Finally, the Committee (but not the Noteholders) contends that Ultra has somehow changed its position on post-petition interest, from allowing that the Code may require "*some* post-petition interest" to insisting that it permits none at all. Committee.BIO.19. Not so. Ultra's argument has been the same from day one: §502(b)(2) disallows respondents' claims for post-petition interest at their steep contractual default rates, and the most the Code entitles them to is the federal judgment rate. Since the plan gives them interest at the federal judgment rate, any dispute about whether the plan could have paid them less is purely academic.

## II. The Decision Below Contributes To Growing Lower-Court Confusion Over This Issue.

The panel majority's opinion conflicts with numerous other decisions and adds to the growing and acknowledged confusion in the lower courts. *See In re Mullins*, 633 B.R. 1, 3-4 (Bankr. D. Mass. 2021) ("courts have reached different conclusions"). As respondents tacitly concede, the decision below breaks

with the majority of courts to consider this issue, which have regularly applied the plain statutory text to disallow claims as the Code requires even when the debtor is solvent. *See* Pet.28-31. That includes the Third Circuit, which affirmed a bankruptcy court's determination that the Code limited a landlord's claim against a solvent debtor without creating impairment—an outcome that cannot be reconciled (respondents certainly make no attempt) with the decision below. *In re PPI Enters. (U.S.), Inc.*, 324 F.3d 197 (3d Cir. 2003); *see* Pet.28-29; *cf.* Noteholders.BIO.16-17 (sidestepping the conflicting results). That also includes district-court and bankruptcy-court decisions from across the nation, which respondents do not dispute. Pet.29-31.

Respondents' attempts to shore up their side of the split fall flat. Apart from the decision below and the Ninth Circuit's recent decision in *In re PG&E Corp.*, 46 F.4th 1047 (9th Cir. 2022)—both over spirited dissents, and both with pending petitions for certiorari—no other federal circuit has held that an unwritten pre-Code solvent-debtor exception supersedes the plain terms of the Code. Respondents cite the Second Circuit's recent decision in *LATAM*, a case where creditors invoked the solvent-debtor exception, but that opinion did not decide "whatever survives of the solvent-debtor exception" after enactment of the Code (because, *inter alia*, the debtor there was insolvent). *In re LATAM Airlines Grp. S.A.*, 55 F.4th 377, 387 (2d Cir. 2022). Respondents also cite decisions from the First and Sixth Circuits, but both cases explicitly recognize that the disallowance provisions of §502(b) apply in solvent-debtor cases—which is irreconcilable with the panel's reasoning

below. *See Gencarelli v. UPS Cap. Bus. Credit*, 501 F.3d 1, 7 (1st Cir. 2007) (claims in solvent-debtor cases are enforceable only "so long as they are valid under section 502"); *In re Dow Corning Corp.*, 456 F.3d 668, 680 (6th Cir. 2006) (section 502(b) "precludes allowance" of enumerated claims); *see also* Pet.32-33.[2]

The Committee (but not the Noteholders) deny the conflict between the decision below and the Ninth Circuit, disputing any real difference in approach. Committee.BIO.17-18. But the opinions speak for themselves: The Ninth Circuit held that courts can choose a different post-petition interest rate when "compelling equitable considerations" warrant, 46 F.4th at 1064, while the decision below flatly holds that creditors "are entitled to contractually specified rates." App.39. That divergence further highlights the dangers inherent in choosing the uncertain guidance of pre-Code practice over clear statutory text, and underscores the need for this Court to intervene and provide uniformity.

## III. The Question Is Exceptionally Important And Cleanly Presented.

1. The question presented is exceptionally important, regularly recurring, and cleanly presented. The significant economic fluctuations of recent years have driven numerous companies into bankruptcy only to return them to solvency before bankruptcy proceedings conclude, forcing courts across the

[2] *Dow Corning* separately concluded that §1129(b)'s "fair-and-equitable standard" could require default-rate post-petition interest, *see* 456 F.3d at 677-80, but that provision is not at issue here.

country to decide whether an unwritten "solvent-debtor exception" supersedes the plain text of the Code—often with hundreds of millions of dollars at stake. *See* Pet.34. The decision below answers that question incorrectly not only as a legal matter but also as a practical matter, creating perverse incentives for creditors and administrative nightmares for bankruptcy courts. Pet.34-35.

Respondents assert that solvent debtors are so rare as to be nearly oxymoronic. But, fortunately for our economy, *most* debtors are solvent. What must strike respondents as anomalous is a solvent debtor *in bankruptcy*. In reality, insolvency is not a pre-condition for bankruptcy at all, and in these tumultuous times even insolvent filers can become solvent during the course of the bankruptcy. That is hardly unusual, and the numbers bear this out. Indeed, even respondents are forced to concede that "several such cases" implicating a supposed solvent-debtor exception "have arisen in recent years," Committee.BIO.24, including four separate cases in four courts of appeals in just the past twelve months. *See In re Hertz Corp.*, No. 23-1169 (3d Cir. docketed Jan. 27, 2023); *LATAM*, 55 F.4th 377 (decided Dec. 14, 2022); App.1-49 (decided Oct. 14, 2022); *PG&E*, 46 F.4th 1047 (decided Aug. 29, 2022). That is hardly "episodic." To the extent respondents' point is merely that this issue arises more often in times of economic upheaval, that is true of the entire Code and hardly a strike against certiorari.

Respondents attempt to minimize the havoc that the decision below plays across the Code, *see* Pet.24-28, by claiming that the solvent-debtor exception has

"traditionally" been applied only to post-petition interest, that it "strains credulity" to suggest that it could allow double-counting, and that state law could provide additional constraints. Committee.BIO.24-25. But the decision below (like respondents' rhetoric about honoring commitments) reaches much further than interest, reading "traditional doctrine" to require a solvent debtor broadly to "pay its valid contractual debts, bankruptcy rules notwithstanding." App.19. Nothing in that sweeping holding is limited to post-petition interest, or obviates the double-counting problems that applying both the Code provision for statutory interest and the solvent-debtor exception for otherwise disallowed contractual interest would create. *See* Pet.24-27. Nor is the solvent-debtor exception the only anachronism that could be invoked to elevate judicial gloss on since-repealed text over the plain text of the Code. Pet.27-28.

2. Respondents' asserted vehicle problems are illusory. As noted, the contention by the Committee (but not the Noteholders) that Ultra has changed its "primary argument" is misplaced. Ultra has consistently maintained that §502(b)(2) disallows all *claims for* post-petition interest at contractual default rates, so respondents are entitled at most to post-petition interest *under the Code* at the federal judgment rate (and that Ultra proposed to pay). *See* Pet.19-23; Ultra.C.A.Br.3-4, 38-54; Ultra.Bankr.Br.20-29 (Bankr.Dkt.1834).

Respondents try to fend off review by invoking two purported "alternative grounds for full or partial affirmance," claiming this Court could rule in their favor (at least in part) by holding either that the make-

whole amount here was not unmatured interest disallowed by §502(b)(2), or that unimpaired creditors are entitled to their contractual rights *even if* those rights are disallowed by the Code. Committee.BIO.23-24; *see* Noteholders.BIO.20-27. That respondents would prefer to relitigate other issues that they lost unanimously below—and did not raise in a conditional cross-petition—is no basis for denying review of the actual question presented.

In any event, respondents' purported alternative grounds for affirmance are meritless. All three judges on the panel below agreed that the make-whole amount here was the economic equivalent of unmatured interest (and thus presumptively barred by §502(b)(2)), and for good reason: that amount was specifically designed to compensate the Noteholders for the unmatured interest they would lose if their notes were repaid in advance. App.9-18; App.41 (Oldham, J., dissenting). That fact-sensitive determination is plainly correct, does not conflict with any decision from any other court, *contra* Noteholders.BIO.23-24, and poses no obstacle to this Court's review of the purely legal question presented.

So too for respondents' assertion that unimpaired creditors are entitled to recover even amounts that are disallowed by the Code. *See* Noteholders.BIO.25-27; Committee.BIO.23. As respondents concede, *no* court has accepted that argument, and "three other circuits" have rejected it. Noteholders.BIO.26; *see* App.139 (joining the "monolithic mountain of authority" opposing respondents' position). Again, that is for good reason: because the explicit text of the Code determines impairment by what "the plan" does, not

what the Code disallows. 11 U.S.C. §1124; *see* App.145. And again, nothing in the decision below requires this Court to revisit that settled issue in order to decide whether the Fifth Circuit erred by elevating pre-Code practice over the unambiguous text of the Code. This Court should grant review and decide the question presented.

## CONCLUSION

This Court should grant the petition for certiorari.

Respectfully submitted,

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