No. 18-560

IN THE
Supreme Court of the United States

PEAJE INVESTMENTS LLC,
Petitioner,

v.

THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, AS REPRESENTATIVE FOR THE PUERTO RICO HIGHWAYS AND TRANSPORTATION AUTHORITY, *et al.*,
Respondents.

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

PETITIONER'S REPLY

G. Eric Brunstad, Jr.
Dechert LLP
Counsel of Record
90 State House Square
Hartford, CT 01603
(860) 524-3999
eric.brunstad@dechert.com

Allan S. Brilliant
Dechert LLP
1095 Avenue of the Americas
New York, NY 10036

Counsel for Petitioners

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PRELIMINARY STATEMENT

The courts of appeals apply conflicting standards for determining whether a lien qualifies as a "statutory lien" under the Bankruptcy Code. As elaborated in Peaje's petition, the court below adopted a "two-circumstance" test: "a statute can create a lien outright or it can establish that a lien will attach automatically upon an identified triggering event . . . ." Pet. 4-5; Pet. App. 19a, 21a. Under this approach, a statute must do *all* the lien-creating work, either "outright" or "automatically" upon a "triggering event," which triggering event does not include agency regulation. In particular, agency regulation imposing a lien on specific collateral does not qualify—even if contemplated or directed by a statute—because agency regulation "is not a statute." Pet. App. 19a, 21a. Thus, "[b]ecause the [Enabling] Act does not automatically trigger a lien upon the performance of a specified condition, apart from [HTA's] decision to grant a lien, it does not create a statutory lien." *Id*. at 21a. Notably, this approach is similar to the Second Circuit's "consent" standard—if consent is involved in the imposition of a lien, it is not a "statutory lien." *See In re Lionel Corp*., 29 F.3d 88, 94-95 (2d Cir. 1994).

As the Second Circuit acknowledged, however, "other courts" have determined that a statutory lien may arise "by operation of statute and not by agreement *between the parties* . . . ." *Id*. at 94 (emphasis added). Notably, the Third and Ninth Circuits have adopted an "operation of a statute" standard that conflicts with the standard adopted by the court below. Under the Third Circuit's approach, a statute need *not* do all the lien-creating work; it does

not matter, for example, whether the statute in question "lacks explicit lien-creating language . . . ." *In re Schick*, 418 F.3d 321, 328 (3d Cir. 2005). Rather, what matters is whether an agency's decision to impose the lien is "one of the specified conditions for the creation of the statutory lien." *Id.* at 326; *accord In re Mainline Equipment, Inc.*, 865 F.3d 1179 (9th Cir. 2017). In turn, the Fifth Circuit has adopted a "bilateral-agreement" standard. Under this approach, the fact that one party "consents" to the lien is immaterial. Rather, what matters is whether the lien arises from a statutory source and is not the product of a *bilateral* agreement. *See In re Green*, 793 F.3d 463, 468-70 (5th Cir. 2015). Thus, although the debtor in *Green* may have consented to the lien in question, it was nonetheless a "statutory lien" because it arose by operation of a statute as opposed to arising from a *bilateral* contract between the parties (*e.g.*, a negotiated mortgage).

In this case, it is clear that Peaje's lien does not arise from any *bilateral* agreement between HTA and any bondholder—a point Respondents do not deny. Rather, the lien is imposed unilaterally under the Enabling Act and the 68 Resolution. Thus, under *Green*, it is properly a statutory lien. Respondents characterize the 68 Resolution as something akin to a private agreement. *See* Op. 1. But they do not deny that the Resolution was duly issued in accordance with the Enabling Act and is therefore binding as a matter of Puerto Rico law. And as an official promulgation duly authorized under the Enabling Act, Puerto Rico law assigns to the Resolution "the same legal status as a law passed by the legislature" as "part of" the Enabling Act itself. *Armstrong v.*

Ramos, 74 F. Supp. 2d. 142, 149 (D.P.R. 1999). Respondents disagree, but the relevant point remains that the lien arises unilaterally as the result of HTA's exercise of its authority. Respondents counter that, although Peaje's lien may not arise from any bilateral agreement negotiated between HTA and any bondholder, it does involve HTA's "consent" to the lien, as least in the sense that HTA selected the collateral. Whether any of this matters for purposes of classifying Peaje's lien as a "statutory lien," however, depends on the legal standard that is adopted and applied, which is the subject of disagreement among the courts of appeals.

Respondents deny the conflict, but their denial is meritless. For example, they state that no conflict exists because the relevant cases all "apply the same principle of law that a statutory lien must arise solely by force of statute upon specified circumstances." Op. 11. But their statement merely parrots the first part of the Bankruptcy Code's definition of a statutory lien—one arising "solely by force of a statute on specified circumstances . . . ." 11 U.S.C. §101(53)—and thus amounts merely to the assertion that the cases apply the statute. The question, however, is the identification of the proper criteria for the statute's correct application, which is the subject of a conflict among the courts of appeals.

Respondents' additionally deny the conflict on the assertion that no other court of appeals has confronted precisely the same fact pattern. Op. 2. The question presented, however, is not whether the courts have each confronted the same facts. The question is

whether this Court should review the conflicting legal standards that the courts of appeals have adopted.

Respondents next intermix a series of additionally misleading and irrelevant contentions. For example, they fault Peaje for not complaining below that the First Circuit's standard conflicts with that of other courts of appeals, *see* Op. 2 n.2, even though this could not have been determined until *after* the First Circuit announced its decision. Likewise, they assert that Peaje failed to mention that it was not allowed to assert its alternative argument that it holds a security interest, *see id.* at 2, even though Peaje plainly disclosed this in the background section of its petition, *see* Pet. 18 & 21 n.11. All of this is mere distraction. Because the courts of appeals are divided on the question presented, certiorari is warranted.

The decision below also conflicts with the decisions of this Court because the court below impermissibly rewrote the governing statute to impose limitations that do not appear in the text. Respondents concede that, by definition, a statutory lien arises by force of a statute "on specified circumstances and conditions . . . ." Op. 1. Nothing in the text of the Bankruptcy Code, however, directs that the "circumstances and conditions" giving rise to a statutory lien cannot include agency action unilaterally imposing a lien. What the definition of "statutory lien" *does* exclude is any lien arising from a negotiated *bilateral* agreement between the parties, which is a security interest. 11 U.S.C. §101(53) (providing that a statutory lien "does not include security interest"). But there is simply no warrant in the Code for limiting the relevant

"circumstances and conditions" in the manner directed below.

Respondents attempt to reduce Peaje's argument to the strawman assertion that courts must "read statutes correctly," followed by their criticism that this argument is absurd because, if an incorrect reading of a statute were sufficient to warrant review, "every case . . . would be entitled to certiorari." Op. 3. Peaje's point, however, is not that the decision below is merely an incorrect reading; it is an impermissible rewriting. Moreover, Respondent's criticism that, if certiorari is warranted based merely in an incorrect reading then "every case would be entitled to certiorari" is itself absurd because it presumes the fallacy that all lower court interpretations are wrong.

The question presented is likewise important and consequential. As the court below determined, the classification of Peaje's lien matters because "Peaje's rights in the [bankruptcy case] differ considerably depending on whether it possesses a statutory lien or a lien resulting from a security agreement (i.e., a security interest)." Pet. App.10a. Respondents do not deny that they have been taking and spending all of Peaje's collateral. Nor do they deny that they intend to continue doing so indefinitely, leaving the Bonds entirely unpaid. They likewise do not deny that statutory liens enjoy special protections under the Bankruptcy Code—protections Peaje contends clearly prohibit them from taking all the collateral and leaving the Bonds unpaid. These considerations have important implications. Municipal bonds such as those at issue here are characteristically secured by collateral selected unilaterally as a matter of

regulatory discretion. Yet the court below held that such discretionary action disqualifies the resulting encumbrance from being a statutory lien. Pet. App. 18a-20a. With the stroke of a pen, the court below thus devalued hundreds of billions of dollars of municipal bonds by categorically denying them the statutory treatment in bankruptcy that they legitimately should have.

Respondents challenge the importance of the question presented on the bold assertion that they will win no matter what. *See* Op. 3. But that turns entirely on the legal standard that applies. They likewise contend implausibly that, before certiorari may be granted, Peaje must first satisfy some kind of exhaustion requirement, saving its statutory lien arguments for some later proceeding. Op. 22. The decision below, however, conclusively determines Peaje's entitlement to have its lien treated as a statutory lien. Peaje must present its petition now, not later after its opportunity for certiorari has expired.

Finally, the decision below creates an unworkable and otherwise incorrect legal standard. As noted, the court below held that a statutory lien arises in two circumstances, the first where "a statute . . . create[s] a lien outright," and the second where it "establish[es] that a lien will attach automatically upon an identified triggering event other than an agreement to grant the lien." Pet. App. 19a. Respondents do not deny that the first circumstance never occurs because *all* statutes giving rise to statutory liens require at least some kind of triggering event. In addition, the second circumstance is too narrow because it excludes

what Congress intended to include within the statutory lien category. Respondents deny this, but their denial is misaligned with the text, context, history, and policy behind the Bankruptcy Code's treatment of statutory liens. Certiorari is warranted.

ARGUMENT

I. THE COURTS OF APPEALS ARE DIVIDED ON THE QUESTION PRESENTED.

In an effort to obscure the conflict among the courts of appeals, Respondents mischaracterize both Peaje's arguments and the relevant decisions. For example, while acknowledging that "Peaje relies primarily on *In re Schick*, . . . which held a lien to be statutory," Respondents dismiss that holding as one that turned on the fact that the lien in question "did not depend on any agreement to create a lien." Op. 12. But that oversimplification misrepresents the import of the decision and its reasoning. It likewise ignores other precedents from the Third Circuit that further bolster Peaje's argument. *See Graffen v. City of Philadelphia*, 984 F.2d 91, 96 (3rd Cir. 1992); *Rankin v. DeSarno*, 89 F.3d 1123, 1127 (3d Cir. 1996).

Schick involved a factual scenario similar to this case. There, a combination of statutes and regulations allowed the motor vehicle commission to impose "surcharges" against drivers for certain violations. 418 F.3d at 324. These statutes and regulations, however, did not automatically create a lien; instead a different set of statutes and regulations gave the commission discretion to file a "certificate of debt" with the clerk of the local court, which action imposed

a lien on the driver's property. *Id.* at 324-25. Nothing required the commission to file such a certificate, and nothing directed that any lien would arise "automatically" as a result of the driver's violations. Rather, the imposition of the lien depended entirely on the commission's exercise of its regulatory discretion to make the filing. *Id.* at 329.

Respondents' efforts to obscure the import of *Schick* and its reasoning do not alter the fact that the decision concluded that discretionary agency action may appropriately satisfy the "specified circumstances or conditions" that give rise to a statutory lien. *See* 11 U.S.C. §101(53)); Pet. App. 42a. That is the situation here. In this case, the Enabling Act directs that the Bonds may be paid *only* from the collateral securing them, and specifically authorized HTA to select the relevant collateral by way of the 68 Resolution. Critically, the Enabling Act contemplates and provides for a lien; otherwise the Bonds would have *no* source of payment. *See* Pet. 10-11; Pet. App. 47a. It is thus incorrect to state, as Respondents do, that "[h]ere, the statute granted HTA the discretion to issue debt and the discretion whether to secure it *or not* and what the collateral should be." Op. 14 (emphasis added). HTA could be said to possess the discretion *not* to secure the Bonds only by indulging the absurdity that HTA had the discretion to deny the bondholders a source of repayment. In truth, HTA selected collateral to secure the Bonds because that was necessary to identify the source of payment as provided by the Enabling Act. In turn, the Enabling Act validated the lien HTA imposed. *See* Pet. 10-11; Pet. App. 43a-45a.

The lien in this case thus arises unilaterally by operation of the Enabling Act and the 68 Resolution. The relevant point is that, following *Schick*, it should not matter that the imposition of the lien involved some discretionary agency action. Nor should it matter that all of the lien-creating work is not done automatically by statute. Yet the court below concluded that these considerations disqualify Peaje's lien from constituting a statutory lien because HTA's exercise of regulatory discretion selecting the relevant collateral "is not a statute." Pet. App. 21a.

Respondents likewise mischaracterize the import of *In re Mainline Equipment, Inc.*, 865 F.3d 1179 (9th Cir. 2017), on the misplaced theory that the result in that case turned on the parties' agreement. *See* Op. 15 ("There, the parties agreed the lien at issue was statutory because it arose under a statute that" created a lien). On the contrary, the parties litigated whether the liens at issue were statutory. The Ninth Circuit held that they were because, once the county "recorded tax delinquency certificates" under the applicable statutes, a lien arose on the debtor's property. *See In re Mainline*, 865 F.3d at 1182, 1184. The statutory liens thus depended once again on discretionary agency action.

The Fifth Circuit's holding in *Green* likewise conflicts with the decision below, albeit for a different reason. *Green* focused on whether the lien in question arose from a bilateral contract between the parties or from unilateral action. *See* 793 F.3d at 469. The court concluded that, what matters is that the lien in question arose unilaterally. The same is true in this case, yet the court below reached a result that does

not square with *Green*. Respondents' contentions notwithstanding, the relevant decisions conflict.

II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S PRECEDENTS.

Despite Respondents' efforts to trivialize Peaje's argument, the decision below conflicts with this Court's precedents because it impermissibly rewrites the relevant statutory text. In particular, the decision below impermissibly narrowed the scope of the statute by reading into the text limitations that do not appear there. *See* Pet. App. 21a. The court's insistence that a statute must do all the lien-creating work also impermissibly collapsed the entirety of the definition into a singularity: that a statutory lien must arise purely "by force of a statute," as opposed to one that arises "by force of a statute on specified circumstances or conditions" that may include delegated regulatory discretion.

As a further distraction, Respondents spuriously (and irrelevantly) deny once again that the 68 Resolution is in fact "an 'agency regulation,'" arguing instead that it is "akin to a resolution adopted by a corporate board of directors." Op. 19 n.6. As noted, however, Respondent's position is both mistaken and irrelevant. Contrary to Respondents' assertion, the court below never ruled that the 68 Resolution is "not a regulation." *Id.* 19 n.6, 21, 29. The court simply found that the Resolution "is not a statute." Pet. App. 21a. Regardless, what matters is that there is no dispute that the Resolution is binding as a promulgation authorized by the Enabling Act and duly issued by HTA. Moreover, the Resolution clearly imposes a lien unilaterally on the Toll Revenues,

directing that "the principal, interest and premiums [under the Bonds] are payable solely from Revenues . . . *which Revenues . . . are hereby pledged to the payment thereof* . . .," HTA Res. No. 68-18, §601 (emphasis added); Pet. App. 4a, 21a, rather than through any *bilateral* agreement between the parties. The question is whether the resulting lien is a "statutory lien," which turns on the correct legal standard.

III. THE QUESTION PRESENTED IS IMPORTANT.

The question presented is important and consequential. Respondents attempt to limit the significance of this case to its particular facts on the theory that the outcome here "will not have a significant impact on the law in general." Op. 20. But that is false. In short, it matters what the law is because the rights of the holders of liens turns on the correct legal standard.

Again, Respondents resort to distraction. Contrary to their assertions, the question is not whether Peaje should or will obtain injunctive or other relief on remand. *See* Op. 23-26. Those are open issues, *see* Pet. App. 23a., properly guided by the selection of the correct legal standard for determining whether Peaje holds a statutory lien. The question here is the identification of the correct legal standard—a task this Court is particularly well-suited to address.

IV. THE DECISION BELOW ESTABLISHES AN INCORRECT AND UNWORKABLE LEGAL STANDARD.

Respondents do not deny that the decision below is at least partially untenable—in particular, that there is no statute that, by itself, creates a lien "outright." Respondents simply assert that the decision below is correct in requiring that a statute must do all the lien-creating work, while ignoring the magnitude of the impact of such a requirement on the municipal bond market. *See* Pet. 33. Because the decision below is contrary to the text, purpose, history, and policy of the Bankruptcy Code's treatment of statutory liens, certiorari is warranted.

CONCLUSION

For the foregoing reasons, as well as those set forth in its petition, Peaje respectfully requests that the Court certiorari in this case.

Respectfully submitted,

G. Eric Brunstad, Jr.
Dechert LLP
Counsel of Record
90 State House Square
Hartford, CT 01603
(860) 524-3999
eric.brunstad@dechert.com

Allan S. Brilliant
Dechert LLP
1095 Avenue of the Americas
New York, NY 10036

Counsel for Petitioners

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