No. ______

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

PETITION FOR WRIT OF CERTIORARI

GEORGE W. HICKS, JR.
KIRKLAND & ELLIS LLP
1301 Pennsylvania Ave., NW
Washington, DC 20004

DAVID R. SELIGMAN, P.C.
MICHAEL B. SLADE
KIRKLAND & ELLIS LLP
300 N. LaSalle
Chicago, IL 60654

PAUL D. CLEMENT
Counsel of Record
C. HARKER RHODES IV*
MARIEL A. BROOKINS*
CLEMENT & MURPHY, PLLC
706 Duke Street
Alexandria, VA 22314
(202) 742-8900
paul.clement@clementmurphy.com

*Supervised by principals of the firm who are members of the Virginia bar

Counsel for Petitioners

February 13, 2023

QUESTION PRESENTED

The Bankruptcy Code disallows claims for "unmatured interest," i.e., claims for interest not yet mature when the bankruptcy petition was filed. 11 U.S.C. §502(b)(2). In the decision below, the Fifth Circuit unanimously (and correctly) held that this provision by its terms disallows respondents' claim for a $201 million "make-whole" amount that was explicitly designed to compensate respondents for future unmatured interest. But a two-judge majority then went on to hold that an unwritten, judicially-created "solvent-debtor exception" dating back to pre-Code practice overrode the plain statutory text and allowed respondents to recover from petitioners both that $201 million make-whole amount and an additional $186 million in post-petition interest at steep contractual default rates. The decision below is the second in less than a year to hold, over vigorous dissent and in conflict with numerous other courts, that an unwritten "solvent-debtor exception" supersedes the plain language of the Bankruptcy Code and permits creditors to recover amounts that the Code expressly disallows. Notably, the decision below held that decisions of this Court compelled this atextual approach.

The question presented is:

Whether an unwritten "solvent-debtor exception" overrides the Bankruptcy Code's statutory text and allows creditors in solvent-debtor cases to recover amounts that the Code disallows.

PARTIES TO THE PROCEEDING

Petitioners are Ultra Petroleum Corporation, Keystone Gas Gathering, L.L.C., Ultra Resources, Incorporated, Ultra Wyoming, Incorporated, Ultra Wyoming LGS, L.L.C., UP Energy Corporation, UPL Pinedale, L.L.C., and UPL Three Rivers Holdings, L.L.C. (collectively, "Ultra"). Petitioners were the Reorganized Debtors in the Chapter 11 cases and the appellants below.

Respondents are the Ad Hoc Committee of OpCo Unsecured Creditors, OpCo Noteholders, Allstate Life Insurance Company, and Allstate Life Insurance Company of New York. Respondents were the creditors-appellees below.

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, petitioners state as follows:

Ultra Petroleum Corporation does not have a parent company, and no public company owns 10% or more of its stock. Ultra's successor, UP Energy, LLC does not have a parent company, and no public company owns 10% or more of its stock. The other petitioners are wholly owned subsidiaries of Ultra Petroleum Corporation.

STATEMENT OF RELATED PROCEEDINGS

This case is directly related to the following proceedings:

In re Ultra Petroleum Corporation, No. 21-20008, (5th Cir.) (Oct. 14, 2022)

In re Ultra Petroleum Corporation, No. 16-32202 (Bankr. S.D. Tex.) (Oct. 27, 2020)

In re Ultra Petroleum Corporation, No. 17-20793 (5th Cir.) (Jan. 17, 2019; opinion withdrawn and superseded on reh'g, Nov. 26, 2019)

In re Ultra Petroleum Corporation, No. 16-32202 (Bankr. S.D. Tex.) (Sept. 21, 2017)

TABLE OF CONTENTS

QUESTION PRESENTED i
PARTIES TO THE PROCEEDING ii
CORPORATE DISCLOSURE STATEMENT iii
STATEMENT OF RELATED PROCEEDINGS iv
TABLE OF AUTHORITIES viii
PETITION FOR WRIT OF CERTIORARI 1
OPINIONS BELOW 3
JURISDICTION 4
STATUTORY PROVISIONS INVOLVED 4
STATEMENT OF THE CASE 4
A. Factual Background 4
B. The Ultra Petroleum Bankruptcy 5
C. Proceedings Below 7
REASONS FOR GRANTING THE PETITION 11
I. The Decision Below Contravenes The Clear Text Of The Bankruptcy Code And Settled Precedent 13
A. The Panel Majority Seriously Erred by Relying on Unwritten Pre-Code Practice to Override Clear Statutory Text 13
B. The Panel Majority Similarly Erred by Invoking Pre-Code Practice to Require Contractual Post-Petition Interest That the Code Explicitly Disallows 19
C. The Panel Majority's Decision Creates Havoc Across the Code 24

II. The Decision Below Contributes To The Growing Lower-Court Confusion Over This Issue 28

III. The Question Presented Is Exceptionally Important 34

CONCLUSION 37

APPENDIX

Appendix A

Opinion, United States Court of Appeals for the Fifth Circuit, *Ultra Petroleum Corp. v. Ad Hoc Committee of OpCo Unsecured Creditors*, No. 21-20008 (Oct. 14, 2022) App-1

Appendix B

Order, United States Court of Appeals for the Fifth Circuit, *Ultra Petroleum Corp. v. Ad Hoc Committee of OpCo Unsecured Creditors*, No. 21-20008 (Nov. 15, 2022) App-50

Appendix C

Amended Memorandum Opinion, United States Bankruptcy Court for the Southern District of Texas, *In re: Ultra Petroleum Corp.*, No. 16-32202 (Oct. 27, 2020) App-52

Appendix D

Opinion, United States Court of Appeals for the Fifth Circuit, *Ultra Petroleum Corp. v. Ad Hoc Committee of OpCo Unsecured Creditors*, No. 17-20793 (Jan. 17, 2019) App-105

Appendix E

Order, United States Court of Appeals for the Fifth Circuit, *Ultra Petroleum Corp. v. Ad Hoc Committee of OpCo Unsecured Creditors*, No. 17-20793 (Nov. 26, 2019) App-138

Appendix F

Memorandum Opinion, United States Bankruptcy Court for the Southern District of Texas, *In re: Ultra Petroleum Corp.*, No. 16-32202 (Sept. 21, 2017) App-153

Appendix G

Relevant Statutory Provision.................. App-180

11 U.S.C. §502(b)(2)................................ App-180

TABLE OF AUTHORITIES

Cases

Alexander v. Sandoval,
532 U.S. 275 (2001).. 19

Bank of Am. Nat'l Tr. & Sav. Ass'n v. 203 N. LaSalle St. P'ship,
526 U.S. 434 (1999).. 15

BFP v. Resolution Tr. Corp.,
511 U.S. 531 (1994).. 17

Cohen v. de la Cruz,
523 U.S. 213 (1998).. 16

Dewsnup v. Timm,
502 U.S. 410 (1992).. 17

Gencarelli v. UPS Cap. Bus. Credit,
501 F.3d 1 (1st Cir. 2007) 33

Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.,
530 U.S. 1 (2000)... 14, 17

HSBC Bank USA, Nat'l Ass'n v. Calpine Corp.,
2010 WL 3835200 (S.D.N.Y. Sept. 15, 2010) 30

In re Ancona,
2016 WL 828099
(Bankr. S.D.N.Y. Mar. 2, 2016) 30

In re Augé,
559 B.R. 223 (Bankr. D.N.M. 2016) 31

In re Cardelucci,
285 F.3d 1231 (9th Cir. 2002).................... 20, 31, 35

In re Dow Corning Corp.,
456 F.3d 668 (6th Cir. 2006).................................. 33

In re Farley, Inc.,
146 B.R. 739 (Bankr. N.D. Ill. 1992) 30

In re Federated Dep't Stores, Inc.,
131 B.R. 808 (S.D. Ohio 1991) 30

In re Flanigan,
374 B.R. 568 (Bankr. W.D. Pa. 2007) 29

In re Hertz Corp.,
637 B.R. 781 (Bankr. D. Del. 2021)...21, 22, 29, 30, 34

In re Hertz Corp.,
No. 21-50995 (Bankr. D. Del. Nov. 21, 2022) 29

In re Kravitz,
2001 WL 36381905
(B.A.P. 1st Cir. Feb. 16, 2001) 31

In re LATAM Airlines Grp.,
2022 WL 2206829
(Bankr. S.D.N.Y. June 18, 2022) 21, 30, 34, 35

In re Melenyzer,
143 B.R. 829 (Bankr. W.D. Tex. 1992) 31

In re Mullins,
633 B.R. 1 (Bankr. D. Mass. 2021) 33

In re Palomar Truck Corp.,
951 F.2d 229 (9th Cir. 1991) 27

In re Parque Forestal, Inc.,
949 F.2d 504 (1st Cir. 1991) 27

In re PG&E Corp.,
46 F.4th 1047 (9th Cir. 2022) 31, 32, 34

In re PPI Enters. (U.S.), Inc.,
228 B.R. 339 (Bankr. D. Del. 1998) 25, 29

In re PPI Enters. (U.S.), Inc.,
324 F.3d 197 (3d Cir. 2003) 25, 28, 29

In re Premier Ent. Biloxi LLC,
445 B.R. 582 (Bankr. S.D. Miss. 2010) 31

In re RGN-Grp. Holdings, LLC,
2022 WL 494154
(Bankr. D. Del. Feb. 17, 2022)............. 21, 29, 30, 34

In re Smith,
431 B.R. 607 (Bankr. E.D.N.C. 2010) 31

In re Ultra Petroleum Corp.,
943 F.3d 758 (5th Cir. 2019).................................... 7

Kelly v. Robinson,
479 U.S. 36 (1986).. 16

Merit Mgmt. Grp., LP v. FTI Consulting, Inc.,
138 S.Ct. 883 (2018).. 15

Midlantic Nat'l Bank v. N.J. Dep't of Envt'l Prot.,
474 U.S. 494 (1986).. 16

Nat'l Ass'n of Mfrs. v. Dep't of Def.,
138 S.Ct. 617 (2018).. 14

Puerto Rico v. Franklin Cal. Tax-Free Trust,
579 U.S. 115 (2016).. 15

RadLAX Gateway Hotel, LLC v. Amalgamated Bank,
566 U.S. 639 (2012)... 14, 17

Siegel v. Fitzgerald,
142 S.Ct. 1770 (2022)... 34

United States v. Ron Pair Enters.,
489 U.S. 235 (1989).................................... 15, 16, 17

Constitutional Provision

U.S. Const. art.I, §8, cl.4 34

Statutes

11 U.S.C. §502(b)(2) 2, 13, 20, 21, 26
11 U.S.C. §502(b)(4) 25
11 U.S.C. §502(b)(9) 25
11 U.S.C. §506(b) 27
11 U.S.C. §726(a)(5) 20, 26
11 U.S.C. §1112(b)(1) 25
11 U.S.C. §1129(a) 20, 25
28 U.S.C. §1254(1) 4
28 U.S.C. §158(d)(2) 7
Pub. L. No. 95-598, 92 Stat. 2549 (1978) 21
Pub. L. No. 98-353, 98 Stat. 333 (1984) 22

Other Authorities

Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 Boston U. L. Rev. 109 (2010) 15
John F. Manning, *Clear Statement Rules and the Constitution*, 110 Colum. L. Rev. 399 (2010) 15
Norton Bankr. L. & Prac. 3d (2023) 23
Transcript, *Ysleta del Sur Pueblo v. Texas*, No. 20-493 (U.S. Feb. 22, 2022) 15

PETITION FOR WRIT OF CERTIORARI

The divided decision below addresses a critically important and recurring question of bankruptcy law—and it gets the answer grievously wrong, choosing judicial gloss on since-repealed statutes over the clear text of the Bankruptcy Code. Over a spirited dissent, the two-judge panel majority held that an unwritten "solvent-debtor exception" derived from judicial decisions interpreting superseded bankruptcy statutes overrides the Code's plain text, and requires petitioners to pay to creditors some $387 million in unmatured interest that the Code explicitly disallows. That holding cannot be reconciled with unambiguous statutory text or with settled principles of statutory interpretation. It also conflicts with numerous lower-court decisions rejecting any such unwritten solvent-debtor exception to the Code, and contributes to rapidly growing confusion over an important and recurring issue. Worse still, the panel majority laid the blame for its concededly atextual approach on decisions of this Court, which it read to compel this anomalous result. This Court's review is urgently warranted.

Petitioners, a group of natural gas companies, were rendered insolvent by a sharp decline in commodities prices and filed for bankruptcy under Chapter 11. No one doubted petitioners' insolvency or good faith at the time of that filing. During the bankruptcy proceedings, however, commodities prices recovered and petitioners became solvent again. Petitioners therefore proposed a plan of reorganization that would give their unsecured creditors, including respondents, everything the Code

entitled them to, paying them principal, pre-petition interest, and post-petition interest at the federal judgment rate in full and in cash. Respondents nevertheless asserted that they were entitled to hundreds of millions of dollars more in contractual obligations triggered by the bankruptcy filing, including (i) a $201 million "make-whole" amount designed to compensate them for future interest, and (ii) $186 million in post-petition interest at steep contractual default rates—despite the Bankruptcy Code's explicit disallowance of claims for unmatured interest. *See* 11 U.S.C. §502(b)(2).

In a sharply divided decision, the Fifth Circuit ruled for respondents. The panel unanimously agreed that the make-whole amount was disallowed by the express terms of §502(b)(2). According to the panel majority, however, that did not end the matter. Instead, relying on a purported "substantive canon of Bankruptcy Code interpretation," the majority held that an unwritten "solvent-debtor exception" derived from pre-Code judicial decisions supersedes the clear statutory text, and requires solvent debtors like petitioners to pay claims that the Code explicitly disallows. The panel majority relied on that same concededly atextual "exception" to hold that petitioners were required to pay respondents post-petition interest at steep contractual default rates.

The divided decision defies both the Code and basic rules of statutory interpretation, and demands correction. As this Court has explained in case after case—including bankruptcy cases—statutory interpretation begins with the text, and when the text is clear, ends there as well. Judicial decisions

interpreting since-repealed statutes have no valid role in creating ambiguity, let alone in overriding clear text. The panel majority nonetheless departed from that textual approach by invoking a "substantive canon" for interpreting the Code, and relying on that canon and pre-Code practice to "suspend" the explicit text that Congress enacted. Worse still, the panel majority attributed this mode of construction to this Court.

The decision below not only is wrong, but adds to the growing conflict and confusion in the lower courts over this important and recurring issue. While numerous courts have held, and continue to hold, that the plain text of the Code controls, the decision below and an equally sharply-divided Ninth Circuit decision have now both rejected that longstanding view in favor of an atextual solvent-debtor exception drawn from pre-Code judicial decisions. But even those two circuits disagree on how to apply their atextual exception to the Code, which is perhaps unsurprising as it is far easier to disagree on the contours of pre-Code practice and equitable discretion than on the meaning of statutory text. This Court should grant review now, reaffirm the controlling principles of statutory interpretation that the decision below disregards, and end the growing conflict and confusion in the lower courts on this significant and recurring issue.

OPINIONS BELOW

The Fifth Circuit's opinion below is reported at 51 F.4th 138 and reproduced at App.1-49. The bankruptcy court's opinion below is reported at 624 B.R. 178 and reproduced at App.52-104. The Fifth

Circuit's prior opinion is reported at 943 F.3d 758 and reproduced at App.105-137. The bankruptcy court's initial opinion is reported at 575 B.R. 361 and reproduced at App.153-179.

JURISDICTION

The Fifth Circuit issued its decision on October 14, 2022, and denied rehearing on November 15, 2022. App.1-51. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISION INVOLVED

The relevant provision, 11 U.S.C. §502(b)(2), is reproduced at App.180.

STATEMENT OF THE CASE

A. Factual Background

Petitioners, including Ultra Resources, Inc., are energy exploration and production companies focused on natural gas. App.3. In 2008, Ultra Resources entered into a Master Note Purchase Agreement ("MNPA"), under which it issued unsecured notes (the "Notes") with a total face value of approximately $1.46 billion. App.5. Under the MNPA, a bankruptcy filing would trigger severe consequences. In the event of a filing, Ultra Resources would immediately owe the full outstanding principal amount of the Notes, plus a "Make-Whole Amount" equal to the discounted value of all future scheduled payments (including all future unaccrued interest) minus the outstanding principal amount. App.6 & n.3. As its name suggests, the Make-Whole Amount was designed to make the Noteholders whole by compensating them for the future interest payments they would not receive if Ultra Resources became bankrupt. App.6. Any delay

in paying this amount or amounts due under a separate 2011 Credit Agreement (the "RCF"), App.5, would trigger steep "default" interest rates at least 2% higher than otherwise applicable rates. App.7 & n.4. But while the contracts purported to inflict these draconian consequences on the filing of a bankruptcy petition, the Bankruptcy Code expressly precludes these harsh consequences.

B. The Ultra Petroleum Bankruptcy

In late 2015 and early 2016, commodity prices crashed, and petitioners became insolvent and filed voluntary Chapter 11 bankruptcy petitions in April 2016. App.2-3. No one doubted petitioners' good faith or insolvency at the time of the filing. During the course of the bankruptcy proceedings, however, commodity prices rebounded and petitioners became solvent again. Petitioners were therefore able to propose a Chapter 11 plan that would pay all allowed unsecured claims in full and in cash, including claims under the Notes and the RCF. App.3-4. Because the proposed plan paid all outstanding principal and accrued pre-petition interest in full, along with post-petition interest at the federal judgment rate, it treated those claims as unimpaired, meaning creditors holding those claims were "conclusively presumed to have accepted the plan" and did not vote on the plan. 11 U.S.C. §1126(f). App.4.

Respondents, two groups of creditors holding claims under the Notes and the RCF, objected to the proposed plan and argued that their payout was short of their contractual entitlements by hundreds of millions of dollars. App.4. Respondents contended that to treat the Noteholders as unimpaired, the plan

had to pay out not only what Noteholders were due under the Code, but also the Make-Whole Amount ($201 million) and post-petition interest at the contractual default rates on both the outstanding principal (another $106 million) and the Make-Whole Amount (another $14 million). App.6-7. Respondents further contended that to treat the RCF holders as unimpaired, the plan had to pay post-petition interest at the contractual default rate (an additional $66 million). App.7, 109 n.1.

Ultra disagreed. As to the Make-Whole Amount, Ultra explained that it constituted unmatured interest barred by 11 U.S.C. §502(b)(2), which provides that a claim must be disallowed "to the extent that ... such claim is for unmatured interest." App.28. Ultra further contended that any entitlement to post-petition interest should be limited to the federal judgment rate, not calculated based on contractual default rates. App.7.

In March 2017, the bankruptcy court confirmed the plan. App.57. The confirmed plan classified claims under the Notes and the RCF as unimpaired, and provided that holders of those claims would receive full payment of all outstanding principal, pre-petition interest at the contractual rate, and post-petition interest at the federal judgment rate. App.3-4. The confirmation order also provided that those claims would be paid any additional amounts necessary to make them unimpaired, and petitioners created a $400 million reserve to cover those amounts. App.4-5. That approach allowed the bankruptcy court to confirm the plan before deciding whether respondents' claims must include the Make-Whole

Amount and post-petition interest at the contractual default rates to remain unimpaired. App.5.

C. Proceedings Below

1. In September 2017, the bankruptcy court held that to leave respondents unimpaired, petitioners' plan had to pay respondents the full Make-Whole Amount and post-petition interest at the contractual default rates, even if the Bankruptcy Code itself disallowed any claim for those amounts. App.5. The bankruptcy court certified its ruling for direct review by the Fifth Circuit, which accepted the appeal. *See* 28 U.S.C. §158(d)(2)(A). The Fifth Circuit reversed, holding that *a plan*—as opposed to the Code itself—does not impair a claim by refusing to pay amounts disallowed by the Bankruptcy Code. *In re Ultra Petroleum Corp.*, 943 F.3d 758 (5th Cir. 2019); *see* App.5. It then remanded for the bankruptcy court to determine whether the Code disallowed respondents' claims for the Make-Whole Amount and post-petition interest at the contractual default rates. App.5.

2. The bankruptcy court issued its decision on remand in October 2020.[1] App.52. As to the Make-Whole Amount, it held that amount was not unmatured interest disallowed under §502(b)(2). App.58. As to post-petition interest, the bankruptcy court recognized that as a general matter, §502(b)(2) bars creditors from asserting any contractual right to post-petition interest at the contractual default rates.

---

[1] In the interim, commodity prices again plunged, and petitioners filed another Chapter 11 petition in May 2020. App.54 n.1. They have since emerged from that subsequent bankruptcy, which has no impact on the resolution of this petition.

App.100. But it held that respondents were nevertheless entitled to post-petition interest at the contractual default rates based on an unwritten "solvent-debtor exception," which it viewed as giving respondents an "equitable right" to recover post-petition interest at the contractual default rates despite the clear text of §502(b)(2). App.100-101. It therefore awarded respondents the full amount they sought—hundreds of millions of dollars more than their entitlement under the Code. The bankruptcy court again certified its decision for direct appeal, and the Fifth Circuit again accepted the appeal.

3. The Fifth Circuit affirmed in a sharply divided decision. The panel began by unanimously holding that the Make-Whole Amount did indeed constitute unmatured interest, and so was disallowed under 11 U.S.C. §502(b)(2). App.9-18; *see* App.11 (holding that "the Code … disallows" the "Make-Whole Amount"); App.49 (Oldham, J., dissenting) ("We all agree that the Make-Whole Amount is unmatured interest. And we all agree that 11 U.S.C. §502(b)(2) bars unmatured interest.").

Despite unanimity on that seemingly dispositive holding, the panel then fractured. The panel majority held that even though §502(b)(2) disallowed the claim to the Make-Whole Amount, which would end the matter for a typical "insolvent debtor," in the case of a solvent debtor that clear statutory text had to yield to an unwritten exception developed in pre-Code judicial decisions. According to the majority, a so-called "solvent-debtor exception" "survived the Bankruptcy Code's enactment" and "operates in this case to suspend §502(b)(2)'s disallowance of [the] Make-

Whole Amount." App.19-20. Under that unwritten "exception," the majority claimed, "when a debtor is able to pay its valid contractual debts, traditional doctrine says it should—bankruptcy rules notwithstanding." App.19. Because Ultra was solvent at the time it proposed the plan (though not when it made its Chapter 11 filing), the majority concluded, "Ultra must pay [respondents] the contractual Make-Whole Amount—even though, as we have already determined, … it is indeed otherwise disallowed unmatured interest." App.32-33.

The majority candidly acknowledged that its reasoning "allows judicial practice to override otherwise clear statutory text," and contravened the "not unreasonabl[e]" assumption that "Congress means what it says." App.26, 30. But in the majority's view, that atextual and counterintuitive result was demanded by this Court's precedent, which the majority read as adopting a bankruptcy-specific "substantive canon of interpretation" requiring an "'unmistakably clear' statement on the part of Congress" to alter any pre-Code bankruptcy practice. App.27. Under that purported "substantive canon," the majority believed, pre-Code judicial doctrine continues to control in all cases unless "expressly abrogated," and "any ambiguity will be construed in favor of prior practice." App.27. Despite all that, the majority considered this case a "close call"—but ultimately concluded that §502(b)(2), which explicitly disallows any claim for unmatured interest, was not sufficiently unambiguous because it did not "specifically address the solvent-debtor scenario." App.19-20.

For similar reasons, the panel majority held that respondents were entitled to post-petition interest at the steep contractual default rates rather than the federal judgment rate. App.35-40. The panel recognized that §502(b)(2) disallows any claim for post-petition interest at the contractual default rate as "*part of* a claim," since post-petition interest is by definition unmatured interest. App.39 n.27. Nevertheless, according to the majority, the same unwritten solvent-debtor exception entitles unimpaired creditors "as a matter of equity" to insist on receiving their "contractually specified rates of interest." App.39. Indeed, in the majority's view, this purported "equitable right" was "the root of the solvent-debtor exception," which the majority insisted "survived the Bankruptcy Code's enactment." App.39.

Judge Oldham dissented, rejecting the majority's holding that an "unwritten solvent-debtor exception" supersedes "the clear statutory text." App.41. The Code's plain text, he explained, makes "unmistakably clear" that §502(b)(2) disallows all claims for unmatured interest, and so "is incompatible with the preexisting solvent-debtor exception." App.41-42. Given the "stark contradiction" between §502(b)(2) and the historical solvent-debtor exception, and given that "the statutory text offers no alternative interpretation to avoid it," he explained, only one conclusion is possible: "The Code overrides the solvent-debtor exception." App.42. Indeed, Judge Oldham observed, the panel majority's opinion left entirely unclear "what Congress should have done to make the point more lucid short of saying, 'and the solvent-debtor exception doesn't apply.'" App.48. Congress, however, "need not speak superfluously to

speak 'unmistakably.'" App.48. Because the majority's solvent-debtor exception could not be squared with the plain language of the Code, Judge Oldham concluded, "[t]he Make-Whole Amount should be barred, and [respondents] should recover post-petition interest only at the federal judgment rate." App.49.

REASONS FOR GRANTING THE PETITION

The divided panel decision below addresses an exceptionally important question of bankruptcy law and statutory interpretation—and gets the answer exceptionally wrong. The decision below deviates from bedrock principles of statutory construction by elevating judicial gloss on superseded statutes over subsequently enacted clear text. The resulting decision conflicts with the statutory text, this Court's settled precedent, and numerous decisions from other lower courts. This Court should grant review, correct the panel majority's Code-defying error, and end the growing confusion in the lower courts on this critically important issue.

As this Court has often made clear, statutory interpretation begins with the statutory text—and when the text is clear, ends there as well. There is no bankruptcy exception to this bedrock rule; indeed, the Court has repeatedly invoked these principles in the bankruptcy context. Nonetheless, the decision below flouts that straightforward rule, invoking a bankruptcy-specific "substantive canon of interpretation" that makes pre-Code bankruptcy practice controlling unless "expressly abrogated," and then relying on that purported canon to elevate a "judicially-crafted exception" to the since-repealed

Bankruptcy Acts of 1898 and 1938 over the clear and unambiguous text of the Bankruptcy Code. App.22, 27. Adding insult to injury, the majority attributed this text-defying doctrine to this Court.

The panel majority did not dispute that the plain text of §502(b)(2) disallows claims for unmatured interest in all cases, and "does not distinguish solvent and insolvent debtors." App.24. But the panel majority nevertheless ordered petitioners to pay respondents what every member of the court agreed was unmatured interest. That result does not even pretend to be consistent with the statutory text or with the settled rule that text controls. And this bold proclamation of a bankruptcy exception to textualism should not be allowed to stand.

The decision below is not only exceptionally wrong and dangerous, but in direct conflict with numerous other lower-court decisions, which have routinely held that the Bankruptcy Code's disallowance provisions apply equally to solvent and insolvent debtors. Even the recent Ninth Circuit decision, invoking the solvent-debtor exception over an equally sharp dissent, differed from the decision below over the particulars. That is hardly surprising, as once courts elevate judge-made doctrines over statutory text, disagreements are inevitable. The question presented is also extraordinarily important, implicating not only significant sums but fundamental principles of bankruptcy law and statutory interpretation. This Court should grant certiorari.

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

A. The Panel Majority Seriously Erred by Relying on Unwritten Pre-Code Practice to Override Clear Statutory Text.

Section 502(b)(2) of 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). Nothing in that text even hints at a distinction between solvent or insolvent debtors, or limits its application "to the extent that" a debtor remains insolvent throughout the bankruptcy proceedings. Instead, §502(b)(2) by its plain terms addresses the precise extent to which claims for unmatured interest are allowed and disallows *all* such claims, regardless of whether the debtor is or becomes solvent at any particular juncture. Its language "offers no alternative interpretation." App.42 (Oldham, J., dissenting).

The panel majority did not dispute that §502(b)(2)'s plain text disallows claims for unmatured interest altogether. On the contrary, the panel majority openly acknowledged that the "straightforward disallowance of claims for unmatured interest in §502(b)(2) does not distinguish solvent and insolvent debtors." App.24. But the panel majority nevertheless chose to depart from that clear statutory text, because pre-Code judicial decisions interpreting since-repealed statutes had drawn such a distinction. *See* App.20. According to the panel majority, a bankruptcy-specific "substantive canon of interpretation"—which the majority attributed to this

Court—makes pre-Code practice controlling "unless expressly abrogated." App.27. And according to the majority, §502(b)(2) does not "specifically address the solvent-debtor scenario," and thus did not override pre-Code "traditional bankruptcy practice" allowing creditors in solvent-debtor cases to recover unmatured interest. App.19-20.

That reasoning cannot be squared with basic principles of statutory interpretation. As this Court has explained time and again, statutory interpretation "begins with the statutory text"—and when that text is unambiguous, "ends there as well." *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S.Ct. 617, 631 (2018). That fundamental rule leaves no room for a bankruptcy exception. Instead, as this Court has made clear in numerous bankruptcy cases, "pre-Code practice" is "a tool of construction, not an extratextual supplement." *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 10 (2000). Like any other tool of construction, it "can be relevant to the interpretation of an ambiguous text," but cannot be allowed to infuse clear text with ambiguity and has nothing to contribute when there is "no textual ambiguity" to resolve. *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 649 (2012).

The panel majority disregarded those instructions, attributing its "substantive canon of Bankruptcy Code interpretation"—which makes pre-Code practice controlling unless Congress has "expressly abrogated" it in "unmistakably clear" terms—to this Court. App.27, 31. This Court does not deserve that opprobrium. The Bankruptcy Code is a statute like any other, and as this Court has

repeatedly made clear, the interpretation of its provisions "begins where all such inquiries must begin: with the language of the statute itself." *United States v. Ron Pair Enters.*, 489 U.S. 235, 241 (1989); *see, e.g.*, *Merit Mgmt. Grp., LP v. FTI Consulting, Inc.*, 138 S.Ct. 883, 893 (2018) (interpretation of Code provision "begins with the text"); *Puerto Rico v. Franklin Cal. Tax-Free Trust*, 579 U.S. 115, 125 (2016) ("The plain text of the Bankruptcy Code begins and ends our analysis."); *Bank of Am. Nat'l Tr. & Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 459 (1999) (Thomas, J., joined by Scalia, J., concurring in the judgment) ("[A]nalysis of any statute, including the Bankruptcy Code, must not begin with external sources, but with the text itself."). The panel plainly erred by choosing to "begin with history," App.19, and in allowing that history to trump statutory text.

The panel majority likewise had no warrant to insist that Congress use "unmistakably clear" language to abrogate pre-Code practice. *Contra* App.27. While this Court has adopted a few clear-statement rules requiring Congress to speak with special clarity in rare circumstances that "reflect some constitutional or quasi-constitutional value," Tr.63, *Ysleta del Sur Pueblo v. Texas*, No. 20-493 (U.S. Feb. 22, 2022) (Kavanaugh, J.), no constitutional concern is implicated here. *Cf., e.g.*, Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 Boston U. L. Rev. 109, 118-19 (2010) (listing substantive clear-statement rules that implicate constitutional values); John F. Manning, *Clear Statement Rules and the Constitution*, 110 Colum. L. Rev. 399, 401 (2010) (clear-statement rules "derive from constitutional inspiration").

Unsurprisingly, none of the decades-old cases on which the panel relied actually turned on the imagined "substantive canon of Bankruptcy Code interpretation" that the panel deemed dispositive. *Contra* App.27, 31 (citing *Cohen v. de la Cruz*, 523 U.S. 213 (1998); *Midlantic Nat'l Bank v. N.J. Dep't of Envt'l Prot.*, 474 U.S. 494 (1986); *Kelly v. Robinson*, 479 U.S. 36 (1986)). In *Cohen*, this Court adopted the "most straightforward reading" of the statutory text, and invoked pre-Code practice only to "reinforce[]" that straightforward textual reading, not supplant it. 523 U.S. at 218, 221. In *Midlantic*, this Court held (in a 5-4 decision, over a sharp dissent written by then-Justice Rehnquist) that the Code provision allowing bankruptcy trustees to abandon property did not preempt state public-health and safety laws based not only on historical "restrictions on a trustee's abandonment power" but on textual evidence that Congress had not afforded trustees "*carte blanche* to ignore nonbankruptcy law." 474 U.S. at 501-02; *see also Ron Pair*, 489 U.S. at 243-44 (recognizing that *Midlantic* "did not rest solely, or even primarily, on a presumption of continuity with pre-Code practice"). And in *Kelly*, this Court recognized that the proper "starting point in every case involving construction of a statute is the language itself," and simply construed the "ambiguous words" of the provision at issue in the light of historical practice and federalism principles. 479 U.S. at 43, 48 n.9, 50-53.

Moreover, this Court's more recent cases explicitly delineate the proper—and properly limited—role of historical bankruptcy practice in interpreting the Code. As Justice Scalia wrote for a unanimous Court in *RadLAX*, pre-Code practice "can

be relevant to the interpretation of an ambiguous text," but carries no weight when there is "no textual ambiguity" to interpret. 566 U.S. at 649. Or as Justice Scalia wrote for a unanimous Court in *Hartford*, "while pre-Code practice 'informs our understanding of the language of the Code,' it cannot overcome that language." *Hartford*, 530 U.S. at 10 (citation omitted); *see also, e.g.*, *id.* ("Where the meaning of the Bankruptcy Code's text is itself clear[,] its operation is unimpeded by contrary prior practice." (brackets and ellipses omitted) (quoting *BFP v. Resolution Tr. Corp.*, 511 U.S. 531, 546 (1994)); *id.* at 11 (rejecting reliance on pre-Code practice where "the language of the Code leaves no room for clarification"); *Dewsnup v. Timm*, 502 U.S. 410, 419-20 (1992) (pre-Code practice can assist in interpreting "vague" language, but not "where the language is unambiguous"); *Ron Pair*, 489 U.S. at 243-46 (pre-Code practice can provide "interpretive assistance" where the text is "open to interpretation," but cannot overcome the "natural interpretation of the statutory language").

Under all that controlling precedent, the panel majority seriously erred by choosing a judicial gloss on since-repealed statutes over the unambiguous text of §502(b)(2). App.21-22. Notably, the panel majority made no attempt to identify any actual ambiguity in the text of §502(b)(2) that pre-Code practice could clarify. Indeed, if an administrative agency were to attempt to assert ambiguity in such an unqualified prohibition in order to create a regulatory exception, it would not get past *Chevron* step-one.

The panel majority nevertheless asserted that §502(b)(2) is ambiguous not as written, but "in the

context of what came before," App.31, because pre-Code bankruptcy statutes from 1898 and 1938 likewise prevented recovery of unmatured interest but that "did not stop courts from applying the traditional solvent-debtor exception." App.29. Perhaps greater fealty to statutory text *should have* stopped those earlier courts. But one would have thought the practical relevance of that interpretative debate would not survive the repeal of those earlier statutes and their replacement by the Code. There is certainly no reason to conjure the spirit of the *Church of the Holy Trinity* to ignore the Bankruptcy Code just because courts of a bygone era may have taken liberties with earlier bankruptcy statutes.

As Judge Oldham explained in detail in his dissent, moreover, the convoluted web of pre-Code statutes on which the panel majority relied bears almost no resemblance to the clear, unambiguous, and exception-free command of §502(b)(2). App.42-48. Instead, the relevant language of those prior acts "expressly prohibits *some* unmatured interest," but "*does not* contain a blanket bar on all unmatured interest—unlike 11 U.S.C. §502(b)(2)." App.45. As a result, the panel majority's assertion that those prior acts "barred unmatured interest just as clearly as does 11 U.S.C. §502(b)(2)"—and so that Congress should be presumed to have incorporated the same unwritten exception that applied under those prior acts into the far different (and explicitly contrary) language of §502(b)(2)—was "with deepest respect, false." App.48.

In any event, the very fact that the majority needed to flyspeck century-old, superseded statutory provisions to apply a judicially-crafted exception

overriding clear modern-day statutory language underscores the folly of the whole enterprise. Even if pre-Code courts might have believed themselves entitled to create unwritten exceptions to the text Congress enacted, that is hardly a sound reason to continue that practice today. Disregard of clear legislative text in favor of judicial conceptions of remedial justice was common in the pre-Code era and hardly limited to bankruptcy cases. Whatever limited license there may be to consult pre-Code practice in cases of genuine statutory ambiguity, it is not an invitation to return to the bad old days of statutory construction when courts treated clear congressional commands as mere suggestions subject to unwritten equitable exceptions. Now that courts have "sworn off the habit of venturing beyond Congress' intent," they should not "accept [the] invitation to have one last drink." *Alexander v. Sandoval*, 532 U.S. 275, 287 (2001). The panel majority seriously erred by treating pre-Code practice as authorizing an unwritten solvent-debtor exception to the unambiguous text of §502(b)(2).

B. The Panel Majority Similarly Erred by Invoking Pre-Code Practice to Require Contractual Post-Petition Interest That the Code Explicitly Disallows.

For much the same reasons, the panel majority erred by invoking the same purported solvent-debtor exception from pre-Code practice to hold that respondents were entitled to obtain post-petition interest at their contractual default rates rather than the federal judgment rate. App.35-40. Once again, the

panel majority wrongly elevated pre-Code practice over the current Code.

The proper analysis again begins with §502(b)(2), which explicitly disallows any "claim ... for unmatured interest." 11 U.S.C. §502(b)(2). Post-petition interest is by its very definition unmatured on the petition date. *See* App.39 n.27 (panel majority acknowledging that §502(b)(2) "operates to disallow 'unmatured interest' that is part of a claim" (emphasis omitted)). Thus, the Code squarely prohibits any claim for post-petition interest at the contractual default rate.

At the same time, Congress recognized that creditors should be able to recover *some* post-petition interest on their claims when the debtor is solvent—and enacted explicit Code provisions providing for that result. In particular, a solvent Chapter 7 debtor must pay its creditors post-petition interest "at the legal rate" before retaining any remaining assets. 11 U.S.C. §726(a)(5). The same rule is incorporated in Chapter 11 proceedings via the "best interests of creditors" test, under which a plan can only be confirmed if each impaired creditor either accepts the plan or will receive "not less than the amount" it would receive under Chapter 7. *Id.* §1129(a)(7)(A)(ii). The Code thus expressly entitles all Chapter 7 creditors and all impaired Chapter 11 creditors in solvent-debtor cases to post-petition interest at the legal rate—i.e., the federal judgment rate—on their allowed claims, as compensation for the delay in recovery occasioned by the bankruptcy proceedings. App.36-38; *see, e.g.*, *In re Cardelucci*, 285 F.3d 1231 (9th Cir. 2002).

While there is no separate Code provision explicitly requiring post-petition interest at the

federal-judgment rate to render Chapter 11 creditors unimpaired in solvent-debtor cases, there is no basis for such creditors to assert an entitlement to post-petition interest at more than the federal judgment rate, which the plan here provided them. By the express terms of §502(b)(2), those creditors cannot assert any *contractual* right to post-petition interest at contractual default rates, because any such contractual "claim … for unmatured interest" is explicitly disallowed. 11 U.S.C. §502(b)(2). And those unimpaired Chapter 11 creditors have suffered no more delay in recovery due to the bankruptcy proceedings than impaired creditors entitled to post-petition interest at the federal judgment rate under §726(a)(5) and §1129(a)(7)(A)(ii). As such, unimpaired Chapter 11 creditors are (at most) entitled to post-petition interest at the federal judgment rate, not any higher contractual rate. *See, e.g.*, *In re LATAM Airlines Grp.*, 2022 WL 2206829, at *18-25 (Bankr. S.D.N.Y. June 18, 2022) (post-petition interest at the federal judgment rate leaves creditors unimpaired), *aff'd*, 643 B.R. 741 (S.D.N.Y. Aug. 31, 2022), *aff'd*, 55 F.4th 377 (2d Cir. 2022); *In re RGN-Grp. Holdings, LLC*, 2022 WL 494154, at *5-6 (Bankr. D. Del. Feb. 17, 2022) (same); *In re Hertz Corp.*, 637 B.R. 781, 792-801 (Bankr. D. Del. 2021) (same).

The statutory history of the Code supports the same view. When Congress first enacted the Bankruptcy Code in 1978, the "best interests of creditors" test of §1129(a)(7) originally applied to all Chapter 11 creditors, not just impaired creditors, leaving no gap to use as a basis for smuggling in pre-Code practice. Pub. L. No. 95-598, §1129(a)(7), 92 Stat. 2549 (1978). Six years later, Congress amended

that provision to make clear that only impaired creditors were required to vote on confirmation. Pub. L. No. 98-353, §512(a)(7), 98 Stat. 333 (1984); *see Hertz*, 637 B.R. at 796, 800. Nothing in that amendment, however, suggests that Congress meant to revive a previously-abrogated pre-Code exception, and award unimpaired Chapter 11 creditors post-petition interest at higher rates than all other creditors.

The panel majority nevertheless adopted precisely that implausible view, again relying solely on its conclusion that "the solvent-debtor exception survived the Bankruptcy Code's enactment" and so "the Code does not preclude the contractual interest rate." App.39-40. But applying the pre-Code solvent-debtor exception to afford creditors post-petition interest at their contractual default rates is flatly contrary to §502(b)(2), which unambiguously disallows such claims, and to the post-petition interest structure that the Code creates, which contemplates post-petition interest at no more than the federal judgment rate.

Once again, the panel majority gave no persuasive justification for choosing atextual pre-Code practice over the clear text and structure of the Code. It began by asserting that the Code "only sets a *floor*" for what creditors must receive, and "does not preclude unimpaired creditors from receiving" more than the legal rate. App.38-39. That misses the point. The question is not whether the Code *precludes* unimpaired creditors from receiving a higher rate of post-petition interest; unsurprisingly, the Code erects no obstacle to a solvent debtor paying its creditors

more than they are actually owed. The question is whether the Code *entitles* unimpaired creditors to insist on contractual post-petition interest that §502(b)(2) explicitly disallows—and by the Code's plain terms, the answer to that question is clearly no.[2]

In sum, both the text of the Code and its structure unmistakably confirm that unimpaired creditors are at most entitled to post-petition interest at the federal judgment rate, not at higher contractual default rates. The panel majority's decision to instead rely on pre-Code practice to create an unwritten solvent-debtor exception to the plain terms of the Code, and rely on that exception to award respondents a full $186 million in post-petition interest above and beyond that provided by the federal judgment rate, cannot be permitted to stand.

---

[2] The panel majority's remaining arguments simply beg the question. Its assertion that "as a matter of equity, creditors are entitled to contractually specified rates of interest" in solvent-debtor cases assumes that the solvent-debtor exception preserves the right to those contractual rates despite the contrary text of §502(b)(2). *Contra* App.39. Likewise, the assertion that the "absolute priority rule" requires that "creditors' rights prevail" assumes that §502(b)(2) does not disallow those rights. *Contra* App.39. Finally, since the default rates are jacked up as a result of filing for bankruptcy, and thus act as the kind of penalty on a debtor availing itself of the bankruptcy process that the Code generally prohibits, *see, e.g.*, 2 Norton Bankr. L. & Prac. 3d §46:22 (2023) (explaining that the Code "generally protects the debtor from the enforcement of unfavorable insolvency-triggered clauses"), it is hardly "equitable" to enforce those steep default rates.

C. The Panel Majority's Decision Creates Havoc Across the Code.

The panel majority's embrace of a wide-ranging, judicially-created solvent-debtor exception to the Bankruptcy Code not only resulted in overriding clear statutory text in this case but creates havoc across the Code. Debtors and creditors alike should be able to assess their rights by the simple expedient of reading the Code, without trying to divine the extent to which inconsistent judicial decisions based on subsequently repealed text somehow continue to haunt the bankruptcy landscape.

1. The unwritten solvent-debtor exception that the panel majority adopted below is not limited to §502(b)(2). It is as far-ranging as it is atextual. According to the panel majority, the unwritten exception requires that a debtor "pay what it [has] promised" whenever it is "financially capable" of doing so, regardless of Bankruptcy Code provisions to the contrary. App.3; *see* App.19 (stating that "traditional doctrine" requires a solvent debtor to "pay its valid contractual debts … bankruptcy rules notwithstanding"). That rule would override not only the Code's disallowance of unmatured interest in §502(b)(2), as the panel majority held here, but all the other disallowance provisions in §502(b) as well, creating numerous departures in solvent-debtor cases from the explicit limitations Congress placed on certain bankruptcy claims—even though none of those provisions by its terms distinguishes in any way between solvent and insolvent debtors, or suggests in any way that it applies only to the latter.

For instance, §502(b)(4) uniformly disallows claims by any "insider or attorney of the debtor" for their services, to the extent those claims "exceed[] the reasonable value of such services." 11 U.S.C. §502(b)(4). Under the panel majority's view, however, the solvent-debtor exception would "suspend" that disallowance in solvent-debtor cases, App.8-9, leaving the debtor's CEO and lawyers free to claim whatever unreasonable amounts they were contractually entitled to, even if, as here, the contractual entitlement was triggered by the bankruptcy filing. So too for the specific limitations that Congress enacted in §502(b)(6) on claims by lessors for future rent, or in §502(b)(7) on claims by employees for future wages—in any bankruptcy involving a solvent debtor, according to the panel majority's reasoning, those provisions would have no effect. *But see, e.g.*, *In re PPI Enters. (U.S.), Inc.*, 228 B.R. 339, 345-48 (Bankr. D. Del. 1998) (rejecting the argument that §502(b)(6) is inapplicable in solvent-debtor cases), *aff'd*, 324 F.3d 197 (3d Cir. 2003). Indeed, the panel majority's expansive solvent-debtor exception would apparently override even the disallowance of *untimely claims* under §502(b)(9), throwing the bankruptcy process into chaos in every solvent-debtor case. *See* 11 U.S.C. §502(b)(9) (disallowing claims that are "not timely filed").

This solvent-debtor exception is as unnecessary as it is atextual. The Code is not indifferent to the prospect that the bankruptcy process could be abused by a bad-faith filing by a fully solvent debtor. *See, e.g.*, 11 U.S.C. §1112(b)(1) (allowing dismissal of bankruptcy case "for cause," including bad faith); *id.* §1129(a)(3) (plan of reorganization must be proposed

"in good faith"). The Code provisions addressing that issue, however, nowhere suggest that solvency alone constitutes bad faith, let alone that there is any bad faith in a case like this where the debtor was insolvent when it sought Chapter 11 protection and only became solvent later based on post-filing developments outside of its control. In those circumstances, there is nothing inequitable in giving creditors their full entitlement under the Code and no basis for courts to deviate from the Code based on equitable considerations or pre-Code judicial decisions.

2. The panel majority's expansive and atextual solvent-debtor exception also makes a hash of the Code's approach to post-petition interest. In numerous places, the Code provides a specific and explicit exception to the Code's general disallowance of claims for unmatured interest, including post-petition interest. By layering on an additional unwritten exception, the panel majority creates chaos out of order and necessitates either double recoveries or further equitable tinkering. For example, the Code sets out a straightforward scheme for post-petition interest in Chapter 7 cases: first, §502(b)(2) disallows any claims for post-petition interest (as "unmatured interest"), and then, if the debtor is solvent, §726(a)(5) provides creditors with post-petition interest on their allowed claims "at the legal rate." 11 U.S.C. §§502(b)(2), 726(a)(5). But if, as the panel majority held, the solvent-debtor exception "suspend[s]" §502(b)(2) in solvent-debtor cases, App.8-9, creditors in solvent-debtor Chapter 7 cases would be entitled to claim post-petition interest twice: first at their contractual default rates (which would no longer be disallowed under §502(b)(2)), and then at the federal

statutory rate under §726(a)(5). Would it be more equitable to allow them a double recovery, to recover only the higher of the two rates, or would courts view the text of §726(a)(5) as foreclosing any resort to the solvent-debtor exception? There are no clear answers once the text of the Code is deemed non-dispositive.

The same conundrums would extend to impaired creditors in solvent-debtor Chapter 11 cases. And similar problems would arise under §506(b), which allows a creditor with an oversecured claim to recover post-petition "interest on such claim" up to the value of the security interest. 11 U.S.C. §506(b). All of that disorder underscores the dangers of layering judge-made doctrines carried over from the *ancien regime* on top of the finely reticulated Code.

3. Finally, there is no logical reason that the difficulties and confusion introduced by the decision below would be confined to the solvent-debtor context. After all, the solvent-debtor exception is not the only judicial gloss on since-repealed bankruptcy statutes that could be said to survive the enactment of the Code and could be employed to create ambiguity in circumstances where the answer under the Code is clear. For example, several courts before *Hartford* made precisely that error by following the equitable pre-Code practice of allowing recovery from collateral by nontrustees despite the Code's clear contrary text. *See, e.g.*, *In re Palomar Truck Corp.*, 951 F.2d 229, 232 (9th Cir. 1991), *abrogated by Hartford*, 530 U.S. 1; *In re Parque Forestal, Inc.*, 949 F.2d 504, 511-12 (1st Cir. 1991) *abrogated by Hartford*, 530 U.S. 1. There is simply no reason to allow this notion of a bankruptcy-code exception to ordinary principles of

statutory construction to fester. As in other contexts, earlier judicial decisions may have interpretative value where the text is comparable. But the notion of a substantive canon that requires courts to start with history rather than the statutory text is wholly misguided and should be corrected before it confuses other issues where the Code itself provides a clear answer.

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

The panel majority's decision not only is wrong, but conflicts with rulings from numerous other courts and contributes to growing confusion on this issue. In case after case, the majority of courts, including expert bankruptcy courts, have regularly applied the disallowance provisions of §502(b) to limit or disallow claims as dictated by the plain language of the Code, even when the debtor is solvent. Those decisions cannot be squared with the panel majority's adoption of a broad, atextual solvent-debtor exception that "demands that [a debtor] pay what it promised" whenever it is "financially capable" of doing so, even when the Code explicitly provides otherwise. App.3; *see* App.19 ("[W]hen a debtor is able to pay its valid contractual debts, traditional doctrine says it should—bankruptcy rules notwithstanding.").

In *PPI*, for instance, the Third Circuit affirmed the bankruptcy court's determination that the Code applied to limit a landlord's claim against a solvent debtor, and that this limitation by the Code did not create impairment. 324 F.3d at 203-07. The bankruptcy court explicitly rejected the landlord's

argument that the Code's disallowance provisions "should not apply in a solvent debtor case," explaining that the Code "allows for no such distinction." *PPI*, 228 B.R. at 345-48. While the Third Circuit saw no need to separately discuss the solvency issue in affirming the bankruptcy court decision, its definitive holding that the landlord in *PPI* was "only 'entitled' to his rights under the Bankruptcy Code," 324 F.3d at 205, cannot be squared with the holding below that an unwritten solvent-debtor exception "suspend[s] the Code's disallowance" of claims in solvent-debtor cases, and entitles creditors in such cases to recover their full "valid contractual debts ... bankruptcy rules notwithstanding." App.8-9, 19.[3]

Courts within the Third Circuit have followed *PPI* in rejecting any residual solvent-debtor exception. *See, e.g.*, *Hertz*, 637 B.R. at 799 (solvency "does not waive the application of section 502(b)(2)"); Memorandum Opinion at 13-18, *In re Hertz Corp.*, No. 21-50995 (Bankr. D. Del. Nov. 21, 2022), Dkt.71 (recognizing disagreement and denying reconsideration); *RGN*, 2022 WL 494154, at *5-6 (agreeing with "the thorough and well-reasoned analysis laid out in *Hertz*"); *In re Flanigan*, 374 B.R. 568, 575 (Bankr. W.D. Pa. 2007) (rejecting any

---

[3] Unlike the Fifth Circuit in the first appeal in this case, the Third Circuit in *PPI* did not leave any solvent-debtor issue open on remand but simply affirmed, which is particularly telling given that the bankruptcy court had already rejected any such argument. Moreover, as the Fifth Circuit recognized in its first decision in this case, that *PPI* involved §502(b)(6) rather than §502(b)(2) is "a distinction without a difference." App.116. The same reasoning "applies with equal force" to any of the Code's disallowance provisions. *Id.*

"judicially-crafted exception" to §502(b) for solvent-debtor cases). The same view has prevailed in numerous other courts across the country. *See, e.g.*, *LATAM*, 2022 WL 2206829, at *21 (section 502(b)(2) "is not limited to cases other than solvent debtors"); *In re Ancona*, 2016 WL 828099, at *6 (Bankr. S.D.N.Y. Mar. 2, 2016) (rejecting the argument that "a court must first find a debtor to be insolvent" before applying §502(b), which would "effectively rewrite" the Code); *HSBC Bank USA, Nat'l Ass'n v. Calpine Corp.*, 2010 WL 3835200, at *5, *10 (S.D.N.Y. Sept. 15, 2010) (applying §502(b)(2) even though debtor was "very solvent"); *In re Farley, Inc.*, 146 B.R. 739, 747-48 (Bankr. N.D. Ill. 1992) (whether the debtor is solvent is "irrelevant" under §502(b)); *In re Federated Dep't Stores, Inc.*, 131 B.R. 808, 817 (S.D. Ohio 1991) (rejecting the argument that "a bankruptcy court may depart from [§502(b)] any time the debtor is solvent"). Those decisions cannot be reconciled with the panel majority's view that pre-Code practice "suspend[s]" the plain text of the Code, and requires solvent debtors to pay whatever their contracts require "notwithstanding" contrary Code provisions. App.8-10.

The panel's decision also directly conflicts with numerous decisions addressing post-petition interest. Its holding squarely contradicts multiple cases specifically holding that unimpaired creditors in solvent-debtor Chapter 11 cases are entitled to post-petition interest only at the federal judgment rate, not their contractual default rates. *See LATAM*, 2022 WL 2206829, at *18-25; *RGN*, 2022 WL 494154, at *5-6; *Hertz*, 637 B.R. at 792-801. And more broadly, its assertion that the solvent-debtor exception entitles

creditors "as a matter of equity" to post-petition interest at steep contractual default rates *whenever* the debtor is "fully capable of paying up," App.39, conflicts with countless decisions limiting creditors in other solvent-debtor cases to post-petition interest at the federal judgment rate. *See, e.g.*, *Cardelucci*, 285 F.3d 1231; *In re Kravitz*, 2001 WL 36381905, at *2-3 (B.A.P. 1st Cir. Feb. 16, 2001); *In re Augé*, 559 B.R. 223, 228 (Bankr. D.N.M. 2016); *In re Premier Ent. Biloxi LLC*, 445 B.R. 582, 645-46 (Bankr. S.D. Miss. 2010); *In re Smith*, 431 B.R. 607, 610-11 (Bankr. E.D.N.C. 2010); *In re Melenyzer*, 143 B.R. 829 (Bankr. W.D. Tex. 1992).

While the decision below conflicts with numerous contrary cases, it unfortunately is not a lone outlier. Just two months before the decision below, a divided Ninth Circuit panel held that an atextual solvent-debtor exception drawn from pre-Code judicial decisions supersedes the plain text of the Code and can authorize creditors to claim post-petition interest at their contractual default rates in solvent-debtor cases. *In re PG&E Corp.*, 46 F.4th 1047 (9th Cir. 2022), *pet. for cert. pending*, No. 22-733 (U.S. filed Feb. 2, 2023). Like the panel majority here, the Ninth Circuit panel majority first recognized that §502(b)(2)'s explicit "prohibition on the inclusion of 'unmatured interest' as part of a claim" disallows any "contractual right to [post-petition] interest" at the contractual default rate. *Id.* at 1063. Then, like the panel majority here, the *PG&E* majority held that the pre-Code solvent-debtor exception supersedes that statutory text, and gives unimpaired creditors in solvent-debtor Chapter 11 cases an "equitable right" to post-petition interest at their contractual or state-law default rates. *Id.* at

1064. But unlike the panel majority here, the Ninth Circuit went further and improvised a new atextual exception, holding that courts can choose a different rate when "compelling equitable considerations" warrant. *Id.* That additional layer of judge-empowering discretion not only deepens the conflict among lower courts, but underscores the dangers of deviating from the statutory text. After all, once courts abandon the text of the Code as a guide, there is nothing left to constrain their equitable discretion or their ability to recognize their own equitable preferences in the crowd of pre-Code judicial decisions.

Judge Ikuta filed a vigorous dissent from the Ninth Circuit's decision, explaining that this Court has "directed [lower courts] to take the exact opposite approach" to interpreting the Code: "[S]o long as the Code is clear, we do not refer to pre-Code practice." *Id.* at 1065 (Ikuta, J., dissenting); *see id.* at 1069 (rejecting any "presumption that the Code incorporates pre-Code practice"). Because "the text of the Code is clear," pre-Code practice cannot justify awarding post-petition interest at contractual default rates that the Code specifically disallows, much less presumptively awarding that interest subject to unspecified equitable considerations. *Id.* at 1065.

To defend its approach, the Ninth Circuit panel majority (but not the panel majority below) cited two cases from other circuits that it claimed supported its view that the pre-Code solvent-debtor exception "persists under the Code." *Id.* at 1061. Each of those cases made clear, however, that any such solvent-debtor exception could *not* override the explicit disallowance provisions of the Code, even in solvent-

debtor cases. *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, 680-81, 686 n.4 (6th Cir. 2006) (recognizing in a solvent-debtor case that §502(b) would disallow unreasonable attorneys' fees). They thus provide no support for the mistaken view adopted by the decision below. *Cf.* App.24 (noting that petitioners cited these cases "for the proposition that §502(b)(2) applies regardless of debtor solvency"). Regardless, any lack of clarity in those decisions only underscores the confusion in the lower courts on this issue, and the pressing need for this Court to intervene and establish certainty by determining, once and for all, whether there is an unwritten solvent-debtor exception to the Bankruptcy Code that supersedes the statutory text.

In sum, "trial and appellate courts have reached different conclusions" as to whether the pre-Code solvent-debtor exception "survived the Code's enactment," and they "will likely continue to do so until the issues are finally determined by the Supreme Court or Congress amends the statute." *In re Mullins*, 633 B.R. 1, 3-4 (Bankr. D. Mass. 2021). The divided decision below is now part of a three-way conflict on this question (among the Fifth Circuit, the Ninth Circuit, and the numerous decisions following the clear statutory text), and the growing confusion in the lower courts on this issue shows no sign of abating. This Court should not allow that ongoing confusion to remain unresolved—especially in the bankruptcy context, where the Constitution itself calls for "uniform Laws on the subject of Bankruptcies throughout the United States." U.S. Const. art.I, §8,

cl.4; *see also Siegel v. Fitzgerald*, 142 S.Ct. 1770, 1781 (2022) (recognizing that the Bankruptcy Clause "does not permit the arbitrary, disparate treatment of similarly situated debtors based on geography").

III. The Question Presented Is Exceptionally Important.

The exceptionally important and recurring nature of the question presented underscores the need for this Court's review. Fluctuations in commodities prices and extraordinary events like the COVID-19 pandemic have forced numerous companies into bankruptcy only to have subsequent developments render them solvent before the bankruptcy proceedings have run their full course. As a result, numerous courts in jurisdictions across the country have confronted the question whether an unwritten pre-Code "solvent-debtor exception" survived the enactment of the Code. *See, e.g.*, *PG&E*, 46 F.4th 1047; *LATAM*, 2022 WL 2206829, at *18-25; *RGN*, 2022 WL 494154, at *5-6; *Hertz*, 637 B.R. at 792-801. That question carries far more than academic interest; as this case demonstrates, it can determine the distribution of hundreds of millions of dollars. App.2 ("some $387 million"); *see also, e.g.*, *PG&E*, 46 F.4th at 1052 ("roughly $200 million"); *Hertz*, 637 B.R. at 784 ("approximately $272 million").

Furthermore, even beyond the havoc the decision below works across the Code, *see* pp.24-28, *supra*, it creates serious adverse consequences in practice. The distortion starts long before bankruptcy as the decision incentivizes creditors to insist on punitive make-whole provisions and steep default rates of interest to obtain outsized recoveries in bankruptcy.

Then in solvent-debtor cases, the decision below converts what should be a be "a relatively simple process" into an "administrative nightmare" that treats creditors differently based on the happenstance of the applicable state interest rate or whether they negotiated for a make-whole or a steep default interest rate. *Cardelucci*, 285 F.3d at 1236. It also creates additional complexities when a debtor who would otherwise be solvent is pushed into insolvency if it must pay contractual make-wholes or default rates. *See* App.23 n.16 (recognizing this "gray area"). Whereas commodity price swings rendered Petitioners solvent despite the high stakes of this dispute, the nearly $400 million at issue would make the difference between solvency and insolvency in many a case. In other cases, there will be a robust debate about whether the debtor is solvent and what obligations and assets count for purposes of assessing solvency, *see LATAM*, 2022 WL 2206829, at *18 (describing multiple solvency tests), and unsecured creditors with contractual make-wholes or steep default rates will push for higher valuations that result in just enough solvency to pay those amounts and disproportionately advantage those creditors. The panel majority's opinion also undermines the "overriding policy consideration" of "equitable treatment of creditors," and disincentivizes good-faith bankruptcy filings by imposing harsh default rates of interest. *Cardelucci*, at 1235-36. These conundrums are all avoided by the simple expedient of adhering to the statutory text, because the Code disallows contractual claims to unmatured interest altogether regardless of solvency.

Moreover, denying review now would entrench the panel majority's error in ways that would make it

difficult to correct in the future. While numerous future bankruptcies will involve debtors who become solvent during the bankruptcy and implicate matters like make-whole amounts and post-petition interest, debtors in the Fifth and Ninth Circuits will have little practical choice but to accede to mistaken circuit law in structuring their plans.

That dynamic underscores not only the disruptive consequences of the divided panel decision below, but also the pressing need for this Court to grant immediate review. This case is an ideal vehicle for doing so, as the issue is outcome-dispositive and is cleanly presented without any disputed facts.

Finally, review is warranted to make clear that this Court's cases do not compel a bankruptcy exception to textualism. It is bad enough that the panel majority deviated from bedrock principles of statutory construction. It is worse still that it perceived itself as compelled to do so by this Court's precedents. If even a textually inclined panel felt like it had no choice but to look to history first and use judicial decisions involving superseded statutes to override the Code, then the need for this Court's intervention is clear. Simply put, when the lower courts attribute their error to this Court's decisions, only this Court can correct that error and make clear that in interpreting the Bankruptcy Code, as with any other statute, the proper inquiry begins—and generally ends—with the statutory text.

In short, the decision below is wrong both for its holding that an unwritten solvent-debtor exception suspends the plain text of the Code, and for the method of statutory interpretation that allowed it to

reach that holding—and both errors are critically important. This Court should not leave unsettled a recurring and consequential question at the heart of bankruptcy law and of proper statutory construction in general.

CONCLUSION

For the foregoing reasons, this Court should grant the petition.

Respectfully submitted,

PAUL D. CLEMENT
Counsel of Record
C. HARKER RHODES IV*
MARIEL A. BROOKINS*
CLEMENT & MURPHY, PLLC
706 Duke Street
Alexandria, VA 22314
(202) 742-8900
paul.clement@clementmurphy.com

*Supervised by principals of the firm who are members of the Virginia bar

GEORGE W. HICKS, JR.
KIRKLAND & ELLIS LLP
1301 Pennsylvania Ave., NW
Washington, DC 20004

DAVID R. SELIGMAN, P.C.
MICHAEL B. SLADE
KIRKLAND & ELLIS LLP
300 N. LaSalle
Chicago, IL 60654

Counsel for Petitioners

February 13, 2023