No.

In the Supreme Court of the United States

CAPITAL CARTRIDGE, LLC, PETITIONER

v.

J. MICHAEL ISSA, AS TRUSTEE OF THE HMT LIQUIDATING TRUST

ROYAL METAL INDUSTRIES, INC., PETITIONER

v.

J. MICHAEL ISSA, AS TRUSTEE OF THE HMT LIQUIDATING TRUST

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

These cases present a significant question of federal bankruptcy law that has squarely divided the lower courts: the validity and scope of the "judicially-created doctrine of derivative standing."

The Bankruptcy Code has multiple provisions authorizing "the trustee" to bring avoidance litigation to claw back funds that belong to the estate. Even though Congress explicitly granted that authority to the trustee alone, multiple courts have authorized creditors' committees to litigate those claims in a "derivative" capacity. These courts have recognized that the Code's text does not affirmatively authorize this practice; they have instead invoked "equitable" power to revamp the Code and redline its provisions—all to better effectuate these courts' view of Congress's intent. This practice has produced multiple conflicts among lower courts—including whether the doctrine exists at all, and if it does, when a creditors' committee is allowed to invoke it.

The district court below (acting in its appellate capacity) flagged the core conflict, and the same split has been identified by multiple courts and commentators nationwide. The question is substantial: it arises constantly in bankruptcy courts, implicates litigation with massive stakes, and consumes countless hours and resources as courts debate whether to authorize derivative standing—conducting extensive "cost-benefit" analyses to decide whether a party *not* listed in the Code is permitted to replace the single party that *is*.

The question presented is:

Under the Bankruptcy Code's avoidance provisions, whether a creditors' committee has "derivative standing" to bring suit on behalf of the estate, and if so, under what conditions derivative standing is permitted.

PARTIES TO THE PROCEEDINGS BELOW AND RULE 29.6 STATEMENT

In accordance with this Court's Rule 12.4, this petition for a writ of certiorari covers the judgments in two cases.

Petitioners are Capital Cartridge, LLC, and Royal Metal Industries, Inc., the appellants below and defendants in the bankruptcy court. Capital Cartridge, LLC, has no parent corporation, and no publicly held company owns 10% or more of its stock. Royal Metal Industries, Inc., has no parent corporation, and no publicly held company owns 10% or more of its stock.

Respondent is J. Michael Issa, the appellee below and Trustee of the HMT Liquidating Trust.

RELATED PROCEEDINGS

United States Bankruptcy Court (Bankr. D. Nev.):

In re X-Treme Bullets, Inc., et al., No. 18-50609-btb/hlb (Oct. 1, 2020) (order confirming first amended Chapter 11 plan)

Official Committee of Unsecured Creditors of X-Treme Bullets, Inc., et al. v. *Capital Cartridge, LLC (In re X-Treme Bullets, Inc.)*, Adv. No. 20-5018-BTB (Oct. 23, 2020) (order and judgment granting motion to dismiss)

Official Committee of Unsecured Creditors of X-Treme Bullets, Inc., et al. v. *Capital Cartridge, LLC (In re X-Treme Bullets, Inc.)*, Adv. No. 20-5018-BTB (Jan. 22, 2021) (order denying motion for reconsideration)

Official Committee of Unsecured Creditors of X-Treme Bullets, Inc., et al. v. *Royal Metal Industries, Inc. (In re X-Treme Bullets, Inc.)*, Adv. No. 20-5019-BTB (Oct. 21, 2020) (order and judgment granting motion to dismiss)

Official Committee of Unsecured Creditors of X-Treme Bullets, Inc., et al. v. *Royal Metal Industries, Inc. (In re X-Treme Bullets, Inc.)*, Adv. No. 20-5019-BTB (Jan. 22, 2021) (order denying motion for reconsideration)

United States District Court (D. Nev.):

J. Michael Issa, as Trustee of the HMT Liquidating Trust v. *Capital Cartridge, LLC (In re X-Treme Bullets, Inc.)*, No. 3:21-cv-60-MMD (June 14, 2022) (order and judgment reversing bankruptcy court)

J. Michael Issa, as Trustee of the HMT Liquidating Trust v. *Capital Cartridge, LLC (In re X-Treme Bullets, Inc.)*, No. 3:21-cv-60-MMD (June 29, 2022) (order denying motion for rehearing)

J. Michael Issa, as Trustee of the HMT Liquidating Trust v. *Royal Metal Industries, Inc. (In re X-Treme Bullets, Inc.)*, No. 3:21-cv-62-MMD (June 14, 2022) (order and judgment reversing bankruptcy court)

J. Michael Issa, as Trustee of the HMT Liquidating Trust v. *Royal Metal Industries, Inc. (In re X-Treme Bullets, Inc.)*, No. 3:21-cv-62-MMD (June 29, 2022) (order denying motion for rehearing)

United States Court of Appeals (9th Cir.):

J. Michael Issa v. *Capital Cartridge, LLC (In re X-Treme Bullets, Inc.)*, No. 22-16141 (Dec. 11, 2023)

J. Michael Issa v. *Capital Cartridge, LLC (In re X-Treme Bullets, Inc.)*, No. 22-16141 (Jan. 31, 2024) (order denying rehearing)

J. Michael Issa v. *Royal Metal Industries, Inc. (In re X-Treme Bullets, Inc.)*, No. 22-16143 (Feb. 28, 2024)

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PETITION FOR A WRIT OF CERTIORARI

Capital Cartridge, LLC, and Royal Metal Industries, Inc., respectfully petition for a writ of certiorari to review the judgments of the United States Court of Appeals for the Ninth Circuit in these cases. In accordance with this Court's Rule 12.4, petitioners are filing a "single petition for a writ of certiorari" because the "judgments * * * sought to be reviewed" are from "the same court and involve identical or closely related questions." Sup. Ct. R. 12.4.

OPINIONS BELOW

In *Capital Cartridge*, the opinion of the court of appeals (App., *infra*, 1a-4a) is unreported but available at 2023 WL 8542624. The opinion of the district court (App., *infra*, 5a-35a) is unreported but available at 2022 WL 2134089. The order of the bankruptcy court (App., *infra*, 36a-41a) is unreported.

In *Royal Metal*, the opinion of the court of appeals (App., *infra*, 44a-47a) is unreported but available at 2024 WL 837043. The opinion of the district court (App., *infra*, 48a-78a) is reported at 642 B.R. 312. The order of the bankruptcy court (App., *infra*, 79a-84a) is unreported.

JURISDICTION

In *Capital Cartridge*, the judgment of the court of appeals was entered on December 11, 2023. A petition for rehearing was denied on January 31, 2024 (App., *infra*, 42a-43a). In *Royal Metal*, the judgment of the court of appeals was entered on February 28, 2024, and no petition for rehearing was filed. On April 24, 2024, Justice Kagan extended the time within which to file a petition for a writ of certiorari in both cases until June 28, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Bankruptcy Code, 11 U.S.C. 101 *et seq.*, are reproduced in the appendix to this petition (App., *infra*, 85a-90a).

INTRODUCTION

This case presents an important and recurring question under the Bankruptcy Code that has squarely divided the lower courts: whether a creditors' committee has "derivative standing" to bring suit on behalf of the estate, and if so, under what conditions derivative standing is ever

permitted. In the proceedings below, the Ninth Circuit cemented its practice of authorizing creditors' committees to assert avoidance claims belonging to the estate—even though the Bankruptcy Code explicitly assigns that critical power to the trustee alone. See, *e.g.*, 11 U.S.C. 544(b)(1) ("the *trustee* may avoid any transfer of an interest of the debtor in property"); 11 U.S.C. 548(a)(1) ("[t]he *trustee* may avoid any transfer"); 11 U.S.C. 550(a) ("the *trustee* may recover * * * the property transferred") (emphases all added).[1]

This "significant" and "important" question (*In re Baltimore Emergency Servs. II, Corp.*, 432 F.3d 557, 560-561 (4th Cir. 2005)), has sharply divided the lower courts. There is a meaningful conflict regarding whether derivative standing is allowed at all, and a direct conflict over the "narrow" standards for applying this "judicially created doctrine." The practice has been outright forbidden by the Tenth Circuit BAP. *United Phosphorous, Ltd.* v. *Fox (In re Fox)*, 305 B.R. 912, 914 (B.A.P. 10th Cir. 2004) ("obey[ing] the [Code's] literal language" and disavowing contrary decisions from other circuits).[2] The issue sharply split the Third Circuit en banc, with four judges (including then-Judge Alito) categorically rejecting the derivative standing. *Official Comm. of Unsecured Creditors of*

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[1] A debtor in possession can also bring these suits due to its separate textual grant of authority to exercise the same powers assigned a trustee: "a debtor in possession shall have all the rights * * * and powers, and shall perform all the functions and duties * * * of a trustee serving in a case under this chapter." 11 U.S.C. 1107(a). There is no similar assignment of authority to creditors or any creditors' committee.

[2] This Court routinely considers decisions of bankruptcy appellate panels in describing conflicts warranting the Court's review. See, *e.g.*, *Schwab* v. *Reilly*, 560 U.S. 770, 778 & n.4 (2010); *Grogan* v. *Garner*, 498 U.S. 279, 283 & n.7 (1991).

Cybergenics Corp. ex rel. Cybergenics Corp. v. *Chinery*, 330 F.3d 548, 580 (3d. Cir. 2003).[3] The Fourth Circuit refused to endorse the doctrine—leaving the issue for another day after explaining all the reasons why it should be forbidden. *Baltimore Emergency Servs.*, 432 F.3d at 561 (calling its validity "far from self-evident"). And multiple experts and commentators have flagged the doctrine as textually indefensible and analytically unsound. See, *e.g.*, *id.* at 561 (flagging conflicting commentary). Even those courts that permit the practice disagree over every facet of its general application—which is little surprise given the (atextual) doctrine is judge-made out of whole cloth.

Even if derivative standing is (somehow) authorized, the circuits disagree over *where* it is authorized. Some circuits (including the Fifth and Seventh Circuits) flag this as a *limited* exception solely where a trustee shirks his or her duties and "unjustifiably" refuses to file suit. *E.g.*, *In re Consolidated Indus. Corp.*, 360 F.3d 712, 716 (7th Cir. 2004) ("Bankruptcy law does allow a creditor to bring a derivative claim on behalf of the estate, but only in limited circumstances. To do so, a creditor must show that the trustee has *unjustifiably refused* the creditor's demand to pursue a colorable claim and obtain leave from the bankruptcy court to proceed.") (emphasis added; citations

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[3] "In this case, the majority interprets the phrase 'the trustee may,' in § 544(b)(1) of the Bankruptcy Code, to mean that the trustee *and* a creditors' committee may seek recovery under the statute. Although the majority does not conclude that the phrase is ambiguous or that its meaning is in any way obscure, it has, nonetheless, broadened the statute to add a party that Congress specifically omitted. * * * The majority's view is inconsistent with the plain and natural reading of § 544, is not supported by the Code provisions it cites, is not adequately grounded in prior practice and, perhaps more importantly, is inconsistent with the Supreme Court's plain meaning analysis of the identical phrase in *Hartford Underwriters*." 330 F.3d at 580 (Fuentes, J., dissenting).

omitted); see also *Kreit* v. *Quinn (In re Cleveland Imaging & Surgical Hosp., LLC)*, 26 F.4th 285, 297 (5th Cir. 2022) ("'the debtor-in-possession' [must have] refused unjustifiably to pursue the claim'"). Yet other circuits (like the Ninth Circuit) endorse a sweeping rule where derivative standing is permitted whenever a trustee "consents" and greenlights a committee's authority. See, *e.g.*, *Avalanche Maritime, Ltd.* v. *Parekh (In re Parmetex, Inc.)*, 199 F.3d 1029, 1031 (9th Cir. 1999) ("where the trustee stipulated that the Creditors could sue on his behalf and the bankruptcy court approved that stipulation[,] the Creditors had standing to bring the suit").

This Court has expressly reserved the question before (*Hartford Underwriters Ins. Co.* v. *Union Planters Bank, N.A.*, 530 U.S. 1, 13 n.5 (2000)), and it continues to generate endless confusion among lower courts and expert commentators. In the meantime, some circuits recognize strict limits designed to cabin the practice (if it is allowed at all), whereas others (like the Ninth Circuit) simply brush aside any meaningful restrictions.

In short, this is a critical question that affects significant litigation with massive stakes in countless bankruptcies nationwide, and this is a perfect opportunity for the Court to impose a uniform rule in an area generating needless confusion. Because this case presents an ideal vehicle for resolving this important question of federal law, the petition should be granted.

STATEMENT

1. This case involves two related appeals arising from the same Chapter 11 bankruptcy case.[4] In those proceedings, the debtors appointed a chief restructuring officer

[4] The bankruptcy proceedings below involved the separate bankruptcy filings of eight companies "in the business of manufacturing,

(responsible for administering the bankruptcies), and the U.S. Trustee appointed "an official Committee of Unsecured Creditors" under 11 U.S.C. 1102(a). App., *infra*, 7a-8a, 51a-52a.

Nearly two years into the bankruptcy, the chief restructuring officer entered into a stipulation "purport[ing] to grant the Committee derivative standing to commence, prosecute, and resolve certain claims and causes of action on behalf of the Debtors," including "the authority to pursue claims relating to certain pre-petition transactions between certain Debtors and a list of third-party targets." App., *infra*, 8a, 52a. That stipulation covered both petitioners and the adversary proceedings filed below.

2. The bankruptcy court approved the stipulation "two days later," granting the creditors' committee "derivative standing" to pursue these claims. App., *infra*, 9a, 52a. The committee itself prepared the order, and the stated basis for its approval was unspecified "good cause." *Id.* at 9a, 52a. In authorizing derivative standing, there accordingly was no explanation why the debtors could not pursue these claims themselves; there was no indication the debtors refused (or would have refused) to pursue these claims; "'there was no hearing held,'" "'no discussion that any causes of action were colorable or viable,'" "'no analysis of the cost of pursuing the causes of action vers[u]s the potential recovery,'" and "'no discussion as to whether or not the Debtor[s] had looked into the potential claims,'"

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assembling, and selling small arms ammunition." App., *infra*, 6a, 50a. Although the debtors were separate companies, the same individual "was the principal of each Debtor," and the debtors accordingly "coordinated extensively throughout their respective cases." *Ibid.* "The orders giving rise to both appeals were argued together before the Bankruptcy Court, and both appeals present the same legal questions." *Id.* at 6a n.2, 49a-50a n.2.

much less "'whether the Committee had made demand on the Debtor[s] to file suit against [petitioners], or whether the Debtors refused to file suit despite a demand.'" *Id.* at 10a, 53a. In short, the court authorized derivative standing without any indication the debtors "unjustifiably refused" (or would have refused) to pursue these claims on their own—much less why these claims were a good idea.

The committee then immediately filed separate adversary proceedings against each petitioner, seeking "to avoid transfers and recover previously transferred property" under 11 U.S.C. 544, 548, and 550. App., *infra*, 9a, 52a-53a. These suits sought hundreds of thousands of dollars in recovery.

3. Petitioners filed motions to dismiss the adversary proceedings, asserting the committee lacked standing to pursue the claims. The bankruptcy court granted those motions and dismissed the proceedings. App., *infra*, 36a-41a, 79a-84a.

4. The committee appealed to the district court, which ultimately reversed. As the district court confirmed, the appeals "turn[] on the propriety of a debtor granting 'derivative standing' to another for the purpose of pursuing adversary claims." App., *infra*, 16a, 59a. And the court found "[l]ong-established Ninth Circuit and Ninth Circuit BAP precedent authorizes a debtor-in-possession to stipulate to derivative standing for unsecured creditors' committees, subject to a bankruptcy judge's approval." *Ibid.* It thus rejected applicants' argument that "this grant of derivative standing * * * exceeded the scope of the Debtors' and the Bankruptcy Court's authority under the Bankruptcy Code." *Ibid.*

In so holding, the district court recognized that "[s]ome circuits" limit derivative standing to "narrow[er] circumstances than those allowable in the Ninth Circuit." App., *infra*, 19a, 62a (citing cases in the Fourth, Fifth, and

Seventh Circuits). It also recounted how the Tenth Circuit BAP found "derivative standing agreements were impermissible under the Bankruptcy Code." *Id.* at 33a, 76a. But it declared those decisions at odds with "the majority view," and concluded Ninth Circuit law authorized "derivative standing": "'[i]t is well settled that in appropriate situations the bankruptcy court may allow a party other than the trustee or debtor-in-possession to pursue the estate's litigation." *Id.* at 18a, 32a, 49a, 59a, 61a; see also *id.* at 18a, 61a ("the Ninth Circuit has reiterated its approval of derivative standing stipulations").[5]

5. a. The Ninth Circuit affirmed. App., *infra*, 1a-4a, 42a-47a. It rejected petitioners' argument that "the grant of derivative standing to the Committee violated the Bankruptcy Code." App., *infra*, 3a, 46a. Although admitting "the Bankruptcy Code contains no explicit authorization for the initiation of an adversary proceeding by a creditors' committee," it found "implied" authorization in other Code provisions, and it declared itself bound by prior circuit authority: In *Parmetex*, *supra*, "we rejected the proposition that creditors 'have no standing to sue because only the * * * trustee has authority to bring adversary proceedings under' the Bankruptcy Code"; instead, "[w]e held that, 'where the trustee stipulated that the Creditors could sue on his behalf and the bankruptcy court approved that stipulation[,] the Creditors had standing to bring the suit.'" *Id.* at 3a-4a, 46-47a (quoting 199 F.3d at 1030-1031). It thus held the committee below

[5] Respondent (Issa) is the trustee of the Liquidating Trust established by the Chapter 11 plan, and he acts as "successor-in-interest to the Committee." App., *infra*, 14a, 57a-58a. He is litigating these proceedings "through the Committee," which "was acting on behalf of the Debtor when the Adversary was filed." *Ibid.*

"had derivative standing pursuant to the stipulation between it and the Debtors, as approved by the bankruptcy court." *Ibid.*

b. The Ninth Circuit denied Capital Cartridge's petition for rehearing en banc; despite the petition directly challenging derivative standing and flagging the circuit conflict, no judge requested a vote. App., *infra*, 42a-43a. Royal Metal did not seek rehearing.

REASONS FOR GRANTING THE PETITION

A. There Is A Clear And Intractable Conflict Over A Significant Question Under The Bankruptcy Code

The decisions below further entrench a preexisting conflict over an exceptionally important question of federal bankruptcy law: when, if ever, can creditors' committees invoke derivative standing to litigate avoidance claims that the Code explicitly assigns to trustees alone. The issue arises constantly in courts nationwide and generates endless confusion. While "[m]ost courts" have embraced some form of derivative standing, "there is contrary authority" barring the doctrine entirely. Hon. Joan N. Feeney et al., 2 *Bankr. L. Manual* § 9:2 (5th ed. June 2024) (Feeney). And even where the doctrine is allowed, courts sharply "differ" over *when* derivative standing is permissible. *Ibid.*

At least three circuits (the Seventh, Fifth, and Third) have cabined derivative standing as a "narrow" exception (*In re Perkins*, 902 F.2d 1254, 1258 (7th Cir. 1990)) satisfied only where the "trustee has unjustifiably refused to pursue the claim" (Feeney, *supra*). Yet "[o]ther courts are more lenient"—"expanding" the doctrine to sweep in *consent-based* derivative litigation. *In re Adelphia Commc'ns Corp.*, 544 F.3d 420, 424 (2d Cir. 2008) (Sotomayor, then-J.) (recounting the circuit's "'implied'" derivative rights,

despite the Code "not expressly authoriz[ing] committees or individual creditors" to sue). In these circuits (the Second, Sixth, Eighth, and Ninth), a creditors' committee can now bring avoidance claims so long as the trustee "consents" (Feeney, *supra*)—despite the Code assigning that power exclusively to the trustee. Still other courts have refused to embrace derivative standing at all or cast serious doubt on its validity—including the Tenth Circuit BAP (in a square holding), the Fourth Circuit (criticizing the doctrine without resolving the question), a four-judge en banc dissent in the Third Circuit (including then-Judge Alito), multiple lower courts, and prominent experts and academics.[6]

Although the issue generates substantial conflicts and confusion, one core point is clear: these so-called "derivative" rights are not found anywhere in the Code—this is a "*judicially-created* doctrine of derivative standing." *Canadian Pac. Forest Prods. Ltd.* v. *J.D. Irving, Ltd. (In re Gibson Group, Inc.)*, 66 F.3d 1436, 1440 (6th Cir. 1995) (emphasis added). It is ultimately founded in the judiciary's (perceived) equitable authority, not the Code's plain text, and the problems here arise directly because courts have largely refused to apply the Code to mean what it says. See, *e.g.*, Feeney, *supra* ("*even absent statutory authority*, case law has developed to permit the avoiding powers to be exercised by other entities") (emphasis added). It is thus little surprise that the doctrine (in its

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[6] See, *e.g.*, Keith Sharfman, *Derivative Suits in Bankruptcy*, 10 Stan. J.L. Bus. & Fin. 1, 3 (2004) ("the rationales offered for permitting derivative suits in bankruptcy are unpersuasive" and "courts [should] cease permitting creditors to prosecute them"); see also Bill Rochelle, *Ninth Circuit Rebuffs Attack on a Committee's Derivative Standing to Sue*, ABI (Mar. 5, 2024) (questioning the "long-standing practice" in light of its atextual nature and this Court's recent bankruptcy-law authority).

various iterations) has produced division: because courts are simply making it up, courts will inevitably disagree over multiple aspects of the judge-made doctrine. Taking Congress at its word would eliminate the conflicts and resolve the persistent confusion: "a situation in which a statute authorizes specific action and designates a particular party empowered to take it is surely among the least appropriate in which to presume nonexclusivity." *Hartford*, 530 U.S. at 6 (describing a related section of the Bankruptcy Code). That describes the relevant avoidance provisions (11 U.S.C. 544, 548, and 550) exactly—and yet some circuits are still embracing judge-made exceptions for committees *not* named in the statute.[7]

In the proceedings below, the Ninth Circuit nonetheless "reaffirmed" its own judge-made "exception" to the *actual* "rule" found in the Code—that trustees alone are "the 'exclusive parties' that may sue on behalf of the estate." App., *infra*, 30a, 73a. And the Ninth Circuit not only stood by its "judicially-created" exception, but it applied the broadest possible version of the doctrine: "circuit

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[7] While this Court expressly reserved this question in *Hartford* (see 530 U.S. at 13 n.5), its rationale is incompatible with derivative standing. See, *e.g.*, *United Phosphorous, Ltd.* v. *Fox (In re Fox)*, 305 B.R. 912, 914-915 (B.A.P. 10th Cir. 2004) ("The mandate of both the [*Hartford*] decision and the statute say unequivocally that only trustees may assert these statutory remedies."); see also *Official Comm. of Unsecured Creditors of Cybergenics Corp. ex rel. Cybergenics Corp.* v. *Chinery*, 330 F.3d 548, 580 (3d Cir. 2003) (Fuentes, J., dissenting) (rejecting derivative standing as "inconsistent with the Supreme Court's plain meaning analysis of the identical phrase in *Hartford Underwriters*"); *Rockstone Capital, LLC* v. *Walker-Thomas Furniture Co., Inc. (In re Smith)*, No. 04-10457, 2006 WL 1234965, at *4 (Bankr. D.D.C. Feb. 27, 2006) (flagging conflict between courts permitting derivative standing and "other courts" "refus[ing] to recognize *any* set of circumstances" for derivative standing—and suggesting *Hartford*'s construction of the Code's "plain language" supports the latter view as "the correct one").

precedent permitted the Debtors to confer derivative standing on the Committee via [s]tipulation." App., *infra*, 34a, 77a; see also *id.* at 4a, 46a.

The existing situation is untenable. As it now stands, derivative standing is available (or not) based entirely on where an action is filed. Some circuits require "unjustified refusals"; others require the opposite ("consent"); and still others disavow the doctrine entirely—accepting the Code's language at face value. The conflict is mature, and there is no possible hope of the split resolving itself. The rampant uncertainty leaves parties guessing whether a derivative suit can proceed—including whether derivative standing will ultimately be upheld on appeal after wasting months (or even years) of costly litigation.

The Court should finally decide the question it left open in *Hartford*: whether derivative standing is permitted at all, and what limits apply if derivative standing does exist. This is the rare opportunity to resolve both questions and eliminate the rampant confusion and waste this issue constantly generates in lower courts. See, *e.g.*, *Cybergenics*, 330 F.3d at 577 (describing situation as "relatively commonplace event"). Because the lower-court conflict is undeniable and entrenched, the petition should be granted.

1. The Ninth Circuit's consent-based doctrine cannot be squared with settled law in at least three circuits. See, *e.g.*, App., *infra*, 19a, 62a (acknowledging that "[s]ome circuits" restrict derivative standing to "narrow[er] circumstances than those allowable in the Ninth Circuit").

a. The Seventh Circuit has long narrowed derivative standing to situations of unjustified refusals: "a creditor must show that the trustee has unjustifiably refused the creditor's demand to pursue a colorable claim." *In re Consolidated Indus.*, 360 F.3d 712, 716-717 (7th Cir. 2004). So while derivative standing is allowed, it is allowed "only in

limited circumstances." *Id.* at 716; see also *In re USA Baby, Inc.*, 424 F. App'x 558, 563 (7th Cir. 2011) ("We have permitted this relief only when the trustee has failed to honor the creditor's priority and 'unjustifiably refused' to bring an action to enforce a claim"); *In re Smart World Techs., LLC*, 423 F.3d 166, 176 (2d Cir. 2005) (understanding the Seventh Circuit's position as endorsing derivative standing "only where a 'debtor was shirking his statutory responsibilities'").

In *Perkins*, for example, the Seventh Circuit initially observed that "[t]he authority to collect the debtor's assets is vested exclusively in the trustee." 902 F.2d at 1257. Yet the court still permitted an exception to that rule, but "only in narrow circumstances"—"the trustee unjustifiably refuses a demand to pursue the action," "the creditor establishes a colorable claim or cause of action," and "the creditor seeks and obtains leave from the bankruptcy court to prosecute the action." *Id.* at 1258; see also *In re Emerald Casino, Inc.*, 867 F.3d 743, 761 (7th Cir. 2017) (same); *Fogel* v. *Zell*, 221 F.3d 955, 965 (7th Cir. 2000) ("If a trustee unjustifiably refuses a demand to bring an action to enforce a colorable claim of a creditor, the creditor may obtain permission of the bankruptcy court to bring the action in place of, and in the name of, the trustee.").

This law is now entrenched in the Seventh Circuit, and lower courts consistently enforce the doctrine despite robust challenges. See, *e.g.*, *In re SGK Ventures, LLC*, 521 B.R. 842, 849 (Bankr. N.D. Ill. 2014) ("Because the Supreme Court has not overruled the Seventh Circuit decisions recognizing derivative trustee standing, those decisions are binding, and the defendants' argument that derivative standing cannot be granted must be rejected.").

b. The Fifth Circuit likewise restricts derivative standing to cases where a trustee unjustifiably refuses to pursue credible litigation: "'the debtor-in-possession' [must

have] refused unjustifiably to pursue the claim.'" *Kreit* v. *Quinn (In re Cleveland Imaging & Surgical Hosp., LLC)*, 26 F.4th 285, 297 (5th Cir. 2022).

As the Fifth Circuit acknowledged, "the circumstances under which a creditors' committee may sue are not explicitly spelled out in the Code." *Louisiana World Exposition* v. *Federal Ins. Co.*, 858 F.2d 233, 247 (5th Cir. 1988). But it found support for a derivative action in two provisions—11 U.S.C. 1103(c)(5) "and/or" 11 U.S.C. 1109(b). *Id.* at 247.[8] And it found that "bankruptcy courts have generally" permitted derivative standing where the trustee (or debtor-in-possession) has "refused unjustifiably to pursue" a "colorable" claim. *Ibid.* While again recognizing that, "[i]n general," "only trustees and debtors-in-possession, *not* creditors, have standing to invoke

[8] Section 1103(c)(5) is a catchall provision that authorizes committees to "perform such *other* services as are in the interest of those represented"—after enumerating a set of powers having nothing to do with derivatively litigating on behalf of the estate. See 11 U.S.C. 1103(c)(1)-(4). And "those represented" by the committee are solely the *creditors*, not the trustee: the committee is "a fiduciary for those whom it represents, not for the debtor or the estate generally." *Official, Unsecured Creditors' Committee* v. *Stern (In re SPM Mgf. Corp.)*, 984 F.2d 1305, 1315 (1st Cir. 1993); see also *Adelphia*, 544 F.3d at 424 n.1. It therefore is a mystery how such a provision would authorize a committee to step into the trustee's shoes for the estate itself. Cf. *Cybergenics*, 330 F.3d at 563 (agreeing with the Fifth Circuit's result, but disagreeing with its rationale: "§ 1103(c)(5) does not confer the sort of blanket authority necessary for the Committee independently to initiate an adversarial proceeding"). And Section 1109(b) merely grants the committee the right to "raise," "appear," and "be heard" on "any issue in a case under this chapter"—a limited power that nowhere authorizes the committee to initiate derivative litigation assigned exclusively to the trustee. 11 U.S.C. 1109(b); see also, *e.g.*, *In re Gibson Group, Inc.*, 66 F.3d 1436, 1446 n.1 (6th Cir. 1995) ("[b]y way of distinction, we do not base our decision regarding a creditor's standing to file an avoidance action on 11 U.S.C. § 1109(b)").

avoidance powers," it nevertheless agreed that derivative standing exists where the trustee "'unjustifiably declines to sue.'" *City of Farmers Branch* v. *Pointer (In re Pointer)*, 952 F.2d 82, 88 (5th Cir. 1992).

But the Fifth Circuit has made clear that this is the only path to derivative standing: the doctrine activates "*only* where the bankruptcy court concludes * * * that the debtor-in-possession ha[s] refused unjustifiably to pursue" a "'colorable" claim.'" *Torch Liquidating Trust ex rel. Bridge Assocs. LLC v. Stockstill*, 561 F.3d 377, 388 n.11 (5th Cir. 2009) (emphasis in original). And lower courts have recognized the narrow limit the Fifth Circuit imposed on the doctrine. See, *e.g.*, *In re On-Site Fuel Serv., Inc.*, No. 18-4196, 2020 WL 3703004, at *4 (Bankr. S.D. Miss. May 8, 2020) (noting "the Eighth Circuit developed a different standard in cases where the trustee consents to representation by a creditor or creditors' committee," but rejecting consent-based derivative standing as "a departure from the standard set forth by the Fifth Circuit").

c. In a sharply divided en banc decision, the Third Circuit also endorsed derivative standing—but only in the context of a trustee unjustifiably refusing to perform his or her duties. And while a four-judge dissent (including then-Judge Alito) would have categorically barred derivative standing (see Part A.3, *infra*), the majority's position was limited to authorizing standing in this single context. *Official Comm. of Unsecured Creditors of Cybergenics Corp. ex rel. Cybergenics Corp.* v. *Chinery*, 330 F.3d 548 (3d Cir. 2003).

At the outset, the majority was clear about the limited relief it was authorizing and the source of that authority: "the issue before us today concerns a *bankruptcy court's equitable power* to craft a remedy when the Code's envisioned scheme breaks down." 330 F.3d at 553 (emphasis

in original); accord *id.* at 567. And while the majority believed three Code sections (11 U.S.C. 1109(b), 1103(c)(5), and 503(b)(3)(B)) "evince Congress's approval of derivative avoidance actions," it was ultimately "bankruptcy courts' equitable powers" that activated derivative standing "where a debtor-in-possession unreasonably refuses to pursue an avoidance claim." *Ibid.*; see also *id.* at 561-562 (derivative standing conferred only "after" the court "determine[s] that the debtor was neglecting its statutory duty to act in the estate's interest"); *id.* at 567 ("the missing link is supplied by bankruptcy courts' equitable power to craft flexible remedies in situations where the Code's causes of action fail to achieve their intended purpose").

At bottom, the majority effectively admitted its holding was atextual: "courts are able to craft flexible remedies that, *while not expressly authorized by the Code*, effect the result the Code was designed to obtain." 330 F.3d at 568 (emphasis added). But it felt that judicial redline was necessary because "derivative standing in this instance achieves Congress's policy goals." *Id.* at 572. And it linked those goals expressly to addressing situations "when a debtor unreasonably refuses to pursue an avoidance action" (*id.* at 579)—the polar opposite of the Ninth Circuit's *consent*-based scheme.

The Third Circuit has since confirmed its position is limited, with its rationale tethered to "unjustified refusals": "A derivative action is one that a bankruptcy court may authorize under its equitable powers *when the Bankruptcy Code's envisioned scheme breaks down*" and "*a trustee fails to comply with his or her fiduciary duties*." *Weyandt* v. *Federal Home Loan Mortg. Corp. (In re Weyandt)*, 544 F. App'x 107, 110 (3d Cir. 2013) (emphases added); see also *Merritt* v. *Cheshire Land Preservation Trust (In re Merritt)*, 711 F. App'x 83, 86-87 (3d Cir. 2017) (same). "Otherwise," the court explained, "there would be

no reason for the Bankruptcy Court to subvert the Bankruptcy Code's usual scheme and grant [] derivative standing to exercise powers normally granted exclusively to the Trustee." *Weyandt*, 544 F. App'x at 110.

That rationale is strictly incompatible with the Ninth Circuit's "derivative-standing-via-consent" holding.

2. While the Ninth Circuit's position is at odds with settled law in three circuits, it is consistent with the views of three different circuits.

a. First, the Second Circuit has likewise endorsed consent-based derivative standing. As the court explained, "[a]lthough not explicitly authorized in the Code, we have extended standing to bring fraudulent conveyance claims under §§ 548 and 549 to additional parties such as creditors when to do so is in the best interest of the estate." *Glinka* v. *Murad (In re Housecraft Indus. USA, Inc.)*, 310 F.3d 64, 70 (2d Cir. 2002). While the court initially restricted derivative standing to situations where "the debtor-in-possession unjustifiably refuses to bring suit," it later "broadened this doctrine" to permit creditor suits where the debtor "consent[s] to prosecution by the committee in their stead." *Ibid.*; see also *Adelphia*, 544 F.3d at 424; *Smart World*, 423 F.3d at 176 n.15 ("We have also recognized that derivative standing may be appropriate where the debtor-in-possession consents.").

Like the Ninth Circuit (and unlike the Seventh, Fifth, and Third Circuits), the Second Circuit now authorizes derivative standing in both "limited instances," not one. *In re AppliedTheory Corp.*, 493 F.3d 82, 85-86 (2d Cir. 2007).

b. The Sixth Circuit has also recognized derivative standing via consent. As that court explained, "[s]ometimes the bankruptcy trustee does not want to do the dirty work, and sometimes the trustee simply *cannot*—like when it has run out of money to pay for lawyers." *In re*

Blasingame, 920 F.3d 384, 389 (6th Cir. 2019). In those situations, the court concluded, "the bankruptcy trustee can allow a creditor to sue on the trustee's behalf, giving the creditor 'derivative standing.'" *Ibid.*

This, again, is opposite the approach taken by other circuits: a trustee *consenting* to sue is not a trustee *unjustifiably refusing* to sue. While this second path is likewise accepted in the Ninth Circuit, it would have failed had this action instead arisen in Chicago, Dallas, or Philadelphia.

c. Finally, the Eighth Circuit has also joined the Ninth Circuit's side of the split. In *In re Racing Services, Inc.*, 540 F.3d 892 (8th Cir. 2008), the court addressed "the uncertainty in this Circuit" over derivative standing. 540 F.3d at 898. It noted the "conflicting views" on the question, including "bankruptcy courts outright reject[ing] derivative standing." *Ibid.* And it further acknowledged the Fourth Circuit's "hostility" toward the doctrine, and the four-judge dissent in the Third Circuit. *Id.* at 898 n.7. But it ultimately embraced both forms of derivative standing: the court held such standing is available when a trustee "*unjustifiably* refus[es] to pursue the creditor's proposed claim," and "when the trustee (or debtor-in-possession) consents (or does not formally oppose) the creditor's suit." *Id.* at 899, 902 (citing *Parmetex*, 199 F.3d at 1031); see also *id.* at 904-905 (same); *In re Foster*, 516 B.R. 537, 543 (B.A.P. 8th Cir. 2014) (explaining the Eighth Circuit adopted the Second Circuit's position).

This holding again cannot be squared with the contrary views of the Seventh, Fifth, and Third Circuits.

3. In yet a third camp, multiple courts, judges, and experts have refused to embrace derivative standing at all—preferring instead to follow the Code's plain text to limit avoidance actions to the textually enumerated parties

(trustees and debtors-in-possession). The weight of authority here is substantial.

a. The Tenth Circuit BAP has squarely rejected derivative standing because "the Bankruptcy Code does not allow such suits." *Fox*, 305 B.R. at 914. The court considered the Code and "f[ound] it to be explicit, unambiguous, and absolute." *Ibid.* It identified different remedies in the Code where "a trustee refuses for whatever reason to pursue a valuable asset," and declared "th[o]se remedies are the ones Congress saw fit to provide for creditors and committees in such cases." *Id.* at 915-916.

The court further acknowledged the "policy" reasons for permitting derivative standing, and conceded that some had possible merit. But it ultimately concluded "this reasoning is best considered by Congress": "it is not up to us to create a remedy for creditors [Congress] has not granted to them, especially when that right is given exclusively to the trustee." 305 B.R. at 916.

b. The Fourth Circuit likewise cast significant doubt on derivative standing. See *In re Baltimore Emergency Servs. II, Corp.*, 432 F.3d 557 (4th Cir. 2005). In the Fourth Circuit's view, the question is both "important" and "difficult." 432 F.3d at 561. It flagged the conflicts among courts, the tension between the doctrine and this Court's *Hartford* decision, and the expert debate on the topic. *Id.* at 560-562. It also explained the importance of "'reducing the number of ancillary suits * * * in the bankruptcy context so as to advance the swift and efficient administration of the bankrupt's estate'"—a "'goal'" "'achieved primarily by narrowly defining who has standing in a bankruptcy proceeding.'" *Id.* at 560-561. It thus found it "far from self-evident that the Bankruptcy Code permits creditor derivative standing." *Id.* at 561.

In the end, the Fourth Circuit left the question unresolved on that record: "even if were to recognize derivative standing in some cases, we would not permit it here." 432 F.3d at 562. But its rationale further undermines the majority position endorsing derivative standing in at least some capacity.

c. As noted earlier, a four-judge dissent in the Third Circuit (including then-Judge Alito) flatly rejected derivative standing. See *Cybergenics*, 330 F.3d at 580 (Fuentes, J., dissenting). The dissent found the doctrine analytically bankrupt on every level: "The Bankruptcy Code does not authorize bankruptcy courts to grant derivative standing to creditors committees," and this Court "has rejected the notion that the federal courts have any policy-making role in construing clear statutory language." *Id.* at 587. In short: "If it is a good idea for creditors' committees to have standing, that is a matter for Congress, not the courts, to decide." *Ibid.*

d. The same concerns have been raised by multiple lower courts and expert commentators. See, *e.g.*, *In re Cooper*, 405 B.R. 801, 812 (Bankr. N.D. Tex. 2009) ("Because of the unique role of a trustee, there would seem to be no equitable rationale to deviate from the Bankruptcy Code's apparent remedial scheme *vis-à-vis* avoidance actions and other estate causes of action. * * * An experienced bankruptcy trustee, unlike a potentially angry and out-for-justice creditor, may have a better instinct for what is worth chasing and what is worth foregoing."); *In re Newcorn Enters., Ltd.*, 287 B.R. 744, 748-749 (Bankr. E.D. Mo. 2002) ("[t]he federal courts are split on whether derivative standing is available to nontrustees"; "[t]he rationale behind denying derivative standing to nontrustees has merit when Congress has granted the power to act solely to the trustee"); *Surf N Sun Apts., Inc.* v. *Dempsey*, 253 B.R. 490, 491, 493 (M.D. Fla. 1999) ("the Code does

not vest bankruptcy courts with the power to grant standing to individual creditors to prosecute such actions"; "this Court respectfully declines to unilaterally expand the confines of section 548 under the guise of equity by adopting the judicially crafted 'extraordinary circumstances' exception to Congress' singular grant of standing to the trustee"); *In re SRJ Enters., Inc.*, 151 B.R. 189, 193 (Bankr. N.D. Ill. 1993) ("Notwithstanding the lack of conferring language (or even an ambiguity) in § 547(b), courts have allowed individual creditors to use trustee avoiding powers in the name of the trustee for the benefit of the estate").

e. And, of course, this Court in *Hartford* reserved the question, but its rationale is directly at odds with derivative standing. It stressed the importance of the plain text; it rejected a parallel reliance on other Code provisions (including Section 1109(b)); it repudiated the contrary reliance on "pre-Code practice and policy considerations"; it brushed aside the possibility that "in some cases the trustee may lack an incentive to pursue payment"; it credited the trustee's "oblig[ation] to seek recovery * * * whenever his fiduciary duties so require"; and it ultimately declared any desire to modify the plain text "a task for Congress, not the courts." 530 U.S. at 4-14.

Each point squarely applies in this context, and undermines the views of those circuits refusing to read the Code to mean what it says. It is exceedingly difficult to embrace the *Hartford*'s animating logic without foreclosing derivative standing.

* * *

The conflict over this fundamental bankruptcy question is deep, obvious, and entrenched. The lower courts disagree whether derivative standing is authorized at all, and further disagree which conditions should determine if

any such standing should be granted. The confusion is palpable, and the importance is key: this kind of litigation has massive stakes, consumes time and resources, derails bankruptcy reorganizations, and embroils bankruptcy judges (with busy dockets) into disputes over whether a party *not* mentioned in the Code can nevertheless displace the single party who *is*. All aspects of the debate have been fully exhausted, and additional percolation is pointless—the courts disagree over every facet of the question presented, and there is no chance of this split dissipating on its own. The Court's immediate review is warranted.

B. The Question Presented Is Exceptionally Important And Warrants Review In This Case

1. The question presented has obvious legal and practical importance. It presents a clear, entrenched conflict on a significant legal question that arises constantly in bankruptcies nationwide. The Ninth Circuit's holding frustrates the Code's effective administration, and invites intolerable confusion in an area that demands uniformity. The issue will continue generating conflicts and uncertainty until this Court provides a definitive answer.

This "judicially created" doctrine also creates needless work for the nation's bankruptcy courts. The Code tasks a specific party with the responsibility to bring these claims and pursue these lawsuits. That party has a fiduciary obligation to the estate and cannot shirk that obligation if the suit has merit. There is no reason to invite burdensome collateral litigation (with its serious imposition of expense and delay) simply so parties *not* listed in the Code can assume the role of the single party that *is* listed in the Code. Under the conflicting tests in various circuits, bankruptcy courts are stuck deciding whether a committee's proposed suit has "merit" (whatever that means);

whether the trustee "unjustifiably" refused to bring litigation (a fact-intensive analysis); whether the suit would benefit the estate or advance the "fair and efficient resolution of the bankruptcy proceedings" (*e.g.*, *Racing Servs.*, 540 F.3d at 902); and whether the trustee in fact *consented*—which itself is occasionally subject to dispute.

The general task involves a "cost-benefit analysis" with both fact-intensive inquiries and complex legal determinations (*e.g.*, *Gibson*, 66 F.3d at 1438—all to decide *whether (atextual) standing exists in the first place*. These pointless inquires distract from the bankruptcy process and create needless work out of whole cloth by simply ignoring the Code's unambiguous language—and its singular assignment of the proper party to consider, evaluate, and pursue avoidance litigation: the trustee.

Review is also essential to ensure the Code's effective administration. There is an overriding (even *constitutional*) importance of achieving national "uniform[ity]" in the bankruptcy context. U.S. Const. Art. I, § 8, cl. 4. For that reason, this Court routinely grants review to resolve even shallow conflicts over the interpretation or application of the Bankruptcy Code. See, *e.g.*, *Husky Int'l Elecs., Inc.* v. *Ritz*, 136 S. Ct. 1581 (2016) (2-1 split); *Baker Botts L.L.P.* v. *ASARCO LLC*, 135 S. Ct. 2158, 2163 (2015) (1-1 split); *Harris* v. *Viegelahn*, 135 S. Ct. 1829, 1836 (2015) (1-1 split); *Clark* v. *Rameker*, 134 S. Ct. 2242, 2246 (2014) (1-1 split). The existence of a *deeper* conflict here is undeniable: petitioners would have prevailed had these proceedings occurred in Colorado, Texas, Illinois, or Pennsylvania, but they lost due to the happenstance that this bankruptcy arose in Nevada. A party's rights under the Code should not be determined by geography. Given the constitutional and practical interests in clarity and uniformity, the existing conflict is particularly intolerable.

2. These cases are an ideal vehicle for (finally) resolving the split. The question is a pure question of law. It was outcome-determinative below, and it was squarely resolved at each level. If respondent lacks "derivative standing," the suits must be dismissed—and petitioners will prevail because the estate's claims are otherwise time-barred. App., *infra*, 12a, 55a.[9] Nor could respondent possibly satisfy the conflicting standard applied in other circuits: whereas those circuits demand a showing that the trustee *unjustifiably refused* to pursue the action, respondent here *conceded* the debtors "'themselves would have prosecuted avoidance claims against [petitioners]'" had they not abandoned their statutory duties to the creditors' committee. *Id.* at 12a, 55a-56a. In short, if this dispute had arisen in Illinois or Texas, this case would have come out the opposite way. There is no conceivable obstacle to deciding this important legal question.

[9] The fact that respondent's claims would be time-barred underscores the overwhelming importance of the question presented. Parties need to know with certainty whether derivative standing exists; otherwise, parties can litigate to judgment only to discover years later on appeal that such standing is categorically unavailable; that standing was approved under an incorrect iteration of this judge-made standard; or that the standard (whatever it is) was not met. This Court's guidance is essential in crafting a uniform rule for this outcome-determinative issue.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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