No.

In the Supreme Court of the United States

AVIANCA GROUP INTERNATIONAL LIMITED,
PETITIONER

v.

BURNHAM STERLING & COMPANY LLC;
BABCOCK & BROWN SECURITIES LLC

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, for purposes of Section 365(d) of the Bankruptcy Code, the "obligation" of a Chapter 11 debtor under a lease "aris[es]" as soon as the obligation accrues, rather than when payment becomes due.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Petitioner Avianca Group International Limited is wholly owned by Abra Group Limited. No publicly held company holds 10% or more of Abra Group Limited's stock.

Petitioner is the successor in interest to Avianca Holdings S.A., which was the debtor and appellant below but no longer exists as an entity.

Respondents are Burnham Sterling & Company LLC and Babcock & Brown Securities LLC.

RELATED PROCEEDINGS

United States Bankruptcy Court (S.D.N.Y.):

In re Avianca Holdings S.A., No. 20-11133 (Jan. 26, 2023)

United States District Court (S.D.N.Y.):

In re Avianca Holdings S.A., Civ. No. 23-1211 (Dec. 29, 2023)

United States Court of Appeals (2d Cir.):

In re Avianca Holdings S.A., No. 24-255 (Feb. 3, 2025)

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Avianca Group International Limited respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-20a) is reported at 127 F.4th 414. The opinion of the district court (App., *infra*, 21a-38a) is unreported but available at 2023 WL 9016495. The opinion of the bankruptcy court (App., *infra*, 39a-58a) is unreported but available at 2023 WL 494255.

JURISDICTION

The judgment of the court of appeals was entered on February 3, 2025. On April 17, 2025, Justice Sotomayor extended the time within which to file a petition for a writ of certiorari to and including July 3, 2025. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 365(d) of Title 11 of the United States Code provides in relevant part:

> (2) In a case under chapter 9, 11, 12, or 13 of this title, the trustee may assume or reject an executory contract or unexpired lease of residential real property or of personal property of the debtor at any time before the confirmation of a plan but the court, on the request of any party to such contract or lease, may order the trustee to determine within a specified period of time whether to assume or reject such contract or lease.
>
> (3) The trustee shall timely perform all the obligations of the debtor, except those specified in section 365(b)(2), arising from and after the order for relief under any unexpired lease of nonresidential real property, until such lease is assumed or rejected, notwithstanding section 503(b)(1) of this title. The court may extend, for cause, the time for performance of any such obligation that arises within 60 days after the date of the order for relief, but the time for performance shall not be extended beyond such 60-day period. This subsection shall not be deemed to affect the trustee's obligations under the provisions of subsection (b) or (f) of this section. Acceptance of any such performance does not constitute waiver or relinquishment of the lessor's rights under such lease or under this title.

* * *

(5) The trustee shall timely perform all of the obligations of the debtor, except those specified in section 365(b)(2), first arising from or after 60 days after the order for relief in a case under chapter 11 of this title under an unexpired lease of personal property (other than personal property leased to an individual primarily for personal, family, or household purposes), until such lease is assumed or rejected notwithstanding section 503(b)(1) of this title, unless the court, after notice and a hearing and based on the equities of the case, orders otherwise with respect to the obligations or timely performance thereof. This subsection shall not be deemed to affect the trustee's obligations under the provisions of subsection (b) or (f). Acceptance of any such performance does not constitute waiver or relinquishment of the lessor's rights under such lease or under this title.

STATEMENT

This case presents an important question concerning the interpretation of the Bankruptcy Code that has divided the courts of appeals. Under Section 365(d)(3) and (d)(5), a debtor in possession (or trustee) in a Chapter 11 bankruptcy must "timely perform all of the obligations of the debtor * * * arising from or after" a specified post-petition date "under an unexpired lease" of certain types of property "until such lease is assumed or rejected." 11 U.S.C. 365(d)(5); see 11 U.S.C. 365(d)(3). The question presented here is when, for purposes of Section 365(d), a debtor's "obligation" under a lease "aris[es]": specifically, whether it arises as soon as the obligation accrues, rather than when payment becomes due.

Petitioner is an airline that used respondents' brokerage services to lease airplanes. Payment for respondents'

services was structured as a series of periodic payments over the life of each lease. After petitioner filed a petition for Chapter 11 bankruptcy, respondents filed multiple claims in bankruptcy court for those payments that came due after the statutory date set by Section 365(d)(5), asserting that they were entitled to payment in full on the theory that petitioner's "obligations" to pay "ar[ose]" on the payments' due dates. Petitioner objected on the ground that the obligations "ar[ose]" as soon as they accrued under the terms of the leases—that is, pre-petition.

The bankruptcy court accepted respondents' view and determined that respondents were entitled to priority claims for payments that came due after the statutory date. The district court affirmed, reasoning that the statutory text, together with the text of the leases, dictated that petitioner's obligations arose when each payment came due. The court of appeals also affirmed, recognizing a conflict in authority on how best to interpret the statutory text but ultimately holding that Congress's use of the phrase "obligations of the debtor," rather than "claim," meant that Congress intended to focus on when payment was owed rather than when the obligations accrued.

The court of appeals' decision was erroneous, and it deepens a circuit conflict on the question whether an obligation first arises when it accrues, as opposed to when payment becomes due, under Section 365(d)(3) and (d)(5). Two courts of appeals have held that an obligation arises when it accrues. But four courts of appeals, including the court below, have reached the opposite conclusion. Because this case is an ideal vehicle for resolving the conflict on an important question of federal law, the petition for a writ of certiorari should be granted.

A. Background

1. Chapter 11 of the Bankruptcy Code allows business entities to seek reorganization when their debts exceed their assets. See 11 U.S.C. 1101-1195; see also *NLRB* v. *Bildisco & Bildisco*, 465 U.S. 513, 517 n.1 (1984). Although the bankruptcy court may direct the appointment of a trustee to control the estate during the reorganization proceedings, more commonly the estate remains under the control of the debtor, which assumes the identity of a "debtor in possession." See 11 U.S.C. 1101(1). The debtor in possession operates the estate and, with some exceptions not relevant here, has the same substantive rights and duties as a trustee. See 11 U.S.C. 1107(a).

Filing a voluntary petition for Chapter 11 bankruptcy constitutes an order for relief under the Bankruptcy Code and triggers an automatic stay. See 11 U.S.C. 301(b), 362(a). The stay bars, among other things, "any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title" (*i.e.*, the filing of the petition). 11 U.S.C. 362(a)(6). Section 503(b)(1) provides an exception to the automatic stay. After notice and a hearing, it permits the debtor in possession (or trustee) to make administrative payments for "the actual, necessary costs and expenses of preserving the estate." 11 U.S.C. 503(b)(1)(A). Those administrative expenses are generally limited to payments for "services rendered after the commencement of the case." 11 U.S.C. 503(b)(1)(A)(i).

2. After filing a petition for Chapter 11 bankruptcy and receiving authorization to continue operating its business, a debtor in possession must decide whether to assume or reject the benefits and obligations of its existing executory contracts and unexpired leases. See 11 U.S.C. 365(a). A contract is "executory" if "performance is due to some extent on both sides." *Bildisco & Bildisco*, 465

U.S. at 522 n.6 (internal citation omitted). When a debtor in possession chooses to "assume" a particular contract, it elects to continue receiving the benefits of that contract while also obligating itself to the continued performance of its contractual duties. See *Mission Product Holdings, Inc.* v. *Tempnology, LLC*, 587 U.S. 370, 373-374 (2019). If the debtor in possession instead chooses to "reject" a contract, it repudiates any further performance of its duties. See *id.* at 374.

Whether a debtor in possession assumes or rejects a contract will affect the nature of the claims held by its contractual creditors. When the debtor in possession rejects a contract, it is deemed to have breached that contract "immediately before the date of the filing of the petition." 11 U.S.C. 365(g)(1); see *Mission Product Holdings*, 587 U.S. at 374. As a result, the counterparty to the contract has a pre-petition claim against the estate for damages resulting from non-performance and so is placed "in the same boat as the debtor's unsecured creditors, who in a typical bankruptcy may receive only cents on the dollar." *Mission Product Holdings*, 587 U.S. at 374. By contrast, when the debtor in possession assumes a contract, it must continue to perform its full obligations pursuant to the contract—in other words, the counterparty can expect to receive payment in full as an administrative expense of the estate. See *Bildisco & Bildisco*, 465 U.S. at 531-532.

3. Because a substantial amount of time may pass between the imposition of the automatic stay and a debtor in possession's decision to assume or reject a contract, Congress has established rules dictating what happens to those contracts during the intervening period. See 11 U.S.C. 365(d). Those rules vary depending on the type of contract in question. As relevant here, for any "unexpired lease of personal property" (subject to certain exceptions not at issue here), the estate "shall timely perform all of

the obligations of the debtor * * * first arising from or after 60 days after the order for relief * * * until such lease is assumed or rejected." 11 U.S.C. 365(d)(5). That provision is modeled on an earlier-enacted provision of the Bankruptcy Code governing "any unexpired lease of nonresidential real property," under which the estate "shall timely perform all the obligations of the debtor * * * arising from and after the order for relief * * * until such lease is assumed or rejected." 11 U.S.C. 365(d)(3). For purposes of the question presented here, the relevant language of Section 365(d)(3) and (d)(5) is materially identical, and it has been interpreted identically across both provisions. See App., *infra*, 11a & n.4; *In re Midway Airlines Corp.*, 406 F.3d 229, 234 (4th Cir. 2005).

As with the assumption of a contract, the effect of Section 365(d)(3) and (d)(5) is to create an administrative claim to the benefit of contractual creditors for "obligations * * * arising" during the relevant statutory period before the contract is assumed or rejected. But unlike payments made pursuant to an assumed contract or other administrative expenses, payments owed under Section 365(d)(3) and (d)(5) are exempt from the requirements of Section 503(b)(1) for administrative expenses.

B. Facts And Procedural History

1. Petitioner is one of Latin America's largest airlines. Respondents are companies that petitioner retained to assist in brokering airplane leases on its behalf. App., *infra*, 3a-4a.

Beginning in 2014, petitioner engaged respondents for the purpose of identifying and leasing suitable airplanes for its use. In all, respondents brokered 20 aircraft leases for petitioner. Under the terms of the leases, petitioner's payments for the brokerage services respondents ren-

dered were structured as "additional rental payment[s]"—amounts that petitioner was required to pay periodically on a preset schedule over the life of the leases. The terms of the leases rendered those additional rental payments the unconditional obligations of petitioner, and they designated the brokers as third-party beneficiaries with the power to enforce their rights to the payments. App., *infra*, 4a, 23a.

2. On May 10, 2020, due to financial distress caused by the COVID-19 pandemic, petitioner and certain subsidiaries filed a voluntary petition for Chapter 11 bankruptcy in the Southern District of New York. As of that date, respondents had received some but not all of the payments owed under the leases. App., *infra*, 3a-5a, 39a.

While its bankruptcy was pending, petitioner operated its business as a debtor in possession, retaining the authority to decide whether to assume or reject its unexpired airplane leases. During that time, petitioner continued to pay the aircraft's lessors for rent that came due. Petitioner, however, did not pay any additional brokerage fees that came due after the petition date. Over the course of two years, petitioner ultimately rejected all 20 leases. App., *infra*, 3a-5a.

3. Respondents filed multiple proofs of claim in the bankruptcy court, arguing that their claims for brokerage fees under the leases were entitled to priority treatment under 11 U.S.C. 365(d)(5). Respondents then moved to compel payment on the ground that their fees "ar[ose]" when the additional payments came due under the leases' schedules, such that fees due at least 60 days after the petition date were entitled to priority treatment. Petitioner objected, arguing that its "obligations" to pay respondents "ar[ose]" pre-petition because respondents rendered

all of their brokerage services, and the terms of the "additional rental payment[s]" were set by the leases, before petitioner filed for bankruptcy. App., *infra*, 5a-6a.

The bankruptcy court granted respondents' motion to compel payment. App., *infra*, 39a-58a. It determined that respondents were entitled to priority treatment based on "both the plain meaning of [Section 365(d)(5)] and the commercial realities of the parties' arrangement." *Id.* at 47a. The court reasoned that the statutory text's referral "to plural 'all obligations' of the debtor 'arising' under 'a lease'" was a "signal[] that each separate payment requirement under 'a' lease constitutes a separate 'obligation.'" *Ibid.* The court noted that, under the terms of the leases, "no payment was due—and thus the debtor had no payment obligation as to any future scheduled payment—until and unless its due date was reached." *Ibid.* Accordingly, the court concluded that petitioner's obligation to pay the relevant additional rental payments "ar[ose]" on the dates specified in the lease schedule. *Id.* at 42a. The court ordered petitioner to pay respondents over $4.3 million. *Id.* at 6a.

4. The district court affirmed the bankruptcy court's order. App., *infra*, 21a-38a. The district court relied on similar reasoning, explaining that "[t]he natural reading of the statute, in concert with the text of the [l]ease [a]greements, dictates that [petitioner's] obligation to make the disputed payments arose when each payment came due." *Id.* at 32a. The court noted that petitioner could have ensured that respondents were left with an unsecured pre-petition claim by rejecting the leases within the 60-day statutory grace period. *Id.* at 36a-37a.

5. The court of appeals also affirmed. App., *infra*, 1a-20a. In so doing, it recognized a "deep, pre-existing split of authority regarding the proper method for determining when a debtor's obligation arises." *Id.* at 11a. The court

of appeals noted that some courts have taken the view that the date of accrual is dispositive of whether a claim is entitled to priority treatment. *Id.* at 11a-12a. Meanwhile, other courts have held that the date at which payment becomes due is dispositive. *Id.* at 12a. The court of appeals followed the bankruptcy and district courts in adopting the latter view, determining that additional rental payments did not arise pre-petition. *Id.* at 20a.

The court of appeals acknowledged that both parties had "put forward plausible interpretations of the word 'arise' because Section 365(d)(5) does not explicitly specify when an obligation can be said to have arisen." App., *infra*, 13a. But it adopted respondents' interpretation primarily because it believed that petitioner's position mirrored "the logic for determining whether a contractual *claim* has arisen pre-petition," whereas Section 365(d)(5) is framed in terms of "*debtor's obligations*" instead of claims. *Id.* at 16a. In the court's view, that difference in language signaled a difference in meaning. *Ibid.* The court expressed concern that petitioner's approach imposed a "post-petition benefit" requirement that contravened Section 365(d)(5)'s directive that the provision applied "*notwithstanding* Section 503(b)(1)." *Id.* at 16a-17a.

REASONS FOR GRANTING THE PETITION

This case presents the question whether, for purposes of Section 365(d) of the Bankruptcy Code, a Chapter 11 debtor's obligation under a lease "aris[es]" as soon as the obligation accrues, rather than when payment becomes due. That question is the subject of an entrenched conflict among the courts of appeals. In holding that an obligation "aris[es]" when payment becomes due, the court of appeals improperly interpreted Section 365(d)(5) to permit creditors to hold priority claims even for amounts that accrue pre-petition. Only the Court can resolve the conflict

and correct that flawed interpretation of the Bankruptcy Code, and this case is an excellent vehicle in which to do so. The petition for a writ of certiorari should be granted.

A. The Decision Below Conflicts With The Decisions Of Other Courts Of Appeals

The court of appeals acknowledged a "deep, pre-existing split of authority" on the question of when a debtor's obligation pursuant to a lease "aris[es]" for purposes of Section 365(d)(3) and (d)(5). App., *infra*, 11a. Two courts of appeals, together with numerous lower courts, have held that a debtor's obligation arises when it accrues, such that an obligation that accrues pre-petition cannot be treated as a priority claim regardless of when payment is due. By contrast, four other courts of appeals (including the court below) have held that an obligation arises when payment becomes due, such that a creditor holds a priority claim for any portion of a payment that is due on or after the statutory date regardless of when the obligation accrued. The resulting conflict warrants the Court's review.

1. a. The Seventh Circuit adopted the "accrual" approach in *In re Handy Andy Home Improvement Centers, Inc.*, 144 F.3d 1125 (1998), holding that Section 365(d)(3) affords priority claims only to those payments owed pursuant to a lease which first accrued post-petition and pre-rejection. See *id.* at 1128. In *Handy Andy*, the terms of a commercial lease between the parties required the lessee to reimburse the lessor for property taxes that the lessor paid in the first instance. See *id.* at 1126-1127. Although the taxes were assessed well before the lessee petitioned for bankruptcy, the lessor issued an invoice for reimbursement only after the date specified in Section 365(d)(3). See *ibid.*

In an opinion written by Judge Posner, the Seventh Circuit held that the lessee's "obligation" arose when the taxes were assessed, rather than when the lessor issued the invoices for recovery of the taxes. See 144 F.3d at 1127. That was so because the amount owed became "fixed irrevocably" on the last day of each tax-assessment period; the lessee's obligation to pay the assessed amount became unconditional on that day. *Ibid.*

That interpretation, the Seventh Circuit reasoned, was consistent with the statutory context and history. See 144 F.3d at 1127-1128. The Bankruptcy Code is designed to "enable the debtor to keep going for as long as its current revenues cover its current costs, so that it does not collapse prematurely because of the weight of its existing debt." *Id.* at 1127. But maintaining the estate as a going concern requires the participation of other entities on which the debtor relies to conduct its business. As the Seventh Circuit explained, the Bankruptcy Code incentivizes most such entities to continue to engage with the debtor by awarding them "a high priority in the distribution of [the] debtor's estate." *Ibid.* But for certain services that are fundamental to the estate's preservation, the Bankruptcy Code takes a firmer hand. For example, landlords are prohibited from evicting their tenants until those tenants elect to assume or reject their leases. See *id.* at 1128. Section 365(d)(3) compensates those landlords by permitting them to "collect the rent fixed in the lease" during the statutory period. *Ibid.*

b. In addition, although it did not adopt the "accrual" approach in so many words, the Sixth Circuit applied the reasoning of that approach in *In re Koenig Sporting Goods, Inc.*, 203 F.3d 986 (2000), which addressed an unexpired lease in which rent was due in advance of the lessee's use of a property. See *id.* at 989.

In *Koenig Sporting Goods*, the parties had entered into a lease of commercial property for which rent was due on the first of each month. See 203 F.3d at 987-988. The lessee filed bankruptcy before the first of the month, but rejected the lease shortly after the first of the month and asserted that Section 365(d)(3) required it to pay only a prorated amount. See *id.* at 988.

The Sixth Circuit held that Section 365(d)(3) required the debtor in possession to pay the full month's rent. See *Koenig Sporting Goods*, 203 F.3d at 987, 990. The court reasoned that the debtor "was obligated to pay [the creditor the rent amount] in advance on the first of each month," such that the "specific obligation to pay rent for December 1997 arose on December 1, which was during the postpetition, prerejection period." *Id.* at 989. In that circumstance, the court explained, requiring full payment also made good policy sense, because "[t]he debtor alone was in the position to control [the creditor's] entitlement to payment of rent for December" by choosing to reject the lease before or after rent came due. *Ibid.* In that case—involving a "month-to-month, payment-in-advance lease" where the debtor had "complete control over the obligation"—the court "believe[d] that equity as well as the statute favor[ed] full payment to [the creditor]." *Ibid.* The Seventh Circuit later reached the same conclusion in materially identical circumstances, citing the Sixth Circuit's decision as well as its own earlier decision in *Handy Andy*. See *HA-LO Industries, Inc.* v. *CenterPoint Properties Trust*, 342 F.3d 794, 799-800 (2003).

c. Several other federal courts have adopted the accrual approach. Most notably, the Bankruptcy Appellate Panel for the Tenth Circuit did so in *In re Furr's Supermarkets, Inc.*, 283 B.R. 60 (2002). The debtor in that case received a post-petition bill for three months of rent and twelve months of tax obligations, almost all of which had

accrued pre-petition. See *id.* at 64. Agreeing with the Seventh Circuit's "better-reasoned" approach in *Handy Andy*, the appellate panel held that Section 365(d)(3) required the debtor to pay only the portion of the rent and tax obligations that had accrued after the order for relief. See *id.* at 68. The court reasoned that a contrary approach would give an "unwarranted" meaning to Section 365(d)(3) and "unravel[]" the Bankruptcy Code's carefully calibrated priority scheme, allowing lessors unfairly to "leap-frog[] over other unsecured creditors." *Id.* at 69. Many district courts have reached the same conclusion, see, *e.g.*, *In re Door to Door Storage, Inc.*, No. 17-1385, 2018 WL 1899361, at *2 (W.D. Wash. Apr. 20, 2018); *In re William Schneider, Inc.*, 175 B.R. 769, 771, 773 (S.D. Fla. 1994); *In re Duckwall-Alco Stores, Inc.*, No. 90-4064, 1992 WL 365326, at *2 (D. Kan. 1992), as have a number of bankruptcy courts, see, *e.g.*, *In re Winn-Dixie Stores, Inc.*, 333 B.R. 870, 873 (Bankr. M.D. Fla. 2005); *In re Learningsmith, Inc.*, 253 B.R. 131, 134-135 (Bankr. D. Mass. 2000); *In re Almac's, Inc.*, 167 B.R. 4, 8 (Bankr. D.R.I. 1994).

2. In addition to the Second Circuit in the decision below, three other federal courts of appeals (two over dissents) have adopted a "billing" approach, holding that Section 365(d)(3) and (d)(5) affords priority claims to payments owed pursuant to leases when the payments become due, regardless of when the underlying obligations accrued.

a. The Third Circuit adopted the billing approach in *In re Montgomery Ward Holding Corp.*, 268 F.3d 205 (2001). There, as in *Handy Andy*, the lessor sought from the lessee reimbursement for taxes that had accrued pre-petition but for which the lessor sent invoices following entry of the order for relief. See *id.* at 207-208. Creating an express conflict with the Seventh Circuit's decision in

Handy Andy on materially identical facts, the Third Circuit held that an obligation pursuant to a lease does not arise when the obligation accrues, but rather when the lessee "becomes legally obligated *to perform*," such that the debtor-lessee was required to pay the lessor for all taxes invoiced following the statutory date regardless of when those taxes had been assessed. *Id.* at 209, 212 (emphasis added).

The Third Circuit reasoned that "the nature of the 'obligation' and when it 'arises'" must be determined by "look[ing] to the terms of the lease." 268 F.3d at 209. While the Third Circuit was "reluctan[t]" to diverge from the Seventh Circuit and "acknowledge[d] that proration was the pre-Code practice," it nevertheless concluded that Section 365(d)(3) was "unambiguous" and that "no other reasonable interpretation" would be consistent with its text. *Id.* at 210-211.

Judge Mansmann dissented. In her view, the majority's approach effectively gave "an unwarranted preference to landlords for recovery of 'prepetition' debts." 268 F.3d at 212. Nor did anything in the text bar the adoption of the accrual approach: while "the terms of the lease determine the obligation," she noted, "[n]othing in the [statutory] text is inconsistent with the common-sense view that when an obligation arises may be fixed by its intrinsic nature and/or by the extrinsic circumstances of its accrual." *Id.* at 213. Thus, "[a]n obligation attributable to a particular time may well be said to 'arise' at that time, and an obligation that accrues over time may be said to 'arise' as it accrues, without doing violence to the statutory language." *Ibid.*

b. The Fourth Circuit reached a similar conclusion in *In re Rose's Stores, Inc.*, 155 F.3d 560, 1998 WL 393984 (1998) (unpublished table disposition). Affirming the dis-

trict court, the Fourth Circuit concluded that rent payments that "came due under [the] leases after the bankruptcy petition had been filed" were "obligations that arose post-petition by the terms of the contracts," such that the debtor was required to pay them under Section 365(d)(3). *Id.* at *1.

Judge Michael dissented. In his view, "[t]he language of [Section] 365(d)(3) is ambiguous as to whether an obligation 'arise[s]' when the obligation is due to be paid or when it accrues." 1998 WL 393984, at *1. But "[t]he overall structure of the Bankruptcy Code and the legislative history both indicate that Congress intended to adopt the accrual theory," which had also been "applied by the overwhelming majority of courts" to have considered the question at that time. *Ibid.*

c. The Eighth Circuit adopted the billing approach in *In re Burival*, 613 F.3d 810 (2010). The parties in that case had entered into a lease for commercial farmland that divided the annual rent into two payments, one due in April and the other in December. See *id.* at 811. The lessee filed for bankruptcy days before the December payment was due, but did not reject the lease until well after. See *ibid.* The Eighth Circuit concluded that Section 365(d)(3) required the debtor to pay any portion of rent billed during the statutory period regardless of when the value of the land was used. See *id.* at 812-813. The court reasoned that any reduction based on the extent to which the property "preserved the estate," which the court viewed as otherwise required by Section 503(b)(1), would "violate the specific language" of Section 365(d)(3), which requires performance of a debtor's obligations "notwithstanding" the requirements of Section 503(b)(1). *Ibid.*

B. The Decision Below Is Incorrect

In this case, the court of appeals held that, despite the Bankruptcy Code's general rule that a claim arising prepetition may not receive priority treatment, an obligation pursuant to a lease must give rise to a priority claim when payment becomes due after the statutory date established in Section 365(d)(5), regardless of when the obligation accrued. That holding is incorrect.

1. The text, context, and history of Section 365(d)(5) all favor the accrual approach.

a. The plain text of Section 365(d)(5) requires payment only of an obligation that accrues during the statutory period. The central point of interpretation is to identify the point in time at which an "obligation" first "aris[es]." Dictionary definitions make clear that the existence of an "obligation" is closely tied to the existence of a legal requirement to act: that is, "[a] legal or moral duty to do or not do something," *Black's Law Dictionary* 1288 (12th ed. 2024), or an "[a]ction, or an act, to which one is morally or legally * * * bound," 10 *Oxford English Dictionary* 648 (2d ed. 1989). To "arise" is "to originate; to stem (from)," *Black's Law Dictionary* 132 (12th ed. 2024), or "[t]o spring up, come above ground, into the world, into existence," 1 *Oxford English Dictionary* 629 (2d ed. 1989). Combining those definitions, an obligation can be said to "originate" or "come into existence" when a source of law commits a person to act (or not to act).

The statute proceeds to identify the relevant source of law: an "unexpired lease of personal property" that has not yet been assumed or rejected. 11 U.S.C. 365(d)(5). Here, the leases at issue required petitioner to make a series of payments to respondents for services that respondents "ha[d] already provided," with the result that petitioner's "obligations to pay" the relevant fees were "un-

conditional." Pet. C.A. Br. 3. Under those terms, petitioner was committed to the specified course of action—to make payments at certain dates—as of the time of execution. The relevant obligations thus came into existence at that time.

b. The statutory context confirms that Section 365(d)(5) requires full payment only of an obligation that accrues during the statutory period. The Bankruptcy Code defines a claim as a "right to payment, whether or not such right is * * * matured," 11 U.S.C. 101(5)(A), and directs the bankruptcy court to "determine the amount of such claim * * * as of the date of the filing of the petition," 11 U.S.C. 502(b). That means that, "[i]f obligation were interpreted to refer to the entire amount that matures and becomes payable on a given date, without regard to whether any part of the amount accrued prepetition," then Section 365(d)(3) and (d)(5) would "conflict with, and constitute * * * exception[s] to, the provisions governing claims." *Learningsmith*, 253 B.R. at 134.

Requiring the debtor in possession fully to perform an obligation that accrued pre-petition would pose a particular threat to the bankruptcy system's priority scheme. See *Furr's Supermarkets*, 283 B.R. at 69. Under the Code, administrative claims are given priority over nearly all unsecured claims. See 11 U.S.C. 507(2)-(10). But the billing approach would render some unsecured claims entitled to full performance under Section 365(d) (either in whole or in part), giving them priority even "before payments to any other administrative claimant or creditor" and allowing those creditors to "leap-frog[] over other unsecured creditors." *Furr's Supermarkets*, 284 B.R. at 69. By contrast, the accrual approach maintains the "overarching policy of treating all creditors within a class (such

as unsecured pre-petition trade creditors) alike." *Montgomery Ward*, 268 F.3d at 213 (Mansmann, J., dissenting).

c. Finally, only the accrual approach is consistent with the relevant statutory history. In a statement addressing the bill creating Section 365(d)(3), Senator Hatch explained that Congress was seeking to address the problem of a commercial landlord being "forced to provide current services—the use of its property, utilities, security, and other services—without current payment." 130 Cong. Rec. 13,068 (May 21, 1984). Congress subsequently sought to address a similar problem encountered by lessors of personal property by enacting Section 365(d)(5), which was modeled on Section 365(d)(3). See *In re Lakeshore Construction Co. of Wolfeboro, Inc.*, 390 B.R. 751, 755 (Bankr. D.N.H. 2008). At the time, such lessors could seek payment only under Section 503(b)(1), which required notice and a hearing and limited recovery to "an amount representing the estate's actual and necessary use of the property." *In re Midway Airlines Corp.*, 406 F.3d 229, 237 (4th Cir. 2005).

2. The court of appeals erred by holding that, for purposes of Section 365(d)(5), a debtor's "obligation" first "aris[es]" only when payment becomes due.

a. As a preliminary matter, the court of appeals veered off course when it relied on the phrase "timely perform" in Section 365(d)(5). The court reasoned that "the use of the word 'perform' * * * requires the existence of some presently existing duty that the debtor must fulfill." App., *infra*, 14a. From there, the court appears to have concluded that a duty to perform cannot exist before the date the bill becomes due. *Id.* at 14a-15a. But that does not follow, because the statute's use of the word "timely" suggests that an obligation might exist both before and after the specified performance date. After all, if

timeliness were a necessary quality of the debtor's obligation, then the statute's direction "timely [to] perform" all "obligations" would be redundant. The statute's qualification that the debtor must "timely perform" obligations that arise during the statutory period simply underscores that the debtor's legal commitment to make payment may exist even though performance is not yet due.

b. The court of appeals also erred by concluding that statutory context favored the billing approach. To begin with, the court of appeals attached significance to Congress's decision to refer to a debtor's "obligation," rather than to a creditor's "claim." See App., *infra*, 14a-16a. But the two concepts are closely related. As the court of appeals itself recognized, "a *claim* will be deemed to have arisen * * * if the relationship between the debtor and the creditor contained all of the elements necessary to give rise to a legal *obligation* * * * under the relevant non-bankruptcy law." *Id.* at 15a (citation omitted). That a claim and an obligation might arise simultaneously is thus unsurprising. Nor does the accrual approach conflate the two: a creditor's "claim" will be limited to the amount of payment that accrued pre-petition, whereas the "obligation" will more comprehensively cover the debtor's legally required duties under the contract regardless of whether they arise pre-petition or post-petition. The function of Section 365(d)(3) is to distinguish between pre-petition and post-petition *obligations* and to require payment in full only of obligations that arise during the statutory period.

In addition, the court of appeals posited that, by directing performance of obligations "notwithstanding [S]ection 503(b)(1)," Congress expressly intended to allow payments for services rendered pre-petition. App., *infra*, 16-17a (citation and emphasis omitted). But even assum-

ing that is correct, it is consistent with the accrual approach, because an obligation can arise in the post-petition period despite the debtor having received a pre-petition benefit. Consider, for example, a contract for services that contained a conditional warranty clause: party A shall owe party B payment for repair of a machine only if the machine continues to operate for 90 days following the repair. If party A files bankruptcy 20 days following completion of the repair, it will have received the benefit of the service pre-petition, but its obligation to pay party B will not arise until the conditional period has expired 70 days post-petition. As that example illustrates, there is no tension between the accrual approach and the statutory exemption from the requirements of Section 503(b)(1).

c. Finally, the court of appeals reasoned that interpreting Section 365(d)(3) and (d)(5) to be consistent with the "pre-1984 practice of prorating payment of a debtor's obligation under a lease, regardless of the billing date," would improperly disregard Congress's "clear indication" that it "intended a departure from past practice." App., *infra*, 17a (citation omitted). But that misunderstands the departure that Congress intended to make. The addition of Section 365(d)(3) and (d)(5) ensured that a lessor would be compensated for property that remained subject to the terms of an unexpired lease without having to give notice, seek a hearing, or demonstrate that the continued use of the property was actually "necessary" to "preserving the estate." 11 U.S.C. 503(b)(1). There is no evidence that Congress intended additionally to depart from the accrual approach and confer priority treatment regardless of when the obligation accrued. The court of appeals' decision was erroneous, and it warrants further review.

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

The question presented in this case is one of substantial legal and practical importance. This case, which cleanly presents the question, is an optimal vehicle for the Court's review.

1. The Court has long recognized that uniformity is fundamental to the proper administration of the Bankruptcy Code. See, *e.g.*, *McKenzie* v. *Irving Trust Co.*, 323 U.S. 365, 369-370 (1945). The Constitution itself acknowledges the importance of uniformity in bankruptcy law, granting Congress the power "[t]o establish * * * uniform Laws on the subject of Bankruptcies." U.S. Const. Art. I, § 8, cl. 4; see *Railway Labor Executives' Association* v. *Gibbons*, 455 U.S. 457, 471-472 (1982). Accordingly, this Court routinely grants certiorari to resolve circuit conflicts over the interpretation of provisions of the Bankruptcy Code, even where those conflicts are shallow. See, *e.g.*, *Truck Insurance Exchange* v. *Kaiser Gypsum Co.*, 602 U.S. 268 (2024); *Harris* v. *Viegelahn*, 575 U.S. 510 (2015); *Clark* v. *Rameker*, 573 U.S. 122 (2014).

In addition, the practical consequences of the conflict on the question presented are significant. The purpose of Section 365(d)(3)—on which Section 365(d)(5) was modeled—was to ensure "current payment" for "current services," requiring payment of post-petition rent obligations at the contractual rate up to the point of rejection. 130 Cong. Rec. 13,068 (statement of Sen. Hatch). The accrual approach best aligns with that purpose because it ensures that the debtor is not bogged down by obligations that accrued pre-petition. As Judge Posner explained, that approach "tracks the purpose of giving postpetition creditors a high priority in the distribution of the debtor's estate" and "enabl[ing] the debtor to keep going for as long as its current revenues cover its current costs." *Handy*

Andy, 144 F.3d at 1127. "In economic terms, the prioritizing of postpetition debt enables the debtor (or trustee) to ignore sunk costs—treat bygones as bygones—and continue operating as long as the debtor's business is yielding a net economic benefit." *Ibid.*

By contrast, the billing approach would thwart that aim. By requiring full repayment of fees accrued pre-petition simply because payment happens to become due during the post-petition statutory period, the billing approach grants certain creditors a windfall, to the detriment of all other creditors and the viability of the debtor as a going concern. "No other creditor is put in [that] position" under Chapter 11. 130 Cong. Rec. 13,068 (statement of Sen. Hatch).

2. This case is the perfect vehicle in which to decide the question presented. The only issue before the court of appeals was whether to affirm an order granting a motion to compel additional rental payments on a priority basis under Section 365(d)(5). See App., *infra*, 2a-3a. As the Second Circuit made clear in the decision below, the sole "task" before it was "interpreting the text of Section 365(d)(5) to determine when [petitioner's] obligation to pay the additional rental payments arose." *Id.* at 11a. And "[t]he parties [did] not dispute the underlying facts found by the bankruptcy court." *Id.* at 3a n.1.

Six courts of appeals have now analyzed the question presented. Those courts have reached different conclusions after substantial analysis. To be sure, the conflict regarding "the proper method for determining when a debtor's obligation arises" first "crystallized in the context of Section 365(d)(3), applicable to leases of real property." App., *infra*, 11a & n.4. But Section 365(d)(5) was modeled on Section 365(d)(3); the relevant language in the two provisions is materially identical; and there is no dispute that the language should be interpreted identically

for purposes of the question presented. See pp. 6-7, *supra*.

This case presents a rare opportunity to resolve the conflict. Appellate review in bankruptcy cases is the exception, rather than the norm. See Troy A. McKenzie, *Judicial Independence, Autonomy, and the Bankruptcy Courts*, 62 Stan. L. Rev. 747, 782-783 (2010) (noting that only one out of every 1,580 bankruptcy cases is reviewed by a court of appeals). Indeed, despite the longstanding conflict, this petition appears to be the first to present the question at issue for the Court's review. A failure to intervene here would risk impairment to both "accuracy and uniformity in the law of bankruptcy." *In re One2One Communications, LLC*, 805 F.3d 428, 451 (3d Cir. 2015) (Krause, J., concurring).

This case thus provides an ideal opportunity to consider and resolve an important question concerning the interpretation of the Bankruptcy Code that has divided the federal courts of appeals. This case is exceptionally well suited for the Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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