No. 25-25

IN THE
Supreme Court of the United States

AVIANCA GROUP INTERNATIONAL LIMITED

Petitioner,

v.

BURNHAM STERLING & COMPANY LLC AND BABCOCK & BROWN SECURITIES LLC,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION

PETER FRIEDMAN
(Counsel of Record)
JONATHAN D. HACKER
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300
pfriedman@omm.com

Counsel for Respondents

PARTIES TO THE PROCEEDING

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

Avianca Group International Limited is the Petitioner.

CORPORATE DISCLOSURE STATEMENT

Respondent Burnham Sterling & Company LLC is wholly owned by Burnham Holdings LLC, which is a wholly-owned subsidiary of Burnham Babcock & Brown LLC. No publicly held corporation owns more than 10% of its stock.

Respondent Babcock & Brown Securities LLC is a wholly-owned subsidiary of B&B Securities Holdings LLC, which is wholly owned by Burnham Holdings LLC, which is a wholly-owned subsidiary of Burnham Babcock & Brown LLC. No publicly held corporation owns more than 10% of the stock.

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INTRODUCTION

The petition presents no issue warranting this Court's review. Most importantly, there is no conflict among the courts of appeals over the issue actually decided below: the proper treatment under 11 U.S.C. § 365(d)(5) of a fixed, periodic lease payment obligation stated in the lease. Although the Seventh and Third Circuits have disagreed over the proper treatment of real property taxes billed separately from a lease under a companion provision, 11 U.S.C. § 365(d)(3), that issue does not arise in this case. And with respect to the issue that *does* arise in this case, all of the circuits are in agreement with the decision below, as the relevant decisions amply illustrate. Further, there is no conflict with the precedents of this Court. Nor does this matter involve a recurring issue of any particular importance. Finally, the decision below was correctly decided. For these reasons, certiorari should be denied.

Petitioner's argument for certiorari rests entirely on a misunderstanding of selected decisions in two circuits—the Sixth and Seventh. In fact, the controlling precedents in both circuits hold the opposite of what petitioner represents on the issue actually decided below. Those circuit precedents agree entirely with the Second Circuit on the application of §§ 365(d)(3)&(5) to fixed, periodic lease-payment obligations stated in the lease, as does every other appellate decision on the issue.

Section 365(d)(5) requires a debtor-lessee in a Chapter 11 bankruptcy to "timely perform all of the obligations of the debtor . . . first arising from or after 60 days after the order for relief in [a chapter 11 case]

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." 11 U.S.C. § 365(d)(5). Section 365(d)(3) provides the same for real property leases (absent the 60-day grace period). The provisions were enacted to treat real and personal property leases different from other executory contracts—and to treat property lessors different from other creditors—because of concerns that the normal bankruptcy rules imposed greater burdens on lessors of property than they imposed on other creditors.

Consistent with the statute's broad text and explicit objective, federal appellate courts have uniformly recognized that §§ 365(d)(3)&(5) require a debtor that is a lessee under a pre-petition lease (*i.e.*, a lease entered into before the bankruptcy case is commenced) to continue making fixed, periodic payments as they come due under the lease terms (subject to § 365(d)(5)'s 60-day grace period). *See HA-LO Indus., Inc. v. Centerpoint Props. Tr.*, 342 F.3d 794, 796 (7th Cir. 2003); *Cukierman v. Uecker (In re Cukierman)*, 265 F.3d 846, 850-51 (9th Cir. 2001); *Koenig Sporting Goods, Inc. v. Morse Road Co. (In re Koenig Sporting Goods, Inc.)*, 203 F.3d 986, 989 (6th Cir. 2000); *see also Rose's Stores, Inc. v. Saul Subsidiary I, L.P. (In re Rose's Stores, Inc.)*, 155 F.3d 560 (4th Cir. 1998) (per curiam) (unpublished). That rule applies fully to fixed, periodic payments for pre-petition services that are part of the lease. *See, e.g.*, *Cukierman*, 265 F.3d at 850-51. Because §§ 365(d)(3)&(5) expressly exempt lease obligations from the normal Code requirement that post-petition debts (*i.e.*, those

arising after the bankruptcy case is commenced) receive priority only if—and only to the extent—they provide a post-petition benefit to the estate, lessors are entitled to enforcement of all fixed, periodic lease-payment obligations, even if they provide *no* post-petition benefit to the estate. Pet App. 16a-17a.

No appellate decision holds otherwise, including *HA-LO* and *Koenig*, which Petitioner cites as agreeing with its position and rejecting the Second Circuit's decision. In fact, both decisions explicitly hold that, when a pre-petition lease fixes periodic payment duties, those payment obligations "arise" under § 365(d)(3) when the payments become due. That rule is exactly the rule applied by the Second Circuit in this case. Petitioner's characterization of *HA-LO* and *Koenig* as conflicting with the decision below is baffling.

Petitioner's argument for certiorari rests on a another, related mistake. Petitioner relies on the Seventh Circuit's decision in *In re Handy Andy Home Improvement Centers, Inc.*, 144 F.3d 1125 (7th Cir. 1998), as allegedly conflicting with the Second Circuit's decision here, but the conflict is illusory. *Handy Andy* addressed a materially different factual scenario involving a debtor-lessee's obligations to pay property taxes assessed for pre-petition periods, but not billed by the landlord until the post-petition period. Lest there be any doubt that the distinction matters, the Seventh Circuit in *HA-LO* later distinguished *Handy Andy* on precisely this basis, confirming that the Seventh Circuit does not now—and indeed never did—apply a different approach than the Second Circuit to fixed, periodic lease-payment obligations.

What Petitioner perceives as a conflict justifying certiorari is actually a shallow disagreement between the Seventh and Third Circuits particular to the property-tax obligation issue addressed in *Handy Andy*. *See Centerpoint Props. v. Montgomery Ward Holding Corp. (In re Montgomery Ward Holding Corp.)*, 268 F.3d 205, 209 (3d Cir. 2001) (disagreeing with *Handy Andy* in context of property-tax obligations). As the Seventh Circuit's later decision in *HA-LO* confirms, the answer to that disputed property-tax question has no bearing on the issue presented here. This Court may wish to consider the proper treatment of property-tax obligations under § 365(d)(3) in a case actually presenting that issue, but this is not that case.

The distinct issue presented here is straightforward, uncontroversial, and unworthy of this Court's review. Certiorari should be denied.

STATEMENT

In 2014, Petitioner began contracting with Respondents to arrange the financing and leasing of certain aircraft. Pet. App. 4a. Under their leases, Petitioner agreed to pay for Respondents' brokerage services by making "Additional Rental Payments," which were to be paid on a fixed schedule over the life of the lease. *Id.* Respondent's acceptance of periodic payments under the lease is an atypical mechanism for compensating an arranger for brokerage services, and it provided a significant benefit to Petitioner, enabling it to spread out the cost of Respondents' services over time and treat them as rental costs, rather than paying Respondents' fees up front. Accordingly, the amounts owing are clearly stated as part of each lease, and are plainly included as lease obligations.

Each applicable lease agreement includes a schedule establishing the dates and amounts of the Additional Rental Payments Petitioner would pay to Respondents. Each lease also states that Respondents "already provided services prior to the Delivery Date" for the aircraft and "accordingly . . . that [Petitioner's] obligations to pay the [Broker] Fees hereunder are unconditional." *Id.* at 23a.

On May 10, 2020, Petitioner filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code in the U.S. Bankruptcy Court for the Southern District of New York, which entered an "order for relief" that day. *Id.* at 3a. The order for relief initiated the 60-day clock in § 365(d)(5) for Petitioner (as debtor-in-possession, *see* 11 U.S.C. § 1107(a)) to assume or reject its existing personal property executory contracts. Petitioner did not assume or reject the lease agreements to which Respondents (and others) were party during that grace period, but instead gradually rejected the lease agreements over the next two years. Pet. App. 23a–24a. After the sixtieth day and prior to rejection, Petitioner was required under § 365(d)(5) to timely perform all the payment obligations to Respondents and other lease parties that arose and came due as specified in the lease agreements. Petitioner did not do so with respect to Respondents. *Id.* at 24a.

In 2022, Respondents timely asserted their contractual rights to payment of the unpaid Additional Rental Payments by filing a motion to compel Petitioner to fulfill its contractual obligations pursuant to § 365(d)(5). *Id.* at 25a. Petitioner objected on various grounds, including that its obligation to make the Additional Rental Payments arose when the lease was

executed, which was *before* the petition date, so Respondents were not entitled to compel payment under § 365(d)(5) and instead were entitled only to an unsecured claim for the amounts owed. *Id.*

The bankruptcy court granted Respondents' motion to compel in relevant part. The court held that lease payments were "obligations" that did not "arise" until they became due under the lease, and thus Petitioner was required under § 365(d)(5) to make the payments that became due more than sixty days after the petition date. *Id.* at 50a–51a.

The district court affirmed. The "natural reading of the statute," the court held, is that Petitioner's "obligation to make the disputed payment arose when each such payment became due." *Id.* at 32a. The court noted that the "parties to the Leases—all sophisticated entities—contracted in a manner that makes plain their intent to ensure that [Petitioner's] payment obligations did *not* arise at the time the Lease Agreements were signed." *Id.* at 33a (emphasis added). The court found Petitioner's "reading of Section 365(d)(5)—at least as applied to this case—to be strained," because "upon the parties' signing of the Lease Agreements, [Petitioner] had no obligations to 'perform.'" *Id.* at 33a–34a. The court also rejected Petitioner's non-textual arguments. *Id.* at 34a–35a.

The Second Circuit unanimously affirmed. The court held that the phrase "first arising from or after 60 days after the order for relief" in § 365(d)(5) means that "the duty the debtor must perform has to 'originate from' or 'come into being' under an unexpired lease of personal property 60 days after the order for relief or later." *Id.* at 14a. Petitioner's contrary

theory, the court held, misconstrued the statute's text and contravened its history and objectives. *Id.* at 11a–20a. The court also observed that if Petitioner had wanted to avoid the consequences dictated by the statute, it had two "safety valves" it could have used, but did not. *Id.* at 20a. For one, it could have rejected the leases during the 60-day grace period, before it was required to perform. *Id.* For another, it could have petitioned the bankruptcy court to amend its payment obligations after the 60-day grace period lapsed. *Id.*

Petitioner did not seek rehearing or rehearing en banc. It instead proceeded to file its petition for a writ of certiorari.

REASONS FOR DENYING THE PETITION

I. NO DECISION FROM ANY COURT CONFLICTS WITH THE SECOND CIRCUIT'S DECISION

Petitioner contends that certiorari is warranted to resolve an "entrenched conflict among the courts of appeals." Pet. 10. But no such conflict exists with respect to the issue actually decided below. Petitioner's contrary contention misconstrues the appellate cases it claims to be in conflict with the decision below. In fact, two of the "conflicting" appellate decisions Petitioner cites affirmatively *agree* with the rule the Second Circuit adopted. And while the Second Circuit's opinion itself refers to a "deep, pre-existing split of authority regarding the proper method for determining when a debtor's obligation arises" under §§ 365(d)(3), it identifies only one precedential appellate decision—the Seventh Circuit's decision in *Handy Andy*—that ostensibly adopts a position

contrary to the Second Circuit's. Pet. App. 11a. And that seemingly contrary position arises out of materially different lease provisions and contractual obligations involving *real property-tax* obligations, as the Seventh Circuit itself later confirmed in *HA-LO*. *See infra* at 12-13.

As in *Handy Andy*, some courts have applied an "accrual" approach to certain property-tax obligations of a debtor-lessee, holding that such obligations arise for purposes of § 365(d)(3) if they are attributable to property taxes that accrued pre-petition, even if the debtor-lessee was not billed for the payment until after the bankruptcy. *See infra* at 15-17. In that same setting, other courts have applied a "billing date" approach to property-tax obligations, concluding that such obligations arise under a lease whenever the lease requires the debtor-lessee to pay the tax bill. *Id.*

The "billing date" versus "accrual date" nomenclature makes some sense as applied in the property-tax context in which the lessor as counter-party may be able to manipulate the timing of when it invoices a debtor in order to manufacture a post-petition obligation. But the labels reflect no substantive disagreement over proper application of § 365(d)(5) to the facts of *this* case, which involves fixed, periodic lease-payment obligations that arise on specified dates not subject to manipulation. As to this factual scenario, the "billing date" label is imprecise at best: the obligation to make a fixed rental payment does not arise on whatever date the lessor decides to *bill* for the payment, as in *Handy Andy*, but on each pre-specified date the lease terms *require* payment. And regardless of the label applied, every relevant appellate decision agrees that a fixed, periodic lease-payment obligation

does not "arise" for purposes of §§ 365(d)(3)&(5) until the payment becomes due and enforceable under the lease terms.

In short, this case implicates no circuit conflict warranting certiorari review.

A. No Circuits Disagree With The Second Circuit On The Application Of §§ 365(d)(3)&(5) To Fixed, Periodic Lease-Payment Obligations Stated in the Lease

Every federal appellate court to have addressed the question actually decided below has held that a debtor-lessee must continue to make fixed, periodic lease payments as they come due during the post-petition, pre-rejection period.

1. Petitioner does not mention the Ninth Circuit's decision in *Cukierman*, but it is entirely consistent with the Second Circuit's decision here. In *Cukierman*, the parties to the lease settled an earlier dispute by including in their lease a "further rent" provision that required the lessee to make fixed, periodic payments on a separate promissory note as payments under the lease itself. 265 F.3d at 848. Because the parties "used the lease agreement as a vehicle for [the lessee's] repayment of outside obligations," the "obligation to pay 'further rent' [was] arguably completely unrelated to [the lessee's] use of the property." *Id.* at 850. For that reason, the debtor-lessee contended that the "further rent" payments were not entitled to priority under § 365(d)(3).

The Ninth Circuit disagreed. The court first noted that the fact that lease payments were arguably unrelated to use of the property "might be relevant to

the question of whether or not the lease is a 'true' or 'bona fide' lease covered by § 365(d)(3)." *Id.* But the debtor-lessee had not raised that argument, instead arguing only that the "further rent" lease obligations related to the promissory note should be singled out for treatment different from other lease-payment obligations. The court declined to do so.

"Congress made the provision for trustee compliance broad," the court explained, "extending it to cover *all* the obligations under a lease." *Id.* (emphasis added). That broad language serves the statute's objective, the court continued, which is "to ensure immediate payment of lease obligations," so the lessor is not forced to continue providing services under the lease without receiving the payments due under the lease. *Id.* at 850-51. By establishing "a bright-line rule, encompassing all obligations contained in a bargained-for agreement," § 365(d)(3) "ensures prompt performance of lease obligations by bankruptcy trustees," because it makes crystal clear "which lease obligations they are required to perform in a timely fashion," *i.e.*, *all* of them. *Id.* at 851; *see infra* at 24-26 (discussing objectives of § 365(d)(3)). That "purpose would be frustrated," the court concluded, if § 365(d)(3) required courts to parse whether particular lease-payment obligations are adequately "related to the use of the premises" or properly "constitute 'rent'" as that term has been "interpreted . . . in other sections of the Bankruptcy Code." *Cukierman*, 265 F.3d at 251.

As noted, petitioner does not even acknowledge *Cukierman*, let alone deny its alignment with the Second Circuit's decision in this case.

2. Petitioner does cite the Sixth Circuit's decision in *Koenig*, but Petitioner treats *Koenig* as a *conflicting* decision. It plainly is not. The lease in *Koenig* required the debtor-lessee to pay each month's rent in full, in advance, on the first day of the month. After filing its bankruptcy petition, the debtor rejected the lease effective December 2, one day *after* full rent for December was due. The landlord argued that it was entitled to payment of the full month's rent under § 365(d)(3), and the Sixth Circuit agreed. Under the lease terms, the court held, the debtor "was obligated to pay … in advance on the first of each month," which in the relevant instance was an obligation that arose "during the postpetition, prerejection period." 203 F.3d at 989. The court further explained that, among other things, the debtor could have rejected the lease sooner if it wanted to avoid paying rent for that month, but it did not. *Id.*

Petitioner argues that while *Koenig* "did not adopt the 'accrual' approach in so many words," the decision "employed the reasoning of that approach." Pet. 12. Not so; rather, it held the opposite. According to *Koenig*, the "obligation" under the lease to pay each month's rent arose for purposes of § 365(d)(3) *when it became enforceable under the lease* on the first day of each month. Exactly the same is true here—Petitioner's obligations under the leases to make Additional Rental Payments did not arise until they became legally enforceable on each fixed payment date. That holding aligns squarely with the Sixth Circuit's holding in *Koenig*.

3. In the course of its confused discussion of *Koenig*, Petitioner asserts that the Seventh Circuit "later reached the same conclusion in materially

identical circumstances" in *HA-LO*, which "cit[ed] the Sixth Circuit's decision" in *Koenig*. Pet. 13. Petitioner is correct that *HA-LO* applies the same rule in the same circumstances and reaches the same outcome as *Koenig*. The problem is that Petitioner reads both decisions backwards.

As in *Koenig*, the lease in *HA-LO* required the debtor to pay monthly rent in full on the first day of each month, and the debtor did not reject the lease until three days into the month. Observing that § 365(d)(3) requires a debtor to "timely perform all lease obligations that arise after [the petition date], until the lease is rejected," the Seventh Circuit held that because the debtor's "obligation" did not "arise" until the rent became due the first day of each month, the debtor was required to pay the full month's rent under § 365(d)(3). 342 F.3d at 798. The Seventh Circuit agreed with the Sixth Circuit that the debtor could have avoided paying the full month's rent by rejecting the lease before the first day of the month, when the obligation to pay the rent arose under the lease. *Id.* at 800.

For the reasons explained above in connection with *Koenig*, the Seventh Circuit's holding and analysis in *HA-LO* is entirely consistent with the Second Circuit's decision below. Underscoring its misunderstanding of *HA-LO*, Petitioner invokes *HA-LO*'s citation of the Seventh Circuit's earlier precedent in *Handy Andy* (Pet. 13), but Petitioner ignores the point of that citation, which was to explain why *Handy Andy* involved a *different* kind of legal obligation that dictated *different* treatment under § 365(d)(3). *See infra* at 15-17 (discussing *Handy Andy*). On the facts that matter here, the Seventh Circuit's more recent,

controlling precedent in *HA-LO* confirms the absence of any circuit conflict warranting certiorari review.

4. The uniformity among relevant circuit precedents is also reflected in the Eighth Circuit's decision in *In re Burival*, 613 F.3d 810 (8th Cir. 2010). In that case, the lease required the debtor to make periodic rent payments in April and December. *Id.* at 811. The debtor filed for bankruptcy in November, but did not reject the lease before the December rent came due. The Eighth Circuit held that the debtor was required to pay the entire amount of the December rent because its payment obligation arose under the prepetition lease, for purposes of § 365(d)(3), when the payment became due. *Id.* at 812.

5. The same is true for the Fourth Circuit's unpublished decision in *Rose's Stores*. Like this case, *Rose's Stores* involved leases requiring periodic payments of fixed amounts on specific dates. The court held that the debtor-lessee was required to make postpetition payments as they "came due under [the] leases," because the payments were "obligations that arose post-petition by the terms of the contracts." 155 F.3d at 560.

6. The analysis and holding of the Third Circuit's decision in *Montgomery Ward* are likewise consistent with the Second Circuit's decision here, but the decision did involve a different fact pattern that potentially implicates different considerations under § 365(d)(3). The lease provisions at issue in *Montgomery Ward* were not the kind of fixed, periodic lease-payment provisions at issue here and in *Cukierman*, *Koenig*, *HA-LO*, *Burvival*, and *Rose's Stores*. Rather, the lease provisions in *Montgomery Ward* involved an

obligation to reimburse the landlord for *property taxes* previously paid by the landlord. 268 F.3d at 207. And in that case, the landlord had paid the taxes before the petition date, but did not send the debtor certain invoices until the post-petition period. As the panel majority construed the lease, the debtor-lessee had no duty to reimburse property taxes until it was invoiced for them. *Id.* at 209. The court accordingly held that § 365(d)(3) applied to the payment, because "an obligation arises under a lease for the purposes of § 365(d)(3) when the legally enforceable duty to perform arises under that lease." *Id.* at 211.

As Petitioner observes, the *Montgomery Ward* court acknowledged the tension between its decision and the Seventh Circuit's decision in *Handy Andy*, which also involved a debtor-lessee's obligation to reimburse property-tax payments paid by the landlord. *Id.* at 210. That tension arose, however, because of the courts' divergent understanding of when *property-tax* obligations "arise" for purposes of § 365(d)(3), as the next section shows.

As to fixed, periodic lease-payment obligations, however, every relevant circuit decision agrees that such obligations arise under a lease for purposes of §§ 365(d)(3)&(5) only when the payments become due.

B. The Seventh Circuit's Decision In *Handy Andy* Does Not Conflict With The Decision Below

Leaving aside Petitioner's misreading of *Koenig* and *HA-LO*, its argument for certiorari rests on a claimed conflict between the Second Circuit's decision and the Seventh Circuit's decision in *Handy Andy*. No such conflict exists.

The dispositive difference between this case and *Handy Andy* has already been previewed. As noted, *Handy Andy,* like *Montgomery Ward*, involved a lease provision requiring the debtor-lessee to reimburse the landlord for property-tax obligations paid by the landlord. 144 F.3d at 1126–27. In the Seventh Circuit's words, *Handy Andy* "addressed a situation in which non-rent expenses (real estate taxes) . . . had in part accrued prepetition . . . but were not billed" until the post-petition, pre-rejection period. *HA-LO*, 342 F.3d at 798.

More specifically, under the lease in *Handy Andy*, the landlord would pay property taxes and then invoice the lessee for reimbursement, which would be due with the lessee's next rental payment. 144 F.3d at 1126. The landlord received a property tax bill before the petition date, but did not promptly pay and transmit it to the lessee for reimbursement. *Id.* at 1127. The landlord instead delayed transmitting the bill until after an involuntary bankruptcy petition was filed and an order for relief was entered. *Id.* The landlord then invoiced the debtor-lessee for the property taxes attributable to (and billed by the government for) the pre-petition period, and later submitted a second invoice for taxes attributable to both pre- and post-petition periods. *Id.*

On that record, the Seventh Circuit held that § 365(d)(3) did not apply to the taxes attributable to the pre-petition period, even though the lease only required reimbursement after the lessor *invoiced* the lessee, which occurred post-petition. *Id.* As the court observed, the landlord might well have "delayed the transmission of the bill precisely to set the stage" for claiming priority—behavior the court did not "see the

sense of encouraging." *Id.* at 1129. Of course, no such manipulation could occur simply by enforcing fixed, periodic payment obligations specified in the lease.

More generally, in Judge Posner's view, sound bankruptcy policy required the debtor-lessee to be treated like a debtor who owed "trade creditors for supplies that it bought [pre-petition] but never paid for." *Id.* at 1127–28. A typical creditor does not "obtain a priority for what the debtor owes him for goods or services sold to the debtor before the bankruptcy," Judge Posner reasoned, and in his view a debtor-lessor "is in no different situation" under § 365(d)(3), *id.* at 1128—even though that provision was enacted *precisely* to put the "obligations" of leases on a different footing from all other contracts, as explained below, *see infra* at 24-26.

As noted above, the Third Circuit in *Montgomery Ward* did not agree with the Seventh Circuit's application of § 365(d)(3) in *Handy Andy*. In the Third Circuit's view, *Handy Andy* overemphasized "desirable" policy outcomes, failing to recognize that it "is not [the courts'] role . . . to make arguably better laws than those fashioned by Congress." 268 F.3d at 211. Rather than trying to stretch § 365(d)(3)'s language to treat landlords like "trade creditors," the Third Circuit recognized that Congress enacted the statute specifically to treat landlords different from other creditors, leaving for courts only the task of "determin[ing] the nature of the change based on the text chosen." *Id.*

Whatever one might say for each side's position in that disagreement, it is beside the point here, because the Seventh Circuit in *HA-LO* later clarified and

confirmed that *Handy Andy*'s analysis of a debtor-lessee's *property-tax* reimbursement obligations has no bearing on its duties to make fixed, periodic payments under a lease. *See supra* at 12-13. Under the Seventh Circuit's controlling precedent in *HA-LO*, the obligation to make such payments arises only when they become due under the lease terms.

In short, what matters here is not whether *Handy Andy* conflicts with *Montgomery Ward*, but whether it conflicts with the Second Circuit's decision here and the myriad cases agreeing with that decision. It does not.[1] There is accordingly no basis for certiorari.

II. THE UNIFORM VIEW OF THE RELEVANT CIRCUIT DECISIONS IS CORRECT

Like other appellate decisions addressing fixed, periodic lease-payment obligations, the Second Circuit's decision correctly applies § 365(d)(5) to the facts of this case.

A. The Second Circuit's Decision Adheres To The Statute's Plain Language And Structure

Section 365(b)(5) provides in relevant part that the debtor-lessee must "timely perform all the obligations of the debtor . . . arising . . . after" the petition date

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[1] Petitioner passingly mentions *In re Furr's Supermarkets, Inc.*, 283 B.R. 60 (10th Cir. B.A.P. 2002), but does not claim it as a conflicting appellate precedent. Rightly so: as a decision of the circuit's Bankruptcy Appellate Panel, *Furr's Supermarkets* is binding neither on the circuit nor even on lower courts within the circuit. *See Bank of Maui v. Est. Analysis, Inc.*, 904 F.2d 470, 472 (9th Cir. 1990). *Furr's Supermarkets* also involves payment of property-tax obligations, and thus is irrelevant on its own terms for essentially the same reasons *Handy Andy* is irrelevant.

and the 60-day grace period, until the lease is rejected. The application of this provision thus depends on whether the lease "obligation" that the debtor-lessee must "timely perform" is an "obligation" properly characterized in a particular case as "arising" "after" the petition date, or before. Every relevant word in the provision compels the conclusion that "lease payment obligations arise when they become due and payable, and not when the lease is signed." *Fisher v. N.Y. City Dep't of Hous. Pres. & Dev. (In re Pan Trading Corp., S.A.)*, 125 B.R. 869, 876 (Bankr. S.D.N.Y. 1991).

To start, the term "obligation" is not defined in the Bankruptcy Code, so it must be given its "ordinary, contemporary, common meaning." *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 388 (1993) (quotations omitted). The ordinary meaning of "obligation" is an "act or course of action to which a person is . . . legally bound." *Obligation*, Oxford English Dictionary, https://www.oed.com/dictionary/obligation_n?tab=factsheet#34088866 (last accessed Oct. 14, 2025); *see Obligation*, Black's Law Dictionary (12th ed. 2024) ("anything that a person is bound to do or forbear from doing").

Notably, an "obligation" differs from a "claim," which Congress employed many times in the Bankruptcy Code, but conspicuously did not employ in § 365(d)(5). *See R.H. Macy & Co. v. Lakewood Mall Shopping Ctr.*, 1994 U.S. Dist. LEXIS 21364, at *32–33 (S.D.N.Y. 1994) (Sotomaytor, J.) (citing various uses of "claim" throughout Code). And the Code *does* define "claim"—it broadly constitutes a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent,

matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." 11 U.S.C. § 101(5)(A). In other words, a "claim" under the Code explicitly includes payment duties that have not yet matured, without regard to whether or when they may become legally enforceable. Because a present duty to pay is unnecessary, a "claim" can include a right to payment that "arose before the filing of the petition," even though the right was not yet enforceable. Pet. App. 15a (quoting *Elliott v. Gen. Motors LLC (In re Motors Liquidation Co.)*, 829 F.3d 135, 156 (2d Cir. 2016)). The Second Circuit's opinion provides the useful example of a right to indemnification established by a pre-petition contract—that right is treated as a pre-petition claim because it arises when the indemnification agreement is executed, even though the right to *payment* at that point has not yet matured. Pet. App. 15a–16a.

As then-Judge Sotomayor observed, if "Congress wanted to use the concept of a 'claim' in Section 365(d), I presume it knew how to do so," given the many uses of "claim" elsewhere in the Code. *R.H. Macy*, 1994 U.S. Dist. LEXIS 21364, at *33. But because Congress notably did not use "claim" in § 365(d)(3), courts "must interpret 'obligation' according to its ordinary meaning." *Id.* And that ordinary meaning entails a right to payment that *has* become legally enforceable.[2]

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[2] Petitioner itself acknowledges that the terms "obligation" and "claim" are "closely related." Pet. 20. Which is precisely the point—they are *related*, but *different* in one critical respect: "obligation" refers to a legally enforceable duty, whereas "claim" encompasses unmatured payment duties. To the extent Petitioner means to argue that Congress used different terms merely

The adjacent language requiring the debtor to "timely perform" its obligations reinforces the point. *See* Pet. App. 13a. As the Second Circuit explained, the term "perform" means "to carry into effect, [or] discharge (a service, duty, etc.)," *id.* (quoting *Perform*, Oxford English Dictionary, https://www.oed.com/search/dictionary/?scope=Entries&q=perform), and "to adhere to the terms of: treat as an obligation: implement, fulfill," *id.* at 13–14a (quoting *Perform*, Merriam Webster Dictionary, https://unabridged.merriam-webster.com/unabridged/perform). In other words, the term "perform" "requires the existence of some *presently existing duty* that the debtor *must fulfill*." *Id.* at 14a (emphasis added); *see Montgomery Ward*, 268 F.3d at 209 (in context, "obligation" refers to "something that one is legally required to perform under the terms of the lease").

According to Petitioner, the Second Circuit's plain-meaning reading of the statute renders the "timely" modifier unnecessary. Pet. 19-20. Not at all. The term serves obvious and important purposes. Most significantly, it helps ensure that an "obligation" is not treated like a "claim" that must be paid after the *end* of the case, either as an unsecured claim in accordance with the plan, or as an administrative

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because "debtors have obligations" and "creditors have claims," that argument is "a tautology with no support in the statutory language itself." *R.H. Macy*, 1994 U.S. Dist. LEXIS 21364, at *33 (Sotomayor, J.). Congress could have used the broader term "claim" in § 365(d)(5), or it could have provided a broader statutory definition of "obligation." The very fact that Congress chose to use a related but *narrower* term must be given meaning. *See id.*; Pet. App. 16a.

expense that must be paid on the effective date of the chapter 11 plan unless the claimant agrees to different treatment. *See* 11 U.S.C. § 1129(a)(9)(A). The "timely performed" modifier underscores that lease-payment obligations are not subject to such conditions; rather, they must be performed simply as required by the lease terms, including terms prescribing the time of performance. Relatedly, the "timely" modifier confirms that a debtor-lessee cannot delay performance of fixed payment obligations under a lease until it decides whether to assume or reject the lease, as debtors ordinarily can for other contracts pending their assumption or rejection. 11 U.S.C. § 1123(b)(2). In short, the modifier reinforces the effect of all of §§ 365(d)(3)&(5)'s terms, which together operate to make the *lease itself* determinant of a debtor-lessee's continuing obligations during the post-petition, pre-rejection period.

Those terms include the term "arising," which the Second Circuit understood to be "[t]he crux of the parties dispute" below. Pet. App. 13a. On its own, the term "arise" means to "originate from" or "come into being." *Arise*, Merriam Webster Unabridged, https://unabridged.merriam-webster.com/unabridged/arise; *see Arise*, Black's Law Dictionary (12th ed. 2024) ("To originate; to stem (from)" or "[t]o result (from)"). Read in context with "obligations" the debtor-lessee must "timely perform," the phrase "first arising . . . after" the bankruptcy petition is filed is "best understood" as referring to lease obligations that must be *performed* in the post-petition period. Pet. App. 14a. In other words, during the post-petition period, the debtor-lessee has no duty to perform any payment obligation that has not yet come due.

Only when the payment becomes due does the debtor-lessee's "obligation" to make the payment "arise" for purposes of § 356(d)(5).

In addition to that straightforward linguistic analysis, the Second Circuit also correctly emphasized an important "structural point": an "obligation" within § 365(d)(5) is exempt from the normal rule that a post-petition obligation may be enforced as an "administrative expense" under § 503(b) only if the expense provides a post-petition benefit to the estate, and only to the extent the obligation is commensurate with the benefit it provides. Pet. App. 16a. As the court explained, § 365(d)(5) "explicitly requires priority payment of the debtor's obligations first arising 60 days post-petition, '*notwithstanding* section 503(b)(1).'" *Id.* (emphasis added by court). In other words, it is irrelevant under § 365(d)(5) whether "the debtor received a post-petition benefit from the creditor's services," as § 503(b)(1) normally requires. *Id.* at 17a. "Section 365(d)(5) breaks with the requirements of Section 503(b)(1) and refocuses the relevant inquiry on whether the debtor has a performance obligation, instead of on whether the debtor receives a post-petition benefit." *Id* at 18a.

The exemption from § 503(b)(1) conclusively refutes Petitioner's contention that § 365(d)(5) cannot apply to the Additional Rental Payment obligations merely because they provided provide "no [post-petition] benefit" to the estate. Pet. App. 17a (quoting Appellant C.A. Br. 17). As the Ninth Circuit recognized in *Cukierman*, where—as here—the lease itself is not challenged as invalid or not bona fide, the "notwithstanding section 503(b)(1) proviso" in § 365(d)(3) precludes any inquiry into whether a lease "obligation is

related to [debtor-lessee's] use of the premises." 265 F.3d at 850. In short, the "notwithstanding" proviso confirms that what matters under §§ 365(d)(3)(&(5) is simply *whether* a lease requires fixed, periodic payments, not *why* it requires them.[3]

B. The Second Circuit's Decision Is Consistent With The Statute's Objectives

Congress enacted §§ 365(d)(3)&(5) to remove personal and real property leases from the Code's usual treatment of debtor contracts, which allows the debtor

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[3] In addition to making post-petition benefits categorically irrelevant, § 365(d)(5)'s "notwithstanding" proviso confirms the primacy of lease terms in another way. Section 503(b)(1) requires not only that a post-petition obligation confer a post-petition benefit, but it also limits priority to the demonstrated *amount* of the post-petition benefit, usually measured by market value, not the contract price. *See Cramer v. Mammoth Mart, Inc. (In re Mammoth Mart, Inc.)*, 536 F.2d 950, 954 (1st Cir. 1976) ("When the claim is based upon a contract between the debtor and the claimant, the case law teaches that a creditor's right to payment will be afforded first priority only to the extent that the consideration supporting the claimant's right to payment was both supplied to and beneficial to the debtor-in-possession in the operation of the business."); *United Trucking Serv., Inc. v. Trailer Rental Co. (In re United Trucking Serv., Inc.)*, 851 F.2d 159, 162 (6th Cir. 1988) (administrative expenses under § 503 are "'based upon the reasonable value' of the benefits conferred, rather than upon the contract price" (quoting *Am. Anthracite & Bituminous Coal Corp. v. Leonardo Arrivabene, S.A.*, 280 F.2d 119, 124 (2d Cir. 1960)). So, for example, if a non-lease contract imposes a post-petition obligation to pay $10,000 for services that have a market value of only $5,000, then only $5,000 of the obligation will receive priority as an administrative expense. No such calculus applies to lease obligations under §§ 365(d)(3)(5): because of the "notwithstanding" proviso, there is no separate "market value" test for enforcing lease-payment obligations—the lease terms themselves are solely determinant.

to avoid performance of its contractual obligations until it elects to assume or reject the contract. Pet. App. 8a. This structure posed a particular problem for lessors of real and personal property: a debtor-lessee could continue exploiting the lessor's property during the bankruptcy, while the lessor was denied the compensation it expected to receive under the lease. *See HA-LO*, 342 F.3d at 799.

Congress enacted § 365(d)(3) to address that problem and "relieve the burden placed on nonresidential real property lessors (or 'landlords') during the period between a tenant's bankruptcy petition and assumption or rejection of a lease." *Koenig*, 203 F.3d at 989 (quotations omitted); *see* H.R. Rep. No. 103-835, at 50 (1994), *as reprinted in* 1994 U.S.C.C.A.N. 3340, 3359 (§ 365(d)(5) "responds to concerns that [normal] procedure may be unduly burdensome on lessors of personal property"). The "purpose of § 365(d)(3)," in short, was "to ensure that landlords continue to receive payment for lease obligations." *Cukierman*, 265 F.3d at 851.

As the Ninth Circuit observed in *Cukierman*, that objective would be "frustrated" if §§ 365(d)(3)&(5) were construed as applying not to all fixed, periodic lease-payment obligations that come due during the lease term, but only to those particular obligations shown to be adequately "related to the use of the premises" or that "constitute 'rent'" as the term is defined elsewhere in the Code. *Id.* Under that approach, "landlords would not be paid immediately," because debtor-lessees would have "an incentive to withhold performance of lease obligations," in "the hope that the bankruptcy court would subsequently exclude the obligation from the reach of § 365(d)(3)."

Id. For that reason, §§ 365(d)(3)&(5) eschews such obligation-parsing in favor of "a bright-line rule, encompassing *all* obligations contained in a bargained-for agreement." *Id.* (emphasis added) . "The simplicity of this rule prevents delays and disputes caused by uncertainty over whether the provision applies to any given lease obligation." *Id.*; *see* Pet. App. 36a (Congress enacted § 365(d) to "'prevent parties in contractual or lease relationships with the debtor from being left in doubt concerning their status vis-à-vis the estate.'" (quoting *Tully Constr. Co. v. Cannonsburg Env't Assocs., Ltd. (In re Cannonsburg Env't Assocs., Ltd.)*, 72 F.3d 1260, 1266 (6th Cir. 1996) (quoting H.R. Rep. No. 95-595, at 348 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6304)). And by eliminating disputes over whether claims arising from nonperformance of particular lease-payment obligations are entitled to priority, the statute "advances the interest of resolving bankruptcy cases expeditiously." *Cukierman*, 265 F.3d at 851.

To be clear, while the statute indisputably was enacted to establish a clear, administrable rule providing additional protection for creditor-lessors, the resulting scheme is not one-sided in their favor. Rather, the statute was more modestly "designed to tip the balance slightly in favor of creditor protection as compared to the baseline rules set out elsewhere in the Code." Pet. App. 18a. To that end, debtor-lessees still have at least two "safety valves" they can invoke to protect their interests. *Id.* at 20a. For one, they can reject their leases if they believe them to be burdensome (with an extra 60-day grace period for payments under for personal property leases). *Id.*; *see HA-LO*, 342 F.3d at 800 (because of right to reject lease, debtor

"alone controlled [landlord's] entitlement to payment of rent"); *Koenig*, 203 F.3d at 989 (same). In addition, even after the grace period, a debtor can petition the bankruptcy court to amend its payment obligations if justified by the equities of the case and the needs of the estate. Pet. App. 20a. Petitioner did not avail itself of either mechanism here.

Petitioner, unsurprisingly, insists that the better policy outcome is to require courts to parse fixed, periodic payment obligations within a lease and exclude those that do not satisfy a nontextual "accrual" test. Even on their own terms, those policy arguments would not be sound reasons to disregard § 365(d)(5)'s plain meaning: "As this Court has explained, 'even the most formidable' policy arguments cannot 'overcome' a clear statutory directive." *B.P. PLC v. Mayor & City Council of Balt.*, 593 U.S. 230, 245 (2012) (quoting *Kloeckner v. Solis*, 568 U.S. 41, 55 n.4 (2012)). But Petitioner's policy arguments are, in any event, hardly formidable. To the contrary, both the plain text of § 365(d)(5) *and* its underlying policy objectives firmly support the Second Circuit's position.

III. THIS CASE DOES NOT PRESENT A RECURRING AND IMPORTANT QUESTION

Petitioner asserts that "uniformity is fundamental to the proper administration of the Bankruptcy Code." Pet. 22. True enough, but that principle counsels *against* certiorari here, because appellate courts already uniformly agree that when the debtor is the lessee under an unexpired pre-petition lease, §§ 365(d)(3)&(5) apply to all the fixed, periodic payment obligations that come due during the post-petition, pre-rejection period. *See supra* Part I. It is

Petitioner that seeks to upend the settled consensus and sow doubts among courts and litigants about which particular fixed, periodic payment obligations arise when payment is due, and which arise when the lease is executed.

To be sure, as the discussion in Part I shows, there is a *different* disagreement between the Third and Seventh Circuits over a *different* question, *viz.*, whether, and under what circumstances, certain pre-petition property-tax bills sent to a debtor post-petition, either deliberately or otherwise, pursuant to a pre-petition lease, qualify as "arising" post-petition for purposes of § 365(d)(3). *See supra* at 13-14. If this Court considers that distinct issue worthy of review, it can grant certiorari from an appellate decision that actually presents that issue. This one does not.

The legal obligations at issue in this case have generated no confusion among courts and enforcing them implicates none of the manipulation that concerned the *Handy Andy* court. And granting review of the straightforward, easily-resolved issue here would not necessarily facilitate resolution of the potentially thornier questions presented in the property-tax context—the Court could well affirm the Second Circuit's judgment on grounds that would say nothing about how property-tax obligations should be handled. Resolution of the latter question can and should await another day.

Finally, it bears emphasis that the particular lease obligations at issue in this case are themselves atypical. The leasing parties here agreed to provide a special benefit to Petitioner by allowing it to pay for Respondents' brokerage services over time through

fixed, periodic lease payments, rather than making a single upfront payment. The only circuit precedent cited by either party that involved that particular kind of lease obligation is *Cukierman*, which correctly held that § 365(d)(3)'s requirement of post-petition performance until rejection governed the obligation. Two circuit precedents that address similar unusual facts over the course of three decades—and reach the same outcome—is not the stuff of certiorari review.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

PETER FRIEDMAN
(Counsel of Record)
JONATHAN D. HACKER
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300
pfriedman@omm.com

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