No. 25-25

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

REPLY BRIEF FOR THE PETITIONER

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This case presents an acknowledged circuit conflict as to whether the "accrual" approach or the "billing" approach determines when an obligation arises for purposes of Section 365(d) of the Bankruptcy Code. In their brief in opposition, respondents tie themselves in knots to dispute that a conflict exists. They contend that the Seventh Circuit's seminal decision on the question is distinguishable because the obligation at issue there related to taxes, but they fail to identify any textual reason why a tax-related obligation should be deemed to arise at a different time than any other debt. Respondents also deny that a Sixth Circuit decision and a subsequent Seventh Circuit

decision conflict with the decision below. But the reasoning of those cases makes clear that they too apply the accrual rule. And respondents' efforts to chip away at the circuit conflict get them little, because even a 1-1 conflict would warrant this Court's review on an important question involving the interpretation of the Bankruptcy Code.

Respondents' merits arguments are equally unavailing. The billing approach disregards the ordinary meaning of "obligation" and the neighboring words of the statute. And it makes nonsense of the statutory scheme, turning a provision designed to protect lessors who are obligated to provide services during bankruptcy into a provision that grants a windfall to some creditors relative to others.

This case presents the Court with an opportunity to resolve an important question of statutory interpretation, free of potentially confounding questions of contract interpretation that might arise under a different lease. Given the challenges inherent in getting a bankruptcy question to percolate all the way through the appellate courts, this case presents both a rare opportunity to resolve the question presented and a particularly clean 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

As the court of appeals recognized, there is a "deep * * * split of authority" as to whether "the 'accrual' approach" or "the 'billing date' approach" should be used to determine when a Section 365(d)(3) or (d)(5) obligation first arises. Pet. App. 11a-12a & nn. 5, 6. The court picked a side in that split, "hold[ing] that the billing date approach is the approach most consistent with the text of [the statute]" and ruling against petitioner on that basis.

Id. at 20a. Respondents' efforts to deny that this case implicates the conflict are unpersuasive.

1. It is telling that respondents' lead argument on the conflict is an effort to add another case to their column. See Br. in Opp. 9-10. Respondents contend that the Ninth Circuit's decision in *In re Cukierman*, 265 F.3d 846 (2001), "align[s] with" the decision of the court of appeals. Br. in Opp. 10. Even if that were correct, *Cukierman* would merely deepen the conflict implicated by the decision below and underscore the need for review.

But it is wrong. In *Cukierman*, the Ninth Circuit had no occasion to decide between the accrual and billing approaches. Instead, it simply determined that obligations "denominated in a lease as 'further rent'" can qualify for payment under Section 365(d)(3) even though they "represent repayments of promissory notes" rather than anything "related to [a debtor's] use of the premises." *Cukierman*, 265 F.3d at 848, 850. That issue is not presented here. Before this Court, petitioner does not contend that respondents' payments should receive different treatment simply because they relate to brokerage services, rather than use of the property. Instead, as long as the obligation accrued post-petition—for instance, because a brokerage service was provided then—that obligation would be payable under petitioner's rule.

2. Respondents next address the Seventh Circuit's decision in *In re Handy Andy Home Improvement Centers, Inc.*, 144 F.3d 1125 (1998), which unambiguously adopted the accrual approach. At points, respondents insist that no conflict exists at all, see Br. in Opp. 7-8, but elsewhere they contend only that the conflict is not impli-

cated here, see *id.* at 8. Respondents' ambivalence is understandable, because neither argument has much to recommend it.[1]

Respondents describe the Seventh Circuit's position in *Handy Andy* as "seemingly" and "ostensibly" contrary to the decision below, Br. in Opp. 7-8, but those adverbs cannot conceal the square conflict between the circuits. In *Handy Andy*, the Seventh Circuit rejected "the 'billing date' approach," holding that a debtor's obligation under a lease first arose when it accrued (*i.e.*, became "fixed irrevocably") even though that occurred "before [the debtor] was contractually obligated to" provide the reimbursement. 144 F.3d at 1127. Writing for the court, Judge Posner explained that the accrual approach better tracked the statute's design by allowing the debtor "to keep going for as long as its current revenues cover its current costs" while applying the normal priority scheme as to money the debtor borrowed pre-petition. *Id.* at 1127-1128.

Changing tune, respondents then concede that "some courts have applied an 'accrual' approach" while "other courts have applied a 'billing date' approach." Br. in Opp. 8. But they contend that those holdings apply only where the underlying obligation is a "property-tax obligation[]." *Ibid.* That is the linchpin of respondents' whole opposition, and it is wrong. Nothing in the language of Section 365(d)(3) or (d)(5) would allow a distinction based on the nature of an underlying obligation; the text specifically captures "*all* of the obligations of the debtor" that first arise during the relevant period. 11 U.S.C. 365(d)(5) (em-

[1] Respondents do not suggest that decisions addressing Section 365(d)(3) are distinguishable from those addressing Section 365(d)(5); instead, like the court of appeals, respondents correctly treat the two provisions as interchangeable. See, *e.g.*, Br. in Opp. 2, 9, 23-26; Pet. App. 11a n.4.

phasis added); see 11 U.S.C. 365(d)(3). Respondents suggest a policy-based reason for the distinction, arguing that, in the tax context, the lessor "may be able to manipulate the timing" of the invoice. Br. in Opp. 8. But that concern cuts in the other direction: the timing of a property-tax obligation depends in part on the operation of applicable tax laws and the decisions of the taxing authorities, making manipulation comparatively more difficult. See *Handy Andy*, 144 F.3d at 1126. And the Seventh Circuit never rested on tax-specific considerations; instead, it focused on the oddity of applying Section 365(d)(3) to "*any* class" of debts that accrue pre-petition. *Id.* at 1128 (emphasis added). Nor did the decision in this case distinguish the tax context; instead, the Second Circuit acknowledged that its billing approach conflicted with the Seventh Circuit's accrual approach in *Handy Andy*. See Pet. App. 12a n.5. In short, respondents' efforts to limit *Handy Andy* go nowhere.

3. a. Respondents also contend that the Seventh Circuit's subsequent decision in *HA-LO Industries, Inc.* v. *Centerpoint Properties Trust*, 342 F.3d 794 (2003), is "entirely consistent" with the decision below. Br. in Opp. 12. Not so. *HA-LO* followed the accrual rule, as *Handy Andy* required.[2]

In *HA-LO*, the Seventh Circuit considered a lease obligation (paying for rent expenses) that accrued on the first day that the service (providing the real property for use in a particular month) began, shortly before the

[2] To the extent respondents suggest that, in the event of inconsistency, *HA-LO* would govern in the Seventh Circuit because it is the "more recent" and thus "controlling precedent," Br. in Opp. 12-13, that is mistaken under the Seventh Circuit's prior-panel-precedent rule. See *Robledo-Gonzales* v. *Ashcroft*, 342 F.3d 667, 680 n.10 (7th Cir. 2003); 7th Cir. R. 40(e).

debtor rejected the lease. In determining when the obligation arose for purposes of Section 365(d)(3), the court followed the accrual rule, asking when the obligation "accrued and therefore arose." *HA-LO*, 342 F.3d at 799. Because the obligation accrued in full post-petition and pre-rejection, the court deemed the obligation payable under Section 365(d)(3), even though it "cover[ed] in part a period of time that extends beyond rejection of the lease." *Ibid.*

Of particular relevance here, the *HA-LO* court doubled down on *Handy Andy*'s holding that, where expenses under the lease "had in part accrued prepetition * * * but were not billed" until after the petition, those obligations arose pre-petition and so were not payable under Section 365(d)(3). 342 F.3d at 798. And the court recognized that, where expenses accrue pre-petition because they represent a payment for pre-petition services (as in this case and in *Handy Andy*), those "sunk costs" are not payable. *Id.* at 798-799. Respondents contend that the *HA-LO* court invoked *Handy Andy* to explain why the latter case "involved a *different* kind of legal obligation that dictated *different* treatment under [Section] 365(d)(3)." Br. in Opp. 12. In fact, the *HA-LO* court laid out the accrual rule, then applied that rule to the facts. To be sure, the accrual rule led to a different result in *HA-LO* than in *Handy Andy* because the *HA-LO* obligation *accrued* post-petition. See 342 F.3d at 799. But for present purposes, the key points are that the Seventh Circuit has consistently applied an accrual rule—and that, under that rule, this case would have come out the other way.

b. Respondents' effort (Br. in Opp. 11) to distinguish the Sixth Circuit's decision in *In re Koenig Sporting Goods, Inc.*, 203 F.3d 986 (2000), similarly fails. Like *HA-LO*, *Koenig* involved a lease where the disputed payment

obligation accrued on the first of the month, but the relevant service (providing the leased property) continued over the course of that month; the debtor rejected the lease shortly after accrual. See *Koenig*, 203 F.3d at 987. Applying the accrual approach, the Sixth Circuit specifically distinguished that factual scenario from one in an earlier case in which a lease was billed "on December 1 of each year for the *prior* year's occupancy" and the debtor filed for bankruptcy shortly before the obligation came due. *Id.* at 990. In that case, the Sixth Circuit had allowed a lessor to recover on an obligation for pre-petition rent that had accrued but not yet been billed as of the petition date. See *ibid.* (citing *In re Vause*, 886 F.2d 794, 796 (1989)). But because the obligation at issue in *Koenig* accrued post-petition (and pre-rejection), the Sixth Circuit held that the debtor was required to pay under Section 365(d)(3). See *ibid.* That reasoning thus establishes that the Sixth Circuit too has adopted the accrual approach, rather than the billing approach adopted by the decision below.

c. Finally, respondents would discount the decision of the Bankruptcy Appellate Panel for the Tenth Circuit in *In re Furr's Supermarkets, Inc.*, 283 B.R. 60 (10th Cir. B.A.P. 2002), on the ground that a bankruptcy appellate panel decision is not "binding." See Br. in Opp. 17 n.1. But not surprisingly given the expertise of bankruptcy appellate panels, this Court has repeatedly included their decisions in describing circuit conflicts on issues of bankruptcy law. See, *e.g.*, *Schwab* v. *Reilly*, 560 U.S. 770, 778 & n.4 (2010); *Grogan* v. *Garner*, 498 U.S. 279, 283 & n.7 (1991).

d. In short, the question presented implicates a 4-2 circuit conflict (or 4-3, counting the bankruptcy appellate panel). But even if the conflict were shallower, it would be

of no moment: this Court routinely grants review to resolve conflicts between just two courts of appeals on statutory questions. See, *e.g.*, *Bissonnette* v. *LePage Bakeries Park Street, LLC*, 601 U.S. 246, 252 (2024) (No. 23-51); *Cantero* v. *Bank of America*, 602 U.S. 205 (2024) (No. 22-529); *Southwest Airlines Co.* v. *Saxon*, 596 U.S. 450, 455 (2022) (No. 21-309). And recognizing the need for uniformity in the interpretation of the Bankruptcy Code, see U.S. Const. Art. I, § 8, cl. 4, the Court regularly grants review in bankruptcy cases where one side of the conflict resulted in a published decision only in a single circuit. See, *e.g.*, *Mission Product Holdings, Inc.* v. *Tempnology, LLC*, 587 U.S. 370 (2019) (No. 17-1657) (2-1 conflict); *Husky International Electronics, Inc.* v. *Ritz*, 578 U.S. 355 (2016) (No. 15-145) (same); *Baker Botts L.L.P.* v. *ASARCO LLC*, 576 U.S. 121 (2015) (No. 14-103) (1-1 conflict); *Harris* v. *Viegelahn*, 575 U.S. 510 (2015) (No. 14-400) (same); *Clark* v. *Rameker*, 573 U.S. 122 (2014) (No. 13-299) (same).

Review is particularly warranted here in light of the deep disagreement among other federal courts. See Pet. 14; Pet. App. 12a nn. 5, 6. The question is a prototypical example of an important bankruptcy question that is "the subject of a large number of decisions by bankruptcy and district judges," yet rarely reaches the appellate level. *Handy Andy*, 144 F.3d at 1126. Especially given the broader disagreement, the question presented is ripe for the Court's review.

B. The Decision Below Is Incorrect

Respondents' efforts to defend the billing approach on the merits are equally unavailing.

1. In addressing the text of Section 365(d)(5), respondents first set out a definition of "obligation" as an "act or course of action to which a person is * * * legally

bound." Br. in Opp. 18 (quoting *Obligation*, Oxford English Dictionary <tinyurl.com/OED-Obligation> (last visited Oct. 27, 2025)). So far so good, but that language squarely supports the accrual approach: petitioner was "bound" to pay respondents' brokerage fees from the day the leases were executed, even though it was entitled to wait to make those payments.

Respondents next contend that the billing approach is necessary to give meaning to the difference between an "obligation" and a "claim." Br. in Opp. 18-19. But the accrual approach also gives effect to Congress's choice to use "obligation" rather than "claim." First, an "obligation" is a duty of the debtor, whereas a "claim" is a right of the creditor. See 11 U.S.C. 101(5)(A). Second, a "claim" can be "contingent," whereas an obligation arises only when the duty to pay becomes unconditional. See *ibid.*; Pet. 17-18. For both reasons, using "claim" would not have worked.

Respondents stress (Br. in Opp. 20-22) the statute's requirement that a debtor "timely perform" those obligations that "aris[e]" in the statutory period. But that language cuts against respondents' position, because it illustrates that the existence of an obligation and the due date for its performance are distinct concepts: more precisely, that an obligation can "first aris[e]" before "timely performance" is required. 11 U.S.C. 365(d)(5). If, as respondents would have it, an obligation can arise only when it becomes due, the requirement of "timely performance" would be redundant. Under the accrual reading, by contrast, an obligation can arise at one point in time and become due for performance at a later time, thereby giving meaning to the requirement.

Similarly unavailing is respondents' argument that the billing approach is necessary to give effect to Section 365(d)(5)'s exemption from the normal requirements for

"administrative expenses." 11 U.S.C. 503(b)(1); see Br. in Opp. 22. It is entirely consistent with the exemption to recognize that an obligation arises when it accrues (which is often, though not always, when services are performed). Section 503(b)(1) requires a claimant to establish that the payments are necessary and appropriate and that sufficient post-petition value has been provided. But none of that is necessary for a lease obligation that accrues post-petition. So, for example, if a debtor obtains post-petition brokerage services, or post-petition use of the premises, the creditor would be entitled to payment under Section 365(d)(3) and (d)(5) regardless of whether the expense is necessary or priced at fair-market value. Indeed, respondents themselves acknowledge the exemption ensures that the creditor is not limited "to the demonstrated *amount* of the post-petition benefit" and that payment occurs at the "contract price." Br. in Opp. 23 n.3.

2. Respondents end their merits discussion with a lengthy argument about legislative purpose (Br. in Opp. 23-26), but that too cuts against their preferred approach. As the Seventh Circuit has explained, the relevant language is designed to compensate a creditor that is required under a lease to provide goods or services in exchange for a new obligation during the post-petition, pre-election period. See Pet. 12 (discussing *Handy Andy*, 144 F.3d at 1127-1128). But a creditor that provided pre-petition goods or services pursuant to a lease is identically situated to other pre-petition creditors regardless of when the payment would have come due absent the bankruptcy. Conversely, a creditor that is required to provide goods or services under the lease post-petition in exchange for a new obligation would lose out under the billing approach (despite congressional intent) if the debtor rejects the lease after the services occurred and the obligation ac-

crued, but before the payment came due. The accrual approach thus tracks Congress's evident purpose, and respondents identify no reason that Congress would have wanted to give favored treatment to some creditors relative to others based on the billing date.

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

Respondents acknowledge (Br. in Opp. 26) that uniformity is fundamental to the proper administration of the Bankruptcy Code. Yet they resist review with the claim that the facts here are atypical because the lease obligation at issue is the payment of brokerage fees. But as respondents recognize, whether a lease obligation relates to rent is irrelevant to Section 365(d)(3) and (d)(5). See Br. in Opp. 10, 28 (citing *Cukierman*, *supra*). To the extent that the brokerage obligation makes the case unusual, moreover, it actually renders this case a better, not a worse, vehicle in which to review the question presented. While some cases in the conflict involve lease provisions that accrue on one day of a period but cover future services, see pp. 5-7, *supra*, there is no dispute here that petitioner's obligation accrued (and that all the services that obligation represented were completed) before the petition date. See Pet. App. 4a, 11a. It is also undisputed that the payments at issue were due to be paid after the petition date. See *id.* at 5a. This case thus turns solely on the answer to the legal question—an important question of statutory interpretation that has divided the lower courts. Given the acknowledged circuit conflict, further review is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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