

No. 26-315

IN THE
Supreme Court of the United States

AMY L. GOLDMAN,

Petitioner,

v.

TAMMY R. PHILLIPS, *et al.*,

Respondents.

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

**AMICI CURIAE BRIEF OF THE HON. LEIF CLARK
(RET.), HON. MELANIE CYGANOWSKI (RET.), HON.
BRUCE MARKELL (RET.), HON. EUGENE WEDOFF
(RET.) AND LAW PROFESSOR NANCY RAPOPORT
IN SUPPORT OF THE PETITIONER**

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INTEREST OF THE AMICI¹

Amici curiae are former U.S. Bankruptcy Judges Leif Clark, Melanie Cyganowski, Bruce Markell and Eugene Wedoff and Professor of Law Nancy Rapoport.

The Honorable Leif Clark (ret.) served as a United States Bankruptcy Judge for 25 years, sitting in the Western District of Texas. Judge Clark has served as an adviser to the American Law Institute's Transnational Insolvency Law project and the development and administration of a USAID-sponsored judicial training program for judges in the emerging economies of Central and Eastern Europe. Judge Clark is a member of the American College of Bankruptcy and the National Bankruptcy Conference.

The Honorable Melanie L. Cyganowski (ret.) served a 14-year term as a Bankruptcy Judge for the Eastern District of New York. From November 29, 2005, through the end of her term, she was the Chief Judge of the Court. Judge Cyganowski is a Fellow of the American College of Bankruptcy, on the Editorial Advisory Board of Norton Journal of Bankruptcy Practice & Law, and an adjunct professor at St. John's University School of Law.

The Honorable Bruce A. Markell (ret.) is the Professor of Bankruptcy Law and Practice, and the Edward Avery

1. Pursuant to Sup.Ct.R. 37.6, no counsel for a party authored the brief in whole or in part nor made a monetary contribution intended to fund the preparation or submission of the brief. Counsel of record for all parties received at least 10 days' notice before the due date of our intention to file a brief.

Harriman Lecturer in Law, at the Northwestern Pritzker School of Law. Prior to that he served as a United States Bankruptcy Judge for the District of Nevada, and was a member of the Ninth Circuit Court of Appeals Bankruptcy Appellate Panel. He is a conferee of the National Bankruptcy Conference, a Fellow and former scholar in residence of the American College of Bankruptcy, a charter member of the International Insolvency Institute, and a lifetime member of the American Law Institute.

The Honorable Eugene R. Wedoff (ret.) served as a Bankruptcy Judge in the Northern District of Illinois (in Chicago) from 1987 to 2015, and was Chief Judge from 2002 to 2007. He was a member of the Advisory Committee on Bankruptcy Rules from 2004-2014 and served as its chair after 2010. Judge Wedoff was the president of the National Conference of Bankruptcy Judges in 2013 and 2014. He also served as a member of the NCBJ's Board of Governors, as its secretary, and as chair of its education committee. In addition, he was an associate editor of the American Bankruptcy Law Journal. Judge Wedoff is a Fellow of the American College of Bankruptcy, a member of the National Bankruptcy Conference and a member and past president of the American Bankruptcy Institute.

Professor Nancy B. Rapoport is a University of Las Vegas Distinguished Professor and the Garman Turner Gordon Professor of Law, at the William S. Boyd School of Law at the University of Nevada, Las Vegas. She is a Fellow of both the American College of Bankruptcy and the American Bar Foundation.

Our interest in submitting this amicus brief arises from our concern that the decision of the Ninth Circuit

will be harmful to the successful operation of the U.S. trustee program, and the important work of the Chapter 7 trustees. The Ninth Circuit held that, “[i]n personal capacity suits, absent a basis for immunity, the trustee is personally liable for her intentional and negligent torts. *See Mosser v. Darrow*, 341 U.S. 267, 274, 71 S. Ct. 680, 95 L. Ed. 927 (1951).” *Phillips v. Gilman (In re Gilman)*, 176 F.4th 1152, 1163 (9th Cir. 2026). The Ninth Circuit based its decision on two pivotal points: first, that *Mosser* is controlling and second, that imposing personal liability for acts of simple negligence would promote “efficiency and honesty” in the conduct of the duties of a Chapter 7 trustee. *Id.*

We submit that both points are wrong. *Mosser* did not interpret the applicable language of the Bankruptcy Code, and the Code neither provides for personal liability based on simple negligence nor does the Chapter 7 trustee program require a strict negligence standard to promote efficiency and honesty. The Chapter 7 trustee system in our view is functioning as Congress intended. Harsh sanctions for simple negligence are not needed to correct a perceived defect. There has been no hue and cry to fix the system. Your amici see no justification for putting a trustee’s personal assets at risk for simple negligence in the performance of her duties.

The U.S. Trustee system is based on a highly detailed statutory scheme that provides ample supervision and guidance for the work of the Chapter 7 trustee—with no need to permit challenges to the work of Chapter 7 trustees based on a negligence standard for liability. The Chapter 7 trustees effectively handle several hundred thousand cases each year. *See* U.S. Bankruptcy Courts—

Judicial Business 2025,² stating that 344,825 Chapter 7 cases were filed in 2025. In these cases, Chapter 7 trustees successfully collected and distributed gross receipts of over \$1.8 billion dollars of which 35% went to secured creditors and 22% to unsecured creditors. *See* U.S. Trustee Program: Chapter 7 Trustee Final Reports.³ Of this amount only 4.4% was distributed as trustee's fees. *Id.*

An empirical study in 1997, by the National Bankruptcy Review Commission whose members were appointed by the President, members of Congress and the then-Chief Justice, addressed many of the leading issues in bankruptcy law. After a two-year study the Commission concluded that Chapter 7 trustees should *not* be liable for acts of simple negligence done in the course of performing their duties. The National Bankruptcy Review Commission, *Bankruptcy: the Next Twenty Years, October 20, 1997* (2000) (the "NBRC Rpt.").⁴ Comparable studies by the American Bankruptcy Institute likewise urged

2. Available at <https://www.uscourts.gov/data-news/reports/statistical-reports/judicial-business-united-states-courts/judicial-business-2025/us-bankruptcy-courts-judicial-business-2025>.

3. Available at <https://www.justice.gov/ust/bankruptcy-data/statistics/chapter-7-trustee-final-reports>.

4. Available at <https://govinfo.library.unt.edu/nbrc/reportcont.html>. "The NBRC is a commission formed by the Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106, (1994) whose purpose is to study and investigate issues related to the bankruptcy system and devise proposals to deal with these issues." David Primack, *Confusion and Solution: Chapter 11 Bankruptcy Trustee's Standard of Care for Personal Liability*, 43 Wm. & Mary L. Rev. 1297, 1313 (2002) stating that the proposals on duty of care were "immediately influential on the current debate surrounding the bankruptcy system."

that case fiduciaries be protected from claims for simple negligence as has the American College of Bankruptcy in its amicus filing before this Court. *See* Part II, *infra*.

The NBRC Report has been accepted by the Fifth Circuit and other courts. “[W]e conclude that trustees should not be subjected to personal liability unless they are found to have acted with gross negligence.” *Dodson v. Huff (In re Smyth)*, 207 F.3d 758, 762 (5th Cir. 2000); *DiStefano v. Stern (In re J.F.D. Enterprises)*, 223 B.R. 610, 625-26 (Bankr. D. Mass., 1998).

Creditors have ample means of protecting their interests without seeking personal recourse for acts of alleged simple negligence. A Chapter 7 trustee can be removed for cause, 11 U.S.C. § 324(a); the trustee can be sued, as the estate representative (but not personally), 11 U.S.C. § 323; and where, as in this case, there is concern that an asset is not being “administered,” the creditor can seek abandonment of the asset, and then foreclose under state law, or seek the right to pursue a claim that the trustee has declined to pursue.

This Court’s decision in *Mosser* does not require a negligence standard. This Court’s decision was based on self-dealing by the trustee’s agents, and was found to be “a case of a willful and deliberate setting up of an in interest in employees adverse to that of the trust.” *Mosser*, 341 U.S. 267, 272. “Any cursory glance at *Mosser* reveals that the Supreme Court specifically rejected negligence as a grounds for personal liability. Instead, it based personal liability on the trustee for acts that the Court concluded were ‘willful and deliberate.’” Ralph C. McCullough, *Trustee Liability: Is there Enough Protection for these ‘Arms of the Court?’*, 103 Comm. L.J. 123, 132 (1998).

Further, *Mosser* was decided under the former Bankruptcy Act of 1898,⁵ more than 25 years before the passage of the Bankruptcy Reform Act of 1978, now codified as 11 U.S.C. § 101 et seq. (the “Code”), and more importantly, at a time when the statutory and administrative apparatus for the operation of the Chapter 7 trustee system did not exist. The U.S. Trustee program was first established in 1978 on a trial basis in pilot districts, but was not extended to most of the United States until the 1986 Amendments. Pub. L. No. 99-554, 100 Stat. 3088 (Oct. 27, 1986). *See United States Trustee v. Vance*, 189 B.R. 386, 390 (W.D. Va. 1995).

The Ninth Circuit’s decision will discourage competent attorneys from serving as panel trustees, and encourage disappointed creditors to seek a source of payment outside of the bankruptcy estate. This concern over inability to attract talented trustees was identified in the Seventh Circuit’s decision in *Mosser*: “If an assignee is liable in this case no man in his senses would act as assignee under the Commissioners in Bankruptcy. This court has laid down a rule with regard to the transaction of assignees and more so of trustees so as not to strike terror into mankind acting for the benefit of others and not for their own.” *In re Fed. Facilities Realty Tr.*, 184 F.2d 1, 8 (7th Cir. 1950), *rev’d sub nom. Mosser v. Darrow*, 341 U.S. 267 (1951) (quoting *ex parte Belchier*, (1 Amb. 218); 27 Eng. Reprint 144 (1794)).

As *Mosser* itself noted, “[t]rustees are often obliged to make difficult business judgments, and the best that disinterested judgment can accomplish with foresight may

5. Bankruptcy Act of 1898, ch. 541, 30 Stat. 544, *repealed by* Pub. L. No. 95-598, 92 Stat. 2549 (1978).

be open to serious criticism by obstreperous creditors, aided by hindsight.” *Mosser*, 341 U.S. 267, 273.

The Ninth Circuit below, however, rejected this concern about the impact on Chapter 7 trustees, based on its view that *Mosser* “suggested that negligent conduct is enough to impose liability on a trustee.” *In re Gilman*, 176 F.4th 1152, 1167. We see no such suggestion.

This Court has not had the opportunity to address the standard of care for a Chapter 7 trustee operating under the 1978 Code and the U.S. Trustee program. Thus, not only did *Mosser* not hold that the Code imposes a simple negligence standard, but it did not—and could not—consider the protections and procedures now in place to ensure that Chapter 7 trustees operate with efficiency and honesty—without need for a simple “negligence” standard as a further enforcement mechanism. We submit that even if *Mosser* had suggested such enforcement it has been superseded, by the detailed supervision and regulation of the Chapter 7 trustee program. *See In re Freedlander, Inc. The Mortgage People*, 95 B.R. 390, 394 (Bankr. E.D. Va.) pointing out that *Mosser*’s statement that trustees could seek orders from the court approving their decisions was now “unwise and perhaps impermissible today.”

STATEMENT OF THE CASE

This case involves claims by judgment lien creditors that Amy Goldman, a Chapter 7 panel trustee, failed to collect rental income and properly maintain two parcels of real property owned by the debtor. *See Complaint for Breach of Fiduciary Duty*, Case 1:22-ap-01014-VK, ECF 1, p. 3.

Ms. Goldman, at the outset of the case, however, properly gave notice that in her judgment the two properties should not be administered by the trustee, and that she was going to “abandon” the two parcels of real property as required by the Handbook for Chapter 7 Trustees. *See* Exec. Office for U.S. Trustees, U.S. Dept. of Justice Handbook for Chapter 7 Trustees (2012).⁶ The Handbook instructs that Chapter 7 trustees have no duty to administer fully secured property for the benefit of secured creditors.⁷ Had Respondents consented to the abandonment, they could have exercised their state law foreclosure rights (subject to any senior liens), and then collected rents and maintained the assets. Further, it is settled law that a Chapter 7 trustee is generally not encouraged to administer assets for the benefit of secured creditors. *See In re Christensen*, 561 B.R. 195, 204, (Bankr. Utah 2016) (noting the sale of fully encumbered asset by a Chapter 7 trustee is “prohibited”).

6. Available at [https://www.justice.gov/file/795116/dl?inline=](https://www.justice.gov/file/795116/dl?inline=1). (The “Handbook”).

7. “The Trustee Handbook directs that, in general, ‘a trustee should not sell property subject to a security interest unless the sale generates funds for the benefit of unsecured creditors. A secured creditor can protect its own interests in the collateral subject to the security interest.’ Instead, when dealing with fully-encumbered assets ‘the trustee’s proper function is to abandon the property, not administer it.’” *In re Christensen*, 561 B.R. 195, 203 (Bankr. Utah 2016) (citing *In re KVN Corp.*, 514 B.R. 1, 6 (B.A.P. 9th Cir. 2014) and Trustee Handbook 4-7 (2012). “These statements show that Chapter 7 trustees are not encouraged to act as liquidating agents for secured creditors, who have their own remedies and could liquidate their own collateral if they so desired.” *Id.* at 204.

Phillips initially claimed that their allegations against Ms. Goldman constituted “gross negligence,” but the courts below found that their allegations only constituted simple negligence. As the Ninth Circuit explained, “The [bankruptcy] court concluded that Phillips alleges only ordinary negligence.” *In re Gilman*, 176 F.4th 1152, 1160.⁸ “Although Phillips’s complaint contains some gratuitous allegations regarding Goldman’s perceived failings, we understand her claims to be relatively modest.” *Id.* at 1168. The Ninth Circuit then turned to *Mosser*, stating the Supreme Court has “suggested that negligent conduct is enough to impose liability.” 176 F.4th 1152, 1167-68.

Thus, this case was decided below based on the assertion by Respondents that their complaint was for breach of fiduciary duty, and that the *only* threshold requirement that they had to satisfy was to show that Ms. Goldman acted negligently. “A [breach of fiduciary duty] claim against a bankruptcy trustee requires nothing more than simple negligence and this court has never said otherwise.” *Appellants’ Amended Opening Brief*, at 2, No. 24-2249 (9th Cir. Dec. 13, 2024). When presented with the opportunity to amend their complaint Respondents declined. Accordingly, this petition presents the narrow legal question about whether simple negligence is sufficient to impose personal liability on a Chapter 7 trustee.

This case is an example of the kinds of concerns expressed by this Court when it noted the risk to trustees of “obstreperous creditors.” *Mosser*, 341 U.S. at 274. In

8. The Ninth Circuit opinion referred to Tammy Phillips and her separate law firm, Tammy Phillips APLC, collectively as “Phillips.” 176 F.4th at 1158.

the words of the Bankruptcy Appellate Panel, which commented on the 28 motions filed by Respondents, “this appeal concerns litigation that no economically rational actor would perpetuate.” *Phillips v. Gilman (In re Gilman)*, No. CC-18-1066-TaLS, 2019 Bankr. LEXIS 2089 at *1 (B.A.P. 9th Cir. 2019).

Commentators saw the same: “The BAP described how Phillips had taken an \$8,500 damages award and parlayed it into a multimillion-dollar claim based predominantly on the creditor’s appetite for litigation and incurring fees.” Blakeley E. Griffith, *The Clarification of Trustee Immunity and the Specter of Rule 9011 Sanctions in Phillips v. Goldman*, Am. Bankr. J., September 2026, at 30.

Had the Ninth Circuit followed the rule that simple negligence is not sufficient, the complaint’s dismissal would have been upheld, and eleven years of needless litigation would have been put to rest. The Ninth Circuit decision should be reversed to avoid another similar outcome.

SUMMARY OF ARGUMENT

We support the petition seeking review by this Court of the Ninth Circuit decision. Our reasons are as follows:

First, in 1978, Congress enacted the Bankruptcy Reform Act of 1978, “that made significant changes in both the substantive and procedural law of bankruptcy.” *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 52-53 (1982). This included a comprehensive regime for the newly created Office of the U.S. Trustee

to regulate and supervise case trustees. “The Bankruptcy Code of 1978 continued the trend of relieving bankruptcy judges of administrative duties by creating the pilot U.S. Trustee program.” *In re Freedlander*, 95 B.R. at 392.

Chapter 7 trustees have operated successfully under this statutory regime of supervision. The decision of the Ninth Circuit serves little purpose and will be detrimental to the operation of the Chapter 7 trustee system. Chapter 7 trustees serve vital functions, both administrative and at times quasi-judicial. They are vital to the proper operation of the bankruptcy system. Imposing liability on Chapter 7 trustees for acts of simple negligence would be counter-productive, could limit prudent and expeditious resolution of issues, and could provide an unwarranted path for a back-door collateral attack on administration of the bankruptcy case.

Second, a key rationale cited by the Ninth Circuit was supposedly to ensure honesty and efficiency in the operation of the Chapter 7 system. Yet, the empirical study by the National Bankruptcy Review Commission found there is no need for a harsh rule imposing liability for mere negligence, and indeed, that harmful consequences would ensue.

Third, the circuit courts are sharply divided on the issue of the standard of care. The Fifth Circuit in *Dodson v. Huff* (*In re Smyth*), 207 F.3d 758 (5th Cir. 2000) endorses the views of the National Bankruptcy Review Commission that a showing of negligence is *not sufficient* but instead requires gross negligence. Other courts “have found that the trustees can only be held personally liable for

injuries arising from willful and deliberate conduct.” See McCullough, *Trustee Liability*, at 132. The Ninth Circuit departs from both standards.

A legal standard of either “gross negligence” or “willful and deliberate” provide needed protection for the Chapter 7 trustee. The rationale is the same—reasonable protection for the trustee. The Fifth Circuit relied in large part on the “nature of a trustee’s duties,” noting that the requirement that a trustee maintain disinterestedness “often results in the selection of trustees who have limited historical knowledge of the debtor’s business or prior understanding of the industry in which the business is operated.” *Symth*, 207 F.3d at 762. Further, the trustee must make “enormously complex decisions within tight time constraints and without the assistance of—in fact, in the face of opposition or hostility from both secured and unsecured creditors.” *Id.* at 762 (citing *J.F.D. Enterprises, Inc.*, 223 B.R. 610, 628 (Bankr. D. Mass 1998)).

Fourth, the imposition of personal liability for simple negligence is not required by this Court’s ruling in *Mosser*. See, e.g., *Symth*, 207 F.3d 758, 761. (“The *Mosser* Court did not address a trustee’s personal liability with regard to negligent actions.”) Some commentators point out that *Mosser* requires a “willful and deliberate standard.” McCullough, *Trustee Liability*, at 134. Moreover, at least one court, *In re Freedlander Inc., The Mortg. People*, 95 B.R. 390 (Bankr. E.D. Va. 1989), has questioned whether *Mosser* is still good law in light of the evolution of bankruptcy judges from bankruptcy referees to true judicial officers and the development of the United States Trustee system. *In re NSCO, Inc.*, 427 B.R. 165, 178 (Bankr. D. Mass. 2010).

LEGAL ARGUMENT

- I. The Chapter 7 trustee system is functioning properly, and there is no justification for imposing a severe rule of personal liability in order to encourage honesty and efficiency.**
 - A. The statutory provisions governing Chapter 7 trustees give trustees substantial discretion in representing the estate.**

The need to impose personal liability on Chapter 7 trustees for actions that constitute simple negligence, but not gross negligence, is belied by the statutory provisions that describe the role of the Chapter 7 trustee. The “Bankruptcy Code does not provide a personal liability standard for bankruptcy trustees.” NBRC Rpt. at 859. Section 323(a) provides that a trustee is the “representative of the estate,” and § 323(b) provides that a trustee “has capacity to sue and be sued.” Such suit, however, is *not* against the Chapter 7 trustee personally, but rather as a representative. Congress did not include any express provision relating to the right to sue Chapter 7 trustees individually, and certainly did not include any provision suggesting simple negligence is the proper legal standard.

This, in part, is what has led to the circuit split—or “crazy quilt”—of judicial views on this subject. NBRC Rpt. at 859. Nevertheless, the statutory provisions governing duties and supervision support the view that a harsh sanction of negligence liability is not necessary to ensure the trustee system operates efficiently and honestly.

Although the trustee is not vested with the title of the debtor under the Code, § 323(a) “gives the trustee full authority to represent the estate and to dispose of the debtor’s nonexempt property that makes up the estate.” 3 COLLIER ON BANKRUPTCY, ¶ 323.02[1] (Alan N. Resnick & Henry J. Sommer, eds., 16th ed. 2012).

Section 704(a) sets forth the basic duties of the trustee, which primarily consist of the duty to collect and reduce to money the property of the estate for which such trustee serves, and close such estate “as expeditiously as is compatible with the best interests of parties in interest,” to account for such property received, to investigate the financial affairs of the debtor, and to make a final report and final account of the estate.

The role of the Chapter 7 trustee in consumer cases has grown, and “many vital decisions” are left to the discretion of the trustee:

[Chapter 7 trustees] dominate the consumer-bankruptcy process; the trustee is often the only agent of the court with whom the debtor will ever interact; rarely will a debtor see a judge, and there are virtually no jury trials in consumer bankruptcy. As a result, many vital decisions are left substantially to the discretion of the trustee. Trustees exercise power over consumer cases tantamount to that of a judge, and they enjoy similar levels of immunity for their decisions.

Belisa Pang, *One Size Fits All: An Overdue Reform for Chapter 7 Trustees*, 131 Yale L.J. 976, 988 (2022).

Bankruptcy trustees generally have standing, as a party in interest, to challenge any matters concerning the bankruptcy estate. *See In re Cmty. Home Fin. Servs., Inc.*, 990 F.3d 422, 427 (5th Cir. 2021). “[A] bankruptcy trustee is distinct from all other bankruptcy parties because the trustee is responsible for the administration of the bankruptcy estate.” *Id.* at 426. Accordingly, the “trustee’s standing comes from the trustee’s duties to administer the bankruptcy estate, not from any pecuniary interest in the bankruptcy.” *Id.* at 427.

The trustees receive only modest compensation. Code § 326(a) states that the maximum compensation that can be paid to the trustee is based on “all moneys” disbursed by the trustee after liquidating assets of the estate. The maximum fee is 25 percent on the first \$5,000 or less; 10 percent on any amount between \$5,000 and \$50,000; 5 percent between \$50,000 and \$1.0 million.” However, in a “no-asset case” the Chapter 7 trustee may receive only \$120.00.

Although the Chapter 7 trustee is said to be a fiduciary, case law recognizes that in order to operate expeditiously and without needless disputation, the trustee is given broad discretion. “[T]he trustee is given a substantial degree of discretion in deciding how best to administer the estate committed to his care and his actions are measured by a business judgment standard.” *All. United Ins. Co. v. Krasnoff (In re Venegas)*, 623 B.R. 555, 562 (B.A.P. 9th Cir. 2020).

The volume of Chapter 7 cases is extremely high. In 2025, 344,825 Chapter 7 cases were filed. *See* U.S.

Bankruptcy Courts—Judicial Business: 2025.⁹ Given the large number of Chapter 7 cases, trustees need to operate with substantial discretion, and free from challenges over each decision. A standard of simple negligence will overwhelm the bankruptcy courts with endless disputes by disappointed creditors who hope to recover through the personal assets of the trustee, rather than the estate.

B. The Chapter 7 trustee program provides ample supervision and guidance for trustees, and does not require a punitive negligence standard to ensure Chapter 7 trustees operate honestly and efficiently.

The modern program for Chapter 7 and 11 trustees was part of the innovations introduced by the 1978 Bankruptcy Code. It was part and parcel of the related elevation of bankruptcy judges (formerly called “referees”) and the general modernization of the bankruptcy system to function more like a federal judicial system. “The Bankruptcy Code of 1978 continued the trend of relieving bankruptcy judges of administrative duties by creating the pilot U.S. Trustee program.” *In re Freedlander Inc.*, 95 B.R. 390, 392 (Bankr. E.D. Va. 1989).

“[T]he purpose for the establishment of the U.S. Trustee program was in part to relieve the workload of bankruptcy judges by allocating purely administrative duties to the U.S. Trustee.” *Vance*, 189 B.R. 386, 389 (W.D. Va. 1995). A key role of the U.S. Trustee program was to remove the bankruptcy judge from the administrative role that the former Bankruptcy Act imposed on them:

9. *See supra* note 2.

The Bankruptcy Reform Act of 1978 removed the bankruptcy judge from the responsibilities for day-to-day administration of cases. Debtors, creditors, and third parties litigating against bankruptcy trustees were concerned that the court, which previously appointed and supervised the trustee, would not impartially adjudicate their rights as adversaries of that trustee. To address these concerns, judicial and administrative functions within the bankruptcy system were bifurcated.¹⁰

Further, many administrative functions formerly performed by the court were placed within the Department of Justice. And, as relevant here, “Among the administrative functions assigned to the United States Trustee were the appointment *and supervision* of Chapter 7 trustees.” Handbook, at 1-2 (emphasis added).

The operation of the U.S. Trustee system is currently governed by the Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99-554, 100 Stat. 1008 (Oct. 27, 1986). Title 28 U.S.C. § 581(a) provides that the Attorney General shall appoint one United States trustee for each of twenty-one regions composed of federal judicial districts. The basic duty of the United States Trustee within the applicable region is to “establish, maintain and supervise a panel of private trustees that are eligible and available to serve as trustees in cases under Chapter 7 of title 11,” 28 U.S.C.

10. Handbook for Chapter 7 Trustees, Effective October 1, 2012, p.1-1 available at <https://www.justice.gov/ust/page/file/762521/dl?inline>.

§ 586(a)(1) and to “supervise the administration of cases and trustees under Chapter 7 of title 11.” 28 U.S.C. § 586(a)(3).

The United States trustee system is supervised by the Department of Justice under the Executive Office for United States Trustees. The United States Trustee, an official within the Department of Justice, “is the administrative officer of the bankruptcy system, ensuring that trustees and lawyers are properly using the system by supervising the trustees and debtors.” *Collier Pamphlet Edition: Bankruptcy Code*, (Richard Levin and Henry J. Sommer eds., 2020, at J-39).

The Chapter 7 system is implemented rigorously through a detailed Policy and Practices Manual.¹¹ The manual contains detailed provisions that ensure honesty and efficiency, including selection criteria, training, review, removal, and supervision. *See generally, id.*, vol. 2 (devoted to the operation of the Chapter 7 trustee program).

None of this legal structure was in place at the time of this Court’s decision in *Mosser*. Modern Chapter 7 trustees, especially panel trustees, like Ms. Goldman, function in a different environment, under meaningful supervision, and with substantial responsibility. They are paid modestly and are required to handle cases expeditiously. They should not be required to exercise their discretionary powers under the threat of second-guessing by disappointed creditors. Requiring the trustees to work under the possibility of a lawsuit for

11. Available at <https://www.justice.gov/ust/united-states-trustee-program-policy-and-practices-manual>.

simple negligence serves no policy and is not required by any statute.

II. The National Bankruptcy Review Commission recommended that Chapter 7 trustees not be personally liable for acts of simple negligence—but only for acts of gross negligence.

In 1994, as part of the Bankruptcy Reform Act of 1994, Congress authorized the creation of an independent commission to study and investigate how the recently enacted Bankruptcy Code (1978) was functioning, including the issue presented here—whether the Chapter 7 trustees should be liable for acts of simple negligence under the still relatively new Chapter 7 program. Members of the Commission were appointed by the President, Congress and the then-Chief Justice.¹² The Commission’s members included a federal circuit judge, a bankruptcy judge, a former member of Congress, and leading practitioners and scholars. *Id.* at 1. The recommendations of the Commission were set forth about three years later in its report entitled the National Bankruptcy Review Commission, *Bankruptcy the Next Twenty Years*, October 20, 1997 (2000).¹³

The Commission recommended that Chapter 7 trustees “should only be subject to suit in the trustee’s representative capacity and subject to suit in the trustee’s

12. See NBRC Fact Sheet, available at <https://govinfo.library.unt.edu/nbrc/facts.html>.

13. See *supra* note 4. “The report included 170 recommendations for improving bankruptcy law and procedure.” *In re Excel Storage Prods., L.P.*, 458 B.R. 175, 182 (Bankr. M.D. Pa. 2011).

personal capacity only to the extent that the trustee acted with gross negligence in the performance of the trustee's fiduciary duties." NBRC Rpt. at 858.¹⁴

More fully, the Commission recommended that Chapter 7 trustees would "not be subject to suit in their individual capacity for acts taken within the scope of their statutory authority or court-ordered authority, so long as the applicable court order was issued on notice to interested parties and full disclosure to the court. Outside that scope of authority, trustees would be personally liable for gross negligence in the performance of their fiduciary duties." *Id.* at 861. The NBRC Report defined "gross negligence" as "reckless indifference or deliberate disregard of the trustee's fiduciary duty." *Id.* Critically, although other recommendations of the Commission were subject to vigorous dissent, the recommendation regarding trustee liability was unanimous.¹⁵

The Fifth Circuit has held that the recommendations on the liability of Chapter 7 trustees was the correct approach among the "crazy quilt" of various approaches used by the courts. *Smyth*, 207 F.3d at 761-62. "[A]fter considering the policy goals and the Commission's recommendations, we conclude that trustees should not be subject to personal liability unless they are found to have acted with gross negligence." *Id.* at 762.

14. *But see* Daniel B. Bogart, *Finding the Still Small Voice: The Liability of Bankruptcy Trustees and the Work of the National Bankruptcy Review Commission*, 102 Dick. L. Rev. 703 (1998) (arguing that the report was "flawed").

15. The dissents are collected in Chapter 5 of the NBRC Rpt. beginning at <https://govinfo.library.unt.edu/nbrc/report/24commvi.pdf>.

As the Fifth Circuit held in *Smyth*, “in order to properly balance the opposing policy concerns identified by the Commission, we must consider the nature of a trustee’s duties. The requirement that a trustee maintain disinterestedness . . . and must make enormously complex decisions within tight time constraints and without the assistance of—in fact, in the face of opposition from both secured and unsecured creditors” justifies a holding “that trustees should not be subjected to personal liability unless they are found to have acted with gross negligence.” *Smyth*, 207 F.3d at 761-62.

The bankruptcy court in *In re J.F.D. Enters., Inc.*, 223 B.R. 610, 628 (Bankr. D. Mass. 1998), also embraced the NBRC Report and focused in some detail on the “myriad of difficult decisions” confronting Chapter 7 trustees:

There are a myriad of difficult decisions that may face a trustee trying to administer an estate: In fact, trustees are commonly faced with decisions to either take action or not, whether it be to file a complaint, a motion to set aside a judgment, or to assume or reject a lease or other contract with virtually no notice. Sometimes trustees have only hours to make such decisions and are faced with the unenviable duty of preserving the status quo under the threat of rule 11 sanctions or being sued personally for failure to preserve and protect an intangible asset of the estate.

Id. at 628 (quoting Mem. from David W. Allard on behalf of the National Association of Bankruptcy Trustees, Bankruptcy Trustees Should be Provided a Uniform

Standard of Care Governing Personal Liability—Support for Revision of the United States Bankruptcy Code, at 4-5 (April 1997)).

A similar issue has been addressed in the context of Chapter 11 cases where case fiduciaries seek immunity in a plan of reorganization in the form of exculpation clauses. The ABI Commission to Study the Reform of Chapter 11 urged approval of exculpatory provisions in bankruptcy plans for key estate participants at least as to simple negligence. *See* Am. Bankr. Inst. Comm’n to Study Reform of Chapter 11, 2012-2014, Final Report and Recommendations, 250 (2014).

The American College of Bankruptcy also supports the view that case fiduciaries in general should be immunized by permitting exculpation clauses in Chapter 11 plans. *See* Brief of the Am. Coll. of Bankr. as Amicus Curiae in Support of Neither Party, 9-13, *Harrington v. Purdue Pharma L.P.*, 603 U.S. 204 (2024) No. 23-124.

III. The Ninth Circuit’s decision is not mandated by this Court’s decision in *Mosser*.

The Ninth Circuit cited *Mosser* for the view that this Court “suggested” that a Chapter 7 trustee might be liable for acts of simple negligence. But *Mosser* makes no such suggestion. This Court held that the conduct of the trustee was willful and deliberate in allowing his agents to engage in improper self-dealing. This was “a case of willful and deliberate setting up of an interest in employees adverse to that of the trust.” *Mosser*, 341 U.S. at 272.

The circuit courts have been split on the issue of whether *Mosser* addressed the issue of personal liability of trustees for acts of mere negligence for no less than three decades. *See, e.g., In re Hutchinson*, 5 F.3d 750, 752-53 (4th Cir. 1993) (“*Mosser* did not directly address to what extent, if any, bankruptcy trustees are liable for negligent breaches of their duties as trustee. The circuits have divided on this question.”).

At least one bankruptcy court has held that *Mosser* means only that Chapter 7 trustees may be liable for intentional breaches of fiduciary duty:

It appears to this Court that the holding of *Mosser* cannot be extended any further than the proposition that trustees are personally liable for intentional violations of their fiduciary duties. The Supreme Court limited its holding to cases involving intentional breaches of fiduciary duty, and expressly avoided extending its holding any further.

In re J.F.D. Enters., Inc., 223 B.R. 610, 626-27 (Bankr. D. Mass. 1998), *aff’d sub nom. DiStefano v. Stern*, 236 B.R. 112 (D. Mass. 1999), *aff’d sub nom. In re JFD Enters., Inc.*, 215 F.3d 1312 (1st Cir. 2000) (unpublished table decision).

The Ninth Circuit’s decision was based in large measure on a concern for “efficiency and honesty.” These concerns were addressed by Congress in creating the modern U.S. Trustee program. Congress saw no need to add a provision imposing personal liability for the lowest legal standard—simple negligence. The comprehensive scheme of appointment and supervision is sufficient. The

Ninth Circuit rule reflects a lack of confidence in the statutory regime that Congress has created. Your amici see no justification for adopting an additional enforcement mechanism.

CONCLUSION

Accordingly, your amici respectfully request that the Court grant the petition for writ of certiorari.

Respectfully submitted,

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