No. 26-510

IN THE

Supreme Court of the United States

6525 BELCREST ROAD, LLC,

Petitioner,

v.

DEWEY, L.C.,

Respondent.

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

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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REPLY BRIEF FOR PETITIONER

Respondent calls this a "contract dispute" over "one sentence in a private agreement." (Opp. 1, 14). It is not. The Petition does not ask this Court to interpret a contract. It asks whether a Bankruptcy Code definition may override state-law allocation of a rent stream between assignors and assignees. Contrary to *Butner* and *Travelers*, every court below held that it may. Each read the contractual rent reservation language—"accrued prior to the Revenue Transfer Date"—through the lens of §101(5), rationalizing that because bankruptcy "accelerated" all future rent, the post-August 30, 2022 rent that was expressly assigned to New Town under the Amended Assignment "accrued" before August 30, 2022, making it claimable by Respondent. (App. 5a–6a, 22a, 87a). No court cited as support any Maryland authority addressing the right to rent that is allocated between an assignor and assignee of a reversion in a written agreement, which leads to the question presented: whether §101(5), or state law and the parties' assignment, determines which of an assignor and assignee holds the lessor's claim, and in what amount. (Pet. i).

Respondent's opposition confirms the error below. First, Respondent concedes that it retained the right to collect rent only "until August 30, 2022" (Opp. 2) but claimed the entire $21 million rent stream through June 2045 as "Respondent's lease-rejection damages for the remaining term of the Lease" (Opp. 4 & n.1). Outside of bankruptcy, Respondent's bargained-for rent stream ended 11 months post-rejection, but yet, in bankruptcy, and as a result of

bankruptcy, Respondent was allowed a claim for rent ending 36 months post-rejection, nearly $2 million more than it could claim under Maryland law. *See* Part II, *infra*. That is the "windfall merely by reason of the happenstance of bankruptcy" that *Butner* forbids.

Respondent's vehicle objections fare no better. The ownership question is legal and turns on undisputed facts. The Second Circuit's waiver footnote addresses acceleration, but the Petition does not contest acceleration. The supposed alternative ground for the allowed claim—Petitioner's liability would be the same if New Town filed a claim—was dicta. And Respondent's argument that Rule 3001(e)(1) is inapplicable because there was "no 'transfer'" cannot be squared with the Second Circuit's statement that Respondent "assigned its rights under the ground lease to New Town" before the petition.

I. Respondent Concedes that the Courts Below Used §101(5) to Construe the Amended Assignment Instead of Maryland Law.

Respondent's central defense is that §101(5) answered only an "undisputed federal question: whether, as of the Petition Date, Respondent's claim included unmatured future rent." (Opp. 11). That framing presents the wrong question. It is not disputed that Respondent's claim includes unmatured rent. The question is whether Respondent's claim may include unmatured rent after August 30, 2022. Accordingly, the Petition addresses the question of ownership, not maturity, which must be decided under state law. *Butner v. United States*, 440 U.S. 48,

55 (1979); *Travelers Cas. & Sur. Co. of Am. v. Pac. Gas & Elec. Co.*, 549 U.S. 443, 450–51 (2007).

Every court below answered the ownership question by applying accrual under §101(5). The bankruptcy court framed the issue as "whether Dewey properly may assert the entirety of the Landlord's allowed rejection damages claim" (App. 80a) and resolved it by holding that the claim "became allowable and therefore 'accrued' as of the date of filing of the bankruptcy petition" (App. 87a). The district court reasoned that "because all of Belcrest's debts were immediately accelerated upon filing," the reserved rent "would include all future rents." (App. 22a). And, the Second Circuit held that because future rents "were accelerated upon Belcrest's bankruptcy petition," "[a]ll future rent under the ground lease thus 'accrued prior to the Revenue Transfer Date.'" (App. 5a–6a). Respondent concedes that the courts applied "a contract term ('accrued')" to "a claim whose federal character is undisputed" (Opp. 11); that is, a claim defined by §101(5).

The outcome acknowledged by Respondent results in a federal rule that displaces state law, contrary to *Rodriguez v. FDIC*, 589 U.S. 132, 136 (2020). Section 101(5) merely defines a "claim"—a "right to payment, whether or not such right is ... matured [or] unmatured." It does not determine who owns that right for purposes of an allowed claim under §502. A "right to payment" can only be unmatured if the claimant holds that right. While Respondent asserts that the courts determined its claim as a matter of Maryland law and that they applied "state-law rules of construction" (Opp. 11), the only Maryland

authority cited below was the canon that a specific provision controls over a general one. (App. 17a). That general canon fails to address the central substantive issue regarding the allocation of future rent between an assignor and an assignee under Maryland law or whether bankruptcy acceleration can enlarge a reserved rent interest. No court below cited any Maryland decision on the dispositive issue. Nor is this "the misapplication of a properly stated rule of law." (Opp. 14). The courts below stated the wrong rule—that §101(5)'s inclusion of unmatured rights determines when rent "accrued" under a private allocation, and therefore who owns it. Whether that is the law is a federal question, and it is the question presented. (Pet. i).

II. Respondent Does Not Defend the Allowed Claim Under Maryland Law.

The Petition identified the governing Maryland law that the assignee of the reversion is entitled to rent "accruing after the assignment, where there has been no severance or reservation of the rent." *Abrams v. Sheehan*, 40 Md. 446, 460 (1874); *see Antietam-Sharpsburg Museum, Inc. v. William H. Marsh, Inc.*, 252 Md. 265, 267 (1969). (Pet. 16–17). Respondent does not cite either of these cases, let alone dispute them. Respondent acknowledges that "a claimant must demonstrate that it holds the right it asserts." (Opp. 8). Pursuant to the above state-law precedent, the only rent Respondent held after the May 18, 2021 Transfer Date was the rent it specifically reserved, which Respondent concedes runs only "until August 30, 2022." (Opp. 2). Thus, it cannot hold the right to rent after August 30, 2022.

SVAP II Pasadena Crossroads LLC v. Fitness International LLC, 260 Md. App. 77 (2023) also is not "consistent with the judgment below" as Respondent contends. (Opp. 9). In *SVAP*, the seller-assignor recovered the rents allocated to it before the proration date in the parties' agreement and the later rents belonged to the purchaser-assignee which held the reversion. 260 Md. App. at 88, 92. Here, by contrast, 25 of the 36 months of rent used to fix Respondent's allowed claim fall after the August 30, 2022 pro-ration date that the Amended Assignment unambiguously allocated to New Town.

Respondent's own proof of claim further proves its allowed claim is contrary to Maryland law. Respondent asserted a claim for approximately $21 million in "lease-rejection damages ***for the remaining term of the Lease***" (Opp. 4 n.1, 8) (emphasis added), calculated as "'base rent' through June 2045" plus taxes and utilities "remaining under the Lease." (Opp. 4 n.1). Since Respondent conceded that it retained only "the right to collect rent until August 30, 2022" (Opp. 2), the rent for the following 23 years never belonged to Respondent and cannot reflect a loss that it ever would have sustained. At most, the rent, taxes and utilities for the remaining 23 years is the landlord's—New Town's—loss, not Respondent's. Petitioner repeatedly pressed that Respondent's proportionate share of any lease rejection claim was limited to the reserved period; i.e., $632,500 in base rent. (Pet. 11, 32–33).

Respondent also is wrong that the courts followed "precisely the sequence" from *In re Highland Superstores, Inc.*, 154 F.3d 573, 579 (6th Cir. 1998),

and *In re Merry-Go-Round Enterprises, Inc.*, 180 F.3d 149, 161–62 (4th Cir. 1999). (Opp. 7). Those courts *first* measured the amount claimant could recover under the lease and state law, and *then* applied the cap. Here, the courts performed the analysis in reverse, first comparing the aggregate lease rejection loss to the §502(b)(6) cap and then deciding how much of that claim Respondent owned by invoking §101(5) (App. 80a, 86a–87a). Not only did the state-law step measuring the amount of Respondent's claim not occur first in the analysis, it never occurred. (App. 83a).

III. The Vehicle Objections Fail.

A. The "waiver" footnote does not reach who owns the claim.

Respondent misstates the Second Circuit's footnote 1 as holding that Petitioner waived its argument "concerning the amount of Respondent's allowed claim." (Opp. 12). It says no such thing. Instead, it stated that any argument regarding "acceleration" of rents was "waived." (App. 5a–6a). Petitioner does not contest acceleration and the question presented assumes this. (Pet. 33–34). Respondent is entitled to acceleration of all rent between the lease rejection and August 30, 2022; beyond that, it has no right to rent under the Amended Assignment and Maryland law. The subject of the Petition is not whether rent should be accelerated or whether the aggregate lease rejection damages exceed the statutory cap, but rather what portion of the total lease rejection damages Respondent owned under the Amended Assignment and under Maryland law. Petitioner never disputed

that the aggregate loss exceeds the cap. "The parties dispute only the amount of the lease rejection damages component" (App. 5a), and on that quantum issue, Respondent bore the burden of persuasion and proof. *Raleigh v. Ill. Dep't of Revenue*, 530 U.S. 15, 21 (2000).

B. The question was pressed and passed upon.

Respondent argues that the Petition should be denied because it "rests on theories and authorities never presented to the Second Circuit" and because Petitioner did not previously cite *Butner*, *Travelers*, *Rodriguez*, or *Raleigh*. (Opp. 13). The argument has no merit. A grant of certiorari is precluded "only when 'the question presented was not pressed or passed upon below.'" *United States v. Williams*, 504 U.S. 36, 41 (1992). "Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992); *accord Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995). Each of Petitioner's claims was pressed or passed upon below, as required by *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005):

Petitioner's claim that Respondent's right to payment is defined and limited by the Amended Assignment and state law, and not by §101(5), was pressed at every stage. For example, Petitioner argued that:

- "state law governs property rights in a bankruptcy case," (Pet. C.A. Br. 21);

- "[r]egardless of whether the Debtor's debts are deemed accelerated as of the petition date under §101(5)," "the applicable agreement and state law are controlling," (*id.* at 20);

- acceleration "does not automatically result in an allowed claim," (*id.* at 30 n.7); and

- a lessor's damages are "computed in accordance with the terms of the debtor's lease and applicable state law," (Pet. D. Ct. Reply Br. 3) (quoting *Highland Superstores*).

The claim was also passed upon by all three courts. (App. 5a, 22a, 86a–89a).

Similarly, the Petition's ownership and standing claims also are not new, as Respondent contends. (Opp. 13). Petitioner argued below that no transfer of New Town's claim to Respondent had been made or filed, and that New Town's letter "cannot take the place of an assignment or transfer of New Town's claim to Dewey as required by Bankruptcy Rule 3001." (Pet. D. Ct. Reply Br. 26; Pet. C.A. Br. 38–39; Pet. C.A. Reply Br. 11). Every court below also identified and decided it. (App. 4a; App. 16a, 18a; App. 30a, 66a–69a).

C. There was no alternative ground for the decision.

Respondent argues the Petition should be denied because the bankruptcy court provided an alternative basis for the judgment when stating that "if New Town owned any part of Respondent's claim, it 'would be inclined to permit New Town to file a claim.'" (Opp.

13). The suggestion is that if New Town files a late claim, Petitioner would be liable for the full 36 months of rejection damages totaling $2,602,119.73 regardless. This was not an alternative basis for the court's ruling since the court expressly stated, "it is not necessary … to rule on th[is] alternative suggestion." (App. 89a). The district court declined to address the point (App. 23a n.4) and the Second Circuit did not mention it. Moreover, the hypothetical presupposes that Petitioner's argument was correct, in which case, Respondent would be effectively conceding its allowed claim does not exceed approximately eleven months of rent.

Nor is Respondent correct that the Petition "will not impact or change the amounts it owes" (Opp. 10, 14), since it presupposes that New Town will be permitted to file a late proof of claim and that it actually files a proof of claim. To that end Petitioner opposed any late claim below (Pet. C.A. Br. 36–37) and New Town "expressly waive[d] any future claim it may have" (App. 88a). Respondent's allowed claim must stand on its own merit and cannot be inflated by hypothetical liability.

Because Petitioner is paying allowed claims in full (App. 76a), allowing Respondent to receive the full 36 months of lease rejection damages is the very "windfall" proscribed by *Butner*. 440 U.S. at 55.

D. Rule 3001(e)(1) applies because the Second Circuit recognized the transfer.

Respondent contends that Rule 3001(e)(1) does not apply because there was "no 'transfer.'" (Opp. 12). The Second Circuit said the opposite. (App. 4a). The

Amended Assignment carved out only rent "prior to the Revenue Transfer Date" (App. 3a); the rent post-Revenue Transfer Date was transferred to New Town along with the reversion. Under Maryland law, rent not reserved follows the reversion. *Abrams*, 40 Md. at 460. Pursuant to Rule 3001(e)(1), when "… a claim [is] transferred before a proof of claim is filed, only the transferee" may file it. Therefore, since the reversion and the unreserved rent after August 30, 2022 were transferred to New Town before Respondent filed a proof of claim, only New Town had the right to file a claim for those future rents.

IV. A Retrospective Contract Interpretation by Respondent and New Town Cannot Support Allowance of Respondent's Claim.

Respondent's fallback for denying the Petition is that it and New Town "agree[d]" that the Amended Assignment should be interpreted that Respondent holds the claim, which Petitioner cannot challenge as "a stranger to that contract." (Opp. 9, 14). That argument fails for three reasons.

First, their "agreement" was not a legal contract. It was an unsworn letter (C.A. App. 548), never admitted at trial (C.A. App. 783-784), that New Town wrote at the bankruptcy court's request in April 2023—nearly two years after the petition—while "working in cooperation with Dewey." (App. 76a). Despite the unambiguous terms of the Amended Assignment that Respondent only had the right to rent through August 30, 2022 (a fact Respondent concedes), the courts below nonetheless treated Respondent and New Town as "the best authorities as to the meaning of their own contract" to allow

Respondent the right to receive all rent post-August 2022. (App. 89a; App. 22a).

This use of New Town's retrospective letter contravenes the long-standing legal principles and holdings of this Court that extrinsic evidence cannot be introduced to alter or vary unambiguous terms of an agreement. *See CITGO Asphalt Ref Co. v. Frescati Shipping Co., Ltd.*, 589 U.S. 348, 355 (2020). Respondent's and New Town's intent must be gleaned from the terms of the Amended Assignment, and even where a contract is ambiguous,

> retrospective, subjective, and unexpressed views about the contract are not proper extrinsic evidence: "It is the intention of the parties as expressed in their words and the paper which they sign, not their own interpretation as to what their statements and acts were supposed to mean, which is determinative."

Impac Mortg. Holdings, Inc. v. Timm, 474 Md. 495, 508, 255 A.3d 89, 96 (2021).

Second, the letter is a waiver, not an assignment. New Town said it "expressly waives any future claim it may have." (App. 88a). New Town can only waive a claim that it held and once it was waived, the claim was extinguished; it was not transferred to Respondent, as confirmed by Respondent's counsel. (Pet. 9). And if New Town held the claim, Respondent did not.

Third, a debtor is never a "stranger" to the question of who holds a claim against it. Section

502(b)(1) preserves every defense available "under any agreement or applicable law," and Rule 3001(e) exists to protect the debtor from paying the wrong party. If an objecting debtor's status as a non-party to an assignment were disqualifying, no debtor could ever contest a transferred claim.

V. The Error Will Recur.

Respondent argues that the question arises only on unusual facts. (Opp. 9). The rule applied below is not so limited. It holds that petition-date acceleration under §101(5) fixes the meaning of any prepetition allocation of rent keyed to accrual. Proration clauses on the sale of leased property, partial assignments of the reversion, and assignments of rents are routine features of commercial real estate. *See SVAP*, 260 Md. App. at 88. The Fourth and Sixth Circuits measure a lessor's claim under the lease and state law before applying the cap; the decision below measures it by §101(5). (Pet. 27–30). The fact that the Second Circuit ruled by summary order "carries no weight" in deciding whether to grant review. *Commissioner v. McCoy*, 484 U.S. 3, 7 (1987) (per curiam); *see MOAC Mall Holdings LLC v. Transform Holdco LLC*, 598 U.S. 288 (2023) (reviewing a Second Circuit summary order). The rule affirmed by the Second Circuit appeared in reasoned bankruptcy-court and district-court opinions, which remain citable. Thus, whenever a sale, partial assignment of the reversion, or assignment of rents allocates rent by when it "accrues," the decisions below will support awarding the entire capped claim to whoever held the right to rent on the petition date, regardless of state law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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