No. 06-

IN THE

Supreme Court of the United States

DOW CORNING CORPORATION,

Petitioner,

v.

OFFICIAL COMMITTEE OF UNSECURED CREDITORS, MERRILL LYNCH, PIERCE, FENNER & SMITH, BANK OF AMERICA, N.A., BANK OF NEW YORK, JP MORGAN CHASE, DK ACQUISITION PARTNERS, L.P., HALCYON MANAGEMENT CO. LLP, HALCYON OFFSHORE MANAGEMENT CO., LLC, ANGELO, GORDON & CO., DAVIDSON KEMPNER INTERNATIONAL ADVISORS, M.H. DAVIDSON CO., INC., APPALOOSA MANAGEMENT, LLC, FRANKLIN MUTUAL ADVISORS, LLC, BEAR STEARNS & CO., INC., BEAR STEARNS GOVERNMENT SECURITIES, INC., BEAR STEARNS INVESTMENT PRODUCTS, INC., CUSTODIAL TRUST CO., NEWSTART FACTORS, INC., FARALLON CAPITAL PARTNERS, L.P., FARALLON CAPITAL INSTITUTIONAL PARTNERS, L.P., FARALLON CAPITAL INSTITUTIONAL PARTNERS II, L.P., FARALLON CAPITAL INSTITUTIONAL PARTNERS III, L.P., FARALLON CAPITAL OFFSHORE INVESTORS, INC., FARALLON CAPITAL MANAGEMENT, LLC, JP MORGAN CHASE BANK, CONSOLIDATED PRESS INTERNATIONAL, THE COMMON FUND, TINICUM PARTNERS LP, CREDIT SUISSE FIRST BOSTON MANAGEMENT CORP., AMROC INVESTMENTS, INC.,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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November 21, 2006

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QUESTIONS PRESENTED

1. Whether the Sixth Circuit erred by holding, in direct conflict with the Fourth, Fifth, and Ninth Circuits, that a bankruptcy court may not interpret a confirmed plan of reorganization in a way that would violate the Bankruptcy Code, thereby depriving such a plan of finality and allowing parties to challenge its legality at any time.

2. Whether the Sixth Circuit erred by holding, in direct conflict with the Ninth Circuit, that a bankruptcy court may award creditors attorneys' fees and costs under pre-petition contracts with the debtor for litigating post-petition matters of federal bankruptcy law.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, petitioner Dow Corning Corporation states that it is 50% owned by Corning Incorporated, and 50% owned by Dow Holdings, Inc., a wholly owned subsidiary of The Dow Chemical Company. No other publicly held corporation owns 10% or more of petitioner's stock.

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INTRODUCTION

This Court's review is warranted because the Sixth Circuit has decided two important questions of federal bankruptcy law in a way that is not only incorrect, but also conflicts with decisions from other federal courts of appeals.

As a threshold matter, the Sixth Circuit held that a bankruptcy court may not interpret a confirmed plan of reorganization in a way that would violate the Bankruptcy Code. The effect of that holding is to allow parties to challenge such a plan's legality at any time, and deprive it of finality. That holding not only conflicts with holdings from the Fourth, Fifth, and Ninth Circuits, *see Stratosphere Litig. L.L.C. v. Grand Casinos, Inc.*, 298 F.3d 1137, 1143 (9th Cir. 2002); *In re Varat Enters., Inc.*, 81 F.3d 1310, 1315-17 (4th Cir. 1996); *Republic Supply Co. v. Shoaf*, 815 F.2d 1046, 1050 (5th Cir. 1987), but also strikes at the very heart of a stable and predictable bankruptcy regime. The whole point of plan confirmation, after all, is to fix the parties' respective rights and obligations, which could not happen if the parties were free to challenge the legality of confirmed plans at any time, even years after confirmation.

The Sixth Circuit next held that a bankruptcy court may award creditors attorneys' fees and costs under pre-petition contracts with the debtor for litigating post-petition matters of federal bankruptcy law. In so holding, the Sixth Circuit expressly rejected a line of contrary Ninth Circuit authority. *See*, *e.g.*, *Thrifty Oil Co. v. Bank of Am. Nat'l Trust & Sav. Ass'n,* 322 F.3d 1039, 1040-42 (9th Cir. 2003); *Renfrow v. Draper*, 232 F.3d 688, 694 (9th Cir. 2000); *In re Baroff*, 105 F.3d 439, 440-42 (9th Cir. 1997); *In re Fobian*, 951 F.2d 1149, 1153 (9th Cir. 1991). This Court recently granted certiorari in a case arising from the Ninth Circuit to resolve this very conflict. *See Travelers Cas. & Sur. Co. v. PG&E Co.*, 167 Fed. Appx. 593 (9th Cir. 2006) (unpublished), *cert. granted*, __ S. Ct.

__, 2006 WL 1520766, 75 U.S.L.W. 3020 (U.S. Oct. 6, 2006) (No. 05-1429). Accordingly, while this Court should grant a writ of certiorari in this case to resolve the circuit conflict with respect to the first question presented (which is independent of the second question, and will not be affected by the outcome in *Travelers*), at the very least this Court should hold the petition pending the disposition of *Travelers*.

OPINIONS BELOW

The Sixth Circuit's decision is reported at 456 F.3d 668, and reprinted in the Appendix (App.) at 1-31a. The district court's unreported decision is reprinted at App. 34-53a. The bankruptcy court's unreported order is reprinted at App. 54a, and the bankruptcy court's oral ruling explaining the basis for that order is reprinted at App. 55-71a.

JURISDICTION

The Sixth Circuit rendered its decision on July 26, 2006. App. 1a. The Sixth Circuit subsequently denied a timely petition for rehearing *en banc* on October 31, 2006. App. 32-33a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

PERTINENT STATUTORY PROVISION

11 U.S.C. § 1141(a) provides:

> Except as provided in subsections (d)(2) and (d)(3) of this section, the provisions of a confirmed plan bind the debtor, any entity issuing securities under the plan, any entity acquiring property under the plan, and any creditor, equity security holder, or general partner in the debtor, whether or not the claim or interest of such creditor, equity security holder, or general partner is impaired under the plan and whether or not such creditor, equity security holder, or general partner has accepted the plan.

STATEMENT OF THE CASE

Petitioner Dow Corning, a manufacturer of silicone breast implants, filed for Chapter 11 bankruptcy reorganization in May 1995. Among its creditors are respondents here, who own petitioner's unsecured commercial debt. There is no dispute that petitioner owes respondents "pendency interest" (*i.e.*, interest that accrued during the pendency of the bankruptcy) on that debt. Rather, the dispute here involves the *rate* of pendency interest that petitioner must pay. That point has been hotly disputed from the outset.

Petitioner originally proposed a plan of reorganization that provided for pendency interest at a statutory rate: "the Federal judgment rate provided in 28 U.S.C. § 1961 in effect on the Petition Date (6.28%), compounded annually on each anniversary of the Petition Date." Amended Plan §§ 1.24, 5.1, C.A. Joint App. 50, 83-84. Respondents objected to the proposed plan, arguing that because petitioner was solvent, it was liable for pendency interest not only at the rate set forth in the parties' contracts, but at the rate set forth for parties in default under those contracts. *See, e.g.*, C.A. Joint App. 808 (arguing that respondents are "entitled to the *default* rate of interest provided in the Loan Agreements") (emphasis added). Respondents voted against the plan.

In urging the bankruptcy court not to confirm the proposed plan, respondents argued that it violated 11 U.S.C. § 1129(b), which requires that a plan be "fair and equitable" to creditors in a dissenting class. According to respondents, the proposed plan would violate this provision unless they were paid pendency interest at the contractual default rates. The court (Spector, J.) agreed with respondents that "the Plan provision fixing the pendency interest rate at that which applies to federal judgments is not 'fair and equitable,'" and that respondents were entitled to pendency interest "in accordance with the terms of the parties' contracts." *In re*

Dow Corning Corp., 244 B.R. 678, 696 (Bankr. E.D. Mich. 1999). The court did not agree with respondents, however, that interest "in accordance with the terms of the parties' contracts" meant interest at the contractual *default* rates, as opposed to the contractual *base* rates: "In determining the applicable rate, … no effect is to be given to contractual provisions which purport to define as a default the filing of a voluntary petition for bankruptcy relief." *Id.*; *see also id.* (citing four cases for the proposition that creditors cannot recover pendency interest at contractual *default* rates as a result of a bankruptcy filing). The court thus took a middle path between the federal judgment rate proposed by petitioner and the much higher contractual default rates sought by respondents.

In that same ruling, the bankruptcy court deemed petitioner's plan of reorganization to "have been verbally amended to provide that pendency interest will be paid to [respondents] in accordance with the terms of [their] contracts," *id.*, and confirmed the plan. Respondents did not seek clarification of interest "in accordance with the terms of the parties' contracts," and did not appeal the order of confirmation.

Petitioner subsequently objected to respondents' proofs of claim to the extent that they sought pendency interest at the contractual default rates. Respondents insisted that they were entitled to interest at those rates, and moved for summary judgment on this issue. The bankruptcy court denied the motion. App. 54-71a.

As the bankruptcy court explained, "a straightforward application of the plan terms would mean that the creditors are entitled only to the *base* contract rate of interest." App. 58a (emphasis added); *see also* App. 60a ("[T]he Court does not see how one can reconcile [respondents'] demand for default-rate interest with the plan's provision for application of the interest rate in effect when [petitioner] filed its [Chapter 11] petition.").

And, because the plan had long since been confirmed, respondents were not free to challenge the legality of its terms. App. 59a ("[O]nce a bankruptcy plan is confirmed, its terms are not subject to collateral attack.") (internal quotation omitted); *id.* ("Section 1141(a) … binds both the creditors and the debtor to the terms of a confirmed plan."). As the bankruptcy court explained, respondents were "in effect seeking to modify the plan," which they were not entitled to do.

Separately, the bankruptcy court denied respondents' motion for summary judgment on whether they were entitled, under their pre-petition contracts, to recover post-petition attorneys' fees and costs for litigating bankruptcy-related issues. App. 63-69a. Even assuming that § 506(b) of the Bankruptcy Code did not preclude an award of such fees and costs, the court explained, they are not allowable as claims under § 502(b) of the Code because respondents "held no pre-petition claim for costs, as the breach … giving rise to a right of reimbursement occurred post-petition." App. 68a.

Respondents appealed, but the district court (Hood, J.) affirmed on all scores. The court noted that "[t]here is no dispute that the Bankruptcy Court in its December 1999 opinion ruled that the Amended Joint Plan was … amended to provide that [respondents] would be paid pendency interest 'in accordance with the terms of the parties' contracts.'" App. 47a (quoting *In re Dow Corning*, 244 B.R. at 696). The court then held that "the Bankruptcy Court did not abuse its discretion in determining that th[is] amendment … presumed that the contract rate to be applied was the *base* contract rate (in accordance with the terms of the parties' contracts) applicable on the day the Petition for bankruptcy was filed by the Debtor." App. 47a (emphasis added). Indeed, the court noted that the default rates could not possibly apply because "[p]endency interest begins with the commencement of the case. At that time all parties appear to agree that the Debtor was not in default and

therefore the default rate was not in effect." App. 47-48a. Accordingly, "[t]he Bankruptcy Court did not abuse its discretion in denying [respondents'] summary judgment motions" with respect to the interest rate. App. 49a.

Separately, the district court also affirmed the bankruptcy court's order denying respondents' motion for summary judgment with respect to their entitlement to post-petition attorneys' fees under their pre-petition contracts with petitioner. App. 49-53a. According to the district court, "[a]ttorney fees may be awarded to an unsecured creditor in a bankruptcy proceeding only to the extent that state law governs the substantive issues and authorizes the court to award fees." App. 52a (citing *Renfrow*, 232 F.3d at 694). "Inasmuch as [respondents] have not shown that they have incurred attorney fees in litigating the validity of their contracts," the district court held, "the Bankruptcy Court did not abuse its discretion in denying their summary judgment motion." App. 53a.

Respondents again appealed, and the Sixth Circuit reversed. As a threshold matter, however, the appellate court rejected respondents' argument that the bankruptcy court had "modified" the confirmed plan by holding that respondents were not entitled to default interest rates under the plan. App. 11a. As the Sixth Circuit explained, "the bankruptcy court's 2001 decision merely interpreted, rather than modified, the amended plan." *Id.*; *see also id.* ("The language of the bankruptcy court's 2001 decision makes clear that it was only interpreting the language of the amended plan, not modifying it.").

The Sixth Circuit also rejected respondents' argument that the bankruptcy court had "abused its discretion … by incorrectly interpreting its prior language." App. 11a. As the appellate court noted, the confirmed plan provided for interest "at the applicable contract rate," and the bankruptcy court was entitled to interpret that provision to mean the non-default interest rates, rather than the higher default rates. App. 12-14a.

Notwithstanding its conclusion that the bankruptcy court had reasonably interpreted the terms of the confirmed plan, the Sixth Circuit proceeded to entertain respondents' challenge to the legality of the bankruptcy court's order under 11 U.S.C. § 1129. *See* App. 14-19a. According to the Sixth Circuit, the bankruptcy court necessarily abused its discretion "if it construed the plan in such a way as to cause it to violate" the Bankruptcy Code. *Id.* at 14a.

On the merits of the § 1129 issue, the Sixth Circuit concluded that where (as here) a debtor is solvent, that provision presumptively requires the payment of pendency interest at contractual default rates. *Id.* at 14-19a. The Sixth Circuit then held that the bankruptcy court, in "approv[ing] the plan over the objections of [a] dissenting class," had failed to apply that presumption. *See* App. 15a, 19a. Accordingly, the appellate court reversed the district court's decision affirming the bankruptcy court's order awarding respondents pendency interest at the contractual base rate, and remanded the case for the bankruptcy court to determine whether the Sixth Circuit's presumptive rule should apply on the facts of this case. *See id.* at 19a.

Separately, the Sixth Circuit also reversed the district court's ruling on attorneys' fees. *See* 19-31a. According to the Sixth Circuit, nothing in the Bankruptcy Code explicitly or implicitly "prohibit[s] the recovery of reasonable post-petition attorneys' fees, costs and expenses," at least where (as here) the debtor is solvent. App. 20a. Thus, the Sixth Circuit held, "[w]e … choose to join the body of cases holding that unsecured creditors may recover their attorneys' fees, costs and expenses from the estate of a solvent debtor where they are permitted to do so by the terms of their contract and applicable non-bankruptcy law." App. 24a. In so holding, the Sixth Circuit expressly rejected a line of contrary Ninth Circuit authority. App. 28-29a (citing, *inter alia*, *Thrifty Oil*, 322

F.3d at 1040-42; *Renfrow*, 232 F.3d at 694; *Baroff*, 105 F.3d at 440-42; *Fobian*, 951 F.2d at 1153).

REASONS FOR GRANTING THE WRIT

I. The Sixth Circuit Erred, And Undermined The Bedrock Principle Of Finality In Bankruptcy Cases In Conflict With Other Circuits, By Holding That A Bankruptcy Court May Not Interpret A Confirmed Plan In A Way That Would Violate The Bankruptcy Code.

The Sixth Circuit erred by holding, in direct conflict with the Fourth, Fifth, and Ninth Circuits, that a bankruptcy court may not interpret a confirmed plan of reorganization in a way that would violate the Bankruptcy Code, thereby depriving such a plan of finality and allowing parties to challenge its legality at any time. *Compare* App. 14-15a *with Stratosphere*, 298 F.3d at 1143; *Varat*, 81 F.3d at 1315-17; *Republic Supply*, 815 F.2d at 1050. It is hard to overstate the impact of that decision on the stability and predictability of the federal bankruptcy system: if the decision below is allowed to stand, confirmed plans of reorganization will always remain vulnerable to legal challenges in the Sixth Circuit, and there will be no such thing as finality in a Chapter 11 reorganization.

Finality, of course, is the whole point of plan confirmation. Thus, once a bankruptcy court has confirmed a plan and any appeals from the order of confirmation have been exhausted, the plan's legality is conclusively established. *See*, *e.g.*, 11 U.S.C. § 1141(a) (confirmed Chapter 11 plan "bind[s] the debtor ... and any creditor ... whether or not such creditor ... has accepted the plan"); *Adair v. Sherman*, 230 F.3d 890, 894 (7th Cir. 2000) ("[O]nce a bankruptcy plan is confirmed, its terms are not subject to collateral attack."); *See, e.g.*, 8 *Collier on Bankruptcy* ¶ 1141.02[4] (15th ed. rev. 2006) ("Confirmation of a plan acts as a final judgment. All questions that could have been raised that pertain to the

confirmed plan are barred by the doctrine of *res judicata*."). At that point, the only remaining question is what the plan says, not whether what the plan says comports with the Bankruptcy Code.

Here, the bankruptcy court interpreted petitioner's plan of reorganization (which the bankruptcy court itself had confirmed) to require pendency interest at the contractual *base* rate, instead of the contractual *default* rate. App. 57-61a. As the Sixth Circuit recognized, the bankruptcy court did not thereby impermissibly "modify" the terms of the confirmed plan. *See* App. 11a ("[T]he bankruptcy court's 2001 decision merely interpreted, rather than modified, the amended plan."). And that interpretation, as both the district court and the Sixth Circuit held, was—at the very least—reasonable. *See* 12-14a, 47-49a. As the Sixth Circuit put it, respondents "have not met the extremely difficult burden of demonstrating ... that the bankruptcy court incorrectly interpreted its own prior language or intent," and "[a]ccordingly, the bankruptcy court cannot be said to have abused its discretion by interpreting its own words incorrectly." App. 14a. That should have been (and in the Fourth, Fifth, and Ninth Circuits, would have been) the end of the matter: whether or not the terms of the confirmed plan, as permissibly interpreted by the bankruptcy court, violated the Bankruptcy Code is beside the point.

The Sixth Circuit, however, insisted that a second analytical step was necessary. "Although the bankruptcy court did not abuse its discretion by interpreting the plan as requiring the payment of pendency interest at a non-default, fixed rate, the bankruptcy court still may have done so if it construed the plan in such a way as to cause it to violate § 1129(b)'s fair and equitable requirement." App. 14a. That is so, the Sixth Circuit declared, because "a bankruptcy court's exercise of its equitable powers is cabined by the provisions of the Bankruptcy Code," and "[b]ankruptcy courts may approve a reorganization plan"

only to the extent the plan is "not inconsistent with the applicable provisions of the Bankruptcy Code." App. 15a (internal quotations and brackets omitted).

With all due respect, that assertion is a *non sequitur*. There is no question that bankruptcy courts must follow the provisions of the Bankruptcy Code when deciding whether to confirm a plan in the first instance. But that does not mean that parties remain free to challenge the legality of a plan at any time, even *after* confirmation. Respondents here had a full and fair opportunity to challenge the plan's legality, and/or clarify its scope, at the time of its confirmation. If the plan was ambiguous, they could and should have sought to clear up any such ambiguity. *See, e.g.*, *In re Harvey*, 213 F.3d 318, 322 (7th Cir. 2000); *In re Haynes*, 107 B.R. 83, 86 (Bankr. E.D. Va. 1989). Having failed to do so, respondents cannot now challenge the legality of the confirmed plan.

The Sixth Circuit's decision to entertain such a challenge squarely conflicts with decisions from the Fourth, Fifth, and Ninth Circuits. Thus, in *Republic Supply*, the Fifth Circuit held that a party to a Chapter 11 bankruptcy proceeding may not challenge the legality of a provision of a confirmed plan of reorganization. *See* 815 F.2d at 1049-50. In that case, the plan released a third-party non-debtor (a principal of the debtor) from a personal guaranty to a creditor. *See id.* at 1047-49. Before the plan was confirmed, the creditor sued the principal on that guaranty, but did not object to the plan. *See id.* at 1048. After the plan was confirmed, the principal raised the defense of *res judicata*, but the creditor argued that the plan could not lawfully discharge a non-debtor's liabilities. *See id.* at 1049. The district court agreed with the creditor, but the Fifth Circuit reversed.

On appeal, the creditor argued that "*res judicata* is not the issue in this case," and that the Fifth Circuit "should simply interpret the Plan so as to read it devoid of

the objectionable provision, since that is the only way to view the Plan as being consistent with the bankruptcy law," which does not authorize a discharge of non-debtors. *Id.*; *see also id.* ("[The creditor] contends that a [plan] provision that releases guarantors is without effect because it is beyond the authority of the bankruptcy court.") (citing 11 U.S.C. § 524); *id.* at 1050 ("The creditor] asserts that a proper interpretation of the Plan consistent with section 524 would simply delete the provision releasing [the principal's] guaranty."). The Fifth Circuit squarely rejected that argument: "Regardless of whether that provision is inconsistent with the bankruptcy laws or within the authority of the bankruptcy court, it is nonetheless included in the Plan, which was confirmed by the bankruptcy court without objection and was not appealed." *Id.* As the Fifth Circuit explained, the creditor, "in effect, is now seeking to appeal the confirmed Plan and asking us to review it on its merits," but "[q]uestions of the propriety or legality of the bankruptcy court confirmation order are … properly addressable on direct appeal," and could not be raised later in a collateral attack on a confirmed plan. *Id.*

Similarly, in *Stratosphere*, the Ninth Circuit rejected the argument that "the bankruptcy court lacked the power to release" the liability of a third-party non-debtor. 298 F.3d at 1143. As the court explained:

> It is true that a bankruptcy court cannot confirm a reorganization plan that discharges the liabilities of a third party. However, [a creditor] is barred from collaterally challenging the bankruptcy court's confirmation of [the debtor's] second reorganization plan. *This would be so even if the plan contained illegal provisions*.

Id. (emphasis added) (citing *In re Pardee*, 193 F.3d 1083, 1086 (9th Cir. 1999), and *In re Gregory*, 705 F.2d 1118, 1121 (9th Cir. 1983)). Accordingly, the *Stratosphere* court

held that the alleged illegality of a bankruptcy court's order provided no basis for denying that order *res judicata* effect. *See* 298 F.3d at 1143.

And in *Varat*, the Fourth Circuit also held that a party to a Chapter 11 bankruptcy proceeding may not challenge the legality of a provision of a confirmed plan of reorganization. *See* 81 F.3d at 1314-17. In that case, the plan classified a claim by a particular creditor (a law firm) as a secured claim. *See id.* at 1313. After the plan was confirmed, another creditor (a bank that had not objected to the confirmation) sought to argue that the law firm's claim should not have been so classified under the Bankruptcy Code. *See id.* at 1314. In particular, the bank argued that "no legal basis supported [the law firm's] alleged secured status." *Id.* at 1317. The Fourth Circuit refused to entertain that argument on *res judicata* grounds: "We hold that the confirmation order precludes consideration of [the bank's] present objections on the merits." *Id.* To the extent the bank believed that the confirmation order was unclear, it could and should have sought clarification before the plan was confirmed. *See id.* at 1316.

The decision below necessarily conflicts with these decisions by holding that a bankruptcy court may not interpret a confirmed plan of reorganization in a way that would violate the Bankruptcy Code. Once a plan has been confirmed, its legality is no longer open to question through any challenge other than a direct appeal from the confirmation order. *See, e.g.*, *Celotex Corp. v. Edwards*, 514 U.S. 300, 313 (1995); *Stoll v. Gottlieb*, 305 U.S. 165, 171-72 (1938) (same). That principle is not unique to cases under Chapter 11 of the Bankruptcy Code, but also applies with full force to cases under Chapter 13 of the Code. *See*, *e.g.*, *Adair*, 230 F.3d at 895 ("Allowing collateral attacks [on the legality of provisions contained in the confirmed plan] would give [parties] an incentive to refrain from objecting in the bankruptcy proceeding and would thereby destroy the finality that bankruptcy

confirmation is intended to provide."); *Pardee*, 193 F.3d at 1086 ("This court has recognized the finality of confirmation orders even if the confirmed bankruptcy plan contains illegal provisions."); *In re Szostek*, 886 F.2d 1405, 1406 (3d Cir. 1989) ("[A]fter the plan is confirmed the policy favoring the finality of confirmation is stronger than the bankruptcy court's … obligation[] to verify a plan's compliance with the Code."); *Gregory*, 705 F.2d at 1121 (creditor's failure to raise objection to plan legality "at the confirmation hearing or to appeal from the order of confirmation should preclude its attack on the plan or any provision therein as illegal in a subsequent proceeding"). Indeed, that principle simply reflects the general rule of *res judicata* that the "consequences of a final, unappealed judgment on the merits [are not] altered by the fact that the judgment may have been wrong." *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981). That rule, in turn, reflects the fundamental "policy judgment that in most matters it is more important that the applicable rule of law be settled than that it be settled right." *Agostini v. Felton*, 521 U.S. 203, 235 (1997) (internal quotation omitted).

To be sure, courts should strive to interpret confirmed bankruptcy plans in a manner consistent with the Bankruptcy Code, just as courts should strive to interpret statutes in a manner consistent with the Constitution. *See, e.g.*, *Clark v. Martinez*, 543 U.S. 371, 385 (2005). But that is not what the Sixth Circuit did here. The appellate court expressly concluded that "the bankruptcy court did *not* abuse its discretion by interpreting the plan as requiring the payment of pendency interest at a non-default, fixed rate," and then proceeded to reverse the bankruptcy court's decision on the ground that the court had not conducted a proper "fair and equitable" analysis under § 1129(b). App. 14a (emphasis added). The latter point is not a matter of plan *interpretation*; it is purely a matter of plan *legality*. Indeed, the Sixth Circuit's decision to remand the case for further "consideration of

any equitable factors affecting the interest rate," App. 19a, confirms that the court moved beyond issues of plan interpretation, because the consideration of such factors has nothing to do with the proper interpretation of the plan.

The upshot of the decision below is that, in the Sixth Circuit at least, confirmed plans will always remain vulnerable to legal challenges, and there will be no such thing as finality in a Chapter 11 reorganization. As a practical matter, it is hard to imagine a more fundamentally destabilizing regime. The frenetic negotiating and litigating that characterize Chapter 11 reorganizations have always had an end point, when the rules of the road are settled. Both debtors and creditors need to know when they have reached this end point, so they can cut their losses and move on. By holding that a bankruptcy court has no discretion to interpret a confirmed plan in a way that would violate the Bankruptcy Code, the decision below eliminates this end point and condemns parties to perpetual litigation over plan legality. This is not an issue that categorically favors any one side over another: although the result here happens to favor a class of creditors, by possibly forcing the debtor to pay tens of millions of dollars in additional interest that it did not owe under the confirmed plan, all parties benefit from knowing the rules of the road.

Indeed, it is hard to think of a case that illustrates the point more dramatically than this one. Petitioner's bankruptcy was, to put it mildly, exhaustively negotiated and litigated. *See, e.g.*, *In re Dow Corning Corp.*, 419 F.3d 543 (6th Cir. 2005); *In re Dow Corning Corp.*, 280 F.3d 648 (6th Cir. 2002); *In re Dow Corning Corp.*, 142 F.3d 433, 1998 WL 180596 (6th Cir. 1998) (unpublished); *In re Dow Corning Corp.*, 113 F.3d 565 (6th Cir. 1997); *In re Dow Corning Corp.*, 103 F.3d 129, 1996 WL 668567 (6th Cir. 1996) (*per curiam*) (unpublished); *In re Dow Corning Corp.*, 86 F.3d 482 (6th Cir. 1996). The arduous path to a confirmed plan of reorganization required compromises by

all sides. The plan was confirmed more than seven years ago, and petitioner emerged from bankruptcy (after nine years) more than two years ago. The plan has now been substantially consummated, and petitioner has paid its various creditors (including respondents) almost *$3 billion* to date under the plan. For the Sixth Circuit now to open the door to challenges to the legality of the plan is to call this entire Herculean effort into question. Given that the decision below departs from precedent and jeopardizes bankruptcy policies of the highest order, this case warrants this Court's review.

II. The Sixth Circuit Erred, And Deepened A Circuit Conflict That This Court Already Has Agreed To Review, By Holding That A Party To A Chapter 11 Bankruptcy Proceeding May Recover Contractual Attorneys' Fees For Litigating Matters Of Federal Bankruptcy Law.

The Sixth Circuit also erred by holding, in direct conflict with the Ninth Circuit, that a party to a Chapter 11 bankruptcy proceeding may recover contractual attorneys' fees for litigating matters of federal bankruptcy law. *See* App. 28-29a (expressly "declin[ing] to follow [a] series of Ninth Circuit cases," including *Thrifty Oil*, 322 F.3d at 1040-42; *Renfrow*, 232 F.3d at 694; *Baroff*, 105 F.3d at 440-42; *Fobian*, 951 F.2d at 1153); *see also Travelers*, 167 Fed. Appx. at 593-94. Indeed, this Court recently granted certiorari in *Travelers* to resolve this very conflict.

The attorneys' fees issue presented here (and in *Travelers*) is wholly independent of the finality issue raised in the first question presented above. Regardless of how the Court rules in *Travelers*, in other words, any such ruling will not affect the resolution of the first question presented. Accordingly, there is no need for this Court to wait for *Travelers* to resolve the second question before deciding whether to grant certiorari on the first

question. At the very least, however, this Court should hold the petition pending resolution of *Travelers*.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

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