No. 15-1223

In the Supreme Court of the United States

SOUTHWEST SECURITIES, FSB, PETITIONER

v.

MILO H. SEGNER, JR.

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether Section 506(c) of the Bankruptcy Code, 11 U.S.C. 506(c), authorizes a debtor-in-possession to recover from a secured creditor the costs of maintaining encumbered property during a period before the debtor-in-possession has abandoned that property to the creditor.

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This brief is submitted in response to the Court's order inviting the Acting Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

1. Under the Bankruptcy Code, 11 U.S.C. 101 *et seq.*, a bankruptcy trustee generally must pay an estate's administrative expenses using the estate's unencumbered assets, rather than with assets that are encumbered by a creditor's lien. *Hartford Underwriters Ins. Co.* v. *Union Planters Bank, N.A.*, 530 U.S. 1, 5 (2000). Section 506(c) of the Code, however, codifies "an important exception to the rule that secured claims are superior to administrative claims." *Ibid.* That provision authorizes a trustee to recover "the reasonable, necessary costs and expenses of preserving, or disposing of," property securing a secured

creditor's claim, through a surcharge on a secured creditor's collateral "to the extent of any benefit to the holder of such claim, including the payment of all ad valorem property taxes with respect to the property." 11 U.S.C. 506(c). Such administrative claims enjoy "a special priority [status] ahead of the secured party's general priority to its collateral." 4 *Collier on Bankruptcy* ¶ 506.05[1] (Alan N. Resnik & Henry J. Sommer eds., 16th ed. 2016).

Section 506(c) codified longstanding practice. *Hartford Underwriters*, 530 U.S. at 9. Although the 1898 Bankruptcy Act, ch. 541, 30 Stat. 544, did not explicitly provide for surcharge of the costs of preserving a secured creditor's collateral, courts administering that Act invoked "equitable principle[s]" to conclude "that where a court has custody of property, costs of administering and preserving the property are a dominant charge." *Hartford Underwriters*, 530 U.S. at 9; see 4 *Collier on Bankruptcy* ¶ 506.05[1] & n.7. By expressly authorizing such surcharges in the Bankruptcy Code in 1978, Congress "codifie[d] [the then-]current law." H.R. Rep. No. 595, 95th Cong., 1st Sess. 357 (1977); S. Rep. No. 989, 95th Cong., 2d Sess. 68 (1978).

2. a. This case arises from a Chapter 11 bankruptcy filed on behalf of Domistyle, Inc., a manufacturer of household goods. Pet. App. 2a. In 2013, a Texas state court placed Domistyle in receivership and appointed respondent as receiver. *Ibid.* The state court authorized respondent to initiate Chapter 11 proceedings. Bankr. Ct. Doc. 1-1, at 2 (Apr. 12, 2013). After respondent determined that reorganization was not viable, respondent ended Domistyle's operations and

prepared to liquidate the company. Pet. App. 2a; C.A. R.E. 89.

One of Domistyle's most valuable assets was a factory in Laredo, Texas. Pet. App. 2a. Then-recent appraisals had valued the factory at $6 million. *Id.* at 3a Petitioner held the primary lien, worth $3.69 million, on the property. *Id.* at 2a-3a.[1] In light of the $6 million valuation, respondent believed that substantial equity in the property could be used to satisfy not only petitioner's secured claim but also the claims of junior and unsecured creditors. *Id.* at 3a. In August 2013, respondent therefore retained a broker to sell the property. See *ibid.* Petitioner acceded to the plan because, "[g]iven the property's perceived value," petitioner believed that "moving immediately to lift the automatic stay and foreclose would have been futile." Pet. Reply Br. 4 n.2.

Respondent developed, and the bankruptcy court confirmed, a plan containing terms of liquidation with Domistyle's creditors. Pet. App. 3a. The plan transferred all of Domistyle's assets, including the encumbered property, to a "Liquidating Trust" to be administered by respondent. Bankr. Ct. Doc. 297 §§ 5.1, 5.2, 6.3(i)-(ii) (Jan. 9, 2014) (Plan). Respondent's "sole duty" was to administer the trust's "assets for the benefit of holders of Allowed Claims * * * by reasonably maximizing the value and recovery of said assets." Plan § 6.5. With respect to the encumbered factory, the plan directed respondent to "use commercially reasonable means to market and sell" the property, and to "retain" the previously hired "[b]roker on

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[1] The property was also encumbered by junior liens held by two other entities, Frost Bank and the Buell Group. Pet. App. 3a. Neither entity is a party to this case.

the same terms and conditions, and subject to the same compensation." Plan § 5.5(i). The plan authorized respondent to accept any offer "where the Net Proceeds [we]re sufficient to pay" petitioner's secured claim and any superior tax claims "in full," but respondent was not authorized to accept any lower offer without petitioner's consent. Plan § 5.5(ii). The plan set May 1, 2014, as the deadline for consummating a sale. Plan § 5.5(iv). The plan further provided that, if the factory was not sold by that date, petitioner could choose between foreclosing on the property and accepting a deed in lieu of foreclosure. Plan § 5.5(v).

Recognizing that the bankruptcy estate would incur sale-related expenses, the plan transferred respondent's right to request a Section 506(c) surcharge to the liquidating trust. Plan § 5.9. The plan also preserved petitioner's right to object to any surcharge. *Ibid.* The plan limited any surcharge request to expenses "directly related to preserving or enhancing" the property, such as "funds expended for security, *ad valorem* taxes against the [collateral], repairs to any improvement or fixture, * * * and electricity." *Ibid.* It prohibited respondent from attempting to surcharge expenses with a more attenuated connection to the sale, such as "attorney's fees and expenses" and "the trustee's time spent attempting to market the" collateral. *Ibid.* Petitioner participated in plan negotiations and voted in the plan's favor. C.A. R.E. 92.

As the liquidation plan had anticipated, the liquidating trust incurred hundreds of thousands of dollars in expenses related to the secured property. These expenses included the cost of "security, repairs to the roof and electrical system, mowing, landscaping, utilities, and insurance premiums." Pet. App. 3a. Respon-

dent paid these expenses from the liquidating trust's unencumbered cash reserves. C.A. R.E. 90.

Notwithstanding the appraised value of the encumbered factory, respondent was unable to sell the property under the terms of the plan. Before the plan's May 1 deadline, respondent received only one offer—a $4 million offer that was too low to satisfy petitioner's lien in full after the requisite deductions. Pet. App. 3a. Petitioner refused to authorize sale of the property at that price. *Id.* at 3a-4a.

When the sale deadline passed, however, petitioner did not exercise either of the options—foreclosure or acceptance of a deed in lieu of foreclosure—that were available to it under the plan. Pet. App. 4a. In the meantime, respondent tried in vain to conclude a sale with the only buyer to emerge. *Ibid.* Those negotiations ended with no sale around May 22, three weeks after the sell-by date had passed. *Ibid.* Respondent then informed petitioner that he intended to cease paying expenses such as "insurance, security[,] and utility service." *Ibid.* Petitioner objected because "such action would virtually destroy any value remaining in the" property. *Ibid.*

Respondent subsequently moved to abandon the property as "burdensome and of inconsequential value to the Liquidating Trust." Pet. App. 4a. His motion explained that, because petitioner had refused to exercise its options to take possession of the property, abandonment was necessary so that the trust could avoid paying to preserve the factory. C.A. R.E. 108-109. Petitioner opposed the motion. Pet. App. 4a.

Respondent also requested a Section 506(c) surcharge for the $420,000 the trust had expended to "protect[], preserv[e], and enhanc[e] the value of the

Property." C.A. R.E. 91. Respondent's request covered the costs of security, repairs and maintenance, utilities, and insurance from April 2013 (when Chapter 11 proceedings began) to June 2014 (when the surcharge motion was filed). *Ibid.* Respondent also requested compensation for any future preservation expenses the trust incurred during the pendency of respondent's abandonment motion. *Ibid.*

Petitioner ultimately agreed to reimburse respondent for preservation expenses incurred after June 1, 2014—a few days after respondent informed petitioner that he intended to abandon the property. Pet. App. 5a. The parties also agreed that respondent would abandon the factory to petitioner in September 2014. *Ibid.* But the parties did not reach an agreement concerning whether expenses incurred before June 2014 could be surcharged against the encumbered factory under Section 506(c). *Ibid.*

b. The bankruptcy court granted respondent's surcharge motion. Pet. App. 19a-22a. The court allowed a surcharge for approximately $338,000, which "represent[ed] actual and necessary amounts expended in this Bankruptcy Case from its beginning through May 31, 2014 to preserve the value of the Property." *Id.* at 20a.

c. The court of appeals affirmed. Pet. App. 1a-18a. As relevant here, the court explained that, under Section 506(c), a trustee may recover from a secured property sums that the trustee expended if "(1) the expenditure was necessary, (2) the amounts expended were reasonable, and (3) the creditor benefitted from the expenses." *Id.* at 6a (citation omitted).

The court of appeals explained that the last requirement is satisfied if the expense was "incurred

primarily to preserve or dispose of encumbered property." Pet. App. 12a. This "case specific" standard reaches those costs that are "directly related" to "preserving the value of" collateral or "preparing it for sale." *Ibid.* (emphasis omitted). The standard does not reach "general administrative costs" such as "legal fees for debtor's counsel" because such expenses inhere principally to the debtor's benefit, and "any tertiary benefit bestowed upon the secured property . . . is too indefinite and remote to support surcharge." *Id.* at 10a (citation and internal quotation marks omitted).

Applying this standard, the court of appeals concluded that "all of the surcharged expenses related only to preserving the value of the Property and preparing it for sale." Pet. App. 12a. The court observed that, if respondent had not paid those expenses before abandoning the property, petitioner might have received "a vacant building damaged by vandalism, filled with overgrown weeds, and saddled with a leaking roof." *Id.* at 16a. The court found that "[t]he necessary direct relationship between the expenses and the collateral is obvious here." *Id.* at 12a.

The court of appeals rejected petitioner's argument that the surcharge should have been disallowed under *In re Trim-X, Inc.*, 695 F.2d 296 (7th Cir. 1982), which petitioner "read[] as supporting a rule that administrative expenses are never incurred for the 'primary benefit' of the secured creditor" before the debtor-in-possession moves to abandon that collateral. Pet. App. 13a. The court viewed the *Trim-X* court's analysis as "largely unmoored from the statutory text." *Id.* at 15a. The court further observed that petitioner's proposed rule would be "inconsistent" with the "case

specific" nature of the benefit inquiry, and would result in "unjust enrichment" of secured creditors at the expense of bankruptcy estates. *Id.* at 14a (citation omitted).

DISCUSSION

The court of appeals correctly held that the administrative expenses incurred by respondent in order to maintain the value of petitioner's collateral could be surcharged under 11 U.S.C. 506(c). Its application of Section 506(c) to the facts of this case does not squarely conflict with any decision of this Court or another court of appeals. Further review is not warranted.

1. The court of appeals correctly upheld respondent's Section 506(c) surcharge for expenses to maintain the value of petitioner's collateral in the period before respondent sought to abandon the property. Section 506(c) allows a debtor-in-possession to recover "the reasonable, necessary costs and expenses of preserving, or disposing of," the "property securing an allowed secured claim * * * to the extent of any benefit to the holder of such claim, including the payment of all ad valorem property taxes with respect to the property." 11 U.S.C. 506(c).[2] Thus, a debtor-in-possession may surcharge "costs and expenses" for "preserving, or disposing of," secured property if

[2] Although Section 506(c) explicitly authorizes only "trustee[s]" to surcharge the collateral of a secured creditor, "[d]ebtors-in-possession may also use this section, as they are expressly given the rights and powers of a trustee." *Hartford Underwriters Ins. Co.* v. *Union Planters Bank, N.A.*, 530 U.S. 1, 6 n.3 (2000) (citing 11 U.S.C. 1107). The bankruptcy court found that respondent "ha[d] all of the powers and duties of a debtor-in-possession," See Bankr. Ct. Doc. 96 (May 20, 2013), and petitioner has not contested that respondent may invoke Section 506(c).

(1) "the expenditure was necessary," (2) "the amounts expended were reasonable," and (3) "the creditor" holding a lien on the secured property "benefitted from the expenses." Pet. App. 6a (citations omitted).

There is no dispute that the payments here were necessary and reasonable expenses for preserving property that served as petitioner's collateral. See Pet. App. 16a-17a & n.11. The parties dispute only whether petitioner received a "benefit" from the expenses that respondent incurred to maintain the property during the period before respondent moved to abandon the factory. In sustaining respondent's surcharge, the court of appeals correctly recognized that expenses paid to prevent the value of secured property from declining may confer a "benefit" on a secured creditor.

a. The court of appeals' approval of the surcharge at issue here follows from the plain language of the statute. Payments made to prevent devaluation of a creditor's collateral confer a "benefit" on the creditor under the ordinary meaning of that term. A "benefit" is something that "promotes welfare; advantage; [or] profit," *Webster's New International Dictionary of the English Language* 253 (2d ed. 1958); "promotes or enhances well-being," *American Heritage Dictionary of the English Language* 168 (4th ed. 2000); or has a "helpful or useful effect," *Black's Law Dictionary* 188 (10th ed. 2014); accord *Webster's Third New International Dictionary of the English Language* 204 (1993); 2 *Oxford English Dictionary* 111 (2d ed. 1989).

Expenses that prevent the destruction or diminution in value of a creditor's property interests promote the welfare, advantage, profit, or well-being of the creditor by enabling the creditor to maximize its re-

covery from the sale of the property. If respondent had not paid maintenance expenses for such items as "security, lawn mowing, and roof repairs," petitioner "may have been left trying to sell a vacant building damaged by vandalism, filled with overgrown weeds, and saddled with a leaking roof." Pet. App. 16a; see *id.* at 16a-17a (noting that petitioner had objected to respondent's proposal to stop paying maintenance expenses on the ground that "such action would virtually destroy any value remaining in the Laredo Property"). Maintenance payments thus benefited petitioner by enabling it to recover more from the sale of the property than petitioner could have recovered without the expenditures. See *id.* at 17a (noting "the testimony of [petitioner's] experienced real estate broker" that "the value preserved" by the expenditures "was at least as much as the amount expended"). Indeed, petitioner was the *only* entity that benefited from payment of those maintenance expenses because there was not enough equity in the Laredo property for unsecured creditors to recover any funds from the property's sale.

Petitioner suggests that a creditor does not receive a "benefit" from payments that keep a secured property in the same condition, rather than increasing the property's value, because "a 'benefit'" requires more than "the avoidance of *harm*." Pet. 11; see Pet. Reply Br. 10 ("[L]eav[ing] property 'unharmed' is not a 'benefit'"); see also Pet. 9 (suggesting that another circuit has held that, during the period in which a trustee is "retaining the property, any 'benefit' must actually *improve* the creditor's original position; merely preserving the status quo is not enough") (citation omitted). Of course, a trustee who has simply

left a property alone cannot recover a surcharge because that trustee has not incurred "costs and expenses of preserving, or disposing of," the collateral, 11 U.S.C. 506(c). But when a trustee pays expenses that prevent diminution of the secured property's value, the creditor receives a "benefit" under the ordinary meaning of that term because the creditor is aided by maintenance payments that prevent it from suffering a loss.

Other language in Section 506(c) reinforces that conclusion. Most notably, Section 506(c) authorizes a surcharge for the "reasonable, necessary costs and expenses of *preserving*" secured property, "to the extent of any benefit" to the secured creditor. 11 U.S.C. 506(c) (emphasis added). That language assumes that "preserv[ation]" of secured property can confer a "benefit" on the secured creditor. *Ibid.* Section 506(c) further provides that the "reasonable, necessary costs and expenses of preserving, or disposing of," secured property that can be surcharged "includ[e] the payment of all ad valorem property taxes with respect to the property." *Ibid.* But payment of ad valorem taxes does not "actually *improve* the creditor's original position," Pet. 9—it merely avoids the adverse consequences that missed tax payments would produce.

Petitioner also argues that Section 506(c) is inapplicable here because petitioner "did not 'benefit' from the trustee retaining the status quo rather than transferring the property immediately to" petitioner. Pet. 11; see Pet. 11-12. That argument reflects a misunderstanding of the statutory text and of the court of appeals' opinion. The court did not hold, and Section 506(c) does not require as a condition for surcharge, that respondent's *retention* of the property conferred

a benefit on petitioner. Rather, the court of appeals held that a surcharge was authorized in this case because respondent's payment of *expenses* conferred such a benefit. See Pet. App. 17a.

The fact that respondent retained the property in an attempt to realize value for other creditors, and incurred the relevant expenses while retaining the property for that purpose, does not render a surcharge unavailable. Section 506(c) does not suggest that the availability of a surcharge depends on whether the trustee acted *for the purpose* of benefiting a secured creditor. Rather, by authorizing a surcharge "to the extent of any benefit to the holder of [the] claim" that the collateral secures, Section 506(c) makes determinative the actual conferral of a benefit on the secured creditor, not the trustee's motivation in incurring the expenses. Indeed, petitioner acknowledges that "[t]rustees *always* retain property to benefit other creditors." Pet. Reply Br. 3 n.1 (emphasis added). An interpretation of Section 506(c) that barred surcharge in circumstances where property is retained "to serve other parties," Pet. 11 (emphasis omitted), would come close to negating that provision.[3]

b. Before Congress enacted Section 506(c) in 1978, many courts had recognized an "equitable principle that a lienholder may be charged with the reasonable

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[3] Petitioner suggests (Reply Br. 11) that a secured creditor does not benefit from pre-abandonment preservation expenses because the debtor-in-possession has an independent fiduciary duty to preserve collateral prior to abandonment. This argument would likewise make Section 506(c) entirely unavailable for preservation expenses, both before and after any abandonment motion, because a trustee is obligated to preserve secured property until the property leaves its control.

costs and expenses incurred by the estate that are necessary to preserve or dispose of the lienholder's collateral to the extent that the lienholder derives a benefit as a result." 4 *Collier on Bankruptcy* ¶ 506.05[1]; see *Hartford Underwriters Ins. Co.* v. *Union Planters Bank, N.A.*, 530 U.S. 1, 9 (2000). Courts described this principle as reaching expenses associated with preservation of the collateral. See, *e.g.*, *Textile Banking Co.* v. *Widener*, 265 F.2d 446, 453 (4th Cir. 1959); *First W. Sav. & Loan Ass'n* v. *Anderson*, 252 F.2d 544, 550 (9th Cir. 1958) (*First Western*), superseded by statute as stated in *Hartford Underwriters*, 530 U.S. 1; *Miners Sav. Bank* v. *Joyce*, 97 F.2d 973, 977 (3d Cir. 1938); *In re Myers*, 24 F.2d 349, 351 (2d Cir. 1928).

Courts applying this principle allowed surcharge for expenses like security and insurance that prevented diminution in a secured property's value, on the theory that such expenses benefited the creditor and that a surcharge was appropriate to prevent unjust enrichment. See, *e.g.*, *In re Pioneer Sample Book Co.*, 374 F.2d 953, 961 (3d Cir. 1967) (permitting surcharge for insurance costs on the ground that the costs "were appropriate for the safeguarding and administering of the entire estate" so that "these charges should be prorated between the liened and free assets"); *First Western*, 252 F.2d at 549 (permitting surcharge from proceeds of sale of a shopping center for costs of "protective service" of the property, including "merchant patrol surveillance"); *Title & Trust Co.* v. *Wernich*, 68 F.2d 811, 814 (9th Cir. 1934) (upholding surcharge of "watchmen's fees" on the ground that the fees were "expended and incurred by the trustee in the preservation of the mortgaged property"); *Virginia Sec.*

Corp. v. *Patrick Orchards, Inc.*, 20 F.2d 78, 81 (4th Cir. 1927) (permitting surcharge from proceeds of sale of orchard for the costs of spraying and cultivating the orchard in order to prevent "deteriorat[ion]" that would "greatly diminish[]" the orchard's value, in part because a trustee may surcharge an "expense [that] has been incurred wholly for the benefit and the advantage of the mortgaged property").

When Congress enacted Section 506(c) as part of the Bankruptcy Code in 1978, it authorized surcharges for the same categories of expenses—expenses for preserving or disposing of collateral—for which surcharges had traditionally been available. The committee reports described Section 506(c) as "codif[ying] current law." S. Rep. No. 989, 95th Cong., 2d Sess. 68 (1978); H.R. Rep. No. 595, 95th Cong., 1st Sess. 357 (1977). Pre-Code surcharge practice, which reflected judicial approval of surcharges for preservation expenses like those at issue here, thus reinforces the most natural reading of the statutory text.

c. The court of appeals' decision in this case also accords with the equitable objectives undergirding Section 506(c). The principle underlying the surcharge rule is "the prevention of a windfall to the secured creditor; a secured creditor should not reap the benefit of actions taken to preserve the secured creditor's collateral without shouldering the cost." 4 *Collier on Bankruptcy* ¶ 506.05; see, *e.g.*, *In re Tyne*, 257 F.2d 310, 312 (7th Cir. 1958). Petitioner's proposed approach would produce just that sort of windfall. It would require unsecured creditors to bear the costs of preserving secured collateral even when the benefits of those payments have flowed entirely to the secured creditor. Here, for example, payments for services

such as security, utilities, and insurance redounded to petitioner's benefit, by maintaining the value of its collateral, but did not benefit the unsecured creditors, who ultimately obtained no funds from the sale of the Laredo property. Petitioner's understanding of Section 506(c) thus would "result in the unjust enrichment that the statute aims to prevent." Pet. App. 14a (citation omitted).

2. Petitioner asserts (Pet. 6-9) that the courts of appeals disagree concerning whether a trustee may surcharge reasonable and necessary expenses to maintain the value of a secured creditor's collateral when that collateral is held in the bankruptcy estate, before the filing of any abandonment motion. Petitioner is mistaken.

a. Every court of appeals to consider the question allows surcharge of reasonable and necessary preservation expenses under Section 506(c) when, among other conditions, the "expenses of preservation are incurred primarily for the benefit of the secured creditor." *In re Trim-X, Inc.*, 695 F.2d 296, 301 (7th Cir. 1982) (*Trim-X*); see *In re Parque Forestal, Inc.*, 949 F.2d 504, 512 (1st Cir. 1991), overruled on other grounds by *Hartford Underwriters*, 530 U.S. 1; *In re Flagstaff Foodservice Corp.*, 762 F.2d 10, 12 (2d Cir. 1985); *In re Visual Indus. Inc.*, 57 F.3d 321, 326 (3d Cir. 1995); *In re K & L Lakeland, Inc.*, 128 F.3d 203, 207-208 (4th Cir. 1997); *Brookfield Prod. Credit Ass'n* v. *Borron*, 738 F.2d 951, 952 (8th Cir. 1984) (*Brookfield*); *In re Cascade Hydraulics & Util. Servs., Inc.*, 815 F.2d 546, 548 (9th Cir. 1987). While courts' applications of this standard have been highly case-specific, numerous decisions have allowed recovery of maintenance expenses comparable to the payments at

issue in this case. See, *e.g.*, Jo Ann F. Wasil, *Liability of Secured Creditor Under 11 USCS § 506(c) to Pay for Maintenance and Preservation of Real Property Leased or Owned by Debtor* § 7[a], 119 A.L.R. Fed. 535, 560-567 (1994) (collecting cases); see also 4 *Collier on Bankruptcy* ¶¶ 506.05[4] n.17 and 506.05[6][c] n.33. In applying this standard, courts have not required proof that the relevant payments were made *for the purpose* of benefiting the secured creditor, but have found it sufficient that the secured creditor in fact received a direct and significant benefit. See, *e.g.*, *In re Parque Forestal, Inc.*, 949 F.2d at 512 ("We think the [persons seeking a surcharge] met the requirement that [the secured creditor] directly benefit from the provided security services.").

b. Petitioner asserts (Pet. 7-8) that two early appellate decisions categorically prohibited surcharge of expenses that maintain the value of a secured creditor's collateral in the period before a trustee abandons the collateral. See Pet. 6-9 (discussing *Trim-X*, *supra*, and *Brookfield*, *supra*). In fact, neither decision endorsed the bar to recovery of pre-abandonment maintenance expenses that petitioner advocates.

i. The court of appeals in *Brookfield* did not perform any meaningful independent analysis, but instead quoted at length from the district court's opinion, see 738 F.2d at 952-953, and stated that it found "no error of law or fact on the part of the district court," *id.* at 953. The district court itself, moreover, had held only that the bankruptcy court did not commit clear error in finding that the secured creditor had derived no benefit from the relevant expenditures. See *ibid.* ("The [bankruptcy court's] conclusion that these facts do not support a finding of benefit as

Section 506(c) requires is not clearly erroneous.") (quoting district court opinion).

The district court in *Brookfield* stated that "[e]xpenses undertaken to improve the position of the debtor-in-possession, although indirectly benefiting the creditor, are not recoverable." 738 F.2d at 952. Read in isolation, that sentence might suggest that Section 506(c) turns on the trustee's subjective intent to benefit a secured creditor. Two sentences later, however, the district court stated that "courts construing [Section] 506(c) appear to require the debtor-in-possession, who bears the burden of proving benefit, to show that absent the costs expended the property would yield less to the creditor than it does as a result of the expenditure." *Ibid.* The court thus correctly recognized that, to determine whether a secured creditor has received a "benefit," courts should make an objective comparison between the actual value of the preserved property and the value the property would have had if the preservation expenses had not been incurred. In the present case, the court below applied substantially the same requirement and found it to be satisfied, explaining that "the testimony of [petitioner's] experienced real estate broker was that the value preserved was at least as much as the amount expended." Pet. App. 17a. Nothing in *Brookfield*, in which the district court identified an array of relevant facts and concluded only that the bankruptcy court had not clearly erred in finding no benefit to the secured creditor, supports petitioner's proposed categorical rule that a "benefit" within the meaning of Section 506(c) "must actually *improve* the creditor's original position; merely preserving the status quo is not enough." Pet. 9.

ii. In *Trim-X*, a Chapter 7 trustee moved to abandon collateral fifteen days after bankruptcy proceedings commenced. 695 F.2d at 300. The secured creditor "failed to promptly respond" to the abandonment petition. *Id.* at 301. The court of appeals allowed the trustee to surcharge only those preservation expenses that were incurred after the abandonment petition was filed. See *ibid.* The court stated that Section 506(c) had "codified" the equitable principle that "expenses of preservation" may be surcharged where the expenses were "incurred primarily for the benefit of the secured creditor or where the creditor caused or consented to such expenses." *Ibid.* (citing cases); see *id.* at 299 (additional citations).

In distinguishing between the expenses the trustee had incurred before and after the petition for abandonment was filed, the court in *Trim-X* stated that, "[a]lthough the emphasis under [Section 506(c)] is on 'benefit' to the secured creditor, considerations of 'consent' and 'causation' are still relevant." 695 F.2d at 301 (citation omitted). With respect to the facts of the case before it, the court stated that, "[a]lthough the secured creditor eventually 'benefited' from [the trustee's pre-abandonment-petition] expenses in the sense that it received the assets unharmed, it did not in any way consent to or cause these expenses." *Ibid.* "In contrast," the court concluded, "the expenses that accrued after the trustee filed his petition to abandon not only went to preserving assets that ultimately were abandoned to [the secured creditor], but also were 'caused' by the secured creditor in the sense that it failed promptly to respond to the trustee's petition." *Ibid.*

There is significant tension between the *Trim-X* court's analysis and that of the court below. In particular, the Fifth Circuit in this case correctly recognized that the *Trim-X* court's reliance on "considerations of 'consent' and 'causation,'" as bases for denying a surcharge even though "the secured creditor 'benefited' from [the pre-abandonment-petition] expenses in the sense that it received the assets unharmed," 695 F.2d at 301, was "largely unmoored from the statutory text," Pet. App. 15a; see *id.* at 15a n.10 (stating that the Seventh Circuit in *Trim-X* had "downplayed the importance of the statute's text in order to reach its holding"). But the *Trim-X* court did not endorse petitioner's view (Pet. 9) that the prevention of harm to secured property cannot confer a Section 506(c) "benefit" on the secured creditor. And petitioner does not endorse (or even mention) the *Trim-X* court's reliance on "considerations of 'consent' and 'causation,'" 695 F.2d at 301, as limits on the availability of surcharges under Section 506(c). In any event, *Trim-X* was decided 35 years ago, only four years after the Bankruptcy Code was enacted. Given the absence of more recent court of appeals decisions adopting the rule that petitioner advocates (see pp. 20-21, *infra*), the tension between *Trim-X* and the decision below does not warrant this Court's review.[4]

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[4] Petitioner identifies three bankruptcy-court and district-court decisions that have adopted its reading of *Trim-X*. See Pet. Reply Br. 7. But other lower courts, including lower courts in the Seventh Circuit, have expressly relied on *Trim-X* while authorizing surcharges of pre-abandonment expenses to maintain a secured property under Section 506(c). See, *e.g.*, *In re National Real Estate Ltd. P'ship-II*, 104 B.R. 968, 973 (Bankr. E.D. Wis. 1989) (authorizing surcharge for expenses for "lawn maintenance and flowers" and payroll services for an apartment complex in which

c. Appellate courts in subsequent cases have not read *Brookfield* and *Trim-X* to establish the categorical rule that petitioner advocates. The First Circuit in *In re Parque Forestal, Inc.*, cited both *Trim-X* and *Brookfield* and upheld a surcharge for maintenance expenses—the costs of security services for vacant home sites that served as collateral for secured creditors—that closely resembled those at issue here. 949 F.2d at 512. The First Circuit found it reasonable for the district court to infer, on the facts of the case before it, "that security arrangements were needed to maintain the development's overall value," and it concluded that the district court had correctly found satisfied "the requirement of [Section] 506(c) that the recovered funds be spent primarily for [the secured] creditor's benefit." *Ibid.* (citing *Brookfield*, 738 F.2d at 952). The First Circuit further noted that, although the *Trim-X* court had "intimated" that a creditor's consent or lack of consent "might still be germane" after the enactment of Section 506(c), the absence of consent did not counsel against a surcharge in light of all the circumstances because, at a minimum, "it could be inferred that [the creditor] benefited from the security and consented to its desirability if not its expense." *Id.* at 512-513.

The Fifth Circuit in *In re Delta Towers, Ltd.*, 924 F.2d 74 (1991) (*Delta Towers*), likewise cited both

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secured creditors had an interest, because such payments "were reasonable, necessary and beneficial to the preservation and maintenance of the property"); *In re Piasecki*, No. 06-90643, 2007 WL 914337, at *2 (Bankr. C.D. Ill. Mar. 26, 2007) (finding that trustee had satisfied the requirements for a Section 506(c) surcharge, including the requirement of benefit to the secured creditor, with respect to payments for utilities and insurance in a period preceding abandonment).

Brookfield and *Trim-X* with approval, but it did not construe those decisions to bar the recovery of pre-abandonment maintenance expenses. *Id.* at 76. Instead, the *Delta Towers* court held that, because the party seeking surcharge had not adequately quantified the extent to which the provision of utility services had benefited secured creditors by preventing deterioration of a building, that party had "failed in establishing its burden of proof." *Id.* at 78. The courts of appeals thus have not viewed *Brookfield* or *Trim-X* as establishing a *per se* bar to recovery of expenses to maintain the value of a secured creditor's collateral in the period before the trustee abandons the property.

3. No other circumstance presented by this case calls for this Court's intervention.

a. Petitioner suggests (Pet. 6) that, if the Fifth Circuit's ruling remains in place, secured creditors may be subjected to surcharges for administrative expenses in a "sweeping" array of new contexts. But courts have routinely permitted the surcharge of expenses like the ones at issue here, both before and after Congress enacted Section 506(c), without triggering any sweeping expansion of the surcharge doctrine. See pp. 12-16, *supra*. The court below emphasized that it allows surcharge only of expenses that primarily benefit a lienholder, not "general administrative costs which only incidentally benefit a secured creditor," such as "legal fees for debtor's counsel," "telephone expenses," "social security taxes," and "executive compensation arising from operation of the debtor's business before it was liquidated." Pet. App. 9a-11a.

b. Petitioner is wrong in asserting (Pet. 15) that the question presented here "arises virtually every time a trustee retains unencumbered property in the hope of benefiting unsecured creditors." Because comparatively few bankruptcy estates hold sufficient unencumbered cash to satisfy administrative expenses, trustees often must negotiate with secured creditors in order to pay the estate's expenses. In many Chapter 11 cases, trustees' Section 506(c) rights are "waived in connection with post-petition financing facilities or cash collateral agreements," thereby "forc[ing] the trustee to rely on any consensual carve-outs negotiated in the case, or upon the secured creditor's *ex post* agreement to fund certain claims necessary to facilitate a sale of the collateral." *Final Report and Recommendations of the American Bankruptcy Institute Commission to Study the Reform of Chapter 11: 2012-2014*, 23 Am. Bankr. Inst. L. Rev. 1, 248 (2015). In the present case, such negotiations were unnecessary because the bankruptcy estate held substantial reserves of unencumbered cash. See Bankr. Ct. Doc. 78 (May 13, 2013) (bankruptcy schedules). But respondent's ability to pay the preservation expenses from those reserves, without compromising its right to seek surcharge of those expenses under Section 506(c), is not typical of Chapter 11 cases.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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