No. 08-1232

IN THE

Supreme Court of the United States

CARLYLE FORTRAN TRUST,

Petitioner,

v.

NVIDIA CORPORATION, *et al.*,

Respondents.

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

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner Carlyle Fortran Trust ("Carlyle") purports to present the following questions, though some are not legitimately presented by this case:

1. In *Caplin v. Marine Midland Grace Trust Co.*, 406 U.S. 416, 428 (1972), this Court held that a bankruptcy trustee does not have standing to assert claims "on behalf of debenture holders," a class of the creditors. Positing a split in the circuits on this point, Carlyle asks whether a trustee also lacks standing to press a claim that belongs to all creditors.

2. The Second Circuit's so-called "*Wagoner* rule," holds that, under New York law, a bankruptcy trustee lacks standing to pursue a claim against a defendant for defrauding the debtor corporation with the cooperation of the debtor's management. Was the Court of Appeals correct in declining to apply this standing rule?

3. The Bankruptcy Code caps claims by a debtor's landlord. Did the Ninth Circuit correctly hold that the mere existence of the statutory cap does not confer standing on a landlord to sue a party other than the debtor for the unpaid rent to the extent that the unpaid rent exceeds the statutory cap?

4. Carlyle claims that NVIDIA assumed a lease on which Carlyle was the landlord. In support of the claim, it attached to its complaint an unsigned facsimile of a redlined draft contract. It also presented an email that supposedly contradicts an integrated contract. Was the Court of Appeals

CORPORATE DISCLOSURE STATEMENT

Respondent NVIDIA Corporation is a public company. No publicly held company owns 10% or more of its stock. Respondent NVIDIA US Investment Company is a wholly owned subsidiary of NVIDIA Corporation.

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INTRODUCTION

This bankruptcy appeal arises from an order dismissing Petitioner Carlyle Fortran Trust's complaint for lack of standing. Carlyle was the bankrupt debtor's landlord. In this suit, it does not seek to recover rent from the debtor. Rather, it blames third parties for the debtor's financial failure, and has sued them for the rent. Specifically, it alleges the defendants paid too little for the debtor's assets in a pre-bankruptcy asset purchase transaction, leaving the debtor unable to meet its financial obligations.

At bottom, this case is about who has standing to bring such a claim: May creditors sue third parties on such claims, or do the claims belong exclusively to the bankruptcy trustee? Under bankruptcy law, it must be one or the other; otherwise a creditor could beat the estate to a defendant and seek recoveries at the expense of the estate (and all the other creditors). The courts of appeals uniformly articulate the dividing line the Ninth Circuit applied in this case, that a bankruptcy trustee has exclusive standing to bring claims based on an underlying injury to the debtor, even though an injury to the debtor may also have ripple effects that derivatively harm creditors. App. 5-6.[1]

Carlyle does not dispute that universal rule. It does not purport to present any question about who can bring claims *based on injuries to the debtor.*

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[1] Petitioner's Appendix is cited herein as "App. __" The NVIDIA Respondents' Appendix is cited as "Resp. App. __"

Instead, it characterizes the central issue as revolving around who can bring claims *based on injuries inflicted directly on the creditors.* Acknowledging that the Supreme Court has held that a trustee may never bring claims on behalf of a *subset of creditors*, *see Caplin v. Marine Midland Grace Trust Co.*, 406 U.S. 416 (1972), Carlyle asks this Court to decide whether a trustee may nevertheless bring a "general" claim for harm inflicted on *all creditors*, regardless of the cause of that injury. But this case does not present the question—and the Court of Appeals did not decide it—because the Court of Appeals held that the claims in question *did not belong to the creditors*, but only to the debtor.

In its second question, Carlyle asks this Court to decide whether to adopt a standing rule articulated by the Second Circuit in *Shearson Lehman Hutton, Inc. v. Wagoner*, 944 F.2d 114, 118 (2d Cir. 1991). In essence, the "*Wagoner* rule" is that under New York law, a bankruptcy trustee lacks standing to sue a defendant for harm inflicted on the debtor, if a potential defense to that claim is *in pari delicto,*—that the defendant was in cahoots with the debtor's management to cause the harm—so the debtor cannot seek to recover for its own wrongdoing. This question in substance is just a variant of the first question, and no more cert.-worthy. Moreover, because the *Wagoner* rule is a product of New York state law, and this case involves California law, uniformity is unimportant, and there is no reason for this Court to intervene. Finally, the *Wagoner* rule does not apply—and never has been applied—in the manner Carlyle advocates.

Carlyle also seeks review of an esoteric issue concerning the relationship between these standing doctrines and the cap that the Bankruptcy Code imposes on landlord claims in bankruptcy. Carlyle enthuses that this is "a question of first impression," Pet. 30, on which it could "not find any case law," whatsoever, Pet. 27, as if this were a selling point for Supreme Court review. Finally, Carlyle asks this Court to review a fact-bound application of California's statute of frauds. Neither assignment is consistent with this Court's customary role.

Carlyle's petition should be denied.

STATEMENT OF THE CASE

3dfx Interactive, Inc. ("3dfx"), was a technology company whose business began to falter in 1999. Throughout 2000, 3dfx was hemorrhaging cash, debt was piling up, and losses were accelerating. Eventually, 3dfx's management concluded the company could not sustain its existing operations. At its November, 2000 meeting, 3dfx's board of directors met with bankruptcy counsel to confront the sobering reality that 3dfx's cash would run out by mid-December 2000. It had to find a transaction that would enable the company to meet its financial obligations.

In consultation with its investment banker, the board concluded that the first choice was to recruit a merger partner. For all the board's gold-plated connections, however, no one in the market had any interest in acquiring, or merging with, 3dfx's broken business. Nor could 3dfx find an investor to infuse the struggling business with cash. The only viable

deal it found was with Respondents NVIDIA Corporation and NVIDIA US Investment Company (collectively, "NVIDIA"). NVIDIA agreed to purchase many of 3dfx's assets. In December, 2000, NVIDIA entered into an Asset Purchase Agreement, in which NVIDIA purchased those 3dfx assets for $70 million in cash, plus a possible transfer of stock that was contingent on other events. This transaction was a giant step toward achieving the board's ultimate objective: After consideration of all other alternatives available to 3dfx, the board concluded that the liquidation, winding up and dissolution of 3dfx was the alternative most reasonably likely to enable 3dfx to pay its creditors and to maximize the return of value to its shareholders.

At the time of the transaction, 3dfx was renting office space from two landlords: Carlyle and CarrAmerica Realty Corporation ("CarrAmerica"). The Carlyle space was in California, and the CarrAmerica space in Texas. NVIDIA did not acquire those leases in the transaction.

The infusion of cash from NVIDIA forestalled the immediate financial crisis. But ultimately, it was not enough to help cover 3dfx's debts. More than a year after signing the Asset Purchase Agreement, 3dfx stopped paying rent to the two landlords. The landlords therefore decided to sue NVIDIA to make them whole.

In 2002, the two landlords filed suit in California state court against NVIDIA and some of its officers and directors (together with the individual defendants in the Carlyle complaint, the "NVIDIA

Respondents") as well as 3dfx's officers and directors. The landlords alleged that 3dfx could not make rent because NVIDIA had paid 3dfx too little for its assets a year earlier. If only NVIDIA had paid more, the landlords asserted, 3dfx would not have defaulted on its rent. Carlyle, the landlord whose claim is before the Court in this appeal, alleged, among other things, that by paying too little, NVIDIA tortiously interfered with the lease agreement, violated the Uniform Fraudulent Transfer Act, and was liable on the lease under theories of successor liability.

3dfx tried to effect a corporate dissolution under state law, but failed. In October, 2002, 3dfx filed a Chapter 11 bankruptcy petition in the Northern District of California. NVIDIA then removed both landlords' cases to the bankruptcy court.

The trustee for 3dfx's bankruptcy estate also sued NVIDIA, asserting fraudulent transfer and successor liability claims, just as the landlords had done. Like the landlords, the trustee complained that NVIDIA had paid too little for 3dfx's assets. The bankruptcy court consolidated the three adversary proceedings for discovery, and they all proceeded in tandem for a while. After the close of discovery in 2005, for reasons not relevant here, the district court ordered the landlord lawsuits transferred from the bankruptcy court to the district court.

Upon arriving back in the district court, both landlords amended their complaints, prompting motions to dismiss. The District Court dismissed both amended complaints for lack of standing, with leave to amend. Resp. App. 1-16. The further

amendments were no better received; in late 2006, the district court dismissed both lawsuits with prejudice for lack of standing, painstakingly reviewing each claim and concluding that all alleged injury to the debtor in the first instance, and so belonged to the estate. App. 9-34; Resp. App. 17-37. The landlords appealed to the Ninth Circuit.

While the landlords' appeals were pending, the bankruptcy court tried the trustee's case against NVIDIA. The object of that trial was to determine the value of the assets that 3dfx had conveyed to NVIDIA in the Asset Purchase Agreement, so as to assess whether NVIDIA had paid "reasonably equivalent value" as required under controlling state law. The bankruptcy court issued an 87-page memorandum opinion finding that NVIDIA had paid more than twice the fair market value of the assets it purchased from 3dfx, and thus had caused the estate (and its creditors) no harm. *Brandt v. NVIDIA Corporation (In re 3dfx Interactive, Inc.)*, 389 B.R. 842, 887-88 (Bankr. N.D. Cal. 2008). The trustee's appeal to the district court is pending.

On review of the order dismissing the landlords' cases, the Court of Appeals reached a split decision. It affirmed the dismissal of Carlyle's complaint entirely. The Court of Appeals observed that the gravamen of Carlyle's complaint was that NVIDIA injured *the debtor* (3dfx) by dissipating the debtor's assets. App. 6. According to the court, all of Carlyle's alleged injuries flowed derivatively from the harm to the debtor, not harm that NVIDIA inflicted directly on Carlyle. App. 6. Under existing Ninth Circuit precedent, this meant that only *the trustee* had standing to recover, because the trustee

is exclusively responsible for pursuing claims involving injury to the debtor. *See Smith v. Arthur Anderson*, 21 F.3d 989, 1004 (9th Cir. 2005). A creditor whose injury derives only from harm to the debtor does not have standing to sue directly. That creditor must stand in line with all the other creditors and recover only its fair aliquot of the funds the trustee recovers from such claims.

The Court of Appeals reached a different conclusion as to some of CarrAmerica's claims. It held that CarrAmerica had pled certain direct injuries that were particular to CarrAmerica, and not derivative of any injury to 3dfx. App. 7-8. That meant that the trustee could not bring those claims, and CarrAmerica had standing to bring them directly against NVIDIA. App. 8. CarrAmerica has not sought review as to the claims that have been dismissed.

Carlyle filed a petition for rehearing *en banc* and a motion for clarification in the Court of Appeals. The court denied rehearing *en banc*, with not a single judge requesting a vote on Carlyle's petition. App. 37. However, in response to Carlyle's motion for clarification, the Court of Appeals remanded Carlyle's case to determine whether the trustee had abandoned the estate's property interest in any of the claims Carlyle had asserted against NVIDIA. App. 36-37. The bankruptcy court has since concluded that the trustee had not abandoned any of its claims. En route to that conclusion, the bankruptcy court chided Carlyle for securing the remand from the Court of Appeals through a "lack of candor" in its motion for clarification. *See In re 3dfx Interactive, Inc.*, No. 02-55795 RLE (Bankr. N.D.

Cal.) (Hearing held, May 13, 2009, Docket No. 1129; transcript at p. 49:4-11).

REASONS FOR DENYING THE PETITION

Carlyle presents four questions that it purports to find in the Court of Appeals' short, unpublished opinion. None of them is worthy of this Court's review.

The first is a question about whether a trustee has standing to assert claims that belong to all creditors. That question is not presented here, because the Court of Appeals held that the claims at issue do *not* belong to the creditors. And, in any event, the circuit conflict Carlyle describes is illusory. *See infra* Point I.

The second question is whether this Court should adopt a peculiar rule about trustee standing that no court other than the Second Circuit has ever adopted. The issue is not cert.-worthy because the Second Circuit rule is the product of New York state law, and California law (which governs here) is different. *See infra* Point II.

The remaining two questions are utterly unworthy of this Court's attention. Question 3 is a bankruptcy law question so esoteric that, according to Carlyle, no court other than the Ninth Circuit has ever addressed it. This Court should deny certiorari for that reason alone. *See infra* Point III.

Finally, Carlyle inexplicably asks this Court to decide a state law question about an application of the statute of frauds to a specific set of facts, the very antithesis of a cert.-worthy question. *See infra* Point IV.

I. THIS CASE DOES NOT PRESENT A CERT.-WORTHY CONFLICT ABOUT WHETHER TRUSTEES HAVE STANDING TO BRING "GENERAL" CLAIMS ON BEHALF OF ALL CREDITORS.

Carlyle purports to present this Court with an opportunity to resolve an asserted circuit conflict about whether a bankruptcy trustee has standing to bring claims on behalf of all creditors. Carlyle sees ambiguity in this Court's holding in *Caplin v. Marine Midland Grace Trust Co.*, that "nowhere in the statutory scheme is there any suggestion that the trustee in reorganization is to assume the responsibility of suing third parties on behalf of debenture holders," a class of creditors. 406 U.S. at 428. Carlyle presents the question "whether a bankruptcy trustee lacks standing to sue on behalf of creditors *generally* or only *a certain class* of creditors," such as debenture holders. Pet. 12 (emphasis added). The petition depicts two nearly equal camps aligning on either side of the question.

Carlyle is mistaken because: (A) this case does not present that question; and (B) the purported circuit conflict is illusory.

A. This Case Does Not Present the Issue Carlyle Purports to Present.

The conflict Carlyle seeks to present arises only in the specific context where a trustee "assume[s] the responsibility of suing third parties *on behalf of*" creditors. *Caplin*, 406 U.S. at 428 (emphasis added). Only where the trustee is presenting claims that

actually *belong to* creditors does the debate arise over whether the trustee is ever allowed to do so, and, if so, under what circumstances. Only in that circumstance does a court confront the choice between: (1) a rule that the trustee has standing to bring claims on behalf of creditors, but only if the claims belong *generally* to *all* creditors; and (2) a rule that the trustee *never* has standing to press claims on behalf of creditors, even if the claims belong generally to all creditors.

This case does not present this Court with the opportunity to choose between these alternative rules, because the necessary precondition is missing. Contrary to Carlyle's assertion, the Court of Appeals did not "read *Caplin* broadly and for the proposition that a bankruptcy trustee cannot bring 'general' creditor claims." Pet. 12. The Court of Appeals did not interpret *Caplin*, and did not address the question whether a trustee can ever bring a claim *on behalf of* creditors. Rather, it held that the claims in question did not belong to creditors at all—not to all creditors generally and not to a subclass of creditors. The court could not have been clearer: "While the Creditors were harmed by the alleged diminution of 3dfx's estate, depleting the assets available for the bankruptcy estate *constitutes an injury to the bankrupt corporation itself, not an individual creditor of that corporation.*" App. 6 (emphasis added). In light of that conclusion, the Court of Appeals did not apply the *Caplin* rule, but a different rule entirely: "[T]he Trustee has exclusive standing to sue with respect to all claims asserted by Creditors based on an underlying injury to [the debtor]." App. 5-6.

Carlyle does not take issue with this rule. And for good reason. Whatever uncertainty there might be as to a trustee's power to bring claims that belong to *creditors*, every circuit to address the issue—at least ten in all—agrees that the trustee has exclusive authority to bring claims that belong to the *debtor*, and that a claim based on an injury to the debtor is a claim that belongs to the debtor, not to creditors.[2] Carlyle does not cite a single case that holds otherwise.

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[2] *See Smith*, 421 F.3d at 1004 (trustee has exclusive standing where injury to creditors results from "the economic reality that any injury to an insolvent firm is necessarily felt by its creditors"); *Official Committee of Unsecured Creditors v. R.F. Lafferty & Co., Inc.*, 267 F.3d 340, 347-48 (3d Cir. 2001) (bankruptcy estate representative has standing where injury to creditors was not "separately cognizable" from injury to debtor); *Schimmelpennick v. Byrne (In re Schimmelpennick)*, 183 F.2d 347, 358-61 (5th Cir. 1999) (creditor has no standing to bring claims based on injury to debtor that affected creditor derivatively); *Bivens Gardens Office Bldg., Inc. v. Barnett Banks of Fla., Inc.*, 140 F.3d 898, 908 (11th Cir. 1998) (creditor lacks standing "if the injury alleged was suffered only as a result of harm to the corporation"); *Honigman v. Comerica Bank (In re van Dresser Corp.)*, 128 F.3d 945 (6th Cir. 1997) (creditor lacks standing because injury was derivative of harm to debtor corporation); *Steinberg v. Buczynski*, 40 F.3d 890, 893 (7th Cir. 1994) (a trustee enforces a creditor's interest in claims where they are derivative of the debtor corporation's claims); *Kalb, Voorhis & Co. v. Am. Fin. Corp.*, 8 F.3d 130, 132 (2d Cir. 1993) ("If a claim is a general one, with no particularized injury arising from it, and if that claim could be brought by any creditor of the debtor, the trustee is the proper person to assert the claim, and the creditors are bound by the outcome of the trustee's action."); *St. Paul Fire and Marine Ins. Co. v. PepsiCo Inc.*, 884 F.2d 688, 704 (2d Cir. 1989) (creditor lacked standing where its injury "alleged a secondary effect from harm done to"

This rule derives from the trustee's bedrock duty to collect the property of the estate and reduce it to money. *See* 11 U.S.C. § 704(1). As the Fifth Circuit has explained:

> If a cause of action alleges only indirect harm to a creditor (i.e., an injury which derives from harm to the debtor), and the debtor could have raised a claim for its direct injury under the applicable law, then the cause of action belongs to the estate. (citations omitted) Conversely, if the cause of action does not explicitly or implicitly allege harm to the debtor, then the cause of action could not have been asserted by the debtor as of the commencement of the case, and thus is not property of the estate.

Schertz-Cibolo-Universal City, Indep. School Dist. v. Wright (In re Educators Group Health Trust), 25 F.3d 1281, 1284 (5th Cir. 1994).

Not only is this rule consistent with *Caplin*, but it is a necessary corollary to the *Caplin* rule. As the Third Circuit has explained:

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the debtor); *Regan v. Vinick & Young (In re Rare Coin Galleries of Am., Inc.)*, 862 F.2d 896, 900-01 (1st Cir. 1988) (trustee has standing when alleging claims based on injury to debtor, even though wrongdoing caused debtor's customers to lose money); *Steyr-Daimler-Puch of Am. Corp. v. Pappas*, 852 F.2d 132, 136 (4th Cir. 1988) (creditor lacked standing to bring claim where injury is to debtor corporation under state law); *Delgado Oil Co., Inc. v. Torres*, 785 F.2d 857, 862 (10th Cir. 1986) (claim based on transferring assets from corporation states injury to corporation, and so belongs to trustee, not individual creditor).

> Simply because the creditors of a[n] estate may be the primary or even the only beneficiary of such a recovery does not transform the action into a suit by the creditors. Otherwise, whenever a lawsuit constituted property of an estate which has insufficient funds to pay all creditors, the lawsuit would be worthless since under *Caplin* it could not be pursued by the trustee.

Lafferty, 267 F.3d at 348-49 (quotation and citation omitted).

To say that the courts universally agree on the baseline rule does not mean that the rule is always easy to apply. Sometimes seemingly inconsistent outcomes are attributable to the fact that state law dictates whether a claim belongs to the debtor or the creditor. *See Butner v. Unites States*, 440 U.S. 48, 54 (1979).[3] Other times, different outcomes are attributable to subtle differences among the claims being assessed.[4] Carlyle is incorrect in saying that

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[3] *Compare, e.g., Kalb*, 8 F.3d at 132 (alter ego claim belongs to corporation under Texas law, so claim was exclusive to trustee and creditor lacked standing), *St. Paul Fire*, 884 F.2d at 703-4 (same under Ohio law), *and CBS, Inc. v. Folks (In re Folks)*, 211 B.R. 378, 385 (B.A.P. 9th Cir. 1997) (same under California law), *with Mixon v. Anderson (In re Ozark Restaurant Equip. Co.)*, 816 F.2d 1222, 1225 (8th Cir.) (alter ego claim belongs to creditor under Arkansas law, so trustee lacked standing), *cert. denied*, 484 U.S. 848 (1987).

[4] *See, e.g., Shearson Lehman*, 944 F.2d at 119-20 (under New York law, a "churning" claim belonged to the corporation, so the trustee had exclusive standing to bring it, but the trustee

the various cases it cites "cannot be reconciled." Pet. 15. But the more important point, for present purposes, is that these cases all articulate and apply the same rule that the Ninth Circuit followed here.[5] If there are any irreconcilable outcomes, they are a function not of confusion as to what the rule is, but inevitable disagreements as to how to apply it to a new set of facts.

Carlyle does not seek certiorari to review the Court of Appeals' conclusion that Carlyle's suit "constitutes an injury to the bankrupt corporation itself, not an individual creditor of that corporation." App. 6. Yet, at points its petition appears to dispute that holding. *See* App. 17 (arguing that "the rights under a lease accrue only to the landlord, not to creditors of the tenant"). To the extent Carlyle seeks review of that holding, this Court should reject the invitation to delve into a fact-bound determination that revolves around particulars of state law.

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lacked standing to bring a second claim that alleged damage only to "client of" the debtor).

[5] *See, e.g., Koch Refining v. Farmers Union Cent. Exchg., Inc.*, 831 F.2d 1339, 1349 (7th Cir. 1987) (trustee has exclusive standing to bring a claim that alleged injury to the debtor-corporation because the creditor-claimant "had been injured only in an indirect manner"); *Steinberg*, 40 F.3d at 892-93 (holding that the trustee lacked standing because "the only injured person here is the [creditor]," and "[w]hen a third party has injured not the bankrupt corporation itself but a creditor of that corporation, the trustee in bankruptcy cannot bring suit against the third party").

B. The Purported Circuit Split Carlyle Claims to Present Is Illusory.

Even if this case did present the question Carlyle poses, and even if the Court of Appeals had addressed it, the question would not be worthy of this Court's consideration. The circuits do not disagree as to whether, under 11 U.S.C. § 541(a), a trustee has standing to bring a claim that belongs to creditors. Their uniform answer is no. No circuit has upheld standing for a trustee bringing a claim that actually belongs to creditors—i.e., a claim that is premised on direct harm to the creditors, as opposed to harm that is derivative of harm to the bankrupt debtor.

Carlyle does not cite a single case that reaches the opposite conclusion. It cites no case upholding a trustee's standing to press a claim that actually belongs to the creditors, and no case barring creditors from bringing a claim that belongs to them.

Instead, Carlyle performs the verbal equivalent of an amateur parlor trick. It tries to create the illusion of a conflict by stringing together several isolated quotes that seem superficially contradictory—until you stare at them a few seconds longer. These snippets are to the effect of: "[i]f a claim is a general one, with no particularized injury arising from it, . . . the trustee is the proper person to assert the claim," *Kalb, Voorhis & Co.*, 8 F.3d at 132, or "[a] trustee may maintain only a general claim," *Koch Refining*, 831 F.2d at 1349. Not a single one of these cases holds that a bankruptcy trustee *does* have standing to press claims on behalf of creditors—claims where the creditors, not the

debtor, were the subject of the injury. Rather, in each situation, Carlyle's misdirection consists of exploiting different uses of the word "general." These snippets use the word "general" as a synonym for "derivative." They use the phrase to describe an injury to the *debtor* that happens to have inflicted harm on all the creditors. In this usage, the "general claim" is distinguished from a "personal" or "particularized" claim, in which injury was inflicted directly on a particular creditor. In these passages, trustees bring "general" claims in the sense that their recoveries benefit all creditors generally—not in the sense that they are asserting claims, *on behalf of* creditors, that actually *belong to* all creditors.

One good example of this usage is *In re Folks*, 211 B.R. 378, which Carlyle features as a poster-child for the proposition that trustees may bring general claims on behalf of creditors. *See* Pet. at 13-14. The court there detailed the difference between "General v. Particularized Injury": A "general" claim, is one "with no particularized injury arising from it, *which is based upon injury to the corporate debtor* and all its creditors, rather than a personal claim belonging to any individual creditor." *Folks*, 211 B.R. at 387-88 (emphasis added).

This same distinction explains why several circuits take positions on *both* sides of the artificial dichotomy Carlyle tries to draw. *See* Pet. 14-16 (cataloguing supposed conflicts). Carlyle characterizes the duality as "Intra-Circuit Conflict[s]" (without explaining why this Court should abandon its customary practice of declining to resolve intramural conflicts within a circuit). Pet. 14. But the accused circuits do not see it that way.

Take, for example, the Seventh Circuit, which is the source of the above-quoted snippet that "[a] trustee may maintain only a general claim." *Koch Refining*, 831 F.2d at 1349. Carlyle juxtaposes this quote against a passage in a later Seventh Circuit case holding that "the trustee . . . has no right to enforce entitlements of a creditor." *Steinberg*, 40 F.3d at 893. Carlyle asserts that the two opinions "cannot be reconciled." Pet. 15. The only way to make this assertion true is to read the quotes really fast—and then ignore every word of both opinions except the quoted words. Not only can they be reconciled, but the second opinion, written by Judge Posner, explains at length exactly how to reconcile them. The key lies in getting past the imprecise nomenclature. The Seventh Circuit explained that the earlier opinion's description of claims as either "general" or "personal" was "not an illuminating usage." *Id.* at 893. The real question in that earlier case, and in all cases like this, is whether the injury befalls the creditor directly, or whether the harm to the creditor is derivative of the harm to the debtor:

> The point is simply that the trustee is confined to enforcing entitlements of the [debtor]. He has no right to enforce entitlements of a creditor. [The trustee] represents the unsecured creditors of the corporation; and in that sense when he is suing on behalf of the corporation he is really suing on behalf of the creditors of the corporation. But there is a *difference between a creditor's interest in the claims of the corporation* against a third party, which are

> enforced by the trustee, and the *creditor's own direct—not derivative—claim* against the third party, which only the creditor himself can enforce.

Id. (emphasis added).

More recently, the Fifth Circuit made the same point, resolving the confusion that arose from the same imprecise nomenclature:

> The discussion of personal and general claims . . . was not meant to work a change to th[e] well-established rule, even when the claims at issue may be brought by a number of creditors instead of just one. Rather, our point was that some claims that are usually brought by creditors outside of bankruptcy (and thus in a sense may be said to "belong to" the creditors and not the debtor) are nonetheless vested exclusively in the trustee in bankruptcy.

Highland Capital Mgmt LP v. Chesapeake Energy Corp. (In re Seven Seas Petroleum, Inc.), 522 F.3d 575, 588-89 (5th Cir. 2008). The court continued, "It is '[a]ctions by individual creditors asserting a generalized injury to the debtor's estate, which ultimately affects all creditors[,]' that can be said to raise a 'generalized grievance,' not actions by creditors that are merely common to a number of them." *Id.* at 589 (citation omitted).

In short, despite variations in terminology, these courts uniformly apply the same rule—the very rule the Ninth Circuit applied in this case. This Court

need not grant certiorari to align the lower courts around a single lexicon—particularly since they are already falling into line of their own accord.

II. THE VALIDITY OF THE *WAGONER* RULE IS NOT A CERT.-WORTHY QUESTION.

Carlyle next urges the Court to resolve the validity of the so-called "*Wagoner* rule," as articulated by the Second Circuit in *Shearson Lehman Hutton, Inc. v. Wagoner*, 944 F.2d 114 (2d Cir. 1991). The Ninth Circuit declined to follow the rule in this case. App. 7. This Court should refuse Carlyle's invitation for three reasons: (A) the issue is merely a variation of the first question, which itself is not cert.-worthy; (B) the *Wagoner* rule is a product of the application of state law; and (C) the Wagoner rule does not apply—and has never been applied—in circumstances like these.

A. The Second Question Is Merely A Variant Of The First Question Concerning Ownership Of Claims.

The *Wagoner* rule, as the Second Circuit articulates it, is as follows: "A claim against a third party for defrauding a corporation with the cooperation of management accrues to the creditors, not to the guilty corporation." *Id.* at 120. As noted in Part I, a bankruptcy trustee's standing to sue third parties depends upon whether the claim being pursued is property of the bankruptcy estate. 11 U.S.C. §704(1) ("trustee shall . . . collect and reduce to money the property of the estate . . ."); §541(a)(1) (defining "property of the estate" to

include any interest in property that the debtor had as of the commencement of the bankruptcy case). Whether a cause of action is property of the estate belonging to the trustee, or belongs to creditors, is a question of state law. *Barnhill v. Johnson,* 503 U.S. 393, 398 (1992). On its face, *Wagoner* is merely an articulation of one circumstance in which a creditor might be found to own a claim that, in other jurisdictions, would belong to the bankruptcy estate.

In other words, Carlyle's protest of the Ninth Circuit's refusal to adopt the Second Circuit's *Wagoner* rule in this case reflects Carlyle's confused thinking about the dispositive analysis: (a) What determines a party's standing to sue is whether that party owns the claims it would assert; (b) where a bankruptcy is implicated, ownership of the claims depends upon analysis of whether that claim is property of the estate; and (c) what constitutes property of the estate is largely a question of state law. Therefore, if the claim the creditor would assert is, under the relevant state law analysis, property of the bankruptcy estate, the creditor does not own the claim and lacks standing to pursue it. If it is not property of the estate, then the creditor must still demonstrate ownership to establish standing, but at least is not foreclosed by the bankruptcy trustee's exclusive standing.

As we observed above, *see supra* Point I, every circuit in the country follows this analytical framework. The Second Circuit's *Wagoner* rule is nothing more than a part of that analysis, applied in circumstances where New York law controls and the debtor and the defendant were in cahoots. This is, therefore, still a debate about the first question: who

owns the claims that Carlyle would assert? The second question thus presents no more compelling a case for certiorari than the first.

B. The Wagoner Rule is the Product of New York State Law.

Carlyle describes the disagreement between the Second Circuit and other circuits over whether to apply the *Wagoner* rule as an "irreconcilable inter-circuit conflict." Pet. 25. In truth, the conflict is nothing of the sort; state law differences account entirely for the different results.

Under *Wagoner,* as a matter of New York state law the property of the bankruptcy estate does not include claims against third parties for injuries caused by the misconduct of the debtor's controlling managers. *See Ernst & Young v. Bankruptcy Services, Inc., (In re CBI Holding Co.)*, 529 F.3d 432, 447 (2d Cir. 2008) ("**Under New York law**, '[a] claim against a third party for defrauding a corporation with the cooperation of management accrues to the creditors, not to the guilty corporation.'") (emphasis added); *Mediators, Inc. v. Manney (In re Mediators, Inc.),* 105 F.3d 822, 826 (2d Cir. 1997) ("In *Wagoner,* we held that, **under New York law**, a bankruptcy trustee had no standing to sue Shearson Lehman Hutton for aiding and abetting the unlawful investment activity of . . . the president and sole shareholder of a bankrupt corporation.") (emphasis added). While the Second Circuit in *Wagoner* did not explain its rationale for the rule, lower courts have surmised that it derives from the application of New York's state law equitable affirmative defense of *in pari delicto*,

which prohibits a company from suing someone else for injuries that the company's own management helped inflict. *See, e.g., Schertz-Cibolo-Universal City v. Wright (In re Adelphia Commc'ns Corp.)*, 365 B.R. 24, 45 (Bankr. S.D.N.Y. 2007); *Buchwald v. The Renco Group, Inc., (In re Magnesium Corp. of Am.)*, 399 B.R. 722, 764 (Bankr. S.D.N.Y. 2009); *but see Official Committee of the Unsecured Creditors of Color Tile, Inc. v. Coopers & Lybrand, LLP*, 322 f.3d 147, 157 (2d Cir. 2003) ("*Wagoner* had nothing to do with affirmative defenses."). Thus, New York state law conflates the equitable defense of *in pari delicto* with questions of standing, and analyzes the questions together.

At bottom, Caryle's lament is that its claims are not governed by New York law, where it might have benefited by application of the *Wagoner* rule. This case, however, is governed by California law. Unlike New York, most other jurisdictions—including California—treat questions of standing and the affirmative defense of *in pari delicto* as "analytically distinct concepts." *See Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP*, 133 Cal. App. 4th 658, 677 (2005) ("Although some cases have considered the bankrupt entity's unclean hands (generally referred to in federal decisions as *in pari delicto* doctrine) as an element of standing, they are analytically distinct concepts.") (citations omitted).[6]

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[6] *See also Moratzka v. Morris (In re Senior Cottages of America, LLC)*, 482 F.3d 997, 1003 (8th Cir. 2007); *Baena v. KPMG*, 453 F.3d 1, 7 (1st Cir. 2006) (*in pari delicto* has nothing to do with standing); *Official Comm. Of Unsecured Creditors of PSA, Inc. v. Edwards*, 437 F.3d 1145, 1149 (11th Cir. 2006) ("an analysis

In *Peregrine*, the California Court of Appeals found that a trustee enjoyed standing to bring his claims, but that the unique procedural context of that case permitted a dismissal. The defendant filed a special motion to strike that, under the relevant California statute, shifted the burden to the plaintiff to show a probability of success on the merits. The trustee's complaint contained sufficient allegations of misconduct by the debtor—which the Court termed "admissions"—to support the *in pari delicto* affirmative defense, so the court adjudicated the matter on that basis. Plainly, a California court would treat *in pari delicto* as a defense, and not divest a trustee of ownership of the claim, and so standing. The nuances of individual states' applications of the *in pari delicto* defense, while perhaps worthy of a law school student note, do not compel certiorari review.

The Court of Appeals in this case correctly determined that notions of *in pari delicto* do not divest a bankruptcy trustee of exclusive standing to pursue claims otherwise owned by the estate. That a court applying New York law might reach a different conclusion is neither remarkable nor worthy of this Court's attention.

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of standing does not include an analysis of equitable defenses, such as *in pari delicto*"); *Lafferty*, 267 F.3d at 346 ("whether a party has standing to bring a claim and whether a party's claims are barred by an equitable defense are two separate questions"); *In re Educator's Group Health Trust*, 25 F.3d 1281, 1286 (5th Cir. 1994) (rejecting "the proposition that a defense on the merits of a claim precludes the debtor from bringing the claim.")

C. The Wagoner Rule Does Not Apply in the Circumstances Here.

Carlyle also asks this Court to rule on a unique and unprecedented application of the *Wagoner* rule. Carlyle invokes the *in pari delicto* doctrine, shorn from its legal context or any understanding of its function, to argue that a different plaintiff in an entirely independent lawsuit should be divested of standing to prosecute that second action. Carlyle cites no cases applying the rule in this manner, and for good reason: no bankruptcy trustee could ever pursue claims of the debtor against any person if a creditor could divest the trustee of standing by the simple expedient of filing its own lawsuit against the same defendant, and fill it with artful allegations that the defendant and the debtor were collaborators in the wrongs that led to the debtor's insolvency.

Certainly, research has uncovered no cases in which a court has ever divested a trustee of standing in his lawsuit as a result of allegations made by a creditor in an entirely different and separate lawsuit. The argument is especially peculiar here where the trustee's lawsuit has been adjudicated to judgment without consideration of any *in pari delicto* defense. Rather, in every case in which the *Wagoner* rule has been considered, it is asserted by a defendant against a trustee to dismiss the trustee's complaint. The *Wagoner* rule simply has no applicability in the circumstances here.

III. THIS COURT SHOULD NOT REVIEW AN ISSUE OF FIRST IMPRESSION ABOUT WHEN A LANDLORD MAY EVADE A STATUTORY CAP ON LANDLORD CLAIMS.

Carlyle's third question is: "As between a Chapter 11 reorganization trustee and creditor of the estate, does a creditor (landlord) have standing to pursue claims against a third party for lease damages in excess of the 11 U.S.C. § 502(b)(6) 'cap.'" Pet. ii. Carlyle breathlessly announces that this is a "question of first impression," Pet. 30—not just for the courts of appeals, but for any court anywhere. It adds that "[d]espite extensive research, Carlyle did not find any case law addressing th[is] question," other than the Ninth Circuit's unpublished opinion in this case. Pet. 27. Trying to win certiorari on this basis is like trying to gain admission to Heaven by announcing, "I've never done anything good."

That is reason alone to deny admission. Carlyle offers no reason for this Court to depart from its custom of reviewing only those issues that have fully percolated in the courts of appeals. Certainly, the question whether a landlord may evade the statutory cap of 11 U.S.C. § 502(b)(6) is not the sort of earth-shattering issue of such profound and urgent importance that it cries out for immediate resolution without the benefit of lower court vetting.

The most that Carlyle offers is that "[t]he Ninth Circuit's reasoning is erroneous." Pet. 28. But until this Court decides to transform into a court of errors, that is a singularly unpersuasive reason.

In any event, the claim of error is irrelevant, and incorrect. It is irrelevant because the Ninth Circuit rejected Carlyle's claim on the basis of an alternative ground, rooted entirely in state law. It held that regardless of the outcome of the bankruptcy law question, "[t]he district court properly held that the California statute of frauds barred Carlyle's claim that NVIDIA is liable for damages above the cap because Carlyle's complaint failed to allege there was a written assumption of the lease signed by NVIDIA." App. 7. In fact, this state law ground was *the* reason that the district court invoked for rejecting Carlyle's claim for rent in excess of the cap; it assumed that Carlyle had standing to sue NVIDIA, but dismissed the claim as precluded by the statute of frauds (App. 24-26) and on other state law grounds. App. 19-20. Since this Court does not sit to resolve issues of state law, *see infra* Point IV, nothing it says about the statutory cap will have any effect on the outcome of this case.

The claim of error, moreover, is incorrect, because the Court of Appeals' analysis was spot on. Nothing in "§ 502(b)(6) gives rise to a particularized injury that divests the Trustee of standing." App. 6-7. The provision does not constrain the powers of the trustee or limit his standing in any way. Rather, it limits the allowance of *claims* that belong to secured creditors. "[S]o the cap impairs the Creditors' claims regardless of whether the Trustee or the Creditors pursue the claim." App. 7. Moreover, the cap is not itself an "injury"; it is a function of the application of the Bankruptcy Code's legislatively mandated claims allowance process; it has no bearing on whether Carlyle has standing to sue. *See Smith*, 421 F.3d at

1004-5 (disparate treatment of creditors based on application of the Bankruptcy Code "irrelevant" to question of standing).

IV. THE COURT SHOULD NOT REVIEW A QUESTION OF STATE LAW ABOUT CALIFORNIA'S STATUTE OF FRAUDS.

Carlyle's final argument is that "review is necessary to determine whether the Ninth Circuit erred in finding that e-mails cannot satisfy the statute of frauds." Pet. 31 (capitalization omitted). This conclusion, Carlyle asserts, "is contrary to California statute and case law." *Id.* This is the antithesis of a cert.-worthy issue (and Carlyle is wrong anyway). The state law issue does not become any more cert.-worthy just because Carlyle says that the supposed error is "manifest." Pet. 33.

CONCLUSION

For the foregoing reasons, the Court should deny Carlyle's petition for a writ of certiorari.

Respectfully submitted,

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