No. ____

In the Supreme Court of the United States

THE BANK OF NEW YORK MELLON AND
THE BANK OF NEW YORK MELLON CORPORATION,
Petitioners,

v.

FREDERICK J. GREDE, AS TRUSTEE OF THE
SENTINEL LIQUIDATION TRUST,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Caplin* v. *Marine Midland Grace Trust Co.*, 406 U.S. 416 (1972), this Court held that a bankruptcy trustee lacked standing to file claims against a third party on behalf of a select group of creditors where any recovery would go only to those creditors rather than to the estate. In the decision below, the Seventh Circuit held that the *Caplin* rule does not apply where such claims were assigned to a liquidation trustee even though, as in *Caplin*, any recovery would go only to the assigning creditors rather than to the estate. The Seventh Circuit expressly recognized that its ruling conflicts with *Williams* v. *California 1st Bank*, 859 F.2d 664, 665-667 (9th Cir. 1988). The question presented is:

Whether a trustee appointed by a bankruptcy court to liquidate the estate has the authority to pursue assigned creditor claims against a third party where any recovery will not go to the estate.

RULE 29.6 STATEMENT

The Bank of New York Mellon Corporation is the parent corporation of The Bank of New York Mellon f/k/a The Bank of New York. No publicly held corporation owns 10% or more of the Bank of New York Mellon Corporation's stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, The Bank of New York Mellon and The Bank of New York Mellon Corporation (collectively, "the Bank"), respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-8a) is reported at 598 F.3d 899. The district court's order (App., *infra*, 9a-25a) is reported at 409 B.R. 467.

JURISDICTION

The judgment of the court of appeals was entered on March 18, 2010. Petitioner's timely petition for rehearing en banc was denied on April 16, 2010. App., *infra*, 26a-27a. On July 7, 2010, the time within which to file this petition was extended by Justice Breyer to August 16, 2010. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

"The trustee in a case under this title is the representative of the estate." 11 U.S.C. § 323(a).

"The trustee shall *** collect and reduce to money the property of the estate for which such trustee serves ***." 11 U.S.C. § 704(a)(1).

STATEMENT

A. The Sentinel Bankruptcy

Sentinel was an investment manager that filed for Chapter 11 bankruptcy in August 2007. Respondent Frederick J. Grede ("Grede") was appointed trustee of the Sentinel estate in the Chapter 11 proceeding, in which Sentinel customers and other entities asserted unsecured claims. The Bank was Sentinel's only secured creditor.

In October 2007, Grede sued Sentinel's principals, alleging that they had defrauded Sentinel and its customers. In March 2008, Grede filed an adversary proceeding against the Bank, claiming that it had facilitated the Sentinel principals' alleged fraud. The district court granted the Bank's motion to dismiss the Trustee's claims in part. *Grede* v. *Bank of New York*, 2009 WL 188460 (N.D. Ill. Jan. 27, 2009). The remaining claims in that action are pending.

In December 2008, the bankruptcy court confirmed a Chapter 11 plan ("Plan") that established a Liquidation Trust to liquidate the Sentinel estate. C.A. App. 57.[1] The Plan also provided for Grede's resignation as Chapter 11 Trustee and his simultaneous appointment as Liquidation Trustee. *Id.* at 87 § 6.3. According to the Plan, Grede would thereby "become the appointed representative of the Estate in accordance with Section 1123(b)(3) of the Bankruptcy

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[1] "Although the central purpose of Chapter 11 is to facilitate reorganizations rather than liquidations (covered generally by Chapter 7), Chapter 11 expressly contemplates liquidations." *Florida Dept. of Revenue* v. *Piccadilly Cafeterias, Inc.*, 128 S. Ct. 2326, 2330 n.2 (2008) (citing 11 U.S.C. § 1129(a)(11)).

Code." *Ibid.* In the Bankruptcy Court's order confirming the Plan, Grede as Liquidation Trustee was given "all powers afforded a trustee under the Bankruptcy Code and Rules." *Id.* at 419 ¶ 4.

The Plan established "a distinct tranche of the Liquidation Trust," which it designated "Tranche-P," to hold the "Non-Estate Claims" of Sentinel customers who assigned those claims to the Liquidation Trust. C.A. App. 91 § 6.12. These Non-Estate Claims were defined broadly to include potential claims against numerous entities, including the Bank and "all Entities that entered into transactions with Sentinel." *Id.* at 74-75. The Plan authorized Grede to "prosecute, settle, and release the Non-Estate Claims" (*id.* at 89 § 6.5(e)), specifying that Sentinel creditors who did not hold claims assigned to Tranche-P "will not receive any distribution on account of Tranche-P." *Id.* at 91 § 6.12. Many but not all of the Sentinel customer claims were assigned to Tranche-P.

The Plan also established a "Liquidation Trust Expense Fund" from which Grede and his retained professionals are to be compensated. C.A. App. 91-92 § 6.14, 94 § 6.21. The Liquidation Trust Agreement provides that Grede shall receive both "hourly-based compensation" and "contingency-based compensation" tied to recoveries obtained for the Liquidation Trust. *Id.* at 148.

B. District Court Proceedings

In April 2009, Grede brought this action on behalf of Sentinel customers who had assigned their claims against the Bank to Tranche-P. C.A. App. 7 ¶ 5. He raised essentially the same claims that he had raised previously against the Bank, but now on

behalf of only the assigning customers, with any recovery to go only to the assignors, not to the estate. *Id.* at 43-50 ¶¶ 148-68.[2]

The Bank moved to dismiss this action, contending that Grede lacks standing and that his claims are insufficient as a matter of law. The district court granted the Bank's motion, holding that Grede lacks standing and not reaching the Bank's additional grounds for dismissal.

District Judge Zagel explained that a precedent of this Court bars standing where a bankruptcy trustee pursues claims for money not owed to the estate. App., *infra*, 16a, citing *Caplin* v. *Marine Midland Grace Trust Co.*, 406 U.S. 416 (1972). The court refused Grede's request to create an exception where the trustee is an assignee of such claims because "he is still subject to the Code's requirement that he act for the benefit of the estate." *Id.* at 19a. Moreover, the court reasoned, allowing a trustee to pursue such non-estate litigation risks diminishing the assets available to the estate's creditors. *Ibid.* As the court put it, bankruptcy law does not permit a trustee "to bring claims for the benefit of the few at the expense of the many." *Ibid.* Allowing Grede's claims to proceed would "essentially circumvent[] the order of priority of claims established by the Code" by distributing the proceeds solely to some holders of unsecured claims. *Id.* at 22a. For these and other reasons, the court concluded, "the estate has no interest in the claims, and Trustee has no authority under the Code to bring them." *Id.* at 21a-22a.

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[2] Pursuant to Rule 14(g)(ii), petitioner notes that respondent asserted diversity jurisdiction in the district court pursuant to 28 U.S.C. § 1332(a)(1).

C. The Court of Appeals' Decision

The Seventh Circuit reversed. It ruled that *Caplin* does not apply to a suit "by a liquidation trustee on assigned claims," likening the trust established to liquidate the estate to "a reorganized debtor." App., *infra*, 5a-6a.

The court of appeals rejected the Bank's contention that authorizing liquidation trustees to use estate assets to finance assigned litigation that will not benefit the estate creates a perverse incentive to free-ride off the estate in conflict with bankruptcy law principles. According to the panel, the Bank has no interest in avoiding such a harmful consequence. *Id.* at 7a.

The Seventh Circuit expressly recognized that its ruling conflicts with *Williams* v. *California 1st Bank*, 859 F.2d 664, 665-667 (9th Cir. 1988), opting instead for a contrary ruling in *Semi-Tech Litig., LLC* v. *Bankers Trust Co.*, 272 F. Supp. 2d 319, 323-324 (S.D.N.Y. 2003), aff'd, 450 F.3d 121 (2d Cir. 2006). The panel stated that "[w]e must choose between the second circuit's holding and the ninth's," and it chose the former. App., *infra*, 5a.[3]

REASONS FOR GRANTING THE PETITION

Grede was appointed Chapter 11 Trustee and then Liquidation Trustee for a specific purpose—to gather the Sentinel estate assets for distribution to Sentinel creditors in accordance with applicable

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[3] Although this Court used the term "standing" in *Caplin*, the Seventh Circuit expressed a preference for the term "authority" to avoid any confusion with Article III standing, which is not at issue in this case. App., *infra*, 3a. This petition uses the two terms interchangeably.

Bankruptcy Code provisions. He filed this lawsuit for a very different purpose—to obtain damages for a subset of Sentinel's unsecured creditors on their personal claims against the Bank. Far from maximizing the value of the estate, this lawsuit forces the estate to subsidize litigation that does not even purport to seek any benefit for the estate as a whole. Accordingly, Grede lacks authority to bring this lawsuit, and the Seventh Circuit's ruling should be vacated to ensure that bankruptcy estates are not used to bankroll litigation in which they have no interest.

The Seventh Circuit's ruling conflicts with *Caplin*, in which this Court held that a bankruptcy-court-appointed trustee lacks authority to pursue recoveries for select creditors rather than for the estate as a whole. The Seventh Circuit erred by allowing Grede to circumvent *Caplin* by means of a formalistic change of hats. As this Court said in *Caplin*, expanding a trustee's litigation authority is up to Congress, not the courts.

The decision below also conflicts with *Williams* v. *California 1st Bank*, 859 F.2d 664, 665-667 (9th Cir. 1988), as the Seventh Circuit expressly recognized. In *Williams*, the Ninth Circuit held that a liquidation trustee lacked authority to pursue assigned claims where any recoveries would go only to the assignor-creditors, not to the estate. Whereas the Ninth Circuit found the claims' assignment to the trustee an insufficient distinction from *Caplin* to require a different result, the Seventh Circuit agreed with the Second Circuit's view that such an assignment authorizes a trustee to pursue claims that, under *Caplin*, otherwise would be unauthorized. There is now a mature, three-way acknowledged conflict among the circuits.

The issue presented is one of exceptional importance. The longstanding rule that trustee litigation must seek to benefit the estate protects against free riding. The Seventh Circuit's abrogation of that rule when select creditor claims are assigned to a liquidation trustee will encourage wholesale assignments of such claims to liquidation trustees to enable the assignors to avoid the costs of litigation and instead foist them on the estate. The bankruptcy process was not designed for such an improper purpose. The need for clarity on this subject is critical for the proper administration of the soaring number of bankruptcy filings, especially in complex cases.[4]

I. THE RULING BELOW CONFLICTS WITH THIS COURT'S *CAPLIN* PRECEDENT AND THE PLAIN MEANING OF THE BANKRUPTCY CODE.

In *Caplin*, a "trustee in reorganization" appointed under Chapter X of the former Bankruptcy Act brought suit "for the benefit of a specific class of creditors, the debenture holders," against an indenture trustee charged with ensuring the sufficiency of the debtor's assets. 406 U.S. at 416, 421 n.12. The Court evaluated whether the trustee had standing by first looking to the statutory provisions governing the trustee's authority, where it found "nothing" that "enables him to collect money not owed to the es-

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[4] See *Bankruptcy Filings Highest Since 2006*, News Release, Administrative Office of the U.S. Courts (May 14, 2010), http://www.uscourts.gov/news/NewsView/10-05-14/Bankruptcy_Filings_Highest_Since_2006.aspx (bankruptcy filings rose 27% in last 12 months); Sara Murray, *Personal Bankruptcies Rise*, Wall St. J., Aug. 5, 2010, at A2.

tate." *Id.* at 428. Instead, under the plain language of the Act the trustee's task was "simply to 'collect and reduce to money the property of the estates.'" *Id.* at 428-429. Thus, a bankruptcy trustee lacked statutory authority to sue third parties for recoveries that would not go to the estate.

The Court then noted additional problems with such trustee suits: they would likely raise issues of subrogation, may be inconsistent with any independent actions brought by the affected creditors, and would not be as binding on all such creditors as a class action. 406 U.S. at 430-432 & n.22. The Court recognized that it would not necessarily be "unwise" to allow the trustee to bring such suits. *Id.* at 434. But it concluded that conferring standing on a trustee for such matters is "a policy decision [that] must be left to Congress and not to the judiciary." *Ibid.*

Congress responded to that invitation, when it replaced the Bankruptcy Act with the Bankruptcy Code in 1978, by considering and rejecting a proposal to broaden trustee litigation authority. The House bill included a proposed Section 544(c) which would have "overrule[d] *Caplin*" by authorizing both reorganization and liquidation trustees to sue for recoveries that would go only to select creditors "on whose rights the trustee has based the action." H.R. Rep. No. 95-595, at 370-371 (1977), 1978 U.S.C.C.A.N. 5963, 6326. That provision was dropped in conference. "The inability of the drafters of the Code to square the proposed § 544(c) with Rule 23 of the Federal Rules of Civil Procedure and the complex issues arising in class action situations led to a decision to delete the proposed subsection." Patrick A. Murphy & Eric E. Sagerman, CREDITORS' RIGHTS IN BANKRUPTCY § 13.7 (2d ed. 2009).

As a result, trustees were left with no greater litigation authority under the new Code than under the former Act. 124 Cong. Rec. H11,097 (Sept. 28, 1978); see *In re Ozark Restaurant Equip. Co.*, 816 F.2d 1222, 1227-1228 & n.9 (8th Cir. 1987) (describing history and applying the *Caplin* rule to Chapter 7 liquidation trustees). As numerous courts have recognized, Congress's affirmative rejection of this attempt to overrule *Caplin* maintained the enforceability of the *Caplin* rule on trustee standing under the new Code. *E.g.*, *DSQ Property Co.* v. *DeLorean*, 891 F.2d 128, 131 (6th Cir. 1989) ("The Bankruptcy Act still has no provision providing for a bankruptcy trustee to sue third parties on behalf of creditors"); *E.F. Hutton & Co.* v. *Hadley*, 901 F.2d 979, 986 (11th Cir. 1990) (*Caplin* "remain[s] the law under the revised bankruptcy statutes"); *In re Bradley*, 326 F. App'x 838, 839 (5th Cir. 2009). It is improper for courts to effect a change in the law that Congress specifically rejected. "Congress is presumed to be aware of [a] judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *Forest Grove Sch. Dist.* v. *T.A.*, 129 S. Ct. 2484, 2492 (2009). That is especially true where, as here, the judicial change increases the likelihood of vexatious litigation. See *Stoneridge Inv. Partners* v. *Scientific-Atlanta, Inc.*, 552 U.S. 148, 162-163 (2008).

The Bankruptcy Code limits the scope of a trustee's authority to serving the estate. A trustee appointed by a bankruptcy court is "the representative of the estate" (11 U.S.C. § 323(a)), who shall "collect and reduce to money the property of the estate for which such trustee serves." *Id.* § 704(a) (made applicable to Chapter 11 proceedings by *id.* § 1106(a)(1)). See *CFTC* v. *Weintraub*, 471 U.S. 343, 352 (1985) (a

trustee "has the duty to maximize the value of the estate"); *Ohio* v. *Kovacs*, 469 U.S. 274, 284 n.12 (1985) (a trustee is "charged with the duty of collecting and reducing the property of the estate"). "Property of the estate" is defined as "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a). A trustee's duty to gather that property for the benefit of the estate cannot be reconciled with the initiation of private litigation on behalf of select creditors.

Caplin established a bright-line rule essential to the administration of the many complex bankruptcy cases facing federal courts. If any recovery would go to the estate, the trustee has authority to bring suit. *E.g.*, *In re Bogdan*, 414 F.3d 507, 514 (4th Cir. 2005). If any recovery would go only to assigning creditors rather than to the estate, the trustee does not have such authority. *E.g.*, *E.F. Hutton*, 901 F.2d at 986; *Ozark Restaurant*, 816 F.2d at 1229-1230.

That rule holds true even outside the ordinary bankruptcy context. Thus, in *Boston Trading Group* v. *Burnazos*, 835 F.2d 1504, 1514 (1st Cir. 1987) (Breyer, J.), the court held that a receiver appointed by a federal court to pursue claims on behalf of defunct commodity investment firms lacked standing to pursue claims on behalf of individual investors in the firms' commodity pools. Then-Judge Breyer explained that there was "no relevant distinction between *Caplin* and the case before us," requiring the First Circuit "to follow the Supreme Court case." *Id.* at 1515-1516. Accord *Marion* v. *TDI Inc.*, 591 F.3d 137, 148 (3d Cir. 2010); *Fleming* v. *Lind-Waldock & Co.*, 922 F.2d 20, 25 (1st Cir. 1990); see also *Florida Dept. of Ins.* v. *Chase Bank of Tex. Nat'l Ass'n*, 274 F.3d 924, 929-931 (5th Cir. 2001) (applying *Caplin* to

deny liquidator of insolvent insurer standing to pursue policyholders' claims).

The Seventh Circuit, too, should have followed *Caplin*. It is undisputed that any recovery from this lawsuit will go not to the estate for pro rata distribution to the creditors but instead only to a subset of Sentinel's unsecured creditors. App., *infra*, 11a. Moreover, Grede's fees and expenses incurred in prosecuting this lawsuit will be paid out of estate assets. C.A. App. 91-92 § 6.14. Thus, this litigation not only will not benefit the estate but also will affirmatively harm it. Accordingly, as the district court correctly ruled, Grede lacks authority to bring this action. [5]

The Seventh Circuit thought this case distinguishable from *Caplin* on the ground that Grede brought claims assigned to a liquidation trust established by a confirmed Chapter 11 plan, likening the trust to a reorganized debtor "just like the reorganized United Airlines." App., *infra*, 6a. But unlike a reorganized debtor, the Liquidation Trust is not a going concern that emerged from bankruptcy ready to stand on its own feet. It was not established to generate additional assets and revenues or incur additional liabilities as part of its post-emergence operations. Neither Grede nor anyone else contributed any new capital or financing to allow the debtor to

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[5] As Professor Dan Schechter commented after the decision below issued: "The result in this case seems to circumvent the decision by Congress in 1978 to ratify *Caplin*." Dan Schechter, *Liquidation Trustee is Empowered to Assert Claims Assigned by Estate's Creditors Against Third Party Tortfeasors*, Commercial Finance Newsletter (Apr. 5, 2010), available on Westlaw at 2010 COMFINNL 28.

"emerge" from bankruptcy. The trust is not a rehabilitated "business" in the ordinary meaning of that term but simply a mechanism to liquidate the estate, *i.e.*, gather the estate's assets for pro rata distribution to the estate's creditors. This conclusion is confirmed by the IRS regulations governing liquidation trusts established by Chapter 11 plans:

> An organization will be considered a liquidating trust if it is organized for the primary purpose of liquidating and distributing the assets transferred to it, and if its activities are all reasonably necessary to, and consistent with, the accomplishment of that purpose. A liquidating trust is treated as a trust for purposes of the Internal Revenue Code because it is formed with the objective of liquidating particular assets and *not as an organization having as its purpose the carrying on of a profit-making business.*

26 C.F.R. § 301.7701-4(d) (emphasis added).

Moreover, the Plan makes clear that establishment of the Trust would not expand Grede's authority beyond those he held as Chapter 11 Trustee. The estate was to remain in place, and Grede's task was to liquidate it according to Code priorities. Specifically, the Plan established the Liquidation Trustee as "representative of the Estate *in accordance with Section 1123(b)(3) of the Bankruptcy Code.*" C.A. App. 87 § 6.3 (emphasis added). Section 1123(b)(3) authorizes a trustee to enforce only claims or interests "belonging to the debtor or to the estate." Further, after confirmation "the Chapter 11 Case will remain open pending final order of the Bankruptcy Court closing the case and the Bankruptcy Court shall retain jurisdiction" for numerous listed purposes, including

"[t]o determine on a non-exclusive basis, any and all Causes of Action and Non-Estate Claims that have been transferred to the Liquidation Trust on the Transfer Date." C.A. App. 104 § 9.1(b). Similarly, the Confirmation Order provides that the Liquidation Trustee will have "all powers afforded a trustee under the Bankruptcy Code and Rules" (C.A. App. 419 ¶ 4), underscoring that Grede's powers are coextensive with those of a bankruptcy trustee.

In sum, the Plan by its terms did not reorganize the debtor and free it from Bankruptcy Court oversight; it simply established a vehicle to liquidate the estate with the same trustee at the wheel. Both before and after confirmation of the Plan, Grede's authority was limited to marshaling the debtor's assets for the benefit of the estate. See *Holywell Corp.* v. *Smith*, 503 U.S. 47, 52-53 (1992) (noting that the duties of a person appointed to liquidate a debtor pursuant to a confirmed plan do not differ whether he is characterized as a "trustee in a case under title 11," "receiver," or "assignee"). Yet, the Seventh Circuit seized on Grede's redesignation from Chapter 11 Trustee to Liquidation Trustee to expand his litigation authority, contrary to the command of *Caplin*. See *Torch Liquidating Trust* v. *Stockstill*, 2008 WL 696233, at *6 n.4 (E.D. La. Mar. 13, 2008) ("prior case law is explicit that Litigation Trusts such as Plaintiff do not have standing to pursue the direct claims of creditors"), aff'd on alternate grounds, 561 F.3d 377 (5th Cir. 2009).

The Seventh Circuit's reliance on a formalistic distinction between pre- and post-plan liquidation trustees would allow the *Caplin* rule—and the statutory provisions on which its rests—to be circumvented by simply giving the trustee a new name or

label, which would empower him broadly to pursue private claims at the expense of the bankruptcy estate. The petition should be granted to ensure that this Court's precedents are not cast aside based on artificial distinctions.

II. THE RULING BELOW DEEPENS A CIRCUIT SPLIT OVER TRUSTEE STANDING TO BRING ASSIGNED CLAIMS THAT WILL NOT BENEFIT THE ESTATE.

As the Seventh Circuit expressly recognized, its ruling in this case conflicts with that of the Ninth Circuit in *Williams* v. *California 1st Bank*, 859 F.2d 664 (9th Cir. 1988). App., *infra*, 5a.

In *Williams*, over 100 investors in a Ponzi scheme initiated by the debtor assigned their claims against a bank that allegedly facilitated the scheme to a Chapter 7 liquidation trustee. Noting that "*Caplin* and its progeny control this case," the Ninth Circuit ruled that the trustee lacked standing to pursue those claims. 859 F.2d at 666-667. The court rejected the notion that "the mere fact of assignment in order to allow the Trustee to pursue the claims for the creditors sufficiently distinguishes this case to allow of a different result." *Id.* at 666. The court explained that, notwithstanding the assignments, "the Trustee, as in *Caplin*, is attempting to 'collect money not owed to the estate.'" *Id.* at 667. The court concluded that "*no* trustee, whether a reorganization trustee as in *Caplin* or a liquidation trustee," may assert such claims, finding support in "Congress' express decision not to overrule *Caplin*." *Ibid.* (emphasis added).

The Seventh Circuit rejected the *Williams* decision in favor of *Semi-Tech Litig., LLC* v. *Bankers*

Trust Co., 272 F. Supp. 2d 319 (S.D.N.Y. 2003), aff'd, 450 F.3d 121 (2d Cir. 2006). The district court in *Semi-Tech* disagreed with *Williams* on the ground that a trustee-assignee is "no different" from any other assignee "outside the bankruptcy context." *Id.* at 323-324. The Second Circuit affirmed, adopting the district court's opinion "as the law of this Circuit." 450 F.3d at 123. Courts in the Second Circuit continue to maintain that *Caplin* does not limit a trustee's standing to pursue assigned claims even where any recoveries will go only to the assignors and not to the estate. See *Taberna Capital Mgmt., LLC* v. *Jaggi*, 2010 WL 1424002, at *3 (S.D.N.Y. Apr. 9, 2010).

In contrast, other courts have followed *Williams* and held that "[t]he rule articulated in *Caplin* holds true even in cases where a creditor has assigned her claims to a trustee or Trust." *Trenwick Am. Litig. Trust* v. *Ernst & Young, L.L.P.*, 906 A.2d 168, 191 (Del. Ch. 2006), aff'd sub nom. *Trenwick Am. Litig. Trust* v. *Billett*, 931 A.2d 438 (Del. 2007); accord *Mukamal* v. *Bakes*, 383 B.R. 798, 811-814 (S.D. Fla. 2007) (post-confirmation liquidation trustee lacked standing to pursue assigned claims), aff'd on other grounds, 2010 WL 1731775 (11th Cir. Apr. 30, 2010).

This Court should grant the petition to resolve this conflict on the recurring issue whether the simple assignment of claims to a trustee obviates the *Caplin* rule on trustee standing. The conflict should be resolved against an "assignment" exception to *Caplin*. As Professor Schechter has observed: "If *Caplin* can be circumvented by the simple expedient of executing an assignment, then it is limited to a very strange set of facts, *i.e.*, when a trustee tries to assert claims belonging to creditors who do not con-

sent to his behavior." Dan Schechter, *Where Creditors Have Executed Formal Assignments of Tort Claims, Liquidation Trustee as Assignee Has Standing to Prosecute Creditors' Claims*, Commercial Finance Newsletter (Apr. 26, 2010), available on Westlaw at 2010 COMFINNL 33.

The Seventh Circuit suggested that there is something anomalous about barring a liquidation trustee, but not the rest of the world's potential assignees, from bringing a suit like this. App., *infra*, 4a. But a trustee appointed by a bankruptcy court to represent the estate is very different from the universe of other potential assignees. He is a creature of bankruptcy law with powers limited by statute, and no assignee other than the Trustee can force the bankruptcy estate to subsidize such litigation. Indeed, if the customer claims had been assigned to Grede in his personal capacity, he (or the assignors) would have had to incur the upfront costs of litigation, just like other plaintiffs. It is Grede's unique power as Bankruptcy-Court-appointed trustee to impose those costs directly on the estate that distinguishes him from all other potential assignees.[6]

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[6] In the court of appeals, Grede argued that *Sprint Commc'ns Co.* v. *APCC Servs., Inc.*, 554 U.S. 269 (2008), limits *Caplin* and overrules *Williams*. But *Sprint* does not address the litigation authority of a bankruptcy-court-appointed trustee, holding only that an assignee's standing to sue is not barred simply because any proceeds will go to the assignors. That point of assignment law is immaterial here. Whether the proceeds go to the assignors or stay with the assignee, they will not go to the estate, an issue of bankruptcy law governed by *Caplin* and not addressed by *Sprint*.

III. THIS COURT SHOULD RESOLVE THIS IMPORTANT FEDERAL QUESTION TO PREVENT SUBSTANTIAL HARM TO THE BANKRUPTCY PROCESS.

The Seventh Circuit's ruling threatens severe adverse practical consequences for numerous bankruptcy cases pending in the federal judicial system. Unless reversed, it will generate perverse (and irresistible) incentives by allowing trustees to use the estates they are supposed to represent to finance litigation against third parties on behalf of assigning creditors. Whereas litigation costs generally act to constrain private parties from pursuing unwarranted litigation, the Seventh Circuit's ruling allows a trustee to draw freely on estate assets to pursue third-party litigation. Especially where, as here, a trustee is not only guaranteed his fees and expenses from estate assets but also has a chance to earn a substantial contingency fee if he wins, even the most dutiful of trustees would be hard-pressed to resist being overly litigious. As Judge Posner has noted, courts must "be vigilant in policing the litigation judgment exercised by trustees." *Maxwell* v. *KPMG LLP*, 520 F.3d 713, 718 (7th Cir. 2008). That is particularly true with respect to litigation launched by liquidation trustees with personal incentives to bring actions funded by the bankruptcy estate.

In the name of the Liquidation Trust, Grede has effectively set himself up as an independent plaintiffs' law firm, claiming the right to file lawsuits against third parties that will not benefit the estate (or the liquidation trust) but only select claimants. But unlike in other litigation, neither Grede nor his "clients" have to pay a dime in fees or expenses, all of which he imposes on the bankruptcy estate. If Grede

loses this lawsuit, he is still a winner because the estate will pay all his fees and expenses, as well as those of the professionals he engages to assist him. And if he wins this lawsuit, he stands to garner a hefty contingency fee as well. This is the sweetest of all possible deals, one that is unprecedented, unjustified, and open to abuse.

The ruling below invites wholesale assignments of personal claims to liquidation trustees so that claimants can foist the usual costs of litigation onto the bankruptcy estate, including on creditors with no interest in the resolution of those claims and nothing to gain from their pursuit. The Seventh Circuit said this is "no skin off *the Bank's* nose." App., *infra*, 7a. But the Bank is the very target of the assigned claims in this case, giving it an interest in ensuring that Sentinel's investors are subject to normal litigation constraints. Moreover, in other cases the Bank is bound to be among the estate creditors that could be forced to subsidize litigation from which the estate cannot benefit. There will doubtless be many such cases because post-confirmation liquidation trusts are becoming an increasingly popular tool for liquidating debtors via Chapter 11 plans. See David R. Kuney, *Liquidation Trusts and the Quagmire of Postconfirmation Jurisdiction: the Case of the Disappearing Estate*, 14 J. Bankr. L. & Prac. 6 Art. 3 (2005) (noting the "increasing use of the liquidating trusts" in confirmed bankruptcy plans); Andrew M. Thau *et al., Postconfirmation Liquidation Vehicles (Including Liquidating Trusts and Postconfirmation Estates): An Overview*, 16 J. Bankr. L. & Prac. 2 Art. 4 (2007) (a liquidation trust "allows a Chapter 11 plan to be confirmed, and distributions to begin, before all of the debtor's assets have been liquidated or litigation completed, because often the most complex

and time-consuming matters are left for resolution by the [trust]").

This Court should review and reverse the decision below to prevent a misuse of the bankruptcy process for private gain at the expense of the estate as a whole—precisely what the bankruptcy laws were intended to prevent. See *Howard Delivery Serv., Inc.* v. *Zurich Am. Ins. Co.*, 547 U.S. 651, 667 (2006) (the "broad purpose" of the bankruptcy statutes "is to bring about an equitable distribution of the bankrupt's estate"). As the Court stressed in *Caplin*, if any change in the existing bright-line rule is to be made, that decision must come from Congress, which alone can address the competing policy issues. See also *Jones* v. *Harris Assocs. L.P.*, 130 S. Ct. 1418, 1430-1431 (2010) (change to longstanding "workable standard" is "a matter for Congress, not the courts").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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