No. ______

In the
Supreme Court of the United States

NOBLE ENERGY, INC.,

Petitioner,

v.

CONOCOPHILLIPS CO.,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Texas

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a state court may impose onerous contractual obligations on a non-signatory to the contract by disregarding the full-disclosure requirements of federal bankruptcy law and foisting the undisclosed perpetual indemnity obligation of a Chapter 11 debtor upon an unknowing purchaser of related assets.

2. Whether boilerplate "assumed-unless-rejected" language in a bankruptcy reorganization plan renders an undisclosed executory contract assumed under 11 U.S.C. §365.

CORPORATE DISCLOSURE STATEMENT

Petitioner Noble Energy, Inc. has no parent company, and no publicly held company owns 10% or more of its stock.

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PETITION FOR WRIT OF CERTIORARI

Nearly twenty years ago, petitioner Noble Energy, Inc. purchased certain assets of Alma Energy Corp. after Alma had filed for bankruptcy under Chapter 11 of the federal Bankruptcy Code. Among those assets were various properties that Alma had obtained from respondent ConocoPhillips Co. five years earlier. In no small part because of Noble's asset purchase, Alma was able to craft a reorganization plan and emerge from bankruptcy, and its Chapter 11 proceedings closed shortly thereafter.

Unbeknownst to Noble, when Alma had purchased the properties from ConocoPhillips, Alma had agreed to indemnify ConocoPhillips *in perpetuity* for any environmental claims concerning those properties, regardless of who caused the injury or when. Neither Alma nor ConocoPhillips ever disclosed that extraordinary liability of Alma to Noble or anyone else during Alma's bankruptcy proceedings. Instead, both remained silent while Noble bought the properties and injected critical cash into Alma's Chapter 11 proceedings.

Years later, ConocoPhillips invoked that undisclosed obligation to demand that Noble, not Alma, indemnify it to the tune of $63 million. Because ConocoPhillips was invoking a contract with Alma to which Noble was a stranger, Noble understandably refused ConocoPhillips' extraordinary request. ConnocPhillips then brought suit in state court. Although the trial court granted summary judgment for Noble, a sharply divided Texas Supreme Court agreed with ConocoPhillips that the obligation

transferred to Noble when Noble purchased the properties during the federal bankruptcy proceedings.

The Texas Supreme Court's decision demands this Court's review on two separate grounds. First, federal courts of appeals and other state supreme courts have long held that complete disclosure is the *sine qua non* of federal bankruptcy proceedings, particularly as to executory contracts like the agreement between Alma and ConocoPhillips. Under well-established law, federal bankruptcy law will not transfer an obligation of Alma's to a party like Noble without, *inter alia*, full disclosure of the obligation. In the decision below, however, a majority of the Texas Supreme Court held that parties to a Chapter 11 proceeding, including the debtor (Alma) and an interested third party (ConocoPhillips), can transfer massive obligations to an asset purchaser while withholding critical information. In the majority's view, it was sufficient that Noble had "constructive knowledge" of the undisclosed liability. But state-law notions like constructive knowledge do not supply the *actual* disclosure that federal bankruptcy law requires.

Second, the majority held that generic language in Alma's bankruptcy plan providing that any executory contracts would be "assumed … unless rejected" was sufficient as a matter of federal bankruptcy law for Alma to assume the earlier agreement with ConocoPhillips—a necessary antecedent to assigning it to Noble in the asset purchase. That decision squarely conflicts with Fifth Circuit precedent—and decisions of federal bankruptcy courts—holding that such general

"assumed-unless-rejected" language in a reorganization plan is *insufficient* for a debtor to assume an undisclosed executory contract, because executory contracts cannot be assumed by implication or through boilerplate language. The Texas Supreme Court sought to minimize this direct conflict with the Fifth Circuit, but the conflict is stark and outcome-dispositive here.

Both the result and the consequences of the decision below are intolerable. By failing to disclose critical information during bankruptcy proceedings, ConocoPhillips and Alma foisted upon Noble a perpetual obligation to indemnify ConocoPhillips in a contract Noble never signed or even heard about at the time of its asset purchase. In this case alone, the tab is $63 million, with millions (if not billions) more to come. ConocoPhillips and Alma, by contrast, came out like bandits: ConocoPhillips obtained claims against a thriving company like Noble, rather than against a company teetering on the brink, and Alma eliminated a significant liability at the same time it generated cash for the bankruptcy without disclosure of the accompanying obligations. Under a proper understanding of federal bankruptcy law, the undisclosed indemnification did not transfer to Noble but remained with Alma, and ConocoPhillips' effort to collect from Noble, a non-party to the contract, should have been a non-starter. The Texas Supreme Court's contrary decision stands as a cautionary tale for anyone considering purchasing assets in federal bankruptcy proceedings. Moreover, the policies underlying the Bankruptcy Code will suffer as sound bankruptcy policy requires generating cash for financially-strapped companies through asset sales. If

buyers must beware of undisclosed obligations, the values of assets sold in bankruptcy and policies that depend on generating much-needed cash will both suffer.

Although this case involves federal bankruptcy law, it arises out of state court. But state court is where contractual obligations are typically enforced, and federal bankruptcy policy can only be vindicated if the rules are clear. State courts simply cannot be allowed to (mis)interpret federal bankruptcy law to impose massive undisclosed obligations on parties who are strangers to a contract just because they have purchased related assets in bankruptcy sales. The decision below is thus a direct threat to federal bankruptcy law and policy. The Court should grant certiorari to restore uniformity to federal bankruptcy law and reverse the Texas Supreme Court's dangerous and erroneous decision.

OPINIONS BELOW

The opinion of the Texas Supreme Court is reported at 532 S.W.3d 771 (Tex. 2017) and reproduced at App.1-50. The opinion of the Texas Court of Appeals is reported at 462 S.W.3d 255 (Tex. App. 2015) and reproduced at App.52-93. The opinion of the Texas trial court granting summary judgment is unreported and reproduced at App.98-99.

JURISDICTION

The Texas Supreme Court issued its opinion on June 23, 2017. A petition for rehearing was denied December 15, 2017. On February 9, 2018, Justice Sotomayor extended the time for filing this petition to April 16, 2018. This Court has jurisdiction under 28 U.S.C. §1257(a).

STATUTORY PROVISIONS INVOLVED

The relevant portions of 11 U.S.C. §365 and Bankruptcy Rules 1007, 6006, 9013, and 9014 are reproduced at App.100-127.

STATEMENT OF THE CASE

A. The Bankruptcy Proceeding

In 1994, Alma and respondent ConocoPhillips entered into an agreement—the "Exchange Agreement"—pursuant to which they swapped oil and gas interests and agreed to indemnify the other party for any environmental claims concerning the properties received, regardless of who caused the injury or when, whether before the swap or after. App.1-4. The mutual indemnity obligations provided for in the Exchange Agreement were essentially perpetual: the agreement provided that the obligations would "survive ... the transfer of the Assets." App.3. And each party's recorded assignment effectuating the transfers was made subject to the Exchange Agreement and provided that the indemnity obligations would "extend to, bind and inure to the benefit of the parties ... , their heirs, successors and assigns." App.4.

Five years later, in 1999, Alma filed for Chapter 11 bankruptcy. During bankruptcy proceedings, Noble agreed to purchase certain assets from Alma pursuant to an Asset Purchase Agreement (APA). Specifically, under the APA, Noble agreed to purchase "[t]he oil and gas leases, mineral interests, and other significant Assets described in Exhibit 'A.'" App.4. Exhibit A listed, among other things, the properties Alma had received from ConocoPhillips under the Exchange Agreement. App.4. Noble also agreed to

buy Alma's interests in "all … agreements … associated with" those assets, "including but not limited to, those Material Contracts … described on Exhibit 'D.'" App.4. Neither Exhibit identified the Exchange Agreement or the indemnification obligation at issue here.

The APA also did not list the Exchange Agreement—or its perpetual indemnity obligation—among Noble's "Assumed Liabilities." App.5. On the contrary, it provided that Noble was "not assuming any liability … related to the Assets of any kind or description whatsoever," except, as relevant here, "all duties and obligations … which accrue or arise from and after [closing]," including "the obligation [to] … perform obligations under any executory contracts … expressly assumed hereunder" to the extent "such obligation or liability is attributable to events or periods of time after [closing]." App.5 (emphasis added).[1]

Not only did the APA not list the Exchange Agreement or its perpetual indemnification obligation as an Assumed Liability, nor identify the Exchange Agreement as a purchased asset (on Exhibit A) or as a "Material Contract" associated with a purchased asset (on Exhibit D); Alma failed to include the Exchange

[1] An executory contract is "a contract on which performance is due to some extent on both sides.'" App.9 (citing *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 522 n.6 (1984)). "Executory contracts in bankruptcy are best recognized as a combination of assets and liabilities to the bankruptcy estate; the performance the nonbankrupt owes the debtor constitutes an asset, and the performance the debtor owes the nonbankrupt is a liability." *In re Columbia Gas Sys. Inc.*, 50 F.3d 233, 238 (3d Cir. 1995).

Agreement in its required schedule disclosing executory contracts. *See* Fed. R. Bankr. P. 1007(b)(1)(C) (debtor "shall file … a schedule of executory contracts"); App.117-118. Likewise, Alma's reorganization plan did not mention the Exchange Agreement. App.4-5. In fact, it is undisputed that Alma *never disclosed* the Exchange Agreement—or its perpetual indemnification obligation—at *any* time during the *entire* bankruptcy proceeding. App.25-26.

What Alma's reorganization plan *did* include was generic, catch-all, assumed-unless-rejected language regarding executory contracts. Specifically, section 10.8 of the plan provided that executory contracts not specifically referenced on a certain schedule (Exhibit J) were to be "assumed [by Alma] and assigned to [Noble]" unless rejected at closing. App.6. Section 10.9 of the plan required that, by a certain date, "[Noble] shall notify [Alma] of any ... executory contracts which are not set forth on Exhibit 'J' and which [Noble] elects not to have assumed and assigned to it by [Alma]." App.7. Section 10.9 also provided that "[a]ll ... executory contracts which are not (i) rejected or the subject of a motion to reject as of the Confirmation Hearing, (ii) on Exhibit 'J' or (iii) on the list provided by [Noble] to [Alma] ... shall be assumed by [Alma] and assigned to [Noble]." App.7.

Consistent with the non-disclosure of the Exchange Agreement (and indemnity obligation) in the rest of the bankruptcy proceedings, Exhibit J of the reorganization plan did not list the Exchange Agreement. Nor did Alma reject the Exchange Agreement. And, because the Exchange Agreement was never disclosed to Noble, Noble did not notify

Alma that it elected not to have Alma assume and assign the Exchange Agreement to Noble. App.7-8.

In August 2000, the bankruptcy court "approved and confirmed in all respects" Alma's reorganization plan and the APA. App.7. The confirmation order provided:

> Except for those contracts and agreements that have either already been assumed or rejected, those Executory Contracts ... proposed to be assumed and assigned to [Noble] pursuant to the Plan are ordered assumed and assigned to [Noble]. ... Those Executory Contracts ... proposed to be rejected pursuant to the Plan ... are ordered rejected. … [Noble has] provided adequate assurance of future performance of all Executory Contracts ... being assumed and assigned to it.

B. The Texas Court Proceedings

A decade later, in 2010, ConocoPhillips settled a suit involving environmental damage at one of the properties it had conveyed to Alma in the Exchange Agreement. It then sought $63 million in indemnification from Noble and sued for breach of the Exchange Agreement when Noble refused payment. A Texas trial court granted summary judgment for Noble, App.98-99, but a court of appeals reversed after giving effect to the general, catch-all provision of Alma's reorganization plan and concluding that the Exchange Agreement—including the indemnity obligation—was an executory contract that had been assumed by Alma and assigned to Noble. App.52-93.

The Texas Supreme Court granted Noble's petition for review, and in a sharply divided opinion, affirmed. App.1-50. The majority first held that the Exchange Agreement was an executory contract governed by section 365 of the Bankruptcy Code. App.12-13. The majority next acknowledged that it was "less than perfectly clear" whether, under federal bankruptcy law, Alma assumed and assigned the Exchange Agreement to Noble. App.13. Nevertheless, in the majority's view, the Exchange Agreement was among the interests acquired by Noble because it was "associated with [the] assets Noble bought." App.13. And because the indemnification obligation for the 2010 suit arose after the APA's closing, it was an assumed liability under section 8.03 of the APA. App.13-14. This interpretation was "reinforce[d]" by the reorganization plan, the majority continued, because the plan provided that "executory contracts not specifically referenced" were to be "assumed and assigned to Noble" unless rejected at closing, and the Exchange Agreement was never rejected. App.16 (brackets omitted).

The majority acknowledged that the Exchange Agreement was never "mentioned in any way in the bankruptcy proceeding" nor "specifically referenced in the Plan," and that ConocoPhillips—who was a party to the bankruptcy proceeding—"could have disclosed the Exchange Agreement but never did." App.16, App.25-26. The majority nevertheless brushed aside Noble's argument that "full disclosure in bankruptcy proceedings is essential." App.26. In the majority's view, Noble had "constructive notice of the Exchange Agreement" because, years before the bankruptcy proceeding, "the Exchange Agreement was specifically

referenced in Conoco's assignment to Alma of some of the interests" that Noble later acquired, and the recorded assignment was "expressly subject to the Exchange Agreement." App.25. The Court was unconcerned with Alma's and ConocoPhillips' lack of actual disclosure during the Chapter 11 proceedings because, "[a]s critical as disclosure in bankruptcy proceedings may be," it is "more critical that parties to bankruptcy proceedings and others have confidence that reorganization plans and court orders will be interpreted and enforced according to their plain terms." App.26.

The majority rejected Noble's argument that the undisclosed Exchange Agreement could not be assumed and assigned under the general, catch-all, assumed-unless-rejected provisions of Alma's reorganization plan and the confirmation order. In the majority's view, the confirmation order "confirmed the APA and the Plan that used both exclusive and non-exclusive language throughout, and we must assume the choices were intentional." App.24-25.

Justice Johnson, joined by two others, dissented. In his view, the majority erred in its interpretation of federal bankruptcy law in two ways. First, "Alma did not disclose the Exchange Agreement during the bankruptcy proceedings[,] as it was required to do by bankruptcy law." App.32. Justice Johnson noted that "a debtor is required to disclose assets, liabilities, and executory contracts on particularized schedules." App.34 (citing 11 U.S.C. §521(a)(1)(i)). But "Alma did not disclose the Exchange Agreement as an executory contract," even though bankruptcy courts have "firmly put both the obligation of full disclosure and the risks

of non-disclosure on the debtor." App.35. The majority's invocation of "constructive knowledge" and recorded instruments was insufficient because those concepts are "not applicable in the bankruptcy context.'" App.35, App.36. Instead, "[d]ebtors are statutorily required to explicitly disclose assets, liabilities, and executory contracts so all the parties involved, including the bankruptcy court, can rely on the disclosures." App.35-36.

Second, Justice Johnson observed that "an executory contract must be explicitly assumed in bankruptcy, and Alma did not explicitly assume the Exchange Agreement" consistent with federal bankruptcy law. App.32-33. He noted that 11 U.S.C. §365 "does not authorize a debtor to assign an executory contract unless [the debtor] first assumes the agreement and the assignee gives adequate assurance of performance," after which the bankruptcy court must provide approval. App.30. But "under relevant bankruptcy authority construing section 365, general plan language" like the "assumed-unless-rejected" language in Alma's plan "does not effect assumption of an *undisclosed* executory contract, approval of a putative assignee's adequate assurance of performance of it, and then its assignment." App.30 (emphasis added). The bankruptcy court could not "have approved the assumption as required by section 365 when the contract's existence was known only to Alma and Conoco and undisclosed by either of them in the bankruptcy to other parties, the trustee, or the court." App.40. As such, Justice Johnson disagreed that "through the general Plan language Alma assumed the undisclosed Exchange Agreement, Noble gave

adequate assurance of performance of it, and Alma assigned it to Noble." App.44.

The majority's approach, Justice Johnson maintained, transformed bankruptcy proceedings into a "matter of gamesmanship" turning on "how opaque can a debtor's filings and disclosures be and how many omissions can be made without consequences to the debtor seeking relief and other parties such as [ConocoPhillips] with knowledge of the opaqueness and who ostensibly are benefitted[.]" App.33. Justice Johnson found the majority's decision to be "manifestly inequitable." App.33. It prejudiced Noble, who had no notice of the Exchange Agreement and should have been able to rely on Alma's disclosures without conducting its own investigation, yet was stuck with the perpetual indemnity obligation. App.34. And it benefited the direct parties to the Exchange Agreement—ConocoPhillips and Alma—because, by silently effecting a transfer of the indemnity obligation to Noble, ConocoPhillips obtained "a claim against Noble instead of the reorganized Alma," and Alma "escap[ed] liability for bankrupt Alma's failure to comply with bankruptcy law by not disclosing an executory contract." App.34. In such circumstances, Justice Johnson concluded, the majority should have "followed applicable bankruptcy precedent" and held that "the Exchange Agreement rode through the bankruptcy and remained a liability of reorganized Alma." App.50.

REASONS FOR GRANTING THE PETITION

The Texas Supreme Court's decision saddles Noble with a perpetual indemnification obligation under a contract it never signed that neither Alma nor

ConocoPhillips disclosed when Noble purchased assets from Alma during federal bankruptcy proceedings. That holding conflicts with the holdings of federal courts of appeals and state supreme courts, has far-reaching implications for federal bankruptcy law, and is manifestly unjust. By any measure, the decision merits this Court's review for two separate and independent reasons.

First, full and complete disclosure is the *sine qua non* of federal bankruptcy proceedings. It is required by the Bankruptcy Code, it is a prerequisite to numerous events in bankruptcy, and it is necessary for bankruptcy courts to exercise their statutory and equitable authority over the parties and assets. Here, Noble has been held liable to the tune of $63 million under an indemnification agreement it never signed. Thus, ConocoPhillips' entire claim depends on the notion that its executory contract with Alma transferred to Noble along with assets Noble purchased. It is undisputed that the Exchange Agreement and the indemnity obligation contained therein were never disclosed during Alma's bankruptcy proceedings. Under the decisions of numerous federal courts of appeals and state supreme courts, that should have resolved this case: Noble cannot be bound by what it never signed and was never disclosed to it during the bankruptcy proceedings. ConocoPhillips cannot use federal bankruptcy law to accomplish the strange alchemy of converting base metal (an indemnity from a company teetering on the brink of bankruptcy) to gold (an indemnity with a different fully solvent company) without complying with federal bankruptcy law's cardinal requirement of full disclosure. That is

particularly so given that the undisclosed Exchange Agreement containing the indemnity obligation was an executory contract, of which the Code, the Bankruptcy Rules, and numerous decisions specifically require unfettered disclosure. The Texas Supreme Court nevertheless held that "constructive notice" grounded in recordation principles could trump the actual-disclosure obligations of federal bankruptcy law. But such *state-law* concepts have no applicability in *federal* bankruptcy proceedings, where *federal* law strictly governs disclosure requirements that, all agree, were not satisfied here.

Second, the undisclosed indemnity obligation was foisted upon Noble by means of generic language in Alma's reorganization plan providing that any executory contracts would be "assumed … unless rejected" by Alma. Assumption of an executory contract like the Exchange Agreement is a necessary antecedent to its assignment to another party, like Noble. But where an executory contract is undisclosed, generic "assumed unless rejected" language does not suffice to effect assumption of the contract. That is precisely what the Fifth Circuit has held, on plan language materially indistinguishable from that at issue here. The Texas Supreme Court nevertheless brushed aside that precedent on reasoning that does not withstand scrutiny and only underscores the stark conflict on this critical issue of federal bankruptcy law. And as Justice Johnson explained in dissent, when as here an executory contract is undisclosed, such generic language does not allow a bankruptcy court to carry out its statutory mandate to review and approve assumption of executory contracts.

The decision below will have far-reaching implications on federal bankruptcy proceedings. If state courts do not enforce the disclosure requirements of federal bankruptcy law, or treat undisclosed executory contracts as having been assumed and assigned based simply on boilerplate plan language, parties to a Chapter 11 bankruptcy will have every incentive to make their disclosures and plans as opaque as possible. The resulting *caveat emptor* approach will lower the price that potential purchasers offer for assets or deter them from making offers altogether, given the risk that they might be stuck with an undisclosed liability. In turn, debtors will take longer to emerge from Chapter 11, creditors will face reduced recovery, and third parties hoping for a successful reorganization will endure greater uncertainty. That outcome is antithetical to sound bankruptcy policy.

The outcome here is fundamentally contrary to justice as well. Through no fault of its own, Noble has been saddled with an indemnity obligation that it never agreed to or knowingly assumed and which requires it to pay $63 million in this case alone, with much more likely to come. By contrast, the parties that knew about and could have disclosed the indemnification obligation benefit substantially: ConocoPhillips can make indemnity claims against Noble, rather than a recently bankrupt entity; and reorganized Alma is freed from the indemnity obligation it agreed to altogether. Under a proper view of federal bankruptcy law, the Texas Supreme Court should have held that Noble was not bound by Alma's undisclosed indemnity obligation. Because its decision instead forces Noble to comply with that

obligation, contrary to the decisions of numerous other courts and well-established bankruptcy law and policy, this Court's review is warranted.

I. The Court Should Grant Certiorari To Resolve Whether A State Court May Disregard The Full-Disclosure Requirements Of Federal Bankruptcy Law.

The Texas Supreme Court discarded federal bankruptcy law requiring complete disclosure in bankruptcy proceedings, and in particular before a debtor may assume and assign an executory contract. In the majority's view, state-law principles trump the Bankruptcy Code's well-established notice requirements. That holding is both egregiously incorrect and in conflict with federal courts of appeals and other state supreme courts, warranting this Court's review.

A. The Texas Supreme Court Disregarded the Requirement of Full Disclosure in Bankruptcy Proceedings, in Conflict With Other Courts.

Federal and state courts have long recognized that complete disclosure is the *sine qua non* of bankruptcy. *See, e.g., In re Coastal Plains, Inc.*, 179 F.3d 197, 208 (5th Cir. 1999) ("[T]he importance of th[e] disclosure duty cannot be overemphasized."). Thus, "the Bankruptcy Code is replete with provisions requiring proper notice to all parties affected by the proceedings." *In re Nat'l Gypsum Co.*, 208 F.3d 498, 510 (5th Cir. 2000) As just one example, the Code requires a debtor to disclose assets and liabilities on particularized schedules. *See, e.g.*, 11 U.S.C. §521(a)(1)(B)(i); Fed. R. Bankr. P. 1007(b)(1)(C).

It is a "well-established requirement that a debtor seeking the benefits of bankruptcy must fulfill the companion duty of fully disclosing and scheduling all property interests and rights so that the bankruptcy court and creditors can make an informed decision about the debtor's proposed reorganization plan." *Littlefield v. Union State Bank*, 500 N.W.2d 881, 883 (N.D. 1993); *Luna v. Dominion Bank of Middle Tenn., Inc.*, 631 So.2d 917, 919 (Ala. 1993) ("The importance of full disclosure is underlaid by the reliance placed upon the disclosure statement by the creditors and the court.").

Indeed, because full disclosure provides notice to affected non-debtors, it is a prerequisite to numerous events in bankruptcy proceedings. *See, e.g., In re Keeney*, 227 F.3d 679, 685 (6th Cir. 2000) (full disclosure required before discharge). Relatedly, non-disclosure deprives the bankruptcy court of information it needs to exercise its statutory and equitable authority over the parties and assets. *See Am. United Mut. Life Ins. Co. v. City of Avon Park*, 311 U.S. 138, 145-46 (1940) (full disclosure required for bankruptcy courts to "safeguard the public interest"). Disclosure "is part of the price debtors pay for receiving the bankruptcy discharge." *Greer-Burger v. Temesi*, 879 N.E.2d 174, 183 (Ohio 2007) (quoting *In re Colvin*, 288 B.R. 477, 481 (Bankr. E.D. Mich. 2003)). As the Mississippi Supreme Court has put it, "the omission of a claim in bankruptcy filings is 'tantamount to a representation that no such claim existed.'" *Kirk v. Pope*, 973 So. 2d 981, 991 (Miss. 2007) (quoting *In re Superior Crewboats, Inc.*, 374 F.3d 330, 335 (5th Cir. 2004)).

The Texas Supreme Court's decision diverges from this unbroken line of caselaw. And it does so on reasoning that is unsustainable. The majority conceded that disclosure is "critical," but thought it "more critical that parties to bankruptcy proceedings and others have confidence that reorganization plans and court orders will be interpreted and enforced according to their plain terms." App.26. But that gets matters backwards, because complete disclosure is a *condition precedent* to enforcing the plain language of bankruptcy plans and confirmation orders. Thus in *Van Sickle v. Hallmark & Associates, Inc.*, 840 N.W.2d 92 (N.D. 2013), the North Dakota Supreme Court held that nondisclosure rendered an agreement unenforceable. In that case, the reorganized debtor argued that a party with no notice, nor opportunity to participate in its bankruptcy proceeding, was nevertheless bound by it. The North Dakota Supreme Court disagreed: because the non-debtor had no notice of the bankruptcy, it was "not bound by the plan"—regardless of what the "plain terms" of the plan said. *Id.* at 104.

Similarly, while the Texas Supreme Court thought that state-law principles of "constructive notice" and recordation were sufficient to provide the necessary notice under federal bankruptcy law, other state supreme courts have rejected the notion that the notice requirements of federal bankruptcy law are trumped by state-law principles. In *A & J Construction Co. v. Wood*, 116 P.3d 12 (Idaho 2005), the Idaho Supreme Court held unenforceable a contract that had not been disclosed during bankruptcy. The court noted that the debtor was required by federal law "to disclose all assets, or

potential assets, to the bankruptcy court under [the Bankruptcy Code]." "Because both creditors and bankruptcy courts rely on the accuracy of the disclosure statements," the Idaho Supreme Court wrote, "the importance of full and honest disclosure cannot be overstated." *Id.* at 16. As a result, the debtor's failure to disclose its interest in a joint venture agreement during bankruptcy meant that a later state court was prohibited from "determin[ing] the existence, nature and extent of [the debtor's] interest" in the agreement. *Id.* at 18.

The Idaho Supreme Court had it right. As Justice Johnson noted in his dissent, state-law principles, including the constructive knowledge and recordation principles invoked by the majority, are "not applicable in the bankruptcy context" in determining whether disclosure requirements have been satisfied. App.35 (Johnson, J., dissenting). That is because debtors "are statutorily required to explicitly disclose assets, liabilities, and executory contracts so all the parties involved, including the bankruptcy court, can rely on the disclosures." App.35-36. Likewise, "the requirements for assigning an executory contract are explicitly spelled out in the Bankruptcy Code." App.37. The majority's belief that state-law principles like constructive knowledge and recordation could trump the *actual* disclosure requirements that Congress expressly set forth in the Bankruptcy Code underscores the error of the decision below and the need for this Court's review.

B. The Texas Supreme Court Disregarded the Specific Notice Requirements for Assumption of an Executory Contract, Deepening a Conflict Among Courts.

While the general disregard for the full-disclosure requirement is reason enough to grant certiorari, review is further warranted because the decision below specifically cast aside the notice necessary before an executory contract can be assumed and assigned in bankruptcy proceedings. Federal courts of appeals are divided over the notice required with respect to executory contracts. The Texas Supreme Court's decision sets a new low-water mark that essentially eliminates the need for actual notice in this critical area of bankruptcy law.

1. Executory contracts are a particularly significant area of bankruptcy law. They are distinctive because, unlike an ordinary contract, which typically involves goods or services on one side and money on the other, both parties to an executory contract have unperformed obligations. *In re C & S Grain Co.*, 47 F.3d 233, 237 (7th Cir. 1995) ("For purposes of the Bankruptcy Code, an executory contract is one in which the obligations of each party remain substantially unperformed."). Congress thus enacted a specific section of the Bankruptcy Code—section 365—to deal with executory agreements.

Section 365 is one of the most powerful arsenals in a debtor's possession. The provision allows debtors to pick and choose among its executory contracts—rejecting those that are disadvantageous and assuming those in which it has the better end of the bargain. The ability to reject an executory contract "is

vital to the basic purpose of a Chapter 11 reorganization, because rejection can release the debtor's estate from burdensome obligations that can impede a successful reorganization." *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 528 (1984). Section 365 also permits a debtor to "force others to continue to do business with it when the bankruptcy filing might otherwise make them reluctant to do so." *Nat'l Gypsum*, 208 F.3d at 504-07. At the same time, a debtor cannot assign an executory contract to a third party unless it has first assumed that contract. *See In re Mirant Corp.*, 440 F.3d 238, 253 (5th Cir. 2006); 11 U.S.C. §365(f)(2). If an executory contract is neither assumed nor rejected, it remains in effect and "rides through" with other property to the reorganized debtor. App.32 (Johnson, J., dissenting).

2. Given the potency of the power to assume or reject executory contracts, the Bankruptcy Code imposes firm limitations on debtors with respect to their executory contracts. Among other things, section 365 requires a debtor who wishes to assume an executory contract to cure any default in past performance and to "provide[] adequate assurance of future performance." 11 U.S.C. §365(b)(1)(C). Court approval of an assumption or rejection decision is also required, in order to protect "the integrity of the proceedings and the best interests of all the concerned parties." App.32; *see In re FBI Distribution Corp.*, 330 F.3d 36, 45 (1st Cir. 2003).

The most important requirement, however—and the requirement that is antecedent to all other obligations—is sufficient notice. Notice in the executory contract context is critical because a non-

debtor's rights and remedies are dramatically affected by the debtor's choice. For example, a debtor's rejection of an executory agreement gives rise to a breach and "a claim for damages by the non-debtor party." *Nat'l Gypsum Co.*, 208 F.3d at 505. Such a claim created by a rejection is treated as an unsecured claim that may be discharged in bankruptcy under section 1141(d). If the debtor instead assumes the executory agreement, the agreement remains "in effect through and then after the completion of the reorganization." *Id.* The debtor's assumption of an executory contract forces the non-debtor to continue to perform. *Id.* And, of course, since executory contracts may contain lurking obligations—like a perpetual indemnity obligation—it is imperative that the debtor comply fully with necessary disclosure requirements for executory contracts.

The Code contains numerous provisions ensuring sufficient notice of executory contracts. For example, Schedule G, titled "Executory Contracts and Unexpired Leases," demands that a debtor "[d]escribe *all* contracts and … [s]tate what the contract … is for and the nature of the debtor's interest." Official Bankruptcy Form B206, Schedule G, https://bit.ly/2EE7cdy (emphasis added). The assumption or rejection of an executory contract is also governed by specific bankruptcy rules. Bankruptcy Rule 6006(a) provides that a "proceeding to assume, reject, or assign an executory contract or unexpired lease, other than as part of a plan, is governed by Rule 9014." Rule 9014 states that relief "shall be requested by motion," and "reasonable notice and opportunity for hearing shall be afforded the party against whom relief is sought." Under Bankruptcy Rule 9013, a

motion must "state with particularity the grounds therefor, and … set forth the relief or order sought." Fed. R. Bankr. P. 9013. Rule 9013 also specifies that every written motion (except those which may be considered *ex parte*) must be served on the trustee or the debtor in possession and on any entities specified by the Bankruptcy Rules. *Id.*

3. Where a debtor fails to provide the appropriate notice, federal courts do not hesitate to find the assumption or rejection to be invalid. *See, e.g., In re Burger Boys, Inc.*, 94 F.3d 755, 763 (2d Cir. 1996); *Sea Harvest Corp. v. Riviera Land Co.*, 868 F.2d 1077 (9th Cir. 1989); *In re Parkwood Realty Corp.*, 157 B.R. 687, 691 (Bankr. W.D. Wash. 1993) (no effective rejection of contract through plan where non-debtor party did not receive notice). The courts of appeals disagree, however, on the notice required for the assumption of an executory contract.

The Ninth Circuit, for example, has held that the failure to provide the notice required by the Bankruptcy Rules is fatal to an assumption. "[S]trict compliance with these [notice] requirements avoids ad hoc inquiries into the meaning of the debtors' words and actions." *Sea Harvest Corp.*, 868 F.2d at 1079. Anything short of strict compliance "risks uncertainty." *Id.* Thus, even where the debtor had indicated its intent to assume particular contracts by filing documents with the court entitled "Affirmation and Assumption of Executory Contracts," the Ninth Circuit found the failure to file a formal motion fatal. *Id.*

The Second Circuit has similarly held that the notice requirements of section 365 must be strictly

met. *Burger Boys*, 94 F.3d at 763. In that case, the debtor filed an election to assume an executory contract (a lease). Even though the election referenced a specific lease, the Second Circuit invalidated the assumption because the debtor had failed to file a formal motion with the court. "We agree with the majority of other courts that have considered this issue," the court wrote, "and conclude that the assumption of a lease must be done, as suggested by the Bankruptcy Rules, through a formal motion to the court." *Id.*

The Fifth Circuit, in contrast, has approved a more wide-ranging inquiry into notice where the debtor indicated its intent to assume an executory contract "as part of [its reorganization] plan." *Nat'l Gypsum*, 208 F.3d at 512. The court first held that "[n]otice as a procedural safeguard cannot expand or contract based solely upon the procedural choice of the debtor when the ramifications to the non-debtor party are no less severe." *Id.* As a result, "the debtor had a responsibility to assure that the non-debtor party was on notice of the *debtor's specific intent* to assume *the* contract." *Id.* at 513 (emphasis added). The court held that the "plan of reorganization or some other court-ordered notice [must] set forth [the debtor's] intent to assume the [Executory] Agreement." *Id.* The Fifth Circuit then went beyond the four corners of the bankruptcy plan: in its view, "actual knowledge of a sufficiently refined degree" could also satisfy section 6006(a)'s notice requirement. *Id.*

The Texas Supreme Court has blazed a new path on this issue, concluding that "constructive notice" is sufficient to effectuate the assumption of an executory

contract. App.25. But the majority's wide-ranging notice inquiry did not stop there. The majority went well beyond the four corners of the bankruptcy court documents and even dug into Noble's "post-bankruptcy conduct." The Court found it especially probative that Noble had decommissioned an obsolete tank battery on the property it had received from Conoco and allegedly indemnified Conoco on two prior occasions. App.8. The Texas Supreme Court thus used *post-bankruptcy* conduct to evaluate the notice given *during the bankruptcy* proceedings. This sort of wide-ranging inquiry is fundamentally at odds with not just the Bankruptcy Code's general disclosure requirements but also the specific bankruptcy law provisions and rules that govern notice for the assumption of an executory contract.

It is plain that this case would come out differently in the Second, Fifth, and Ninth Circuits. Indeed, the conflict between the Texas Supreme Court and the Fifth Circuit, in which Texas lies, is clear. There is no dispute that the Exchange Agreement was never referenced in any "court-ordered" bankruptcy document. *Nat'l Gypsum*, 208 F.3d at 513. Nor is there any evidence of actual notice of the agreement, much less its perpetual indemnity obligation. Yet despite the undisputed failure of Alma, ConocoPhillips, or anyone else to provide any actual notice of the Exchange Agreement, the Texas Supreme Court gave effect to an assumption and assignment of that executory contract that left Noble holding the bag—and a $63 million tab. Certiorari is warranted to restore uniformity on this question of federal bankruptcy law and reverse the Texas Supreme Court's plainly incorrect decision.

II. The Court Should Grant Certiorari To Resolve Whether Generic "Assumed-Unless-Rejected" Language In A Bankruptcy Reorganization Plan Renders An Undisclosed Executory Contract Assumed.

The Texas Supreme Court further erred and opened up a split with the federal courts when it held that the boilerplate "assumed-unless-rejected" language in Alma's reorganization plan was sufficient for Alma to have assumed the undisclosed Exchange Agreement. That holding squarely conflicts with the Fifth Circuit and a number of lower bankruptcy court decisions, warranting this Court's intervention.

A. The Decision Below Diverges from the Fifth Circuit and Other Federal Courts.

Under bankruptcy law, a debtor may not assign an executory contract unless it assumes the agreement, the assignee gives adequate assurance of performance, and the bankruptcy court has given approval. 11 U.S.C. §365(a), (f)(2). As noted, disclosure of an executory contract is critical for the proper functioning of these provisions, and failure to disclose an executory contract renders the assumption (and subsequent assignment) of that contract a nullity *ab initio*. But an undisclosed executory contract also means that a debtor must do more than assume the contract though generic "assumed-unless-rejected" language found in a reorganization plan.

That is precisely what the Fifth Circuit held in *In re O'Connor*, 258 F.3d 392 (5th Cir. 2001). There, it was undisputed that the non-debtor parties had no notice of the executory contract at issue. *Id.* at 401. Furthermore, the reorganization plan did not make

any "specific reference to" the contract. *Id.* Instead, the plan simply provided that "all executory contracts … not rejected … will be assumed." *Id.* (brackets, ellipsis, and emphasis omitted). The Fifth Circuit described this provision as "boilerplate language" and held that such boilerplate plan language providing for the assumption of undisclosed executory contracts "would be inconsistent with §365(a)." *Id.* In the court's view, "an executory contract may *not* be assumed either by implication or through the use of boilerplate plan language." *Id.*

The circumstances here are materially indistinguishable from those in *In re O'Connor*. As in that case, it is undisputed that Noble had no notice of the Exchange Agreement, which was never disclosed during Alma's bankruptcy proceedings. Alma's reorganization plan, moreover, merely provided that executory contracts not specifically referenced were to be "'assumed and assigned to [Noble]' unless rejected [by Alma] at closing." App.6. To be sure, the plan also permitted Noble to provide a list of executory contracts beyond those already specified by Alma that Noble did not wish to have assumed by Alma and assigned to it, *see* App.6-7, but that provision likewise employed "assumed-unless-rejected" language. *See* App.7 (plan stating that "[a]ll … executory contracts which are not (i) rejected … (ii) on Exhibit 'J' or (iii) on the list provided by Noble to Alma … shall be assumed by Alma and assigned to Noble" (brackets omitted)).

In the Fifth Circuit, therefore, this would have been a straightforward case: the boilerplate "assumed-unless-rejected" language could not have effected Alma's assumption of the undisclosed

Exchange Agreement. The Texas Supreme Court, however, found no problems with Alma's assumption (and subsequent assignment) of the undisclosed Exchange Agreement—and its perpetual indemnity obligation—to Noble. The conflict between the two courts on this question of federal bankruptcy law is stark.

Seeking to downplay this conflict, the Texas Supreme Court asserted that in *In re O'Connor*, "[t]he Fifth Circuit's labeling of the language at issue as 'boilerplate' was no more than an aside." App.18. But that is wishful thinking: the Fifth Circuit *twice* referred to "boilerplate" language, and that characterization of the plan language at issue was the necessary premise for its conclusion that "an executory contract may *not* be assumed either by implication or through the use of boilerplate plan language." 258 F.3d at 401. The Texas Supreme Court thought that the "boilerplate" label "does not fit" with respect to Alma's plan, because the plan "used both exclusive and non-exclusive language throughout." But the *relevant* portions of the plan addressing assumption of executory contracts, sections 10.8 and 10.9, used precisely the same sort of "assumed-unless-rejected" language that the Fifth Circuit in *In re O'Connor* deemed "boilerplate" and unavailing to render assumption of an undisclosed executory contract.

Not only is the Texas Supreme Court's decision irreconcilable with the Fifth Circuit's decision; it departs from the decisions of bankruptcy courts that have likewise held that boilerplate plan language does not effect assumption of an undisclosed executory

contract. For example, in *Parkwood Realty*, the bankruptcy plan provided that "[a]ll other executory contracts … which have not been previously rejected shall be deemed rejected on the Effective Date." 157 B.R. at 689. The court concluded that this language did not operate to reject an undisclosed executory contract, because "approv[ing] the rejection of an unidentified contract results in purely fictitious compliance with the Code." *Id.* at 691; *see also In re Swallen's, Inc.*, 210 B.R. 120, 122 (Bankr. S.D. Ohio 1997) ("There is no room in the bankruptcy scheme for assumption of an executory contract by implication.").

Indeed, even the bankruptcy court decisions that the Texas Supreme Court cited to support its anomalous decision indicate that boilerplate "assumed-unless-rejected" language is invalid to effect assumption if an executory contract was undisclosed. In *In re GCP CT School Acquisition*, 429 B.R. 817 (B.A.P. 1st Cir. 2010), for example, the First Circuit Bankruptcy Appellate Panel held that "the question is not only whether the language contained within the plan or motion is sufficiently explicit, but whether the notice … under the circumstances was adequate." *Id.* at 828-29. And in *In re Amerivision Communications, Inc.*, 349 B.R. 718 (B.A.P. 10th Cir. 2006), the Tenth Circuit BAP held that "[t]he validity of any language depends upon notice and clarity and the overall information provided to the parties in interest." *Id.* at 723. Where, as here, there was indisputably *no* notice of an executory contract given to the relevant party in interest—Noble—there can be no doubt that general, boilerplate language purporting to effect assumption of that contract is invalid.

In short, the Texas Supreme Court stands alone in its view that boilerplate, "assumed-unless-rejected" language may validly apply to an undisclosed executory contract. The Fifth Circuit and numerous specialized bankruptcy courts disagree, and the difference is dispositive here. Accordingly, certiorari is warranted.

B. Boilerplate, "Assumed-Unless-Rejected" Plan Language Cannot Effect Assumption of an Undisclosed Executory Contract.

The Texas Supreme Court's view that boilerplate, "assumed-unless-rejected" plan language can operate to assume an undisclosed executory contract not only diverges from decisions of other courts; it is clearly wrong. That approach essentially discards the requirement that a bankruptcy court expressly and meaningfully review and approve an assumption or rejection of an executory contract under section 365(a).

Under section 365(a), the trustee or debtor in possession, "*subject to the court's approval*, may assume or reject any executory contract." 11 U.S.C. §365(a) (emphasis added). An executory contract "cannot be assumed by the unilateral acts of the debtor in possession during the reorganization of the business." *FBI Distribution*, 330 F.3d at 45. "Rather, the plain text of section 365 requires express approval by the court." *Id.*

Indeed, Congress specifically amended the bankruptcy code in 1978 to require court approval of assumptions and rejections of executory contracts. Section 365(a)'s predecessor, section 70(b) of the Bankruptcy Act of 1898, did not expressly require

judicial approval of assumption or rejection decisions. Under the 1898 Act, it was routinely held that an assumption need not be approved by a court, but rather could be shown "by word or by deed consistent with the conclusion that the trustee [or debtor] intended to assume." *In re Steelship Corp.*, 576 F.2d 128, 132 (8th Cir. 1978); *see also Brown v. Presbyterian Ministers Fund*, 484 F.2d 998, 1007 (3rd Cir. 1973) (assumption may be shown by acts or oral statements as well as by formal written declaration).

Now, given the statutory command, bankruptcy courts reviewing and authorizing assumption or rejection of an executory agreement engage in the "business judgment" test. *See, e.g.*, *In re Orion Pictures Corp.*, 4 F.3d 1095, 1099 (2d Cir. 1993). A court must use its own independent business judgment to assess whether the debtor has cured any default and provided adequate assurances of future performance. *See FBI Distribution*, 330 F.3d at 45.

All of the foregoing principles are at odds with the notion that boilerplate "assumed-unless-rejected" language is sufficient to assume an undisclosed executory contract, as the Texas Supreme Court held. As Justice Johnson noted in dissent, the majority could not explain "how the bankruptcy court could have approved the assumption as required by section 365 when the contract's existence was known only to Alma and Conoco and undisclosed by either of them in the bankruptcy to other parties, the trustee, or the court." App.40 (Johnson, J., dissenting). The majority thought the bankruptcy court's approval of the plan "perfectly understandable"—even though it did not know the agreement existed—because "[s]ection 365

does not impose an obligation on the court to conduct an independent investigation." App.40, App.20. But while neither the bankruptcy court nor Noble was required to conduct an independent investigation into the existence of an executory contract, that is precisely because it is expected—indeed, required—that the *debtor will disclose the contract*. Where an executory contract is *not* disclosed, generic boilerplate language effecting the assumption prevents a court from conducting the explicit, meaningful review of the assumption that the Code and sound policy require.

Along the same lines, an undisclosed executory contract assumed by boilerplate "assumed-unless-rejected" plan language prevents a bankruptcy court from determining whether an assignee has provided adequate assurance of future performance of the contract, as the Code further requires. Instead, as Justice Johnson aptly observed, "a bankruptcy court interpreting general language approving assumption of an undisclosed executory contract and finding in its order that adequate assurance of future performance has been provided when the contract was not disclosed and was unknown to the court, is pure fiction." App.40-41 (Johnson, J., dissenting).

III. The Questions Presented Are Exceptionally Important And Warrant Review Of The Texas Supreme Court's "Manifestly Inequitable" Decision.

The Texas Supreme Court's outlier decision implicates questions of significant importance to the proper functioning of the Nation's federal bankruptcy laws. As an initial matter, one can hardly dispute the compelling need for uniformity in interpretation and

application of the federal bankruptcy laws. The bankruptcy laws are "intended to have uniform application throughout the United States." *McKenzie v. Irving Tr. Co.*, 323 U.S. 365, 369-70 (1945). Indeed, the Framers considered the creation of a uniform bankruptcy system so important that the Bankruptcy Clause of the Constitution "contains an affirmative limitation or restriction upon Congress' power: bankruptcy laws must be uniform throughout the United States." *Ry. Labor Execs.' Ass'n v. Gibbons*, 455 U.S. 457, 468 (1982) (citing U.S. Const. art. I, §8, cl. 4 (granting Congress authority to "establish … uniform Laws on the subject of Bankruptcies throughout the United States")). Reflecting that significance, the Court routinely grants certiorari to resolve conflicting interpretations of the Bankruptcy Code, *see, e.g.*, *Merit Mgmt. Grp., LP v. FTI Consulting, Inc.*, 138 S. Ct. 883, 888 (2018) (resolving competing interpretations of 11 U.S.C. §546(e)), even when the stakes implicated by a specific provision are not particularly high, *see Lamie v. U.S. Tr.*, 540 U.S. 526, 532-33 (2004) (resolving split over award of attorney's fees under 11 U.S.C. §330(a)(1) in case involving $1,000).

But here, both the stakes and the need for uniformity are high indeed, for the Texas Supreme Court's decision has wide-ranging consequences. If state courts refuse to take the disclosure requirements of federal bankruptcy law seriously and treat undisclosed executory contracts as having been assumed and assigned based on nothing more than boilerplate plan language, the core purpose of Chapter 11 bankruptcy law will be jeopardized. The "purpose of a business reorganization" case is "to restructure a

business's finances so that it may continue to operate, provide its employees with jobs, pay its creditors, and produce a return for its stockholders." *In re Cedar Shore Resort, Inc.*, 235 F.3d 375, 379 (8th Cir. 2000). The Texas Supreme Court's decision impedes those goals by transforming Chapter 11 proceedings into "a matter of gamesmanship" turning on "how opaque a debtor's filings and disclosures can be and how many omissions can be made without consequences to the debtor seeking relief and other parties … with knowledge of the opaqueness." App.33 (Johnson, J., dissenting). The risk to putative asset purchasers that they might inadvertently purchase undisclosed executory contract obligations will lower the price those purchasers would otherwise offer, or deter them from purchasing assets altogether. *See In re Brown's Chicken & Pasta, Inc.*, 503 B.R. 86, 94 (Bankr. N.D. Ill. 2013) ("[C]ompetent, financially able purchasers will shun a bankruptcy process that requires them to speculate about what they are asked to purchase."). As a result, debtors will take longer to emerge from Chapter 11 (if they emerge at all), creditors will face greater uncertainty regarding their claims, and bankruptcy courts will be burdened by ever-longer proceedings—to say nothing of the ripple effects on employees, consumers, and other parties hoping for a successful reorganization of the debtor.

As this case also demonstrates, the Texas Supreme Court's decision creates a strong incentive for a debtor and a counterparty to an executory contract to disregard disclosure and notice requirements, thereby benefiting them and prejudicing an unwitting purchaser. Here, by virtue of Alma's and ConocoPhillips' failure to disclose the

Exchange Agreement during the bankruptcy proceedings, reorganized Alma no longer has to comply with an indemnity obligation or the corresponding millions (or billions) in future claims, and ConocoPhillips is now able to make an indemnity claim against Noble. In stark contrast, Noble has been unwittingly saddled with a *perpetual* indemnity obligation that, in just this case alone, amounts to $63 million—with untold millions (or billions) to come based on future demands by ConocoPhillips.

Nothing in federal bankruptcy law tolerates that "manifestly inequitable" outcome. App.33 (Johnson, J., dissenting). To the contrary, federal bankruptcy law squarely places the risk of non-disclosure on the debtor. *See In re JZ L.L.C.*, 371 B.R. 412, 417 (B.A.P. 9th Cir. 2007) (stating that a debtor "bears the risk of nondisclosure"). In the context of executory contracts, the result of nondisclosure is that an executory contract will be neither assumed nor rejected and thus will merely "pass[] with other property of the debtor to the reorganized corporation." *Consol. Gas Elec. Light & Power Co. of Balt. v. United Rys. & Elec. Co. of Balt.*, 85 F.2d 799, 805 (4th Cir. 1936); *see also Nat'l Gypsum*, 208 F.3d at 504 n.4 ("If an executory contract is neither assumed nor rejected, it will 'ride through' the proceedings and be binding on the debtor even after a discharge is granted."); *CCT Commc'ns, Inc. v. Zone Telecom, Inc.*, 172 A.3d 1228, 1246 (Conn. 2017) ("[E]xecutory contracts that are neither affirmatively assumed nor rejected in the context of a chapter 11 proceeding pass through the reorganization unaffected and become obligations of the reorganized debtor"). This well-established "ride through" doctrine appropriately aligns incentives: If a debtor

fails to disclose an executory agreement, through oversight or otherwise, then the reorganized entity is liable on the same terms as was the debtor.

Here, Alma "rightly" should remain liable for the indemnity obligation of the Exchange Agreement that it "did not disclose and assign within the framework of the bankruptcy proceeding." App.49-50 (Johnson, J., dissenting). Instead, Noble is stuck with that perpetual obligation on the basis of reasoning by the Texas Supreme Court that not only has been rejected by other courts, but has been rejected by the federal court of appeals in which Texas lies. The need for uniformity in interpreting and applying the bankruptcy laws is always paramount, but it is especially pressing when state and federal courts within the *same state* have taken diametrically opposing views on significant federal bankruptcy issues.

There are no obstacles preventing review of the decision below. Both the majority and the dissent squarely—and exhaustively—addressed the federal bankruptcy law issues raised in this petition. Those issues, moreover, are dispositive. If this Court were to rule that the assumption and assignment of the Exchange Agreement was improper because of the non-disclosure of the Exchange Agreement or the boilerplate "assumed-unless-rejected" plan language, then Noble never acquired the indemnity obligation—which passed through to reorganized Alma—and it has no obligation to indemnify ConocoPhillips in this case.

Indeed, this case presents an ideal vehicle for the Court to provide clear rules of federal bankruptcy law

for state courts that must interpret and apply that law after bankruptcy proceedings have closed. The nondisclosure issue that permeates this case will frequently arise in subsequent state-law actions because the majority of contract actions are litigated in state court, and the issue of whether an obligation was transferred through bankruptcy will be decided by state courts many years later. Indeed, it is precisely because such issues typically arise in subsequent state-court actions that the need for a clear federal rule is paramount. Here, the Texas Supreme Court rewarded the surreptitious transfer of an extraordinary obligation to Noble while diverging from other state and federal courts and creating uncertainty in the law as intolerable as the result in this case. Certiorari is imperative.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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