No. 17-1438

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

REPLY BRIEF FOR PETITIONER

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July 2, 2018

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

REPLY BRIEF

The "importance of th[e] disclosure duty" in federal bankruptcy proceedings "cannot be overemphasized." *In re Coastal Plains, Inc.*, 179 F.3d 197, 208 (5th Cir. 1999). Yet a sharply divided Texas Supreme Court held petitioner Noble Energy liable for $63 million based on an indemnification obligation that Noble never signed, that was never disclosed to Noble in bankruptcy proceedings, and that supposedly passed to Noble via "assumed-unless-rejected" language in a bankruptcy reorganization plan. That decision violates well-established bankruptcy law, departs from the holdings of other courts, transforms Chapter 11 proceedings into "a matter of gamesmanship," and is "manifestly inequitable." App.33 (Johnson, J., dissenting).

ConocoPhillips does not dispute that the Exchange Agreement at issue was never disclosed. Seeking to avoid the consequences of that critical fact, it mischaracterizes both the decision below and the petition. ConocoPhillips asserts that the questions presented "received scant attention" in what it frames as a "basic contract case decided under state law." Opp.1, 32. But both the majority and the dissent thoroughly addressed whether the undisclosed Exchange Agreement was assumed and assigned to Noble given the Bankruptcy Code's full-disclosure requirements and the "assumed-unless-rejected" plan language—both *federal* bankruptcy-law issues. ConocoPhillips insists that Noble seeks to "void" the bankruptcy court's plan confirmation order and that the majority rejected this "collateral attack." But this case concerns whether, under that order *as issued*,

federal bankruptcy law permits the assumption and assignment of the undisclosed Exchange Agreement. Holding in Noble's favor would not disturb the order, and the decision below never suggested otherwise. ConocoPhillips contends that Noble contractually accepted the burden of discovering the Exchange Agreement. But that assertion ignores that Noble had every right to expect disclosure of the Exchange Agreement under federal law. Finally, ConocoPhillips maintains that the circumstances here are unusual and do not portend disruption of bankruptcy proceedings. But the only things that are unusual about this case are the complete lack of disclosure of the Exchange Agreement and the Texas Supreme Court's anomalous determination that Noble is nevertheless subject to the agreement's perpetual indemnification obligation. Certiorari is warranted.

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

1. ConocoPhillips does not dispute that neither it nor Alma disclosed to Noble the Exchange Agreement and its perpetual indemnification obligation during Alma's bankruptcy proceedings. And it does not dispute that full disclosure is the *sine qua non* of federal bankruptcy law, particularly concerning executory contracts like the Exchange Agreement. *See* Pet.16-17, 21-23. Those points are dispositive: Under federal bankruptcy law, the undisclosed Exchange Agreement was not assumed by Alma and assigned to Noble, and consequently Noble cannot now be bound by what was never transferred to it.

Rather than defend the majority's contrary holding, ConocoPhillips rewrites the decision below. *See* Opp.15-16. In its telling, the majority "held only that Noble was bound by the plain terms of the APA, Plan, and Confirmation Order." *Id.* at 16. The majority then "concluded that the window for Noble's procedural challenge to Alma's disclosure of the Exchange Agreement had closed." *Id.* at 15. And purportedly over concerns about "finality," the majority held that "Noble's belated challenge to the sufficiency of Alma's disclosure during bankruptcy was not a ground for a state court to void the plain meaning of the APA, Plan, and Confirmation Order." *Id.* at 15-16.

This recharacterization is deeply flawed. At the outset, notwithstanding ConocoPhillips' repeated assertions to the contrary, *see* Opp.3, 15, 20, 22-23, 35, concerns about the "finality" of bankruptcy proceedings did not underlie the majority's rejection of Noble's federal bankruptcy-law arguments. ConocoPhillips' assertions depend on a single sentence in the majority opinion: "As critical as disclosure in bankruptcy proceedings may be, we think 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. The majority's admonition that reorganization plans and court orders "be interpreted and enforced according to their plain terms" merely reflected the majority's state-law holding with respect to the APA, plan, and confirmation order—its determination that, under the "plain terms" of those documents, the Exchange Agreement was "not among the contracts expressly

rejected" by Noble and was thus transferred to Noble. Opp.16.

That state-law determination, however, did not answer the subsequent question whether, under federal bankruptcy law, the *undisclosed* nature of the Exchange Agreement permitted its assumption and assignment to Noble. To answer that federal-law question, the majority did not invoke finality principles, nor did it "decline[] to resolve" the question. Opp.3 (emphasis omitted). Instead, it plainly held the federal-law disclosure obligation has no force provided an undisclosed executory contract is deemed conveyed under state contract law—an improper elevation of state-law principles over the Bankruptcy Code's notice and disclosure requirements. Thus, even non-participants to the case have criticized the majority's decision for "overlook[ing] the protections given by the bankruptcy system," Plains *Amicus* Br.1, an observation regarding the court's federal-law holding incompatible with ConocoPhillips' effort to cabin the decision to state-law principles.

Relatedly, ConocoPhillips insists that Noble seeks to "void" or "collaterally attack" the confirmation order. *See* Opp.1-3, 12-14, 15-16, 20, 22-24, 27, 33, 35. Not so. As this case comes to the Court, the question is whether, *given* the confirmation order as construed under state law, federal bankruptcy law nevertheless permits the assumption and assignment of an *undisclosed* executory contract. Answering that question in the negative would not affect the confirmation order one bit. It would simply mean that, as a matter of federal law, the undisclosed Exchange Agreement "rode through the bankruptcy and

remained a liability of" Alma rather than was transferred to Noble, such that, in this subsequent action, ConocoPhillips cannot enforce the Exchange Agreement's indemnification obligation against Noble. App.50 (Johnson, J., dissenting).

This case thus bears no resemblance to *Travelers Indemnity Co. v. Bailey*, 557 U.S. 137 (2009), or *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260 (2010). In *Travelers*, the Court held that the finality of two bankruptcy-court orders following the conclusion of direct review precluded "challenging the[ir] enforceability" or otherwise engaging in a "collateral attack" on them. 557 U.S. at 140, 154. Here, Noble does not challenge the enforceability of, or "collateral[ly] attack," the confirmation order. The issue is simply the scope of the order, specifically, whether federal bankruptcy law allows the assumption and assignment to Noble of the undisclosed Exchange Agreement. Likewise, *Espinosa* addressed whether a confirmation order should be deemed "void," rendering it a "legal nullity." 559 U.S. at 269-70. A decision in Noble's favor would have no such impact on the confirmation order here.

Tellingly, the majority cited neither *Travelers* nor *Espinosa*, despite ConocoPhillips' insistence that their application here is "obvious." Opp.16. What is "obvious" is why the majority never did so: Noble has never sought to upend any bankruptcy order; a decision in its favor would not do so; and the majority neither suggested otherwise nor relied on finality concerns in rejecting Noble's federal-law argument.

2. ConocoPhillips' effort to distinguish the decision below from the conflicting decisions of other

state supreme courts and federal courts of appeals, *see* Opp.17-21, is equally misguided. ConocoPhillips largely relies on two arguments, both unavailing. First, ConocoPhillips again invokes the majority's supposed "finality" ruling and contends that none of Noble's cases "cast[s] any doubt on" the "basic principles of finality" purportedly applied by the majority in rejecting Noble's federal-law argument. Opp.19-20. But as noted, this case does not involve a "collateral, state-court attack on closed bankruptcy proceedings." *Id.* at 20. Nor did the majority "conclu[de]" that "basic principles of finality bar Noble from altering the meaning of longstanding bankruptcy orders." *Id.* Consequently, it is irrelevant that the conflicting federal-court decisions were "all rendered on direct appeal from bankruptcy court decisions." *Id.* (emphasis omitted). Indeed, as Noble has explained, the nondisclosure issue that permeates this case will frequently arise only in subsequent state-court actions because the majority of contract actions are litigated in state court. Pet.37. And in such actions, state supreme courts have held that, given federal bankruptcy-law requirements, nondisclosure renders undisclosed agreements like the one at issue here unenforceable. *See* Pet.18-19.

Second, ConocoPhillips contends that, unlike the parties in other decisions, Noble was not "left in the dark" during Alma's bankruptcy proceedings. Opp.18. Rather, Noble "knowingly and voluntarily entered an asset purchase agreement" pursuant to which it agreed to conduct due diligence that, "if completed, indisputably would have revealed the Exchange Agreement." *Id.*; *see also id.* at 21 (Noble "was a purchaser that expressly agreed to assume

unspecified contracts from Alma subject to its own due diligence"). That Noble contractually agreed to undertake due diligence does not, however, eliminate the federal-law requirement of full disclosure during bankruptcy proceedings. And given that well-established requirement—particularly as to executory contracts, *see* Pet.21-23—the due diligence process was intended to shed light on the range of obligations in disclosed contracts, not to unearth undisclosed contracts in the first instance. *Cf.* Plains *Amicus* Br.2 ("Purchasers rely on the protections afforded by the Bankruptcy Code … when they agree to purchase assets" notwithstanding due diligence obligations). Indeed, "multiple other executory contracts" between Alma and ConocoPhillips "*were* listed … in Alma's bankruptcy disclosure statement." App.50 (Johnson, J., dissenting) (emphasis added). Noble can hardly be faulted for relying on those disclosures and failing to discover an additional executory contract that Alma and ConocoPhillips did *not* disclose.

3. On the merits, ConocoPhillips offers no defense of the majority's disregard of bankruptcy law's full-disclosure requirement except again to accuse Noble of seeking to "collaterally attack the bankruptcy court's final orders in state court." Opp.24. But as explained, the majority did not reject Noble's federal-law argument due to finality, and a decision in Noble's favor would not disturb any bankruptcy-court order.

In particular, ConocoPhillips does not defend the majority's belief that state-law constructive knowledge principles can substitute for the actual knowledge that federal bankruptcy law requires. *See* App.35 (Johnson, J., dissenting) (observing that

"'constructive knowledge' is not applicable in the bankruptcy context"). Instead, ConocoPhillips disputes that the majority ever so held, contending that "[t]he majority mentioned constructive notice only to answer the dissent's charge that its decision was 'manifestly inequitable.'" Opp.16 (citing App.26). That assertion is false. In fact, the majority repudiated Noble's argument that "the Exchange Agreement was not listed in Alma's disclosure or mentioned in any way in the bankruptcy proceeding" by stating that "Noble had … constructive notice of the Exchange Agreement." App.25. ConocoPhillips simply ignores that and other language by which the majority held that actual disclosure was unnecessary given Noble's constructive knowledge. *See* App.4-5, App.20 n.69. The majority's subordination of federal law's actual-disclosure requirement to state-law principles of constructive notice is indefensible and undefended, underscoring the need for this Court's review.

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

Under Section 365 of the Bankruptcy Code, an executory contract does not transfer to an assignee unless the debtor assumes the contract, the assignee provides adequate assurance of future performance, and the bankruptcy court approves the assumption. Pet.26. But because a bankruptcy court necessarily cannot review the assumption and assignment of an *undisclosed* contract, a reorganization plan that

simply provides that all executory contracts are "assumed unless rejected" cannot effect the assumption and assignment of that undisclosed contract, which consequently "rides through" to the debtor. App.50 (Johnson, J., dissenting). The majority's incorrect decision to the contrary conflicts with other decisions and warrants review.

ConocoPhillips resists review by again mischaracterizing both Noble's argument and the decision below. ConocoPhillips contends that Noble is "collaterally attacking a final order in a … bankruptcy proceeding," and the majority "said nothing about" the propriety of "assumed-unless-rejected" language under federal bankruptcy law. Opp.27. The former proposition is demonstrably incorrect, *see* pp.4-5, *supra*, and the latter is belied by the majority's exhaustive review of cases concerning "the law on assumption-rejection catchall provisions in Chapter 11 plans," App.21. After conducting that review, the majority concluded that "[u]ltimately, the issue is one of notice," and it held that Noble "had at least constructive notice" of the Exchange Agreement. App.24-25.

The majority thus not only thoroughly addressed Noble's argument that, under bankruptcy law, the undisclosed Exchange Agreement could not be assigned under the "assumed-unless-rejected" language here. App.17. It also rejected Noble's argument only by resorting to state-law constructive-knowledge principles, rather than explaining how "assumed-unless-rejected" language could operate to transfer an undisclosed executory contract in compliance with Section 365. ConocoPhillips has

literally nothing to say in defense of that proposition. It instead nitpicks at the "boilerplate" label for the "assumed-unless-rejected" language here. Opp.26-27. That designation derives from materially identical language that the Fifth Circuit deemed "boilerplate" in *In re O'Connor*, 258 F.3d 392, 401 (5th Cir. 2001). Regardless, whatever the label for "assumed-unless-rejected" language, the "ultimate issue" is whether that language suffices under bankruptcy law to effect the assumption and assignment of an undisclosed executory contract. App.43 (Johnson, J., dissenting). And "a general statement" like the provision here "simply does not approve or disapprove of assumption of an undisclosed executory contract that the court has not expressly considered." *Id.*

ConocoPhillips' efforts to distinguish *O'Connor* are unpersuasive. ConocoPhillips first argues that the court's conclusion that "an executory contract may *not* be assumed either by implication or through the use of boilerplate language" merely "reflects a deferential approval of '[t]he bankruptcy court's interpretation.'" Opp.29 (alteration in original) (quoting 258 F.3d at 401). But the Fifth Circuit affirmatively endorsed that "interpretation" when it held that "interpreting the Plan's boilerplate language as providing for assumption of the agreement would be inconsistent with §365(a), which requires court approval." 258 F.3d at 401. Had the Fifth Circuit concluded that an executory contract *may* be assumed "either by implication or through the use of boilerplate language," it would have not hesitated to register its disapproval of the bankruptcy court's interpretation.

Second, ConocoPhillips maintains that *O'Connor* "involved materially different contractual language." Opp.29. The plan in *O'Connor* provided that certain executory contracts "are hereby rejected," while all other executory contracts "not rejected … will be assumed." 258 F.3d at 401 (emphases omitted). The relevant language here provided that executory contracts would be "assumed [by Alma] and assigned to [Noble]" unless rejected. App.6. This is a distinction without a difference. The operative point is that the Fifth Circuit held that the *O'Connor* plan language did not effect assumption of an executory contract because "something more" than assumption-by-implication was necessary. 258 F.3d at 401. So too here: an undisclosed executory contract cannot be impliedly assumed by "assumed-unless-rejected" language that necessarily sidesteps meaningful review of the contract by the bankruptcy court. *See also In re Parkwood Realty Corp.*, 157 B.R. 687, 691 (Bankr. W.D. Wash. 1993) (holding that "approv[ing] the rejection of an unidentified contract results in purely fictitious compliance with the Code").[1]

III. The Questions Presented Are Exceptionally Important And Warrant Review Here.

ConocoPhillips' efforts to downplay the importance of this case are meritless. Citing a hand-picked list of other bankruptcy sales, Opp.26-27, ConocoPhillips insists that the "assumed-unless-rejected" language here is "the exception, not the rule," and the majority's decision "incentivizes" parties

[1] In seeking to distinguish *Parkwood Realty*, *see* Opp.30-31, ConocoPhillips skips over the critical point, which is that, as here, the executory contract was undisclosed.

entering into asset purchase agreements to "ensure they know what those contracts say before signing—or else negotiate different language." *Id.* at 33-34. As an initial matter, this argument has no bearing on the first question presented, which asks whether a state court may impose contractual obligations by disregarding bankruptcy law's full-disclosure requirements—irrespective of contractual or plan language. In all events, ConocoPhillips' assertion only underscores its misguided belief, endorsed by the majority below, that state-law principles can transform federal bankruptcy law from a full-disclosure framework into a *caveat emptor* regime. And this case demonstrates the dangers of doing so: Even under its contractual due diligence obligation, Noble had every reason to expect that, under federal law, the Exchange Agreement would be disclosed, particularly since ConocoPhillips and Alma had disclosed other executory contracts. *See* pp.6-7, *supra.*[2]

ConocoPhillips brushes aside the consequences of the decision below for the federal bankruptcy system, *see* Pet.33-35, by pointing to a single recent bankruptcy proceeding that wrapped up in "a tidy four months," Opp.33-34. But a sample size of one,

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[2] ConocoPhillips asserts that Noble and its predecessors repeatedly "enforc[ed] the Exchange Agreement" before now. Opp.4, 9-10. ConocoPhillips mischaracterizes the facts; for example, the supposed "production payments," *id.* at 9, stemmed not from the Exchange Agreement but from real property rights separately conveyed to Noble's predecessor. *See* CR 855. Regardless, prior conduct by Noble "do[es] not alter whether Alma complied with the requirements of section 365." App.30-31 (Johnson, J., dissenting).

unaccompanied by any further description, hardly rebuts the broader implications of the majority's decision: that it will transform federal bankruptcy proceedings into a "matter of gamesmanship" by encouraging opacity over transparency, thereby undermining "confidence in proceedings, plans, and court orders." App.33 (Johnson, J., dissenting); *see also* Plains *Amicus* Br.15-16.

ConocoPhillips goes back to the "collateral attack" well one last time in contending that allowing Noble's "collateral attack" to succeed would "significantly disrupt the Nation's bankruptcy system." Opp.35. But all ConocoPhillips means by collateral attack is that this case involves a state-court effort to enforce a contract alleged to have been assumed via bankruptcy sans disclosure, which is the precise posture where such issues will arise and precisely why the federal rule needs to be crystal-clear. Pet.36-37.

Finally, ConocoPhillips' suggestion that the issues presented here "received scant attention below," Opp.32-33, is plainly incorrect. Both the majority and the dissent thoroughly addressed whether bankruptcy law's full-disclosure requirements and the "assumed-unless-rejected" plan language permitted assumption and assignment of the undisclosed Exchange Agreement to Noble. That is more than enough for this Court to review these important questions and restore uniformity to federal bankruptcy law. *Cf. Illinois v. Gates*, 462 U.S. 213, 222-23 (1983).

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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