No. 17-423

IN THE

Supreme Court of the United States

RICHARD STERBA, ET UX.,

Petitioners,

v.

PNC BANK,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a federal court exercising bankruptcy jurisdiction should apply federal choice-of-law rules or the forum State's choice-of-law rules to decide which statute of limitations applies to a creditor's claim.

RULE 29.6 STATEMENT

Pursuant to this Court's Rule 29.6, undersigned counsel state that PNC Bank, National Association is a wholly owned subsidiary of PNC Bancorp., Inc., which in turn is a wholly owned subsidiary of The PNC Financial Services Group, Inc. The PNC Financial Services Group, Inc. does not have any parent corporation, and no publicly held corporation owns 10% or more of its stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

STATUTES

CONSTITUTIONAL PROVISIONS

TABLE OF AUTHORITIES
(continued)

Page(s)

OTHER AUTHORITIES

BRIEF IN OPPOSITION

Respondent PNC Bank respectfully submits this brief in opposition to the petition for a writ of certiorari filed by petitioners Richard and Olga Sterba.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 852 F.3d 1175. The opinion of the bankruptcy appellate panel for the court of appeals (Pet. App. 15a-30a) is reported at 516 B.R. 579. The opinion of the bankruptcy court (Pet. App. 31a-34a) is not reported but is available at 2013 WL 6080982.

JURISDICTION

The judgment of the court of appeals was entered on April 5, 2017. A petition for rehearing was denied on May 19, 2017 (Pet. App. 35a). On July 19, 2017, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including September 16, 2017, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners are debtors in a Chapter 7 bankruptcy proceeding. Pet. App. 3a, 15a. Respondent PNC Bank is a national bank that has a claim against the bankruptcy estate. *Id.* at 2a-3a.

PNC Bank's claim is premised on petitioners' 2007 purchase of a condominium in Santa Rosa, California. Pet. App. 2a-3a, 16a-17a. To make the purchase, petitioners took out two loans. *Id.* at 2a. One of the loans was from National City Bank. *Ibid.* The promissory note for the loan stated that Ohio law would govern any dispute between the parties:

> [T]he Bank is a national bank located in Ohio and [the] Bank's decision to make this Loan to you was made in Ohio. Therefore, *this Note shall be governed by and construed in accordance with . . . the laws of Ohio*, to the extent Ohio laws are not preempted by federal laws or regulations, and *without regard to conflict of law principles*.

Pet. App. 17a-18a (emphases added). Petitioners defaulted on the loan, leaving National City with a claim for approximately $42,000. *Id.* at 3a. National City then merged with PNC Bank. *Id.* at 3a, 31a.

In 2013, petitioners filed for bankruptcy. Pet. App. 3a. PNC Bank filed a claim against the bankruptcy estate based on the 2007 note. *Ibid.* Petitioners objected to the claim on the ground that it is barred by California's four-year statute of limitations for an obligation founded on a written instrument. *Id.* at 3a, 17a; see Cal. Code Civ. Proc. § 337. Petitioners' theory is that because they filed for bankruptcy in federal court in California, California choice-of-law rules apply, and those rules lead to application of California's statute of limitations, which bars PNC Bank's claim. Pet. App. 19a-20a. PNC Bank, in contrast, argued that Ohio's six-year statute of limitations applies to the claim. PNC explained that in a federal bankruptcy proceeding, federal choice-of-law rules apply, and under those rules, a federal court should give effect to the parties' agreement that Ohio law would govern their contract. *Id.* at 3a, 17a-18a; see Ohio Rev Code § 1303.16.

2. The bankruptcy court applied Ohio's statute of limitations and overruled petitioners' objection to the

claim. Pet. App. 31a-34a. The court first decided that when "a federal court exercises jurisdiction over [a] state law claim[]," the forum State's (here, California's) choice-of-law rules apply. *Id.* at 31a. Using California's choice-of-law rules, the court concluded that it should give effect to the parties' agreement that Ohio law would govern their dispute, and so PNC Bank's claim is timely. *Id.* at 32a.

3. The bankruptcy appellate panel for the court of appeals reversed. Pet. App. 15a-30a. First, the panel held that federal (rather than state) choice-of-law rules should be used to determine the applicable statute of limitations. *Id.* at 16a. That is so, the panel explained, because this case involves "a bankruptcy court exercising federal question jurisdiction." *Id.* at 20a (citing, *inter alia*, *Lindsay* v. *Beneficial Reinsurance Co.*, 59 F.3d 942, 948 (9th Cir. 1995)).

The panel then determined that under federal choice-of-law rules, the choice-of-law clause in the parties' contract was not controlling, because as a general matter, "standard contractual choice of law provisions do not cover conflicts between statutes of limitations." Pet. App. 16a. The panel believed that it was compelled to reach that result by *Des Brisay* v. *Goldfield Corp.*, 637 F.2d 680, 682 (9th Cir. 1981), a securities-fraud case interpreting an outdated version of the Second Restatement of Conflicts. Pet. App. 27a. The panel therefore applied California's statute of limitations and found PNC Bank's claim untimely. *Id.* at 16a, 28a.

4. The court of appeals reversed. Pet. App. 1a-14a. Like the bankruptcy appellate panel, the court concluded that federal choice-of-law rules apply to a bankruptcy case in federal court. *Id.* at 2a. But unlike the panel, the court determined that those rules

required application of Ohio's statute of limitations, not California's statute of limitations, making PNC Bank's claim timely. *Id.* at 8a.

Because petitioners conceded that federal choice-of-law rules applied, see Pet. C.A. Br. 5, the court of appeals did not discuss the issue but instead simply cited a prior decision. Pet. App. 2a (citing *Lindsay*, 59 F.3d at 948). The court then applied the federal choice-of-law rules, which generally follow the Second Restatement. *Id*. at 3a-10a. The court first observed that, "when parties to an agreement select the law they want to govern an issue," federal courts generally "will enforce that choice." *Id*. at 3a; see Restatement (Second) of Conflict of Laws § 187 (setting out that general rule). But the court noted that in *Des Brisay*, it had held that a choice-of-law clause that does not expressly address the statute of limitations would be construed not to include it. *Id*. at 3a-4a (citing 637 F.2d at 682). For that reason, the court declined to rely on the contract's choice-of-law clause. *Id.* at 4a.

Instead, the court turned to a different section of the Second Restatement and concluded that, under that provision, the Ohio statute of limitations should apply. Pet. App. 5a-10a (citing Restatement (Second) of Conflict of Laws § 142). The court explained that, under Section 142 of the Second Restatement, a court applies the statute of limitations of the forum State "unless the exceptional circumstances of the case make such a result unreasonable." *Id.* at 6a (quoting Restatement). Here, the court explained, applying California's shorter statute of limitations would be unreasonable because PNC Bank had no choice but to bring its claim in the Northern District of California, where petitioners filed for bankruptcy, and if California's statute of limitations applied,

PNC Bank's claim would be extinguished "through no fault of [its own]." *Id.* at 8a. Further, the court explained, it makes sense to apply Ohio law, because Ohio courts would be open to hear the claim, and Ohio "has a substantial interest in its resolution." *Ibid.*; see *id.* at 17a-18a (noting that bank was located in Ohio and made the decision to make the loan in Ohio). Under these circumstances, the court concluded, "the bankruptcy court was correct to apply Ohio's six-year statute of limitations and overrule the Sterbas' objection to PNC's claim." *Ibid.* The court also noted that the result would be the same if it had applied California choice-of-law rules; either way, Ohio's statute of limitations would apply. *Id.* at 13a n.2.

Judge Tashima concurred, finding a "more direct route" to reach the same outcome—simply enforce the parties' agreement to apply Ohio law. Pet. App. 11a-12a. Judge Tashima explained that under federal choice-of-law rules (specifically, Section 187 of the Second Restatement), courts apply "the law of the state chosen by the parties," *id.* at 11a (quoting Restatement), and here, the parties expressly chose to be governed by Ohio law, *id.* at 11a-12a. Indeed, their agreement said that Ohio law would apply "without regard to conflict of law principles," *id*. at 12a (quoting agreement)—meaning without regard to any additional conflicts-of-law analysis, *ibid.* Accordingly, Ohio law applies and PNC Bank's claim is timely. *Ibid.*

5. Petitioners filed a petition for rehearing en banc, which the court denied, with no judge requesting a vote on the petition. Pet. App. 35a.

ARGUMENT

Petitioners renew their contention (Pet. 14-21) that the court of appeals should have applied California choice-of-law rules, rather than federal choice-of-law rules, to decide the timeliness of PNC Bank's claim in this bankruptcy proceeding. The court of appeals' decision is correct: In this case in federal court where federal jurisdiction is premised on a federal question—bankruptcy—federal conflicts-of-law principles apply to determine the appropriate statute of limitations.

Although the federal circuits have disagreed on the question presented, review of that question would be premature at this time, because many circuits have yet to weigh in. Further, this case would be an exceedingly poor vehicle for resolving the question presented for two reasons. First, in the court of appeals, petitioners conceded that federal (rather than state) choice-of-law rules apply in this case, and as a result, the court of appeals did not analyze the issue in any depth. The court of appeals' opinion focused on application of federal choice-of-law rules to the facts of this particular case, and that fact-bound application of settled law does not warrant this Court's review. Second, the resolution of the question presented would not matter to the outcome in this case. As the court of appeals recognized, whether a court uses federal or California choice-of-law rules, the result is the same: the Ohio statute of limitations applies and PNC Bank's claim is timely. The petition for a writ of certiorari therefore should be denied.

1. The court of appeals correctly applied federal choice-of-law principles to conclude that Ohio's statute of limitations governs PNC Bank's claim. The

court of appeals has explained that, although federal bankruptcy law provides substantive rules that guide bankruptcy cases, it does not include a provision that expressly addresses conflicts of law. *In re Holiday Airlines Corp.*, 620 F.2d 731, 734 (9th Cir. 1980). In the absence of such a provision, the court sensibly decided to apply the federal common law of conflicts of laws. The court explained that in federal cases premised on diversity jurisdiction, courts apply state statutes of limitations so that plaintiffs do not have an incentive to forum shop in the federal system. *Lindsay*, 59 F.3d at 948; see *Klaxon Co.* v. *Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941) (federal court sitting in diversity applies choice-of-law rules of the State in which it sits). But in federal bankruptcy cases, "the risk of forum shopping . . . has no application, because the case can only be litigated in federal court," and so "the value of national uniformity of approach need not be subordinated . . . to differences in state choice of law rules." *Lindsay*, 59 F.3d at 948; see *In re SMEC, Inc.*, 160 B.R. 86, 89-91 (M.D. Tenn. 1993) (applying federal choice-of-law rules in bankruptcy prevents debtors, "in the shadow of bankruptcy," from "restructur[ing] or relocat[ing] their business dealings in such a way as to gain the benefit of a certain forum's laws").

In addition to concerns about forum shopping, the strong federal interest in uniformity in bankruptcy favors application of federal choice-of-law rules. In diversity cases, "it is presumed that the forum state has the greatest interest in seeing its laws applied," but that presumption is "untenable" in federal bankruptcy cases. *In re SMEC*, 160 B.R. at 90. Federal bankruptcy law "has a goal of national uniformity rather than congruence with state law." *In*

re Jafari, 569 F.3d 644, 648 (7th Cir. 2009); see U.S. Const. art. I, § 8, cl. 4.

Petitioner contends (Pet. 19) that this Court's decision in *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64 (1938), required the court of appeals to apply state choice-of-law rules in this case. But this Court disagreed in *Vanston Bondholders Protective Committee* v. *Green*, 329 U.S. 156, 163 (1946). The Court explained:

> In determining what claims are allowable and how a debtor's assets shall be distributed, a bankruptcy court does not apply the law of the state where it sits. *Erie R.R. Co.* v. *Tompkins*, 304 U.S. 64, has no such implication. That case decided that a federal district court acquiring jurisdiction because of diversity of citizenship should adjudicate controversies as if it were only another state court. But bankruptcy courts must administer and enforce the Bankruptcy Act as interpreted by this Court in accordance with authority granted by Congress to determine how and what claims shall be allowed under equitable principles.

Id. at 162-163 (footnote and citation omitted). Bankruptcy cases are not premised on diversity but on a federal question, and so *Erie* does not require application of state conflicts rules. See *In re SMEC*, 160 B.R. at 90 (*Vanston* "strongly indicate[s] the Court's

intent to separate bankruptcy jurisdiction from diversity jurisdiction").[1]

Contrary to petitioners' contention (Pet. 24-25), this Court's decisions in *Atherton* v. *FDIC*, 519 U.S. 213 (1997), and *O'Melveny & Myers* v. *FDIC*, 512 U.S. 79 (1994), do not require application of state choice-of-law rules in the circumstances here. Neither was a bankruptcy case, and neither had any choice-of-law issue. The Court in those cases counseled hesitation in creating new federal common law displacing state "standard[s] of conduct," *Atherton*, 519 U.S. at 216, 218, or "tort liability," *O'Melveny & Myers*, 512 U.S. at 87-89, but the court of appeals did not do that here. The question here was whether to apply settled federal conflicts-of-law rules, or apply state rules instead. Both sets of rules ultimately point to state law (a statute of limitations), not federal common law. There was no occasion here for "judicial creation of a special federal rule of decision." *Atherton*, 519 U.S. at 218 (quoting *O'Melveny & Myers*, 512 U.S. at 87). The court of appeals sensibly applied federal choice-of-law rules in this federal bankruptcy case, and those rules led to a sensible result: enforcing the choice-of-law clause to which the parties had expressly agreed.

2. As the court of appeals noted (Pet. App. 13a n.2), there is some disagreement in the circuits re-

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[1] Petitioner contends (Pet. 21) that *Vanston* has been undercut by *Butner* v. *United States*, 440 U.S. 48, 53-54 (1979), but *Butner* addressed a different question—whether state or federal law should be used to determine property rights in the assets of the bankruptcy estate. After *Butner*, it is settled that state law applies, but that does not answer the question of *which* State's law; that is a matter for choice-of-law rules, and *Vanston* counsels in favor of using federal (rather than state) rules.

garding whether, in a federal bankruptcy case, courts should apply federal or state choice-of-law rules to claims that are based upon state law. Compare Pet. App. 1a-2a, with *In re Gaston & Snow*, 243 F.3d 599, 605-607 (2d Cir. 2001), and *In re Merritt Dredging Co.*, 839 F.2d 203, 206 (4th Cir. 1988). See also *In re Payless Cashways*, 203 F.3d 1081, 1084 (8th Cir. 2000) (stating, without any analysis, that "[t]he bankruptcy court applies the choice of law rules of the state in which it sits"); *Mukamal* v. *Bakes*, 378 Fed. App'x 890, 896 (11th Cir. 2010) (similar statement in an unpublished, non-precedential opinion).[2]

But the decisions in this area are nuanced; for example, the Fourth Circuit has held that, in federal bankruptcy cases, state choice-of-law rules apply to claims premised on state law, but only so long as there is no "compelling federal interest which dictates otherwise." *In re Merritt Dredging Co.*, 839 F.2d at 206. The Second Circuit similarly has qualified its rule. See *In re Gaston & Snow*, 243 F.3d at 607 ("limit[ing] [its] holding" that state choice-of-law rules apply to claims in bankruptcy cases premised on state law "to cases where no significant federal policy, calling for the imposition of a federal conflicts rule, exists").

Several circuits have yet to weigh in on the question presented. See, *e.g.*, *In re Mirant Corp.*, 675

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[2] Petitioners cite (Pet. 22-23) several decisions that are inapposite. In *In re Teleglobe Communications Corp.*, 493 F.3d 345, 358 (3d Cir. 2007), jurisdiction was premised on diversity, not bankruptcy. *A.I. Trade Finance, Inc.* v. *Petra International Banking Corp.*, 62 F.3d 1454, 1463 (D.C. Cir. 1995), likewise was not a bankruptcy case; federal jurisdiction was premised on the Edge Act.

F.3d 530, 536 (5th Cir. 2012) ("This circuit has not yet determined whether the independent judgment test or the forum state's choice-of-law rules should be applied in bankruptcy." (citing *Woods-Tucker Leasing Corp. of Ga.* v. *Hutcheson-Ingram Dev. Co.*, 642 F.2d 744, 748 (5th Cir. 1981));[3] *In re Jafari*, 569 F.3d at 651 (Seventh Circuit expressly declining to resolve whether federal or forum state choice-of-law rules apply in bankruptcy cases); *In re Morris*, 30 F.3d 1578, 1581-1582 (7th Cir. 1994) (same).

This Court's review of the question presented would be premature at this time. There is no urgent need for review, because although disagreement exists in the federal circuits, it has existed for many years. Yet the circuit split remains shallow, and several courts of appeals have yet to take definitive positions on the question presented. The issue would benefit from further percolation in the lower courts.

3. Even if this Court wished to review the question presented, this case would be an exceedingly poor vehicle for doing so, for two reasons.

a. First, before the court of appeals, petitioners conceded that federal, rather than state, choice-of-law rules apply in this case. In their opening brief, petitioners stated: "In federal question cases with exclusive jurisdiction in federal court, such as bankruptcy, this Court applies federal choice of law rules." Pet. C.A. Br. 5 (Docket Entry No. 28). The brief then argued that under federal choice-of-law

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[3] In *In re Crist*, 632 F.3d 1226, 1229 (5th Cir. 1980), the Fifth Circuit suggested, without further explanation, that "[w]hen disposition of a federal question requires reference to state law, federal courts are not bound by the forum state's choice of law rules, but are free to apply the law considered relevant to the pending controversy."

rules, as applied in the Ninth Circuit's decision in *Des Brisay* v. *Goldfield Corp.*, 637 F.2d 680, 682 (9th Cir. 1981), California's statute of limitations should apply. Pet. C.A. Br. 6-15. At one point in their brief, petitioners noted that there is a "split in the circuits as to whether bankruptcy courts should use the conflict of laws principles of the forum state or those of federal common law." *Id.* at 8. But petitioners did not make any argument that California (rather than federal) choice-of-law rules should apply. In particular, petitioners did not make any of the policy arguments that they now advance before this Court. See, *e.g.*, Pet. 23 (argument based on "bedrock notions of federalism").[4]

As a result, the court of appeals simply relied on circuit precedent to say that federal choice-of-law principles apply here and did not discuss the issue further. Pet. App. 1a-2a (citing *Lindsay*, 59 F.3d at 948). The entirety of the court of appeals' analysis on this issue was one sentence, and after that one sentence at the beginning of the opinion, the court never returned to the issue. *Ibid.*[5] The court's opinion focused on how to apply the Second Restatement and circuit precedent to the facts of this case. The

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[4] Because petitioners' brief was unclear on this point, PNC Bank, in an abundance of caution, explained in its reply brief why federal (rather than state) choice-of-law rules apply in this case. See PNC Bank C.A. Reply Br. 3-4 (Docket Entry No. 34).

[5] After the court issued its decision, petitioners filed a petition for rehearing en banc, where they (again) mentioned the circuit split, but (again) did not provide argument on why state choice-of-law rules should apply here. See Pet. For Reh'g 1 (Docket Entry No. 48-1). Instead, petitioners' argument was that the court of appeals erred in applying the Second Restatement and circuit precedent. *Id.* at 2-7.

court of appeals' resolution of that fact-bound issue does not warrant this Court's review.

If the Court wishes to review the question presented, it should do so in a case where the petitioner actually briefed and argued the question and the court of appeals thoroughly analyzed it. Indeed, further review is especially inappropriate here, where the position petitioners now advance is directly contrary to the position they took in the court of appeals. Petitioners should not be permitted to take one position in the court of appeals and then another before this Court.

b. Second, resolution of the question presented would make no difference to the outcome of this case. As explained above, if federal choice-of-law rules apply, then the Ohio statute of limitations applies to PNC Bank's claim. There are two routes to that outcome under federal law: use Section 187 of the Restatement (like Judge Tashima did), and enforce the parties' agreement that Ohio law would apply to their dispute, Pet. App. 11a-12a (Tashima, J., concurring), or use Section 142 of the Restatement, and apply Ohio law because using the forum's statute of limitations would lead to an "unreasonable" result, *id.* at 6a-8a.

Significantly, the court of appeals noted that the result would be the same under California choice-of-law rules. The court observed that "California has adopted § 187 of the Second Restatement, which broadly enforces '[t]he law of the state chosen by the parties to govern their contractual rights and duties.'" Pet. App. 13a n.2 (quoting Restatement). And the court explained that "California has no interest in barring PNC's claim," because California law "allow[s] the parties to select their own limitations pe-

riod," demonstrating that it "is not concerned as much with preventing the prosecution of stale claims as it is with vindicating the interest of contracting parties in seeing their agreements enforced." *Ibid.* The bankruptcy court similarly concluded that, under California choice-of-law rules, Ohio's statute of limitations should govern PNC Bank's claim. *Id.* at 31a-33a.

Thus, in this case, California choice-of-law rules and federal choice of-law rules are similar (both rely on the Second Restatement, include the Restatement's strong preference for enforcing choice-of-law clauses), and both lead to the same result. Although petitioners now contend (Pet. 15-18) that California courts would apply California's statute of limitations to this claim, they did not make those arguments in the court of appeals. See Pet. C.A. Br. 6-15. Petitioners now say (Pet. 17) that using California law would advance California's policy of not hearing stale claims, but as the court of appeals explained, California has determined that that policy yields to its countervailing policy in enforcing choice-of-law clauses. Pet. App. 13a n.2.

It is noteworthy that every judge who has considered the issue has believed that it makes sense to apply the Ohio statute of limitations to PNC Bank's claim. The bankruptcy court applied Ohio law (relying on the choice-of-law clause), Pet. App. 31a-32a, as did the court of appeals majority (using a reasonableness analysis), *id.* at 6a-8a, and Judge Tashima (using the choice-of-law clause), *id.* at 11a-12a (Tashima, J., concurring). The bankruptcy appellate panel apparently wanted to apply Ohio law but believed it was precluded from doing so by binding circuit precedent. *Id.* at 24a-28a. The consensus view that Ohio law should apply is obviously correct, be-

cause after all, the parties expressly agreed that Ohio law would govern their contract, and they made clear that they intended for Ohio law to apply "without regard to conflict of law principles." *Id.* at 3a (quoting contract). Accordingly, regardless of whether federal or state choice-of-law rules apply, the result is the same—Ohio's statute of limitations applies and PNC Bank's claim is timely. Further review is therefore unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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