No. 20-1483

In The
Supreme Court of the United States

PHILIP PILEVSKY, et al.,

Petitioners,

v.

SUTTON 58 ASSOCIATES, LLC,

Respondent.

On Petition For Writ Of Certiorari To The New York Court Of Appeals

BRIEF OF AMICI CURIAE THE HONORABLE MELANIE L. CYGANOWSKI (RET.), THE HONORABLE JUDITH FITZGERALD (RET.), THE HONORABLE ROBERT E. GERBER (RET.), THE HONORABLE ALLAN GROPPER (RET.), THE HONORABLE BRUCE MARKELL (RET.), AND A GROUP OF LAW PROFESSORS IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE[1]

Your amici are retired bankruptcy judges with continuing interest in the needs and concerns of the federal bankruptcy system, and a group of bankruptcy law professors who are actively involved in teaching bankruptcy law, conducting research, and participating at national and regional seminars and conferences on bankruptcy law. Your amici are the following:

The Honorable Melanie L. Cyganowski (ret.), formerly on the Bankruptcy Court for the Eastern District of New York from 1993 to 2007 (and its Chief Judge from 2005 to 2007), currently in private practice and an Adjunct Professor in the Practice of Law at St. John's University School of Law.

The Honorable Judith K. Fitzgerald (ret.), formerly on the Bankruptcy Court for the Western District of Pennsylvania from 1987 to 2013 (and its Chief Judge from 2000 to 2005), currently in private practice and a Professor in the Practice of Law at the University of Pittsburgh School of Law.

The Honorable Robert E. Gerber (ret.), formerly on the Bankruptcy Court for the Southern District of New York from 2000 to 2016, currently in private practice

[1] Pursuant to this Court's Rule 37.2(a), the Petitioners and Respondent have consented to the filing of this amicus brief and counsel of record for all parties have received notice of the intention to file an amicus curiae brief earlier than 10 days before the due date. Pursuant to Rule 37.6, amici affirm that no counsel for a party authored this brief in whole or in part, and that no person other than amici or their counsel contributed any money to fund its preparation or submission.

and an Adjunct Professor of Law at Columbia Law School.

The Honorable Allan L. Gropper (ret.), formerly on the Bankruptcy Court for the Southern District of New York from 2000 to 2015, currently an Adjunct Professor of Law at Fordham University School of Law.

The Honorable Bruce A. Markell (ret.), formerly on the Bankruptcy Appellate Panel for the Ninth Circuit from 2007 to 2013, and currently Professor of Bankruptcy Law and Practice at the Northwestern Pritzker School of Law and the Edward Avery Harriman Lecturer in Law at Northwestern.

Professor Erwin Chemerinsky, Dean of Berkeley Law and Jesse H. Chopper Distinguished Professor of Law.

Professor Bruce Grohsgal, Helen S. Balick Professor in Business Bankruptcy Law at the Widener University Delaware Law School.

Professor George Kuney, Lindsay Young Distinguished Professor of Law at the University of Tennessee College of Law.

Professor Nancy Rapoport, Garman Turner Gordon Professor of Law at William S. Boyd School of Law, University of Nevada, Las Vegas.

Professor Gary Sullivan, Professor of Law in Residence at the University of Alabama School of Law.

Professor Jack Williams, Professor of Law at the Georgia State University College of Law.

* * *

We write to address a fundamental issue of substantial importance to the bankruptcy system—whether principles of federal preemption preclude state courts from imposing tort liability on individuals or entities assisting others in invoking a federal right—the right to file a case under the Bankruptcy Code. State courts should not be permitted to impose tort liability based on the premise that the filing of a bankruptcy case was for an improper purpose or caused a delay in the exercise of state law contract rights.

The Bankruptcy Code has explicit mechanisms for dealing with inappropriate filings. The Bankruptcy Code covers the field and provides exclusive statutory remedies for improper bankruptcy filings. Thus, both conflict preemption and field preemption govern the outcome here. The propriety of a bankruptcy filing is squarely and solely for the federal courts—the bankruptcy courts, most obviously, the district courts, and courts of appeals—and not the state courts, to resolve.

Our concern is that the Respondent was allowed to transmute a federal bankruptcy challenge to the propriety of a bankruptcy filing into a tort claim to be resolved by a state court. As the dissent in the court below correctly noted, the tort suit was "a workaround of the bankruptcy system." App. 25a. The federal courts, with the responsibility to run that system,

already have the power, and responsibility, to consider allegations of improper bankruptcy filings, and already have adequate and swift means to grant remedies when warranted. Litigants should not be allowed to employ state tort law to judge the legitimacy of a bankruptcy case, and state courts should not be allowed to entertain state law tort claims against those who assist in the filing of a bankruptcy.

The upshot of the decision is of grave concern to amici, and all others who care, as we do, about the needs and concerns of the bankruptcy system. If upheld, the decision would permit state courts to decide whether bankruptcy filings are improper, or in bad faith, simply by permitting tort claims against third parties who "induce" wrongful filings—thus bypassing the bankruptcy courts' exclusive statutory authority under Bankruptcy Code §§ 1112(b) and 362(d) (and comparable provisions in chapters 7, 9, 11 and 13) to determine the legitimacy of any bankruptcy filing, and to provide relief when required.

The decision below would also permit tort claims against a seemingly unlimited array of professionals who assist a pre-bankruptcy debtor—including, most obviously, lawyers and accountants. It also would permit tort liability to be imposed upon potential lenders, asset buyers, and even trade creditors—any of whom, by advancing services or goods on credit, could be sued

for inducing a breach of a loan covenant not to incur debt by borrowers.[2]

Relatedly, the contract clauses that were allegedly "breached" made filing for bankruptcy an event of default. Yet, practically every commercial loan agreement makes the filing of a bankruptcy case an event of default,[3] and hence a breach of the underlying contract.[4] Recognizing a tort for assisting or inducing a "breach" premised on a bankruptcy filing would chill the exercise of the federally protected right to seek access to the bankruptcy courts.

Without a vigorous enforcement of the principles of preemption, there could hardly be a fully functioning bankruptcy system. The intrusions by state law tort claims would be without limit, and the uniformity of bankruptcy law mandated by the U.S. Constitution would soon give way to chaos and disarray, with bankruptcy law now fluctuating by geography and district, and not by Congressional fiat.

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[2] The decision could also adversely affect legal services organizations which provide assistance to debtors in chapter 7 and 13.

[3] *See, e.g.*, *In re AMR Corporation*, 485 B.R. 279, 292 (Bankr. S.D.N.Y. 2013) noting that similar acceleration clauses based on the filing for bankruptcy are "quite common."

[4] Except in cases, like this one, where there is an effort to thwart the application of the Bankruptcy Code, lenders often include "event of default" provisions not to impose state court tort liability, but rather to accelerate the underlying debt, and to enable the federal bankruptcy system to treat creditor claims, even those not yet matured in accordance with the Bankruptcy Code's normal processes.

It is for that reason that we, as individuals acutely interested in the needs and concerns of the bankruptcy system, urge the Court to take this case, and to rule that state courts are not empowered to enforce state-law tort claims that are premised upon an allegedly wrongful filing for bankruptcy.

SUMMARY OF ARGUMENT

The New York Court of Appeals erred in its determination that the assertion of a claim for tortious interference with contract was not preempted by federal bankruptcy law. The claims are barred by well-recognized principles of implied preemption.

First, the decision below, unless reversed, will cause substantial injury to the orderly and uniform practice among the bankruptcy courts, will encroach upon the jurisdiction of the bankruptcy courts, and will lead to disparate and inconsistent rulings on matters of federal law by the fifty states.

Second, conflict preemption applies when "permitting such claims to proceed in state court will undermine the accomplishment and execution of the full purposes and objectives of the Bankruptcy Code." App. 13a. The court below incorrectly held that conflict preemption did not apply only because it ruled that the tortious conduct (inducing the breach) occurred prior to the bankruptcy filing, and therefore was "peripheral" to the bankruptcy case. This ruling was incorrect.

The test for conflict preemption does not turn on whether the tortious conduct occurred prior to or during the bankruptcy case. The settled law on when the Bankruptcy Code preempts state tort claims is one of broad preemption. As the court below recognized, "it is fair to say that the majority of the courts have held that such tort claims—those *premised upon a bankruptcy filing*, or other alleged wrongful conduct within a bankruptcy proceeding are preempted." App. 14a (emphasis added).

There can be no fair doubt that the tort claims in this case were "premised upon a bankruptcy filing." The Respondent's tort claims were based entirely on the premise that the alleged breaches facilitated the ability of its borrowers to file for, or effectively utilize, bankruptcy and that the bankruptcy case delayed it in the exercise of its state law remedies.[5]

Third, the state law tort claim was preempted under principles of field preemption. The Respondent asserted that the Petitioners' conduct interfered with their state law remedies by assisting the debtor in filing for bankruptcy and that the Respondent was delayed in the exercise of its state law remedies. Congress, however, has already provided appropriate statutory remedies for allegedly improper bankruptcy filings, as well as for delay caused by the bankruptcy case, including expedited motions to dismiss the

[5] The two borrowers of the Respondent were referred to in Respondent's complaint as the "Mortgage Borrower" and the "Mezz Borrower."

bankruptcy case, and expedited motions for relief from the automatic stay. *See* §§ 1112(b) and 362(d).[6] Indeed, this Court has previously ruled that a secured creditor cannot properly contend it will be subject to "inordinate and extortionate delay" as a result of the automatic stay; this is because the burden is on the debtor to show it has a realistic possibility of a successful reorganization within a *reasonable time*. *United Savings Association of Texas v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 375-76 (1988) (emphasis added).

The tort claims in this case essentially require a state court to find that the delay caused by a bankruptcy case was wrongful. The question of wrongful delay, however, is solely for the federal courts. The state courts cannot be permitted to determine the propriety of a bankruptcy filing.

Fourth, access to the bankruptcy system is one of the foundational aspects of modern bankruptcy law. A critical federal bankruptcy policy is to "assure access to the right of a person, including a business entity, to seek federal bankruptcy relief, as authorized by the Constitution and enacted by Congress." In *In re Intervention Energy, LLC*, 553 B.R. 258, 265 (Bankr. D. Del.

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[6] Had Respondent been able to demonstrate the delay caused by the automatic stay was resulting in a decline in the value of its collateral, it would have been entitled to either "adequate protection" in the form of cash or other collateral (*see* § 361(1)-(3), or relief from the stay due to the lack of adequate protection (*see* § 362(d)(1)). That it chose to voluntarily forgo such relief does not then justify claiming tort damages for that very same delay.

2016). The threat of tort liability for the filing of bankruptcy would impermissibly restrict such access.

ARGUMENT

I. The petition for certiorari should be granted because the decision below will endanger federally protected rights, interfere with Congressional power to establish uniform laws on the subject of bankruptcy, and block legitimate access to the federal courts.

The filing of the bankruptcy petition, and challenges to whether such filing is valid and appropriate is a federal law question, within the exclusive jurisdiction of the federal courts. Congress has granted exclusive and original federal jurisdiction over the bankruptcy "case" to the district courts, which in turn, "refer" the case to the bankruptcy courts. *See* 28 U.S.C. §§ 157(a) and 1334(a). Challenges to the propriety of a "case" should properly fall within that exclusive grant of jurisdiction. It is this provision which assures federal review by the federal district courts and federal courts of appeal of the bankruptcy "case" itself. Challenges to the propriety of a bankruptcy case should be heard solely within the federal system, and not by state courts. *Gonzales v. Parks*, 830 F.2d 1033, 1035 (9th Cir. 1987) summarized this critical concept:

> Filings of bankruptcy petitions are a matter of exclusive federal jurisdiction. State courts

> are not authorized to determine whether a person's claim for relief under federal law, in a federal court, and within that court's exclusive jurisdiction, is an appropriate one. Such an exercise of authority would be inconsistent with and subvert the exclusive jurisdiction of the federal courts by allowing state courts to create their own standards as to when persons may properly seek relief in cases Congress has specifically precluded those courts from adjudicating.[7]

In exercising that exclusive and original jurisdiction, the federal courts have developed substantive standards which test the propriety of a bankruptcy case at the outset of a case (upon filing) and during the case, up to and including confirmation. For example, the federal courts have developed highly nuanced and complex factors for determining whether there is a basis for a threshold dismissal of a case or the granting of relief from the automatic stay. "Upon consideration, we agree with those courts that require that both objective futility and subjective bad faith be shown in order to warrant dismissals for want of good faith in filing." *Carolin Corp. v. Miller*, 886 F.2d 693, 700-01 (4th Cir. 1989).

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[7] As the court in *Gonzales* noted, section 1334(a) distinguishes between "cases" which are under the exclusive jurisdiction of the federal courts and "civil proceedings" with are within the original but not exclusive jurisdiction. "Among the matters clearly in the first category is the filing of the bankruptcy petition." *Id.* at 1035, n.6.

Congress has provided for numerous safeguards against delay, providing a secured lender an "off-ramp" during the case when the standards are satisfied. For example, the federal standard for whether a bankruptcy case may be allowed to continue through confirmation involves the assessment of sixteen separate factors. *See* §§ 1129(b)(1)-(16), which assessment varies over time as the case matures. *See, e.g.*, *United Savings Association of Texas v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365 (1968) (determining whether a plan is "in prospect" during the course of the case). A state court cannot properly make any of these determinations.

Unless reversed, the decision will permit a parallel body of state law on one of the most critical bankruptcy issues—namely the power of the bankruptcy court to make the ultimate determination of whether a case is wrongfully filed. The well-developed federal jurisprudence on the propriety of a bankruptcy filing would now encounter countless conflicts with varying decisions from the state courts. The federal standards must and should remain the sole arbiter of whether a bankruptcy filing comports with the statutory goals of bankruptcy.

In addition, the decision below is contrary to settled law. The court below declared that this was a case of first impression, but we think not. As that court recognized, the general rule is that state law tort claims which are premised upon a bankruptcy filing are almost universally held to be preempted. The *only* distinction here was that the tortious conduct was held to

occur before the case occurred. This dividing line is arbitrary and contrary to a large body of case law. It will now lead to uneven and disparate rulings on when preemption applies and when it does not.

The chilling effect cannot be overstated. Third parties who deal with a distressed debtor will have no clear indication about whether they may be sued if they encourage or assist a distressed company to file for bankruptcy. The risk will be untenable and will most certainly discourage third parties from providing professional services and financial assistance to troubled companies that strive either to remain out of bankruptcy or to engage in the normal negotiations and planning, which precede most business bankruptcy cases.

Lastly, the need for review is timely and urgent. The number of commercial cases is increasing generally. Specifically, there is a national crisis in commercial real estate due to COVID-19.[8] This crisis in turn impairs municipal and state tax revenues. These distressed entities are in dire need of restructuring and the preservation of ongoing value, which is a core attribute of the bankruptcy process. Limiting access to the courts is directly counter to the goals of Congress to permit the rehabilitation of troubled companies.

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[8] Peter Eavis and Matthew Haag, "Office Buildings May Stay Empty, Straining Cities . . . Towers' Values Plummet 25% in Manhattan as Tax Revenue Sinks." N.Y. TIMES, April 9, 2021, p. 1.

II. The petition for certiorari should be granted. The tortious interference claims are preempted by the Bankruptcy Code under both conflict and field preemption.

A. State law tort claims based on the impropriety or misuse of a bankruptcy filing are barred by conflict preemption.

The New York Court of Appeals rested its decision on the issue of implied preemption, stating the core issue as follows: "[W]hether plaintiff's tortious interference claims are impliedly preempted in accordance with principles of conflict preemption insofar as . . . permitting such claims to proceed in state court will undermine the accomplishment and execution of the full purposes and objectives of the Bankruptcy Code." App. 13a.

The court below acknowledged that preemption of tort claims is the general rule: "[I]t is fair to say that the majority of the courts have held that such tort claims—those premised upon a bankruptcy filing, or other alleged wrongful conduct within a bankruptcy proceeding are preempted." App. 14a.

Nevertheless, the court below found that permitting the tort claim would not undermine the purposes of the Bankruptcy Code *only* because it viewed the tort claim as "peripheral" to the bankruptcy case. App. 15a. By this it meant only tort claims which involve conduct occurring *after* the bankruptcy filing are preempted. App. 15a. Thus, the court below only focused on the

degree to which the tort claims "interfere[d] with the administration of the debtor's estate." App. 16a.

This court's interpretation of federal preemption was overly narrow and inconsistent with settled law. "Congress did not intend for the Bankruptcy Code to preempt all state law, but the areas where preemption does not apply are extremely limited. . . ." *Astor Holdings, Inc. v. Roski*, 325 F. Supp. 2d 251, 262 (S.D.N.Y. 2003).

The test for preemption is not when the allegedly tortious conduct occurred, but whether the claim is for "any misuse" of the bankruptcy system. *Astor Holdings*, 325 F. Supp. 2d at 262 ("any misuse of the bankruptcy process is governed exclusively by the Bankruptcy Code and thus claims . . . requiring a finding that [a bankruptcy was filed] in bad faith or for an improper purpose, as measured by the standards of New York law, are therefore barred"); *see also National Hockey League v. Moyes*, No. cv-10-01036-PHX-GMS, 2015 WL 7008213, at *6 (D. Ariz. Nov. 12, 2015) (finding preemption when claim is based on *pre-filing conduct* and rejecting argument that preemption only applies to conduct *during* the bankruptcy).[9]

A tort claim, that one wrongfully induced a bankruptcy filing, as argued in this case, has been held to be preempted by the Code. For example, in *Choy v. Redland Ins. Co*., 103 Cal. App. 4th 789 (2002) a state

[9] "When damages arise only after and because of the bankruptcy filing, a claim based on pre-filing conduct is preempted." *Nat'l Hockey League*, 2015 WL 7008213, at *6.

intermediate appellate court considered allegations, like those here that a defendant induced a third party to file for bankruptcy, harming the plaintiff. The *Choy* court determined that such a tort claim for an alleged bad faith filing was preempted. "It is very unlikely that Congress intended to permit the superimposition of state remedies on the many activities that might be undertaken in the management of the bankruptcy process [including Debtors' petitions.]" *Id*. at 797 (citing *MSR Exploration, Ltd. v. Meridian Oil, Inc.*, 74 F.3d 910, 914 (9th Cir. 1996)).

Likewise, state law tort claims based on a contention that a bankruptcy was filed "solely to delay a creditor's foreclosure sale" were found to be preempted by the Code. *Gonzales v. Parks*, 830 F.2d 1033, 1035 (9th Cir. 1987). In *Gonzales*, the claim for abuse of process was "allegations that the Gonzales filed for bankruptcy solely to delay the creditor foreclosure sale. . . ." *Id*. at 1034. Such a tort claim was held to be preempted.

More broadly, case law holds that tort claims for improper filings in the bankruptcy court, including

claims for malicious prosecution,[10] abuse of process,[11] wrongfully inducing the filing of a bankruptcy case,[12] having an improper purpose in the filing of bankruptcy,[13] or aiding and abetting the wrongful filing of a bankruptcy, are preempted.[14]

The tort claims in this case were directly premised on an alleged impropriety of the bankruptcy filing. For example, Respondent's state law complaint alleged that the transfer of assets to the Mortgage Borrower facilitated the filing of its bankruptcy case, as it was designed to overcome "a formidable obstacle in using bankruptcy" (App. 85a) and that the loan to the Mezz Borrower was wrongful because it "could [then] file for

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[10] *See MSR Expl., Ltd. v. Meridian Oil, Inc.*, 74 F.3d 910, 916 (9th Cir. 1996) (claim for malicious prosecution for filing of a claim in a bankruptcy case held preempted); *Idell v. Goodman*, 224 Cal. App. 3d 262, 271 (1990) (claim by debtor against creditor for malicious prosecution in seeking to bar discharge preempted); *Koffman v. Osteoimplant Technology, Inc*., 182 B.R. 115, 125 (D. Md. 1995) (alleged wrongful filing of an involuntary petition held preempted). *See also* New Hampshire Supreme Court decision in *Mason v. Smith*, 672 A.2d 705, 708 (1996) (state tort claim for abuse of process and malicious prosecution for wrongful filing of involuntary preempted).

[11] *See Gonzales*, 830 F.2d at 1035; *Choy*, 103 Cal. App. 4th at 801.

[12] *Nat'l Hockey League*, 2015 WL 7008213, at *4 (aiding and abetting a breach of fiduciary duty by directing an entity to file bankruptcy); *Raymark Indus. v. Baron*, Civil No. 96-7625, 1997 WL 359333, at *9, n.13 (E.D. Pa. June 23, 1997) (abuse of process, and civil conspiracy in filing of involuntary against counsel and claimant).

[13] *Nat'l Hockey League*, 2015 WL 7008213, at *4.

[14] *Nat'l Hockey League*, 2015 WL 7008213, at *4-5.

reorganization under Chapter 11 of the Bankruptcy Code." App. 86a.

Nor under these generally accepted principles does it matter if the claim is against "non-bankruptcy parties for their act in inducing and causing the bankruptcy."[15] As pointed out in *Choy*, the fact that the particular defendant in the state lawsuit was not the debtor "is a distinction without a difference."[16] The court held that it makes no difference whether the tort claim is "by or against a debtor"; any state law challenge to the propriety of an authorized proceeding in bankruptcy is preempted by the Code.[17] *See also National Hockey League*, 2015 WL 7008213, at *5 (stating preemption applies even where the state law claim is brought against a non-bankruptcy party).

These allegations all could and should have been resolved by the bankruptcy court. Indeed, Respondent apparently recognized that its claims should have been addressed to the bankruptcy court, and thus it first filed a motion to dismiss the bankruptcy case, raising many of the same issues as its tort claim. App. 52a. Its decision to withdraw this motion was correctly seen as an improper "workaround" by the dissent. App. 25a. "Plaintiff chose to forgo the array of federal remedies available to a creditor, like plaintiff, for such alleged misuse of the bankruptcy system. To put it bluntly,

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[15] *Choy*, 103 Cal. App. 4th at 801.

[16] *Id.*

[17] *Choy*, 103 Cal. App. 4th at 800.

federal law preempts plaintiff's workaround of the bankruptcy system." App. 24a-25a.

Permitting tort claims based on the impropriety of the case would almost certainly open the floodgates to endless state law litigation over whether the debtors properly sought bankruptcy protection. Yet, such an issue can only be resolved by the federal bankruptcy courts (and district courts and courts of appeal reviewing them) which have developed an extensive body of jurisprudence on the validity of a bankruptcy filing.[18]

B. State law tort claims based on the impropriety or misuse of a bankruptcy filing are barred by field preemption.

The New York Court of Appeals rested its decision on conflict preemption.[19] However, the preemptive outcome over tort claims is also proper under the

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[18] The analysis used by bankruptcy courts to determine if a case was filed in bad faith, often involves carefully calibrated considerations of "objective and subjective futility" of the filing. *See, e.g.*, *In re Kingston Square*, 214 B.R. 713, 734 (Bankr. S.D.N.Y. 1997). In the present case, the Respondent ultimately participated fully in the confirmation of a bankruptcy plan presumably because it benefited from an expedited transfer of its collateral to itself. App. 3a.

[19] "While defendants argue that field preemption precludes assertion of plaintiff's tort claims in state court due to comprehensive federal regulation of bankruptcy proceedings, in our view, this contention does not merit extended discussion." App. 11a.

principles of "field preemption." Here, the test ultimately depends upon the intent of Congress.[20]

Field preemption "occurs when federal law occupies a 'field' of regulation 'so comprehensively that it has left no room for supplementary state legislation.'" App. 8a (citation omitted). More specifically, field preemption may also apply to tort claims. *See generally National Hockey League*, 2015 WL 7008213, at *5 ("Where state law tort claims call into question whether a bankruptcy was filed for an improper purpose or in bad faith, these claims are preempted by federal bankruptcy law, 'a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject'").

Other courts have found that state law tort claims are barred by field preemption because Congress has intended to occupy the field of sanctions and penalties for any abuse in the context of a bankruptcy case. "Congress provided 'a comprehensive federal system of penalties and protections to govern the orderly conduct of debtors' affairs and creditors' rights.'" *Metcalf v. Fitzgerald*, 214 A.3d 361, 367 (Conn. 2019), *cert. denied*, 140 S. Ct. 854 (2020). "We agree with the holdings of the majority of courts . . . that the Bankruptcy Code occupies the field of penalties and sanctions for abuse of the bankruptcy process." *Id*. at 372.

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[20] *MSR Expl.*, 74 F.3d at 914 (explaining that rights and interests involved in bankruptcy processes are "uniquely and exclusively federal").

The same logic that finds field preemption applicable where Congress has provided penalties and sanctions, applies with equal force where Congress provided explicit remedies. Congress provided comprehensive and meaningful remedies for wrongful filings and plainly intended for the issue of improper filings to be adjudicated *only* by the bankruptcy courts, and courts with appellate authority over bankruptcy courts. It provided at least two express statutory provisions: § 1112(b)—with similar provisions in chapters 7, 9, 12 and 13[21]—that provide a bankruptcy court may, on motion, dismiss a case "for cause." The courts have found that "cause" includes a bad faith filing, such as a filing used to gain a tactical advantage with respect to pending litigation. *In re SGL Carbon Corp.*, 200 F.3d 154 (3d Cir. 1999). The courts have dismissed cases where the motive or conduct was similar to what occurred in this case, including structural changes in asset ownership.[22]

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[21] *See* §§ 707(a), 930(a), 1208(c), and 1307(c) ("Each of these code sections provides that a party in interest may move to dismiss a case filed under its particular chapter "for cause," including factors enumerated in that section"). *In re Murray*, 543 B.R. 484, 489 & n.26 (2016), *aff'd*, 565 B.R. 527 (S.D.N.Y. 2017), *aff'd*, 900 F.3d 53 (2d Cir. 2018).

[22] *In re N.R. Guaranteed Ret.*, 112 B.R. 263, 278-79 (Bankr. N.D. Ill. 1990) (dismissing bankruptcy case when used to delay creditors and for transferring assets prior to the bankruptcy). *See also In re Southern Communities, Inc.*, 57 B.R. 215, 218 (Bankr. M.D. Fla 1986) (dismissing bankruptcy case where debtor met indicia of "new debtor syndrome" by reshuffling assets "on the eve of filing. . . .").

Likewise, § 362(d)(1) permits a court to grant relief from the stay "for cause," which may include virtually any grounds, including bad faith.[23] Section 362(d)(1) states, "On request of a party in interest . . . the court shall grant relief from the stay . . . for cause. . . ." The use of the word "including" means the list in § 362 is illustrative and not exhaustive. *See* § 102 on "rules of construction."

Field preemption also rests on the constitutional need for uniformity of decisions governing bankruptcy law. "Permitting state law claims for abuse of the bankruptcy process threatens the uniformity of the bankruptcy system."[24] As in *International Shoe Co. v. Pinkus*, 278 U.S. 261, 265 (1928), "[t]he national purpose to establish uniformity excludes state regulation." Furthermore, "[t]he unique, historical, and even constitutional need for uniformity in the administration of the bankruptcy laws is another indication that Congress wished to leave the regulation of the parties before the bankruptcy court in the hands of the federal courts alone."[25]

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[23] *See In re Gunnison Ctr. Apts., LP*, 320 B.R. 391 (Bankr. D. Colo. 2005) (providing relief from automatic stay under 362(d)(1) due to evidence of bad faith filing by the debtor). *See also First Am. Bank v. Coastal Nursing Ctr.*, 164 B.R. 788 (Bankr. S.D. Ga. 1993) (lifting stay under 362(d)(1) because of behavior indicative of bad faith).

[24] *Metcalf*, 214 A.3d at 375.

[25] *See MSR Expl.*, 74 F.3d at 915.

C. Certiorari should be granted because the decision below will unduly restrict access to the bankruptcy courts.

In *In re Intervention Energy, LLC*, 553 B.R. 258 (Bankr. D. Del. 2016) the court stated that a critical federal public policy which must be guarded, is to "assure access to the right of a person, including a business entity, to seek federal bankruptcy relief, as authorized by the Constitution and enacted by Congress." *Id*. at 265.[26] "It is beyond cavil that a state cannot deny" a corporation's right to seek bankruptcy relief. *Id*. at 265.

The Delaware Bankruptcy Court recently ruled that there is a constitutional right to access the bankruptcy courts, and that accordingly, a private charter provision granting a shareholder the right to bar such a filing is unenforceable.

> [A]ll persons and corporations have a constitutional right to file a bankruptcy [and] to negotiate with their creditors and other stakeholders. [A]ny restriction of that constitutional right is against federal public policy.[27]

As the *Pace Industries* court noted, "[I]t is clear that a lack of access to the Bankruptcy Code and the

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[26] *See also* Adrian Nasr, *Special-Purpose Lending Structures: What Developments Have Been Made Since the Landmark Bankruptcy Case in In re General Growth Properties, Inc.*, 25 AM. BANKR. INST. L. REV. 177 (2017).

[27] Tr. of Record, *In re Pace Indus. LLC, et al.*, Case No. 20-10927 (MFW) (Bankr. D. Del. May 5, 2020), ECF No. 148, at 39.

Bankruptcy Courts would violate public policy . . . to allow a debtor to file [for] bankruptcy."[28] As one commentator has observed, although not addressed explicitly, the court's decision suggests that even where the form of arrangement appears permissible, parties cannot form contracts that would substantively impinge upon fundamental protections provided by federal bankruptcy law."[29]

The determination that the alleged breach of the loan agreements was "peripheral" to the bankruptcy was incorrect. The loan agreements were asserted as a basis for claiming that the ability to obtain access to the bankruptcy courts was wrongful, and the basis for a state law tort claim. The viability and utility of the bankruptcy filing is a federal question, not a state law question, and not proper grounds for a tort claim under state law. Such issues cannot be properly addressed by a state court, lest the need for a uniform system of bankruptcy be hopelessly impaired.

[28] *Id*. at 39.

[29] Kathryn A. Coleman, et al., *Blocking Use of "Blocking Rights*," AM. BANKR. INST. J., July 2020, at 30, 45.

CONCLUSION

For the foregoing reasons, we respectfully ask that this Court grant the petition for the writ of certiorari.

Dated: April 2021

Respectfully submitted,

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