No. 20-1483

In the

Supreme Court of the United States

PHILIP PILEVSKY, MICHAEL PILEVSKY, SETH PILEVSKY, PRIME ALLIANCE GROUP, LTD., AND SUTTON OPPORTUNITY LLC,

Petitioners,

v.

SUTTON 58 ASSOCIATES LLC,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of New York

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

RONALD S. GREENBERG
NATAN M. HAMERMAN
DANIEL LENNARD
KRAMER LEVIN NAFTALIS & FRANKEL LLP
1177 Avenue of the Americas
New York, NY 10036
rgreenberg@kramerlevin.com
(212) 715-9100

MICHAEL H. MCGINLEY
Counsel of Record
JUSTIN M. ROMEO
DECHERT LLP
1900 K Street, NW
Washington, DC 20006
michael.mcginley@dechert.com
(202) 261-3300

MICHAEL P. CORCORAN
DECHERT LLP
2929 Arch Street
Philadelphia, PA 19104

Counsel for Respondent Sutton 58 Associates LLC

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QUESTION PRESENTED

Whether the New York Court of Appeals erred in holding that the state-law tort claims at issue in this case are not preempted by the Bankruptcy Code because they are not premised on an alleged misuse of bankruptcy proceedings.

PARTIES TO THE PROCEEDING

Petitioners Philip Pilevsky, Michael Pilevsky, Seth Pilevsky, Prime Alliance Group, Ltd., and Sutton Opportunity LLC were defendants in the trial court, appellants in the intermediate appellate court, and respondents below.

Respondent Sutton 58 Associates LLC was plaintiff in the trial court, respondent in the intermediate appellate court, and appellant below.

CORPORATE DISCLOSURE STATEMENT

Respondent Sutton 58 Associates LLC states that it has no parent corporation and that no publicly held company owns 10% or more of its stock. Sutton 58 Investor LLC and Gamma Lending S58 II LP are the sole members of Respondent.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND RULES

INTRODUCTION

The New York Court of Appeals' fact-bound decision did not split from any authority, and this Court lacks jurisdiction to review that interlocutory decision. When shorn of Petitioners' rhetoric, it is clear that both the decision below and the others cited by Petitioners can neatly be resolved around the same basic principles. Different cases presenting different facts lead to different results. But that is always true and hardly a reason for this Court to grant review. And by admitting that one of their supposed "splits" is not implicated by this case, Petitioners oddly invite the Court to grant review in this case to issue an advisory opinion. Worse yet, this Court lacks jurisdiction to review the lower court's interlocutory decision—which makes this an especially poor vehicle to decide the already split-less issues that Petitioners ask the Court to address.

The decision below expressly turned on the specific claims in this case. After carefully analyzing Respondent's claims, the New York Court of Appeals held that those specific claims are not preempted by the Bankruptcy Code because they do not attack the bankruptcy process, and because the Bankruptcy Code neither covers the claims nor provides redress for them. In doing so, the New York Court of Appeals carefully distinguished many of the cases that Petitioners cite to support their illusory split. In fact, the lower court noted that its holding might be different if it were faced with the facts and claims of those cases. Far from splitting with other courts, the New York Court of Appeals thus underscored the remarkable agreement among the courts on the basic principles that resolve these cases: If a claim collaterally attacks conduct that occurred *as part of*

the bankruptcy process, it is more likely to be preempted. But if the claim concerns conduct *outside* the bankruptcy process, and *does not* collaterally attack the bankruptcy process, it is not preempted.

Here, Respondent's claims concern conduct outside the bankruptcy process. As the lower court held, Respondent alleges that Petitioners aided third parties in breaching their contracts by transferring assets and debt to them *before* those third parties filed for bankruptcy. The challenged conduct thus occurred outside of the bankruptcies and was wrongful even if the third parties had not filed for bankruptcy. The Bankruptcy Code does not address such pre-filing tortious interference with contracts. Nor does it provide remedies for such pre-filing torts, let alone preempt state-law claims that target such conduct. Given those unique claims, the lower court's decision was both fact-bound and correct.

Glossing over those case-specific distinctions, Petitioners repeatedly miscast Respondent's claims as involving a collateral attack on the bankruptcy process. Indeed, the very first sentence of the Petition inaccurately frames the issue as "whether the Bankruptcy Code preempts state-law tort claims that require deciding whether there has been an abuse of the bankruptcy process." Pet. at 1. But that framing ignores the substance of Respondent's claims, which the New York Court of Appeals held will *not* require any collateral examination of the bankruptcy proceedings at issue. Nor did the New York Court of Appeals remotely hold, as Petitioners claim, that the Bankruptcy Code *never* preempts state tort claims that relate to bankruptcy. Instead, the lower court closely examined the claims at issue here and held that those specific claims were not preempted.

Moreover, Petitioners effectively concede that there is no real split in authority by grasping at an alleged "closely related" split between cases that all deal with a completely different factual scenario and class of claims than the present dispute. This Court's review of this case plainly would not affect a split that Petitioners admit is not raised by the facts here. Thus, Petitioners' resort to that "closely related split" is no more than an invitation for the Court to issue an advisory opinion about an issue that Petitioners concede is not raised here. In truth, as the lower court's analysis demonstrates, the relevant cases can be reconciled by examining whether the claims at issue directly attack conduct within a bankruptcy proceeding or not.

Finally, contrary to Petitioners' strained effort to justify this interlocutory petition, this Court lacks jurisdiction to review the decision below. The New York Court of Appeals remanded the case for further proceedings, and thus did not issue a final decision under 28 U.S.C. § 1257. Nor does the decision below threaten to erode any federal policy, as required for the narrow exceptions to § 1257's requirements. Indeed, any decision by this Court may not prove outcome determinative to this lawsuit.

In short, it would be both imprudent and unnecessary for this Court to wade into this settled, claim-specific area of the law in this fact-bound case with jurisdictional defects. If this Court were to eventually take up the issue, it should grant review from an indisputably final decision that actually creates a split in authority. This is not that case. Accordingly, the Court should deny certiorari.

STATEMENT OF THE CASE

A. Respondent's Loans and the Borrowers' Default

In June 2015, Respondent Sutton 58 Associates LLC entered into two loan agreements with BH Sutton Mezz LLC (Mezz Borrower) and Sutton 58 Owner LLC (Mortgage Borrower) (together, the borrowers). App. 1a, 91a. The purpose of the agreements was to finance the development and construction of an apartment complex in Manhattan on a property owned by Mortgage Borrower. *Id.* Respondent agreed to loan $147,250,000 to the borrowers, and Mezz Borrower pledged its 100% interest in Mortgage Borrower as collateral for the loan. App. 1a-2a.

To protect Respondent's interest in that collateral, the borrowers both agreed to specific provisions that would help expedite any foreclosure or bankruptcy. In particular, the borrowers agreed (1) to not incur any additional debt beyond specifically allowed debt, and (2) to not own any unrelated assets or businesses. App. 4a-5a, 91a-93a. These provisions, common in real estate financing, defined the borrowers as "Special Purpose Bankruptcy Remote Entities," as is also common. *Id.* The purpose of those provisions was to ensure that, if the borrowers filed for bankruptcy, then the bankruptcy proceedings could be expedited and Respondent could acquire the collateral more quickly. App. 2a. Yet the provisions were not conditioned on whether the borrowers filed for bankruptcy, and remained independent obligations on the borrowers regardless of any bankruptcy filings.

When the time came to repay the over-$147 million loan, the borrowers defaulted. App. 2a-3a. Thus, Respondent initiated a UCC foreclosure sale of

Mezz Borrower's interest in Mortgage Borrower pursuant to the loan agreements. *Id.* The borrowers unsuccessfully moved for a preliminary injunction to block the sale. *Id.* At the time of the planned sale, the property was valued at approximately $180 million. App. 4a.

B. Petitioners' Tortious Interference

But the foreclosure sale did not go through as planned. Instead, Petitioners began to tortiously interfere with the loan agreements. The day before the foreclosure sale, Petitioner Prime Alliance Group, Ltd., loaned Mezz Borrower $50,000 in direct violation of the loan agreements. App. 91a-93a, 97a-99a. Although Mezz Borrower used that loan to pay for its bankruptcy counsel, the loan itself violated the borrowers' covenant to not take on additional debt—regardless of how it was used. *Id.*

Shortly thereafter, Petitioner Sutton Opportunity LLC transferred three small, one-bedroom apartments on Long Island to Mortgage Borrower. App. 100a. There was no apparent reason for that transfer; the apartments' net value was less than $250,000 and they brought in only $600 per month in rent. App. 104a. And regardless of any bankruptcy-related effects, that transfer directly violated Mortgage Borrower's promise not to own any additional assets beyond the multi-million-dollar Manhattan property. App. 91a-93a.

As Respondent argued below, Petitioners were aware of the borrowers' promises. App. 106a-108a. Petitioners knew that for the borrowers to accept a loan or apartments would violate those promises—yet Petitioners executed the loan and transferred the apartments intending to aid the borrowers in breaching their agreements. *Id.* Indeed, the timing

and circumstances of the loan and transfer could hardly be explained by anything else. The loan came the day before the foreclosure sale was to occur, and the apartments transferred were of insignificant value compared to the $147 million planned project. App. 98a-104a.

While the borrowers had breached their contracts simply by accepting the loan and apartments—which is the basis for the claims in this litigation—those apartments and loan had substantial consequences once the borrowers filed for bankruptcy. Although Respondent could not prevent the borrowers from filing for bankruptcy, the relevant contractual provisions were designed to ensure that, if the borrowers did file for bankruptcy, they would be "single asset real estate" entities. App. 2a, 94a. Such provisions are common for real-estate loans, and assure that the Bankruptcy Code's rules for such "single asset real estate" entities will apply, in accordance with the contractual agreements. *See* 11 U.S.C. § 101(51B). Among other things, the Bankruptcy Code provides for expedited filings for reorganization plans for such entities. App. 2a. And, when the debtor is a "single asset real estate" entity, the Bankruptcy Code offers the creditor potential relief from the automatic stay imposed on any foreclosure of the debtor's estate, allowing the creditor to more quickly foreclose on the property. *See* 11 U.S.C. § 362(d)(3).

However, when the borrowers filed for bankruptcy here, they used their prior contractual breaches to prolong the bankruptcy process. For example, Respondent first moved to dismiss Mezz Borrower's bankruptcy petition or, in the alternative, to lift the automatic stay on Respondent's UCC foreclosure sale.

App. 3a. As Respondent argued, the bankruptcy was really just a single-creditor, single-asset dispute. App. 98a. Yet Petitioners' conduct effectively thwarted that motion. Because of Petitioners' tortious interference and loan, Mezz Borrower was able to aver that it had multiple creditors and that the bankruptcy was not merely a two-party dispute. *Id.* Respondent thus withdrew its motion, after the bankruptcy court suggested it was premature, and did not re-file it. App. 3a.

Mortgage Borrower followed a similar tack. In its bankruptcy petition, Mortgage Borrower swore that it was not a "single asset real estate" debtor because it owned more than one asset. App. 100. But the only other assets Mortgage Borrower could point to were the Long Island apartments it had acquired from Petitioners—and which were transferred in flat violation of Mortgage Borrower's contractual promises. *Id.* Respondent thus did not file any motions regarding Mortgage Borrower's bankruptcy, which took significantly longer because of Petitioners' misconduct. App. 3a, 85a.

Because of those delays, Respondent was unable to obtain any of the expedited relief that would have been available if the borrowers had remained "single asset real estate" entities—as required under their contracts. *See* App. 3a-4a. Thus, the bankruptcies did not conclude until early 2017, more than nine months after the foreclosure was scheduled to occur. *Id.* By that time, the Manhattan property's value had fallen drastically to approximately $86 million—a loss of nearly $100 million in value. App. 4a.

C. Proceedings Below

In September 2016, Respondent commenced this lawsuit against Petitioners to redress their tortious

interference with the loan agreements. App. 4a, 83a. Contrary to Petitioners' self-serving gloss, Respondent's claims are *not* (and never have been) premised on the notion that the bankruptcies were wrongful. *See* App. 15a, 74a.[1] Instead, Respondent alleges that Petitioners tortiously interfered with the loan agreements by transferring money and apartments to the borrowers before the borrowers filed for bankruptcy. App. 4a-5a. And Respondent's damages resulted from the delay it faced in acquiring the Manhattan property and the substantial attorneys' fees it incurred in prolonged bankruptcies; although that delay was indirectly occasioned by the protracted bankruptcies that borrowers obtained as a result of Petitioners' tortious interference, that indirect link requires no examination of the bankruptcy proceedings' propriety. *See id.*

Petitioners soon moved for summary judgment dismissing the complaint, arguing that Respondent's claims were preempted. App. 5a. The New York Supreme Court denied that motion. App. 81a. As the court reasoned, Respondent's claims were based on "separate breaches" of contract, which did not "say anything about bankruptcy in any of those clauses." App. 74a. Even putting the bankruptcies aside, the court explained that "there are plenty of clauses in

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[1] Although Respondent did include some allegations that the bankruptcies themselves had breached the borrowers' contracts, Respondent has not relied on those allegations to further this lawsuit. Indeed, the New York Court of Appeals did not focus on those specific allegations in its analysis of the complaint—likely because, even if those specific allegations were preempted, Respondent's claims remain focused on Petitioners' monetary loan and apartment transfer to the borrowers *before* the bankruptcy proceedings commenced.

that contract that were breached." App. 75a. The court explained that finding these contractual breaches preempted would "undermine the way business is dealt with in New York City" for real estate development, upending "all of these contracts" that have been written "for years." App. 73a. And the court held that Respondent's complaint was simply "not based upon the bankruptcy." App. 75a.

The New York Appellate Division reversed in a three-paragraph opinion, with only three sentences of a single paragraph devoted to the preemption question. App. 60a-61a. Respondent promptly appealed to the New York Court of Appeals.

The New York Court of Appeals held that Respondent's claims are not preempted "under the circumstances presented here." App. 1a. After carefully considering the specific facts and details of Respondent's claims, the court explained that Petitioners' acts are "not alleged to be tortious on the basis that [they] facilitated the bankruptcy." App. 5a n.6. Rather, the court reasoned, Petitioners' acts "allegedly violated the borrowers covenants" and were tortious for that reason. *Id.*

Indeed, the New York Court of Appeals explicitly distinguished other types of claims—including the sort of claims that Petitioners fall back on to allege a split. As the court recognized, "[Respondent] does not dispute that so-called bad-faith filing claims, or other tort claims premised upon conduct *within* a bankruptcy proceeding, may be preempted." App. 6a. But those claims are different, the court reasoned, from Respondent's actual claims. As the court put it, Respondent's claims in this case are "not asserted by or against a debtor and do not affect the bankruptcy estate." App. 12a. Nor do Respondent's claims raise

any question "as to the propriety of the bankruptcy proceedings." App. 15a. Thus, the claims simply do not collaterally attack the bankruptcy proceedings.

The lower court then held that such claims are not preempted. As the court properly framed the issue, the question is thus "whether federal bankruptcy law preempts [Respondent's] state law claims asserted against non-debtor third parties for tortious interference with a contract." App. 1a. Such claims, based on conduct that occurred outside the bankruptcy process, are simply beyond the scope of the Bankruptcy Code. App. 12a. As Petitioners themselves "concede[d,] . . . the Bankruptcy Code would provide no remedy for [Respondent]'s claims as asserted against [Petitioners]." *Id.* Therefore, the court held, nothing in the Bankruptcy Code preempts such claims. *Id.*

In so holding, the New York Court of Appeals was careful to consider the decisions of other courts, including many of the decisions relied on by Petitioners in their claimed split. But the court concluded that it "need neither adopt nor reject the reasoning of these courts to resolve the instant appeal." App. 14a. The ultimate question, as the court saw it, is "the degree to which the state claims interfere with the administration of the debtor's estate." App. 16a. And while some of those other cases may have involved different claims and different facts that directly attacked the bankruptcy process, the court held that Respondent's claims here do not present the same problem. *Id.*

Three judges dissented, based on how they read specific paragraphs in Respondent's complaint. *See* App. 44a. But, even as the dissent acknowledged, "whether a defendant's conduct is tortious is

necessarily particularized," and the main disagreement revolved over how to construe Respondent's complaint. App. 44a-45a.

ARGUMENT

Contrary to Petitioners' claims, the fact-bound decision below does not implicate any split in authority. On the contrary, the New York Court of Appeals expressly addressed and distinguished the vast majority of the cases that Petitioners cite for their illusory split. And, as explained below, the relevant precedents can be reconciled around a single principle: If a claim directly attacks conduct *during* or *inside* bankruptcy proceedings, then it likely is preempted. If the claim concerns conduct *before* or *outside of* the bankruptcy proceedings, it likely is not preempted. There is no split and thus no reason for this Court to grant review. Worse yet, because the New York Court of Appeals has remanded the case, this Court lacks jurisdiction over this interlocutory appeal. Rather than wade into this settled, case-specific area of law in the context of a fact-bound ruling where jurisdiction is dubious at best, the Court should wait for a final decision that actually creates a division of authority.

I. The Decision Below Does Not Implicate Any Division Of Authority.

The split that Petitioners seek to concoct is illusory. As the New York Court of Appeals itself made abundantly clear, its decision does not conflict with any other court's ruling on this topic. While Petitioners raise cases that found preemption for *different* claims about *different* conduct, the lower court correctly held that *Respondent's* claims about *Petitioners'* conduct are not preempted. Indeed, upon review, a single basic principle explains the various results in these cases: If claims target conduct that

occurred *during* or *inside of* bankruptcy, or are an attempt to collaterally attack the bankruptcy, they are more likely to be preempted. But if claims target conduct that occurred *before* or *outside of* bankruptcy, and do not collaterally attack the bankruptcy, they are less likely to be preempted.

The resolution of cases within that framework is necessarily narrow and case-specific, as the decision below demonstrates. Each given case turns on the specific claims at issue, and whether those claims collaterally attack conduct that occurred inside the bankruptcy proceedings or not. The New York Court of Appeals itself recognized this. Again and again, it said that the present case turned on the specific facts and claims at issue, and that other cases involving *different* facts and claims might warrant preemption. As a result, it distinguished the cases cited by Petitioners—it did not reject them.

Against that logic, Petitioners offer not one, but two different splits in authority that they allege are at issue. But both splits are easily reconciled along the principles set forth above. And, by Petitioners' own telling, all of the cases discussed in their second alleged split are distinguishable from the present case.

A. Petitioners' First Alleged Split is Illusory.

Petitioners' first alleged split is merely a series of fact-bound decisions that reach different results based on the different facts present in each case. Although Petitioners claim that this "split" is directly related to the present case, they fail to explain how any of their cited cases actually contradict the New York Court of Appeals' decision. Indeed, Petitioners raise only two state-court decisions and one federal appellate decision to cast this split. Yet, the New York Court of

Appeals concluded that each of those cases rested on materially different facts from this case. *See, e.g.*, App. 14a, 18a, 22a. Thus, rather than splitting from those cases, the lower court concluded that they were easily reconciled with the result here. And for good reason: the claims at issue in each of those cases are plainly different from Respondent's claims here.

1. To start, take *Choy v. Redland Ins. Co.*, 127 Cal. Rptr. 2d 94, 97-98 (Cal. App. 2002), a California intermediate appellate court decision that Petitioners feature as the prime example of the split. But, in *Choy*, a plaintiff-creditor sued a defendant for *inducing* a debtor's bankruptcy. *Id.* According to the plaintiff, "[t]he bankruptcy filing . . . was done on the initiative of [the defendant] . . . so that [the defendant] could avoid liability for its bad faith conduct." *Id.* at 98. The *Choy* plaintiff sued for intentional infliction of emotion distress and "abuse of process"—only highlighting that his claims were really a direct attack on the bankruptcy proceeding itself. *Id.* at 98, 101. Faced with those claims, the *Choy* court found preemption precisely because the plaintiff's claims would "require the trial court to adjudicate the question of whether [the debtor's] petition had been filed in 'good faith.'" *Id.* at 103. Such direct attacks on a bankruptcy petition are directly covered by the Bankruptcy Code, *see* 11 U.S.C. § 362(d), and would be impermissible collateral attacks on federal proceedings, *cf. Martin v. Hunter's Lessee*, 14 U.S. 304 (1816).

But such a direct attack on the bankruptcy proceeding is not at issue in this case. As the New York Court of Appeals recognized, Respondent's claims are about tortious acts that occurred *before* the bankruptcy process and were tortious irrespective of

the bankruptcy process. App. 18a. "Unlike in *Choy*," the court explained, "[Respondent] here does not allege that [Petitioners] induced the borrowers' bankruptcy petition[s]." *Id.* Instead, Respondent alleges that Petitioners wrongfully extended loans and transferred apartments to the borrowers *before* the bankruptcy filings, and that those loans and transfers were wrongful because they violated the borrowers' contracts. *See id.* Thus, there is no need in this case for the lower courts to adjudicate the propriety of the borrowers' bankruptcies to determine that Petitioners' acts were tortious. *See* App. 15a.

2. The Seventh Circuit and Ohio Supreme Court decisions raised by Petitioners are similarly inapposite. Indeed, the Seventh Circuit's decision in *In re Repository Technologies, Inc.*, 601 F.3d 710, 716 (7th Cir. 2010), involved a plaintiff-creditor's claims against the *lawyers* who assisted a debtor through bankruptcy—because of the lawyers' *role during bankruptcy*. The defendants, the court held, "did not play some incidental role" in the bankruptcy; they were the very lawyers who served "as bankruptcy counsel and fully litigated the Chapter 11 proceedings." *Id.* at 721. Thus, the plaintiff's lawsuit for tortious interference was a direct attack on the bankruptcy proceeding itself. *Id.*[2]

Again, the New York Court of Appeals distinguished the present case from *In re Repository Technologies*. App. 21a-23a. The lower court explained that New York courts are "skeptical" of claims against lawyers, and that preemption here will

[2] Tellingly, the *In re Repository* plaintiffs had also filed an abuse-of-process claim, but then apparently dropped that claim voluntarily. 601 F.3d at 716, 720.

turn on the "degree" to which the state-law claims interfere with a bankruptcy proceeding. App. 16a, 23a. And, unlike the claims in *In re Repository*, Respondent's claims here are not against the lawyers who filed the borrowers' bankruptcy petitions. *See id.* Instead, Respondent sued Petitioners for giving the borrowers additional debt and properties in violation of the borrowers' contracts.

The Ohio Supreme Court's decision in *PNH, Inc. v. Alfa Laval Flow, Inc.*, 958 N.E.2d 120 (Ohio 2011), is similarly inapposite. Indeed, *PNH* only underscores how rulings in this area frequently turn on a case-specific analysis of the claims at issue in a given case. In *PNH*, the *majority* ruled that there was preemption because the plaintiffs sought "recovery for misconduct that they allege [defendants] committed *during* a bankruptcy court proceeding." *Id.* at 127 (emphasis added). Petitioners, however, quote the *dissenters* in *PNH*, who viewed the case as involving conduct "before the involuntary-bankruptcy petition was filed." *Id.* at 130-31 (Lanzinger, J., dissenting). Clearly, a dissenting opinion cannot create a split in authority. And the majority-dissent split in *PNH* only highlights its harmony with the decision below. In *PNH*, the majority viewed the case as involving conduct *during* bankruptcy—and thus found preemption. *Id.* at 127. Here, the majority below viewed the case as involving conduct *before* bankruptcy—and thus did not find preemption. App. 17a.

3. The Ninth Circuit's line of decisions, cited by Petitioners only in a footnote, most clearly illustrate how these basic principles reconcile the various cases according to their unique facts. In fact, the Ninth Circuit's decision in *Davis v. Yageo Corp.*, 481 F.3d

661, 678 (9th Cir. 2007), explicitly delineates the legal framework that reconciles this case with all the cases that Petitioners rely upon. In *Davis*, the plaintiff-shareholders alleged that the defendants controlled a debtor-corporation and decided to place the corporation into bankruptcy without considering alternatives that would have protected plaintiffs' interests. *Id.* at 665-70. In other words, the conduct at issue—a wrongful *decision* to place the corporation into bankruptcy without considering alternatives—had occurred before and outside the bankruptcy. *Id.* at 678.

The Ninth Circuit held that those claims were *not* preempted. *Id.* at 679. As the Ninth Circuit explained, the plaintiffs did not claim that the "bankruptcy petition was filed in bad faith, and their claim [did] not require the adjudication of rights and duties of creditors and debtors under the Bankruptcy Code." *Id.* Critically, the Ninth Circuit distinguished its prior cases that had found preemption for "causes of action for abuse of process and malicious prosecution involving conduct that occurred *during* bankruptcy." *Id.* at 678. Unlike those cases, the Ninth Circuit held, the *Davis* claims "concern[ed] conduct that occurred *prior* to bankruptcy" and did not directly attack the bankruptcy process. *Id.*[3]

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[3] Petitioners' reliance on the unpublished, district court decision in *Nat'l Hockey League v. Moyes*, No. cv-10-01036, 2015 WL 7008213 (D. Ariz. Nov. 12, 2015), only underscores the significance of the Ninth Circuit's holding. Although the *Nat'l Hockey League* district court suggested that *Davis*' holding was narrow, it ignored *Davis*' clear distinction of *In re Miles*. *See id.*, at *5-6. And, in any event, a single district court's narrow characterization of a federal appellate decision is hardly evidence of a split.

Thus, among other cases, the Ninth Circuit distinguished *Davis* from *In re Miles*, 430 F.3d 1083, 1086 (9th Cir. 2005), where the plaintiff had sued creditors "for the filing and prosecution" of involuntary bankruptcy petitions against one of the plaintiffs and the other plaintiffs' parents. As *Davis* explained, the *In re Miles* claim had sought "damages for a claim filed and pursued *in the bankruptcy court*"—and thus was preempted as a direct attack on the bankruptcy proceeding. 481 F.3d at 679 (emphasis added).[4] That distinction both explains the present case and harmonizes it with the above-described cases relied on by Petitioners, showing unequivocally that there is no split.

4. Finally, Petitioners' fail in their half-hearted efforts (again in a footnote) to link the present case to *Rosenberg v. DVI Receivables XVII, LLC*, 835 F.3d 414, 416 (3d Cir. 2016). In *Rosenberg*, a plaintiff had sued creditors for the act of filing involuntary bankruptcy petitions. *Id.* at 416-17. Although the court said that those claims were not preempted, those claims are simply not analogous to the claims at issue here. *Id.* at 420-21. Unlike in *Rosenberg*, Respondent's claims do not attack anyone for a bankruptcy filing. Unlike in *Rosenberg*, the borrowers filed voluntary petitions for bankruptcy, and

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[4] Several district court have similarly found no preemption of state-law claims that did not seek to "punish[] the exercise of rights under the Bankruptcy Code, [or to] question the legal validity or propriety of the Debtors' filings"—only underscoring the legal framework that turns on the specific claims at issue. *See, e.g., In re Extended Stay Inc.*, 435 B.R. 139, 149 (S.D.N.Y. 2010); *Dougherty v. Wells Fargo Home Loan, Inc.*, 425 F. Supp. 2d 599, 609 (E.D. Pa. 2006); *F.D.I.C. v. Barton*, No. Civ.A 94-3294, 1998 WL 169696, at *3-4 (E.D. La. Apr. 8, 1998).

Respondent has now sued the Petitioners for having tortiously interfered with their contracts *before* and *outside of* those voluntary petitions. Thus, far from suggesting that the decision below implicates a division of authority, *Rosenberg* is simply inapposite.

B. Petitioners' Second Alleged Split is Illusory.

Perhaps sensing the weakness of their first alleged split, Petitioners fall back on a "closely related" split—which they concede is not on-point, but only "related" to the case at hand. Pet. at 17. That strained and puzzling reliance on a supposed split that is admittedly not implicated in this case only reveals the weakness of Petitioners' arguments. This Court does not grant certiorari to issue advisory opinions on supposed splits that concededly would not be governed by any decision here. Nor does it engage in guessing-games as to how state courts might rule on state-law claims if presented with different facts and claims.

In any event, this purported alternative split is as illusory as the first alleged split, and only confirms how the decisions in this area can be reconciled. As Petitioners themselves note, many courts have found preemption in cases where a plaintiff brought state-law claims directly attacking a party's conduct *during* a bankruptcy proceeding. Pet. at 17. But, again, the New York Court of Appeals neither disputed those decisions nor took umbrage with them. Instead, the decision below explicitly recognized that such claims were more likely to be preempted—while explaining that this case simply does not involve such a direct attack on a bankruptcy proceeding. As the court explained: "It suffices to say that, where a tort claim is premised upon a bankruptcy filing, itself, or on conduct that occurs within a bankruptcy proceeding

and under the purview of the Bankruptcy Court, the obstacle presented by state tort remedies is more readily discerned." App. 14a.

1. In fact, almost all of the cases that Petitioners claim are related to this alleged split involve claims of abuse of process, vexatious litigation, or malicious litigation—all of which are *direct attacks* on the bankruptcy itself, or a claim filed during the bankruptcy process. This case is nothing of the sort.

Once again, the Ninth Circuit's line of decisions most clearly shows the legal distinctions at work here. For example, in *Gonzales v. Parks*, 830 F.2d 1033, 1033-34 (9th Cir. 1987), a creditor brought an abuse-of-process claim against a bankruptcy debtor *for filing the bankruptcy petition*. The creditor also sued the debtor's attorneys for the bankruptcy filing—just as the plaintiffs had done in *In re Repository Technologies*. *Id.* Similarly, in *MSR Exploration, Ltd. v. Meridian Oil, Inc.*, 74 F.3d 910, 912 (9th Cir. 1996), the plaintiff-debtor sued a creditor for the malicious prosecution of *claims filed during the bankruptcy proceeding*. In both those cases, the Ninth Circuit held that the claims were preempted because they were direct attacks on the bankruptcy filings, and because the Bankruptcy Code expressly provided remedies for attacks on a bankruptcy filing. *Id.* at 915-16; *Gonzales*, 830 F.2d at 1035-36.

But, again, the Ninth Circuit distinguished both *MSR Exploration* and *Gonzales* in *Davis*, 481 F.3d at 678-79. As the Ninth Circuit explained in *Davis*, when a claim does not directly attack a bankruptcy filing, and does not seek to relitigate "conduct that occurred *during* bankruptcy," then it is not preempted. *Id.* Thus, the Ninth Circuit's holding in *Davis* once again reconciles these cases and explains the decision below.

The other cases relied on by Petitioners are akin to *Gonzales* and *MSR Exploration*, not *Davis* or the present case. For example, *Metcalf v. Fitzgerald*, 214 A.3d 361, 365 (Conn. 2019), dealt with a debtor's claim of vexatious litigation against creditors for claims filed during bankruptcy. Similarly, in *Stone Crushed Partnership v. Kassab Archbold Jackson & O'Brien*, 908 A.2d 875, 879-80 (Pa. 2006), a creditor brought malicious prosecution claims against a bankruptcy debtor for the bankruptcy filing itself. And in *Pertuso v. Ford Motor Credit Co.*, 233 F.3d 417, 419, 426 (6th Cir. 2000), the debtor brought claims alleging that creditors had violated an automatic stay imposed by the bankruptcy proceeding.

Each one of those cases involved a direct attack on the bankruptcy filing itself, or on conduct that occurred during the bankruptcy process. Contrary to Petitioners' recasting of this case, Respondent's claims do not directly attack the borrowers' bankruptcy filings or seek to collaterally attack the bankruptcy process. Thus, there simply is no split.

2. Indeed, the New York Court of Appeals expressly distinguished these cases as inapposite to the present case. Although Petitioners assert that the courts listed above "could not possibly reach the same conclusion about preemption," "[i]f faced with the facts of this case," Pet. at 20, the simple truth is that the cases above *were not faced with the facts of this case*. And there is simply no reason to believe that Petitioners' self-serving hypothetical is correct.

Instead, all of these courts could easily distinguish claims about "conduct that occurred *prior to* bankruptcy" from claims "involving conduct that occurred *during* bankruptcy." *Davis*, 481 F.3d at 678. They could acknowledge, as the New York Court of

Appeals did here, that preemption turns in part on "the degree to which the state claims interfere with the administration of the debtor's estate." App. 16a. They could reason, as the New York Court of Appeals did below, that preemption is more likely "where a tort claim is premised upon a bankruptcy filing, itself, or on conduct that occurs within a bankruptcy proceeding and under the purview of the Bankruptcy Court." App. 14a. And through those universally applicable principles, the results are easily reconciled—as the decision below expressly concluded.

3. While inviting this Court to surmise how the New York Court of Appeals or other lower courts would have resolved claims they were not asked to decide, Petitioners misconstrue the relevant decisions.

For example, Petitioners incorrectly claim that "[t]he majority here did not view the existence of Bankruptcy Code remedies as relevant to the preemption analysis." Pet. at 21. That is simply untrue. The New York Court of Appeals explicitly analyzed the relevant remedies under the Bankruptcy Code, and found that they did not evidence preemption of this case. App. 20a-22a. Indeed, the New York Court of Appeals reasoned that the Bankruptcy Code does not provide any avenue to address "whether [Petitioners'] conduct was tortious," and that "[Petitioners] do not claim that any remedy was available to [Respondent] in the bankruptcy proceeding" for Petitioners' conduct. App. 20a. As a result, if there was preemption here, Respondent would be left without any redress for Petitioners' misdeeds. Far from ignoring "the existence of Bankruptcy Code remedies," the New York Court of Appeals thus paid careful attention to such

remedies—and found them to be lacking. *Compare* Pet. at 21 *with* App. 20a.

Petitioners also assert that decisions like *PNH* or *MSR Exploration* cannot be squared with the decision below because those courts noted that the Bankruptcy Code already has remedies to deter abuse of the bankruptcy process. Pet. 21. But that begs the question. The decision below held that Respondent's claims are not about abuse of the bankruptcy process. Again, Respondent does not challenge anything that Petitioners did *during* the bankruptcies; nor does it seek to collaterally attack those proceedings. Instead, Respondent challenges Petitioners' conveyance of loans and assets to the borrowers in violation of the borrowers' contracts—all *before* the relevant bankruptcies and *separate and apart* from those bankruptcies. It does Petitioners no good to compare cases like *PNH* or *MSR Exploration* to their straw-man take on Respondent's claims.[5]

Thus, far from creating any tension, let alone a split, the New York Court of Appeals' decision here is fully consonant with the few cases identified by Petitioners. Indeed, the decision below took care to consider those cases and distinguish them—while leaving open the door to adopt their holdings if faced

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[5] Petitioners' reliance on *Graber v. Fuqua*, 279 S.W.3d 608 (Tex. 2009) is also unavailing. Although Petitioners attempt to tie the case below to *Graber*, they cannot escape the simple fact that *Graber* also dealt with a debtor who sued attorneys under a malicious-prosecution theory based on a bankruptcy court filing. *Id.* at 610-11. Regardless of whether *Graber* purported to split from the decisions listed above, that split is irrelevant to the present lawsuit. *See id.* at 612, 615-17 (focusing on "the particular action" at hand, and distinguishing other cases, including *MSR Exploration*).

with the same facts and claims. That is not a split, let alone one warranting this Court's review.

II. The Decision Below Was Correct.

Beyond standing in harmony with the cases relied on by Petitioners, the New York Court of Appeals' decision was patently correct. "Preemption is based on the Supremacy Clause" of the United States Constitution, which "provides a rule of decision" to specify that "federal law is supreme in case of a conflict with state law." *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1479 (2018) (citation and internal quotations omitted). Thus, a federal statute preempts state law only if "Congress enacts a law that imposes restrictions or confers rights on private actors; [and] a state law confers rights or imposes restrictions that conflict with the federal law." *Id.* at 1480. This sort of conflict can occur expressly, or "by implication." *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 541 (2001). Here, Petitioners do not cite any provision of the Bankruptcy Code that would expressly preempt Respondent's tortious-inference claims. Instead, Petitioners argue only for a dubious theory of obstacle preemption, asserting that Respondent's state-law claims stand as an obstacle to the goals of the Bankruptcy Code. Pet. at 23.

However, "because the States are independent sovereigns in our federal system," this Court has "long presumed that Congress does not cavalierly pre-empt state-law causes of action." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). Especially when it comes to "a field which the States have traditionally occupied," this Court has "start[ed] with the assumption that the historic police powers of the States [are] not to be superseded by [a] Federal Act unless that was the clear and manifest purpose of Congress." *Id.* (quoting

Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)). In turn, this Court has "beg[u]n with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses [Congress'] purpose." *FMC Corp. v. Holliday*, 498 U.S. 52, 57 (1990) (citation omitted). Again, Petitioners do not claim that any provision of the Bankruptcy Code expressly preempts or conflicts with Respondent's state-law claims for tortious interference with contracts. Pet. at 23.

Petitioners instead attack a fictitious theory of Respondent's claims to advance their preemption case. As explained by the decision below, Respondent's tortious-interference claims are *not* that "petitioners abused the bankruptcy process and that there was something wrongful about the process itself." Pet. at 25. To the contrary, Respondent's claims are that Petitioners "tortiously interfered with [Respondent's] contractual rights *prior to* the bankruptcy proceedings." App. 17a (emphasis added). Those claims turn on whether it was proper for Petitioners to extend loans and transfer apartments to the borrowers *before* the borrowers filed for bankruptcy. App. 97a-104a. And those loans and transfers would have been wrongful breaches of contract even if the borrowers had *not filed* for bankruptcy. *See id.*

Thus, despite Petitioners' repeated assertions, the New York courts will be able to resolve Respondent's claims "without any inquiry . . . into whether any provision of the Bankruptcy Code was violated," or "whether the borrowers' bankruptcy petitions were filed in bad faith." App. 17a. Respondent's claims therefore do not conflict with the two "[m]ost pertinent" Bankruptcy Code provisions

that Petitioners cite—those dealing with bad-faith filings and relief from the automatic stay. Pet. at 24.

Nor will the "improper inducement" element of the tortious-interference claim here require examining whether the bankruptcies were improper. *See* Pet. at 25-26. Instead, the question is whether it was improper for Petitioners to have transferred apartments and extended loans to the borrowers *before* the bankruptcies. App. 17a. Moreover, none of Respondent's claims are against the borrowers, *i.e.*, the debtors who sought bankruptcy protections. *See* App. 16a. Thus, Respondent's claims could not "affect the debtor's estate" or "encroach upon the province of the bankruptcy court." *Id.* In short, nothing that was decided in the bankruptcy proceedings would be reexamined by Respondent's lawsuit.

Properly understood, it is clear that nothing in the Bankruptcy Code preempts Respondent's claims. As the New York Court of Appeals recognized, the "Bankruptcy Code . . . is overwhelmingly concerned with *the debtor's* estate." App. 15a; *cf. Grogan v. Garner*, 498 U.S. 279, 286-87 (1991) (explaining that "a central purpose" of the Bankruptcy Code is a limited "fresh start" for "insolvent debtors"). For example, the Bankruptcy Code lays out in great detail the contents and procedures for reorganization plans, and expressly provides that a such plans are binding on the relevant parties. *See* 11 U.S.C. § 1141; *see also, e.g.*, *id.* §§ 1121, 1123, 1125, 1128, 1129. Similarly, the Bankruptcy Code explicitly provides the distribution structure for liquidated estates and offers mechanisms for the discharge of debt. *See, e.g.*, 11 U.S.C. §§ 707, 726, 727. Thus, state-law claims attacking the debtor's estate may be preempted—but those are not Respondent's claims.

Similarly, the Bankruptcy Code provides mechanisms to prevent any abuse of the bankruptcy process. Among other things, the Bankruptcy Code offers remedies for frivolous filings, Fed. Bankr. R. 9011, any abuse of the bankruptcy process, 11 U.S.C. § 105(a), bad faith involuntary petitions, 11 U.S.C. § 303(i)(2), wrongful automatic stays, 11 U.S.C. § 362(d), or any willful violation of the automatic stay, 11 U.S.C. § 362(k). Thus, state-law claims that collaterally attack an involuntary petition, bankruptcy filing, or automatic stay would also likely be preempted. *See MSR Expl.*, 74 F.3d at 915. But state-law claims that do *not* collaterally attack a bankruptcy filing or seek to relitigate the bankruptcy process are not covered by the Bankruptcy Code and thus are not preempted. *See Davis*, 481 F.3d at 679. Here, Respondent's claims do not invoke any of the mechanisms set forth by the Bankruptcy Code or seek to relitigate the bankruptcy process.

To the contrary, as Petitioners conceded below, the Bankruptcy Code offers "*no remedy* for [Respondent's] claims." App. 12a (emphasis added). It is illogical for them now to say that Respondent's claims are somehow preempted, leaving them without any redress at all. Congress simply does not, "without comment, remove all means of judicial recourse for those injured by illegal conduct." *Medtronic, Inc.*, 518 U.S. at 487 (quoting *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984)). And the "failure to provide any federal remedy" for tortious acts is a clear indication that "Congress had no intention" of preempting state-law tort remedies. *Silkwood*, 464 U.S. at 251. Here, to find preemption would thus extend the Bankruptcy Code beyond its enumerated mechanisms and remedies and preempt even state-law claims that are not addressed by the Bankruptcy

Code, and do not turn on anything that occurred in the bankruptcy process.

Petitioners' claimed concerns about the effects of the decision below are therefore misplaced. Rather than providing "an additional mechanism to address misuse of the bankruptcy process," Pet. at 24, the decision below clearly explained that Respondent's claims are not about any misuse of the bankruptcy process. App. 15a. Nor will the decision below prevent debtors from obtaining a "fresh start." Pet. at 27. Again, Respondent is not suing the borrower-debtors, or seeking any damages from the bankrupt estate. And the New York Court of Appeals expressly noted that claims directly attacking the bankruptcy process are more likely to be preempted. App. 14a. For such claims, "the obstacle presented . . . is more readily discerned," *id.*, and thus there is no risk that the decision below will spawn an avalanche of cases that stifle the bankruptcy process.

Nor does the decision below risk chilling any bankruptcy conduct. Petitioners raise the specter of lawsuits against attorneys or legal aid services, Pet. at 29-30, but Respondent has not sued an attorney or legal aid service. In any event, the lower court addressed those concerns by explaining that lawsuits against attorneys are unlikely to succeed. App. 23a. The same is true for Petitioners' concern that this case will create inconsistent standards for bankruptcy-related conduct. Once again, Respondent's claims are not predicated upon the filing of bankruptcy itself. Rather, Respondent's complaint is that Petitioners transferred money and assets to the borrowers in violation of the borrowers' covenants. Although the purposes of those covenants are related to certain

bankruptcy protections, violation of those covenants does not turn on any bankruptcy proceedings.

* * *

In short, nothing about this split-less, fact-bound decision warrants this Court's review. The New York Court of Appeals explicitly limited its holding to the specific claims that Respondent has brought. *See* App. 14a. And it reconciled its holding with the very cases that Petitioners cite to allege a split. In the end, those decisions can all be resolved according to their facts based on the basic principles articulated in the decision below. There is no need for this Court to wade into that claim-specific framework.

III. This Court Lacks Jurisdiction To Address The Decision Below.

In addition to being fact-bound and correct, this case is an exceptionally poor candidate for certiorari because the Court lacks jurisdiction to review the New York Court of Appeals' interlocutory decision. By statute, this Court has jurisdiction only over "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had." 28 U.S.C. § 1257(a). Here, the New York Court of Appeals did not enter a final judgment or decree. Instead, it remanded for further proceedings. There is still plenty of activity currently proceeding in the state courts—with motions and a trial still to come. Accordingly, now is not the time for this Court's involvement (if ever).

Petitioners attempt to skirt this significant vehicle problem by invoking an exception to § 1257 articulated in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975). But the *Cox* exception applies only where "a refusal immediately to review the state court decision might seriously erode federal policy." *Id.* at

483. And Petitioners cannot explain how allowing the decision below to stand pending further proceedings (subject to review by this Court at a later date) would seriously erode important federal policy.

Petitioners grandly claim that the uniformity of bankruptcy law is at stake. But, as explained above, the caselaw is in accord and, in any event, the decision below was consciously narrow and fact-bound. Moreover, no bankruptcy law is in any way implicated by Respondents' tortious interference claims. As the lower court concluded, the claims at issue here can be resolved "without any inquiry . . . into whether any provision of the Bankruptcy Code was violated," or "whether the borrowers' bankruptcy petitions were filed in bad faith." App. 17a. And the cases cited by Petitioners do not change this fact. At most they stand for the proposition that the *Cox* exception *sometimes* applies where a state court rejects a preemption defense. That may be so, but Petitioners fail to explain how on the facts of *this case* important federal policy would be seriously eroded absent immediate review.

Additionally, that *Cox* exception is appropriate *only* if this Court's "resolution of the federal issue [will not be] affected by further proceedings." *Nike, Inc. v. Kasky*, 539 U.S. 654, 659 (2003) (mem.) (dismissing as improvidently granted) (Stevens, J., concurring). In other words, the *Cox* exception does not apply if there may be "further proceedings or amendments that might overcome" the federal issue or affect its resolution. *Id.* Thus, if this Court could potentially resolve the issue in a way that could invite amended complaints, then *Cox* does not apply and this Court lacks jurisdiction. *Id.* Here, as demonstrated above, any resolution of the Bankruptcy Code's preemptive

effects would likely be fact-bound and invite further proceedings.

At the very least, the interlocutory nature of the decision below is a serious vehicle problem that only further underscores that granting certiorari in this split-less, fact-bound case would be imprudent. If this Court wishes to address this area of law, the more prudent course would be to grant review from an indisputably final decision that actually conflicts with other precedents. Because that is not this case, the Court should deny certiorari.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

RONALD S. GREENBERG
NATAN M. HAMERMAN
DANIEL LENNARD
KRAMER LEVIN NAFTALIS
& FRANKEL LLP
1177 Avenue of the Americas
New York, NY 10036
rgreenberg@kramerlevin.com
(212) 715-9100

MICHAEL H. MCGINLEY
Counsel of Record
JUSTIN M. ROMEO
DECHERT LLP
1900 K Street, NW
Washington, DC 20006
michael.mcginley@dechert.com
(202) 261-3300

MICHAEL P. CORCORAN
DECHERT LLP
2929 Arch Street
Philadelphia, PA 19104

Counsel for Respondent Sutton 58 Associates LLC