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

REPLY BRIEF FOR PETITIONERS

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INTRODUCTION

The majority decision below deepens an entrenched split in authority on a central question of bankruptcy-related preemption. It threatens to undermine the bankruptcy system by penalizing activity that is often necessary in order to allow a debtor to file for bankruptcy in the first place. And, as explained in a thorough three-judge dissent, it is wrong on the merits. This Court's review is therefore badly needed.

Respondent's effort to escape from those conclusions is unavailing. Respondent tries to recharacterize its case, walking away from key allegations in its complaint (Opp.8 n.1), and omitting to mention that the claimed "interference" with contract here involved provisions intended to prevent bankruptcy from occurring. But respondent's claims are fundamentally premised on the assertion that the bankruptcy should not have been allowed to happen or to unfold in its normal course. In particular, respondent remains notably silent as to the critical point that all of respondent's claimed damages arise from the fact of the bankruptcy.

Respondent also insists that there is a sharp line for preemption purposes between claims based on pre-bankruptcy conduct and claims based on conduct inside the bankruptcy. But many cases have found preemption where (as here) the only conduct at issue predated bankruptcy. And, more generally, there is a serious clash in the law about whether there should be preemption even where the conduct at issue happened in a bankruptcy proceeding, with several jurisdictions concluding that there should not be. Thus, the majority decision below is in conflict with a large number of other decisions—both those involving very similar facts and those involving contradictory reasoning

about the propriety of preemption in the bankruptcy context. More generally, it is plain that this area of preemption law is desperately in need of clarification by this Court—because, as things stand, the applicability of bankruptcy preemption is a function of geography rather than of principle.

It is equally plain that the decision below will have serious negative effects if left in place—a point that respondent does not seriously contest. If preemption is no bar to a state-law tort claim based on pre-bankruptcy facilitation of a bankruptcy filing, then anyone who helps a debtor file—by providing money, advice, or other assistance—could be subject to liability. It is not hard to see what a devastating effect that legal regime would have on vulnerable debtors' ability to access bankruptcy proceedings, and the cascading problems to which that lack of access would inevitably lead.

Finally, no jurisdictional problem exists here. This Court has frequently exercised jurisdiction over state-court decisions rejecting preemption defenses, and because bankruptcy law is the exclusive province of federal courts the danger of seriously eroding federal policy by allowing this case to proceed in a state court is particularly great. This Court's review is strongly warranted.

ARGUMENT

A. The Decision Below Deepens A Widespread, Acknowledged Conflict On A Recurring Issue.

1. According to respondent (Opp.11-12), the cases are in accord that claims involving conduct inside a bankruptcy are preempted while claims involving conduct that precedes a bankruptcy are not. But decisions from various jurisdictions hold that claims that fall

into the latter category are preempted—and the majority below reached the opposite result. Those decisions therefore evidence a split in authority that only this Court can resolve.

For example, the court in *Choy* v. *Redland Insurance Co.*, 127 Cal. Rptr. 2d 94 (Cal. App. 2002), found preemption as to claims not meaningfully distinguishable from those presented here—that is, tort claims against a non-debtor alleged to have facilitated the bankruptcy, including by supplying the debtor with money for filing fees. See *id.* at 98. Respondent contends (Opp.13-14) that *Choy* is distinct because it involved "induce[ment]" of bankruptcy whereas this case has nothing to do with bankruptcy. That contention is insupportable given respondent's complaint, which says over and over that petitioners should be held liable precisely because they supplied funds and property that allowed the debtors to file for bankruptcy and affected how the bankruptcy unfolded. See, *e.g.*, App.84a, 104a (alleging petitioners paid for "a law firm" to file "for bankruptcy," and thereby harmed respondent); App.85a-86a, 97a-98a, 100a-102a, 107a-108a (similar). Indeed, respondent *admits* that the damages alleged stem directly from the fact that "the borrowers filed for bankruptcy," thwarting respondent's plan to carry out a property foreclosure. Opp.6; see App.58a (dissent) ("If there's no bankruptcy filing, there's no delay, and no damages. Without damages, there is no viable state claim."). The conflict between *Choy* and the majority decision here is thus an acute one.

The majority decision also conflicts with *In re Repository Technologies*, 601 F.3d 710 (7th Cir. 2010), and *PNH* v. *Alfa Laval Flow*, 958 N.E.2d 120 (Ohio 2011). Respondent asserts that *Repository* turned on

the fact that the claims involved the defendant "lawyers' *role during bankruptcy*," Opp.14, but that is a misreading. The Seventh Circuit was clear that its decision encompassed not only allegations about the defendants' actions during the bankruptcy but also allegations that "concern[ed] the defendants' conduct before the official commencement of [the] bankruptcy case" and "focus[ed] on the defendants' pre-petition acts." *Repository*, 601 F.3d at 720. The same kind of allegations are at stake here—yet the majority below set federal law entirely aside. And as for *PNH*, that decision reflected a division between majority and dissent very similar to the one here—but in *PNH* it was the majority, rather than the dissent, that concluded that preemption of the state-law claims was required. See 958 N.E.2d at 125-126; *id.* at 128, 130-131 (dissent).

That split in authority is not diminished by respondent's insistence that the cases discussed above were decided on their own facts and that the majority decision below is "fact-bound." *E.g.*, Opp.12. It goes without saying that the conflicting cases did not all present facts *identical* to those presented in this case. But they did all involve claims based on conduct that occurred prior to bankruptcy—and so they explode respondent's theory that preemption cases neatly line up on either side of a division between pre- and intra-bankruptcy conduct.[1] Moreover, the majority decision

[1] *Davis* v. *Yageo Corp.*, 481 F.3d 661 (9th Cir. 2007), does not support respondent's categorization. If *Davis* did hold that no state-law claim based on pre-bankruptcy conduct can be preempted, that would merely intensify the split. But *Davis* cannot be understood to go that far. There, the damages arose not from the bankruptcy but from the defendants' failure to pursue economically favorable alternatives. See *id.* at 679. Here, in contrast,

below is not limited to the facts of this case; rather, it holds that a state-law tort claim is not preempted by bankruptcy law so long as the allegedly tortious conduct occurred before the moment the bankruptcy petition was filed, no matter how entangled that conduct was with the bankruptcy proceeding. That holding squarely conflicts with *Choy*, *Repository*, and other decisions.

2. This case also implicates a deep split on whether *any* relationship between state-law tort claims and a bankruptcy proceeding can give rise to preemption. Respondent deems irrelevant cases involving tort claims arising from filings in a bankruptcy case rather than from pre-bankruptcy conduct. But the majority opinion below cannot be reconciled with the *reasoning* in the decisions holding that preemption exists where state-law claims allege wrongdoing within the bounds of bankruptcy. Pet.17-23. Those decisions thus further illustrate the need for this Court to provide clarity on an important area of preemption law that has hopelessly divided and confused the Nation's courts.

The divide in the analysis is clear. For instance, respondent emphasizes the majority's conclusion that preemption turns "on 'the degree to which the state claims interfere with the administration of the debtor's estate.'" Opp.21 (quoting App.16a); see Opp.10, 14-15. But the decisions preempting claims against non-debtors for conduct occurring during a bankruptcy have *rejected* the notion that interference

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respondent's claimed damages sprang into being because of the bankruptcy—and thus preemption is required. In addition, *Davis* did not cast doubt on *In re Miles*, 430 F.3d 1083 (9th Cir. 2005), which preempted claims based on conduct preceding any formal bankruptcy. Pet.14 n.3.

with administration of the bankruptcy estate is important. For instance, in *MSR Exploration* v. *Meridian Oil*, 74 F.3d 910 (9th Cir. 1996), the state-law claim was brought *after* the debtor's estate had been administered and the bankruptcy was over. See *id.* at 912. The Ninth Circuit nevertheless refused to permit "even slight incursions [into] and disruptions" of bankruptcy, and rejected "a world where the specter of additional litigation must haunt virtually every actor in a bankruptcy proceeding." *Id.* at 914-916; see *Gonzales* v. *Parks*, 830 F.2d 1033, 1036-1037 (9th Cir. 1987).

In addition, contrary to respondent's argument, in rejecting preemption the majority here discounted the relevance of the Bankruptcy Code remedies for abuse of process on the ground that those remedies did not run against petitioners themselves. Pet.21 (citing App.11a, 20a). But decisions finding preemption of claims based on in-bankruptcy conduct have applied preemption even where those very same bankruptcy remedies were unavailable to plaintiffs, concluding that all courts must respect Congress's choices about when to afford relief and when to withhold it. See, *e.g.*, *Miles*, 430 F.3d at 1091; *Gonzales*, 830 F.2d at 1034-1036.

Respondent's only response is to repeat the mantra that the claims here are divorced from bankruptcy—but, as discussed above, that conclusory assertion is inaccurate. Those claims allege that petitioners are liable precisely because they lent money or transferred assets to debtors that allowed the debtors to file for bankruptcy, and all of respondent's damages arise from the fact that bankruptcy proceedings began and continued.

In short, this case does implicate the broader split over bankruptcy preemption analysis that the petition

identifies. Because resolving the question presented in this case would give this Court an opportunity to address that broader split, this case is an excellent vehicle for bringing clarity to an important area of law that is in substantial disarray.

B. The Question Presented Is Critically Important.

If the decision below is allowed to stand, the consequences will be untenable. Most notably, the decision discourages debtor-assistance groups and even debtors' friends and family from facilitating a bankruptcy filing through money or other assistance—and thereby threatens to decrease or eliminate access to bankruptcy protections for a wide swath of debtors. Pet.28-30.

Respondent barely musters a response. Respondent notes (Opp.27) the self-evident point that this case does not involve claims against attorneys or legal-aid services—but does not deny that the reasoning of the majority decision encompasses such claims and eliminates any possibility that a defendant could dispose of them on preemption grounds at an early stage. Respondent notes only the majority's assertion that such claims are ultimately unlikely to succeed, which does little to dispel the significant chilling effect exerted by the prospect of facing a non-preempted lawsuit. See App.56a-57a (dissent). Respondent also does not deny that any non-lawyer who facilitates a bankruptcy would be vulnerable to the same kind of tortious-interference claims advanced here so long as the debtor has arguably violated a contract by filing for bankruptcy—something that will virtually always be true if the debtor is party to a loan agreement. See Pet.29.

In addition, respondent gives short shrift to the problem of inconsistent standards for bankruptcy-related conduct, again contending (Opp.27) that the state-law claims here are unrelated to bankruptcy. But, as noted above, respondent never explains how it could show that petitioners *improperly* interfered with the contracts without attacking the bankruptcy proceedings, or how it could establish the "essential" damages element of a tortious-interference claim, App.42a-43a (dissent), without proving that the pendency of the bankruptcy was harmful. In fact, those are necessary parts of respondent's case—and so a New York court will have to pass on those bankruptcy-related issues. When a state court applying state law intrudes into the exclusively federal bankruptcy domain, the risk that the court will reach conclusions that vary from those of federal courts is exceedingly high.

C. The Decision Below Is Wrong.

Where state-law tort claims are premised on alleged misuse of bankruptcy proceedings or seek to impose liability based on the very fact of bankruptcy, preemption must apply. The decision below gets the preemption analysis wrong—and respondent's efforts to defend that decision all fall short.

First, respondent curiously appears to suggest (Opp.23-24) that there is no such thing as conflict preemption. But preemption applies "whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." *FMC Corp.* v. *Holliday*, 498 U.S. 52, 56-57 (1990) (citation omitted), *cited in* Opp.24. As the petition explains (and numerous judges below agreed), permitting state-law liability for assisting a debtor into bankruptcy conflicts with the Bankruptcy Code's mechanisms for addressing misuse of the bankruptcy

process, see Pet.23-24 (citing statutory provisions), as well as with the Bankruptcy Code's purpose of ensuring that bankruptcy proceedings are legally permissible and cannot be impinged upon.

Second, respondent again asserts (Opp.24-25) that the tort claims here have nothing to do with bankruptcy. That is wrong for all of the reasons discussed above; as the dissent here put it, the claims are a clear "attempt to avoid the remedies of the Bankruptcy Code," and a state court adjudicating the claims would "invade the precinct of bankruptcy law." App.45a, 54a. Although respondent quotes the majority's contrary conclusions at some length, respondent never provides any analysis of why the claims here do not conflict with the Bankruptcy Code's structure and purposes. Respondent simply repeats that petitioners' conduct occurred before the moment of the bankruptcy petition—"a distinction without a difference." *Choy*, 127 Cal. Rptr. 2d at 103.

Third, respondent contends that if its claims were preempted it would have no remedy. But respondent *pursued* remedies in bankruptcy court when it filed a motion to dismiss the bankruptcy petition as brought in bad faith or to lift the automatic stay. See Pet.23-24; see also, *e.g.*, 11 U.S.C. 1112(b); 11 U.S.C. 362(d). Respondent chose to abandon that motion, see App.3a—but that does not mean that respondent lacked any recourse. And while respondent says it would prefer a tort-law remedy that runs directly against petitioners, Congress's choice to provide the federal remedies on which respondent's bankruptcy-court filing was based should be understood as a "rejection of other penalties, including the kind of substantial damage awards that might be available in state court tort suits." *Gonzales*, 830 F.2d at 1036.

D. This Court Has Jurisdiction.

Finally, no jurisdictional obstacle exists here, because the relevant factors under *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975), are satisfied. This Court has frequently exercised jurisdiction over nonfinal state-court decisions rejecting preemption—especially where, as here, the underlying federal law requires adjudication by a *federal* court. Pet.32.

Respondent makes little effort to contest that analysis. Respondent primarily argues (Opp.28-29) that refusal to review the preemption question would not "seriously erode federal policy." 420 U.S. at 482-483. But the only basis for that argument is an unadorned assumption that preemption is not warranted. Of course, this Court does not need to resolve that merits question to conclude that jurisdiction exists—because the *Cox* exception requires only that a denial of review "*might* seriously erode federal policy." *Ibid.* (emphasis added). Because the majority's decision authorizes state-law tort claims premised on petitioners' facilitation of a bankruptcy proceeding, allowing this case to proceed further in state court might seriously erode Congress's decision to deprive state courts of jurisdiction to resolve federal bankruptcy-law questions—not to mention Congress's choice to afford debtors unhampered access to bankruptcy's many protections.

Respondent also briefly contends (Opp.29-30) that this Court's decision on preemption would not be preclusive of further litigation in this case. That contention is difficult to understand. Taking the allegations in respondent's own complaint as true, the intermediate New York appellate court unanimously concluded that preemption applies, and that conclusion completely disposed of the case. App.60a-61a. The Court of Appeals majority disagreed—but if this Court were

to deem that decision erroneous, then this Court's decision would likewise resolve the case in full.[2] Respondent never tries to explain how a decision from this Court in petitioners' favor would leave room for respondent to proceed with "further litigation," 420 U.S. at 482-483—no doubt because the possibility of any such litigation simply would not exist.

Instead, respondent relies on *Nike* v. *Kasky*, 539 U.S. 654 (2003) (mem.) (Stevens, J., concurring, joined by Ginsburg, J.), with scant explanation—but that two-Justice concurrence provides respondent no aid. The concurrence is not a decision of this Court, and it sheds no light on whether the majority dismissed *Nike* because of concern with the finality of the state-court decision at issue in that case. *Id.* at 661-666 (identifying several independent grounds for dismissal, including lack of standing). And even assuming that the concurrence had force as to the *Cox* analysis, its reasoning is inapposite. This Court's resolution of the dispute in *Nike* over which First Amendment test to apply would have left application of the test, and therefore resolution of the ultimate First Amendment question, open for further litigation. *Id.* at 657, 659-660. But the issue here is not identifying the correct test for assessing whether preemption applies; it is whether such preemption *exists* in the important and frequently re-

[2] After the petition was filed, the state trial court permitted respondent to amend the complaint to restore the individual petitioners as parties (see Pet.31 n.7) and to add claims for aiding and abetting tortious interference. Respondent has conceded that a ruling preempting the tortious-interference claims would resolve the aiding and abetting claims in petitioners' favor. See Plaintiff's Reply, *Sutton 58 Associates* v. *Pilevsky et al.*, No. 654917/2016, at 12-13 (N.Y. Sup. Ct. Mar. 11, 2021).

curring situation in which a state-law claim calls federal bankruptcy proceedings into question. Accordingly, this Court's decision will necessarily be dispositive of the preemption issue here—and of the case in general—one way or the other. This Court's review is therefore jurisdictionally proper as well as amply warranted.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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July 2021