NO. 22-18

In the
Supreme Court of the United States

CUKER INTERACTIVE, LLC,
Petitioner,
v.

PILLSBURY WINTHROP SHAW PITTMAN, LLP,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR *AMICI CURIAE* PROFESSORS OF LAW IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*

Amici curiae are professors of law with expertise in civil procedure and federal courts.[1] They have a strong interest in the proper treatment of these issues by U.S. courts.

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than *amici curiae* and their counsel made a monetary contribution to the preparation or submission of the brief. Counsel for the parties received notice of the intention to file this *amici curiae* brief at least 10 days prior to the deadline and consented to the filing.

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SUMMARY OF ARGUMENT

This case raises an important question about the choice of law rules applicable to claims in bankruptcy.

Most federal courts apply state choice of law rules to non-federal claims in bankruptcy, as this Court has instructed in many other contexts, as recently as last term in *Cassirer v. Thyssen-Bornemisza Collection Foundation*, 142 S. Ct. 1502 (2022). The Ninth Circuit, however, departed from the mainstream and created an independent federal common law rule for choice of law in bankruptcy.

The Ninth Circuit's decision implicates substantive rights arising under state law. It implicates federalism principles embodied in choice of law rules. It implicates the separation of powers that traditionally allocate lawmaking authority to Congress, not the courts. And it implicates forum shopping and the inequitable administration of law that motivated this Court's decision in *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938).

For these reasons, this Court should grant the petition and resolve this pressing circuit split. Alternatively, this Court could grant the petition, vacate the decision below, and remand to the Ninth Circuit so that court may consider the issue in light of *Cassirer*.

ARGUMENT

I. The Petition Presents An Important Question About Choice of Law, On Which The Circuit Courts Are Split.

Unlike its sister circuits, the Ninth Circuit applies a special federal common law rule for choice of law in bankruptcy cases. This approach conflicts with decisions of other federal courts and is inconsistent with this Court's precedents on choice of law and federal common law. This Court should grant the petition and address important questions about the choice of law rules applied in bankruptcy.

A. The Question Has Generated A Circuit Split.

While many issues in bankruptcy arise under federal law, both "core" and "non-core" bankruptcy claims may arise under state law, and issues of state law may arise in many other contexts in bankruptcy. *See*, *e.g.*, *Rodriguez v. FDIC*, 140 S. Ct. 713 (2020) (holding that state law provides the rule for the distribution of tax refunds following a consolidated return, an issue presented in a Chapter 7 bankruptcy); *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982) (discussing the constitutionality of bankruptcy court jurisdiction in a case alleging breach of contract, breach of warranty, misrepresentation, coercion, and duress under state law).

Because bankruptcy proceedings may involve issues of state law, they necessarily require courts to decide *which* state's law applies. For most situations, federal courts applying state law will follow the horizontal choice of law rules of the forum state,

following *Klaxon Co. v. Stentor Electric Manufacturing Co.*, 313 U.S. 487 (1941). Last Term, this Court confirmed that the forum state's choice of law rules apply to cases arising under the Foreign Sovereign Immunities Act. *See Cassirer*, 142 S. Ct. 1502.

In bankruptcy, most federal courts also follow state choice of law rules. *See*, *e.g.*, *In re Syntax-Brillian Corp.*, 573 F. App'x 154, 162 (3d Cir. 2014) ("'The conflict of laws rules to be applied by the federal court in Delaware must conform to those prevailing in Delaware's state courts.'") (quoting *Klaxon*, 313 U.S. at 496); *In re Payless Cashways*, 203 F.3d 1081, 1084 (8th Cir. 2000) ("The bankruptcy court applies the choice of law rules of the state in which it sits."); *In re Merritt Dredging Co.,* 839 F.2d 203, 206 (4th Cir. 1988) ("We believe, however, that in the absence of a compelling federal interest which dictates otherwise, the *Klaxon* rule should prevail where a federal bankruptcy court seeks to determine the extent of a debtor's property interest."); *In re Gaston & Snow*, 243 F.3d 599, 601-02 (2d Cir. 2001) ("[W]e decide that bankruptcy courts confronting state law claims that do not implicate federal policy concerns should apply the choice of law rules of the forum state.").

The Ninth Circuit, however, applies a federal common law approach to choice of law modeled on the Restatement (Second) of Conflict of Laws. *In re Miller*, 853 F.3d 508, 515-16 (9th Cir. 2017) (citing *In re Lindsay*, 59 F.3d 942, 948 (9th Cir.1995)).

These differing approaches are not mere trivia; they can result in different law being applied on the

same facts. *See*, *e.g.*, Symeon C. Symeonides, *Choice of Law in the American Courts in 2019: Thirty-Third Annual Survey*, 68 AM. J. COMP. L. 235 (2020) (collecting state choice of law approaches, many of which deviate from the Second Restatement). For this reason, the circuit split identified in the petition has real and important consequences in cases arising in bankruptcy, including this one.

B. Dicta From This Court's Opinions May Have Contributed To The Circuit Split.

Part of the explanation for the circuit split may be found in Supreme Court dicta. This case presents the Court an opportunity to directly consider and clarify that dicta.

In 1946, this Court in *Vanston Bondholders Protective Committee v. Green* held that federal law provided the rule of decision on the issue whether to require the payment of interest on unpaid interest. 329 U.S. 156 (1946). In dicta, the Court commented on the appropriate choice of law method when a bankruptcy case called for the application of state law, implying that at least under some circumstances a federal court would apply a federal choice of law rule. *Id.* at 161-62.[2]

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[2] There are any number of reasons to discount *Vanston Bondholders*' dicta. For example, the case was decided in 1946, well before this Court's more definitive endorsement of *Klaxon* in *Day & Zimmermann, Inc. v. Challoner*, 423 U.S. 3 (1975). *Vanston Bondholders* also was decided during the era when the Court was still working through the scope and mechanics of the *Erie* doctrine. *See*, *e.g.*, *Guaranty Tr. Co. of N.Y. v. York*, 326 U.S. 99 (1945). It also was decided under the Bankruptcy Act of

More recent dicta, however, point the other way. For example, in *Butner v. United States*, 440 U.S. 48 (1979),[3] this Court addressed what law governed the collection of rents during a bankruptcy. The Court applied state law and, in so doing, made the following observations consistent with the application of state choice of law rules:

> Property interests are created and defined by state law. Unless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding. Uniform treatment of property interests by both state and federal courts within a State serves to reduce uncertainty, to discourage forum shopping, and to prevent a party from receiving "a windfall merely by reason of the happenstance of bankruptcy."

440 U.S. at 55 (quoting *Lewis v. Mfrs. Nat'l Bank*, 364 U.S. 603, 609 (1961)). This language implies that state choice of law rules apply. "Uniform treatment

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1898, superseded by the Bankruptcy Reform Act of 1978. The 1978 statute greatly expanded bankruptcy jurisdiction's reach over state law claims as compared to the era of *Vanston Bondholders*, which might be reason to revisit the choice-of-law framework in bankruptcy. *See N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 52-56 (1982). And finally, this Court takes a much less friendly view toward federal common lawmaking today than it did in 1946.

[3] This Court cited approvingly to *Butner* two years ago in *Rodriguez v. FDIC*, 140 S. Ct. 713 (2020).

. . . within a state" requires the application of state choice of law rules; the only way to avoid a "different result" in bankruptcy would be to follow those state rules. *Cf. Cassirer*, 142 S. Ct. 1502 (making the same point about claims under the FSIA).

This Court also endorsed in dicta the presumptive respect for state law in bankruptcy in *BFP v. Resolution Trust Corp.*, 511 U.S. 531 (1994), explaining: "To displace traditional state regulation in such a manner, the federal statutory purpose must be 'clear and manifest.' Otherwise, the Bankruptcy Code will be construed to adopt, rather than to displace, pre-existing state law." *Id.* at 545-55 (internal citations and note omitted). The presumption that bankruptcy adopts "pre-existing state law" should extend to pre-existing state choice of law.

In short, this Court has not spoken clearly on the choice of law rules applicable in bankruptcy, and what it has said does not provide a clear answer.

C. The Ninth Circuit's Approach Is Inconsistent With This Court's Approach To Choice Of Law.

Although this Court has not spoken clearly on the appropriate choice of law rules for bankruptcy cases, it has been clear in many other categories of cases that federal courts should look to state choice of law.

Three years after *Erie v. Tompkins*, this Court took up horizontal choice of law in *Klaxon Co. v. Stentor Electric Manufacturing Co.*, 313 U.S. 487 (1941). *See* Andrew D. Bradt, *The Shortest Distance: Direct Filing and Choice of Law in Multidistrict*

Litigation, 88 NOTRE DAME L. REV. 759, 770-77 (2012). *Klaxon* was a contract case filed in the District of Delaware. Both the district court and court of appeals applied New York law on prejudgment interest, seemingly following a federal choice of law rule. This Court unanimously reversed, holding that the choice of law rule of the forum state (there, Delaware) should apply. *Klaxon*, 313 U.S. at 496 ("The conflict of laws rules to be applied by the federal court in Delaware must conform to those prevailing in Delaware's state courts.").

Klaxon's holding expressly applies state choice of law in cases arising under the diversity statute, but it is not limited to diversity cases. *See*, *e.g.*, 19 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 4506 (3d ed.). On the same day as *Klaxon*, the Supreme Court decided *Griffin v. McCoach*, 313 U.S. 498 (1941). *Griffin* applied state choice of law rules in a statutory interpleader action that could not have been filed in state court in the forum state. *Id.* Literally from day one, therefore, state choice of law was not limited to diversity cases.

Last term, this Court held that state choice of law applies in cases under the Foreign Sovereign Immunities Act (FSIA). In *Cassirer v. Thyssen-Bornemisza*, this Court reviewed a decision of the Ninth Circuit applying a federal choice of law rule in FSIA cases. 142 S. Ct. 1502. This Court reversed unanimously, explaining that the appropriate approach was to employ state choice of law—a conclusion this Court called "simple." *Id.* at 1506, 1510. Indeed, this Court's intervening decision in *Cassirer* might be grounds to grant the petition,

vacate, and remand to the Ninth Circuit. *See*, *e.g. Lawrence v. Chater*, 516 U.S. 163 (1996) (discussing when "GVR" might be appropriate).

Notably, FSIA cases such as *Cassirer* may implicate foreign relations, and thus they might have been strong candidates for independent federal choice of law rules. Yet this Court said no. State choice of law governs in this area too. *Id.*[4]

D. The Ninth Circuit's Approach Is Inconsistent With This Court's Approach To Federal Common Law.

The Ninth Circuit's rule is also inconsistent with this Court's precedent on when federal courts should develop federal common law. As this Court recently reminded, "[j]udicial lawmaking in the form of federal common law plays a necessarily modest role under a Constitution that vests the federal government's 'legislative Powers' in Congress and reserves most other regulatory authority to the States." *Rodriguez*, 140 S. Ct. at 717. Federal common law in specialized areas survived *Erie*'s admonition that "[t]here is no federal general common law," 304 U.S. at 78, "[b]ut before federal judges may claim a new area for common lawmaking, strict conditions must be satisfied." *Rodriguez*, 140 S. Ct. at 717. *See also United States v. Kimbell Foods,*

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[4] The suggestion that state law should provide the choice of law rules in bankruptcy does not necessarily mean that federal courts sitting in bankruptcy should follow *forum state* choice of law. Which state's choice of law rules should apply in bankruptcy is among the important questions to which this Court should speak.

Inc., 440 U.S. 715 (1979); *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943).

This Court confirmed that its precedents on federal common law apply in the context of choice of law in *Cassirer*. The Court explained that even if the text of the FSIA did not direct its result, "we see scant justification for federal common lawmaking in this context." 142 S. Ct. at 1509. And, again, the Court reached this result despite the presence of potential foreign relations interests that might have justified federal common lawmaking. *Cf. Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).

The decision to follow state choice of law rules does not eliminate federal common law, but it maintains a modest role of federal common law and reserves regulatory authority to the states. *See* Zachary D. Clopton, *Horizontal Choice of Law in Federal Court*, 169 U. PA. L. REV. 2193, 2212-2231 (2021). At a minimum, this Court should superintend the making of federal common law by explaining when such federal interests are present.

II. The Question Presented Implicates Important Issues Beyond This Case.

The choice of law applied in bankruptcy implicates important issues of substantive rights, federalism, the separation of powers, and the twin aims of *Erie*. Granting the petition for a writ of certiorari will allow this Court to resolve a circuit split implicating these important issues.

A. Substantive Rights

Bankruptcy offers debtors a fresh start, but it also affects the substantive rights of creditors.

Creditors may include individuals or entities with legal claims against the debtor that arise under state law. A contract party may have claims under state contract law. A tort victim may have claims under state tort law.

Different choice of law rules may select different state substantive laws. Thus, different choice of law rules may affect the substantive law that governs claims sounding in contract, tort, and others. And because the Ninth Circuit applies a different choice of law when a case arises in bankruptcy, it allows the substantive law to turn on "the happenstance of bankruptcy." *Butner*, 440 U.S. at 55 (quoting *Lewis*, 364 U.S. at 609).

This effect on substantive rights is likely to become more significant as bankruptcy becomes an increasingly common method for resolving mass tort claims. *See*, *e.g.*, S. Elizabeth Gibson, Fed. Jud. Ctr., Judicial Management Of Mass Tort Bankruptcy Cases 1 (2005), https://www.uscourts.gov/sites/default/files/gibsjudi_1.pdf; Lindsey D. Simon, *Bankruptcy Grifters*, 131 YALE L.J. 1154 (2022). Mass tort suits typically involve claims arising under state law. When mass tort claims are aggregated in a bankruptcy proceeding—rather than, for example, in federal and state trial courts—a federal bankruptcy court applying a federal choice of law rule might apply a different state's tort law than a court applying state choice of law. The tort claim, therefore, might change—or disappear altogether—based solely on the defendants' decision to declare bankruptcy. The ability to declare bankruptcy strategically, and to affect the applicable substantive

law in the process, makes this scenario even more worrisome.[5]

B. Federalism

Whether and when federal courts should make federal common law are important questions of federalism that require this Court's attention.

Erie, 304 U.S. 64, struck a blow for federalism, announcing that "[t]here is no federal general common law." *Id.* at 78. The Court's reasoning was deeply connected to federalism, explaining that the expansive role for federal law under *Swift v. Tyson* was an "invasion of the authority of the state and, to that extent, a denial of its independence." *Id.* at 79 (internal quotation marks omitted). *See also Boyle v. United Techs. Corp.*, 487 U.S. 500, 517 (1988) (Brennan, J., dissenting) ("*Erie* was deeply rooted in notions of federalism, and is most seriously implicated when, as here, federal judges displace the state law that would ordinarily govern with their own rules of federal common law.").

This federalism interest extends to choice of law. Choice of law rules are expressions of substantive policies. *See*, *e.g.*, Russell J. Weintraub, *The Erie Doctrine and State Conflict of Laws Rules*, 39 IND. L.J. 228, 242 (1963) ("[T]he choice-of-law rules of a

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[5] For a discussion of how state choice of law might operate in bankruptcy, see Zachary D. Clopton, *Horizontal Choice of Law in Federal Court*, 169 U. PA. L. REV. 2193, 2231-2233 (2021) (applying to bankruptcy a solution developed for multidistrict litigation in Andrew D. Bradt, *The Shortest Distance: Direct Filing and Choice of Law in Multidistrict Litigation*, 88 NOTRE DAME L. REV. 759 (2012)).

state are important expressions of its domestic policy."); *see also Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981); *Watson v. Emps. Liab. Assurance Corp.*, 348 U.S. 66 (1954); *Alaska Packers Ass'n v. Indus. Accident Comm'n*, 294 U.S. 532 (1935).

This Court recognized as much in *Klaxon*, explaining that a federal court's application of state choice of law is intimately connected with the state's ability to make policy via choice of law:

> Whatever lack of uniformity this may produce between federal courts in different states is attributable to our federal system, which leaves to a state, within the limits permitted by the Constitution, the right to pursue local policies diverging from those of its neighbors. It is not for the federal courts to thwart such local policies by enforcing an independent 'general law' of conflict of laws. Subject only to review by this Court on any federal question that may arise, Delaware is free to determine whether a given matter is to be governed by the law of the forum or some other law. This Court's views are not the decisive factor in determining the applicable conflicts rule. And the proper function of the Delaware federal court is to ascertain what the state law is, not what it ought to be.

Klaxon, 313 U.S. at 496-97.

The Ninth Circuit's federal common law rule is "general law" that thwarts the local policies of states, which may make different decisions about the

applicable substantive law. The question presented, therefore, implicates important issues of federalism.

C. Separation of Powers

The decision to make federal common law also implicates the separation of powers. The limited role of federal common law is a corollary of the limited power of federal judges to make law. "Whether latent federal power should be exercised to displace state law is primarily a decision for Congress, not the federal courts." *Atherton v. FDIC*, 519 U.S. 213, 218 (1997) (internal quotation marks omitted). This is not to say that federal judges should never make law, but only that their lawmaking should be limited to "few and restricted" topics. *See O'Melveny & Myers v. FDIC*, 512 U.S. 79, 87 (1994) (quoting *Wheeldin v. Wheeler*, 373 U.S. 647, 651 (1963)).

Surely, identifying those "few and restricted" topics is a task well-suited to this Court. This task is particularly important here because the choice of rule affects substantive rights. *See supra* Section II.A; Patrick Woolley, *Erie and Choice of Law After the Class Action Fairness Act*, 80 TUL. L. REV. 1723, 1725 (2006) ("Because choice-of-law rules define substantive rights, Article III cannot properly be read to authorize the use of independent choice-of-law rules, but instead requires application of the whole law of a state—that is, the choice-of-law rules and internal law of a state—selected without regard to its content.").

These separation of powers issues implicated by federal common law are even more pressing in an area such as bankruptcy that is under the plenary control of Congress. The Constitution authorizes

Congress "to establish . . . uniform Laws on the subject of Bankruptcies throughout the United States." U.S. Const. art. I, § 8, cl 4. This Court, in a decision holding that Congress may abrogate state sovereign immunity in bankruptcy, explained that the bankruptcy clause "encompasses the entire 'subject of Bankruptcies.' The power granted to Congress by that Clause is a unitary concept rather than an amalgam of discrete segments." *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 370 (2006). When federal courts make law in bankruptcy, they risk intruding on Congress's authority in this area.

D. The Twin Aims of *Erie*

Famously, the decision in *Erie v. Tompkins* furthers twin aims: "discouragement of forum shopping and avoidance of inequitable administration of the laws." *Hanna v. Plumer*, 380 U.S. 460, 468 (1965).

This Court should provide guidance to the lower courts on issues of horizontal choice of law because they implicate both of the aims of *Erie*. Horizontal choice of law implicates forum shopping because if state and federal courts in the same state apply different choice of law rules, then parties would have the incentive to shop for different substantive law. Likewise, horizontal choice of law implicates equitable administration because if state and federal courts in the same state applied different choice of law rules, then parties would be treated differently depending on whether they have access to a federal forum.

Importantly, the twin aims of *Erie* are also implicated when federal courts apply different choice

of law rules depending on the basis of federal jurisdiction, as the Ninth Circuit did in this case. If the choice of law rule (and therefore the substantive law) depends on the basis of federal jurisdiction, then parties would have the incentive to "shop" among bases of jurisdiction. *See* Clopton, 169 U. PA. L. REV. 2193. Potential defendants, for example, might declare bankruptcy in order to change the applicable substantive law. Plaintiffs, too, might select among potential defendants depending on whether they were solvent or insolvent. The ability to affect the choice of law in some but not all cases would thus result in the inequitable administration of the law that *Erie* sought to avoid.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully urge that the petition for a writ of certiorari be granted.

Respectfully submitted,

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