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

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a federal court deciding a state-law issue in a bankruptcy case must apply the forum State's choice-of-law rules or federal choice-of-law rules to determine what substantive law governs.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent Pillsbury Winthrop Shaw Pittman, LLP respectfully submits this brief in opposition to the petition for certiorari in this case.

INTRODUCTION

Petitioner urges this Court to resolve a circuit split created in 1995 by *In re Lindsay*, 59 F.3d 942 (9th Cir. 1995). In the 27 years since that decision, this Court has declined at least three times to review this split. *See Sterba v. PNC Bank*, 138 S. Ct. 2672 (2018) (mem.); *Jafari v. Wynn Las Vegas, LLC*, 558 U.S. 1114 (2010) (mem.); *Erkins v. Bianco*, 534 U.S. 1042 (2001) (mem.). The Court should do so again because the underlying question—whether courts should use federal or forum state choice-of-law rules in bankruptcy proceedings—has little or no practical importance, and because this case is a poor vehicle for addressing that question.

It rarely matters whether federal or forum state choice-of-law rules govern the selection of state substantive law in bankruptcy cases. The substantive laws of the states are generally similar. Many states apply the same Restatement choice-of-law approach as federal law. And even when different choice-of-law approaches are used, they typically point in the same direction and lead to the application of the same state's substantive law. Accordingly, decision after decision after decision has found immaterial the question whether federal or forum state choice-of-law rules govern bankruptcy cases. It is hard to imagine a question of less practical importance than the question presented here.

In addition, contrary to petitioner's assertion, this case is a poor vehicle for addressing that question.

Petitioner failed to preserve the issue by not asserting in either the bankruptcy court or the district court that the forum state's choice-of-law rules should be applied. In addition, contrary to petitioner's assertion, the applicable choice-of-law rules are not outcome determinative here. The bankruptcy court ruled that California law applies to this case under both federal and forum state choice-of-law rules, and its application of California's choice-of-law rules was as riddled with errors as its application of the federal rules. Indeed, when it applied the federal choice-of-law rules, the bankruptcy court expressly recanted its primary rationale for applying California law under the California rules—that California has a policy against statutory attorney liens—a fact that petitioner conveniently ignores in asserting that choice-of-law rules are outcome determinative.

In any event, the decision below is correct. As the Solicitor General informed the Court in its amicus brief in the *Sterba* case five years ago, federal choice-of-law rules should be applied in bankruptcy. Bankruptcy proceedings do not create any threat of intra-state forum shopping because federal courts have exclusive jurisdiction over such matters; indeed, applying the forum state's rules creates a danger of *inter*state forum shopping. Moreover, the forum state may have no interest in applying its choice-of-law rules in a proceeding brought in the State only because the debtor petitioned for bankruptcy there as this Court recognized in *Vanston Bondholders Protective Committee v. Green*, 329 U.S. 156 (1946), state choice-of-law rules may not properly accommodate the multiple state interests implicated in a major bankruptcy.

Thus, the question presented does not warrant review, and the petition should be denied.

STATEMENT

A. Walmart's Arkansas Suit Against Petitioner

In January 2014, petitioner Cuker Interactive, LLC contracted with Wal-Mart Stores, Inc. to provide services on an e-commerce project. Almost immediately, fundamental disagreements over deadlines and deliverables developed. Because petitioner had agreed that the contract would be governed by Arkansas law and consented to exclusive jurisdiction in Arkansas, in the summer of 2014 Walmart sued petitioner for breach of contract in Arkansas state court. ER 79, 134.

Petitioner removed to the United States District Court for the Western District of Arkansas and counterclaimed for misappropriation of trade secrets and unjust enrichment as well as breach of contract. ER 134.

In June 2014, petitioner retained an Arkansas firm, Shults and Adams LLP. SER 31-32. The following summer, petitioner retained respondent Pillsbury Winthrop Shaw Pittman, a national law firm, for the action "pending in the United States District Court for the Western District of Arkansas." ER 83. Petitioner also subsequently retained the Henry Law Firm, another Arkansas firm, which tried the case with respondent. ER 25-27.

In April 2017, the case went to trial. After a nine-day trial, petitioner defeated Walmart's contract claims, SER 74-75, and the jury awarded petitioner over $12 million in damages on its trade secret, contract, and unjust enrichment counterclaims. SER 79.

In November 2017, because respondent's work on the case was complete—and petitioner was eleven months' delinquent on its bills, SER 12—respondent confirmed that its attorney-client relationship was terminated, SER 22, and on December 1, 2017, it moved to withdraw from the Walmart litigation. SER 12, 19, 22. On December 8, 2017, respondent sent petitioners written notice of a lien under Arkansas's lien statute, Ark. Code Ann. §16-22-304, on any judgment subsequently entered in the case. Pet. App. 7a; SER 19. Petitioner's Arkansas co-counsel, which likewise had not been paid, did the same. SER 19, 23-24, 34-35, 46, 157.

Approximately four months later, at the end of March 2018, the Western District Court of Arkansas entered an amended judgment against Walmart in the amount of $3,409,283.44, consisting of $745,021 in damages and $2,664,262.44 in attorney's fees and sanctions. Pet. App. 7a; SER 85. In awarding attorney's fees, the Arkansas District Court found that respondent and its co-counsel had obtained excellent results in what was "tantamount to bet-the-company litigation" for petitioner. SER 81-82. The Court also praised the "enormous skill and effort required to obtain such a large jury verdict," SER 79, and characterized trial counsel as "among the best prepared that this Court has ever encountered." SER 81. Nevertheless, petitioner has refused to pay the fees it owes respondent.

B. Petitioner's Arkansas Malpractice Suit

In July 2018, petitioner sued respondent for malpractice in the Arkansas District Court. SER 20. Respondent moved to dismiss the action as frivolous, and petitioner abandoned it before the motion hearing. *Id.*

C. Petitioner's California Bankruptcy Petition

In December 2018, petitioner filed for Chapter 11 bankruptcy in the United States Bankruptcy Court for the Southern District of California. Pet. App. 7a. In early May 2019, respondent filed a proof of claim for $1,637,418.71 secured by the lien filed in Arkansas nearly eighteen months before. *Id.*

D. The Proceedings Below

The Bankruptcy Court—A little more than two weeks after respondent filed its proof of claim, petitioner filed an adversary proceeding against respondent in the bankruptcy court seeking, among other things, a ruling that respondent's attorney's lien is invalid, and respondent should be treated as an unsecured creditor. Pet. App.7a.

Petitioner moved for summary judgment arguing that California law governs and prohibits the attorney's lien asserted by respondent. On July 9, 2020, the bankruptcy court issued a tentative ruling granting the motion. Pet. App. 27a-33a.

Although petitioner had informed it that "federal choice of laws apply," SER 105, the bankruptcy court *sua sponte* applied the forum state's choice-of-law rule, California's governmental interest choice-of-law test, and concluded that California substantive law governs. Pet. App. 30a-31a. The court reasoned that applying Arkansas law would impair a California public policy that it described as "[p]rotection of California entities and indivdiuals from liens for attorney's fees without informed consent." Pet. App.31a. By contrast, the court found that Arkansas has "no legitimate interest in application of its statute given the parties are not Arkansas entities." *Id.* The bankruptcy court then

ruled that under California law no lien for attorney's fees was created because the parties did not contract for such a lien. Pet. App. 32a.

On August 21, 2020, the bankruptcy court issued a final opinion. Pet. App. 20a-26a. Although it once again concluded that California substantive law applies and bars any lien, the court changed its choice-of-law analysis. Noting that "[t]he parties are in agreement that federal choice of law rules apply," the court applied the Restatement's significant relationship test. Pet. App. 21a-23a. Rather than applying Section 251 of the Restatement, which addresses security interests in chattel such as judgment proceeds, the bankruptcy court applied Section 6, which lists the factors generally governing conflicts of law. Pet. App. 22a-23a. It once again concluded that California law applies. Pet. App.23a. It found that "California's relationship to the parties and alleged security interest" was greater than Arkansas's because petitioner is a California company, respondent is licensed in California, and the two entered into an engagement agreement in California. *Id*. The court also found that petitioner would not have expected Arkansas law to govern the validity of the lien filed by respondent. *Id.*

The bankruptcy court also sought to "clarif[y]" the statement in its tentative ruling concerning California policy to the extent that it "could be read to infer that California has a policy against fee liens." Pet. App. 25a. Although California generally requires that fee liens be created by contract with informed consent, the court recognized that there are a "few exceptions" to this requirement and that it cannot be said "that California never permits the creation of fee lien in a different manner." *Id*.

The District Court—Respondent timely appealed to the United States District Court for the Southern District of California, which reversed. Pet. App. 6a-16a. Noting that "[t]he parties do not dispute that federal choice of law principles apply in bankruptcy court proceedings," Pet. App.9a, the district court applied the Restatement. It held, however, that Section 251, the provision expressly addressing security interests, controls, and noted that this section provides that "the location of the chattel is entitled to the greatest weight." Pet. App.11a.

The district court also rejected the bankruptcy court's analysis. It faulted the bankruptcy court for relying on where the parties' engagement agreement was executed because "there is no relationship between this fee lien dispute and the engagement agreement." Pet. App. 12a-13a. The district court found as well that petitioner had good reason to expect that Arkansas law would govern respondent's attorney lien because petitioner retained respondent to represent it in litigation in Arkansas. Pet. App.13a. And the court ruled that Arkansas's interest in the lien exceeds California's because the lien was "on a judgment issued by an Arkansas court, payable by a company with its principal place of business in Arkansas, based on fees incurred in connection with litigation that took place in Arkansas." *Id.* In so doing, the court reasoned that "the basic policies underling the perfection of liens, predictability, and uniformity of result, and ease of determination of the applicable law all support applying Arkansas law to a lien on a judgment issued by an Arkansas court for unpaid attorney's fees incurred in an Arkansas litigation." *Id*.

Finally, turning to Arkansas law, the district court ruled that the written notice provided by respondent was valid because it substantially complied with Arkansas' lien statute. Pet. App. 14a-16a.

The Court of Appeals—Petitioner appealed the district court decision to the Ninth Circuit. Although it had agreed in both the district court and the bankruptcy court that federal choice-of-law rules apply, in the court of appeals petitioner sought initial hearing en banc on whether the forum state choice-of-law rules apply in bankruptcy proceedings. CA9 Dkt. 13. Petitioner also raised the argument in its briefing before the panel. CA9 Dkt. 14 at 24-32. The petition for initial hearing en banc was denied, CA9 Dkt. 39, and the panel, applying the federal choice-of-law test, affirmed. Pet. App. 2a-5a.

In a unanimous memorandum opinion, the panel noted that the parties' engagement agreement "has no nexus to the present lien dispute" and that petitioner had acknowledged this. Pet. App. 3a. It also rejected petitioner's complaint that it lacked notice that Arkansas law would apply, reasoning that petitioner had retained respondent to represent it in litigation in Arkansas and then filed a malpractice action against respondent in that same State. Pet. App. 4a.

REASONS FOR DENYING THE WRIT

I. THE CIRCUIT SPLIT OVER THE QUESTION PRESENTED—WHICH THE COURT HAS DECLINED TO REVIEW AT LEAST THREE TIMES—HAS LITTLE OR NO PRACTICAL IMPORTANCE

As this Court has recognized in denying similar petitions, *see Sterba v. PNC Bank*, 138 S. Ct. 2672 (2018) (mem.); *Jafari v. Wynn Las Vegas, LLC*, 558 U.S. 1114 (2010) (mem.); *Erkins v. Bianco*, 534 U.S. 1042 (2001) (mem.), the question presented here—whether the forum or federal choice-of-law rules govern in bankruptcy—does not warrant this Court's review because it has little or no practical importance.

The particular choice-of-law rule approach employed in bankruptcy cases is rarely, if ever, material. To begin with, it is unnecessary to resolve conflicts in state law in many cases because, due in part to the Restatements, the Uniform Laws, and other efforts to standardize the law, there is a high degree of consistency in state substantive laws. In addition, in resolving conflicts, half of the States employ some version of the Restatement's significant relationship test employed under federal common law. *See, e.g.*, Symeon C. Symeonides, *Choice of Law in the American Courts in 2020: Thirty-Fourth Annual Survey*, 69 AM. J. COMP. L. 177, 195 (2021) (noting that 25 States use the Restatement approach for torts and 24 for contracts). And while States employ other tests, such as California's government interest approach, there is a "surprising degree of consistency, if not uniformity" in the results yielded by these tests. *Id*. at 188; *accord* Stewart E. Sterk, *The Marginal Relevance of Choice*

of Law Theory, 142 U. PA. L. REV. 949, 951 (1994).[1] Indeed, in this case the Bankruptcy Court concluded that California law applies under the Restatement as well as the California test. *Compare* Pet. 29a-32a (applying California's government interest test) *with* Pet. App. 21a-25a (applying Restatement test).

Nor have choice-of-law rules proved material in other bankruptcy cases. To the contrary, the courts of appeals have found over and over that they "need not decide whether state or federal law supplies the choice-of-law rules in a bankruptcy case because [the same state's] law would apply either way." *In re Jafari*, 569 F.3d 644, 651 (7th Cir. 2009); *see also, e.g.*, *Deutsche Bank Tr. Co. Ams. v. U.S. Energy Dev. Corp. (In re First River Energy, LLC)*, 986 F.3d 914, 924 (5th Cir. 2021) ("We need not decide between the Texas forum's law or federal law where both bodies of law reach the same result."); *Fishback Nursery, Inc. v. PNC Bank, N.A.*, 920 F.3d 932, 935-36 (5th Cir. 2019) (noting trial court's finding that "either choice-of-law

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[1] *Amici* assert that different choice-of-law rules "*can* result in different law being applied," Br. for *Amici Curiae* Professors of Law at 5 (emphasis added), but the only authority that they cite in support of this assertion is the 2019 version of Professor Symeonides' survey, *id.* at 6. In so doing, they fail to mention Professor Symeonides' most recent survey, which observes that "regardless of the approach followed," American courts tend to "reach the same substantive result." Symeonides, *Choice of Law in the American Courts in 2020: Thirty-Fourth Annual Survey*, 69 AM. J. COMP. L. at 188. Moreover, *amici* fail to cite a single case in which the conflicts-of-law rule applied would change the substantive state law used in a proceeding in bankruptcy even though they include the reporter of, and two advisers to, the upcoming Restatement (Third) of Conflict of Law. *See* RESTATEMENT (THIRD) OF CONFLICT OF LAW v (Tent. Draft, No. 1, Apr. 21, 2020) (identifying Kermit Roosevelt as reporter and Stephen Burbank and William Dodge as advisors).

approach, forum or federal, would end up determining lien priority under the law of respective state where the farm products were purchased"); *Arrow Oil & Gas, Inc. v. J. Aron & Co. (In re SemCrude L.P.)*, 864 F.3d 280, 291 n.5 (3d. Cir. 2017) ("We need not reach this issue for the purposes of this appeal because, regardless of the state, each has the same choice-of-law rule."); *State Bank v. Miller*, 513 Fed. Appx. 566, 572 (6th Cir. 2013) ("[U]nder either Michigan or Wisconsin law, the Bank's overbid of the full amount of the debt at the Michigan sheriff's office extinguished the entire debt."); *MC Asset Recovery LLC v. Commerzbank A.G.*, 675 F.3d 530, 536 (5th Cir. 2012 ("[T]he independent judgment test is essentially synonymous with the approach adopted by the Restatement (Second) of Conflict of Law . . . ."); *Pescatore v. PAN AM*, 97 F.3d 1, 12 (2d Cir. 1996) ("Regardless of whether we consult the choice of law principles in the Restatement or in New York law, we arrive at the same result . . . ."); *In re Morris*, 30 F.3d 1578, 1581-81 (7th Cir. 1994) ("This controversy need not be resolved here, however, since under either approach Iowa's substantive law would be applied . . . ."); *In re Stoecker*, 5 F.3d 1022, 1029 (7th Cir. 1993) ("We need not try to resolve these issues in this case . . . because any plausible choice of law rule would honor the stipulation that Illinois law is to govern.").

Lower courts similarly have found the particular choice-of-law rule immaterial.[2] Moreover, except for

[2] *See, e.g.*, *Smith v. Quizno's Master LLC (In re Bouley)*, 503 B.R. 524, 531 (Bankr. D.N.H. 2013) ("The Court does not need to resolve this complex issue presently, as the relevant federal choice-of-law rules and the New Hampshire rule are substantially the same."); *In re Harris*, No. 18-16598, 2022 WL 198852, at *9 (Bankr. N.D. Ohio Jan. 21, 2022) ("[T]he result would be the same if the Court were to apply Ohio or federal choice of law rules

two decisions from twenty years ago concerning statutes of limitations, *see In re Vortex Fishing Sys., Inc.* , 277 F.3d 1057, 1069 (9th Cir. 2002); *In re Gaston & Snow*, 243 F.3d 599, 605 (2d Cir. 2001), petitioner fails to cite any decisions finding that application of the federal common law choice-of-law rules would lead to application of different substantive law—which is no doubt why the circuit split over this question has remained static since *In re Gaston & Snow* more than two decades ago.[3]

Thus, as the Solicitor General noted five years ago in connection with another petition seeking review of the circuit split at issue, there is "no sound reason to believe that any inconsistency among the various circuits' approaches to choice-of-law issues in bankruptcy has affected the outcome of an appreciable number of cases." Br. of the United States as Amicus

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instead of Georgia choice of law rules."); *In re Egizii*, 634 B.R. 545, 550 (Bankr. C.D. Ill. 2021) ("the result would be the same regardless of whether federal or forum choice-of-law rules were followed"); *Hill v. Gibson Dunn & Crutcher LLP (In re ms55, Inc.)*, 420 B.R. 806, 820 n.6 (Bankr. D. Colo. 2009) ("[T]he 'internal affairs doctrine' is the controlling choice of laws principle under either line of analysis."); *In re Parmalat Sec. Litig*., No. 04 MD 1653 (LAK), 2007 WL 541466, at *8 (S.D.N.Y. Feb. 22, 2007) (finding no need to resolve whether federal common law applies because "both the federal common law and the Illinois choice-of-law rule is the same"); *In re Olsen Indus., Inc.*, No. 98-140-SLR 2000 WL 376398, at *11 (D. Del. Mar. 28, 2000) ("In the instant case, it matters not which choice-of-law rule is applied, as both federal common law and the forum state (Delaware) follow the approach of the *Restatement* . . . .").

[3] For this same reason, petitioner's concerns about geographic "disuniformity" (Pet. 19-21) are unfounded. It should be noted, however, that if different choice-of-law rules yielded different results, applying forum state rather than federal rules would ensure disuniformity.

Curiae at 17, *Sterba v. PNC Bank*, No. 17-423, 2018 WL 2278124 (U.S. May 17, 2018) ("*Sterba* SG Br.").

II. THIS CASE IS A POOR VEHICLE FOR ADDRESSING THE QUESTION PRESENTED

Petitioner asserts that this case is an "ideal vehicle" for resolving whether federal or forum state choice-of-law rules apply in bankruptcy, Pet. 21, because the question was properly raised below, Pet. 25, and is "outcome-determinative," Pet. 21-22. Petitioner is wrong on both counts.

1. As petitioner points out, it argued in the court of appeals that the forum state's choice-of-law rules should be applied both in an initial petition for rehearing en banc and in briefing to the panel. Pet. 25 (citing CA9 Dkt. 13 and CA9 Dkt. 14 at 24-32). But petitioner fails to mention that it waived this argument by not raising it in either the bankruptcy court or the district court.

Although the bankruptcy court applied the forum state's choice-of-law rules in its tentative opinion, Pet. App. 29a, in its final opinion the court applied federal common law rules at the request of petitioner as well as respondent. Pet. App. 21a ("The *parties* are in agreement that federal choice of law rules apply . . . .") (emphasis added); *see also* SER 105 ("Federal 'Choice of Law' Rules Apply") (emphasis omitted).

Nor did petitioner raise this question in the district court. Although petitioner noted that other circuits apply the forum state's choice-of-law rules, SER 218 n.3, it asserted that federal choice-of-law rules govern without suggesting that the court should apply the forum state's rule or otherwise reserving the issue. *See*

SER 218 ("[T]he Ninth Circuit directs that federal choice of laws apply . . . ."); *see also* Pet. App. 9a ("The *parties* do not dispute that federal choice of law principles apply in bankruptcy court proceedings . . . .") (emphasis added).

Because petitioner did not argue in either the bankruptcy court or the district court that the forum state choice-of-law test should apply, petitioner waived the question and was barred from raising it on appeal. *See*, *e.g*., *Brady v. United States*, 211 F.3d 499, 504 (9th Cir.2000).

2. Even if petitioner had preserved the question presented, this case still would be a poor vehicle for considering that question. As noted above, petitioner asserts that this case is an ideal vehicle because which choice-of-law test governs is "central to the outcome in this case" and, indeed, "outcome-determinative." Pet. 2, 21, 25. In fact, both state and federal tests yield the same result—as the bankruptcy court implicitly recognized when it found (albeit erroneously) that California law applies under the choice-of-law test of the forum state (California) in its tentative opinion, Pet. App. 29a-32a, and under the federal test in its final opinion, Pet. App. 21a-24a.

The bankruptcy court also would be surprised at why petitioner now asserts that California law applies under the state's government interest test. Quoting from the bankruptcy court's tentative opinion, petitioner asserts that California has an overwhelming interest in protecting "'California entities and individuals from liens for attorney's fees without informed consent.'" Pet. 21-22 (quoting Pet. App. 31a).

The bankruptcy court recanted this statement and with good reason. While California law requires lawyers to obtain written and informed consent for

any business transaction in which they obtain a security interest adverse to their clients, Cal. R. Prof. Cond. 1.8.1, California also recognizes that statutory fee liens may be imposed without such consent. *See, e.g.*, Cal. Lab. Code § 4903(a) (West 2011) (authorizing liens for "[a] reasonable attorney's fee" and "reasonable disbursements" in worker's compensation proceedings); *see also* 1 B.E. Witkin*, et al.,* CAL. PROC. 6TH, *Attys* § 182 (2022) (noting other attorney liens authorized by statute without informed consent). Recognizing this, in its final opinion the bankruptcy court "clarifie[d]" that it had not meant its tentative ruling to suggest that "California has a policy against fee liens" or that "California never permits the creation of a fee lien" without written consent. Pet. App. 25a.

Absent a state policy against statutory fee liens, California substantive law does not apply under the state's government interest test. Under that test, a "true conflict" between the laws of different states is resolved by evaluating the "the nature of the strength of the interest of each jurisdiction in the application of its own law" to determine which State's "interest would be more impaired if its law were not applied." *Kearney v. Salomon Smith Barney, Inc.*, 137 P.3d 914, 922 (Cal. 2006). Here, respondent seeks to enforce a lien for attorney's fees authorized by an Arkansas statute, *see* Ark. Code Ann. § 16-22-304, on an Arkansas judgment based on representation provided in an Arkansas court.

As the bankruptcy court recognized, California has no policy against enforcement of statutory attorney's fee liens, much less one imposed on a judgment issued by an Arkansas court. Pet. App. 3a. By contrast, Arkansas has a strong interest in the lien. As noted above, the lien was imposed on a judgment issued by

an Arkansas court, which is payable by a company (Walmart) with its principal place of business in Arkansas, based on litigation that took place in Arkansas. Pet. App.13a. In addition, as the district court recognized, "the basic policies underlying the perfection of liens, predictability and uniformity of result,[4] and ease of determination of the applicable law all support applying Arkansas law to a lien on a judgment issue be an Arkansas court . . . ." *Id*.

Thus, it is Arkansas's interests that would be most impaired if its law were not applied and therefore Arkansas law that applies under California's governmental interest test.

This conclusion is supported by overwhelming precedent. "The generally accepted view is that the existence and effect of an attorney's lien is governed by the law of the place in which the contract between the attorney and the client is to be performed . . . ." Pet.App. 4a (quoting *Conflict of Laws as to Attorney's Liens*, 59 A.L.R.2d 564 § 4 (1958)); *see also* RESTATEMENT (SECOND) CONFLICT OF LAWS § 251(2) (1971) (noting that the validity of security interests is normally governed by the law of the state where the chattel at issue was located when the interest attached). Accordingly,

[4] Petitioner has acknowledged that respondent's Arkansas co-counsel have valid liens on the judgment in question. SER 161, 168. There is no good reason why these liens, which arise from representation provided with respondent in Arkansas, should be enforceable while respondent's lien is not. Petitioner's location in California and execution of the engagement agreement are no justification: as petitioner has acknowledged, the engagement agreement "has no nexus to the present lien dispute." Pet. App. 3a. Nor can petitioner claim unfair surprise at the application of Arkansas law to an attorney lien filed in Arkansas when petitioner retained respondent expressly to represent it in litigation in that State. Pet. App. 4a.

in determining the validity of attorney's lien on a judgment, numerous cases have applied the law of the State where the litigation was conducted and the judgment was entered.[5] Indeed, the petition fails to identify a single contrary case in which a forum applied its own substantive law to an attorney lien imposed on a judgment entered in another State in connection with a case litigated in that other State.

Thus, far from being outcome-determinative, the choice-of-law rules are once again immaterial, and for this reason as well this case is not a good vehicle for resolving the question presented.

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[5] *See, e.g.*, *Peresipka v. Elgin, J. & E. R.y. Co.*, 231 F.2d 268, 271 (7th Cir. 1956) (applying Illinois law to lien for representation in that State "irrespective of whether the contract was signed in Indiana or Illinois"); *Hosey v. Hoffpauir*, 180 F.2d 84, 86 (5th Cir. 1950) (applying New York law to lien for representation in that State filed by lawyers based in Texas); *Underwood v. Phillips Petroleum* Co., 155 F.2d 372, 374 (10th Cir. 1946) (applying Oklahoma law to lien on judgment rendered in that State filed by lawyers based in Texas); *Great Lakes Transit Corp. v. Marceau*, 154 F.2d 623, 624-25, 626 (2d Cir. 1946) (applying New York law to lien for representation in that State filed by lawyers based in Illinois); *Lehigh & N.E. R. Co. v. Finney*, 61 F.2d 289, 290 (3d Cir. 1932) (applying New Jersey law to lien for suit brought in that State where engagement agreement was executed in Pennsylvania); *Golden v. Stein*, No. 4:18-CV-0031-JAJ,-CFB, 2019 WL 3991072, at *6 (S.D. Iowa June 20, 2019) (applying Iowa law to lien for representation in case transferred to court in that State); *In re Military Circle Pet Center No. 94, Inc.*, 181 B.R. 282, 285 (Bankr. E.D. Va. 1994) (applying Virginia law to lien for representation in that State despite agreement to apply Massachusetts law).

III. AS THE SOLICITOR GENERAL PREVIOUSLY INFORMED THE COURT, THE QUESTION PRESENTED WAS CORRECTLY DECIDED

Petitioner contends (Pet. 13-19) that this Court's decisions in *Erie Railroad Company v. Tompkins*, 304 U.S. 64 (1938), and *Klaxon Company v. Stentor Electric Manufacturing Company*, 313 U.S. 487, 496 (1941), require application of the forum state's choice-of-law rules in bankruptcy proceedings. As the Solicitor General informed the Court in response to a similar contention, this argument lacks merit. *Sterba* SG Br. 11-14.

The *Erie* doctrine requires federal courts exercising diversity jurisdiction to apply the forum state's substantive law, *Erie R. Co. v. Tompkins*, 304 U.S. at 74-77, which *Klaxon* held includes choice-of-law rules. *See Klaxon*, 313 U.S. at 496. This requirement discourages intra-state forum shopping and avoids inequitable administration of the laws within a State. *Hannah v. Plumer*, 380 U.S. 460, 468 (1965). As this Court has explained, if federal courts sitting in diversity were to apply different rules than state courts in the same State, "the accident of diversity of citizenship would constantly disturb equal administration of justice in coordinate state and federal courts sitting side by side" and "do violence to the principle of uniformity within a state." *Klaxon*, 313 U.S. at 496.

These concerns about intra-state forum shopping and its impact on the equal administration of justice do not apply in bankruptcy. *See Sterba* SG Br. 11-12. Federal courts have exclusive jurisdiction over most bankruptcy proceedings. *See* 28 U.S.C. § 1334(a). Consequently, in bankruptcy, there is no threat that a plaintiff will choose to file in federal rather than state

court to take advantage of different laws in federal court. Thus, in bankruptcy cases there is no need to apply the forum state's choice-of-law rules: "the risk of forum shopping which is avoided by applying state law has no application, because the case can only be litigated in federal court." *In re Lindsay*, 59 F.3d 942, 948 (9th Cir. 1995).

Moreover, applying the forum state's choice-of-law rules in bankruptcy proceedings creates a danger of interstate forum shopping. *See Sterba* SG Br. 12-13. Bankruptcy petitions channel all claims against the debtor into the venue where the debtor chose to file bankruptcy, 28 U.S.C. § 1334(a). As bankruptcy law has relatively liberal venue provisions, *id.* § 1408, applying the forum state's choice-of-law rules creates an incentive for debtors "to restructure or relocate their business dealings in such a way as to gain the benefit of a certain forum laws," *In re SMEC, Inc*., 160 B.R. 86, 90 (M.D. Tenn. 1993), and thus "permits the jurisdictional manipulation and resulting inequities that *Klaxon* sought to avoid." Zachary D. Clopton, *Horizontal Choice of Law in Federal Court*, 169 U. PENN. L. REV. 2193, 2132 (2021).

Far from endorsing this outcome, in *Vanston Bondholders Protective Comm. v. Green*, 329 U.S. 156 (1946), this Court indicated that federal choice-of-law rules should govern bankruptcy proceedings. Although the Court found the particular question before it governed by the Bankruptcy Act, *id*. at 162-63, it observed that state choice-of-law rules are ill-suited for bankruptcy. Where state law governs, *Vanston* reasoned, "courts can seldom find a complete solution in the mechanical formulae of the conflicts of law." *Id*. at 161-62. Instead, the choice-of-law determination in bankruptcy requires "balancing the interests of the

states with the most significant contacts in order to best accommodate the equities among the parties to the policies of the states." *Id*. at 162. As at that time most States employed a mechanical, vested rights approach to choice of law, *Vanston* clearly rejected use of the forum state's choice-of-law rules in favor of a federal common law approach reflecting the policies underlying federal bankruptcy law. *See* Tobias B. Wolff, *Choice of Law and Jurisdictional Policy in the Federal Courts*, 165 U. PENN. L. REV. 1847, 1875-77 (2017). And while most States now have moved away from the vested rights approach and consider the interests of other states, state choice-of-law rules remain ill-suited to balancing the interests of multiple states often implicated by many bankruptcies.

Ignoring *Vanston*, petitioner asserts that the *Erie* doctrine requires federal courts to apply the forum state's laws whatever the source of the federal court's jurisdiction. Pet. 14-16. Petitioner, however, fails to cite any decision of this Court repudiating *Vanston*. Indeed, only one of the decisions that petitioner cites, *Cassirer v. Thyssen-Bornemisza Collection Found*., 142 S. Ct. 1502 (2022), even considered whether federal courts must apply the forum state's choice-of-law rules, and it ruled that they must based on its interpretation not of the Bankruptcy Code, but rather the Foreign Sovereign Immunity Act. *See id.* at 1508-09 (construing 28 U.S.C. § 1606). Petitioner points to "[c]onsidered dicta" in *Cassirer* that the Court would have reached the same result even if the statute's text had been unclear, Pet. 15, but this observation was based on the "scant justification for federal common lawmaking in this context." *Cassirer*, 142 S. Ct. at 1501.

This case is easily distinguishable. *Cassirer* found scant justification for applying a federal choice-of-law rule because under the FSIA there was no uniquely federal interest needing protection, and the federal government had disclaimed any need for a federal choice-of-law rule. 142 S. Ct. at 1509-10. Here, as shown above, *Vanston* recognized that a federal rule is needed to protect the policies underlying federal bankruptcy law. *Vanston*, 329 U.S. at 162. In addition, as petitioner acknowledges, Pet. 24 n.3, the Solicitor General has informed the Court that federal choice-of-law rules should be applied in bankruptcy cases. *Sterba* SG Br. 11-14.

The other decisions cited by petitioner are also inapposite. *Felder v. Casey*, 487 U.S. 131 (1988), which reviewed a state supreme court decision, merely described the holding in *Erie* without suggesting that it extends beyond diversity jurisdiction. *See id*. at 151. *O'Melveny & Myers v. FDIC*, 512 U.S. 79 (1994), and *Atherton v. FDIC*, 519 U.S. 213 (1997), expressed concern about creating federal common law that would displace "state standard[s] of conduct," *Atherton*, 519 U.S. at 216, 218, and "tort liability," *O'Melveny & Myers*, 512 U.S. at 87, not about using federal choice-of-law rules to determine what *state* substantive law applies.

Amici contend that applying federal choice-of-law rules in bankruptcy raises both federalism and separation-of-powers concerns. Br. for *Amici Curiae* Professors of Law at 13-16. The federalism concerns in bankruptcy, however, are much more limited than in diversity cases. *See Sterba* SG Br. 13-14. In diversity, claims are brought in federal courts that sit "side by side" with the courts of the forum state, where the same claims may have been brought, *Klaxon*, 313 U.S.

at 496, and the forum state presumably has a greater interest than any other state in seeing its law applied to those claims. *In re SMEC, Inc*., 160 B.R. at 90. By contrast, the forum state may have little interest in seeing its choice-of-law rules applied in bankruptcy because bankruptcy proceedings are conducted where the bankruptcy petition is filed, which is typically where the debtor is located, and that location "may bear little relation to the location of his or her property interest or to the corpus of his or her business dealings." *Id.* Indeed, because a forum state's choice-of-law rules may not adequately protect the multiple state interests often implicated by bankruptcy proceedings, *Vanston*, 329 U.S. at 161-62, a federal choice-of-law rule better accommodates the interests of interstate federalism.

Separation-of-powers concerns are also attenuated in bankruptcy. *Amici* contend that Congress, not the federal courts, should decide whether to displace state law with federal common law. Br. for *Amici Curiae* Professors of Law at 15. But a federal choice-of-law rule is a limited and circumscribed exercise of law-making authority, which by definition does not involve making substantive law. Moreover, *amici* recognize that the forum state's choice-of-law rules should not always apply in bankruptcy. *Id*. at 10 n.4. Instead, they point the Court to a law review article, *id*. at 13 n.5, which, as noted above, itself recognizes that applying the forum state's choice-of-law rules permits jurisdictional manipulation, Clopton, *Horizontal Choice of Law in Federal Court*, 169 U. PENN. L. REV. at 2232, and proposes a different rule in which federal courts would determine the "home venue" of actions filed in bankruptcy proceedings, *id*. at 2232-33. This proposal, however, requires federal courts to engage in the same sort of common law rulemaking as a federal choice-of-

law rule, just in the first part of a two-step process that is more complicated than a straight-forward application of federal choice-of-law rules but fails to ensure that the multiple state interests are adequately accommodated.

The more sensible approach is the one this Court endorsed in *Vanston*: adopting a federal choice-of-law rule that both prevents jurisdictional manipulation and accommodates the multiple state interests implicated in bankruptcy proceedings.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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