No. 22-18

# In the Supreme Court of the United States

CUKER INTERACTIVE, LLC, PETITIONER,

*v.*

PILLSBURY WINTHROP SHAW PITTMAN, LLP.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## REPLY BRIEF


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## REPLY BRIEF

Respondent concedes that this case presents a well-entrenched circuit split, and Respondent's arguments for allowing this split to remain unresolved indefinitely do not withstanding scrutiny. Respondent's lead argument is that this Court should not care that different circuits apply different choice-of-law rules because these different choice-of-law rules can lead to the same ultimate result in many circumstances. The respondent in *Cassirer v. Thyssen-Bornemisza Collection Foundation*, 142 S. Ct. 1502 (2022), made this same exact argument at length in its brief in opposition, and this Court properly rejected that wholly meritless position in granting review. Respondent also raises some makeweight vehicle objections—complaining, for example, that Petitioner did not take the futile step of asking the bankruptcy and district courts to overturn the Ninth Circuit's binding case law—but Respondent is unable to cite any authority for its arguments on this score. Finally, Respondent argues that the Ninth Circuit's outlier position within the split is correct, but those arguments are wrong, and, in any event, this Court can resolve them as part of merits briefing.

In all, this Court should grant review to resolve this important, acknowledged circuit split.

## I. Respondent Concedes That The Petition Raises A Well-Entrenched Circuit Split, And Offers No Serious Reason Why This Court Should Leave That Split Unresolved

Respondent concedes that there is a "circuit split over the question presented" of whether a forum State's or federal choice-of-law rules apply when a federal court resolves state-law issues in bankruptcy proceedings, BIO 9 (formatting omitted), with the Ninth Circuit on one side, and the Second, Fourth, Third and Eighth Circuits on the other, Pet.10–13; *see also* Brief for *Amici Curiae* Professors of Law ("*Amici*.Br.") 4–6. This entrenched split is important both because of the federalism and separation-of-powers interests underlying *Erie Railroad Company v. Tompkins*, 304 U.S. 64 (1938), and *Klaxon Company v. Stentor Electric Manufacturing Company*, 313 U.S. 487 (1941), and because the Constitution mandates that "[l]aws on the subject of Bankruptcies" be "uniform," U.S. Const. art. I, § 8, cl. 4, which includes "geographic[al] uniformity," *Vanston Bondholders Protective Comm. v. Green*, 329 U.S. 156, 172 (1946) (Frankfurter, J., concurring); Pet.19–21; *see Amici*.Br.13–16.

Respondent's lead argument for denying review is that choice-of-law rules no longer matter because they can lead to the same outcome in many cases or circumstances. BIO 1. This is the same argument

that this Court necessarily rejected in *Cassirer*. There, the respondent argued for twelve pages in its brief in opposition that a circuit split over which choice-of-law rules federal courts must use in Foreign Sovereign Immunities Act ("FSIA") cases was "meaningless" because the "various choice-of-law tests" under federal common law and forum States are "unlikely to produce different outcomes." Brief in Opposition 12–23, *Cassirer v. Thyssen Bornemisza Collection Found.*, No.20-1566, 2021 WL 3371316 (U.S. July 29, 2021) ("*Cassirer* BIO"). Respondent here makes the same exact argument as its lead point, claiming that it "rarely matters whether federal or forum state choice-of-law rules govern." BIO 1. Similarly, the *Cassirer* respondent catalogued various cases where courts had found that divergent choice-of-law approaches "lead to the same result," exactly like Respondent here. *Compare Cassirer* BIO 16–22, *with* BIO 10–12.

Choice-of-law rules are, of course, important. This Court has long recognized that different choice-of-law rules may lead to the application of different substantive law. *See Cassirer*, 142 S. Ct. at 1509; *Klaxon*, 313 U.S. at 496–97; *see also, e.g.*, *In re Gaston & Snow*, 243 F.3d 599, 605 (2d Cir. 2001); *contra* BIO 10–12. This includes courts in bankruptcy cases, *contra* BIO 10, since, for example, *In re Gaston & Snow* applied New York law under the forum State's choice-of-law rules, while observing that another

State's law would very likely have applied "if federal choice of law rules [were] to be utilized," 243 F.3d at 604–07. And there is no dispute that the substantive laws of the States differ from each other, in important ways, including over: the length of a statute of limitations, *In re Vortex Fishing Sys., Inc.*, 277 F.3d 1057, 1069 (9th Cir. 2002); the proper interpretation of insurance contracts, *Robeson Indus. Corp. v. Hartford Acc. & Indem. Co.*, 178 F.3d 160, 163 (3d Cir. 1999); and, as here, whether a lien is secured or unsecured, Pet.App.9a, 29a–30a. So, even if there were a "consistency in state substantive laws" in some respects, BIO 9, choice-of-law rules nevertheless cause direct and tangible effects in others.

Respondent further belittles the important federalism and separation-of-powers interests that the Question Presented implicates. BIO 21–22. According to Respondent, the harms to federalism from federal courts applying federal choice-of-law rules over the forum State's rules are "much more limited than in diversity cases." BIO 21–22. But this fails to recognize that bankruptcy proceedings affect citizens' substantive rights under state law, no less than in diversity cases, given that the property interests at issue are state-law creations. *Butner v. United States*, 440 U.S. 48, 55 (1979); *accord Amici*.Br.13–15. Further, *Klaxon* held that a State's choice-of-law rules are an inseparable part of those state-law-created substantive rights. 313 U.S.

at 496–97; *Amici*.Br.13–15. Thus, a federal court supplanting a forum State's choice-of-law rules with its own federal creation harms core federalism interests. *Amici*.Br.13–15. Respondent's claim that creating choice-of-law rules does not impact the separation of powers likewise fails in light of *Klaxon*, which held that choice-of-law rules are substantive law for Congress—not the federal courts—to create, *see* 313 U.S. at 496; *accord Amici*.Br.15–16.

Finally, Respondent claims that this Court has previously deemed this split unimportant by declining to review it, but the three examples that Respondent cites do not support its claim. BIO 1, 9 (citing *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.)). Petitioner explained that the *Sterba* petitioner failed to respond to numerous vehicle issues raised by both the Solicitor General and the *Sterba* respondents, not even bothering to file a reply brief or a brief in response to the Solicitor General's invited brief, Pet.22–26, and Respondent has no retort. As for *Jafari*, the Seventh Circuit there expressly declined to decide whether federal or the forum State's choice-of-law rules applied, *In re Jafari*, 569 F.3d 644, 649 (7th Cir. 2009); *see* Brief in Opposition 7–8, *Jafari v. Wynn Las Vegas, LLC*, No.09-541, 2009 WL 4624162 (U.S. Dec. 3, 2009), and this Court "ordinarily do[es] not decide in the first

instance issues not decided below," *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 168 (2004) (citations omitted). Finally, *Erkins* arose over twenty years ago, during the infancy of this circuit split, such that the brief in opposition argued that no split yet existed. *See* Brief in Opposition 5–9, *Erkins v. Bianco*, No.01-0527, 2001 WL 34115685 (U.S. Oct. 26, 2001). Now, even Respondent concedes the circuit split, showing that the percolation that this Court generally awaits has fully occurred.

## II. This Case Is An Ideal Vehicle For Resolving This Conceded, Entrenched Circuit Split

This case presents this Court with an ideal vehicle to resolve this longstanding circuit split over the Question Presented. As Petitioner explained, the choice between federal or California's choice-of-law rules is a central issue in this case, which is why Petitioner raised this Question Presented in an initial en banc petition and as the lead argument before the Ninth Circuit panel. Pet.21–22.

Respondent makes the bizarre assertion that Petitioner failed to preserve the Question Presented by not taking the futile step of asking the bankruptcy and district courts to overturn *Lindsay v. Beneficial Reinsurance Co. (In re Lindsay)*, 59 F.3d 942 (9th Cir. 1995))—the Ninth Circuit's longstanding, binding decision that federal choice-of-law rules apply in

bankruptcy. BIO 13–14. But this Court's "traditional rule" is to decline to grant certiorari on lack-of-preservation grounds only "when the question presented was not pressed or passed upon below." *United States v. Williams*, 504 U.S. 36, 41 (1992) (citation omitted). Petitioner fully satisfied that rule by "press[ing]" the Question Presented before the Ninth Circuit, *id.* (citation omitted)—the only lower court with the legal authority to overturn *In re Lindsay*, Pet.22. The Ninth Circuit then "passed upon" the Question Presented by affirming and applying its longstanding *In re Lindsay* rule. *Williams*, 504 U.S. at 41 (citation omitted); Pet.22; Pet.App.2a. Respondent cites no case even suggesting that Petitioner also had to ask the bankruptcy and district courts to overrule *In re Lindsay*—which those lower courts obviously cannot do, *Hart v. Massanari*, 266 F.3d 1155, 1172–73 (9th Cir. 2001)—to challenge that precedent before this Court, *see Williams*, 504 U.S. at 41, 44–45. The Ninth Circuit's case law did not require Petitioner to make that futile gesture either, as that court will consider a new issue where "the issue presented [is] purely one of law and the opposing party would suffer no prejudice as a result of the failure to raise the issue in the trial court." *Taniguchi v. Schultz*, 303 F.3d 950, 959 (9th Cir. 2002). Respondent suffered no prejudice from Petitioner's decision not to ask the bankruptcy and district courts to overrule binding Ninth Circuit precedent. That is, of course, why Respondent did not

raise this preservation objection in the Ninth Circuit after Petitioner urged that court to overturn *In re Lindsay*, CA9 Dkt.22 at 18–19, so Respondent's feigned concern now is just an unsupported, waived effort to evade this Court's review.

Respondent next argues that this case is a poor vehicle because California's choice-of-law rules "yield the same result" as the federal rules—namely, application of Arkansas substantive law. BIO 14–17. Petitioner strongly disagrees, which is why it filed its petition for initial hearing en banc requesting that the Ninth Circuit overrule *In re Lindsay* and why it led with this issue in its merits briefing before the three-judge panel. Pet.22. But this Court need not decide who has the better of the argument under California's choice-of-law rules after it resolves the circuit split on the Question Presented, as it can always thereafter remand to the Ninth Circuit to allow that court or the district court to decide, in the first instance, whether Arkansas or California law applies under California's choice-of-law rules.

That said, Petitioner's arguments that California's choice-of-law rules require applying that State's substantive law are powerful. Under California's "governmental interest analysis" choice-of-law rule, a court must: determine whether the laws of the relevant jurisdictions are "different"; then, if so, examine each jurisdiction's interest in the application

of its law to see if a "true conflict" exists; then, if there is such a conflict, evaluate the strength of those competing interests. *Kearney v. Salomon Smith Barney, Inc.*, 137 P.3d 914, 922 (Cal. 2006). Here, California's and Arkansas' laws are "different," *id.*, since California requires attorneys to obtain "the client's informed written consent" to assert a lien on a judgment under the circumstances here, which requirement "protect[s] the public" in California and "promote[s] respect and confidence in the legal profession" of California, *Fletcher v. Davis*, 90 P.3d 1216, 1221–23 (Cal. 2004) (citations omitted). Arkansas, in contrast, recognizes attorney's liens without such a writing, Ark. Code § 16-22-304; *see* Pet.App.14a–16a, to "protect the contractual rights of attorneys" and "allow an attorney to obtain a lien for services," Ark. Code § 16-22-301. But despite this difference, there is no "true conflict" here, *Kearney*, 137 P.3d at 922, since only California has an interest in applying its law *to this case*, as it involves a California company and California lawyers who are neither citizens nor residents of Arkansas. CA9 Dkt.14 at 38. Even if there were a conflict, however, *Kearney*, 137 P.3d at 922, California's interests in protecting the public and the integrity of its legal profession outweigh Arkansas' interests in enforcing Arkansas attorneys' debt-collection rights.

Respondent's proposed application of California's "governmental interest analysis" is incorrect.

Respondent ignores the strength of California's interest in its attorney's lien law, claiming that "California has no policy against enforcement of statutory attorney's fee liens," despite *Fletcher*'s clear holding. *See* BIO 14–16 (failing even to cite or to attempt to address *Fletcher*). While Respondent cites four narrow exceptions to California's rule against attorney's liens in the absence of informed written consent, BIO 14–16, those limited carveouts just prove that California has an interest against such liens in all other cases—like the case here—as *Fletcher* described. Finally, Respondent wrongly inflates Arkansas' limited interest in applying its attorney's lien law in this case, asserting that the State has various state interests unsupported by *any* citation of Arkansas authority. *See* BIO 15–16.

## III. The Ninth Circuit's Entrenched Position Is Wrong, And Only This Court's Reversal On The Merits Will Resolve The Entrenched Circuit Split

The Ninth Circuit's conclusion that federal choice-of-law rules, rather than the forum State's rules, apply when bankruptcy courts decide state-law claims or issues is contrary to this Court's precedents. Pet.13–19. *Klaxon* held that the *Erie* doctrine applies to choice-of-law rules, requiring federal courts to apply the rules of a forum State in the absence of a contrary federal constitutional or statutory rule. Pet.13–14. More generally, *Erie* permits federal

courts to create federal common law only for "extraordinary" reasons, and no such reason exists when a bankruptcy court adjudicates state-law claims or issues, as in the case here. Pet.16–19 (quoting *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 87–88 (1994)).

Respondent's arguments in support of the Ninth Circuit's contrary approach rely largely on the Solicitor General's position in *Sterba*. *Compare* BIO 18–23, *with* Brief for the United States as *Amicus Curiae* 11–14, *Sterba v. PNC Bank*, No.17-423, 2018 WL 2278124 (U.S. May 17, 2018) ("*Sterba* SG Br."). Yet, the Solicitor General's arguments there appear to be inconsistent with the arguments that the Solicitor General subsequently advanced before this Court in an *amicus* brief in *Cassirer*. Pet.24 n.3. In *Sterba*, the Solicitor General argued that the "*Erie* doctrine [was] inapplicable" because the case was "not a diversity case under 28 U.S.C. 1332." *Sterba* SG Br.11. But in *Cassirer*, the Solicitor General argued that *Erie* "applies, whatever the ground for federal jurisdiction, to any issue or claim which has its source in state law." Brief for the United States as *Amicus Curiae* at 18–19, *Cassirer v. Hyssen-Bornemisza Collection Found.*, No.20-1566, 2021 WL 5513717 (U.S. Nov. 22, 2021) (quoting Henry J. Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U. L. Rev. 383, 408 n.122 (1964)).

Respondent claims that following the rule that most circuits have adopted would encourage intrastate forum shopping, without any evidence that this has actually occurred, BIO 19; in any event, Congress' choice of a broad bankruptcy venue provision is no reason to limit artificially *Erie* or *Klaxon*. Applying *Klaxon* to bankruptcy courts would advance *Erie*'s twin aims of reducing forum shopping and increasing equal administration of state law because, as *amici* Professors explain, potential plaintiffs and potential-yet-insolvent defendants could maneuver claims into or out of bankruptcy court to obtain more favorable choice-of-law rules, under *In re Lindsay*. *Amici*.Br.16–17.

Respondent also relies on dicta from this Court's decision in *Vanston* for support, BIO 19–20, but, as *amici* Professors again explain, *Amici*.Br.7, more recent dicta from this Court in *Butner* implicitly repudiates *Vanston*'s dicta, explaining that "there is no reason why [state-law created property] interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding," 440 U.S. at 55. Respondent offers no response to this language from *Butner*, or any of the other myriad reasons provided by *amici* Professors for not following *Vanston*'s dicta here. *Compare* BIO 19–20, *with Amici*.Br.6–8 & n.2.

Respondent also has no coherent way to square its position with this Court's considered dicta in *Cassirer*. BIO 20–21. Respondent recognizes that *Cassirer*'s dicta observed that, under *Erie*, state choice-of-law rules would likely apply in FSIA cases even absent the FSIA's clear text because of "the 'scant justification for federal common lawmaking in this context.'" BIO 20 (quoting *Cassirer*, 142 S. Ct. at 1501). Respondent does not grapple with the fact that there was "scant justification" for a federal rule in *Cassirer* because non-immune foreign sovereigns are "subject to standard-fare legal claims involving property, contract, or the like" under state law. *Cassirer*, 142 S. Ct. at 1509. Those "standard-fare" state-law claims and issues are precisely the kind that regularly arise in bankruptcy proceedings. Pet.15–16.

Relatedly, while *amici* Professors suggest that this Court may wish to GVR in light of the *Cassirer* dicta, *Amici*.Br.3, 10, Petitioner respectfully submits that this is not a viable option. This Court will only enter a GVR order where intervening or recent developments provide, as relevant here, "a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration." *Lawrence v. Chater*, 516 U.S. 163, 167–168 (1996) (per curiam). This Court's considered dicta in *Cassirer* does not satisfy that standard because, under controlling

Ninth Circuit precedent, the Ninth Circuit will not overturn its decisions based on dicta from this Court: "[w]here the two are at odds . . . we are bound to follow our own binding precedent rather than Supreme Court dicta." *Martinez v. City of Oxnard*, 270 F.3d 852, 857 n.3 (9th Cir. 2001), *rev'd sub nom. on other grounds Chavez v. Martinez*, 538 U.S. 760 (2003); *accord Newdow v. Rio Linda Union Sch. Dist.*, 597 F.3d 1007, 1106 (9th Cir. 2010). Thus, if this Court concludes that the *Cassirer* dicta resolves the Question Presented in Petitioner's favor—including by putting to rest the question of whether *Butner*'s dicta repudiated the *Vanston* dicta—Petitioner respectfully asks that this Court enter an order summarily reversing the Ninth Circuit and holding that *In re Lindsay* was wrongly decided.

## CONCLUSION

This Court should grant the Petition.

Respectfully submitted,

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