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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether a federal court exercising bankruptcy jurisdiction should apply a federal choice-of-law rule or the forum State's choice-of-law rules to determine whether a creditor's state-law claim is "secured by a lien on property" within the meaning of 11 U.S.C. 506(a)(1).

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INTEREST OF THE UNITED STATES

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the case is moot and the petition for a writ of certiorari should be denied.

STATEMENT

1. Respondent, a law firm, represented petitioner in litigation in Arkansas federal court, which resulted in a favorable judgment for petitioner that required the defendant to pay damages and more than $2.6 million in attorney's fees and sanctions. Pet. App. 7a. On the ground that petitioner had not paid for legal services that respondent had provided, respondent asserted an attorney's lien for the unpaid portion of its bill by sending written notice by certified mail to the defendant in the Arkansas litigation. *Id.* at 5a, 7a, 28a; see

Ark. Code Ann. § 16-22-304 (West 2022); *Metropolitan Life Insurance Co.* v. *Roberts*, 411 S.W.2d 299, 300 (Ark. 1967). Shortly thereafter, petitioner filed for Chapter 11 bankruptcy protection in the Southern District of California. See Pet. App. 7a. Respondent filed a proof of claim for more than $1.6 million in allegedly unpaid attorney's fees related to the Arkansas litigation. *Ibid.* The disputed proceeds from that litigation were placed into a segregated account. *Id.* at 29a.

The Bankruptcy Code generally grants preferential treatment to claims "secured by a lien on property in which the estate has an interest." 11 U.S.C. 506(a)(1). Respondent asserted that its claim was secured because respondent had a valid lien under Arkansas law. Petitioner asserted that the lien was invalid—and the claim was therefore unsecured—under California law, which provides that an attorney's lien generally may be created only by contract. See *Fletcher* v. *Davis*, 90 P.3d 1216, 1219 (Cal. 2004). Petitioner filed an adversary action against respondent to avoid respondent's lien under Section 544(a)(1) of the Bankruptcy Code, which permits a debtor in possession to avoid liens that are not valid and perfected "as of the commencement of the [bankruptcy] case," 11 U.S.C. 544(a)(1). See Pet. App. 7a.

2. a. The bankruptcy court held that respondent's claim was unsecured. Pet. App. 17a-33a. The court explained that if Arkansas law applied, respondent's lien would be valid and the claim would be secured; but if California law applied, the lien would be invalid and the claim unsecured. *Id.* at 22a. The court observed that under Ninth Circuit precedent, federal choice-of-law principles, as reflected in the Restatement (Second) of Conflict of Laws (1971), applied to the dispute. Pet.

App. 21a; see *In re Vortex Fishing Systems, Inc.*, 277 F.3d 1057, 1069 (9th Cir. 2002). Applying those principles, the court found that California law applied and, as a result, that "no lien for attorney's fees was created." Pet. App. 25a.

b. The district court reversed. Pet. App. 6a-16a. Although it also applied the factors set forth in the Second Restatement, the court held that, under those factors, Arkansas law applied to the parties' dispute, *id.* at 9a-14a, and that respondent's lien was valid, *id.* at 14a-16a.

c. The court of appeals affirmed. Pet. App. 1a-5a. On appeal, petitioner asserted that under California choice-of-law rules, California law would apply to the dispute. See Pet. C.A. Br. 32-43. The court explained, however, that it was bound by circuit precedent holding that "federal choice-of-law rules determine which state's substantive law applies" to a dispute arising in bankruptcy. Pet. App. 2a (citing *In re Lindsay*, 59 F.3d 942 (9th Cir. 1995), cert. denied, 516 U.S. 1074 (1996)). Applying the factors set forth in the Second Restatement, the court agreed with the district court that Arkansas law applied, *id.* at 3a-4a, and that respondent had a valid lien under Arkansas law, *id.* at 5a.

3. Meanwhile, in the bankruptcy proceedings, petitioner contested the amount of respondent's claim and also asserted claims of professional negligence and breach of fiduciary duty. The bankruptcy court lifted the automatic stay to permit the parties to arbitrate those claims. See 18-bk-7363 Bankr. Ct. Doc. 258, at 2 (Mar. 24, 2020).

On November 23, 2022—after this Court had invited the Solicitor General to express the views of the United States—petitioner filed an ex parte application in the

bankruptcy court to terminate the segregated account holding the disputed funds from the Arkansas litigation. See 18-bk-7363 Bankr. Ct. Doc. 587 (Nov. 23, 2022) (Ex Parte Appl.). As relevant here, petitioner explained that the arbitral panel had issued an award denying petitioner's claims of professional negligence and breach of fiduciary duty, denying respondent's claim for attorney's fees, and awarding respondent $26,127.06 for certain out-of-pocket costs. *Id.* at 3.

Petitioner informed the bankruptcy court and trustee that it had "paid the amount requested of $26,127.06 utilizing funds from outside the Segregated Account," and that respondent had agreed "to waive any interest on its awarded claim of $26,127.06." Ex Parte Appl. 4-5. In this Court, respondent has explained that it waived the interest "in light of the small amount of the award," and that after receiving the $26,127.06 payment from petitioner, respondent "released the lien it had asserted." Resp. Supp. Br. 4-5; see 18-bk-7363 Bankr. Ct. Doc. 589, at 2-3 (Nov. 29, 2022). Petitioner thus stated in the bankruptcy court that "[respondent's] claim is fully retired." Ex Parte Appl. 5. The court granted petitioner's application to close the segregated account, 18-bk-7363 Bankr. Ct. Doc. 588 (Nov. 29, 2022), and, having previously confirmed a reorganization plan, 18-bk-7363 Bankr. Ct. Doc. 460 (Dec. 15, 2020), the court granted petitioner's subsequent motion to close the Chapter 11 case, 18-bk-7363 Bankr. Ct. Doc. 600 (Jan. 11, 2023).

DISCUSSION

Whether respondent's claim for attorney's fees stemming from a previous lawsuit was secured by a valid lien no longer matters because petitioner has fully satisfied that claim and respondent has released the

lien. This case is therefore moot, and this Court's review of the question presented is unwarranted. Petitioner suggests (Pet. Supp. Br. 3-4) that the Court should recognize a new exception to mootness in circumstances like the ones present here, and on that basis should grant review to address the question presented on the merits. But no court has ever addressed petitioner's proposal for a new mootness exception, and this Court should not do so in the first instance. Petitioner alternatively asks (*id.* at 5-7) that the Court summarily vacate the judgment below under *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950). But summary vacatur under *Munsingwear* is appropriate only if the petition would have been granted absent mootness. Here, there are good reasons to think that the decision below would not have warranted further review.

1. This case is moot and thus does not warrant this Court's plenary review. The question presented asks which choice-of-law rules—the forum State's rules or federal rules—should be used to determine the substantive law to be applied to a state-law question in bankruptcy proceedings. The underlying state-law question here is whether respondent held a valid lien on its claim for attorney's fees. But the answer to that state-law question no longer matters because petitioner has paid respondent's claim in full and the lien at issue has been released. Accordingly, determining which State's law would have governed the lien's validity (while the lien existed) is "no longer embedded in any actual controversy about the [parties'] particular legal rights." *Alvarez* v. *Smith*, 558 U.S. 87, 93 (2009). And that is all the more true for the antecedent question about which choice-of-law rules should have been applied to determine which State's law would have governed the lien's

validity. Accordingly, the dispute is "no longer a 'Case' or 'Controversy' for purposes of Article III." *Already, LLC* v. *Nike, Inc.*, 568 U.S. 85, 91 (2013).

Nor does this case fall into any recognized exception to mootness. The dispute is not "'capable of repetition, yet evading review'" because that exception applies only if, among other things, "there is a reasonable expectation that the same complaining party will be subject to the same action again." *Kingdomware Technologies, Inc.* v. *United States*, 579 U.S. 162, 170 (2016) (brackets and citation omitted). There is no reasonable expectation that petitioner and respondent will find themselves in another lien dispute of this type.

This case does not implicate the "voluntary cessation" doctrine, under which "a defendant cannot automatically moot a case simply by ending its unlawful conduct once sued." *Already*, 568 U.S. at 91. As a threshold matter, it is questionable whether respondent can reasonably be described as a "defendant" who was engaged in allegedly "unlawful conduct," *ibid.*; as a creditor asserting a claim in petitioner's bankruptcy proceedings, respondent seems more akin to a plaintiff who decides a claim is no longer worth pursuing. But even if respondent's voluntary decision to waive interest on the $26,127.06 award and release its lien can be analogized to the actions of a defendant that voluntarily ceases its allegedly wrongful behavior, the case would still be moot if "it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Ibid.* (citation omitted). As noted above, it is clear that another lien dispute of this type between the parties could not reasonably be expected to recur.

2. Petitioner appears to recognize (Pet. Supp. Br. 3-5) that the case is moot and that the established excep-

tions to mootness are inapplicable. Petitioner thus proposes that this Court fashion a new exception to mootness based on petitioner's request for costs and attorney's fees in the bankruptcy case. Specifically, the proposed exception would apply in circumstances "where a party unquestionably had standing throughout the case and pleaded a request for costs and attorney's fees," and "the other party seeks to moot the case for the first time before this Court." *Id.* at 3. That would, petitioner contends, prevent a party that thinks it may lose in this Court on the merits from "escap[ing] having to pay costs and attorneys' fees at the latest hour." *Id.* at 5. But as petitioner recognizes, this Court already has held that a claim for costs and attorney's fees is "insufficient to create an Article III case or controversy where none exists on the merits of the underlying claim." *Id.* at 3 (quoting *Lewis* v. *Continental Bank Corp.*, 494 U.S. 472, 480 (1990)). Petitioner provides no sound reason why Article III should countenance a different result simply because the "case is *already* before this Court." *Id.* at 4.

In any event, no court has considered petitioner's new proposal, and this Court should not do so in the first instance. See *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) ("[W]e are a court of review, not of first view."). The Court's "traditional rule * * * precludes a grant of certiorari" on a question not passed upon below, *United States* v. *Williams*, 504 U.S. 36, 41 (1992), and petitioner offers no sound basis for this Court to deviate from that traditional rule here.

3. Petitioner alternatively asks (Pet. Supp. Br. 5-7) that this Court grant the petition for a writ of certiorari and summarily vacate the judgment below under *Munsingwear*, *supra*. Vacatur, however, is unwarranted be-

cause the case would not have merited further review had it not become moot.

a. When mootness arises before this Court can review the underlying judgment, vacatur ensures that no party is "prejudiced by a [lower-court] decision" and "prevent[s] a judgment, unreviewable because of mootness, from spawning any legal consequences." *Munsingwear*, 340 U.S. at 40-41. As this Court has observed, the determination whether to vacate the judgment when a case becomes moot while pending review ultimately "is an equitable one," *U.S. Bancorp Mortgage Co.* v. *Bonner Mall Partnership*, 513 U.S. 18, 29 (1994), requiring the disposition that would be "most consonant to justice" in light of the circumstances, *id.* at 24 (citation omitted). See *Azar* v. *Garza*, 138 S. Ct. 1790, 1792 (2018) (per curiam) (observing that because *Munsingwear* vacatur "is rooted in equity, the decision whether to vacate turns on 'the conditions and circumstances of the particular case'") (citation omitted).

Equitable considerations would not foreclose *Munsingwear* vacatur here. Petitioner correctly observes (Pet. Supp. Br. 6-7) that if respondent had not unilaterally waived its entitlement to interest on the award, the dispute about the lien's validity would have remained live because of the different interest rates applicable to secured (10.0%) and unsecured (2.69%) claims under the reorganization plan. See Fourth Amended Chapter 11 Plan §§ III, IV.A.2(e)(1)-(2), IV.B.1-IV.B.4, at 7, 18, 22. In that sense, the mootness was most directly caused by the "unilateral action of the party who prevailed in the lower court," *U.S. Bancorp*, 513 U.S. at 23, which is a common circumstance that generally triggers the "established practice" of vacatur, *Munsingwear*, 340 U.S. at 39. But that is not to say that respondent acted im-

properly or inequitably. Respondent quite reasonably concluded—after the amount at stake dropped from approximately $1.6 million to just over $26,000—that "it would be unproductive to litigate over the interest" given that "the interest on the award of costs would be minimal whether or not [respondent's] lien is valid." Resp. Supp. Br. 4-5.

Moreover, there are reasons counseling against *Munsingwear* vacatur here. Petitioner's voluntary decision to use its own funds to pay respondent's claim in full in order to close the segregated account (and, ultimately, the Chapter 11 case), and respondent's acceptance of that payment in full satisfaction of its claim, might be viewed as a sort of settlement, and "mootness by reason of settlement does not justify vacatur of a judgment under review," *U.S. Bancorp*, 513 U.S. at 29. In addition, one justification for vacatur is that it "clears the path for future relitigation of the issues between the parties." *Id.* at 22 (quoting *Munsingwear*, 340 U.S. at 40). As explained above, there is no reasonable prospect that the parties will need to relitigate the issue of this (or any other) lien's validity. And given that the court of appeals' decision not only is unpublished but also simply applied decades-old precedent without further analysis, see Pet. App. 2a (citing *In re Lindsay*, 59 F.3d 942 (9th Cir. 1995), cert. denied, 516 U.S. 1074 (1996)), there is no apparent need to vacate the judgment below in order to prevent it "from spawning any legal consequences," *Munsingwear*, 340 U.S. at 41.

Nevertheless, both petitioner's voluntary decision to satisfy respondent's claim in full and respondent's voluntary decision to forgo the interest on that claim were eminently rational responses to the arbitration panel's 98% reduction in the size of respondent's claim against

petitioner. Accordingly, the unusual situation here "more closely resembles mootness through 'happenstance' than through 'settlement.'" *Alvarez*, 558 U.S. at 94; see *id.* at 95-96 (contrasting the mooting events in that case, which resulted from parallel cases proceeding "through a different court system" that "terminated on substantive grounds in the ordinary course," with the circumstances in *U.S. Bancorp*, where the parties "settled their differences in the Bankruptcy Court" such that "the reorganization plan that the Bankruptcy Judge confirmed in the case amounted to a settlement that mooted the case"). Nor have the parties identified any apparent considerations of fairness that would tilt in either direction. On balance, therefore, equitable considerations alone would not foreclose *Munsingwear* vacatur—though they would not compel it either.

b. Nevertheless, vacatur of a lower court's decision because of intervening mootness is generally available only to "those who have been prevented from obtaining the review to which they are entitled." *Camreta* v. *Greene*, 563 U.S. 692, 712 (2011) (quoting *Munsingwear*, 340 U.S. at 39). It has therefore been the longstanding position of the United States that when a case becomes moot after the court of appeals enters its judgment, but before this Court acts on the petition for a writ of certiorari, *Munsingwear* vacatur is appropriate only if the question presented would have merited this Court's review but for the mootness. See, *e.g.*, U.S. Br. in Opp. at 5-8, *Velsicol Chemical Corp.* v. *United States*, cert. denied, 435 U.S. 942 (1978) (No. 77-900); Gov't Pet. for Cert. at 16-17, *Yellen* v. *United States House of Representatives*, 142 S. Ct. 332 (2021) (No. 20-1738); see also Stephen M. Shapiro et al., *Supreme Court Practice* § 19-28 & n.34 (11th ed. 2019) (listing cases).

It is doubtful that the question presented in the petition would have warranted further review were it not moot. The Court denied review of a materially similar question in *Sterba* v. *PNC Bank*, 138 S. Ct. 2672 (2018) (No. 17-423). That case involved a dispute about whether a state-law claim was "unenforceable against the debtor and property of the debtor, under any agreement or applicable law." 11 U.S.C. 502(b)(1). The government explained that whether a claim is "unenforceable" within the meaning of Section 502(b)(1) is a federal question that in turn depends on "whether the claim could be enforced under the laws of *any* State * * * in which the claim might have been asserted outside of bankruptcy in a suit brought by the creditor." U.S. Amicus Br. at 8, *Sterba*, *supra* (No. 17-423). That approach, the government explained, "ensures that a state-law claim that could be brought and heard outside of bankruptcy does not become unenforceable 'merely by reason of the happenstance of bankruptcy,' or the debtor's decision to file his bankruptcy petition in a particular State." *Id.* at 9 (citation omitted).

This case involves the question whether respondent's state-law claim was "secured by a lien on property in which the estate has an interest." 11 U.S.C. 506(a)(1); see 11 U.S.C. 544(a)(1) (permitting a debtor in possession to avoid any lien that is not perfected at the time the bankruptcy case commences). Whether a claim is "secured by a lien" within the meaning of Section 506(a)(1) likewise is a federal question that in turn depends on whether the lien would have been held valid in any State in which the lien might have been sought to be enforced outside of bankruptcy in a suit brought by the creditor. Here, respondent could have attempted to enforce its lien on the proceeds of the Arkansas judg-

ment in Arkansas itself, cf. *Ford Motor Co.* v. *Montana Eighth Judicial District Court*, 141 S. Ct. 1017, 1026 (2021), and Arkansas courts likely would have applied Arkansas law, especially given that Arkansas's choice-of-law rules (like the Ninth Circuit's federal choice-of-law rules) generally consider which State has the more "significant relationship," see *Hoosier* v. *Interinsurance Exchange*, 451 S.W. 3d 206, 209 (Ark. 2014); *Lane* v. *Celadon Trucking, Inc.*, 543 F.3d 1005, 1007-1011 (8th Cir. 2008) (applying Arkansas law). Accordingly, the court of appeals' determination that the lien was valid in Arkansas—and therefore that respondent's claim was "secured by a lien" within the meaning of the Bankruptcy Code, 11 U.S.C. 506(a)(1), and that the lien was perfected by the time the bankruptcy case was commenced, see 11 U.S.C. 544(a)(1)—was likely correct.

In addition, the choice-of-law question is rarely, if ever, outcome-determinative. See U.S. Amicus Br. at 17, *Sterba*, *supra* (No. 17-423). Although petitioner asserts (Pet. 21) that "California's choice-of-law rules clearly require the bankruptcy court to apply California law" in this case, none of the courts below actually addressed that issue, and the assertion is highly contestable, see Br. in Opp. 14-17. Furthermore, petitioner acknowledges (Pet. 22) that it relies on "the same circuit split" that the petitioner in *Sterba* identified. Accordingly, the Court's reasons for denying the petition in *Sterba* should apply with equal force here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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