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

SUPPLEMENTAL BRIEF OF PETITIONER RESPONDING TO THE SOLICITOR GENERAL'S BRIEF

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I. The Solicitor General Does Not Dispel The Need For This Court To Resolve The Question Presented

The Petition presents a longstanding, widely acknowledged, and entrenched circuit split over whether federal choice-of-law rules or forum state choice-of-law rules apply when bankruptcy courts adjudicate state-law claims or issues. Pet.10–13. The Ninth Circuit's position—that federal choice-of-law rules always apply—violates this Court's *Erie* doctrine, which doctrine requires federal courts to apply state-law choice-of-law rules when adjudicating state-law claims, no matter the source of federal-court jurisdiction to decide those claims. Pet.13–19. Further, this case is the ideal vehicle for resolving the Question Presented, including because the Petition raises the same circuit split at issue in *Sterba v. PNC Bank*, No.17-423, *cert. denied* 138 S. Ct. 2672 (2018) (mem.), where this Court also called for the views of the Solicitor General, yet suffers from none of the vehicle problems in *Sterba*, Pet.19–26.

The Solicitor General concedes that the Petition presents a well-entrenched circuit split, but appears to suggest that this Court should condone different circuits applying different choice-of-law rules in perpetuity because, in the Solicitor General's view, "the choice-of-law question is rarely, if ever, outcome determinative." SG Br.12. But different choice-of-law rules often require the application of different substantive law, as this Court has repeatedly

recognized, and state substantive law differs in a variety of outcome-determinative ways. Reply Br.3–4 (citing *Cassirer v. Thyssen-Bornemisza Collection Found.*, 142 S. Ct. 1502, 1509 (2022); *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496–97 (1941)). In any event, as Petitioner explained when responding to this same exact argument from Respondent, Reply Br.2–4, the respondent in *Cassirer* made precisely the same point in its brief in opposition, and this Court necessarily and correctly rejected that meritless position in granting the petition for certiorari, Brief in Opposition 12–23, *Cassirer v. Thyssen Bornemisza Collection Found.*, No.20-1566, 2021 WL 3371316 (U.S. July 29, 2021). The Solicitor General does not even attempt to argue here that choice-of-law rules are more often outcome determinative in Foreign Sovereign Immunities Act cases, like *Cassirer*, than in bankruptcy cases, like the case here. *See generally* SG Br.12.

Relatedly, the Solicitor General argues that, since Petitioner "relies on 'the same circuit split'" at issue in *Sterba*, "the Court's reasons for denying the petition in *Sterba* should apply with equal force here." SG Br.12 (quoting Pet.22). But as Petitioner explained, the *Sterba* petition suffered from numerous vehicle problems, such as the failure to challenge squarely the lower courts' application of federal choice-of-law rules until the petition-for-certiorari stage. Pet.23–25. The Solicitor General and the *Sterba* respondent, for their parts, focused largely on those vehicle problems with the *Sterba*

petition in arguing that this Court should not grant review in that case. Pet.23–25; Reply Br.5. Although this Court did not disclose its reasons for denying review in *Sterba*, *see* 138 S. Ct. 2672, as is its custom, the fact that it again called for the views of the Solicitor General once the Petition here raised the same circuit split suggests that the *Sterba* petition's vehicle problems were the driving reason that this Court denied review. And unlike the *Sterba* petition, the Petition in this case does not even arguably suffer from such vehicle problems, which is why—unlike in *Sterba*—the Solicitor General's Brief here does not raise any of those vehicle arguments, so "the Court's reasons for denying the petition in *Sterba*" simply do not apply. *Contra* SG Br.12.

Finally, as to the merits of the acknowledged circuit split, the Solicitor General's position that the Ninth Circuit's decision below is "likely correct," SG Br.12, cannot be squared with the Solicitor General's position on the application of the *Erie* doctrine to federal-question-jurisdiction cases in *Cassirer* just last Term—a point that Petitioner raised repeatedly, Pet.24 n.3, Reply Br.11, but which the Solicitor General simply ignores. While the Solicitor General makes a frankly bewildering (to put it generously) assertion as to how 11 U.S.C. § 506(a)(1), in particular, interacts with the circuit split, no party raised this argument before the Ninth Circuit, SG Br.11–12, and thus it is waived, *see Zivotofsky v. Kerry*, 576 U.S. 1, 9 (2015); *Sprietsma v. Mercury Marine*, 537 U.S. 51, 56 n.4 (2002). To the extent the

Solicitor General's opaque, waived argument turns on an unstated claim that Section 506(a)(1) creates some sort of federal-law-based property right in bankruptcy, that is obviously wrong because "Congress has generally left the determination of property rights in the assets of a bankrupt's estate to state law," not federal law. *Butner v. United States*, 440 U.S. 48, 54 (1979); *accord* Pet.15–16. That is doubtless why not even Respondent raised this argument at any point in this case, including before the Ninth Circuit or in its Brief in Opposition.

II. This Court Should Decide The Question Presented In This Case, Notwithstanding Respondent's Eleventh-Hour Attempt To Moot This Case To Avoid Paying Petitioner's Costs And Attorney's Fees

A. As Petitioner explained, Pet'r Supp'l Br.1–5, Respondent's conduct here is part of a troubling trend of litigants attempting to moot long-running cases on the eve of this Court's review, knowing that they would otherwise lose before this Court—a practice that "manipulate[s]" this Court's "docket" in a manner that "should not be countenanced," *N.Y. State Rifle & Pistol Ass'n, Inc. v. City of New York*, 140 S. Ct. 1525, 1527 (2020) (Alito, J., dissenting). Having saddled Petitioner with unjustifiably high attorney's fees in the underlying litigation with Walmart, Respondent then compelled Petitioner to incur still more expense litigating this choice-of-law dispute over Respondent's asserted lien for those fees, only to

attempt to moot this case just before this Court's review by waiving any interest on its proof of claim. That eleventh-hour maneuver, if successful, would frustrate this Court's review of the Question Presented and would allow Respondent to avoid any question regarding Petitioner's pending request for costs and attorney's fees for having to litigate this case—when Petitioner was correct on the law the entire time. This Court should not countenance Respondent's strategic manufacturing of mootness. *See id.* (Alito, J., dissenting); *see also Knox v. Serv. Emps. Int'l Union, Loc. 1000*, 567 U.S. 298, 307 (2012); *City of Erie v. Pap's A.M.*, 529 U.S. 277, 288 (2000). Rather, it should hold that, where a party had standing throughout the case and pleaded a request for costs and attorney's fees, that unsatisfied demand for costs and attorney's fees is sufficient to satisfy Article III standing in the face of the other party's attempt to moot the case for the first time before this Court. And this Court has the power under Article III to recognize such an exception to mootness here, for the same reasons (and more) supporting this Court's capable-of-repetition-yet-evading-review exception to mootness. *See Honig v. Doe*, 484 U.S. 305, 331 (1988) (Rehnquist, C.J., concurring).

B. The Solicitor General argues that this Court should not recognize an exception to mootness under the circumstances here, SG Br.5–7, but her reasoning is unpersuasive.

To begin, the Solicitor General claims that this dispute no longer presents an Article III controversy, SG Br.5–6, and does not fall within the "established exceptions to mootness," SG Br.6–7, but she does *not* dispute that this Court has the Article III authority to recognize an exception to mootness under the circumstances here, *see generally* SG Br.5–7. That is understandable since, as Chief Justice Rehnquist explained, while "mootness . . . may be *connected to* . . . Art. III, it is an attenuated connection that may be overridden where there are strong reasons to override it." *Honig*, 484 U.S. at 331 (Rehnquist, C.J., concurring); *accord* Matthew I. Hall, *The Partially Prudential Doctrine of Mootness*, 77 Geo. Wash. L. Rev. 562, 596, 614–15 (2009).

Here, there are at least two "strong reasons," *Honig*, 484 U.S. at 331 (Rehnquist, C.J., concurring), for this Court to recognize an exception to mootness, both grounded in the Court's longstanding exception to mootness for cases capable of repetition, yet evading review, Pet'r Supp'l Br. 4–5. First, a party mooting a case on the eve of this Court's review impermissibly manipulates this Court's docket, *N.Y. State Rifle & Pistol Ass'n*, 140 S. Ct. at 1527 (Alito, J., dissenting), thereby undermining the Court's ability to address important issues that are fit for its resolution, *see FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 463–64 (2007). Second, such strategic behavior allows a party to avoid paying costs and attorney's fees to the soon-to-be-prevailing party, just as those costs and fees have reached their highest cumulative

amount. *See* Hall, *supra*, at 596, 614–15. While the Solicitor General claims that Petitioner provided "no sound basis" for this Court to recognize an exception to mootness under the circumstances here, SG Br. 7, she does not attempt to rebut the two "strong reasons," *Honig*, 484 U.S. at 331 (Rehnquist, C.J., concurring), that Petitioner supplied.

Finally, the Solicitor General argues that this Court should not consider whether to recognize this exception to mootness "in the first instance." SG Br.5. But the exception to mootness that Petitioner proposes protects only this Court's "docket," *N.Y. State Rifle & Pistol Ass'n*, 140 S. Ct. at 1527 (Alito, J., dissenting), thus there would be no opportunity for the lower federal courts to opine on this exception.

III. Alternatively, *Munsingwear* Vacatur Of The Decision Below Is Appropriate

If this Court decides that it cannot address the Question Presented in the Petition due to Respondent's manufactured mootness, it should then grant the Petition and summarily vacate the Ninth Circuit's decision below under *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950), as Petitioner explained, Pet'r Supp'l Br.5–7. This Court's "established practice" is "to reverse or vacate the judgment below and remand with a direction to dismiss" when "a civil case from a court in the federal system [ ] has become moot while on its way" to this Court. *U.S. Bancorp Mortg. Co. v. Bonner Mall*

P'ship, 513 U.S. 18, 22–23 (1994) (quoting *Munsingwear*, 340 U.S. at 39). This Court should follow its established practice here, since Respondent attempted to moot this case through its own "unilateral action" after it "prevailed in the lower court[s]," *Arizonans for Off. Eng. v. Arizona*, 520 U.S. 43, 71–72 (1997) (citation omitted), by waiving its right to any interest on its proof of claim for attorney's fees. And while Respondent claimed that it was Petitioner's acts of paying the arbitration award and moving to close the segregation account holding those attorney's fees that mooted this case, that is demonstrably incorrect, since Petitioner took those actions while reserving its right to recover any excess payment of interest to Respondent if Petitioner prevailed before this Court. Pet'r Supp'l Br.6–7.

The Solicitor General's arguments for this Court to depart from its "established practice," *U.S. Bancorp*, 513 U.S. at 22–23, of vacatur in these circumstances are incorrect. While the Solicitor General states that the decision to vacate a lower-court decision when mootness arises is "an equitable one," SG Br.8 (quoting *U.S. Bancorp*, 513 U.S. at 29), and concludes that the equities are in equipoise, SG Br.8–10, her balancing of the equities is faulty. Despite correctly recognizing that Respondent "unilaterally waived its entitlement to interest" to moot this case on the eve of this Court's review, the Solicitor General nevertheless concludes that Respondent did not "act[ ] improperly or inequitably." SG Br. 8–9. That ignores the fact that Respondent

took that unilateral action only after it became clear that it would lose before this Court, in a manipulation of this Court's docket and, in part, to avoid the question of paying Petitioner's costs or attorney's fees for having to litigate this case to begin with. Pet'r Supp'l Br.1–2. The Solicitor General's speculation—that Petitioner's "voluntary decision" to pay Respondent's claim after the arbitration award and to close the segregated account "might be viewed as a sort of settlement" that does not justify vacatur—likewise misses the full story. SG Br.9. Petitioner took those actions while expressly reserving its rights to pursue its claims before this Court. Pet'r Supp'l Br.6–7. So, contrary to the Solicitor General's apparently Solomonic efforts, all "considerations of fairness" tilt entirely in the "direction" of Petitioner here, and thus in favor of vacatur. SG Br.10. And while the Solicitor General tries to break the tie that she imagines to exist based upon her view that "[i]t is doubtful that the question presented in the petition would have warranted further review were it not moot," SG Br.11, that is wrong, as explained above, *see supra* Part I.

CONCLUSION

This Court should grant the Petition. If, however, the Court concludes that it must dismiss this case as moot, it should grant the Petition and summarily vacate the decision below.

Respectfully submitted,

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