No. 23-785

IN THE
Supreme Court of the United States

PHH MORTGAGE CORPORATION,

Petitioner,

v.

MARK ANTHONY GUTHRIE,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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RULE 29.6 STATEMENT

The disclosure statement included in the petition for a writ of certiorari remains accurate.

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INTRODUCTION

The Fourth Circuit's holding directly conflicts with the decisions of three other courts of appeals. Those circuits confronted the same question taken up by the court below: "does the Bankruptcy Code preempt state law causes of action for a creditor's improper collection efforts related to debt that has been discharged in bankruptcy?" Pet.App.3a. They answered "yes." The Fourth Circuit answered "no." The circuits are plainly divided. Guthrie resists that conclusion, but the factual distinctions he floats are irrelevant to the preemption analysis.

Moreover, the reasoning of several other circuits in related contexts (the Second, Fifth, Ninth, and Eleventh) is irreconcilable with the Fourth Circuit's holding: they emphasize that the contempt remedy is exclusive and can only be sought in the court that issued the order allegedly violated. Guthrie does not attempt to square the decision below with those cases. He ignores three of those four circuits, and he concedes that the Second Circuit has correctly held that the Bankruptcy Code impliedly preempts state remedies in a closely related context without explaining how it could therefore not find preemption here.

Nor does Guthrie explain how the decision below is consistent with this Court's precedents. This Court's most pertinent cases about the discharge injunction, *Taggart v. Lorenzen*, 139 S. Ct. 1795 (2019), and bankruptcy preemption, *International Shoe Co. v. Pinkus*, 278 U.S. 261 (1929), go unmentioned in his brief. And he offers no defense of outsourcing the enforcement of a *federal* court's injunction to a different court applying *state* law.

Instead, Guthrie forthrightly argues that state-law remedies would give him what the federal remedy will not: a jury trial and generous statutory damages without the hurdle of satisfying *Taggart*'s "objectively unreasonable" standard. That divergence from Congress's chosen remedy is exactly why Guthrie's state-law claims conflict with the Bankruptcy Code. And as nine *amici curiae* have detailed, the Fourth Circuit's decision to allow those claims has already disrupted national uniformity.

This Court should grant review and resolve this important circuit conflict.

ARGUMENT

I. The circuit conflict is undeniable and warrants this Court's review.

Guthrie fails to distinguish the decisions of seven other circuits that conflict with the decision below. He ignores several circuits entirely, and the factual distinctions he does offer do not suggest that he could prevail in any of those circuits.

A. The decision below creates a direct conflict with three circuits.

Decisions from the Seventh, Sixth, and First Circuits have squarely addressed the question presented and given the opposite answer as the court below. *See* Pet. 14-19 (discussing *Cox v. Zale Del., Inc.*, 239 F.3d 910 (7th Cir. 2001); *Pertuso v. Ford Motor Credit Co.*, 233 F.3d 417 (6th Cir. 2000); and *Bessette v. Avco Fin. Servs., Inc.*, 230 F.3d 439 (1st Cir. 2000)). That is a textbook circuit conflict, and Guthrie offers only superficial factual distinctions.

1. Guthrie's principal ground for distinguishing *Cox*, *Pertuso*, and *Bessette* is that those cases involved "reaffirmation agreements." BIO 7. But Guthrie does not say why this distinction matters to preemption, and it does not. In those cases, the state-law claims were premised on violations of the discharge injunction, and they were preempted because of the bankruptcy court's exclusive authority to remedy such violations.

The Bankruptcy Code has a separate provision permitting a debtor and creditor to agree to reaffirm certain debts before the discharge order issues. *See* 11 U.S.C. § 524(c). Properly reaffirmed debt is not covered by the discharge injunction. But in *Cox*, *Pertuso*, and *Bessette* the reaffirmation agreements were invalid.[1] So, the debtors argued, the debts were discharged and attempting to collect them violated the discharge injunction.[2] Whether the alleged violations happened to arise through invalid reaffirmation agreements or in some other manner has no bearing on the preemption question.

Those cases therefore addressed the question whether state-law claims premised on an alleged violation of the injunction were preempted. They all held

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[1] *See Cox*, 239 F.3d at 912 ("the reaffirmation agreement was never filed, and was therefore invalid"); *Pertuso*, 233 F.3d at 424 (similar); *Bessette*, 230 F.3d at 444 (similar).

[2] *See Cox*, 239 F.3d at 913 (invalid reaffirmation agreement led to "violating the order of discharge by trying to collect a discharged debt"); *Bessette*, 230 F.3d at 445 (invalid agreement led to violation of "the discharge injunction" enforced through contempt); *Pertuso*, 233 F.3d at 421 (proper remedy for violating the "injunction lies in contempt proceedings, not in a lawsuit such as this one").

that "state law claims [that] presuppose a violation of the Bankruptcy Code" are preempted. *Pertuso*, 233 F.3d at 426; *Bessette*, 230 F.3d at 447 ("the broad enforcement power under the Bankruptcy Code preempts virtually all alternative mechanisms for remedying violations of the Code"); *Cox*, 239 F.3d at 913, 916-917 ("[A]ffirmative relief can be sought only in the bankruptcy court that issued the discharge.").

2. Guthrie next suggests that *Cox*, *Pertuso*, and *Bessette* are distinguishable because they did not involve "state law consumer protection claims." BIO 7. As an initial matter, that does not distinguish Guthrie's common-law claims for intentional and negligent infliction of emotional distress (*see* Pet.App.7a).

More fundamentally, Guthrie does not explain why this distinction matters. Neither court below saw any reason to treat the statutory claim differently than the common-law ones. Nor has any other circuit indicated that state consumer-protection statutes might escape preemption. Those state-law claims were preempted because of their substance—remedying a violation of the discharge injunction—not their label.

Lower courts applying these precedents have categorically rejected attempts to distinguish consumer-protection statutes. *See, e.g.*, *In re Bassett*, 255 B.R. 747, 758-759 (9th Cir. BAP 2000) (Washington Consumer Protection Act), *aff'd in part and rev'd in part*, 285 F.3d 882 (9th Cir. 2002); *McCruter v. Advantage Imaging of Lake Cnty., L.L.C.*, 168 N.E.3d 53, 56 (Ohio Ct. App. 2021) (rejecting argument that consumer-protection claims are not governed by *Pertuso* as "a distinction without a difference"); *Twomey v. Ocwen Loan Servicing, LLC*, 2016 WL 4429895, at *2 (N.D.

Ill. Aug. 22, 2016) (Illinois Consumer Fraud and Deceptive Practices Act); *Helman v. Bank of Am.*, 2013 WL 12203977, at *3 (S.D. Fla. Aug. 7, 2013) (Florida Consumer Collection Practices Act); *In re Cultrera*, 360 B.R. 28, 32 (Bankr. D. Conn. 2007) (Connecticut Unfair Trade Practices Act). Guthrie does not address these cases, nor does he cite any authority for his contrary view.

3. Guthrie's other attempts at minimizing the split fare no better.

Seventh Circuit: Guthrie incorrectly asserts that "in *Cox* no claims were raised by the debtor for the creditor attempting to collect debts post-bankruptcy that were not owed." BIO 7. But *Cox* did involve a state-law claim "for violating the order of discharge by trying to collect a discharged debt." 239 F.3d at 913; *see also Cox v. Zale Del., Inc.*, 242 B.R. 444, 446 (N.D. Ill. 1999). *Cox* directly conflicts with the decision below.[3]

Sixth and First Circuits: Guthrie does not defend the Fourth Circuit's misreading of *Pertuso* as confined to the automatic stay provision. *See* Pet. 16. Thus, both cases concededly answered the same question presented here. Instead, he claims that both "*Pertuso* and *Bessette* address field preemption." BIO 6. But as noted in the petition (at 16), the Sixth Circuit has

[3] Guthrie argues that "[m]ore on point is *Randolph v. IMBS, Inc.*, 368 F.3d 726 (7th Cir. 2004)." BIO 7. But *Randolph* addressed the interaction of two *federal* statutes, and expressly distinguished *Cox* for that reason. *See* Pet. 21 n.9; 368 F.3d at 730 ("Preemption is more readily inferred [than implied repeal], so decisions such as *Cox v. Zale*—which held that bankruptcy principles come from federal rather than state law—are not informative about which federal laws apply to what transactions.").

explained that "*Pertuso* primarily rested upon a conflict, and not field, preemption analysis." *In re Schafer*, 689 F.3d 601, 614 (6th Cir. 2012). And as explained below, Guthrie's attempt to separate field from conflict preemption ignores the role of uniformity in the bankruptcy context. *See* pp. 10-11, *infra*.

B. The decision below is irreconcilable with the precedents of several other circuits.

The decisions of several other circuits run counter to the Fourth Circuit's preemption analysis. Pet. 19-23. Guthrie has little to say about these cases, and what he does say hurts his cause.

1. Guthrie does not mention or distinguish the key Ninth Circuit case, *MSR Exploration, Ltd. v. Meridian Oil, Inc.*, 74 F.3d 910 (9th Cir. 1996), or the directly on-point Bankruptcy Appellate Panel decision applying *MSR*'s reasoning to state-law claims for violating the discharge injunction, *Bassett*, 255 B.R. at 758-759. *See* Pet. 19-22. Nor does Guthrie try to reconcile the decision below with the cases from the Second, Fifth, and Eleventh Circuits holding that *only* the bankruptcy court that issued the discharge injunction may enforce it through civil contempt proceedings. *See* Pet. 23-24.

Instead, Guthrie addresses only *Walls v. Wells Fargo Bank, N.A.*, 276 F.3d 502 (9th Cir. 2002), which he distinguishes as holding that the Bankruptcy Code displaced a non-bankruptcy *federal* claim premised on violating the discharge injunction. BIO 12. That distinction cuts against Guthrie, however, because displacing a federal statute is a heavier lift than preempting state law. *See* Pet. 21 & n.9. Even Guthrie appears to recognize that problem, because he

ultimately resorts to disagreeing with *Walls* as "misguided." BIO 13.

2. The Second Circuit has held that the "Bankruptcy Code preempts any state law claims for a violation of the automatic stay." *E. Equip. & Servs. Corp. v. Factory Point Nat'l Bank, Bennington*, 236 F.3d 117, 121 (2d Cir. 2001) (per curiam). Guthrie "does not dispute" that holding. BIO 13. But having conceded that implied preemption applies in that closely related context, he does not explain why the Code would not also preempt state-law claims for violating the discharge injunction. Judge Wynn's dissent below made the same observation. Pet.App.37. The majority gave no substantive reply. *See id.* at 10a-11a n.9.

Guthrie notes that the Bankruptcy Code provides a federal damages remedy for violating the automatic stay. BIO 13; *see* 11 U.S.C. § 362(k). But the Code also provides a federal remedy for violating the discharge injunction: civil contempt, which may include "compensat[ing] the complainant for losses." *Taggart*, 139 S. Ct. at 1801 (citation omitted). And the conscious choice of contempt as the remedy, *see* Pet. 5-6, accentuates the conflict with state-law claims tried to a jury. Pet. 28-30. That sharpens the case for preemption.

C. This split on a frequently-recurring question requires prompt resolution.

As several *amici* have noted, whether a particular debt has been discharged "often involves a complex legal question on which reasonable minds may differ." MBA Amicus Br. 9-11. Thus, despite Guthrie's insistence (BIO 10), the question presented recurs

frequently. *See* pp. 4-5, *supra*; Pet.App.56a-57a; Pet. 34 (collecting cases).

By allowing debtors to bypass the federal standard and pursue even strict liability under state law, the Fourth Circuit decision will have a "chilling effect" on creditors, "create national disuniformity," and affect the cost of credit. MBA Amicus Br. 16, 18; ACA Int'l Amicus Br. 12-13. It is also an invitation to forum-shop and to file nationwide class actions. Pet. 32-33. The majority of circuits (including the Nation's financial centers) have provided their views, and this Court should resolve the conflict without delay.

II. Guthrie cannot defend the Fourth Circuit's decision.

Guthrie glosses over the petition's central arguments—echoed by *amici curiae* and the dissent below—that the Fourth Circuit's decision is inconsistent with this Court's precedents.

Crucially, Guthrie acknowledges that his state-law claims *are* premised on violation of the bankruptcy court's discharge order. BIO 16. But he does not even mention the standard for assessing alleged violations of the discharge injunction, set by this Court in *Taggart*, which conflicts directly with many state-law standards. *See* MBA Amicus Br. 9; DRI Center Amicus Br. 2. He certainly does not dispute that he wants the jury to follow a standard that conflicts with *Taggart*'s. Nor does he address *International Shoe*, a key precedent on the preemption of state laws that "conflict" with"[t]he national purpose to establish uniformity" in bankruptcy. 278 U.S. at 265; *see* Pet. 17-18, 25-26; p. 11, *infra*.

Guthrie also ignores this Court's rule that the court issuing an injunction is "solely responsible for identifying, prosecuting, adjudicating, and sanctioning" violations of that injunction. *Int'l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 831 (1994). And, in all events, punishing violations of a federal injunction is a matter of federal, not state, law. *See In re Loney*, 134 U.S. 372, 375 (1890); Pet. 26.

Rather than confront this law, Guthrie makes a series of errors. He argues that the presence of an express preemption provision elsewhere in the Bankruptcy Code (11 U.S.C. § 544(b)(2)) negates implied preemption here. BIO 10-11. But this Court has held the opposite: Neither an express preemption provision, nor even a savings clause, alters the "ordinary pre-emption principles" that determine implied preemption. *Geier v. American Honda Motor Co.*, *Inc.*, 529 U.S. 861, 870-874 (2000). Indeed, Guthrie's argument contradicts his own concession that the automatic-stay provision impliedly preempts state-law remedies. BIO 13.

Guthrie also argues for an assumption against preemption. BIO 10. But this Court has made clear that "an 'assumption' of nonpre-emption is not triggered when the State regulates in an area where there has been a history of significant federal presence." *United States v. Locke*, 529 U.S. 89, 108 (2000). The federal role in bankruptcy law is more than significant—it is "paramount." *International Shoe*, 278 U.S. at 265.

Finally, Guthrie argues that "a finding of preemption would eliminate [his] right to a jury trial and limit recovery against a creditor to … whatever a bankruptcy judge decided." BIO 16. That is another

way of saying that he is unhappy with the remedy Congress designed. ACA Int'l Amicus Br. 8-9. As this Court explained in *Taggart*, Congress eschewed "unlimited authority to hold creditors in civil contempt" and chose a standard that "strikes the 'careful balance between the interests of creditors and debtors' that the Bankruptcy Code often seeks to achieve." 139 S. Ct. at 1801, 1804. That standard also avoids burdening bankruptcy courts with preemptive requests by creditors for dischargeability determinations. MBA Amicus Br. 16-17. Guthrie wants a standard different from *Taggart*'s balanced approach, though he is happy to use the federal discharge order as a predicate for state-law liability. "[T]he inconsistency of sanctions here undermines the congressional calibration of force," *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 380 (2000), and conflicts with the Bankruptcy Code.

III. This case is a good vehicle to decide the question presented.

A. PHH argued for bankruptcy-specific field preemption below.

The petition explained the uniformity-based argument PHH made below—a bankruptcy-specific type of field preemption. *See* Pet. 11-12, 17-19. Guthrie ignores that discussion. He responds only by insisting that PHH did not invoke the label "field preemption," and that any argument for the substance of field preemption is waived. BIO 6, 9-10. That would not detract from the split over *conflict* preemption specifically, pp. 5-7, *supra*, and it is incorrect in any event.

This Court has long recognized that "the categories of preemption are not 'rigidly distinct,'" and that "field

pre-emption may be understood as a species of conflict pre-emption." *Crosby*, 530 U.S. at 372 n.6 (citation omitted). The overlap between conflict and field preemption is especially striking "when state action undermines a congressional decision in favor of national uniformity of standards—a situation similar in practical effect to that of federal occupation of a field." 1 L. Tribe, *American Constitutional Law* § 6-29, at 1185 (3d ed. 2000).

Bankruptcy's uniformity principle exemplifies this scenario—generating a kind of preemption that could fairly be labeled either field or conflict preemption, or both. In *International Shoe*, this Court referred both to "the field occupied by the Bankruptcy Act" *and* to "the national purpose to have uniform laws on the subject of bankruptcies." 278 U.S. at 264, 268. That is, the conflict arises from Congress's insistence upon uniformity. It is the substance, not the label, that matters. *Cf. Hughes v. Talen Energy Mktg., LLC*, 578 U.S. 150, 167 (2016) (Sotomayor, J., concurring) (noting this Court's "general exhortation not to rely on a talismanic pre-emption vocabulary").

Thus, the uniformity-based field-preemption argument was fully aired below. At any rate, "parties are not limited to the precise arguments they made below" when "a federal claim is properly presented." *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 378-379 (1995) (citation omitted). Even where a party has "expressly disavowed" an argument below, this Court may reach that argument if it is not "a new claim" but rather "a new argument to support" the party's consistent claim. *Id.*; Pet. 19 n.7; *compare Kingdomware Techs., Inc. v. United States*, 579 U.S. 162, 173 (2016) (new claim). Here, PHH has consistently raised pre-

emption by the Bankruptcy Code. Nothing prevents this Court from considering all arguments in favor of preemption.

Guthrie is also wrong in suggesting that PHH may have waived preemption by not listing it in its answer. BIO 9. The district court rejected this argument, *see* Pet.App.53a-54a n.2, and Guthrie did not appeal that conclusion. Both courts below fully evaluated preemption on the merits. It is not waived.

B. The district court has stayed proceedings pending certiorari.

Guthrie also suggests that the Court should wait for further proceedings in the district court because other claims do not turn on the preemption issue. BIO 17. But the district court has stayed all proceedings pending disposition of the petition. ECF No. 152 at 2. That is because preemption is outcome-determinative of the state-law claims. Pet. 34. And if the preempted claims went to trial together with the one remaining federal claim (under the FCRA), a subsequent decision that all or most of the state-law claims were preempted might well require reversal of the entire verdict. As the district court has recognized, here there is good reason to decide all the preemption questions *before*, not after, the preempted claims go before a jury.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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