No. 18-89

IN THE
SUPREME COURT OF THE UNITED STATES

AMERICULTURE, INC., *et al.*,

Petitioners,

v.

LOS LOBOS RENEWABLE POWER, LLC, *et al.*,

Respondents.

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

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

Respondents do not dispute there is an entrenched, acknowledged circuit split over whether state anti-SLAPP laws apply in federal courts exercising jurisdiction over state law claims, or the need for this Court's guidance about that issue.

Respondents also do not dispute that the questions presented implicate the rights to speak and to petition, or that states have important interests in safeguarding those rights. *See Cordova v. Cline*, 396 P.3d 159, 165 (N.M. 2017) (State anti-SLAPP law was enacted "to protect citizens who exercise their right to petition from the financial burden of having to defend against retaliatory lawsuits.").

Instead, Respondents' opposition rests entirely on two arguments in support of their claim that this is not a suitable case for the Court to resolve the questions presented. But neither argument is availing.

I. This Case Is an Excellent Vehicle for Resolving the Circuit Split Regarding the Important Questions Presented

A. The Tenth Circuit's Collateral Order Doctrine Ruling Is Not At Issue or an Impediment to Review

In the decision below, the Tenth Circuit determined it had appellate jurisdiction under the collateral order doctrine. App. 16a. Respondents mistakenly suggest the petition should be denied on the theory that the questions presented in the petition are "bound up" with the Tenth Circuit's collateral order determination. Respondents' Brief ("Resp. Br.") 2, 16.

The Tenth Circuit's collateral order determination is not before the Court. Respondents did not file a conditional cross-petition concerning that issue. *See* Sup. Ct. R. 12 & 13.[1] Nor do Respondents dispute that this Court has jurisdiction under 28 U.S.C. § 1254.

When the Court grants a petition it does not revisit every determination contained in a decision below. And it routinely assumes, without deciding, the answers to questions not before it. *See, e.g.*, *Trump v. Hawaii*, 138 S. Ct. 2392, 2407 (2018) ("[W]e may assume without deciding that plaintiffs' statutory claims are reviewable . . . and we proceed on that basis."); *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 371 n.10 (1978) ("We may assume without deciding that the Court of Appeals was correct [about federal court jurisdiction]."). Consistent with that

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[1] Respondents offer their own "Questions Presented" in which they raise a collateral order doctrine issue not presented by the petition. *See* Resp. Br. i, Question 1. If Respondents wished to challenge the Tenth Circuit's ruling about the collateral order doctrine, they were required to do so with the timely filing of a cross-petition or conditional cross-petition. Having failed to do so, Respondents forfeited the argument that the Tenth Circuit lacked appellate jurisdiction. *See Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 119 n.14 (1985) ("An argument that would modify the judgment, however, cannot be presented unless a cross-petition has been filed."); *see also* Stephen M. Shapiro et al., *Supreme Court Practice* § 6.34, at 490 (10th ed. 2013) (a cross-petition "must be filed if a respondent to the initial petition wishes to overturn portions of the judgment below that are unfavorable").

practice, here the Court could assume without deciding that the Tenth Circuit had appellate jurisdiction.[2]

B. Respondents' Bankruptcy Is Not an Impediment to Review

Respondents next suggest the petition should be denied because they supposedly could not be required to pay attorneys' fees even if ordered to do so following a remand from this Court because of their bankruptcy confirmation plan. Resp. Br. 3. This suggestion is misguided in several respects.

First, it is noteworthy that Respondents did not advance this argument before the Tenth Circuit. In fact, they told the court of appeals something quite different, explaining: "while AmeriCulture's Anti-SLAPP claim is disputed, if successful there would be a right to payment from the estate." Appellees' Mem. Br. Regarding Appl. of Automatic Stay at 8, *Los Lobos Renewable Power, LLC v. AmeriCulture, Inc.*, 885 F.3d 369 (10th Cir. 2018) (No. 16-2046), 2017 WL 2671569; *see id.* at 3 ("[T]he claim on appeal is that New Mexico's Anti-SLAPP statute applies in federal court, and if successful, Defendants-Appellants could be entitled to recover attorney's fees from Lightning Dock.").

Second, Respondents' claim that Petitioners could not, under any circumstance, recover attorneys' fees after a remand is a self-serving assertion—not a fact. Even if the confirmation order were relevant to

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[2] This is no foundation for Respondents' purported concern that "adjudication of the petition would create confusion regarding this Court's views of the collateral order doctrine." Resp. Br. 2, 17.

Petitioners' entitlement to fees, Respondents acknowledge there are "certain exceptions to the rule that dissolution bars a claim for recovery." Resp. Br. 20. Whether the bankruptcy confirmation order is relevant at all to Petitioners' entitlement to attorneys' fees, and if so, whether an exception to discharge applies, is one of several issues that would have to be decided in the first instance by the district court following any remand.[3]

Third, Respondents ignore that they have continued to prosecute their lawsuit against Petitioners even after entry of the bankruptcy confirmation order, and that Petitioners have incurred attorneys' fees as result. Respondents have not argued—nor could they do so

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[3] The Court frequently remands after its review for lower court consideration of arguments not previously resolved below. *See, e.g.*, *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 259-60 (2009) (reversing the judgment, noting that respondents argued the lower court's judgment should be affirmed on "independent grounds" not addressed by courts below, and "remand[ing] this case for further proceedings consistent with this opinion"); *Environmental Def. v. Duke Energy Corp.*, 549 U.S. 561, 582 (2007) (explaining respondent's alternative argument was not addressed below, but respondent "may press it on remand"); *Whitman v. Dep't of Transp.*, 547 U.S. 512, 515 (2006) ("The various other issues raised before this Court, but not decided below, may also be addressed on remand," including issues that ultimately could bar petitioner from prevailing); *Devenpeck v. Alford*, 543 U.S. 146, 156 (2004) (declining to "engage in [respondent's alternative argument] for the first time here," and remanding "for further proceedings consistent with this opinion"); *Meyer v. Holley*, 537 U.S. 280, 292 (2003) (declining to consider respondent's alternative argument not addressed below, and leaving the lower court "free on remand to determine whether these questions were properly raised and, if so, to consider them").

credibly—that their obligation to pay Petitioners' attorneys' fees incurred after conclusion of their bankruptcy was discharged.[4]

C. There Is No Reason for the Court to Wait for Another Case Presenting These Issues

While Respondents contend there will be "abundant" opportunities for the Court to address the questions presented in the petition (Resp. Br. 4, 22), there is no assurance that a similarly appropriate vehicle to address these important issues will arrive at the Court any time soon. And history provides reason to doubt it: among the cases discussed in the petition that are the subject of the circuit split at issue, in only one was a petition for certiorari filed.[5]

In contrast with Respondents' speculation about future petitions for certiorari, we already know for

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[4] Respondents contend relief cannot be obtained against Los Lobos because it was dissolved on January 17, 2018. Resp. Br. 19. Although Los Lobos' dissolution does not appear to have been brought to the Tenth Circuit's attention before it rendered its decision, the presence or absence of Los Lobos in these proceedings has no bearing on whether review is warranted.

[5] *See United States ex rel. Newsham v. Lockheed Missiles & Space Co., Inc.*, 190 F.3d 963 (9th Cir. 1999), *cert. denied*, 530 U.S. 1203 (2000). No petition was filed in: *Godin v. Schencks*, 629 F.3d 79 (1st Cir. 2010); *Steinmetz v. Coyle & Caron, Inc.*, 862 F.3d 128 (1st Cir. 2017); *Liberty Synergistics Inc. v. Microflo Ltd.*, 718 F.3d 138 (2d Cir. 2013); *Adelson v. Harris*, 774 F.3d 803 (2d Cir. 2014); *Henry v. Lake Charles Am. Press, LLC*, 566 F.3d 164 (5th Cir. 2009); *Cuba v. Pylant*, 814 F.3d 701 (5th Cir. 2016); *Makaeff v. Trump Univ., LLC*, 715 F.3d 254 (9th Cir. 2013), 736 F.3d 1180 (9th Cir. 2013); *Abbas v. Foreign Policy Grp., LLC*, 783 F.3d 1328 (D.C. Cir. 2015).

certain that: (1) the courts of appeals are divided about whether anti-SLAPP statutes apply in federal court; (2) this well-recognized divide among the courts of appeals is promoting forum-shopping and undercutting the efficacy of anti-SLAPP statutes, enacted by states to protect their citizens' rights to speak out and participate freely in self-government; and (3) lower courts are frequently asked to decide whether anti-SLAPP statutes apply in federal court.

There is no compelling reason to forego consideration of the important issues presented by the petition. The Court's guidance should not be deferred for an indeterminate period, while waiting for another case presenting them to reach the Court.[6]

II. The Decision Below Was Incorrect, and Should Not Be Left Unaddressed

As explained in the petition, the Tenth Circuit's refusal to apply New Mexico's anti-SLAPP provisions in federal court was incorrect. Pet. 25-30.

No federal rule or law even arguably conflicts with New Mexico's anti-SLAPP fee-shifting provision—and the Tenth Circuit cited none. And since no federal rule

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[6] Respondents suggest the petition should be denied because the district court and Tenth Circuit agreed in this case. Resp. Br. 3-4, 21-22. This makes little sense. This Court routinely grants review—and sometimes reverses—in cases where the lower courts were in agreement. *See*, *e.g.*, *Marinello v. United States*, 138 S. Ct. 1101 (2018); *Kokesh v. S.E.C.*, 137 S. Ct. 1635 (2017); *Lightfoot v. Cendant Mortg. Corp.*, 137 S. Ct. 553 (2017); *Samsung Elecs. Co., Ltd. v. Apple Inc.*, 137 S. Ct. 429 (2016). Moreover, what matters most here is that the courts of appeals are divided over the questions presented—a fact that Respondents do not contest.

answers the question whether Petitioners may recover attorneys' fees if they prevail, New Mexico's fee-shifting provision must govern because it is part of the State's substantive law, the purpose of which "is to protect citizens who exercise their right to petition from the financial burden of having to defend against retaliatory lawsuits." *Cordova*, 396 P.3d at 165. That objective was frustrated by the Tenth Circuit's refusal to apply the statute's fee-shifting provision in federal court.

Nor does any federal statute or rule conflict with the New Mexico anti-SLAPP statute's expedited motion-to-dismiss provision. *See* N.M. Stat. Ann. § 38-2-9.1(A). Federal Rules of Civil Procedure 12 and 56, which govern aspects of motions to dismiss and for summary judgment in federal court, are silent about the timing of a court's *consideration* of such motions. A federal court can plainly "give effect to the substantive thrust" of Subsection A "without untoward alteration of the federal scheme" governing dispositive motions. *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 426 (1996). The Tenth Circuit's refusal to give effect to the right to expedited disposition conferred by New Mexico's anti-SLAPP statute runs counter to well-established *federal* law that a federal court "cannot give [a state-created claim] longer life in the federal court than it would have had in the state court without adding something to the cause of action." *Ragan v. Merchs. Transfer & Warehouse Co.*, 337 U.S. 530, 533-34 (1949).

* * *

The petition presents questions that are the subject of an entrenched, acknowledged circuit split of unquestionable importance. With the decision below, the Tenth Circuit aligned itself on the wrong side of that split. As a result, Petitioners have been deprived of substantive protections afforded by New Mexico law. The Court should grant the petition so it can correct the Tenth Circuit's error in this case, while providing much needed guidance to all federal courts.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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