APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS,
THIRD CIRCUIT.

NO. 24-2210, NO. 24-2211, NO. 25-1044

IN RE: WHITTAKER CLARK & DANIELS INC, DEBTOR

PETER PROTOPAPAS, APPELLANT IN NO. 24-2210
OFFICIAL COMMITTEE OF TALC CLAIMANTS APPELLANT IN NO. 24-2211

IN RE: WHITTAKER CLARK & DANIELS INC., DEBTOR
WHITTAKER CLARK & DANIELS INC; BRILLIANT NATIONAL SERVICES INC; L.A. TERMINALS INC.; SOCO WEST INC.

v.

BRENNTAG AG; BRENNTAG CANADA INC.; BRENNTAG GREAT LAKES LLC; BRENNTAG MID-SOUTH INC.; BRENNTAG NORTH AMERICA INC.; BRENNTAG NORTHEAST INC.; BRENNTAG PACIFIC INC.; BRENNTAG SOUTHEAST INC.; BRENNTAG SOUTHWEST INC.; BRENNTAG SPECIALTIES LLC (F/K/A BRENNTAG SPECIALTIES, INC., AND AS MINERAL AND PIGMENT SOLUTIONS, INC.); COASTAL CHEMICAL CO. LLC; MINERAL PIGMENT SOLUTIONS INC.; THOSE PARTIES LISTED ON APPENDIX A TO THE COMPLAINT; JOHN AND JANE DOES 1-1000

OFFICIAL COMMITTEE OF TALC CLAIMANTS, APPELLANT

Argued on April 1, 2025
(Opinion filed: April 27, 2026)

Before: KRAUSE, MATEY, AND AMBRO, *Circuit Judges*

OPINION OF THE COURT

AMBRO, *Circuit Judge*

Plagued by tort claims related to their historical production, storage, and distribution of asbestos-laden talc, Whittaker, Clark & Daniels, Inc. ("Whittaker") and three of its affiliates—Brilliant National Services, Inc. ("Brilliant"), L.A. Terminals, Inc. ("L.A. Terminals"), and Soco West, Inc. ("Soco," and jointly and severally with Whittaker, Brilliant, and L.A. Terminals, the "Debtors")—filed for bankruptcy in 2023. However, as is often the case in mass-tort bankruptcies, their proceedings were contested from the start.

On appeal, Appellants—the receiver appointed for Whittaker by a South Carolina Court (the "South Carolina Receiver" or "Receiver") and the Official Committee of Talc Claimants (the "Committee")—contest whether we should be here at all because, in their view, Whittaker's Chapter 11 petition was improperly filed. If the Debtors rightly entered bankruptcy, the Committee further contends certain successor liability claims that have been or could be asserted against a thirdparty purchaser belong exclusively to its constituent talc creditors.[1] We conclude that Whittaker properly filed for

[1] Throughout the discussion that follows, we refer to the Committee's constituents as talc plaintiffs, talc creditors, and tort creditors interchangeably.

bankruptcy, and the successor liability claims the talc creditors seek to assert against the purchaser are property of the Debtors' bankruptcy estates. Accordingly, we affirm.

I. BACKGROUND

A. The Debtors' Corporate History.

The Debtors were in the business of processing, manufacturing, storing, and distributing various industrial chemicals and minerals, including asbestos-laden talc. Over time, however, their talc products prompted a tsunami of personal injury claims by consumers who developed, among other things, mesothelioma—a form of cancer affecting the protective lining of the lungs. To make matters worse, federal, state, and private parties brought environmental claims alleging the Debtors produced and handled hazardous materials that contaminated property in at least fourteen separate states.

In the face of those liabilities, the Debtors took action. First, L.A. Terminals, which operated a chemical storage and distribution facility at the Los Angeles Harbor, ceased operations in 1994 and began to resolve its liabilities through ordinary-course claims management. Then, in 2004, Whittaker, Brilliant, and Soco sold substantially all of their operating assets to certain subsidiaries of Brenntag North America through a series of corporate transactions too tortured to recount in full (collectively, the "2004 Transactions").

Whittaker, Brilliant, and Soco collectively received approximately $200 million in cash consideration in exchange for their operating assets.

However, in an effort to limit their exposure, Brenntag North America and its affiliates (collectively, "Brenntag") expressly contracted to exclude all pre-sale asbestos and environmental liabilities from the scope of the 2004 Transactions. For their part, Whittaker, Brilliant, and Soco took on the obligation to indemnify Brenntag for any liabilities it accrued from asbestos and environmental tort claims. Thus, in the aftermath of the 2004 Transactions, the Debtors continued to exist as shell companies holding limited assets to satisfy their pending and future tort claims.

Over the next few years, National Indemnity Company, a subsidiary of Berkshire Hathaway Inc., acquired Brilliant and L.A. Terminals. It thereby acquired both Whittaker and Soco indirectly, as subsidiaries of Brilliant. In the process, however, National Indemnity assigned its acquisition rights to another Berkshire affiliate, Ringwalt & Liesche Co., which remains the ultimate parent of the Debtors. And, through a chain of indemnity agreements and obligations, National Indemnity currently backstops certain asbestos-related successor liability claims against Brenntag.

B. Proceedings in South Carolina.

In advance of their bankruptcy cases, the Debtors were engulfed in litigation. Roughly 2,700 plaintiffs had asserted claims alleging asbestos-related injuries as a result of the Debtors' talc products. Plaintiff Sarah Plant brought one such claim against Whittaker in the South Carolina Court of Common Pleas after she was diagnosed with mesothelioma as a result of exposure to asbestos-contaminated talc manufactured by Whittaker. And in March 2023, a jury awarded Plant a $29 million verdict.

Days later, Plant moved the South Carolina Court to place Whittaker into receivership. The Court granted Plant's motion and entered an order (the "Receivership Order" or "Order") appointing Peter Protopapas as the South Carolina Receiver. Among other things, the Receivership Order vested him "with the power and authority [to] fully administer all assets of [Whittaker], accept service on behalf of [it], engage counsel on behalf of [it] and take any and all steps necessary to protect [its] interests." Appellants' Consolidated J.A. 217.

Whittaker promptly moved the South Carolina Court to reconsider. It held a hearing on Whittaker's motion, during which, in response to counsel's suggestion that Whittaker had the "authority to enter into voluntary bankruptcy," the Court stated:

> I'm well aware, that was the main factor in my signing the order so quickly is that I wanted to be sure that something other than [a] kind of amorphous organization I wasn't quite sure about in terms of asset picture, control[,] or anything else[,] would not simply declare bankruptcy and that entity would still be controlling things. I wanted a receiver that I knew would take it seriously, to look at the asset picture and see what was going on.

Id. at 423. The Court denied Whittaker's motion and directed the parties to submit a proposed form of order to memorialize its ruling.

C. The Debtors Petition for Bankruptcy.

With more than 1,000 asbestos claims still pending, the Debtors promptly filed Chapter 11 petitions in the United States Bankruptcy Court for the District of New Jersey. Before they did so, Whittaker's board passed a resolution authorizing its filing without consulting or gaining approval from the South Carolina Receiver. He promptly moved in the Bankruptcy Court to dismiss Whittaker's bankruptcy as an unauthorized petition, arguing the Receivership Order "divested [its] board of the authority to approve a bankruptcy filing on [its] behalf and instead gave such authority to the Receiver alone." Appellants' Consolidated Opening Br. 13.

The Bankruptcy Court denied the Receiver's motion, concluding the Receivership Order did not divest Whittaker's board of the authority to file a petition for bankruptcy because the Order's terms did not demonstrate that the Receiver displaced the board. He appealed to the District Court, which affirmed the Bankruptcy Court's ruling for substantially the same reasons. The Receiver timely appealed to our Court while the Debtors' bankruptcy proceedings continued in parallel. And in light of the Debtors' substantial asbestos liabilities, the United States Trustee appointed the Committee to represent the talc creditors' interests before the Bankruptcy Court.

With their proceedings well underway, the Debtors sought to shore up funding for an exit from bankruptcy. However, they possessed few meaningful assets in the aftermath of their 2004 Transactions. Further complicating matters, the Debtors lacked one of the most obvious tools to centralize and distribute assets because most fraudulent transfer claims they might have asserted under the Bankruptcy Code in connection with the 2004 Transactions were time-barred.[2] So, in lieu of any avoidance actions, the Debtors wielded other successor liability claims as leverage in their negotiations with Brenntag.[3]

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[2] Sections 548 and 544 of the Bankruptcy Code "allow[ ] a trustee to avoid a transaction if it lacked reasonably equivalent value" and left the debtor with "unreasonably small capital." 5 Collier on Bankruptcy ¶ 548.05 (16th ed. 2025). So, for example, a trustee may seek to avoid a transfer when "the debtor is left solvent, but just barely so, and in a condition that bankruptcy or liquidation is substantially likely." *Id.* And—as our precedents demonstrate—fraudulent transfer claims are commonly asserted against third-party purchasers like Brenntag. *See, e.g., In re Wilton Armetale, Inc.*, 968 F.3d 273, 278 (3d Cir. 2020) (considering fraudulent transfer claims asserted by creditors against a third-party purchaser of the debtor's assets); *In re Emoral, Inc.*, 740 F.3d 875, 877 (3d Cir. 2014) (noting that the bankruptcy trustee asserted a fraudulent transfer claim against a third-party purchaser that creditors sought to hold liable on a "mere continuation" theory of liability). The trouble is that Section 548 addresses transfers that occurred within two years of the petition date. 11 U.S.C. § 548(a). Likewise, state-law avoidance claims asserted on behalf of creditors under Section 544 typically expire four years from the date of the challenged transfer or obligation. *See* 5 Collier on Bankruptcy ¶ 548.01A (considering statutes of limitation under the Uniform Fraudulent Transfer Act and Uniform Voidable Transfer Act).

[3] Successor liability claims form a list of exceptions to the general rule of corporate successor nonliability. *Ramirez v. Amsted Indus., Inc.*, 86 N.J. 332, 431 A.2d 811, 815 (1981). In that sense, the term refers to a collection of different causes of action that can be asserted against a successor corporation at common law. *Id.* (discussing successor liability claims—including those based on alter-ego, mere continuation, productline, and actual or constructive fraudulent transfer

Their approach spurred a settlement (the "Settlement"), subject to Bankruptcy Court approval, under which Brenntag will pay approximately $535 million to the Debtors in exchange for, among other things, a release of all successor liability claims against it. The only problem was that certain of the talc plaintiffs represented by the Committee had already asserted successor liability claims against Brenntag before the Debtors filed for bankruptcy. As a result, the Debtors needed to resolve their competing claims to proceed with the Settlement.

To do so, the Debtors filed an adversary proceeding against, among others, Brenntag and hundreds of individual talc plaintiffs represented by the Committee. They sought an order enjoining the talc plaintiffs from pursuing successor liability claims against Brenntag, as well as a declaratory judgment determining that all of those claims are property of their respective bankruptcy estates under Section 541(a)(1) of the Bankruptcy Code. The Committee intervened in the adversary proceeding, and the Debtors moved for summary judgment over its objection.

In support of their motion, the Debtors relied on our decision in *In re Emoral*, 740 F.3d 875 (3d Cir. 2014). According to the Committee, however, that decision narrowly concluded that successor liability claims asserted on a "mere continuation" theory under

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theories—recognized under New Jersey law). The roster of cognizable claims varies from one jurisdiction to another. *See, e.g., id.* at 815–20.

New Jersey law constitute property of the estate.[4] So, the Committee explained, other successor liability claims available to certain talc plaintiffs in a small minority of states belong to those plaintiffs individually, as opposed to the Debtors. More specifically, the Committee focused its objection on the subset of successor liability claims its constituents had or could have asserted on a "product-line" theory of liability (collectively, the "Product-Line Claims").

That theory imposes strict liability for injuries caused by defects of a product line on a corporation that acquires the manufacturer's assets and undertakes essentially the same operation and production practices. *Ramirez*, 431 A.2d at 820. Only a handful of state courts have recognized this "controversial" theory of liability. David Hunt, *Tort Law—Towards a Legislative Solution to the Successor Products Liability Dilemma—Niccum v. Hydra Tool Corp.*, 438 N.W.2D 96 (Minn. 1989), 16 Wm. Mitchell L. Rev. 581, 581–91 (1990). New Jersey and California courts are among the minority. *See, e.g., Ramirez v. Amsted Indus., Inc.*, 86 N.J. 332, 431 A.2d 811, 819–22 (1981) (recognizing the product-line theory); *Ray v. Alad Corp.*, 19 Cal.3d 22, 136 Cal.Rptr. 574, 560 P.2d 3, 7–11 (1977) (same). And although the parties briefed their choice-of-law positions before the

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[4] As mentioned in footnote 3 above, the mere continuation theory of liability is part of the traditional list of successor liability claims recognized under New Jersey law. To assert a mere continuation claim thereunder, a plaintiff must establish sufficient "continuity in management, shareholders, personnel, physical location, assets and general business operation between selling and purchasing corporations following [an] asset acquisition." *Ramirez*, 431 A.2d at 816.

Bankruptcy Court, it made no decision on the issue. *In re Whittaker, Clark, & Daniels*, 663 B.R. 1, 26 (Bankr. D.N.J. 2024). Thus, it is unclear precisely how many of the Committee's constituents have or could have asserted Product-Line Claims. *Id.* at 26 n.13.

After rounds of unsuccessful mediation, the Bankruptcy Court granted summary judgment to the Debtors. *Id.* at 7. Following *Emoral*, it agreed that the Product-Line Claims are property of the Debtors' estates under Section 541. *Id.* at 25. In the alternative, it held that Sections 541(a)(7) and 544(a)(1) drew those claims into the Debtors' respective estates. *Id.* at 14-21.[5] Recognizing the

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[5] Under the former provision, property of the estate includes "[a]ny interest in property the estate acquires after the commencement of the case." 11 U.S.C. § 541(a)(7). The latter provision vests the trustee—or debtor in possession—with the rights and powers of a hypothetical lien creditor who extended credit at the time of the debtor's petition. 11 U.S.C. § 544(a)(1). In the Bankruptcy Court's view, Section 544(a)(1) authorized the Debtors—as debtors in possession bearing the rights of a trustee—to pursue the Product-Line Claims after their petitions were filed. *Whittaker*, 663 B.R. at 21–22. Thus, it concluded the Product-Line Claims constitute after-acquired property of the estate under Section 541(a)(7). *Id.* Several circuit courts, however, have cast doubt on this analysis. *See, e.g., In re Icarus Holding, LLC*, 391 F.3d 1315, 1319 n.5 (11th Cir. 2004); *Shearson Lehman Hutton, Inc. v. Wagoner*, 944 F.2d 114, 118 (2d Cir. 1991); *In re Ozark Rest. Equip. Co., Inc.*, 816 F.2d 1222, 1226 (8th Cir. 1987); *but see In re Kwok*, 172 F.4th 145, 153-56 (2d Cir. Apr. 6, 2026) (narrowing *Wagoner*'s limitations on trustee standing under Section 544). And while the parties devoted a portion of their briefs to addressing the Bankruptcy Court's alternate holding, we need not do so because our precedents require us to conclude the Product-Line Claims are property of the estate under Section 541(a)(1).

uncertainty of the law governing its rulings, the Bankruptcy Court certified its order for direct appeal to our Court under 28 U.S.C. § 158(d)(2). We granted the Committee's petition for direct appeal, ordered expedited briefing, and issued a consolidated opinion in September 2025. Following the Committee's petition for, *inter alia*, panel rehearing, we requested supplemental briefing and now issue a revised opinion reaching the same conclusions.

II. JURISDICTION AND STANDARD OF REVIEW

The Bankruptcy Court had jurisdiction under 28 U.S.C. §§ 1334 and 157(b), and in the South Carolina Receiver's appeal, the District Court had jurisdiction under 28 U.S.C. § 158(a). We have jurisdiction under 28 U.S.C. § 158(d). We review without deference both the Bankruptcy Court's and the District Court's legal conclusions, while our review of their factual findings is for clear error. *In re Trans World Airlines, Inc.*, 145 F.3d 124, 131 (3d Cir. 1998).

III. DISCUSSION

Before us are two issues, each with accompanying nuance. First, the South Carolina Receiver and the Committee contend that Whittaker's Chapter 11 petition must be dismissed because the South Carolina Court vested the Receiver with exclusive authority to file it. Second, the Committee argues that the Bankruptcy Court incorrectly concluded that the Product-Line Claims belong to the Debtors' bankruptcy estates. We review each in turn.

A. Is Whittaker Properly in Bankruptcy?

In order to determine whether Whittaker's Chapter 11 petition must be dismissed, we consider whether the South Carolina Court divested its board of authority to file for bankruptcy. Before doing so, however, we address a predicate question: Does the validity of a Chapter 11 petition affect a court's subject matter jurisdiction? We conclude it does not and that Whittaker's petition was duly filed in any event.

1. A Chapter 11 Petition is Not Jurisdictional.

The Bankruptcy Code provides that, except in narrow circumstances, "on request of a party in interest, and after notice and a hearing, the court shall ... dismiss a case under [Chapter 11] ... for cause." 11 U.S.C. § 1112(b)(1). "Cause" typically includes things like "gross mismanagement of the estate," "failure to comply with an order of the court," and "material default by the debtor with respect to a confirmed plan." *Id.* § 1112(b)(4)(B), (E), (N). But it also includes occasions when a debtor "did not have the proper authority to commence the ... bankruptcy proceeding." *In re 3P Hightstown, LLC*, 631 B.R. 205, 209 (Bankr. D.N.J. 2021). In those cases, the court "has no alternative but to dismiss the petition." *Price v. Gurney*, 324 U.S. 100, 106, 65 S.Ct. 513, 89 L.Ed. 776 (1945).

The Supreme Court previously described this necessary component of the bankruptcy case as a limitation on courts' "jurisdiction," stating, in interpreting the predecessor statute to the Bankruptcy Code, "nowhere is there any indication that Congress bestowed on the bankruptcy court *jurisdiction* to determine that those who in fact do not have the authority to speak for the corporation ... should be empowered to file a petition on behalf of the corporation." *Id.* at 107, 65 S.Ct. 513 (emphasis added).

"Jurisdiction," however, "is a word of many, too many, meanings." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 90, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998) (quoting *United States v. Vanness*, 85 F.3d 661, 663 n.2 (D.C. Cir. 1996)). Some courts have taken *Price*'s mention of "jurisdiction" to mean a limitation on bankruptcy courts' subject matter jurisdiction. *See, e.g., In re Parks Diversified, L.P.*, 661 B.R. 401, 415–20 (C.D. Cal. 2024) (collecting cases); *In re Mach I Aviation, Inc.*, No. 10-01225, 2011 WL 5838520, at *4 n.11 (B.A.P. 9th Cir. Sep. 15, 2011). Following that understanding, the absence of a properly filed petition would extinguish "a court's power to hear a case," leaving it no choice but to dismiss it for lack of jurisdiction. *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514, 126 S.Ct. 1235, 163 L.Ed.2d 1097 (2006) (quoting *United States v. Cotton*, 535 U.S. 625, 630, 122 S.Ct. 1781, 152 L.Ed.2d 860 (2002)).

But in recognition of jurisdictional limitations' "unique potential to disrupt the orderly course of litigation," recent Supreme Court cases are more precise about hanging the "jurisdictional label" on a statutory provision. *Wilkins v. United States*, 598 U.S. 152, 157–58, 143 S.Ct. 870, 215 L.Ed.2d 116 (2023). Today the standard for concluding a statute limits federal courts' subject matter jurisdiction is an exacting one. While Congress need not employ any specific formulation or "incant magic words," "the 'traditional tools of statutory construction must plainly show that Congress imbued a procedural bar with jurisdictional consequences.' " *Boechler, P.C. v. Comm'r of Internal Revenue*, 596 U.S. 199, 203, 142 S.Ct. 1493, 212 L.Ed.2d 524 (2022) (first quoting *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 153, 133 S.Ct. 817, 184 L.Ed.2d 627 (2013); then quoting *United States v. Kwai Fun Wong*, 575 U.S. 402, 410, 135 S.Ct. 1625, 191 L.Ed.2d 533 (2015)). Anything short of a clear indication will not do.

The statutes granting federal courts jurisdiction over bankruptcy cases do not attach jurisdictional significance to the propriety of a debtor's petition. The governing provision, 28 U.S.C. § 1334(a), provides only that, absent exceptions not relevant here, "the district courts shall have original and exclusive jurisdiction of all cases under title 11." In addition, "district court[s] may provide that any or all cases under title 11 ... shall be referred to the bankruptcy judges for the district" who "may hear and determine all cases under title 11 ... and may enter appropriate orders and judgments." *Id.* § 157(a), (b)(1). These statutes establish the jurisdictional grant for district and bankruptcy courts over bankruptcy cases, and neither they, nor any other provision, condition that grant on a properly filed petition.

Code Section 301(a), which does deal with bankruptcy petitions, provides only that a voluntary bankruptcy "is commenced by the filing with the bankruptcy court of a petition under such chapter by an entity that may be a debtor under such chapter." 11 U.S.C. § 301(a). This provision focuses on the commencement of a bankruptcy case by a *debtor*, not on the power of the *court*. Simply put, Section 301(a) "does not speak in jurisdictional terms," *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 394, 102 S.Ct. 1127, 71 L.Ed.2d 234 (1982), and we "will not lightly apply" the jurisdictional label to a provision absent a "clear statement" to the contrary, *Wilkins*, 598 U.S. at 158, 143 S.Ct. 870.

Accordingly, we hold that an improperly filed bankruptcy petition constitutes "cause" to dismiss a bankruptcy case, 11 U.S.C. § 1112(b)(1), but it does not strip bankruptcy courts of subject matter jurisdiction. In doing so, we note that our conclusion is consistent with the decisions of at least two other circuits. *See In re Parks Diversified, L.P.*, 168 F.4th 1188, 1193 (9th Cir. 2026) ("Corporate authority to file for bankruptcy—while important and mandatory—is not jurisdictional."); *In re Martin-Trigona*, 760 F.2d 1334, 1340 (2d Cir. 1985) (concluding that a debtor corporation's authority to file for bankruptcy does not implicate subject matter jurisdiction).

2. Whittaker Properly Filed Its Chapter 11 Petition.

The Supreme Court has long held that, "[i]n [the] absence of federal incorporation," "local law" governs a corporate debtor's authority to petition for bankruptcy. *Price*, 324 U.S. at 106, 65 S.Ct. 513. As corporations act through agents, "local law" is the non-federal rule that gives a corporation's agents—typically its board of directors—the "authority ... to act." *Id.* And because "[c]orporations are creatures of state law," *Burks v. Lasker*, 441 U.S. 471, 478, 99 S.Ct. 1831, 60 L.Ed.2d 404 (1979) (quoting *Cort v. Ash*, 422

U.S. 66, 84, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975)), "it is state law which is the font of corporate directors' powers," *id.* So we look to governing state law to determine the propriety of a corporation's bankruptcy petition. *In re Franchise Servs. of N. Am., Inc.*, 891 F.3d 198, 206 (5th Cir. 2018).

But which state's law governs? More precisely, in a situation such as this, where a South Carolina court has putatively exercised authority over the assets of a New Jersey corporation, do we assess the authority of Whittaker's board to file for bankruptcy with reference to New Jersey or South Carolina law?

The parties make answering this question easy. They agree that New Jersey law governs the authority of Whittaker's board over its internal affairs, like petitioning for bankruptcy. Appellants' Second Supp. Br. 1; Appellees' Second Supp. Br. 2, 11; *Williams v. BASF Catalysts LLC*, 765 F.3d 306, 317 (3d Cir. 2014) (noting that where parties do not dispute governing law, we need not conduct a choice-of-law analysis). So the question becomes whether, under New Jersey law, the Receivership Order stripped Whittaker's board of the authority to file for bankruptcy. It did not.

While we stand far removed in time from the zenith of equity receiverships in this country, *see* David A. Skeel, Jr., Debt's Dominion: A History of Bankruptcy Law in America 56–60 (2001) (describing the rise of equity receivership in the late nineteenth century as a device for resolving corporate insolvency), this case proves that state courts retain the traditional equitable authority to appoint receivers for insolvent corporations. But that authority is not without limits, as this case also proves.

New Jersey law recognizes that "comity requires that [a foreign receiver] should be acknowledged and aided" to the extent that doing so is not "to the disadvantage of creditors resident [in New Jersey]." *Stone v. N.J. & H. R. Ry. & Ferry Co.*, 75 N.J.L. 172, 66 A. 1072, 1073 (N.J. 1907). For that reason, where a foreign court appoints a receiver, New Jersey courts generally "will appoint an ancillary receiver, [and] the assets will be so administered that creditors in [New Jersey] and in the foreign jurisdiction shall fare alike." *Id.*; *accord Clark v. Painted Post Lumber Co.*, 89 N.J. Eq. 409, 104 A. 728, 729 (N.J. Ch. 1918) (recognizing that "after the appointment of the receiver in New York, [an ancillary receiver] was appointed" by a New Jersey court); *Ware v. Supreme Sitting of Order of Iron Hall*, 28 A. 1041, 1043 (N.J. Ch. 1894) (recognizing that an ancillary receiver was appointed in New Jersey and "should be regarded as auxiliary to the [foreign] receiver").

New Jersey law authorizes its Superior Court to appoint receivers for New Jersey corporations. *See* N.J. Stat. Ann. § 14A:14-2(3) ("The court ... shall have power to appoint and remove one or more receivers of the corporation ...."). That provision also permits the court to "enjoin the corporation, its officers and agents, from exercising any of its privileges and franchises, and from collecting or receiving any debts, or paying out, selling, assigning or transferring any of its property, except to a receiver, and except as the court may otherwise order." *Id.* This statute suggests that New Jersey has licensed its courts to exercise broad authority over domestic corporations consistent with its corporate law. Thus, on our reading, New Jersey law permits its courts to recognize foreign receivership orders and appoint an ancillary receiver to aid in the execution of foreign judgments, including by enjoining the corporation and its board from taking specific actions and exercising specific powers.

The Restatement (Second) of Conflict of Laws supports as much. In recognizing that courts may appoint a receiver over a foreign corporation, the Restatement observes that "[w]hen a principal receiver of a corporation has been appointed by a court of a state other than the state of incorporation, and it is intended to dissolve the corporation ..., an ancillary receiver should be appointed for those purposes by a court of the state of incorporation." Restatement (Second) of Conflict of Laws § 367 cmt. d (A.L.I. 1971). This is so because "only a receiver appointed by a court in the state where the corporation was incorporated can institute action to dissolve a corporation." *Id.*[6]

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[6] Of course, neither New Jersey law nor the Restatement contemplates a state's authority over domestic corporations in instances of bankruptcy, as that power is an area of exclusive federal competence. *Hanover Nat'l Bank v. Moyses*, 186 U.S. 181, 187, 22 S.Ct. 857, 46 L.Ed. 1113 (1902) ("The framers of the Constitution ... granted plenary power to Congress over the whole subject of 'bankruptcies.' "). But the scenarios these authorities posit are sufficiently analogous in character to bankruptcy—as they involve fundamental changes to a corporation's structure (or, in the instance of dissolution, existence)—that their precepts apply to the same extent when a board seeks to enter bankruptcy

Accordingly, under New Jersey law and settled choice-of-law principles, the South Carolina Receiver needed to move for—and be granted—recognition in New Jersey and the appointment of an ancillary receiver to displace Whittaker's board's control over, *inter alia*, the company's privileges, franchises and assets. It did not do so. Whittaker's board thus retained authority over those corporate decisions reserved to it by New Jersey law, including the decision whether to reorganize by filing for bankruptcy.

Appellants respond by invoking one of our Nation's oldest laws—the Full Faith and Credit statute, 28 U.S.C. § 1738. They contend that, under obligations imposed by that provision, "New Jersey would not ignore the Receivership Order, just as the Bankruptcy Court could not ignore it." Appellants' Second Supp. Br. 6–7. This argument falters on three fronts.

First, on its face, the Receivership Order does not reach as far as Appellants insist. Rather than extending to displace Whittaker's board's authority over corporate affairs, it purports only to give the South Carolina Receiver control of Whittaker's "assets" and the power and authority to "take any and all steps necessary to protect the interests of [Whittaker] whatever they may be." Appellants' Consolidated J.A. 217. Nowhere does the Order speak to Whittaker's corporate affairs, including the board's authority under New Jersey law to decide whether to file for bankruptcy.[7] And in the absence of anything to

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[7] Appellants have also argued that this type of interpretation is effectively an appeal of the Receivership Order

the contrary in the Order, the default rule discussed above governs—namely, Whittaker's board controls the entity's corporate affairs, subject to lawful displacement under New Jersey law. Thus, because the Receivership Order on its own terms does not dictate the result Appellants assert, affording it full faith and credit under Section 1738 does not lead to a different outcome.

Second, even if we assume the Receivership Order extends to corporate affairs, Appellants still did not attempt to enforce it against Whittaker. While an order rendered by a foreign court may warrant recognition and enforcement under Section 1738, "[e]nforcement measures do not travel with the sister state judgment," and full faith and credit "does not mean that States must adopt the practices of other States regarding the time, manner, and mechanisms for enforcing judgments." *Baker ex rel. Thomas v. Gen. Motors Corp.*, 522 U.S. 222, 235, 118 S.Ct. 657, 139 L.Ed.2d 580 (1998). Even spotting Appellants the enforceability of the Order, they needed to employ the enforcement mechanisms provided under New Jersey

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and thus barred by the *Rooker-Feldman* doctrine, which essentially prohibits federal courts, save the Supreme Court, from reviewing final state court judgments. But if an order is interlocutory, the *Rooker-Feldman* doctrine applies only to those that are "effectively final" because, among other things, the parties have abandoned further litigation. *Cf. Malhan v. Sec'y U.S. Dep't of State*, 938 F.3d 453, 459 (3d Cir. 2019). And what we have here is not "effectively final" because state-court litigation over the Order is not abandoned—it is merely stayed. *See* 11 U.S.C. § 362(a). In fact, Appellants indicated they would continue to litigate the Order if the stay were to be lifted.

law outlined above. They did not do so.[8] Consequently, their Section 1738 argument fails on this basis too.

Third, and more fundamentally, even if the South Carolina Court issued an order purporting to place control of Whittaker's corporate affairs in the hands of the South Carolina Receiver, we doubt its ability to do so. Our system of federalism embodies "the fundamental principle of equal sovereignty" among the states. *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 203, 129 S.Ct. 2504, 174 L.Ed.2d 140 (2009). Implicit in that foundational organization of co-equal sovereigns is "the usual legislative power of a State to act upon persons and property within the limits of its own territory," permitting "different communities to live with different local standards." *Nat'l Pork Producers Council v. Ross*, 598 U.S. 356, 375, 143 S.Ct. 1142, 215 L.Ed.2d 336 (2023) (citation modified).

But states' power to exercise control over actors within their respective borders is not without limits. Indeed, the Constitution has a great deal to say about the relations between states, their authority to decide the rights of foreign parties, and the application of

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[8] The Receiver contends that he should not have been required to seek appointment of an ancillary receiver in New Jersey because Whittaker "itself made [doing so] impossible" by "filing for bankruptcy before the South Carolina Court could even issue a written order memorializing its denial of [Whittaker]'s motion for reconsideration," and characterizing Whittaker's position as "Kafka-esque." Appellants' Consolidated Reply Br. 21. But without an order lawfully preventing it from doing so, Whittaker's board was free to exercise its authority under New Jersey law to enter bankruptcy. The fact that the Receiver lost the race to the courthouse does not render the results invalid.

their laws in instances of conflict. For instance, courts have long construed the Due Process Clause of the Fourteenth Amendment to impose limitations on state courts' authority to determine non-resident parties' rights. *See, e.g., Pennoyer v. Neff*, 95 U.S. 714, 723–43, 24 L.Ed. 565 (1877); *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 323–24, 66 S.Ct. 154, 90 L.Ed. 95 (1945); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980); *Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 592 U.S. 351, 358, 141 S.Ct. 1017, 209 L.Ed.2d 225 (2021). Likewise, the dormant Commerce Clause prohibits, among other things, "the enforcement of state laws 'driven by ... economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.' " *Ross*, 598 U.S. at 369, 143 S.Ct. 1142 (omission in original) (quoting *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 337–38, 128 S.Ct. 1801, 170 L.Ed.2d 685 (2008)).

It is no surprise that the Constitution places limits on the authority a state court can exercise over companies that are incorporated in a sister state. Those limitations are as intuitive as they are sensible. A corporation's state of incorporation or principal place of business determines its domicile. *See Daimler AG v. Bauman*, 571 U.S. 117, 137, 134 S.Ct. 746, 187 L.Ed.2d 624 (2014).[9] And domicile has long carried

[9] Whittaker's principal place of business is in Connecticut. We take no position on the authority a state in which a corporation has a principal place of business may exert over that corporation when it is incorporated in a different state. Neither party has argued that Connecticut is the proper forum to enforce

with it great significance for states' authority. *See id.*; *Pennoyer*, 95 U.S. at 723. Among the many powers they exert over their domiciliaries, states may determine " 'any and all claims' brought against a [resident] defendant." *Ford Motor Co.*, 592 U.S. at 358, 141 S.Ct. 1017 (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919, 131 S.Ct. 2846, 180 L.Ed.2d 796 (2011)). But "the very nature of the federal union of states, to which are reserved some of the attributes of sovereignty, precludes resort to the full faith and credit clause as the means for compelling a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate." *Pac. Emps. Ins. Co. v. Indus. Accident Comm'n*, 306 U.S. 493, 501, 59 S.Ct. 629, 83 L.Ed. 940 (1939). Thus, when it comes to control over corporate decision-making, a state "has no interest in regulating the internal affairs of foreign corporations." *Edgar v. MITE Corp.*, 457 U.S. 624, 645–46, 102 S.Ct. 2629, 73 L.Ed.2d 269 (1982).

As Appellants would have it, that is precisely what the South Carolina Court did in this case. They contend that the Receivership Order, properly construed, "divest[ed]" Whittaker's board of authority to conduct the internal affairs of the corporation—including the authority to file for bankruptcy. Oral Arg. Tr. 15:17.[10] However, as we explained above, the

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the Receivership Order or that its law governs. Accordingly, we limit our discussion to New Jersey and South Carolina laws.

[10] Appellants seemingly take the position that the Receivership Order did far more than merely attempt to prevent Whittaker from filing for bankruptcy. At oral argument, when asked whether, in their view, the Receivership Order authorized

Order, reasonably interpreted, does not extend so far. And if it did, it would be an unprecedented exertion of power over a foreign corporation whose internal affairs are governed by the laws of a sister state, as well as a radical intrusion into the province of a co-equal sovereign.

These constitutional infirmities provide an independent basis to reject Appellants' appeal to Section 1738. Rendering full faith and credit to foreign judgments does not entail blind deference in the face of constitutional limitations. Just as "[a] State may not grant preclusive effect in its own courts to a constitutionally infirm judgment, ... other state and federal courts are not required to accord full faith and credit to such a judgment." *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 482, 102 S.Ct. 1883, 72 L.Ed.2d 262 (1982) (footnote omitted). Where, as here, the parties did not litigate the constitutionality of the state-court judgment, Section 1738 does not require New Jersey to acquiesce in the enforcement of the Receivership Order without assessing its (doubtful) constitutionality.

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"Our Constitution 'was framed upon the theory that the peoples of the several states must sink or swim together.' " *Am. Trucking Ass'ns, Inc. v. Mich. Pub. Serv. Comm'n*, 545 U.S. 429, 433, 125 S.Ct. 2419,

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the South Carolina Receiver "to amend the bylaws of the corporation, to enter into mergers," or to "[c]hange domicile," counsel for Appellants neither disavowed those actions nor offered a limiting principle for their interpretation of the Order. Oral Arg. Tr. 14:1–3.

162 L.Ed.2d 407 (2005) (quoting *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 523, 55 S.Ct. 497, 79 L.Ed. 1032 (1935)). While bound together in this federal union, certain powers remain the province of a particular state. The state of incorporation, for example, enjoys exclusive authority to govern the internal affairs of its corporations. Thus, consistent with relevant constitutional constraints, New Jersey law governs and sanctions the authority of Whittaker's board to petition for bankruptcy.

B. Are the Product-Line Claims Property of the Debtors' Estates?

As Whittaker properly entered bankruptcy, we now turn to consider whether the Product-Line Claims are property of the Debtors' bankruptcy estates. We conclude that they are under both *Emoral* and *Armetale.* To that end, we begin with a summary of the doctrinal landscape.[11]

Under Section 541 of the Bankruptcy Code, the filing of a bankruptcy petition automatically creates an "estate" comprised of "all legal or equitable interests of the debtor in property." 11 U.S.C. § 541(a)(1). This provision captures such interests "wherever located and by whomever held." *Id.* At the same time, the Supreme Court has explained that "[p]roperty interests are created and defined by state law." *Butner v. United States*, 440 U.S. 48, 55, 99 S.Ct. 914, 59 L.Ed.2d 136 (1979). The basic idea is that state

[11] For the sake of clarity, we refer to "claims" and "causes of action" interchangeably throughout the discussion that follows. Additionally, we generally use the term "debtor corporation" in reference to the applicable prepetition entity.

law defines a debtor corporation's property interests, whereas federal law governs whether those interests are swept into its bankruptcy estate. H.R. Rep. No. 95-595, at 367–68 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 5963, 6323; S. Rep. No. 95989, at 82–83 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 5787, 5869.[12]

There is no dispute that causes of action may constitute property of the estate. *See United States v. Whiting Pools, Inc.*, 462 U.S. 198, 205 n.9, 103 S.Ct. 2309, 76 L.Ed.2d 515 (1983). However, it is often difficult to apply Section 541 to causes of action because applicable non-bankruptcy law sends mixed signals. In particular, it establishes a variety of so-called derivative actions in which "the named plaintiff 'is only a nominal plaintiff' " and "[t]he substantive claim belongs to the corporation." *Harrington v. Purdue Pharma L.P.*, 603 U.S. 204, 219, 144 S.Ct. 2071, 219 L.Ed.2d 721 (2024) (quoting 2 J. Macey, Corporation Laws § 13.20[D], p. 13–140 (2020–4 Supp.)).[13] As a result, claims held by a debtor

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[12] Courts frequently use the term "state law" because property interests are ordinarily defined by the states. But federal law may establish property interests, and this is particularly true with respect to causes of action. *See, e.g., Bd. of Trs. of Teamsters Loc. 863 Pension Fund v. Foodtown, Inc.*, 296 F.3d 164, 168–69 (3d Cir. 2002) (considering whether claims arising under federal law constitute property of the estate). Thus, applicable non-bankruptcy law is the more apt term.

[13] We note that "the term 'derivative' has multiple meanings." *In re TPC Grp. Inc.*, No. 22-10493, 2023 WL 2168045, at *9 (Bankr. D. Del. Feb. 22, 2023). However, with respect to our inquiry under Section 541, derivative claims are those "based on an injury to the debtor's estate that creates a secondary harm to all creditors regardless of the nature of their underlying claims

corporation's creditors under applicable non-bankruptcy law must undergo substantive scrutiny to ensure they are not misappropriated from the debtor's bankruptcy estate. *See, e.g., Emoral*, 740 F.3d at 879 (instructing courts to consider the theory of liability); *cf. Young v. Higbee Co.*, 324 U.S. 204, 210, 65 S.Ct. 594, 89 L.Ed. 890 (1945) (noting that "the prime purposes" of bankruptcy include "bring[ing] about a ratable distribution among creditors of a bankrupt's assets" and "protect[ing] the creditors from one another").

The stakes of this exercise are significant. That is because Section 323 of the Bankruptcy Code gives the trustee exclusive statutory authority to pursue claims that constitute property of the estate under Section 541. *In re Wilton Armetale, Inc.*, 968 F.3d 273, 280 (3d Cir. 2020).[14] And the corollary of this rule proves especially troubling for interested parties: creditors—like the Committee's constituents—lack the authority to prosecute, settle, and/or release any claim that constitutes property of the estate unless the trustee

against the debtor." *Armetale*, 968 F.3d at 283 (citation modified); *see also Off. Comm. of Unsecured Creditors v. R.F. Lafferty & Co.*, 267 F.3d 340, 348–49 (3d Cir. 2001) (explaining that derivative claims are predicated on an injury to the debtor corporation).

[14] Under 11 U.S.C. § 1107(a), a debtor in a Chapter 11 case—technically called a debtor in possession—has essentially the rights of a trustee appointed by the bankruptcy court. But trustees are seldom appointed in Chapter 11 cases. Thus, a debtor's rights are, with certain exceptions, coextensive with those of a trustee, and we use the terms interchangeably.

relinquishes his or her statutory authority over it. *Id.* at 284.[15]

Courts have attempted to fix straightforward rules for the classification of claims in light of these stakes. And in doing so, they looked to the Supreme Court's decision in *Caplin v. Marine Midland Grace Tr. Co. of N.Y.*, 406 U.S. 416, 92 S.Ct. 1678, 32 L.Ed.2d 195 (1972). Its facts are straightforward: A trustee appointed under Chapter X of the Bankruptcy Act[16] asserted misconduct claims against a non-debtor indenture trustee on behalf of estate bondholders after concluding the latter trustee had either willfully or negligently breached its obligations under the indenture. *Id.* at 418–20, 92 S.Ct. 1678. In response, the indenture trustee contended that the bankruptcy trustee lacked authority to assert those claims on behalf of the bondholders. *See id.* at 420–21, 92 S.Ct. 1678.

On appeal, the Supreme Court determined that a provision of the Bankruptcy Act analogous to Section

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[15] This consequence rests at the heart of the Committee's appeal. It contends the Product-Line Claims belong exclusively to the talc creditors in order to ensure the proceeds of those claims are not shared with the full creditor constituency under the ordinary rules of priority. In that sense, this case lays bare the conflicting interests of the tort plaintiffs' bar and the bankruptcy bar.

[16] *Caplin* focused on provisions of the Bankruptcy Code's predecessor—the Bankruptcy Act of 1938. The Bankruptcy Act was replaced by the Bankruptcy Reform Act of 1978, which is commonly referred to as the Bankruptcy Code. Many Code provisions grew out of analogous sections under the Act. As a result, judicial decisions and scholarship concerning the Bankruptcy Act often inform our understanding of the Code.

544 of the modern Code did not authorize the bankruptcy trustee to assert the misconduct claims on behalf of bondholders. *Id.* at 422–28, 92 S.Ct. 1678; *see also Koch Refin. v. Farmers Union Cent. Exch., Inc.*, 831 F.2d 1339, 1347 n.11 (7th Cir. 1987) (indicating that Section 544 supplanted the Bankruptcy Act provision considered by *Caplin*); *supra* note 5 and accompanying text (explaining that the Bankruptcy Court relied on Section 544 in connection with its alternate holding in this case). Instead, the bankruptcy trustee's statutory authority was limited to asserting causes of action that were property of the estate. *Caplin*, 406 U.S. at 428–29, 92 S.Ct. 1678. But the Supreme Court concluded that the misconduct claims did not belong to the estate because, *inter alia*, they sought recovery on account of a direct injury to certain bondholders, and the debtor corporation could not have asserted those claims before its bankruptcy case began. *Id.* at 428–30, 92 S.Ct. 1678.

Following *Caplin*, courts considered the same factors to determine whether causes of action were property of the estate under Section 541 of the Bankruptcy Code. *See, e.g., Koch*, 831 F.2d at 1347 n.11; *In re Educators Grp. Health Tr.*, 25 F.3d 1281, 1285 n.4 (5th Cir. 1994). And, as the law developed, many courts adopted the basic rule that a claim is property of the estate when applicable non-bankruptcy law authorized the debtor corporation to assert it prior to bankruptcy, and the claim vindicates an injury to the debtor corporation that created a secondary injury to all creditors. *See, e.g., In re Icarus Holding, LLC*, 391 F.3d 1315, 1319–20 (11th Cir. 2004), *certified question answered sub nom. Baillie Lumber Co. v. Thompson*, 279 Ga. 288, 612 S.E.2d 296

(2005) ("[M]ost courts require that (1) the [disputed claim] be a general claim that applies equally to all creditors, and (2) state law allows the [debtor] entity to bring [the disputed claim].").

Over time, however, the basic rule proved unworkable with respect to successor liability claims that were nominally vested with creditors on account of secondary harms derived from prepetition injuries to the debtor corporation. *See, e.g., St. Paul Fire & Marine Ins. Co. v. PepsiCo, Inc.*, 884 F.2d 688, 700–02 (2d Cir. 1989) (explaining that "*Caplin* is not controlling" where claims vindicate derivative injuries to the full creditor constituency). Those claims presented a contradiction because the derivative-injury aspect favored concluding the claim at issue was property of the estate, whereas the debtor corporation's inability to assert the claim outside of bankruptcy supported the conclusion that it belonged to the individual creditors. *See id.* (discussing both factors).[17]

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[17] This phenomenon makes sense in context. Successor liability claims frequently target an injury to the debtor corporation by a controlling entity. *See, e.g., Walensky v. Jonathan Royce Int'l, Inc.*, 264 N.J.Super. 276, 624 A.2d 613 (N.J. App. Div. 1993). However, as a practical matter, the debtor corporation is unlikely to assert those claims against a controlling entity. *See, e.g., In re Buildings by Jamie, Inc.*, 230 B.R. 36, 42 (Bankr. D.N.J. 1998) (noting that "principals of a solvent debtor will not be compelled to pierce the veil of the very entity they use as a conduit for their personal business" because doing so would "effectively extinguish their limited liability and expose them to the personal liability that the corporate form is employed to avoid"); *In re W. World Funding, Inc.*, 52 B.R. 743, 784 (Bankr. D. Nev. 1985), *aff'd in part and rev'd in part on other grounds sub nom., Buchanan v. Henderson*, 131 B.R. 859 (D. Nev.

We have considered two such cases, and we held the claims at issue were property of the estate in both.[18] The first was *Emoral,* 740 F.3d 875. Before its bankruptcy, the debtor in that case manufactured diacetyl, a chemical used in the food flavoring industry that was found to cause various lung ailments. *Id.* at 877. Through a complicated procedural history, a group of plaintiffs eventually sued a third-party purchaser that acquired certain of the debtor's assets for diacetyl-related personal injuries caused by the debtor's products. *Id.* They proceeded against the purchaser on the theory that it was liable for their diacetyl-related tort claims as the "mere continuation" of the debtor. *Id.* at 876–77; *see also supra* note 4 (discussing the mere continuation theory of liability). But the purchaser contended the tort claimants could not assert the mere continuation claims because they were property of the debtor's bankruptcy estate. *See id.* at 878.

Notably, our approach resembled the basic rule. We explained at the outset that a claim is property of the estate if it (1) existed at the time the debtor

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1990), *rev'd*, 985 F.2d 1021 (9th Cir. 1993) (explaining that "defendants who so completely dominate [a] corporation as to constitute its alter egos are not likely to institute an action to determine their own liability for corporate debts"). Accordingly, state law nominally vests successor liability claims with creditors to ensure they can be asserted.

[18] Counting our decision in *Foodtown*, we have applied Section 541 to causes of action in at least three cases. *See* 296 F.3d at 170–71. But that decision is not applicable because it concerned federal pension withdrawal liability claims that did not exist until the debtor filed for bankruptcy. *Id.* at 170. And in our case, there is no dispute that the Product-Line Claims existed prior to the Debtors' bankruptcy cases.

corporation filed its bankruptcy petition, (2) could have been asserted by the debtor corporation outside of bankruptcy under applicable state law, and (3) is a general claim "with no particularized injury arising from it." *Id.* at 879 (quoting *Bd. of Trs. of Teamsters Loc. 863 Pension Fund v. Foodtown, Inc.*, 296 F.3d 164, 170 (3d Cir. 2002)). As in this case, the parties did not dispute the first prong, so we focused on the latter two.

The second prong was challenging to apply because it was "difficult to imagine" that the debtor corporation "would or could bring a claim for successor liability" outside of bankruptcy. *Id.* at 881. That is because debtor corporations are—as a practical matter—generally unable to assert certain successor liability claims even when state law authorizes them to do so. *Id.* (citing *In re Buildings by Jamie, Inc.*, 230 B.R. 36, 42 (Bankr. D.N.J. 1998)); *see also supra* note 17 and accompanying text (explaining that debtor corporations ordinarily refrain from asserting successor liability claims). At the same time, we noted that courts have classified successor liability claims as property of the estate notwithstanding the practical considerations that prevent their assertion by debtor corporations. *See Emoral*, 740 F.3d at 881 (discussing cases). So, with respect to the dispute before us, we expressed doubt that the debtor corporation's inability to assert the mere continuation claims outside of bankruptcy would be dispositive. *See id.*

The third prong was also challenging because the tort claimants emphasized their underlying tort injuries in an effort to demonstrate particularized harms. *See id.* at 879 (explaining that the tort claimants "focus[ed] on the individualized nature of their personal injury claims against [the debtor]" to obfuscate the derivative nature of the mere continuation theory of liability). Indeed, the tort claimants had asserted personal injury claims against the debtor to recover for the direct injuries they sustained from products manufactured by the debtor. *Id.* at 877. And according to the tort claimants, the mere continuation claims they asserted against the third-party purchaser were predicated on the same product-related injuries. *Id.* at 877–78.

We disagreed. As noted above, the mere continuation theory of liability turns on "continuity in management, shareholders, personnel, physical location, assets and general business operation between selling and purchasing corporations following [an] asset acquisition." *Id.* at 880 (quoting *Ramirez*, 431 A.2d at 816). So, although the tort creditors "focus[ed] on the individualized nature" of their underlying claims, *id.* at 879, they "fail[ed] to demonstrate how any of the factual allegations that would establish their cause of action based on successor liability [were] unique to them," *id.* at 880. Likewise, the tort creditors could not "demonstrate how recovery on their successor liability cause of action would not benefit all creditors." *Id.* From that perspective, their theory of liability was "based on a general injury suffered by a corporate debtor prior to its bankruptcy filing," *id.* at 882 (quoting *Foodtown*, 296 F.3d at 171), as opposed to "any direct injury" inflicted by the purchaser they sought to hold liable, *id.* at 879. We thus concluded the mere continuation claims were property of the estate. *Id.* at 882. And in doing so, we cautioned courts to "examine the nature of the cause of action" to avoid misclassifying successor liability claims on the basis of tort injuries inflicted by the debtor. *Id.* at 879–80.

We decided *Armetale* next. 968 F.3d 273. In that case, the former owner of Wilton Armetale, Inc. engineered a series of transactions involving the sale of corporate assets for less than fair value in exchange for a kickback from the purchaser. *Id.* at 278. Eventually, however, one of Armetale's creditors discovered the scheme and asserted fraudulent transfer claims against the colluding parties. *Id.* Armetale subsequently filed for bankruptcy, which prompted a dispute as to whether those fraudulent transfer claims belonged to the bankruptcy estate or to the creditor that asserted them.

We explained that claims are property of the estate where the theory of liability is "based on an injury to the debtor's estate that creates a secondary harm to all creditors regardless of the nature of their underlying claim[s] against the debtor." *Id.* at 283 (quoting *In re Tronox Inc.*, 855 F.3d 84, 104 (2d Cir. 2017)). Such is the case where the theory of liability is "based on facts generally available to any creditor, and recovery would serve to increase the pool of assets available to all creditors." *Id.* (quoting *Emoral*, 740 F.3d at 881). In contrast, we stated that claims are personal to creditors "[o]nly when a particular creditor suffers a direct, particularized injury that can be 'directly traced' to the defendant's conduct." *Id.* (quoting *Tronox*, 855 F.3d at 100). The disputed fraudulent transfer claims, however, vindicated the prepetition depletion of corporate assets, which "lower[ed] the odds that the [debtor corporation] w[ould] repay its creditors." *Id.* at 277. In that sense, the claims "rel[ied] on a general theory of recovery derivative of harm done to [the debtor corporation]." *Id.* at 283. We therefore determined they were property of the estate. *Id.*

Against this backdrop, the Committee argues the Product-Line Claims are not property of the Debtors' estate for three reasons.[19] We address and reject them in turn.

1. Claims May Constitute Property of the Estate Notwithstanding Whether the Debtor Corporation Could Assert Them Outside of Bankruptcy.

The Committee contends that the Debtors cannot satisfy *Emoral* because state law does not establish "an independent right" for them to assert the Product-Line Claims outside of bankruptcy. Appellant Committee's Opening Br. 32.[20] For this assertion, it

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[19] The Committee also claims that classifying the Product-Line Claims as property of the estate would violate the Supreme Court's decision in *Purdue Pharma.* That decision held that bankruptcy courts lack the power to extinguish creditor claims against third parties absent consent from the affected creditors. 603 U.S. at 227, 144 S.Ct. 2071. So, the Committee argues, treating the Product-Line Claims as property of the estate—and thus permitting the Debtors to settle them—would result in a non-consensual third-party release. But this contention places the cart before the horse. Our inquiry focuses on the antecedent question of whether the Product-Line Claims substantively belong to the tort creditors or to the estate under Section 541. *See id.* at 219, 144 S.Ct. 2071 ("[N]o one questions that [a debtor] may address in its own bankruptcy plan claims ... derivatively asserted by another on its behalf.").

[20] In an effort to bolster its position, the Committee repeatedly emphasizes that the Product-Line Claims are vested

points to a line from *Emoral* explaining that a cause of action is property of the estate "if ... the debtor could have asserted the claim on [its] own behalf under state law." *Emoral*, 740 F.3d at 879 (quoting *Foodtown*, 296 F.3d at 169 n.5). In short, the Committee asks us to consider this aspect of the basic rule a necessary, rather than sufficient, condition.

The problem is that this request is inconsistent with our precedents. For example, we concluded the mere continuation claims at issue in *Emoral* were property of the estate irrespective of whether the debtor could assert them outside of bankruptcy. *See id.* at 881. Similarly, *Armetale* held that fraudulent transfer claims are property of the estate, 968 F.3d at 283, yet state law vests those claims exclusively with the creditors of a debtor corporation outside of bankruptcy, *see, e.g., In re Cybergenics Corp.*, 226 F.3d 237, 242 (3d Cir. 2000) ("[O]utside of the context of bankruptcy, it is clear that a fraudulent transfer claim ... belongs to [the debtor corporation's] creditors ...."); *In re Global Grounds Greenery, LLC*, 405 B.R. 659, 662 (Bankr. D. Ariz. 2009) ("There is no dispute that the Uniform Fraudulent Transfer Act, as adopted in Arizona and elsewhere, only creates causes of action for creditors of the transferor."); *In re ShengdaTech, Inc.*, 519 B.R. 292, 303–04 (D. Nev. 2014) (holding

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with, and inure to the benefit of, tort creditors alone. In any event, that may not be the case. *See Mettinger v. Globe Slicing Mach. Co.*, 153 N.J. 371, 709 A.2d 779, 786 (1998) (holding that "distributors and retailers may use the product-line exception to seek indemnification from corporations that purchased all or substantially all of the original manufacturer's assets and undertook essentially the same manufacturing operation as that corporation").

that, under Nevada's Uniform Fraudulent Transfer Act, a creditor is the only party with standing to bring a claim).

Furthermore, the Committee's request would subvert the goals that Congress sought to advance through the Bankruptcy Code. As we have repeatedly explained, Section 541 safeguards property to enable orderly administration and equitable distribution to all creditors of the bankrupt entity's estate. *See, e.g., Emoral*, 740 F.3d at 879, 881. These aims are particularly germane where the Committee's approach would invite any number of states to endow certain creditors with a windfall recovery by vesting causes of action predicated on an injury to the debtor corporation exclusively with those creditors. Accordingly, consistent with our analysis in both *Emoral* and *Armetale*, we conclude that a claim may constitute property of the estate notwithstanding whether the debtor corporation was authorized to assert it outside of bankruptcy.[21]

2. The Product-Line Claims Are Not Based on Particularized Injuries Directly Traceable to the Conduct of Brenntag.

The Committee also argues that the Product-Line Claims cannot constitute property of the estate because they are "specific claims" that "arise from harms unique to [the tort claimants] ... based on [the] conduct of [Brenntag]." Appellant Committee's

[21] For the sake of clarity, we agree that a debtor corporation's ability to assert a claim under applicable non-bankruptcy law is sufficient—but not necessary—for that claim to constitute property of the estate.

Opening Br. 33. However, we have already explained that successor liability claims are property of the estate because the facts on which successor liability depends—the successor's relationship with the manufacturer—do not implicate a claim that is "specific to the creditor." *Emoral*, 740 F.3d at 879 (quoting *Foodtown*, 296 F.3d at 170).

The same principle applies here. The product-line theory of liability pressed by the Committee turns on the successor's relationship with the manufacturer, for it is the successor's acquisition and continuation of the "same manufacturing operation and practices" that seeds its potential liability to individual claimants. Appellant Committee's Opening Br. 33 (citing *Ramirez*, 431 A.2d at 820). In contrast, the asbestos injuries endured by the tort claimants do not stem from the facts underlying Brenntag's status as a successor to the Debtors. They trace only to their exposure to asbestos-contaminated products manufactured by the Debtors before Brenntag came into the picture. This precludes them from being "directly traced" to Brenntag. *Armetale*, 968 F.3d at 283 (quoting *Tronox*, 855 F.3d at 100).

To be sure, the Committee correctly observes that its constituents have each suffered "harms unique to [them]." Appellant Committee's Opening Br. 33. But this argument simply echoes the dissent in *Emoral*, which would have held that the mere continuation claims at issue were based on a particularized injury "[b]ecause the [tort creditors'] underlying allegations are clearly individualized in nature." *Emoral*, 740 F.3d at 883 (Cowen, J., dissenting). The *Emoral* majority rejected that focus on "the nature of the [underlying tort] injury" in favor of analyzing the theory of liability and the facts on which it relies. *Armetale*, 968 F.3d at 282 (citing *Emoral*, 740 F.3d at 879). And that analysis controls even though the harm suffered by some creditors "might be worse in degree than that suffered by other creditors." *Id.* at 283.

3. The Product-Line Claims Are Based on A Prepetition Injury to the Debtors that Resulted in Secondary Harm to All Creditors.

Finally, the Committee notes that the Debtors "did not suffer the injuries endured by mesothelioma victims." Appellant Committee's Petition for Rehearing 13. So, unlike the fraudulent transfer claims we considered in *Armetale*, the Committee contends that the Product-Line Claims at issue do not involve a theory of recovery "derivative of harm that [the debtor] suffered directly." *Id.* at 8 (quoting 968 F.3d at 282). We disagree. In our view, they are akin to fraudulent transfer claims in two critical respects.

First, the product-line theory of liability serves the same general purpose. As we explained above, the product-line theory imposes liability for injuries caused by defects of a product line on a corporation that acquires the manufacturing assets of another corporation and undertakes essentially the same operations and practices. *Ramirez*, 431 A.2d at 820. But it grew out of the traditional corporate view that successor liability claims apply in "the absence of adequate consideration for [a] sale or transfer." *Ramirez*, 431 A.2d at 815, 819 (citation omitted). Unsurprisingly, then, it serves to prevent the destruction of creditor remedies based on complex commercial transactions involving the transfer of corporate assets that would otherwise be available to creditors of the transferor. *Id.* at 820 (citing *Ray v. Alad Corp.*, 19 Cal.3d 22, 136 Cal.Rptr. 574, 560 P.2d 3, 9 (1977)); *see also Ray*, 136 Cal.Rptr. 574, 560 P.2d at 10 (justifying liability based on the depletion of corporate resources available to satisfy liabilities). Fraudulent transfer claims are no different. They apply in the absence of "reasonably equivalent value" for a transfer or sale. 5 *Collier on Bankruptcy* ¶ 548.05 (16th ed. 2025). They serve "to ensure that the debtor does not engage in transactions that diminish the pool of assets available to creditors." Douglas G. Baird, *Fraudulent Transfer Law's Forgotten Foundations*, 5 U. CHI. BUS. L. REV. 53, 56 (2026). And they do so to prevent debtor corporations from "evad[ing] ordinary creditor remedies." *Id.* at 75.

Second, fraudulent transfer claims turn on the same generally available facts as the product-line theory. A fraudulent transfer is voidable if, among other things, "the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer." N.J. Stat. Ann. § 25:2-27(a). On the other hand, the product-line theory requires proof that the non-debtor defendant's "purchase of the product line destroyed the plaintiff's available remedies." Appellant Committee's PFR, at 11 (citing *Ramirez*, 431 A.2d at 824–25). But these elements overlap such that the generalized findings in support of one claim could be asserted to establish the other. Suppose, for example, that the Bankruptcy Court determined Brenntag's acquisition of the Debtors' manufacturing assets rendered them insolvent. The tort creditors could assert that finding in state court to establish that Brenntag's acquisition destroyed their available remedies. And "[i]f [that] generalized finding[ ] would benefit their [product-line] case[s], then their claims are no less generalized than the fraudulent-conveyance claims." *Tronox*, 855 F.3d at 107; *see also In re Bernard L. Madoff Inv. Sec. LLC*, 740 F.3d 81, 91 (2d Cir. 2014) (concluding conspiracy-based claims were property of the estate where the factual allegations made by tort claimants echoed fraudulent transfer allegations made by the trustee).

Our point is straightforward. The Committee readily concedes that fraudulent transfer claims are property of the estate. Appellant Committee's PFR, at 10 (citing *Armetale*, 968 F.3d at 283). But the Product-Line Claims it challenges on appeal are similar in object and purpose to the fraudulent transfer claims we considered in *Armetale*. Indeed, as we have explained, both theories of liability address derivative injuries to the full creditor constituency that resulted from the prepetition diversion of corporate assets. And "[b]ecause [those] claims depend on harm suffered directly by [the debtor corporation] and only indirectly by [creditors], [the] theory of recovery is not personal, but derivative of harm to the estate." *Armetale*, 968 F.3d at 283; *see also Emoral*, 740 F.3d at 879 (instructing courts to focus on the theory of liability to prevent creditors from obfuscating prepetition harm to the debtor corporation). Such claims belong squarely to the estate.

Contrary to the Committee's assertion, our conclusion is hardly anomalous. Other courts have adopted the same view when creditors asserted successor liability claims predicated on the prepetition diversion of corporate assets. For example, in *National American Ins. Co. v. Ruppert Landscaping Co., Inc.*, the Fourth Circuit held that creditors lacked standing to assert successor liability claims because they were "so similar in object and purpose to [fraudulent transfer] claims that the trustee could bring in bankruptcy court." 187 F.3d 439, 441 (4th Cir. 1999) (Wilkinson, J.). In that case, Ruppert Landscaping Company entered a series of contracts under which it agreed to purchase certain of Green Thumb Enterprise's notes and assets. *Id.* at 440. But Green Thumb was pushed into bankruptcy when it defaulted on various agreements bonded by sureties. *Id.* Thereafter, the sureties asserted, *inter alia*, successor liability claims against Ruppert. *Id.* at 440–41.

On appeal, the Fourth Circuit noted that "the [s]ureties rel[ied] heavily on exposing the Ruppert/Green Thumb transaction to be fraudulent." *Id.* at 441. And "[a]lthough the [s]ureties' claims and the trustee's fraudulent conveyance claim [did] not contain identical elements, they all share[d] this same underlying focus." *Id.* For that reason, "[a]ll creditors, not simply the [s]ureties, ha[d] a stake in exposing any impropriety in the Ruppert/Green Thumb transaction." *Id.* at 442. Moreover, "allow[ing] selected creditors to artfully plead their way out of bankruptcy court would unravel the bankruptcy process" and prompt "a multijurisdictional rush to judgment whose organizing principle could only be first-come-first-served." *Id.* (citations omitted). The Court thus concluded the successor liability claims were property of the estate in an effort to "maintain[ ] the integrity of the bankruptcy proceeding and ensure[ ] that individual creditors [did not] hijack the bankruptcy process." *Id.*

The Second Circuit likewise held in *Tronox* that successor liability claims predicated on the prepetition depletion of a debtor corporation's assets were property of its bankruptcy estate. *See* 855 F.3d at 106–07. Prior to the insolvency proceedings that prompted the dispute, Kerr-McGee Corporation underwent a series of transactions that split the company into two distinct entities: New Kerr-McGee and Tronox. *Id.* at 88. The former maintained control of Kerr-McGee Corporation's oil and gas assets, whereas Tronox was left a corporate shell saddled with Kerr-McGee Corporation's environmental and tort liabilities. *Id.* And in order to manage the claims of several thousand tort creditors, Tronox filed for bankruptcy in the Southern District of New York. *Id.* at 91.

Shortly after the petition date, Tronox asserted fraudulent transfer claims against New Kerr McGee to recover the assets that were transferred to the latter through the spinoff transactions. *Id.* at 88. Tronox ultimately prevailed on those claims, but New Kerr-McGee agreed to an approximately $5 billion settlement before the court entered a final judgment on damages. *Id.* at 92. And, as part of the settlement agreement, Tronox agreed to release New Kerr-McGee from various claims that belonged to its bankruptcy estate. *Id.* However, believing the scope of the estate did not extend to successor liability claims, the tort creditors sought to hold New KerrMcGee liable "as the alter ego and successor to the liabilities of the former parent of the actual alleged tortfeasor." *Id.* at 106.

Consistent with our approach in *Emoral*, the Second Circuit explained that claims are property of the estate if they vindicate an injury to the full creditor constituency "based upon a secondary effect from harm done to the debtor." *Id.* at 100 (citation modified). On the other hand, they belong to individual creditors if they vindicate an injury that can be "directly traced to the third party's conduct." *Id.* (citation modified). And insofar as the Court was concerned, the successor liability claims constituted property of the estate because the tort creditors failed to "trace their harm to New Kerr-McGee." *Id.* at 106.

Crucially, the Court emphasized that "plaintiffs often try, but are not permitted, to plead around a bankruptcy." *Id.* at 100. And in its view, the tort creditors had attempted to do just that. *See id.* at 103–06. Indeed, they sought an opinion and order permitting them "to sue third-party successors of [Tronox] for claims that are truly aimed at recovering estate assets." *Id.* at 104 (discussing *Emoral* with approval). But "[e]very creditor ha[d] a similar claim for the diversion of assets." *Id.* at 103. And "[t]he exact same claim advanced by the trustee on behalf of the estate would be a win for all creditors of the estate." *Id.* at 104. Accordingly, the Court rejected the tort creditors' request.

So too here. As in both *Ruppert Landscaping* and *Tronox*, the tort claimants in our case have attempted to plead their way around the Debtors' bankruptcy proceedings by asserting the Product-Line Claims against Brenntag. They have pursued those claims to recover from, among other things, the operating assets that Brenntag acquired from the Debtors. And they seek this recovery in satisfaction of asbestos injuries they trace to talc products manufactured exclusively by the Debtors. In that context, the Product-Line Claims are predicated on a prepetition injury to the Debtors (from Brenntag's diversion of substantially all operating assets the Debtors possessed) that resulted in a secondary injury to all creditors (by rendering those assets unavailable for distribution on account of their claims against the Debtors). The Product-Line Claims thus constitute property of the estate.

In summary, claims are personal to creditors when the theory of liability is based on a particularized injury directly traceable to the conduct of the defendant. *Armetale*, 968 F.3d at 283; *Emoral*, 740 F.3d at 879. They are property of the debtor's bankruptcy estate if the theory of liability is instead based on an injury to the debtor corporation that resulted in secondary harm to all creditors. *See, e.g., Armetale*, 968 F.3d at 283. And in many cases, claims in the latter category are easy to identify because applicable non-bankruptcy law authorizes the debtor corporation to assert them outside of bankruptcy. *See, e.g., Emoral*, 740 F.3d at 879 (explaining that property of the estate "includes" claims "the debtor could have asserted ... on his own behalf under state law"); *In re S.I. Acquisition, Inc.*, 817 F.2d 1142, 1152 (5th Cir. 1987) (concluding alter-ego claims were property of the estate where the debtor corporation was authorized to assert them).

Nonetheless, certain states might seek to authorize a subset of creditors to vindicate secondary harms derived from the depletion of estate assets through successor-liability claims vested exclusively with that subset. Courts must therefore scrutinize the theory of liability to prevent nominal plaintiffs from commandeering the bankruptcy process. *See, e.g., Emoral*, 740 F.3d at 879 (focusing on the theory of liability—as opposed to underlying tort injuries caused by the debtor—to prevent creditors from obfuscating a general injury to the estate); *Purdue Pharma*, 603 U.S. at 219, 144 S.Ct. 2071 (explaining that derivative claims are property of the estate because "[t]he substantive claim belongs to the corporation") (citation omitted).

To be sure, we "look to state law to determine if a property right exists and to stake out its dimensions." *In re Nejberger*, 934 F.2d 1300, 1302 (3d Cir. 1991) (citing *Butner*, 440 U.S. at 54–55, 99 S.Ct. 914). But "[t]he whole point of channeling claims through bankruptcy is to ... promote an equitable distribution of debtor assets." *Tronox*, 855 F.3d at 106 (citing *Koch*, 831 F.2d at 1343). And "[t]o allow selected creditors to artfully plead their way out of bankruptcy court would unravel the bankruptcy process and undermine an ordered distribution of the bankruptcy estate." *Ruppert Landscaping*, 187 F.3d at 442. We decline to permit that result. Indeed, the Supreme Court cautioned in *Butner* that property interests should be analyzed in accordance with state law "[u]nless some federal interest requires a different result." 440 U.S. at 55, 99 S.Ct. 914.

IV. CONCLUSION

Whittaker filed for bankruptcy after its board exercised its power to authorize the petition. The South Carolina Court could not unilaterally divest Whittaker's board of that authority, and, once appointed, the South Carolina Receiver had to convince a New Jersey court to displace the board. Because that did not occur, Whittaker properly entered bankruptcy. And, once there, Section 541(a)(1) of the Bankruptcy Code brought the Product-Line Claims into the Debtors' estates. For these reasons, we affirm the judgments of the District and Bankruptcy Courts.

AMBRO, Circuit Judge, concurring

The *Erie* doctrine—taken from *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), and its progeny—is the North Star for determining whether federal or state law should apply in federal court. The answer is state law unless the matter is governed by superseding federal law, such as the Constitution, a congressional enactment, or federal common law. *See* Charles A. Wright, Arthur R. Miller, & Edward H. Cooper, 19 *Federal Practice and Procedure* § 4501 (3d ed. 2025). *Erie* questions occur most often when federal courts sit in diversity-of-citizenship jurisdiction because those disputes usually involve only state substantive law. State law, however, includes more than just the underlying substantive law. The Supreme Court told us in *Klaxon Co. v. Stentor Electric Manufacturing Co.*, 313 U.S. 487, 61 S.Ct. 1020, 85 L.Ed. 1477 (1941), that it includes choice-of-law rules as well.

What force, if any, does *Klaxon* have in bankruptcy, where the parties' primary rights and interests are often governed by state law? We need not answer that question in a holding, as the parties agree on the law that governs: New Jersey's. *See* Wright, Miller & Cooper § 4506 (collecting cases for the proposition that courts need not determine which state's choice-of-law regime applies when the parties do not dispute that question).

Though "a pretty good reason for having 'skimmed over the conflicts problem as if none existed' was that none did exist," Henry Friendly, *In Praise of Erie – And the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 401 (1964) (citation omitted), the question whether *Klaxon* applies in bankruptcy has spawned interesting academic debate. Answers span the spectrum. *Compare, e.g.*, Zachary D. Clopton, *Horizontal Choice of Law in Federal Court*, 169 PA. L. REV. 2193, 2203–06 (2021) (*Klaxon* applies without exception), *with* Tobias Barrington Wolff, *Choice of Law and Jurisdictional Policy in the Federal Courts*, 165 PA. L. REV. 1847 (2017) (*Klaxon* applies only in diversity actions). Our concurring colleague has staked out her position that *Klaxon* always applies in bankruptcy, no exceptions. Because I am uncomfortable with that view, I instead take the opportunity to make some nonbinding observations about *Erie* and choice of law.

I. ERIE AND KLAXON

A brief refresher on the *Erie* doctrine. Despite the almost mystical fascination that has long surrounded *Erie*, it stands for three basic propositions.

First, "[t]here is no federal *general* common law." *Erie*, 304 U.S. at 78, 58 S.Ct. 817 (emphasis added). "[N]either Congress nor the federal courts can, under the guise of formulating rules of decision for federal courts, fashion rules which are not supported by a grant of federal authority contained in Article I or some other section of the Constitution." *Hanna v. Plumer*, 380 U.S. 460, 471, 85 S.Ct. 1136, 14 L.Ed.2d 8 (1965). When the Constitution *does* authorize Congress or courts to do so, however, *Erie* has no application, and federal law displaces contrary state law through the Supremacy Clause.

Second, without a federal statute or constitutionally authorized federal common-law rule, the Rules of Decision Act, 28 U.S.C. § 1652, commands federal courts to apply the rules of decision of their forum states "in cases where they apply." The Supreme Court has developed a framework for determining when a state law falls within the scope of the Rules of Decision Act. *See Gasperini v. Ctr. For Humanities, Inc.*, 518 U.S. 415, 427–28, 116 S.Ct. 2211, 135 L.Ed.2d 659 (1996); *Hanna*, 380 U.S. at 468, 85 S.Ct. 1136. The specifics of that framework are irrelevant for our purposes.

Third, when a Federal Rule (*e.g.*, the Federal Rules of Civil Procedure) conflicts with state law, then the Rules Enabling Act, 28 U.S.C. § 2072, not the Rules of Decision Act as construed by *Erie* and other cases, determines which law applies. *See Hanna*, 380

U.S. at 463–64, 85 S.Ct. 1136; *Burlington N. R.R. Co. v. Woods*, 480 U.S. 1, 4–5, 107 S.Ct. 967, 94 L.Ed.2d 1 (1987). The Rules Enabling Act is also irrelevant for our purposes.

Klaxon followed *Erie* and held that a federal court sitting in general diversity-of-citizenship jurisdiction is required to use the choice-of-law rules of its forum state. *Klaxon*, 313 U.S. at 496–97, 61 S.Ct. 1020. The Court's reasoning was sparse, but its decision is best understood as falling into the *Erie* doctrine's second bucket—absent some constitutionally authorized federal law, the Rules of Decision Act kicks in. State choice-of-law rules are state rules of decision under that statute. *See A.I. Trade Fin., Inc. v. Petra Int'l Banking Corp.*, 62 F.3d 1454, 1464 (D.C. Cir. 1995) ("A choice-of-law rule is no less a rule of state law than any other ...."). But if Congress or federal courts invoke some source of constitutional authority to promulgate federal choice-of-law rules, then federal courts would instead find themselves in the first bucket. The Rules of Decision Act, and thus *Klaxon*, would no longer apply.

II. FEDERAL COMMON LAW AFTER *ERIE*

Although *Erie* ended the *general* federal common law, the Supreme Court has been unequivocal in recognizing that the *Erie* doctrine does not entirely displace federal common law. As Justice Brandeis acknowledged in a decision released on the same day as *Erie*, federal courts may still formulate special federal common law on issues of uniquely federal interest. *See Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110, 58 S.Ct. 803, 82 L.Ed. 1202 (1938) (concluding that interstate water apportionment "is a question of 'federal common law' upon which neither the statutes nor the decisions of either State can be conclusive"); *see also Boyle v. United Techs. Corp.*, 487 U.S. 500, 504, 108 S.Ct. 2510, 101 L.Ed.2d 442 (1988) (noting that federal courts may still formulate federal common law in certain areas implicating "uniquely federal interests").

For example, federal courts may still generate common-law rules when "the policy of the law is so dominated by the sweep of federal statutes and doctrines developed under them that the legal relations they affect must be deemed governed by federal law." Wright, Miller, & Cooper § 4514. Likewise, it can sometimes "be inferred from congressional or constitutional intent that the federal courts should supply the necessary rule of decision by pronouncing common law to fill the interstices of a pervasively federal substantive framework." *Id.*

To be sure, the "cases in which judicial creation of a special federal rule would be justified ... are ... 'few and restricted.' " *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 87, 114 S.Ct. 2048, 129 L.Ed.2d 67 (1994) (quoting *Wheeldin v. Wheeler*, 373 U.S. 647, 651, 83 S.Ct. 1441, 10 L.Ed.2d 605 (1963)). Before federal courts develop common-law rules, "a significant conflict between some federal policy or interest and the use of state law must first be specifically shown." *Atherton v. FDIC*, 519 U.S. 213, 218, 117 S.Ct. 666, 136 L.Ed.2d 656 (1997) (quoting *Wallis v. Pan Am. Petrol.*, 384 U.S. 63, 68, 86 S.Ct. 1301, 16 L.Ed.2d 369 (1966)). But when that happens, federal courts no doubt have the power to create special federal common law, including choice-of-law rules.

To recap: When Congress or federal courts validly promulgate some federal rule of decision under a source of constitutional authority, then federal law displaces contrary state law. Absent that kind of federal law, then the Rules of Decision Act applies, which commands federal courts to apply state rules of decision. Even after *Erie*, federal courts retain the power to promulgate special federal common-law rules when a strong federal interest requires such rules. Those cases, however, are rare.

III. WHAT CHOICE-OF-LAW RULES GOVERN WHEN FEDERAL COURTS SIT IN BANKRUPTCY?

This leaves our main questions: (1) Does *Klaxon* apply in federal bankruptcy litigation, and if so, (2) may federal courts ever use special federal common-law choice-of-law rules instead?

The circuits are split. The Ninth Circuit limits *Klaxon* to diversity cases, and thus federal courts must apply federal choice-of-law principles in bankruptcy cases. *In re Lindsay*, 59 F.3d 942, 948 (9th Cir. 1995).[1] The Eighth Circuit has arguably held that

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[1] The Fifth Circuit at one time took a similar view but seems more recently to have second-guessed whether it conclusively settled the question. *Compare Wallace Lincoln-Mercury Co. v. Gentry*, 469 F.2d 396, 400 n.1 (5th Cir. 1972) ("In this federal bankruptcy case the District Court is not obliged to use the choice-of-law methodology of the forum state, Louisiana."), *with Fishback Nursery, Inc. v. PNC Bank, N.A.*, 920 F.3d 932, 935 (5th Cir. 2019) ("[I]t is an open question in this circuit as to whether

Klaxon applies categorically in federal bankruptcy cases without exception. *In re Payless Cashways*, 203 F.3d 1081, 1084 (8th Cir. 2000). I say "arguably" because that decision passes on the issue in a single conclusory sentence with no further analysis. It is thus hard to conclude that the Eighth Circuit contemplated and rejected the possibility of exceptions. Finally, the Second and Fourth Circuits have held that *Klaxon* applies in federal bankruptcy proceedings unless a strong federal interest justifies creating federal choice-of-law rules as a matter of federal common law. *In re Merritt Dredging Co.*, 839 F.2d 203, 206 (4th Cir. 1988); *In re Gaston & Snow*, 243 F.3d 599, 605–06 (2d Cir. 2001).

I believe that the Second and Fourth Circuits have it right. The Ninth Circuit is wrong because *Erie*, and thus *Klaxon*, is not limited to federal diversity jurisdiction. Whenever federal courts encounter an issue whose resolution is not a matter of federal law, the Rules of Decision Act compels them to use state substantive law, which includes choice-of-law rules. If the Eighth Circuit held that *Klaxon* applies without exception in federal bankruptcy cases, it is wrong as well. Federal courts after *Erie* retain constitutional power to promulgate special federal common-law rules, including choice-of-law rules, when strong federal interests justify doing so. "*Erie* did not fence off a 'local law field' constitutionally immune to federal influence; it was quite clear that exclusive state power takes up only where federal power leaves

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courts exercising bankruptcy jurisdiction should apply forum or federal choice-of-law rules.").

off." John Hart Ely, *The Irrepressible Myth of Erie*, 87 Harvard L. Rev. 693, 705 (1974).

A. *Erie* and *Klaxon* Apply Outside General Diversity Jurisdiction.

I believe it is wrong to conclude that *Erie* applies only in federal diversity cases. It applies to any "questions which arise in federal court but whose determination is not a matter of federal law." *Merritt Dredging*, 839 F.2d at 206; *see also Fagin v. Gilmartin*, 432 F.3d 276, 285 n.2 (3d Cir. 2005) (Ambro, J.) (invoking *Erie* to apply New Jersey law in a federal securities-law case brought under federal-question jurisdiction). Given the three-bucket framework I described above, this makes sense. Without on-point federal law, the Rules of Decision Act governs. And that statute does not turn on the basis of federal jurisdiction. *Erie* applies just as much when a court is sitting in its federal-question or bankruptcy jurisdiction as it does in general diversity. *See, e.g., United Mine Workers v. Gibbs*, 383 U.S. 715, 726, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966) (applying *Erie* in pendent jurisdiction cases); *Griffin v. McCoach*, 313 U.S. 498, 503, 61 S.Ct. 1023, 85 L.Ed. 1481 (1941) (applying *Erie* in interpleader cases).[2]

[2] *Vanston Bondholders Protective Comm. v. Green* suggests that federal courts have wide latitude to devise common-law choice-of-law rules in bankruptcy. 329 U.S. 156, 161–62, 67 S.Ct. 237, 91 L.Ed. 162 (1946). When the Court decided that case, however, the Rules of Decision Act covered only common-law claims, and so it would not have applied to claims created by federal bankruptcy law. Clopton, *supra*, at 2205 n.76 ("For those who believe that the Rules of Decision Act plays an important role in *Erie* cases, that statute exclusively referred to common[-]law claims until two years after *Vanston*

If we accept that *Erie* applies whatever the basis of federal jurisdiction, then it does not take much more analysis to conclude that the same is true for *Klaxon*. Both *Erie* and *Klaxon* "make clear that federal law may not be applied to questions which arise in federal court but whose determination is not a matter of federal law." *Merritt Dredging*, 839 F.2d at 206. That includes in bankruptcy. As the Fourth Circuit explained, "[i]t would be anomalous to have the same property interest governed by the laws of one state in federal diversity proceedings and by the laws of another state where a federal court is sitting in bankruptcy." *Id.*

B. Federal Courts May Still Apply Federal Common-Law Choice-of-Law Rules in Bankruptcy Cases When Strong Federal Interests Warrant Doing So.

Klaxon applies in bankruptcy proceedings when addressing state-law questions; that much we agree on. The sole remaining wrinkle is whether federal courts sitting in bankruptcy must *always* apply the forum state's choice-of-law rules when the underlying issue is governed by state law. That is where I part with our concurring colleague. In Judge Krause's view, federal courts sitting in bankruptcy jurisdiction

...."). The Court's mature *Erie* cases came only later. *See, e.g., Day & Zimmermann, Inc. v. Challoner*, 423 U.S. 3, 96 S.Ct. 167, 46 L.Ed.2d 3 (1975); *Hanna*, 380 U.S. 460, 85 S.Ct. 1136; *Byrd v. Blue Ridge Rural Elec., Inc.*, 356 U.S. 525, 537, 78 S.Ct. 893, 2 L.Ed.2d 953 (1958).

can *never* create federal common-law choice-of-law rules for some combination of five reasons.[3]

First, the Bankruptcy Code generally absorbs state laws to define the parties' property interests, and so it follows that state choice-of-law rules must also apply. Conc. Op. 278-80. *Second*, the Bankruptcy Code is intended to facilitate the orderly resolution of competing creditors' claims without significantly affecting their underlying entitlements, and federal choice-of-law rules, if allowed, could change the outcome. *Id.* at 279-81. *Third*, federal courts have limited power to make federal common law. *Id.* at 285-86. *Fourth*, if there were some reason to create a federal rule of decision in bankruptcy, federal courts would be better off creating a rule of decision rather than a choice-of-law rule. *Id.* at 285-86. And *fifth*, any federal interest strong enough to generate a federal choice-of-law rule would be explicit in the Bankruptcy Code itself; the absence of choice-of-law rules in the Code means there is never any such interest. *E.g., id.* at 286.

None of the first four arguments supports the claim that federal courts can never create choice-of-law rules in bankruptcy—they support only the lesser claim that state choice-of-law rules will almost always apply. As noted, I agree with that conclusion. My colleague's fifth argument, however, is where we part,

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[3] To avoid confusion on what follows, Judge Krause in part offers numbered reasons to extend *Klaxon* to the bankruptcy context. Those numbered reasons do not correspond to the numbered reasons I note below for why she believes federal courts in bankruptcy can never create special federal choice-of-law rules.

as the Supreme Court has recognized that even when bankruptcy otherwise looks to state law, sufficiently strong federal interests may warrant creating special federal common law.

1. Bankruptcy typically absorbs state law.

Our concurring colleagues observes, rightly, that federal courts sitting in bankruptcy "regularly look to governing non-bankruptcy law—often 'state law'—to determine parties' 'rights and obligations when the Code does not supply a federal rule.' " Conc. Op. 278-79 (citation omitted). If federal courts in bankruptcy used special federal choice-of-law rules that differed from those of the forum state, then the parties' choice of forum (or even the basis of federal jurisdiction) could change their primary rights.

This is true, but it does not establish more than we already know—*Klaxon* should ordinarily apply in bankruptcy. That federal courts confronted with state-law questions should use state choice-of-law rules to avoid jurisdiction-shopping is not an interest unique to bankruptcy. Yet even federal courts sitting in diversity jurisdiction may theoretically formulate special federal common law to protect important federal interests. *See, e.g., Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 84 S.Ct. 923, 11 L.Ed.2d 804 (1964) (applying act-of-state doctrine in diversity case). And when courts do so, neither *Erie* nor *Klaxon* prevents them from using those rules instead of state law.

At most, that bankruptcy ordinarily absorbs state substantive law supports a background presumption that federal courts in bankruptcy will rarely have a good reason to create federal choice-of-law rules. It does not support the broader argument that federal courts can never create special choice-of-law rules in bankruptcy.

2. Bankruptcy should rarely alter the parties' underlying entitlements.

Our concurring colleague next cites "renowned scholars" endorsing the " 'creditors'[-]bargain' theory," which "conceptualizes bankruptcy's primary role as a means to resolve the collective action problem posed by self-interested creditors who, absent a centralized insolvency resolution system, would engage in individual collection actions under applicable non-bankruptcy law." Conc. Op. 279. On this view, bankruptcy ordinarily should not alter the parties' underlying entitlements.

I take no position on whether the creditors'-bargain theory is the best interpretation of the Bankruptcy Code as a whole. But even if it were, it would not provide an argument in support of the claim that federal courts sitting in bankruptcy lack the power to create federal choice-of-law rules. As above, this argument at most suggests that the circumstances are rare under which federal courts could justifiably create federal common law that affects the parties' underlying rights and entitlements. Rare is not never. There may be times when the purpose of the Bankruptcy Code may be best served by special federal choice-of-law rules. It may be unlikely that such a circumstance would arise, but it strikes me as overconfident and unnecessary to disclaim the possibility once and for all.

3. Federal common law is rare.

Judge Krause next observes, again correctly, that "the creation of federal common law is appropriate only in 'situations where there is a significant conflict between some federal policy or interest and the use of state law.' " Conc. Op. 285-86 (quoting *O'Melveny*, 512 U.S. at 87, 114 S.Ct. 2048). " '[S]uch a conflict [is] a precondition for' federal common law-making." *Id.*

Once again, the premise is true, but it does not support the conclusion. If anything, Judge Krause acknowledges that federal courts *can* create federal common-law rules when there is a sufficiently strong federal interest threatened by state law. As with her argument that bankruptcy should rarely change the parties' underlying rights and interests, this argument mistakes rareness for impossibility. For common lawmaking to be rare, rather than impossible, courts must be able to do it in at least some cases.

Judge Krause also appeals at times to separation-of-powers principles and cautions against leaving courts "to divine untold rules from some brooding cloud of federal interests." Conc. Op. 281. But this misses the point. No one has suggested that federal courts can or should exercise freewheeling lawmaking power or identify federal interests without congressional guidance. *See generally CoreCivic, Inc. v. Governor of N.J.*, 145 F.4th 315 (3d Cir. 2025) (Ambro, J., dissenting) (rejecting that view). But *Congress* may express federal interests through statute—for example, the Bankruptcy Code—and *courts* may, in rare circumstances, create federal common law to give effect to those congressionally endorsed interests, particularly when applying state law would undermine Congress's objectives.

3. Federal courts should create substantive rules of decision instead of choice-of-law rules.

Next, Judge Krause claims that it is hard to imagine a case involving a federal interest strong enough to justify federal common law, but not strong enough to justify a substantive rule of decision rather than a choice-of-law rule. In her view, "for the Second and Fourth Circuits' approach to be correct, ... a federal interest has to fall into the goldilocks zone." Conc. Op. 285-71. Maybe so, but it will not surprise the reader to hear that this also is not an argument against the power of federal courts to create federal choice-of-law rules in bankruptcy. It is an argument for the claim that the circumstances when courts would need to do so are "few and restricted." *O'Melveny*, 512 U.S. at 87, 114 S.Ct. 2048 (quoting *Wheeldin*, 373 U.S. at 651, 83 S.Ct. 1441). Judicial humility cautions against making the sweeping claim, in the absence of a case or controversy before us, that no such interest can exist just because one has not presented itself.

4. The Bankruptcy Code contains all relevant federal interests, and a choice-of-law rule is not among them.

The only argument my colleague makes that theoretically supports her claim that federal courts can never develop choice-of-law rules in bankruptcy is that the Bankruptcy Code is a comprehensive and reticulated statutory regime whose text exhausts all potential federal interests that could justify federal common-law rules. The lack of special choice-of-law rules in the Code means, in her view, that there is no such interest.

That premise is faulty because it would apply with equal strength to the power of federal courts to create substantive common-law rules in bankruptcy. Yet the Supreme Court has rejected that argument: "Property interests are created and defined by state law ... [*u*]*nless some federal interest requires a different result*." *Butner v. United States*, 440 U.S. 48, 55, 99 S.Ct. 914, 59 L.Ed.2d 136 (1979) (emphasis added). If the Supreme Court has recognized that strong federal interests can sometimes allow federal courts to devise special rules of decision governing the parties' underlying property interests, I do not know why those interests could not also justify special choice-of-law rules.

Judge Krause claims that *Butner* stands only for the limited proposition that a strong federal interest can justify a federal substantive rule, "not that this federal interest [could] favor[ ] one state law over others." Conc. Op. 287. But *Butner* does not turn on the difference between substantive law and choice-of-law rules. It supports the broader principle that the selection of state rules of decision in bankruptcy must yield to overriding federal interests. On Judge Krause's view, a sufficiently strong federal interest could warrant a federal substantive rule, but never a choice-of-law rule. The unstated assumption seems to be that there could not be a strong federal interest that would justify a federal choice-of-law rule that ultimately selects state substantive law instead of a federal substantive rule. But that assumption is also faulty. Federal courts can and do develop federal rules that select state substantive law. *See, e.g., Kamen v. Kemper Fin. Servs.*, 500 U.S. 90, 111 S.Ct. 1711, 114 L.Ed.2d 152 (1991) (formulating federal common-law rule for demand futility in federal derivative actions that incorporates the corporate law of the state of incorporation); *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 508, 121 S.Ct. 1021, 149 L.Ed.2d 32 (2001) (formulating federal common-law rule for preclusion in general diversity actions and "adopting, as the federally prescribed rule of decision, the law that would be applied by state courts in the State in which the federal diversity court sits").

Judge Krause insists that cases like *Kamen* and *Semtek* are distinguishable because they involved "federal common law rules of decision—not choice-of-law rules—that incorporate the contents of state law." Conc. Op. 287 n.10. But it is unclear how that distinction defends her central claim, which I understood to be that any federal interest strong enough to authorize federal common law can justify nothing less than a uniform substantive rule. If federal courts can sometimes formulate a rule of decision whose content absorbs the law of the defendant's state of incorporation, then I do not understand why, at least in theory, they could not also formulate a choice-of-law rule that selects the law of the defendant's state of incorporation.

* * *

It is worth stepping back to get a clear view of my concurring colleague's argument. As I understand her, she does not believe *Erie*'s constitutional rule prohibits federal courts from developing special federal common law when the Constitution or federal statute authorizes them to do so. Nor does she believe that federal courts properly exercising their limited common-lawmaking authority lack the power to create a rule of decision that always incorporates the contents of state substantive law. At its core, her argument is merely that she cannot imagine a case in which a federal court would need to create a federal choice-of-law rule in bankruptcy. As she rightly notes, I cannot think of such a case either. Conc. Op. 289 n.11. But this is not an argument that federal courts lack the authority to make choice-of-law rules in bankruptcy.

IV. CONCLUSION

We should not succumb to the "beguiling tendency" to make "[c]onflict-of-law problems ... more complicated than they are." *Vanston*, 329 U.S. at 169, 67 S.Ct. 237 (Frankfurter, J., concurring). If *Klaxon*'s application in bankruptcy becomes an issue, then I would endorse the sensible, never-say-never approach of the Second and Fourth Circuits: Absent an "overwhelming federal policy [that] requires us to formulate a choice of law rule as a matter of independent federal judgment, we adopt the choice of law rule of the forum state." *Merritt Dredging*, 839 F.2d at 206; *see also Gaston*, 243 F.3d at 607 ("We necessarily limit our holding to cases where no significant federal policy, calling for the imposition of a federal conflicts rule, exists.").

KRAUSE, Circuit Judge, concurring.

I join the majority opinion in full. As it persuasively explains, New Jersey law governs the authority of Whittaker's board to exercise corporate authority, and the South Carolina Court did not—and likely could not—unilaterally divest the board of that authority. Once in bankruptcy, moreover, our decisions in *In re Emoral*, 740 F.3d 875 (3d Cir. 2014), and *In re Wilton Armetale, Inc.*, 968 F.3d 273 (3d Cir. 2020), straightforwardly dictate that the Product-Line Claims are property of the estate under 11 U.S.C. § 541(a)(1). I write separately, however, to address which choice-of-law rules govern in bankruptcy—an issue that both looms in the background of this case and that has divided courts for decades.

Both parties ultimately agree that New Jersey law governs Whittaker's authority to petition for bankruptcy protection, but they also recognize that there are two distinct paths to that choice of law—the "forum state" rule of *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 61 S.Ct. 1020, 85 L.Ed. 1477 (1941), on the one hand, and a federal common law choice of law rule, incorporating the internal affairs doctrine, on the other. Here, because the forum state is New Jersey and because Whittaker is a New Jersey corporation, those paths converge. But, as highlighted in the parties' briefing and argument on this question, each rule involves a different analysis and is capable of producing a different outcome. And confusion about how to resolve this conflict-of-laws question in bankruptcy cases will persist in our Circuit absent guidance from our Court. I write here with an eye towards that eventual resolution. As it turns out, the answer lies in established doctrine. For the reasons explained more thoroughly below, the Bankruptcy Code; *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), and the Rules of Decision Act; and the grant of bankruptcy jurisdiction to federal courts all support employing the choice-of-law rules of the state in which the bankruptcy court sits.

I. THE PUZZLE: CHOICE OF LAW IN BANKRUPTCY

Federal courts are most often called on to resolve choice-of-law questions while exercising diversity jurisdiction. In those cases, non-federal law (usually state law) provides the rule of decision, *Erie*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188, and diverse parties might dispute which law governs their claims. When those candidate laws conflict, courts must decide which one controls. To answer that question, a federal court sitting in diversity uses the choice-of-law rules of the state in which it sits. *Klaxon*, 313 U.S. at 496, 61 S.Ct. 1020.

Our Court has not previously determined whether the same rule applies in bankruptcy proceedings.[1] But some of our sister circuits have entered this fray, coming to differing conclusions. The Eighth Circuit applies *Klaxon* in bankruptcy cases, directing that "bankruptcy court[s] appl[y] the choice of law rules of the state in which it sits," *In re Payless Cashways*, 203 F.3d 1081, 1084 (8th Cir. 2000), and that "when some

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[1] *See In re Abeinsa Holding Inc.*, No. 20-3333, 2021 WL 3909984, at *3 (3d Cir. Sept. 1, 2021) (noting that our Court has "not yet precedentially resolved the choice-of-law rules applicable in bankruptcy proceedings").

federal interest requires a different result," the "appropriate question" is not choice-of-law but rather rule of decision, i.e., "whether the state [law] can trump the federal [law]," which it obviously cannot, *In re Schriock Constr., Inc.*, 104 F.3d 200, 201–02 (8th Cir. 1997) (quoting *Butner v. United States*, 440 U.S. 48, 54, 99 S.Ct. 914, 59 L.Ed.2d 136 (1979)).[2] The Ninth Circuit (and possibly the Fifth), on the other hand, have rejected *Klaxon* in bankruptcy cases and instead require a federal common law choice-of-law rule. *See In re Lindsay*, 59 F.3d 942, 948 (9th Cir. 1995); *Wallace Lincoln-Mercury Co. v. Gentry*, 469 F.2d 396, 400 n.1 (5th Cir. 1972). *But see Fishback Nursery, Inc. v. PNC Bank, N.A.*, 920 F.3d 932, 935 (5th Cir. 2019) (describing *Klaxon*'s application in bankruptcy as "an open question"). Finally, the Second and Fourth Circuits take a hybrid approach—applying *Klaxon* "in the absence of a compelling federal interest which dictates otherwise." *In re Merritt Dredging Co.*, 839 F.2d 203, 205–06 (4th Cir. 1988); *see also In re Gaston & Snow*, 243 F.3d 599, 607 (2d Cir. 2001) (applying *Klaxon* unless "significant federal policy, calling for the imposition of a federal conflicts rule, exists"). In other words, in contrast to the Eighth Circuit, which would accommodate any overriding federal interest by applying a federal rule of decision, these courts would reach the same result but under the auspices of a choice-of-law rule.

This tripartite circuit split has persisted for decades and created disparities in how bankruptcy

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[2] To be sure, the Eighth Circuit adopted *Klaxon*'s rule in bankruptcy without much reasoning. *See In re Payless Cashways*, 203 F.3d at 1084.

courts determine which law governs parties' rights and obligations. As I explain below, however, there is no basis to depart from the established rule from *Klaxon*, and, consistent with the Eighth Circuit's approach, any conflict-of-laws issue is properly resolved as a matter of rule of decision, not choice of law.

II. THE AFFIRMATIVE CASE FOR APPLYING KLAXON IN BANKRUPTCY

The reasons for extending *Klaxon* to bankruptcy are many and exceedingly strong. All relate to the structure of the Bankruptcy Code, the purposes the Code serves, and *Erie* and the Rules of Decision Act. I consider them in turn.

First, while bankruptcy provides an "orderly and centralized" process to restructure the debts of the honest but unfortunate debtor, 1 *Collier on Bankruptcy* ¶ 1.01[1] (16th ed. 2025), it does not create substantive property rights. Instead, consistent with the Rules of Decision Act, 28 U.S.C. § 1652, it is non-bankruptcy law that defines parties' property interests,[3] *Butner*, 440 U.S. at 55, 99 S.Ct. 914; *accord In re Boy Scouts of Am.*, 137 F.4th 126, 164 (3d Cir. 2025). Accordingly, courts exercising bankruptcy jurisdiction regularly look to governing non-bankruptcy law—often "state law"—to determine parties' "rights and obligations when the Code does not supply a federal rule." *In re Wright*, 492 F.3d 829,

[3] While "property" generally conjures images of real property or tangible items, in bankruptcy (and elsewhere), various intangibles, such as causes of action, similarly constitute property. *See, e.g., In re Kane*, 628 F.3d 631, 637 (3d Cir. 2010).

832 (7th Cir. 2007) (Easterbrook, J.). And in doing so, those courts frequently encounter the same dilemma they do when sitting in diversity: conflicting laws that purport to govern parties' rights and interests.

As bankruptcy law takes parties' property rights as it finds them, *Butner*, 440 U.S. at 55, 99 S.Ct. 914; *Mission Prod. Holdings, Inc. v. Tempnology, LLC*, 587 U.S. 370, 381, 139 S.Ct. 1652, 203 L.Ed.2d 876 (2019), the fact that parties find themselves wound up in a bankruptcy case should not work to alter the law that would otherwise govern their rights, *cf. Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 820, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985) (rejecting notion that participation in a class action changes the substantive law governing individual plaintiffs' disputes). But adopting a choice-of-law rule unique to bankruptcy risks just that and would subject identically situated parties to different governing laws simply by virtue of one dispute occurring in bankruptcy court while the other unfolds in run-of-the-mill civil litigation.[4] Our

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[4] In addition to diversity cases, *Klaxon* governs choice-of-law questions where jurisdiction is anchored on other bases, including federal questions under 28 U.S.C. § 1331, *Shields v. Consol. Rail Corp.*, 810 F.2d 397, 399 (3d Cir. 1987) (ancillary (now supplemental) jurisdiction); *Sys. Operations, Inc. v. Sci. Games Dev. Corp.*, 555 F.2d 1131, 1136 (3d Cir. 1977) ("Although *Klaxon* was a diversity jurisdiction case, the same principle holds true with respect to pendent jurisdiction claims."); *accord Elliott v. Cartagena*, 84 F.4th 481, 496 n.14 (2d Cir. 2023); *Osborn v. Griffin*, 865 F.3d 417, 443 (6th Cir. 2017); *BancOklahoma Mortg. Corp. v. Cap. Title Co.*, 194 F.3d 1089, 1103 (10th Cir. 1999); *Ideal Elec. Sec. Co. v. Int'l Fidelity Ins. Co.*, 129 F.3d 143, 148 (D.C. Cir. 1997); *Paracor Fin., Inc. v. Gen. Elec. Cap. Corp.*, 96 F.3d 1151, 1164 (9th Cir. 1996); *Sommers Drug Stores Co. Emp. Profit Sharing Tr. v. Corrigan*, 883 F.2d 345, 353 (5th Cir. 1989);

bankruptcy system does not demand—and, indeed, militates against—such a disparity. *See BFP v. Resol. Tr. Corp.*, 511 U.S. 531, 544–45, 114 S.Ct. 1757, 128 L.Ed.2d 556 (1994) (absent a clear and manifest conflict, "the Bankruptcy Code will be construed to adopt, rather than to displace, pre-existing state law"). And nothing in the text of the Code or the statutes granting bankruptcy jurisdiction warrants a departure from the ordinary rule of *Klaxon*. *See* Zachary D. Clopton, *Horizontal Choice of Law in Federal Courts*, 169 U. Pa. L. Rev. 2193, 2212 (2021).

Second, influential bankruptcy scholarship buttresses this conclusion. As renowned scholars have advocated, the bankruptcy system in many ways "mirror[s] the agreement one would expect the creditors to form among themselves were they able to negotiate such an agreement from an *ex ante* position." Thomas H. Jackson, *Bankruptcy, Non-Bankruptcy Entitlements, and the Creditors' Bargain*, 91 Yale L.J. 857, 860 (1982). This view, coined the "creditors' bargain" theory, conceptualizes bankruptcy's primary role as a means to resolve the collective action problem posed by self-interested creditors who, absent a centralized insolvency

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Bi-Rite Enters., Inc. v. Bruce Miner Co., 757 F.2d 440, 442 (1st Cir. 1985); *ITCO Corp. v. Michelin Tire Corp., Com. Div.*, 722 F.2d 42, 49 n.11 (4th Cir. 1983), and interpleader under 28 U.S.C. § 1335, *Griffin v. McCoach*, 313 U.S. 498, 503, 61 S.Ct. 1023, 85 L.Ed. 1481 (1941). Moreover, outside of federal court, state courts employ the forum's choice-of-law rules, *see* Restatement (Second) of Conflict of L. § 5 cmt. b (A.L.I. 1971) ("A court applies the law of its own state, as it understands it, including its own conception of Conflict of Laws.")—the practice that *Klaxon* aims to mirror.

resolution system, would engage in individual collection actions under applicable non-bankruptcy law, inefficiently picking the debtor apart and "destroying value for the collective body of creditors." Kenneth Ayotte & David A. Skeel Jr., *Bankruptcy Law as a Liquidity Provider*, 80 U. Chi. L. Rev. 1557, 1564 (2013). Without bankruptcy's centralization, "[a]n unsecured creditor who seizes the debtor's assets early enough in time, when the debtor has enough to pay, will receive full payment," while "[l]ate-arriving creditors are left out in the cold when the assets are not sufficient to pay the firm's debts." *Id.*

Viewed through this lens, among its other features, bankruptcy facilitates the orderly resolution of competing creditor entitlements that exist under governing non-bankruptcy law. Such a system takes as a given creditors' preexisting property interests and "does not ... justify the implementation of a different set of relative entitlements, unless doing so is necessary as a part of the move from the individual remedies system" that exists outside of bankruptcy. Thomas H. Jackson, *The Logic and Limits of Bankruptcy Law* 21 (1986).

True, the Bankruptcy Code does change parties' "relative entitlements" in some circumstances in aid of debtor rehabilitation. *See, e.g.*, 11 U.S.C. §§ 364(d); 365(e), (i); 502(b); *see also* Daniel J. Bussel et al., *Bankruptcy* 33 (11th ed. 2021). But among the Code's voluminous rules, these provisions fall in the minority.[5] And as the creditors' bargain theory

[5] To be sure, bankruptcy does not have to work this way. The Constitution reserves to Congress the authority to legislate for "the entire 'subject of Bankruptcies,' " *Cent. Va. Cmty. Coll. v.*

advances, non-bankruptcy entitlements generally should endure within bankruptcy, *see* Ayotte & Skeel, *supra*, at 1564–65 ("The second element of the Creditors' Bargain theory is the claim that resolution of common-pool problems may require altering the procedural rights of creditors, but that it typically does not require altering the substantive values of those rights as established by nonbankruptcy law."); *see also* 7 *Collier on Bankruptcy* ¶ 1100.01 (16th ed. 2025) (noting the importance of "preserv[ing] creditors' and stakeholders' existing legal rights to the greatest extent possible"), counseling in favor of adopting *Klaxon* to preserve parity with parties' pre-bankruptcy positions vis-à-vis one another.

Katz, 546 U.S. 356, 370, 126 S.Ct. 990, 163 L.Ed.2d 945 (2006) (quoting U.S. Const. art. I, § 8, cl. 4), which encompasses "nothing less than ... the relations between ... [a] debtor, and [its] creditors," *Wright v. Union Cent. Life Ins. Co.*, 304 U.S. 502, 513–14, 58 S.Ct. 1025, 82 L.Ed. 1490 (1938) (internal quotation marks omitted). Congress could enact legislation that impairs any number of entitlements created by non-bankruptcy law. In this way, *Butner* is merely descriptive of the bankruptcy system that Congress has chosen to enact: "Congress has generally left the determination of property rights in the assets of a bankrupt's estate to state law." 440 U.S. at 54, 99 S.Ct. 914. It does not stand for the proposition that our Nation's bankruptcy laws *cannot* determine parties' relative entitlements, as scholars have pointed out. *See, e.g.*, Anthony J. Casey, *Chapter 11's Renegotiation Framework and the Purpose of Corporate Bankruptcy*, 120 Colum. L. Rev. 1709, 1751 (2020) (advancing a theory of Chapter 11 that "support[s] a soft version of *Butner*" positing that, "[i]n the absence of any evidence of hold up, nonbankruptcy provisions should remain intact ... simply because in the absence of hold up there is no role for bankruptcy law").

Third, extending *Klaxon* to the bankruptcy context is fully consistent with—and supported by—*Erie* and the Rules of Decision Act. *Klaxon* is a product of *Erie*, which announced "[t]here is no federal general common law." 304 U.S. at 78, 58 S.Ct. 817. Instead, where federal law does not govern, "[t]he laws of the several states" are "regarded as rules of decision ... in cases where they apply." 28 U.S.C. § 1652. While *Erie* itself was a diversity case, it "reflects the principle now well established that federal courts should apply state law to legal issues, unless there is some definable federal interest sufficient to justify applying corresponding and possibly inconsistent federal rules of decision." 19 Wright & Miller's Federal Practice & Procedure § 4520 (3d ed. May 2025 update). *Klaxon* reflects the same principle, for "[a] choice-of-law rule is no less a rule of state law than any other." *A.I. Trade Fin., Inc. v. Petra Int'l Banking Corp.*, 62 F.3d 1454, 1464 (D.C. Cir. 1995); *see also* Russell J. Weintraub, *The* Erie *Doctrine and State Conflict of Laws Rules*, 39 Ind. L.J. 228, 242 (1964) ("[T]he choice-of-law rules of a state are important expressions of its domestic policy."). Thus, it would seem that wherever *Erie* travels, *Klaxon* ought to follow. *See* Clopton, *supra*, at 2198 ("In short, *Klaxon* all the way down.").

In the bankruptcy arena, the Bankruptcy Code supplies the federal rules of decision that Congress has deemed necessary to effectively govern the relationship between the debtor and its creditors. Even a cursory review of the Code's "hundreds of interlocking rules," *Harrington v. Purdue Pharma L.P.*, 603 U.S. 204, 209, 144 S.Ct. 2071, 219 L.Ed.2d 721 (2024), reveals that Congress took care to include many provisions that aim "to protect [ ] national" interests, *In re Trib. Co. Fraudulent Conveyance Litig.*, 946 F.3d 66, 94 (2d Cir. 2019); *see, e.g.*, 11 U.S.C. §§ 362(a) (automatic stay of collection of prepetition debts, including state-court litigation); 365(e) (invalidating *ipso facto* clauses); 546(e) (safe harbor for certain pre-petition securities transactions); 555–56, 559–61 (protections for post-petition securities, commodities, repurchase, swap, and netting transactions); 1110 (providing preferred rights to aircraft and vessel lessors).

As these provisions illustrate, Congress identified and manifested in the Code the specific federal interests it wished to protect; it did not leave readers to divine untold rules from some brooding cloud of federal interests hanging over bankruptcy. As we invariably do when construing federal statutes, we look to its text to discern meaning, *In re Imerys Talc Am., Inc.*, 38 F.4th 361, 375 (3d Cir. 2022), and we "presume that [Congress] says in a statute what it means and means in a statute what it says," *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992). So while "the Bankruptcy Clause confers broad authority on Congress," *Siegel v. Fitzgerald*, 596 U.S. 464, 476, 142 S.Ct. 1770, 213 L.Ed.2d 39 (2022), to establish "uniform Laws on the subject of Bankruptcies," U.S. Const. art. I, § 8, cl. 4, Congress has not dictated a particular choice-of-law rule to govern in bankruptcy cases.

This is a glaring omission in a sea of provisions relating to bankruptcies and not one we should presume Congress simply overlooked. To the contrary, we must respect the presumption that state law governs "until Congress strikes a different accommodation." *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 740, 99 S.Ct. 1448, 59 L.Ed.2d 711 (1979). It is not the role of federal courts to extend federal interests beyond those Congress has prescribed. *See Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641, 101 S.Ct. 2061, 68 L.Ed.2d 500 (1981); *In re One2One Commc'ns, LLC*, 805 F.3d 428, 444 (3d Cir. 2015) (Krause, J., concurring); *cf. Cassirer v. Thyssen-Bornemisza Collection Found.*, 596 U.S. 107, 116, 142 S.Ct. 1502, 212 L.Ed.2d 451 (2022) (concluding that, when an exception to foreign sovereign immunity applies under the Foreign Sovereign Immunities Act, federal courts must apply *Klaxon* because the statute already protects the unique federal interest of foreign relations). Instead, "the issue of whether to displace state law ... is primarily a decision for Congress," *Miree v. DeKalb Cnty.*, 433 U.S. 25, 32, 97 S.Ct. 2490, 53 L.Ed.2d 557 (1977), and "[w]e should not assume that Congress intended to set the courts completely adrift from state law with regard to questions for which it has not provided a specific and definite answer in an act ... so intimately related to state law," *Richards v. United States*, 369 U.S. 1, 11, 82 S.Ct. 585, 7 L.Ed.2d 492 (1962). In these circumstances, with a "federal statutory regulation [so] comprehensive and detailed," the usual rule applies that "matters left unaddressed in such a scheme are presumably left subject to the disposition provided by state law," negating the need to "adopt a court-made rule to supplement" the Code. *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 85, 114 S.Ct. 2048, 129 L.Ed.2d 67 (1994).

Accordingly, there is no need to craft a choice-of-law rule unique to bankruptcy to preserve some "undefined federal interests" that do not appear in the Code.[6] *CoreCivic, Inc. v. Governor of N.J.*, 145 F.4th 315, 330 (3d Cir. 2025) (Ambro, J., dissenting). Rather, when a provision of the Bankruptcy Code governs, the Supremacy Clause obviates any choice-of-law analysis, for federal law always trumps conflicting state law. U.S. Const. art. VI, cl. 2; *see also infra* Section IV. And when the Code or other federal law does not supply the rule of decision, the Rules of Decision Act commands that governing non-federal law fills the gap. 28 U.S.C. § 1652. Outside of bankruptcy, that means *Klaxon* controls, and nothing about the bankruptcy context warrants departing from that rule.

Of course, *Erie*, and consequently *Klaxon*, arose in the context of diversity jurisdiction, so the extension of the policies those cases embody to other contexts is not obvious. And that uncertainty has caused some of our sister circuits to either reject *Klaxon* in bankruptcy cases or hedge on its application. *See, e.g., In re Lindsay*, 59 F.3d at 948; *In re Gaston & Snow*, 243 F.3d at 601–02; *In re Merritt Dredging*, 839 F.2d at 206. To be sure, that hesitation is not unfounded.

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[6] This is not to say that the Bankruptcy Code can never embody federal rules that do not appear in its specific provisions. Indeed, the Code can, and does, provide such rules of decision, such as where "pre-Code practice" has not been expressly abrogated by statute, *In re Hertz Corp.*, 120 F.4th 1181, 1198 (3d Cir. 2024), or where a rule "has long been considered fundamental to the Bankruptcy Code's operation," *Czyzewski v. Jevic Holding Corp.*, 580 U.S. 451, 465, 137 S.Ct. 973, 197 L.Ed.2d 398 (2017).

As scholars have noted, "[p]art of the explanation for the departures from *Klaxon* can be found in Supreme Court dicta" in *Vanston Bondholders Protective Committee v. Green*, 329 U.S. 156, 67 S.Ct. 237, 91 L.Ed. 162 (1946). Clopton, *supra*, at 2204; *see also* Tobias Barrington Wolff, *Choice of Law and Jurisdictional Policy in the Federal Courts*, 165 U. Pa. L. Rev. 1847, 1875–78 (2017). There, the Supreme Court considered whether, and to what extent, an insolvent debtor must pay interest on delinquent interest payments due under a prepetition bond indenture under Chapter X of the Bankruptcy Act. *Vanston*, 329 U.S. at 159, 67 S.Ct. 237. In doing so, the Supreme Court admonished:

> [O]bligations, such as the one here for interest, often have significant contacts in many states so that the question of which particular state's law should measure the obligation seldom lends itself to simple solution. In determining which contact is the most significant in a particular transaction, courts can seldom find a complete solution in the mechanical formulae of the conflicts of law.... In determining what claims are allowable and how a debtor's assets shall be distributed, a bankruptcy court does not apply the law of the state where it sits.

Id. at 161–62, 67 S.Ct. 237. And it is this language upon which some courts have seized to conclude *Klaxon* has no application in bankruptcy cases because it is inconsistent with some amorphous federal interest. *See, e.g., In re SMEC, Inc.*, 160 B.R.

86, 91 (M.D. Tenn. 1993); *In re McCorhill Publ'g, Inc.*, 86 B.R. 783, 792 (Bankr. S.D.N.Y. 1988).

But on closer inspection, *Vanston* says nothing about what choice-of-law rule a court should employ in bankruptcy cases when non-federal law provides the rule of decision. Rather than rejecting *Klaxon*'s application in favor of fashioning a bespoke federal choice-of-law rule for bankruptcy cases, the Supreme Court concluded that the bankruptcy courts "administer and enforce the Bankruptcy Act ... in accordance with authority granted by Congress to determine how and what claims shall be allowed under equitable principles," whereas "[w]hen and under what circumstances federal courts will allow interest on claims against debtors' estates being administered by them has long been decided by *federal law*." *Vanston*, 329 U.S. at 162–63, 67 S.Ct. 237 (emphasis added). Thus, *Vanston* did not resolve the question of what choice-of-law rule courts employ when non-federal law governs a dispute in a bankruptcy case. Instead, it merely determined that when federal law provides a rule of decision that conflicts with state law, federal law controls—a proposition that flows directly from the Constitution. U.S. Const. art. VI, cl. 2; *see also In re Gaston & Snow*, 243 F.3d at 607 (interpreting *Vanston* in this way). *Vanston*, then, embodies nothing more than foundational and uncontroversial principle that federal law reigns supreme.

In sum, the structure of the Bankruptcy Code, the purposes of our bankruptcy system, and federal courts' obligation to respect the application of state law under *Erie* and the Rules of Decision Act all support *Klaxon*'s extension to bankruptcy cases.

III. NOTHING REQUIRES A FEDERAL CHOICE-OF-LAW RULE IN PLACE OF *KLAXON*

Aside from seemingly the Eighth Circuit, no other Court of Appeals has extended *Klaxon*—without reservation—to the bankruptcy context. The Ninth Circuit, as well as the Second and Fourth Circuits, have also addressed the question, taking different approaches but each evincing an unwarranted suspicion of *Klaxon*'s relevance beyond diversity cases. I address each approach in turn.

The Ninth Circuit has long eschewed *Klaxon*'s rule in favor of federal choice-of-law rules. *In re Lindsay*, 59 F.3d at 948. In doing so, it stated that "the risk of forum shopping which is avoided by applying state law has no application [in bankruptcy cases], because [they] can only be litigated in federal court," and instead "[t]he value of national uniformity of approach" on this question prevails over a patchwork of state choice-of-law regimes. *Id.* Thus, "[i]n federal question cases with exclusive jurisdiction in federal court, such as bankruptcy, the court should apply federal, not forum state, choice of law rules." *Id.*

There are two flaws in this reasoning. First, it confuses the basis for federal jurisdiction with the question of governing law. A "federal jurisdictional grant ... is not in itself a mandate for applying federal law in all circumstances." *United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 591, 93 S.Ct. 2389, 37 L.Ed.2d 187 (1973). Instead, as is by now clear, "it is the source of the right sued upon, and not the ground on which federal jurisdiction over the case is founded, which determines the governing law." *Maternally Yours v. Your Maternity Shop*, 234 F.2d 538, 540 n.1 (2d Cir. 1956).[7] In other words, the observation that federal courts possess exclusive jurisdiction over bankruptcy cases is correct as far as it goes, but it merely identifies a potential choice-of-law question—it does nothing to resolve it. Instead, the existence of federal jurisdiction begets the downstream question of which law governs the dispute and how to decide that question in instances of conflict. That is a question of parties' *rights*, not federal courts' *jurisdiction*. *See Shutts*, 472 U.S. at 818, 105 S.Ct. 2965. But by reflexively employing a federal common law choice-of-law rule, the Ninth Circuit's approach risks altering parties' rights by selecting different law than would govern outside of bankruptcy.

That points up the second problem with the Ninth Circuit's approach. The *Lindsay* court touts a federal choice-of-law rule as carrying a great deal of "value" without greater explanation, seemingly elevating "national uniformity" for uniformity's sake. 59 F.3d at 948. But uniformity at what cost? Even accepting the

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[7] *See also DelCostello v. Int'l Bhd. of Teamsters*, 462 U.S. 151, 159 n.13, 103 S.Ct. 2281, 76 L.Ed.2d 476 (1983) ("[W]here Congress directly or impliedly directs the courts to look to state law to fill in details of federal law, *Erie* will ordinarily provide the framework for doing so."); 19 Wright & Miller's Federal Practice & Procedure § 4520 (3d ed. May 2025 update) ("[T]he law to be applied is not selected by reference to the basis of the court's subject matter jurisdiction.... In other words, the choice of applicable law turns upon the source or genesis of the right or issue being adjudicated.").

premise that national uniformity has inherent value,[8] the value in uniformity does not outweigh the significant incongruities a bespoke bankruptcy choice-of-law rule portends. A federal choice-of-law rule in bankruptcy cases risks altering parties' substantive rights. State law governs many issues in bankruptcy cases, but none arises more frequently than property interests. *See, e.g., Butner*, 440 U.S. at 55, 99 S.Ct. 914. And the fact that a dispute turns up "in the context of a federal bankruptcy" proceeding "doesn't change much." *Rodriguez v. FDIC*, 589 U.S. 132, 137, 140 S.Ct. 713, 206 L.Ed.2d 62 (2020). So "[s]ince state, rather than federal, substantive law is at issue there is no need for a uniform federal rule." *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 508, 121 S.Ct. 1021, 149 L.Ed.2d 32 (2001). Indeed, as the Fourth

[8] In *Gaston & Snow*, the Second Circuit gestured at the notion that "an interest in uniformity can justify the creation of federal common law," 243 F.3d at 606, and cited the Supreme Court's decision in *Kimbell Foods* for that proposition. But *Kimbell Foods* does not speak to whether a federal choice-of-law rule should govern in bankruptcy. There, the Supreme Court determined that "the priority of liens stemming from federal lending programs must be determined with reference to federal law," *Kimbell Foods*, 440 U.S. at 726, 99 S.Ct. 1448, which obviates the need of a choice-of-law inquiry because the Supremacy Clause requires application of federal rules of decision. Having concluded that federal law, rather than state law, provides the governing rule, the Court went on to define the content of that federal common law rule. And at that second step, the Court noted that "[c]ontroversies directly affecting the operations of federal programs, although governed by federal law, do not inevitably require resort to uniform federal rules" before "reject[ing] generalized pleas for uniformity" in favor of a federal common law rule that "adopt[s] the readymade body of state law as the federal rule of decision." *Id.* at 727–28, 730, 740, 99 S.Ct. 1448

Circuit rightly noted, "[i]t would be anomalous to have the same property interest governed by the laws of one state in federal diversity proceedings and by the laws of another state where a federal court is sitting in bankruptcy." *In re Merritt Dredging*, 839 F.2d at 206. But that disparity is exactly what the Ninth Circuit's approach invites, and it does so with no basis in the Code or the statutes granting federal courts jurisdiction over bankruptcy cases. Parties' property rights do not depend on the basis for a court's jurisdiction.

The approaches of the Second and Fourth Circuits are flawed as a doctrinal matter, though difficult to distinguish from the Eighth Circuit's in practice. Those courts have rightly observed that, in the ordinary course, the fact that a choice-of-law question arises in bankruptcy does not provide sufficient reason to depart from *Klaxon* because state law generally provides the substantive law governing a dispute, so *Erie* and the Rules of Decision Act control. *See In re Gaston & Snow*, 243 F.3d at 607; *In re Merritt Dredging*, 839 F.2d at 206.

They also theorize, however, that there may be exceptional cases when a "compelling federal interest," *In re Merritt Dredging*, 839 F.2d at 206, would require the application of a federal common law choice-of-law rule. Thus, they purport to adopt a safety valve by applying *Klaxon* only "in the absence of a compelling federal interest which dictates otherwise." *Id.*; *see also In re Gaston & Snow*, 243 F.3d at 607 ("We necessarily limit our holding to cases where no significant federal policy, calling for the imposition of a federal conflicts rule, exists."). In positing that carveout, these courts hypothesize a scenario where some federal interest compels abandonment of *Klaxon*. Though this rule may appear on its face to conflict with the rule from *Klaxon*, in practice, it does not. Tellingly, neither court has actually identified—much less confronted—such a situation. And the prospect of them ever doing so seems fanciful because their hypothesis runs headlong into the presumption against, and stringent criteria for, the making of federal common law.

At the outset, it is not clear whether the federal interest the Fourth and Second Circuits hypothesize would need to conflict with a state's choice-of-law rule or the substantive law that choice-of-law rule selects. If the former, it is particularly difficult to imagine what federal interest would conflict with the use of a specific choice-of-law rule given the absence of a federal choice-of-law rule provision in the Bankruptcy Code and the Code's indifference to the law that determines parties' rights and interests. *See infra* pp. 286-87. If it is the latter, then the real problem is not the use of a state's choice-of-law rule at all. Rather, as the Eighth Circuit has properly characterized it, the problem is the incompatibility between the non-bankruptcy law chosen to govern a dispute and the federal interest, because permitting a state law to "trump" the federal interest expressed in the Bankruptcy Code "would effectively convert the [ ] choice of law [question] to an 'anti-preemption' [question]." *In re Schriock Constr.*, 104 F.3d at 202. In short, the resolution to that conflict is application of a federal rule of decision and its priority over state law pursuant to the Supremacy Clause, not abandonment of *Klaxon*.

Even moving past this ambiguity, embracing the alternative to *Klaxon*—a federal choice-of-law rule—must "begin[ ] with the recognition that federal choice of law rules are a species of federal common law." *In re Gaston & Snow*, 243 F.3d at 605. But "those cases in which judicial creation of a special federal rule would be justified ... [are] 'few and restricted.' " *O'Melveny*, 512 U.S. at 87, 114 S.Ct. 2048 (quoting *Wheeldin v. Wheeler*, 373 U.S. 647, 651, 83 S.Ct. 1441, 10 L.Ed.2d 605 (1963)). Crucially, the creation of federal common law is appropriate only in "situations where there is a 'significant conflict between some federal policy or interest and the use of state law.' " *Id.* (quoting *Wallis v. Pan Am. Petroleum Corp.*, 384 U.S. 63, 68, 86 S.Ct. 1301, 16 L.Ed.2d 369 (1966)). Indeed, "such a conflict [is] a precondition for" federal common law-making. *Id.* But where none exists, federal law "supplies no rule of decision," leaving non-bankruptcy law to govern the controversy. *Rodriguez*, 589 U.S. at 138, 140 S.Ct. 713.

In order to justify the Second and Fourth Circuits' approach that departs from *Klaxon*, yet requires a choice-of-law analysis—i.e., employing a federal common law choice-of-law rule—two conditions must be true: (1) there must be a sufficiently weighty federal interest in conflict with otherwise governing non-federal law to warrant fashioning a federal rule of decision to resolve conflicts among non-bankruptcy law, but (2) that interest must not be sufficiently weighty to justify fashioning a federal common law rule of decision. The former must be true to justify the "[j]udicial lawmaking" involved in crafting federal common law rules—lawmaking that "plays a necessarily modest role under a Constitution that vests the federal government's 'legislative Powers' in Congress." *Id.* at 136, 140 S.Ct. 713 (quoting U.S. Const. art. I, § 1). The latter must be true in order to preserve any choice-of-law question at all, for if the federal interest is sufficiently important to justify creation of a federal rule of decision, then there is no "choice" among laws because the Constitution invariably resolves such conflicts in favor of federal law. U.S. Const. art. VI, cl. 2. In other words, for the Second and Fourth Circuits' approach to be correct—as opposed to the Eighth Circuit's, which accounts for an overriding federal interest as a matter of rule of decision, *see In re Schriock Constr.*, 104 F.3d at 202—a federal interest has to fall into the goldilocks zone: not too strong, yet not too weak.

Yet a review of the Bankruptcy Code and its policies establishes neither condition. The Code is agnostic about which body of non-bankruptcy law governs parties' rights—it simply "takes the [interest] as it finds it." *Bartenwerfer v. Buckley*, 598 U.S. 69, 82, 143 S.Ct. 665, 214 L.Ed.2d 434 (2023). That is to say, the Bankruptcy Code embodies no federal interest that favors the application of any particular non-bankruptcy law over another. And this makes good sense. It is "the basic federal rule" that "entitlements in bankruptcy arise in the first instance from the underlying substantive law creating the ... obligation." *Raleigh v. Ill. Dep't of Revenue*, 530 U.S. 15, 20, 120 S.Ct. 1951, 147 L.Ed.2d 13 (2000). Sometimes, federal non-bankruptcy law will control that issue. *See, e.g., Bd. of Trs. of Teamsters Loc. 863 Pension Fund v. Foodtown, Inc.*, 296 F.3d 164, 168 (3d Cir. 2002). Other times, it may be state or foreign law that does. Either way, the Bankruptcy Code directs courts to consider parties' interest under whichever law governs outside of bankruptcy, and it then establishes a collection of rules to deal with those interests.

The Supreme Court's decision in *Butner* is not to the contrary. There, the Court famously held that "[p]roperty interests are created and defined by state law. Unless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding." 440 U.S. at 55, 99 S.Ct. 914. At first glance, this passage might seem to support the Second and Fourth Circuits' approach—after all, the Supreme Court included the proviso "[u]nless some federal interest requires a different result." *Id.* But on closer inspection, this line from *Butner* cannot be read as suggesting the possibility of a different choice-of-law rule to apply in bankruptcy.

Butner addressed whether "the right to the rents collected during the period between [a] mortgagor's bankruptcy and the foreclosure sale of the mortgaged property ... is determined by a federal rule of equity or by the law of the State where the property is located." *Id.* at 49, 99 S.Ct. 914. In other words, the Supreme Court considered which body of law—state or federal—supplies the rule of decision for allocation of rents. It concluded, as a general matter, "[p]roperty interests are created and defined by state law." *Id.* at 55, 99 S.Ct. 914. But it also recognized that, while uncommon, federal law can sometimes define parties' property interests, especially where the United States is a party.[9] *See, e.g., Clearfield Tr. Co. v. United States*, 318 U.S. 363, 366, 63 S.Ct. 573, 87 L.Ed. 838 (1943). For this reason, the Court acknowledged that where federal law does govern property rights, that law controls. But *Butner* cannot reasonably be read to suggest that federal law provides the choice-of-law rule to decide among conflicting non-federal laws when it is those laws that provide the rule of decision. That is because *Butner* posits a scenario in which state property law is displaced due to "some federal interest [that] requires a different result," 440 U.S. at 55, 99 S.Ct. 914, not that this federal interest favors one state law over others. *See Travelers Cas. & Sur. Co. of Am. v. Pac. Gas & Elec. Co.*, 549 U.S. 443, 451, 127 S.Ct. 1199, 167 L.Ed.2d 178 (2007) (juxtaposing *Butner* and *Vanston* to illustrate this point). Put another way, reading *Butner* to license creation of a federal common law choice-of-law rule renders the proviso meaningless because, read in such a way, state law still governs the substantive property interest while federal law simply chooses among conflicting state laws. That plainly is not the dichotomy *Butner* envisioned. Instead, *Butner* stands for the far more straightforward proposition that state law generally governs parties' property interests except in the unusual case where federal law provides the rule of decision. It offers no insight, however, into

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9 The scenario is far from hypothetical, as the federal government is "one of the Nation's largest lenders," *Dep't of Agric. Rural Dev. Rural Housing Serv. v. Kirtz*, 601 U.S. 42, 45, 144 S.Ct. 457, 217 L.Ed.2d 361 (2024), and is a frequent creditor in bankruptcies.

how to choose among conflicting laws when non-federal law governs.[10]

This result does not derogate those federal interests that do exist. To be sure, there are many areas of law in which Congress has legislated extensively. *See, e.g.*, Sherman Antitrust Act, 15 U.S.C. §§ 1–7; Securities Act of 1933, 15 U.S.C. § 77a *et seq.*; Securities Exchange Act of 1934, 15 U.S.C. § 78a *et seq.*; Investment Company Act of 1940, 15 U.S.C. §§ 80a-1 to 80a-64; Lanham Act, 15 U.S.C. § 1051 *et seq.*; Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9601 *et seq.* Perhaps none is a greater expression of a federal interest than those statutory provisions that completely preempt state law, i.e., those where a federal interest "is so powerful," *Franchise Tax Bd. v. Constr. Laborers Vacation Tr. for S. Cal.*, 463 U.S. 1, 23, 103 S.Ct. 2841, 77 L.Ed.2d 420 (1983), that "federal law does not merely preempt a state law to some degree" but instead "substitutes a

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[10] My concurring colleague disagrees, asserting that "[f]ederal courts can and do develop federal choice-of-law rules that select state substantive law." Concurring Op. 276. But the cited cases do not support that proposition; they merely recognize that courts can create federal common law rules of decision—not choice-of-law rules—that incorporate the contents of state law. *See Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 107–09, 111 S.Ct. 1711, 114 L.Ed.2d 152 (1991) (creating a rule of decision for derivative actions that incorporates the contents of state law rather than "displac[ing] state law in this area"); *Semtek*, 531 U.S. at 508–09, 121 S.Ct. 1021 (describing the issue as "a classic case for adopting, as the federally prescribed *rule of decision*, the law that would be applied by state courts," rather than creating "a contrary federal rule" (emphasis added)); *see also infra* note 13.

federal cause of action for the state cause of action," 14C Wright & Miller's Federal Practice & Procedure § 3722.2 (Rev. 4th ed. May 2025 update). Those instances are few, but important. *See Avco Corp. v. Aero Lodge No. 735, Int'l Ass'n of Machinists & Aerospace Workers*, 390 U.S. 557, 560, 88 S.Ct. 1235, 20 L.Ed.2d 126 (1968) (Section 301 of the Labor Management Relations Act); *Metro. Life. Ins. Co. v. Taylor*, 481 U.S. 58, 66, 107 S.Ct. 1542, 95 L.Ed.2d 55 (1987) (Section 502(a) of the Employee Retirement Income Security Act); *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 11, 123 S.Ct. 2058, 156 L.Ed.2d 1 (2003) (Sections 85 and 86 of the National Bank Act).

But again, in these instances—and all others where federal law supplies the rule of decision—there is no choice-of-law question, making *Klaxon* inapplicable. That is because the Constitution resolves vertical choice-of-law questions in absolute terms: "[I]f a state measure conflicts with a federal requirement, the state provision must give way." *Swift & Co. v. Wickham*, 382 U.S. 111, 120, 86 S.Ct. 258, 15 L.Ed.2d 194 (1965). In all other cases, non-federal law enjoys the usual presumption against "displacement." *Boyle v. United Techs. Corp.*, 487 U.S. 500, 507, 108 S.Ct. 2510, 101 L.Ed.2d 442 (1988). So it is only in the absence of a federal rule of decision—that is, in the absence of a federal interest warranting displacement of non-federal law—that a choice-of-law question arises. And at that juncture, the Bankruptcy Code is agnostic about which law governs, leaving "no reason [for] such interests [to] be analyzed differently" than if they had arisen outside of bankruptcy. *Butner*, 440 U.S. at 55, 99 S.Ct. 914.

The daylight between these positions—especially between those of the Eighth Circuit and the Second and Fourth Circuits—can be elusive, and the debate can easily be labeled esoteric. Relative to the number of questions governed by state law that arise in bankruptcies across the country, those that present genuine choice-of-law questions are admittedly few. And those whose outcome would change depending on the application of *Klaxon* versus a federal choice-of-law rule are likely fewer still. But apart from doctrinal clarity, which carries its own virtue, resolution of this question in the manner I have proposed serves two important purposes.

First, federal courts exercise limited powers. Perhaps nowhere is that power more at its nadir than in the area of fashioning federal common law. As the Supreme Court has admonished since *Erie*, those contexts that necessitate a federal common law rule are fleeting, and the criteria for recognizing such a rule are exacting. It is incumbent on us to candidly recognize the limits of our authority as a function of the Constitution's separation of powers. After all, "[t]he Framers 'built into the tripartite Federal Government ... a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other.' " *Clinton v. Jones*, 520 U.S. 681, 699, 117 S.Ct. 1636, 137 L.Ed.2d 945 (1997) (omission in original) (quoting *Buckley v. Valeo*, 424 U.S. 1, 122, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976) (per curiam)). Acknowledging that the federal courts' role in crafting common law is necessarily "modest," *Rodriguez*, 589 U.S. at 136, 140 S.Ct. 713, does much to guard against encroachment upon Congress's authority to legislate on the subject of bankruptcies.

Second, with doctrinal clarity and the acknowledgment of federal courts' limited authority comes clearer notice to litigants as to what rule they can expect to govern their rights. As discussed, the Ninth Circuit's departure from *Klaxon* is misguided. As for the Second, Fourth, and Eighth Circuits, their approaches in practice always have, and always will, lead to the same result—*Klaxon* applies in bankruptcy, but federal law necessarily provides the rule of decision "when some federal interest requires a different result." *In re Schriock Constr.*, 104 F.3d at 202. But by framing the question as choice-of-law instead of rule-of-decision and leaving the door open for a different choice-of-law rule in theory, the Second and Fourth Circuits invite needless litigation over *Klaxon*'s applicability and leave lingering uncertainty about which law will govern parties' disputes. They hypothesize a category of cases that, in reality, is a null set. No federal interest exists that will displace a state's choice-of-law rule without simultaneously requiring displacement of state substantive law in favor of a federal rule of decision. Instead of perpetuating the uncertainty surrounding the choice-of-law rule that governs in bankruptcy, we should recognize what practice teaches and give courts and litigants alike notice of the governing framework: The rule from *Klaxon* extends to bankruptcy cases.[11]

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[11] My concurring colleague agrees that "state choice-of-law rules will almost always apply" in bankruptcy but insists that "[r]are is not never." Concurring Op. at 275. It is telling, however, that the concurrence does not identify a single instance—even a hypothetical one—that would require the application of a federal common-law choice of law rule, but would not result, in any event, in the application of federal law as the rule of decision.

IV. IDIOSYNCRATIC STATE CHOICE-OF-LAW RULES DO NOT LICENSE ABANDONING *KLAXON*

For their part, among the options in this three-way circuit split, the parties urge us to adopt the Second and Fourth Circuits' hybrid approach to *Klaxon*, cautioning that we "should not adopt a rule that would require bankruptcy courts to follow idiosyncratic state choice-of-law rules even when doing so would create conflicts, encourage forum-shopping, or undermine significant federal interests." Appellees' Second Supp. Br. 11; *see also* Appellants' Second Supp. Br. 4. And to illustrate their point, Appellees pose the example of "a hypothetical forum state ... reject[ing] the internal-affairs doctrine [to] allow its own idiosyncratic rules to dictate who speaks for a foreign corporation." Appellees' Second Supp. Br. 10. They insist that in such a scenario, "the federal interest in preserving the internal-affairs doctrine and orderly bankruptcy filings would warrant a federal choice-of-law rule vindicating the internal affairs doctrine."[12] *Id.* at 11.

But choice of law is not a panacea, nor need we make it one. Instead, among other constraints, the Constitution places limits on the extent to which states may exert regulatory authority over parties'

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[12] Apart from the reasons I describe below, I agree with the majority that such a scenario is fanciful because it would violate the Constitution. Maj. Op. 259 ("[W]hen it comes to control over corporate decision-making, a state 'has no interest in regulating the internal affairs of foreign corporations.' " (quoting *Edgar v. MITE Corp.*, 457 U.S. 624, 645–46, 102 S.Ct. 2629, 73 L.Ed.2d 269 (1982))).

disputes and that resolve many of the concerns the parties raise here. Four constitutional provisions in particular—the Supremacy Clause, the Full Faith and Credit Clause, the Privileges and Immunities Clause, and the Due Process Clause of the Fourteenth Amendment, each of which is discussed below—provide a federal backstop to permissible state choice-of-law regimes.

First, and most intuitively for choice-of-law purposes, is the Supremacy Clause. U.S. Const. art. VI, cl. 2. In "split[ting] the atom of sovereignty" for our federal union, *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838, 115 S.Ct. 1842, 131 L.Ed.2d 881 (1995) (Kennedy, J., concurring), the Framers "provide[d] 'a rule of decision' for determining whether federal or state law applies in a particular situation," *Kansas v. Garcia*, 589 U.S. 191, 202, 140 S.Ct. 791, 206 L.Ed.2d 146 (2020) (quoting *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 324, 135 S.Ct. 1378, 191 L.Ed.2d 471 (2015)). The Supremacy Clause supplies a bright-line rule to resolve "vertical" choice-of-law questions, i.e., those that implicate a conflict between federal and state law. *Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677, 691, 126 S.Ct. 2121, 165 L.Ed.2d 131 (2006). When federal and state law are "in conflict or at cross-purposes," the Supremacy Clause embodies the "clear rule" that federal law prevails. *Arizona v. United States*, 567 U.S. 387, 399, 132 S.Ct. 2492, 183 L.Ed.2d 351 (2012).

Thus, when state courts consider which law governs a dispute, the existence of a controlling federal rule resolves any choice-of-law question, "[f]or the policy of the federal [law] is the prevailing policy in every state." *Testa v. Katt*, 330 U.S. 386, 393, 67 S.Ct. 810, 91 L.Ed. 967 (1947). In this way, the Supremacy Clause protects the federal authority to enact federal rules of decision to control in circumstances "necessary to protect uniquely federal interests." *Rodriguez*, 589 U.S. at 136, 140 S.Ct. 713 (quoting *Radcliff Materials*, 451 U.S. at 640, 101 S.Ct. 2061).

Often, those federal interests will be embodied in a federal statute. But in few, yet important, contexts, federal courts have recognized the need to fashion "federal common law—substantive rules of decision not expressly authorized by either the Constitution or any Act of Congress—that supplant state law," 19 Wright & Miller's Federal Practice & Procedure § 4514 (3d ed. May 2025 update), often when the controversy's subject matter closely relates to the federal government or falls within an area of exclusive federal competence, *see, e.g., Norfolk S. Ry. Co. v. Kirby*, 543 U.S. 14, 23, 125 S.Ct. 385, 160 L.Ed.2d 283 (2004) (admiralty); *Boyle*, 487 U.S. at 505–06, 108 S.Ct. 2510 (civil liabilities of contractors under federal procurement contracts); *Clearfield Tr.*, 318 U.S. at 366, 318 U.S. at 366, 63 S.Ct. 573 (rights and duties of the United States under federally issued commercial paper); *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110, 58 S.Ct. 803, 82 L.Ed. 1202 (1938) (apportionment of water rights between states).

To be sure, federal courts' common law-making authority "plays a necessarily modest role," and the Supreme Court has "underscore[d] the care federal courts should exercise before taking up an invitation to try their hand at common lawmaking." *Rodriguez*, 589 U.S. at 136, 138, 140 S.Ct. 713. But in the narrow circumstances that command a federal rule of decision absent constitutional or statutory authority, the Supremacy Clause ensures that federal courts may still fashion such a rule and that contrary state law will yield.[13] *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427, 84 S.Ct. 923, 11 L.Ed.2d 804 (1964) (recognizing the preemptive force of federal common law), *superseded on other grounds by statute*, Pub. L. 88-633, 78 Stat. 1013, *as recognized in, Fed. Republic of Ger. v. Philipp*, 592 U.S. 169, 179, 141 S.Ct. 703, –— L.Ed.2d ——— (2021). After all, "exclusive state power takes up only where federal power leaves off." John Hart Ely, *The Irrepressible Myth of* Erie, 87 Harv. L. Rev. 693, 705 (1974). So that vertical choice-of-law rule, enshrined in our Constitution, does much to ensure that state choice-of-law rules do not unduly "undermine significant federal interests." Appellees' Second Supp. Br. 11.

Second, the Full Faith and Credit Clause occupies a modest, but important, position among the constitutional provisions bearing on choice of law. In relevant part, it provides that "Full Faith and Credit

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[13] When adopting a federal common law rule, federal courts must assess both "(1) the competence of federal courts to formulate a federal rule of decision, and (2) the appropriateness of declaring a federal rule rather than borrowing, incorporating, or adopting state law in point." *McVeigh*, 547 U.S. at 692, 126 S.Ct. 2121. So in some circumstances, federal courts may "adopt the readymade body of state law as the federal rule of decision until Congress strikes a different accommodation," and state law yields only in the sense that it is supplanted by an identical federal rule. *Kimbell Foods*, 440 U.S. at 740, 99 S.Ct. 1448.

shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." U.S. Const. art. IV, § 1, cl. 1. As the Supreme Court has recognized, the Clause's purpose "was to alter the status of the several states as independent foreign sovereignties ... and to make them integral parts of a single nation throughout which a remedy upon a just obligation might be demanded as of right, irrespective of the state of its origin." *Milwaukee Cnty. v. M.E. White Co.*, 296 U.S. 268, 277, 56 S.Ct. 229, 80 L.Ed. 220 (1935); *see also Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430, 439, 64 S.Ct. 208, 88 L.Ed. 149 (1943).

In modern jurisprudence, much of the Full Faith and Credit Clause's function—and that of the statute with which it shares a name, 28 U.S.C. § 1738—occurs in the recognition of judgments rendered by foreign states. *See, e.g., Baker v. Gen. Motors Corp.*, 522 U.S. 222, 233, 118 S.Ct. 657, 139 L.Ed.2d 580 (1998). But as the Supreme Court has recognized, the Full Faith and Credit Clause continues to have an enduring role in the regulation of "credit owed to [foreign] laws." *Id.* at 232, 118 S.Ct. 657. Indeed, "where the policy of one state statute comes into conflict with that of another, the necessity of some accommodation of the conflicting interests of the two states is ... apparent." *Alaska Packers Ass'n v. Indus. Accident Comm'n of Cal.*, 294 U.S. 532, 547, 55 S.Ct. 518, 79 L.Ed. 1044 (1935).

Apart from its other commands, the Full Faith and Credit Clause, at a minimum, requires that a forum state confronting a horizontal choice-of-law question have "some rational basis" for applying its law over that of a sister state. *Id.* at 547–48, 55 S.Ct.

518. That basis must be above and beyond mere favoritism toward forum law, for a state does not have a legitimate interest in discriminating against another state's law simply by virtue of its foreign origin. *See First Nat'l Bank of Chi. v. United Air Lines*, 342 U.S. 396, 398, 72 S.Ct. 421, 96 L.Ed. 441 (1952); *Hughes v. Fetter*, 341 U.S. 609, 613, 71 S.Ct. 980, 95 L.Ed. 1212 (1951); *cf. Metro. Life Ins. Co. v. Ward*, 470 U.S. 869, 878, 105 S.Ct. 1676, 84 L.Ed.2d 751 (1985) (holding that a state does not have a legitimate interest purely in favoring domestic economic interests over foreign ones).

Of course, the Full Faith and Credit Clause "does not require one state to substitute for its own statute, applicable to persons and events within it, the conflicting statute of another state, even though that statute is of controlling force in the courts of the state of its enactment with respect to the same persons and events." *Pac. Emps. Ins. Co. v. Indus. Accident Comm'n of Cal.*, 306 U.S. 493, 502, 59 S.Ct. 629, 83 L.Ed. 940 (1939). And no doubt, in many cases, forum states will have rational, nondiscriminatory reasons for applying their law over that of others. *See, e.g., Cardillo v. Liberty Mut. Ins. Co.*, 330 U.S. 469, 476, 67 S.Ct. 801, 91 L.Ed. 1028 (1947). But the Full Faith and Credit Clause does "set[ ] certain minimum requirements which each state must observe when asked to apply the law of a sister state," *Wells v. Simonds Abrasive Co.*, 345 U.S. 514, 516, 73 S.Ct. 856, 97 L.Ed. 1211 (1953), and it "requires that a state base its assertion of legislative jurisdiction on a claim that its interests are superior," not simply that conflicting law is foreign, Kermit Roosevelt III, *The Myth of Choice of Law: Rethinking Conflicts*, 97 Mich. L. Rev.

2448, 2505 n.240 (1999). This constitutional floor provides yet another constraint on state choice-of-law regimes.

Third, the Privileges and Immunities Clause protects out-of-staters from discrimination on the basis of their foreign citizenship.[14] *See Supreme Ct. of N.H. v. Piper*, 470 U.S. 274, 285, 105 S.Ct. 1272, 84 L.Ed.2d 205 (1985); *see also Tyler Pipe Indus., Inc. v. Wash. State Dep't of Revenue*, 483 U.S. 232, 265, 107 S.Ct. 2810, 97 L.Ed.2d 199 (1987) (Scalia, J., concurring in part and dissenting in part) (grounding the protection "against rank discrimination against citizens of other States" in the Privileges and Immunities Clause). In full, it provides that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. Const. art. IV, § 2, cl. 1. Much like the Full Faith and Credit Clause, the Privileges and Immunities Clause was intended "to help fuse into one Nation a collection of independent, sovereign States." *Toomer v. Witsell*, 334 U.S. 385, 395, 68 S.Ct. 1156, 92 L.Ed. 1460 (1948).

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[14] This rule may sound identical to the constraint provided by the Full Faith and Credit Clause discussed above. But the two clauses play distinct roles. The Full Faith and Credit Clause concerns the respect owed by one state to the laws and judgments of another, while the Privileges and Immunities Clause concerns states' treatment of citizens of foreign states. *Compare* U.S. Const. art. IV, § 1, cl. 1 ("Full Faith and Credit shall be given in *each State* to the public Acts, Records, and judicial Proceedings of *every other State*." (emphasis added)), *with* U.S. Const. art. IV, § 2, cl. 1 ("The *Citizens* of each State shall be entitled to all Privileges and Immunities of Citizens in *the several States*." (emphasis added)).

The Clause does not guarantee that citizens of each state are entitled to all of the same rights and benefits of citizens in other states, *see Piper*, 470 U.S. at 284, 105 S.Ct. 1272, but only those that are "fundamental" to "the vitality of the Nation as a single entity," *Baldwin v. Fish & Game Comm'n of Mont.*, 436 U.S. 371, 382–83, 98 S.Ct. 1852, 56 L.Ed.2d 354 (1978) (quotation omitted). It does, however, "bar discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States." *Toomer*, 334 U.S. at 396, 68 S.Ct. 1156.

The Supreme Court has recognized that access to a state's courts is among the privileges and immunities protected by the Constitution. *McKnett v. St. Louis & S.F. Ry. Co.*, 292 U.S. 230, 233, 54 S.Ct. 690, 78 L.Ed. 1227 (1934); *Canadian N. Ry. Co. v. Eggen*, 252 U.S. 553, 562, 40 S.Ct. 402, 64 L.Ed. 713 (1920). And implicit in that guarantee is the constituent promise that a state may not withhold the application of its law to a citizen of another state in a situation in which it would extend that law to one of its own citizens solely by virtue of the out-of-stater's foreign citizenship. *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 180, 19 L.Ed. 357 (1868) (the Privileges and Immunities Clause "secures to [citizens of a foreign state] in other States the equal protection of their laws"); *see also* Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 Colum. L. Rev. 249, 265–66 (1992). Thus, the Privileges and Immunities Clause "place[s] the citizens of each State upon the same footing with citizens of other States," thereby demanding citizens of foreign states derive the same benefit from a state's law that it would extend to its own citizens and prohibiting discrimination against out-of-staters because of their foreign citizenship. *Paul*, 75 U.S. at 180.

Fourth, and finally, the Due Process Clause of the Fourteenth Amendment substantively limits to which disputes states may extend their law.[15] In providing that "[n]o State shall ... deprive any person of life, liberty, or property, without due process of law," U.S. Const. amend. XIV, § 1, the Clause requires "that for a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair," *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312–13, 101 S.Ct. 633, 66 L.Ed.2d 521 (1981) (plurality). Thus,

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[15] The Supreme Court's articulation of the Fourteenth Amendment Due Process Clause's limitations on state choice-of-law rules has been subject to nearly universal criticism. *See, e.g.*, Roosevelt, *supra*, at 2506–07; Louise Weinberg, *Choice of Law and Minimal Scrutiny*, 49 U. Chi. L. Rev. 440, 460–63 (1982). In comparing choice of law with the Court's personal jurisdiction jurisprudence, Professor Linda Silberman famously quipped, "[t]o believe that a defendant's contacts with the forum state should be stronger under the due process clause for jurisdictional purposes than for choice of law is to believe that an accused is more concerned with where he will be hanged than whether." Linda J. Silberman, Shaffer v. Heitner, *The End of an Era*, 53 N.Y.U. L. Rev. 32, 88 (1978). I do not take a side in this debate here. My point, rather, is that wherever the constitutional boundaries lie, so long a states' choice-of-law regimes fall within them, federal courts have no authority under the Bankruptcy Code, Rules of Decision Act, or statutes granting bankruptcy jurisdiction to supplant state choice-of-law rules in favor of federal ones.

where a state does not have sufficient contacts with a dispute, it lacks legitimate interests warranting extension of its law to the dispute, rendering application of its law "sufficiently arbitrary and unfair as to exceed constitutional limits." *Shutts*, 472 U.S. at 822, 105 S.Ct. 2965; *accord John Hancock Mut. Life Ins. Co. v. Yates*, 299 U.S. 178, 182, 57 S.Ct. 129, 81 L.Ed. 106 (1936); *Home Ins. Co. v. Dick*, 281 U.S. 397, 407–08, 50 S.Ct. 338, 74 L.Ed. 926 (1930). And in doing so, the Due Process Clause protects litigants against "unfair surprise or frustration of legitimate expectations" of the law governing their dealings.[16] *Allstate*, 449 U.S. at 318 n.24, 101 S.Ct. 633.

By recounting these well-trodden constitutional constraints, I do not seek to "embark upon the enterprise of constitutionalizing choice-of-law rules." *Sun Oil*, 486 U.S. at 727–28, 108 S.Ct. 2117. Rather, these constitutional safeguards demonstrate that by extending the rule of *Klaxon* to bankruptcy cases,

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[16] The Supreme Court has somewhat collapsed the inquiries under the Full Faith and Credit Clause and the Due Process Clause for choice-of-law purposes. *See, e.g., Sun Oil Co. v. Wortman*, 486 U.S. 717, 729 n.3, 108 S.Ct. 2117, 100 L.Ed.2d 743 (1988); *see also* Herma Hill Kay et al., *Conflict of Laws* 381 (10th ed. 2018) (noting the convergence in the two analyses). Yet each imposes a different command: As explained above, the Full Faith and Credit Clause governs the respect owed to laws among states, while the Due Process Clause confers an individual right to be free from application of a state's law when that state has no meaningful connection to the dispute. *Compare* U.S. Const. art. IV, § 1, cl. 1 ("Full Faith and Credit shall be given in *each State* to the public Acts, Records, and judicial Proceedings of *every other State*." (emphasis added)), *with* U.S. Const. amend. XIV, § 1 ("No *State* shall ... deprive any *person* of life, liberty, or property, without due process of law." (emphasis added)).

federal courts are not bound to reflexively apply impermissibly parochial state choice-of-law rules as Appellees warn. *See* Appellees' Second Supp. Br. 9–11. But absent running afoul of the limitations imposed by the Constitution, I find no basis (or authority) in federal bankruptcy law to constrain a state's authority to prescribe the choice-of-law rules that shall govern in its courts. Indeed, it is a feature of our federal system that it "leaves to a state, within the limits permitted by the Constitution, the right to pursue local policies diverging from those of its neighbors," and "it is not for the federal courts to thwart such local policies by enforcing an independent 'general law' of conflict of laws." *Klaxon*, 313 U.S. at 496, 61 S.Ct. 1020.

Where states do not transcend constitutional barriers, *Klaxon*'s rule best serves the purposes of the Bankruptcy Code consistent with *Erie*, the Rules of Decision Act, and the presumption against federal common law-making. So just as *Klaxon* and *Erie* aim to preserve the substantive law governing a dispute notwithstanding the "accident of diversity,"[17] *Klaxon*,

[17] Of course, *Klaxon*'s interest in diminishing forum-shopping incentives between state and federal courts, *see* 313 U.S. at 496, 61 S.Ct. 1020, does not neatly map onto bankruptcy, as federal courts possess original and exclusive jurisdiction over bankruptcy cases, 28 U.S.C. § 1334(a). But just as plaintiffs may choose their favored forum in non-bankruptcy cases, consistent with proper venue, to gain a favorable choice-of-law rule, *see* *Ferens v. John Deere Co.*, 494 U.S. 516, 523, 110 S.Ct. 1274, 108 L.Ed.2d 443 (1990); *Van Dusen v. Barrack*, 376 U.S. 612, 639, 84 S.Ct. 805, 11 L.Ed.2d 945 (1964), debtors too may choose a forum for purposes of a specific choice-of-law regime in bankruptcy cases where venue properly lies. And that sort of horizontal forum shopping incentive is "attributable to," and an irreducible

313 U.S. at 496, 61 S.Ct. 1020 (citing *Erie*, 304 U.S. at 74–77, 58 S.Ct. 817), extending *Klaxon* in this manner avoids altering the substantive law governing a dispute simply because of the "happenstance of bankruptcy," *Lewis v. Mfrs. Nat'l Bank of Detroit*, 364 U.S. 603, 609, 81 S.Ct. 347, 5 L.Ed.2d 323 (1961).

* * *

The question of *Klaxon*'s applicability to bankruptcy has persisted for nearly 80 years. This case, just as with others our Court has encountered, permits us to elide the question of which choice-of-law methodology to employ. But we have the responsibility not to perpetuate this uncertainty. I hope that, in the appropriate case, we will resolve this question and give guidance to bankruptcy and district courts in our Circuit in a way that is consistent with the Bankruptcy Code, *Erie* and the Rules of Decision Act, and the policies underlying the grant of bankruptcy jurisdiction to federal courts.

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component of, "our federal system." *Klaxon*, 313 U.S. at 496, 61 S.Ct. 1020.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 24-3207

IN RE: WHITTAKER CLARK & DANIELS INC, DEBTOR
PETER PROTOPAPAS, APPELLANT IN NO. 24-2210
OFFICIAL COMMITTEE OF TALC CLAIMANTS APPELLANT IN NO. 24-2211

IN RE: WHITTAKER CLARK & DANIELS INC., DEBTOR
WHITTAKER CLARK & DANIELS INC; BRILLIANT NATIONAL SERVICES INC; L.A. TERMINALS INC.; SOCO WEST INC.

v.

BRENNTAG AG; BRENNTAG CANADA INC.; BRENNTAG GREAT LAKES LLC; BRENNTAG MID-SOUTH INC.; BRENNTAG NORTH AMERICA INC.; BRENNTAG NORTHEAST INC.; BRENNTAG PACIFIC INC.; BRENNTAG SOUTHEAST INC.; BRENNTAG SOUTHWEST INC.; BRENNTAG SPECIALTIES LLC (F/K/A BRENNTAG SPECIALTIES, INC., AND AS MINERAL AND PIGMENT SOLUTIONS, INC.); COASTAL CHEMICAL CO. LLC; MINERAL PIGMENT SOLUTIONS INC.; THOSE PARTIES LISTED ON APPENDIX A TO THE COMPLAINT; JOHN AND JANE DOES 1-1000; JULIET M. GRAY; KYUNG H. LEE OFFICIAL COMMITTEE OF TALC CLAIMANTS, APPELLANT

No. 24-2210, No. 24-2211, No. 25-1044
Argued on April 1, 2025
(Opinion filed: September 10, 2025)

Before: ROBINSON, NATHAN, and KAHN, *Circuit Judges*. AMBRO, *Circuit Judge*

Plagued by tort liability claims for distributing asbestos-contaminated talc, Whittaker, Clark & Daniels, Inc. ("Whittaker") and its debtor affiliates filed for bankruptcy in 2023 seeking to dispose finally of those claims. Like many mass-tort bankruptcies, counsel contested Whittaker's from the beginning. On appeal, Appellants—the receiver appointed for Whittaker by a South Carolina Court and the Official Committee of Talc Claimants—raise two fundamental questions about Whittaker's bankruptcy: Should we be here at all given that, in their view, Whittaker's petition was improperly filed, and if rightly in bankruptcy, do its assets include certain tort claims relating to asbestos liability?

We conclude that Whittaker properly filed for bankruptcy and the Bankruptcy and District Courts correctly declined to dismiss its petition. We also determine that successor liability claims Appellants seek to assert against a nondebtor belong to the bankruptcy estates rather than individual creditors. Therefore, Whittaker may pursue those claims for the benefit of the estates. Accordingly, we affirm.

I. BACKGROUND

A. The Debtors' Corporate History.

Whittaker and its three affiliated debtors—Brilliant National Services, Inc., L.A. Terminals, Inc., and Soco West, Inc. (collectively with Whittaker, the "Debtors")—were processors, manufacturers, and distributors of various industrial chemicals and minerals, including talc. Through a series of corporate transactions—too tortured to recount in full here—the Debtors sold substantially all of their operating assets in 2004 to subsidiaries of Brenntag North America. As part of that transaction, the Debtors ceased to be operating entities, and Whittaker and Soco were left as shell companies to manage asbestos liability from the Debtors' operating businesses. Whittaker, Brilliant, and Soco also took on the obligation to indemnify Brenntag and its affiliates for any liabilities it accrued from asbestos-related tort claims.

Three years later, National Indemnity Company—a subsidiary of Berkshire Hathaway Inc.—acquired Brilliant and L.A. Terminals, thereby indirectly acquiring Whittaker and Soco.[1] Through a chain of indemnity agreements and obligations, National Indemnity now backstops asbestos-related successor liability claims against Brenntag.

B. Proceedings in South Carolina.

Prior to the Debtors' bankruptcy, plaintiffs across the country filed approximately 2,700 suits against the Debtors for asbestos-related torts. Our case concerns Sarah Plant's lawsuit in the South Carolina Court of Common Pleas. The suit followed Plant's diagnosis of mesothelioma (a form of cancer affecting the protective lining of the lungs) from asbestos-contaminated talc produced by Whittaker. In March 2023, a jury awarded her a $29 million verdict against it.

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[1] National Indemnity assigned its acquisition rights to another Berkshire affiliate, Ringwalt & Liesche Co., who is now the Debtors' ultimate parent.

Days later, Plant moved the South Carolina Court to place Whittaker into receivership. The Court granted Plant's motion and entered an order (the "Receivership Order" or "Order") appointing Peter Protopapas (the "South Carolina Receiver") as Whittaker's receiver. The Receivership Order, among other things, vested the South Carolina Receiver "with the power and authority [to] fully administer all assets of [Whittaker], accept service on behalf of [it], engage counsel on behalf of [it] and take any and all steps necessary to protect the interests of [Whittaker] whatever they may be." Appellants' Consolidated J.A. 217.

Whittaker promptly moved the South Carolina Court to reconsider. It held a hearing on Whittaker's motion, during which, in response to counsel's suggestion that Whittaker had the "authority to enter into voluntary bankruptcy," the Court stated:

> I'm well aware, that was the main factor in my signing the order so quickly is that I wanted to be sure that something other than [a] kind of amorphous organization I wasn't quite sure about in terms of asset picture, control[,] or anything else[,] would not simply declare bankruptcy and that entity would still be controlling things. I wanted a receiver that I knew would take it seriously, to look at the asset picture and see what was going on.

Id. at 423. The Court denied Whittaker's motion and directed the parties to submit a proposed form of order to memorialize its ruling.

C. The Debtors Petition for Bankruptcy.

The Debtors soon thereafter filed for bankruptcy in the United States Bankruptcy Court for the District of New Jersey. Whittaker's board passed a resolution beforehand authorizing the filing without gaining the approval of the South Carolina Receiver or consulting him. He promptly moved in the Bankruptcy Court to dismiss Whittaker's bankruptcy as an unauthorized petition, arguing that the Receivership Order "divested [its] board of the authority to approve a bankruptcy filing on [its] behalf and instead gave such authority to the Receiver alone." Appellants' Consolidated Opening Br. 13.

The Bankruptcy Court denied the South Carolina Receiver's motion, concluding that the Receivership Order did not remove the authority of Whittaker's board to file a bankruptcy petition because its terms did not demonstrate the South Carolina Receiver displaced the board. He appealed to the District Court, which affirmed the Bankruptcy Court's ruling for substantially the same reasons. A timely appeal to our Court followed.

Parallel with the South Carolina Receiver's appeal, Whittaker's bankruptcy proceeded in the Bankruptcy Court. In light of the substantial talc-related asbestos liability the Debtors face, the United States Trustee appointed the Official Committee of Talc Claimants (the "Committee") to represent that constituency's interests during the bankruptcy proceedings.

In September 2023, the Debtors began an adversary proceeding—naming as defendants Brenntag, related entities, and hundreds of individual talc plaintiffs—seeking a declaratory judgment that successor liability claims against Brenntag premised on a "product line" theory of liability[2] (the "Successor Liability Claims") are property of the Debtors' estates under 11 U.S.C. § 541(a)(1).[3] The Committee intervened in the adversary proceeding, and the Debtors moved for summary judgment. In their briefing, the Debtors argued that our decision in *In re Emoral*, 740 F.3d 875 (3d Cir. 2014), requires treating the Successor Liability Claims as property of the Debtors' bankruptcy estates.

After rounds of unsuccessful mediation, in August 2024 the Bankruptcy Court granted summary judgment to the Debtors. It agreed that, under *Emoral*, the Committee's Successor Liability Claims are property of the Debtors' estates and alternatively held that 11 U.S.C. § 544(a)(1) provides an additional

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[2] The "product line" theory of liability "imposes strict liability for injuries caused by defects of a product line on a corporation that acquires the manufacturing assets of another corporation and undertakes essentially the same manufacturing operation and practices." Appellant Committee's Opening Br. 33 (citing *Ramirez v. Amsted Indus., Inc.*, 86 N.J. 332, 431 A.2d 811, 820 (1981)).

[3] In the Bankruptcy Court, the Committee distinguished between claims premised on the "product line" theory generally and those claims governed by California law. The latter, the Committee contended, cannot be property of the estate because the "Debtors are precluded by California law from bringing successor liability claims against Brenntag." *In re Whittaker, Clark, & Daniels*, 663 B.R. 1, 12 (Bankr. D.N.J. 2024). As the "California Claims" comprise a subset of the Successor Liability Claims, and the parties place no meaningful significance on the distinction between the two on appeal, we refer simply to the Successor Liability Claims.

basis for drawing those claims into the estates.[4] Recognizing the uncertainty of the law governing its decision, the Bankruptcy Court certified its decision for direct appeal to our Court under 28 U.S.C. § 158(d)(2). The Committee timely sought a direct appeal, and we granted its petition to do so on December 2, 2024. Given the Receiver's pending appeal and the importance of the issues raised in the Committee's appeal, we ordered expedited briefing and consolidated the two. We now consider both appeals together.[5]

II. Jurisdiction and Standard of Review

The Bankruptcy Court had jurisdiction under 28 U.S.C. §§ 1334 and 157(b), and in the South Carolina Receiver's appeal the District Court had jurisdiction under 28 U.S.C. § 158(a). We have jurisdiction under 28 U.S.C. § 158(d). We review without deference both the Bankruptcy Court's and the District Court's legal conclusions, while our review of their factual findings

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[4] Section 544(a) vests a trustee with the rights and powers of a hypothetical lien creditor who extended credit at the time of the debtor's petition, and under 11 U.S.C. § 1107(a), a debtor in a Chapter 11 case (technically called a debtor in possession) has essentially the rights of a trustee ordered to be appointed by the bankruptcy court. Hence here the Debtors' rights are coextensive with those of a trustee.

[5] In the meantime, the Debtors have sought approval from the Bankruptcy Court to settle the Successor Liability Claims for approximately $535 million. That settlement amount includes $50 million in debtor-in-possession financing provided by Berkshire Hathaway, which the Bankruptcy Court approved on October 15, 2024. The Bankruptcy Court held a trial the week of March 3, 2025, on, *inter alia*, the Debtors' settlement motion. A decision remains pending.

is for clear error. *In re Trans World Airlines, Inc.*, 145 F.3d 124, 131 (3d Cir. 1998).

II. DISCUSSION

Before us are two issues, each with accompanying nuance. First, the South Carolina Receiver and the Committee contend that Whittaker improperly filed for bankruptcy because the South Carolina Court vested that authority exclusively in the South Carolina Receiver, meaning Whittaker's bankruptcy must be dismissed. Second, the Committee argues that the Bankruptcy Court incorrectly concluded that the Successor Liability Claims belong to the Debtors' bankruptcy estates under our decision in *Emoral.* We review each in turn.

A. Properly Filed Petition Is Not a Jurisdictional Prerequisite.

Before considering whether Whittaker properly entered bankruptcy, we encounter a predicate question: Does a properly filed petition affect a court's subject matter jurisdiction? Or is a valid petition instead a non-jurisdictional—but nonetheless integral—component of a bankruptcy case? We conclude it is the latter.

The Bankruptcy Code provides that, except in narrow circumstances, "on request of a party in interest, and after notice and a hearing, the court shall ... dismiss a case under [Chapter 11] ... for cause." 11 U.S.C. § 1112(b)(1). "Cause" typically includes things like "gross mismanagement of the estate," "failure to comply with an order of the court," and "material default by the debtor with respect to a confirmed plan." *Id.* § 1112(b)(4)(B), (E), (N). But it also includes occasions when a debtor "did not have the proper authority to commence the ... bankruptcy proceeding." *In re 3P Hightstown, LLC*, 631 B.R. 205, 209 (Bankr. D.N.J. 2021). In those cases, the court "has no alternative but to dismiss the petition." *Price v. Gurney*, 324 U.S. 100, 106, 65 S.Ct. 513, 89 L.Ed. 776 (1945).

The Supreme Court previously described this necessary component of the bankruptcy case as a limitation on courts' "jurisdiction," stating, in interpreting the predecessor statute to the Bankruptcy Code, "nowhere is there any indication that Congress bestowed on the bankruptcy court *jurisdiction* to determine that those who in fact do not have the authority to speak for the corporation ... should be empowered to file a petition on behalf of the corporation." *Id.* at 107, 65 S.Ct. 513 (emphasis added).

"Jurisdiction," however, "is a word of many, too many, meanings." *Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 90, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998) (quoting *United States v. Vanness*, 85 F.3d 661, 663 n.2 (D.C. Cir. 1996)). And some courts have taken *Price*'s mention of "jurisdiction" to mean a limitation on bankruptcy courts' subject matter jurisdiction. *See, e.g., In re Parks Diversified, L.P.*, 661 B.R. 401, 415–420 (C.D. Cal. 2024) (collecting cases); *In re Mach I Aviation, Inc.*, No. 10-01225, 2011 WL 5838520, at *4 n.11 (B.A.P. 9th Cir. Sept. 15, 2011). Following that understanding, the absence of a properly filed petition would extinguish "a court's power to hear a case," leaving it no choice but to dismiss it for lack of jurisdiction. *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514, 126 S.Ct. 1235, 163 L.Ed.2d 1097 (2006) (quoting *United States v. Cotton*, 535 U.S. 625, 630, 122 S.Ct. 1781, 152 L.Ed.2d 860 (2002)).

But in recognition of jurisdictional limitations' "unique potential to disrupt the orderly course of litigation," recent Supreme Court cases exercise greater care before hanging the "jurisdictional label" on a statutory provision. *Wilkins v. United States*, 598 U.S. 152, 157–58, 143 S.Ct. 870, 215 L.Ed.2d 116 (2023). Today the standard for concluding a statute limits federal courts' subject matter jurisdiction is an exacting one. While Congress need not employ any specific formulation or "incant magic words," "the 'traditional tools of statutory construction must plainly show that Congress imbued a procedural bar with jurisdictional consequences.' " *Boechler, P.C., v. Comm'r*, 596 U.S. 199, 203, 142 S.Ct. 1493, 212 L.Ed.2d 524 (2022) (first quoting *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 154, 133 S.Ct. 817, 184 L.Ed.2d 627 (2013); then quoting *United States v. Kwai Fun Wong*, 575 U.S. 402, 410, 135 S.Ct. 1625, 191 L.Ed.2d 533 (2015)). Anything short of a clear indication will not do.

The statutes granting federal courts jurisdiction over bankruptcy cases do not attach jurisdictional significance to the propriety of a debtor's petition. The governing provision, 28 U.S.C. § 1334(a), provides only that, absent exceptions not relevant here, "the district courts shall have original and exclusive jurisdiction of all cases under title 11." In addition, "district court[s] may provide that any or all cases under title 11 ... shall be referred to the bankruptcy judges for the district" who "may hear and determine all cases under title 11 ... and may enter appropriate orders and judgments." *Id.* § 157(a), (b)(1). These statutes establish the jurisdictional grant for district and bankruptcy courts over bankruptcy cases, and neither they, nor any other provision, condition that grant on a properly filed petition.

Code § 301(a), which does deal with bankruptcy petitions, provides only that a voluntary bankruptcy "is commenced by the filing with the bankruptcy court of a petition under such chapter by an entity that may be a debtor under such chapter." This provision focuses on the commencement of a bankruptcy case by a *debtor*, not on the power to decide of the *court.* Simply put, § 301(a) "does not speak in jurisdictional terms," *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 394, 102 S.Ct. 1127, 71 L.Ed.2d 234 (1982), and we "will not lightly apply" the jurisdictional label to a provision absent a "clear statement" to the contrary, *Wilkins*, 598 U.S. at 158, 143 S.Ct. 870.

Accordingly, an improperly filed bankruptcy petition constitutes "cause" to dismiss a bankruptcy case, 11 U.S.C. § 1112(b)(1), but it does not strip bankruptcy courts of subject matter jurisdiction.

B. Whittaker Properly Filed Its Bankruptcy Petition.

The Supreme Court has long held that, "[i]n the absence of federal incorporation," "local law" governs a corporate debtor's authority to petition for bankruptcy. *Price*, 324 U.S. at 106, 65 S.Ct. 513. As corporations act through agents, "local law" is the non-federal rule that gives a corporation's agents—typically in those circumstances its board of directors—the "authority ... to act." *Id.* And because “[c]orporations are creatures of state law,” *Burks v. Lasker*, 441 U.S. 471, 478, 99 S.Ct. 1831, 60 L.Ed.2d 404 (1979) (quoting *Cort v. Ash*, 422 U.S. 66, 84, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975)), “it is state law which is the font of corporate directors’ powers,” *id.* So we look to governing state law to determine the propriety of a corporation’s bankruptcy petition. *In re Franchise Servs. of N. Am., Inc.*, 891 F.3d 198, 206 (5th Cir. 2018).

But which state’s law governs? More precisely, in a situation such as this, where a South Carolina court has putatively exercised authority over the assets of a New Jersey corporation, do we assess the authority of Whittaker’s board to file for bankruptcy with reference to New Jersey or South Carolina law?

Fortunately, the parties make answering this question easy. They agree that New Jersey law governs the authority of Whittaker’s board over its internal affairs, like petitioning for bankruptcy. Appellants’ Second Supp. Br. 1; Appellees’ Second Supp. Br. 2, 11; *Williams v. BASF Catalysts LLC*, 765 F.3d 306, 317 (3d Cir. 2014) (where parties do not dispute governing law, we need not conduct a choice-of-law analysis). So the question becomes whether, under New Jersey law, the Receivership Order stripped Whittaker’s board of the authority to file for bankruptcy. It did not.

While we stand far removed in time from the zenith of equity receiverships in this country, *see* David A. Skeel, Jr., *Debt’s Dominion: A History of Bankruptcy Law in America* 56–60 (2001) (describing the rise of equity receivership in the late nineteenth century as a device for resolving corporate insolvency), this case proves that state courts retain the traditional equitable authority to appoint receivers for insolvent corporations. But that authority is not without limits, as this case also proves.

New Jersey law recognizes that "comity requires that [a foreign receiver] should be acknowledged and aided" to the extent that doing so is not "to the disadvantage of creditors resident [in New Jersey]." *Stone v. N.J. & H. R. Ry. & Ferry Co.*, 66 A. 1072, 1073 (N.J. 1907). So where a foreign court appoints a receiver, New Jersey courts generally "will appoint an ancillary receiver, [and] the assets will be so administered that creditors in [New Jersey] and in the foreign jurisdiction shall fare alike." *Id.*; *accord Clark v. Painted Post Lumber Co.*, 89 N.J. Eq. 409, 104 A. 728, 728 (1918) (recognizing that "after the appointment of the receiver in New York, [an ancillary receiver] was appointed" by a New Jersey court); *Ware v. Supreme Sitting of Order of Iron Hall*, 28 A. 1041, 1043 (N.J. Ch. 1894) (recognizing that an ancillary receiver was appointed in New Jersey and "should be regarded as auxiliary to the [foreign] receiver").

New Jersey law authorizes its Superior Court to appoint receivers for New Jersey corporations. *See* N.J. Stat. Ann. § 14A:14-2(3) ("The court ... shall have power to appoint and remove one or more receivers of the corporation."). That provision also permits the court to "enjoin the corporation, its officers and agents, from exercising any of its privileges and franchises, and from collecting or receiving any debts, or paying out, selling, assigning or transferring any of its property, except to a receiver, and except as the court may otherwise order." *Id.* This statute suggests that New Jersey has licensed its courts to exercise broad authority over domestic corporations consistent with its corporate law. Thus, on our reading, New Jersey law permits its courts to recognize foreign receivership orders and appoint an ancillary receiver to aid in the execution of foreign judgments, including by enjoining the corporation and its board from taking specific actions and exercising specific powers.

The Restatement (Second) of Conflict of Laws supports as much. In recognizing that courts may appoint a receiver over a foreign corporation, the Restatement observes that "[w]hen a principal receiver of a corporation has been appointed by a court of a state other than the state of incorporation, and it is intended to dissolve the corporation ..., an ancillary receiver should be appointed for those purposes by a court of the state of incorporation." Restatement (Second) of Conflict of Laws § 367 cmt. d (Am. L. Inst. 1971). This is so because "only a receiver appointed by a court in the state where the corporation was incorporated can institute action to dissolve a corporation."[6] *Id.*

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[6] Of course, neither New Jersey law nor the Restatement contemplates a state's authority over domestic corporations in instances of bankruptcy, as that power is an area of exclusive federal competence. *Hanover Nat'l Bank v. Moyses*, 186 U.S. 181, 187, 22 S.Ct. 857, 46 L.Ed. 1113 (1902) ("The framers of the Constitution ... granted plenary power to Congress over the whole subject of 'bankruptcies.' "). But the scenarios these authorities posit are sufficiently analogous in character to bankruptcy—in that they involve fundamental changes to a corporation's structure (or, in the instance of dissolution,

Accordingly, under New Jersey law and settled choice-of-law principles, the South Carolina Receiver needed to move for, and be granted, recognition in New Jersey and the appointment of an ancillary receiver to displace Whittaker's board's control over, *inter alia*, the company's privileges, franchises and assets. It did not do so, meaning Whittaker's board retained authority over those corporate decisions reserved to it by New Jersey law, including the decision whether to reorganize by filing for bankruptcy.

Appellants respond by invoking one of our Nation's oldest laws—the Full Faith and Credit statute, 28 U.S.C. § 1738. They contend that, under obligations imposed by that provision, "New Jersey would not ignore the Receivership Order, just as the Bankruptcy Court could not ignore it." Appellants' Second Supp. Br. 6–7. This argument falters on three fronts.

First, on its face, the Receivership Order does not reach as far as Appellants insist. Rather than extending to displace Whittaker's board's authority over corporate affairs, it purports only to give the South Carolina Receiver control of Whittaker's "assets" and the power and authority to "take any and all steps necessary to protect the interests of [Whittaker] whatever they may be." Appellants' Consolidated J.A. 217. Nowhere does the Order speak to Whittaker's corporate affairs, including the board's authority under New Jersey law to decide whether to

existence)—that their precepts apply to the same extent when a board seeks to enter bankruptcy.

file for bankruptcy.[7] And in the absence of anything to the contrary in it, the default rule discussed above controls—namely, Whittaker's board controls the entity's corporate affairs, subject to lawful displacement under New Jersey law. Thus, because the Receivership Order on its own terms does not dictate the result Appellants assert, affording it full faith and credit under § 1738 does not lead to a different outcome.

Second, even if we assume the Receivership Order extended to corporate affairs, Appellees still did not attempt to enforce it against Whittaker. While an order rendered by a foreign court may warrant recognition and enforcement under § 1738, "[e]nforcement measures do not travel with the sister state judgment," and full faith and credit "does not mean that States must adopt the practices of other States regarding the time, manner, and mechanisms for enforcing judgments." *Baker ex rel. Thomas v. Gen. Motors Corp.*, 522 U.S. 222, 235, 118 S.Ct. 657, 139 L.Ed.2d 580 (1998). So even spotting Appellants the enforceability of the Order, they needed to employ the

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[7] Appellants have also argued that this type of interpretation is effectively an appeal of the Receivership Order and thus barred by the *Rooker-Feldman* doctrine, which essentially prohibits federal courts, save the Supreme Court, from reviewing final state court judgments. But if an order is interlocutory, the *Rooker-Feldman* doctrine applies only to those that are "effectively final" because, among other things, the parties have abandoned further litigation. *Cf. Malhan v. Sec'y U.S. Dep't of State*, 938 F.3d 453, 459 (3d Cir. 2019). And here, state-court litigation over the Order is not abandoned—it is merely stayed. *See* 11 U.S.C. § 362(a). Indeed, Appellants expressed their intention to continue to litigate the Order if the stay were lifted.

enforcement mechanisms provided under New Jersey law outlined above, which they did not do (e.g., not securing the appointment of an ancillary receiver in New Jersey),[8] meaning their § 1738 argument fails on this basis too.

Third, and more fundamentally, were the South Carolina Court to issue an order purporting to place the control of Whittaker's corporate affairs in the hands of the South Carolina Receiver, we doubt its ability to do so. Our system of federalism embodies "the fundamental principle of equal sovereignty" among the states. *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 203, 129 S.Ct. 2504, 174 L.Ed.2d 140 (2009). Implicit in that foundational organization of co-equal sovereigns is "the usual legislative power of a State to act upon persons and property within the limits of its own territory," permitting "different communities to live with different local standards." *Nat'l Pork Producers Council v. Ross*, 598 U.S. 356, 375, 143 S.Ct. 1142, 215 L.Ed.2d 336 (2023) (cleaned up).

But states' power to exercise control over actors within their respective borders is not without limits.

[8] The Receiver contends that he should not have been required to seek appointment of an ancillary receiver in New Jersey because Whittaker "itself made [doing so] impossible" by "filing for bankruptcy before the South Carolina Court could even issue a written order memorializing its denial of [Whittaker]'s motion for reconsideration," characterizing Whittaker's position as "Kafka-esque." Appellants' Consolidated Reply Br. 21. But without an order lawfully preventing it from doing so, Whittaker's board was free to exercise its authority under New Jersey law to enter bankruptcy. The fact that the Receiver lost the race to the courthouse does not render the results invalid.

Indeed, the Constitution has a great deal to say about the relations between states, their authority to decide the rights of foreign parties, and the application of their laws in instances of conflict. For instance, the Due Process Clause of the Fourteenth Amendment is long understood to impose limitations on state courts' authority to determine non-resident parties' rights. *See, e.g., Pennoyer v. Neff*, 95 U.S. 714, 723–43, 24 L.Ed. 565 1877; *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 323–24, 66 S.Ct. 154, 90 L.Ed. 95 (1945); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980); *Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 592 U.S. 351, 358, 141 S.Ct. 1017, 209 L.Ed.2d 225 (2021). Likewise, the dormant Commerce Clause prohibits, among other things, "the enforcement of state laws 'driven by ... economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.' " *Ross*, 598 U.S. at 369, 143 S.Ct. 1142 (omission in original) (quoting *Dep't of Revenue v. Davis*, 553 U.S. 328, 337–38, 128 S.Ct. 1801, 170 L.Ed.2d 685 (2008)).

So it is no surprise that the Constitution limits the authority a state court can exercise over a corporation incorporated in a sister state. Those limitations are as intuitive as they make good sense. A corporation's state of incorporation or principal place of business determines its domicile.[9] *See Daimler AG v. Bauman*,

[9] Whittaker's principal place of business is in Connecticut. We take no position on the authority a state in which a corporation has a principal place of business may exert over that corporation when it is incorporated in a different state. Neither party has argued that Connecticut is the proper forum to enforce the Receivership Order or that its law governs. Accordingly, we

571 U.S. 117, 137, 134 S.Ct. 746, 187 L.Ed.2d 624 (2014). And domicile has long carried with it great significance for states' authority. *See id.*; *Pennoyer*, 95 U.S. at 723. Among the many powers over their domiciliaries, states may determine " 'any and all claims' brought against a [resident] defendant." *Ford Motor Co.*, 592 U.S. at 358, 141 S.Ct. 1017 (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919, 131 S.Ct. 2846, 180 L.Ed.2d 796 (2011)). But "the very nature of the federal union of states, to which are reserved some of the attributes of sovereignty, precludes resort to the full faith and credit clause as the means for compelling a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate." *Pac. Emps. Ins. Co. v. Indus. Accident Comm'n*, 306 U.S. 493, 501, 59 S.Ct. 629, 83 L.Ed. 940 (1939). Thus, when it comes to control over corporate decision-making, a state "has no interest in regulating the internal affairs of foreign corporations." *Edgar v. MITE Corp.*, 457 U.S. 624, 645–46, 102 S.Ct. 2629, 73 L.Ed.2d 269 (1982).

But as Appellants would have it, that is precisely what the South Carolina Court did in this case. They contend that the Receivership Order, properly construed, "divest[ed]" Whittaker's board of authority to conduct the internal affairs of the corporation—including the authority to file for bankruptcy.[10] Oral

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limit our discussion to New Jersey and South Carolina laws, as the parties have framed this case.

[10] Appellants seemingly take the position that the Receivership Order did far more than merely attempt to prevent Whittaker from filing for bankruptcy. At oral argument, when asked whether, in their view, the Receivership Order authorized

Arg. Tr. 15:17. As explained above, the Order, reasonably interpreted, does not extend so far. And if it did, it would be an unprecedented exertion of power over a foreign corporation whose internal affairs are governed by the laws of a sister state, and a radical intrusion into the province of a co-equal sovereign.

These constitutional infirmities provide an independent basis to reject Appellants' appeal to § 1738. Rendering full faith and credit to foreign judgments does not entail blind deference in the face of constitutional limitations. Just as "[a] State may not grant preclusive effect in its own courts to a constitutionally infirm judgment, ... other state and federal courts are not required to accord full faith and credit to such a judgment." *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 482, 102 S.Ct. 1883, 72 L.Ed.2d 262 (1982) (footnote omitted). So where, as here, the parties did not litigate the constitutionality of the state-court judgment, § 1738 does not require New Jersey to acquiesce in the enforcement of the Receivership Order without assessing its (doubtful) constitutionality.

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"Our Constitution 'was framed upon the theory that the peoples of the several states must sink or swim together.' " *Am. Trucking Ass'n, Inc. v. Mich. Pub. Serv. Comm'n*, 545 U.S. 429, 433, 125 S.Ct. 2419,

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the South Carolina Receiver "to amend the bylaws of the corporation, to enter into mergers," or to "[c]hange domicile," counsel for Appellants neither disavowed those actions nor offered a limiting principle for their interpretation of the Order. Oral Arg. Tr. 14:1–3.

162 L.Ed.2d 407 (2005) (quoting *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 523, 55 S.Ct. 497, 79 L.Ed. 1032 (1935)). But while bound together in a federal union, certain powers are reserved to states' respective provinces to the exclusion of sister states. Among others, the state of incorporation enjoys the exclusive authority to govern the internal affairs of its corporations. Thus, consistent with constitutional constraints, New Jersey law governs and sanctions the Whittaker board's authority to petition for bankruptcy. And in any event, the Receivership Order did not purport to divest that body of the authority to seek bankruptcy protection, as the Bankruptcy and District Courts correctly concluded.

C. Successor Liability Claims Are Property of the Debtors' Estates.

As Whittaker properly entered bankruptcy, we now turn to consider whether the Successor Liability Claims belong to the Debtors' estates. We conclude they do.

At the outset of a bankruptcy case, Code § 541(a)(1) establishes an estate comprised of "all legal or equitable interests of the debtor in property," including causes of action, "wherever located and by whomever held." This feature of bankruptcy law can have significant repercussions, for "once a cause of action becomes the estate's property, the Bankruptcy Code gives the trustee, and only the trustee, the statutory authority to pursue it."[11] *In re Wilton*

[11] As mentioned already, supra note 4, in Chapter 11 cases (where there is seldom a trustee) the debtor in possession enjoys

Armetale, Inc., 968 F.3d 273, 280 (3d Cir. 2020). So whether a claim is in or out of the estate determines who can pursue (and recover on) that claim—a difference, as this case demonstrates, with significant consequences.

In order for a claim putatively held by a creditor to belong to the estate, two conditions must be met: (1) it must have existed at the outset of the bankruptcy, and (2) it must be a "general" claim, meaning one "with no particularized injury arising from it." *Emoral*, 740 F.3d at 879 (quoting *Bd. of Trs. of Teamsters Loc. 863 Pension Fund v. Foodtown, Inc.*, 296 F.3d 164, 169 (3d Cir. 2002)). Whether a claim is "general" to all creditors or "personal" to a specific creditor calls for an "examin[ation of] the nature of the cause of action itself." *Id.* In doing so, "we focus not on the nature of the injury, but on the 'theory of liability.' " *Wilton Armetale*, 968 F.3d at 282 (quoting *Emoral*, 740 F.3d at 879).

"General" claims are ones "based on facts generally available to any creditor, and [for which] recovery would serve to increase the pool of assets available to all creditors." *Emoral*, 740 F.3d at 881. Contrast this with "personal" claims, which are "specific to the creditor" and in which "other creditors generally have no interest." *Id.* at 879 (quoting *Foodtown*, 296 F.3d at 170). A claim is "personal" when the creditor's injury can be "directly traced" to wrongful conduct committed by the defendant, whether that be the debtor or a third party. *Wilton Armetale*, 968 F.3d at 283 (quoting *In re Tronox Inc.*,

"all the rights ... and powers ... of a trustee," save for exceptions not relevant here. 11 U.S.C § 1107(a).

855 F.3d 84, 100 (2d Cir. 2017)). A claim is "general" if the creditor's theory of liability depends on facts concerning the relationship between the defendant and another party—that is, "facts generally available to any creditor." *Emoral*, 740 F.3d at 881.

In *Emoral*, we applied this standard to a case that shares many similarities with this one. The debtor (Emoral) manufactured diacetyl, a chemical used in the food flavoring industry that was later found to cause various lung ailments. *Id.* at 877. Through a complicated procedural history, a group of plaintiffs eventually sued Aaroma Holdings LLC—a company that bought some of Emoral's assets and assumed some of its liabilities in the bankruptcy case—for diacetyl-related injuries they suffered from Emoral's products. *Id.* The plaintiffs proceeded against Aaroma on the theory that it was the "mere continuation" of Emoral and thus liable for the plaintiffs' diacetyl-related personal injury and product liability claims as Emoral's successor. *Id.*

We held that the plaintiffs' successor liability claims against Aaroma were "general" claims and belonged to Emoral's bankruptcy estate rather than individual creditors. *Id.* at 880. Because they had not alleged "any direct injury" caused to them by Aaroma, the plaintiffs "fail[ed] to demonstrate how any of the factual allegations" were "unique to them as compared to other creditors of Emoral." *Id.* at 879–80. While the plaintiffs "focus[ed] on the individualized nature of their personal injury claims against Emoral," the same could not be said about their claims against Aaroma. *Id.* at 879. Their only theory of liability as to those claims depended on Aaroma's status as

Emoral's successor, not its relationship with or conduct toward the plaintiffs.

This case mirrors *Emoral*, and that sounds the death knell for the Committee's argument.[12] Start from the beginning: The Committee's theory of liability against Brenntag depends exclusively on the latter's relationship with the Debtors, not on any interaction with the individual claimants themselves. It attempts to hold Brenntag liable under a "product line" tort theory, which, to repeat note 2 above, "imposes strict liability for injuries caused by defects of a product line on a corporation that acquires the manufacturing assets of another corporation and undertakes essentially the same manufacturing operation and practices." Appellant Committee's Opening Br. 33. While that theory of liability is distinct from the "mere continuation" theory advanced in *Emoral*, the Committee here—just as the plaintiffs in *Emoral*—seeks to impose the Debtors' liability onto Brenntag solely due to its status as the Debtors' successor, not because of any "particularized injury that can be 'directly traced' to [its] conduct." *Wilton Armetale*, 968 F.3d at 283 (quoting *Tronox*, 855 F.3d at 100). So the Successor Liability Claims against Brenntag belong to the Debtors' estates, meaning they are for the Debtors to pursue or settle, not the Committee.

The Committee challenges this logic on two fronts. It contends that "[t]he absence of an independent

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[12] All agree the Successor Liability Claims existed as of the Debtors filing bankruptcy, so Emoral's first prong is satisfied and we focus on the second. See Appellant Committee's Opening Br. 25 (not disputing this element); Appellees' Answering Br. 20.

right under state law for the Debtors to bring on their own behalf at least a subset of the Successor Liability Claims ... demonstrates that the Debtors cannot satisfy the first part of the *Emoral* test." Appellant Committee's Opening Br. 32 (quoting *Emoral*, 740 F.3d at 879). For this assertion, the Committee calls out language from a footnote in *Foodtown* that "[a] cause of action is considered property of the estate if [1] the claim existed at the commencement of the filing and [2] the debtor could have asserted the claim on his own behalf under state law." 296 F.3d at 169 n.5 (citing *Butner v. United States*, 440 U.S. 48, 54, 99 S.Ct. 914, 59 L.Ed.2d 136 (1979)). From this statement, the Committee seeks to add a third prong to that property-of-the-estate test, namely that a debtor must have a state cause of action to assert before filing for bankruptcy in order for a claim to be property of the estate.

But this argument divines too much from too little. Elsewhere in *Foodtown* itself, we recited the now-familiar standard noted above governing when claims become property of the estate: "In order for the claim to be the 'legal or equitable interest of the debtor in property,' the claim must be a 'general one, with no particularized injury arising from it.' " *Id.* at 170 (quoting *St. Paul Fire & Marine Ins. Co. v. PepsiCo, Inc.*, 884 F.2d 688, 701 (2d Cir. 1989)). We reiterated that test in both *Emoral* and *Wilton Armetale, see* 740 F.3d at 879 & 968 F.3d at 282, and neither time did we impose an additional, freestanding condition that a debtor be able to pursue the cause of action under state law for it to become property of the estate. So while the ability to "assert[ ] the claim on his own behalf under state law" is enough to become property of the estate, it is not necessary. *Foodtown*, 296 F.3d at 169 n.5. Thus, any inability by the Debtors to assert the Successor Liability Claims against Brenntag outside of bankruptcy does not affect whether those claims are property of the estate inside bankruptcy.[13]

The Committee also argues that the Successor Liability Claims are not "general" because the theory of liability against Brenntag (the product-line theory) involves "specific claims exclusively belonging to victims injured by defective products," and "[t]hey arise from harms unique to those victims ... based on conduct of the successor entity." Appellant Committee's Opening Br. 33. Those claims do not inure to the benefit of all creditors, the Committee asserts, because they are only available to "personal-injury and environmental tort creditors; they do not include, for example, the Debtors' various commercial and contract creditors." *Id.* at 36.

While this argument may have intuitive appeal, our precedent has already rejected it. When assessing whether a claim is "general" or "personal," we "focus not on the nature of the injury, but on the 'theory of liability.' " *Wilton Armetale*, 968 F.3d at 282 (quoting *Emoral*, 740 F.3d at 879). As the Committee presses a "product line" theory, we evaluate whether the facts necessary to establish liability under *that theory* are

[13] In Emoral we expressed doubt that such an inability made a difference to whether a claim was properly characterized as "general." 740 F.3d at 881 ("As a practical matter, it is difficult to imagine a factual scenario in which a solvent Emoral, outside of the bankruptcy context, would or could bring a claim for successor liability against Aaroma.").

"generally available to any creditor." *Emoral*, 740 F.3d at 881.

The product-line theory depends entirely on the successor's relationship with the manufacturer because it is the successor's acquisition and continuation of the "same manufacturing operation and practices" as the manufacturer that seeds potential successor liability to individual claimants. Appellant Committee's Opening Br. 33 (citing *Ramirez*, 431 A.2d at 820). That sort of pass-through liability—using the manufacturer as a conduit to reach the successor—was rejected in *Emoral* because the facts on which liability depended—the successor's relationship with the manufacturer—do not implicate a claim that is "specific to the creditor." *Emoral*, 740 F.3d at 879 (quoting *Foodtown*, 296 F.3d at 170).

So too here. The talc claimants' injuries do not stem from the nucleus of facts that underlay Brenntag's status as a successor to the Debtors. They trace only to the exposure to asbestos-contaminated products manufactured by the Debtors at a time before Brenntag was even in the picture. This obviates their being "directly traced" to it. *Wilton Armetale*, 968 F.3d at 283 (quoting *Tronox*, 855 F.3d at 100). Those claims are quintessentially "general."[14]

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[14] At oral argument, the Committee gestured at the prospect of conceiving its constituents' claims as "direct" and stemming from Brenntag's own conduct, namely its status as "a successor who continues to manufacture the product." Oral Arg. Tr. 77:6–7. But this characterization merely repackages the product-line theory and runs into the same problems. True, the Committee's product-line claims depend, in some measure, on Brenntag's conduct. In order to be a successor susceptible to the

To be sure, the Committee correctly points out that its constituents have each suffered "harms unique to [them]." Appellant Committee's Opening Br. 33. Indeed, this echoes arguments raised in the *Emoral* dissent, which would have held that "[b]ecause the Diacetyl Plaintiffs' underlying allegations are clearly individualized in nature, their claims against Aaroma—which seek to hold this third party liable for their alleged injuries as the 'mere continuation' of Emoral—must also be considered as individualized claims." *Emoral*, 740 F.3d at 883 (Cowen, J., dissenting). The *Emoral* majority, however, rejected that focus on "the nature of the [underlying] injury," instead returning to consideration of "the 'theory of liability' " and the facts on which it relies. *Wilton Armetale*, 968 F.3d at 282 (quoting *Emoral*, 740 F.3d at 879). And that analysis controls even though the harm suffered by some creditors "might be worse in degree than that suffered by other[s]."[15] *Id.* at 283.

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product-line theory, Brenntag must have actually continued the product line, which it has. But that fact was equally present in Emoral, where the diacetyl plaintiffs' "mere continuation" claims depended in part of Aaroma's purchase of Emoral's assets and continuation of its business enterprise. Emoral, 740 F.3d at 880. So while successor liability claims at some level depend on actions by the successor, the injuries to the Committee's constituents cannot be "directly traced" to Brenntag's conduct because they stem from the Debtors' manufacture and sale of asbestos-contaminated products. Wilton Armetale, 968 F.3d at 283 (quoting Tronox, 855 F.3d at 100).

[15] The Bankruptcy Court held in the alternative that § 544(a)(1), coupled with § 541(a)(7), brought the Successor Liability Claims into the Debtors' estates. Section 541(a)(7) provides that "[a]ny interest in property that the estate acquires

III. CONCLUSION

Whittaker filed for bankruptcy after its board exercised its power to authorize the petition. The South Carolina Court could not divest Whittaker's board of that authority on its own, and, once appointed, the South Carolina Receiver had to move successfully a New Jersey court to displace the board. That did not occur (indeed, the attempt was not made), and Whittaker properly entered bankruptcy. Once there, Code § 541(a)(1) and *Emoral* brought the Successor Liability Claims into the Debtors' estates.[16]

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after the commencement of the case" becomes property of the estate. So because the debtor in possession enjoys the rights of a trustee under the Code—including the right to pursue estate causes of action, Wilton Armetale, 968 F.3d at 282—the Bankruptcy Court reasoned that the post-petition cause of action conferred on the trustee by § 544(a)(1) is after-acquired property of the estate under § 541(a)(7). See In re Whittaker, Clark, & Daniels, 663 B.R. at 14. Thus, because, in the Bankruptcy Court's view, the Successor Liability Claims could be asserted by a trustee under § 544(a)(1), § 541(a)(7) drew those claims into the Debtors' estates. While the parties have devoted portions of their briefs and arguments to address this alternative holding, we need not consider it because we conclude that our decision in Emoral makes the Successor Liability Claims property of the estate under § 541(a)(1).

[16] Supplementing note 5 above, we are aware that the Debtors, having prevailed in the Bankruptcy Court, have moved for approval of a settlement of the Successor Liability Claims with Brenntag, National Indemnity, and others. Naturally, our conclusion that the Successor Liability Claims are property of the estate under § 541(a)(1) puts the ball in the Debtors' court, and it is their prerogative to pursue or settle those claims. But we note that the Debtors do not enjoy unbounded discretion. As debtors-in-possession, they owe fiduciary duties to all creditors, including the Committee's constituents, to maximize the value of the estate. *In re Marvel Ent. Grp., Inc.*, 140 F.3d 463, 471 (3d Cir.

For these reasons, we affirm the judgments of the District and Bankruptcy Courts.

1998). Sometimes the most beneficial course may be to settle claims and avoid the cost and uncertainty of litigation. Other times it may not. For that reason, bankruptcy courts must scrutinize proposed settlements under Bankruptcy Rule 9019 "to determine what course of action will be in the best interest of the estate." *In re Martin*, 91 F.3d 389, 394 (3d Cir. 1996). And that scrutiny is "rigorous[ ]" when the debtor looks to settle with an insider. *In re Winstar Commc'ns, Inc.*, 554 F.3d 382, 412 (3d Cir. 2009) (quotation omitted). We have no doubt the Bankruptcy Court will evaluate the Debtors' proposed settlement with these precepts in mind.

KRAUSE, Circuit Judge, concurring.

I join the majority opinion in full. As it persuasively explains, New Jersey law governs the authority of Whittaker's board to exercise corporate authority, and the South Carolina Court did not—and likely could not—unilaterally divest the board of that authority. Once in bankruptcy, moreover, our decisions in *In re Emoral*, 740 F.3d 875 (3d Cir. 2014), and *In re Wilton Armetale, Inc.*, 968 F.3d 273 (3d Cir. 2020), straightforwardly dictate that the Successor Liability Claims are property of the estate under 11 U.S.C. § 541(a)(1). I write separately, however, to address which choice-of-law rules govern in bankruptcy—an issue that both looms in the background of this case and that has divided courts for decades.

Both parties ultimately agree that New Jersey law governs Whittaker's authority to petition for bankruptcy protection, but they also recognize that there are two distinct paths to that choice of law—the "forum state" rule of *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 61 S.Ct. 1020, 85 L.Ed. 1477 (1941), on the one hand, and a federal common law choice of law rule, incorporating the internal affairs doctrine, on the other. Here, because the forum state is New Jersey and because Whittaker is a New Jersey corporation, those paths converge. But, as highlighted in the parties' briefing and argument on this question, each rule involves a different analysis and is capable of producing a different outcome. And confusion about how to resolve this conflict-of-laws question in bankruptcy cases will persist in our Circuit absent guidance from our Court. I write here with an eye towards that eventual resolution. As it turns out, the answer lies in established doctrine. For the reasons explained more thoroughly below, the Bankruptcy Code; *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), and the Rules of Decision Act; and the grant of bankruptcy jurisdiction to federal courts all support employing the choice-of-law rules of the state in which the bankruptcy court sits.

I. THE PUZZLE: CHOICE OF LAW IN BANKRUPTCY

Federal courts are most often called on to resolve choice-of-law questions while exercising diversity jurisdiction. In those cases, non-federal law (usually state law) provides the rule of decision, *Erie*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188, and diverse parties might dispute which law governs their claims. When those candidate laws conflict, courts must decide which one controls. To answer that question, a federal court sitting in diversity uses the choice-of-law rules of the state in which it sits. *Klaxon*, 313 U.S. at 496, 61 S.Ct. 1020.

Our Court has not previously determined whether the same rule applies in bankruptcy proceedings.[1] But some of our sister circuits have entered this fray, coming to differing conclusions. The Eighth Circuit applies *Klaxon* in bankruptcy cases, directing that "bankruptcy court[s] appl[y] the choice of law rules of the state in which it sits," *In re Payless Cashways*, 203

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[1] *See In re Abeinsa Holding Inc.*, No. 20-3333, 2021 WL 3909984, at *3 (3d Cir. Sept. 1, 2021) (noting that our Court has "not yet precedentially resolved the choice-of-law rules applicable in bankruptcy proceedings").

F.3d 1081, 1084 (8th Cir. 2000), and that "when some federal interest requires a different result," the "appropriate question" is not choice-of-law but rather rule of decision, i.e., "whether the state [law] can trump the federal [law]," which it obviously cannot, *In re Schriock Constr., Inc.*, 104 F.3d 200, 201–02 (8th Cir. 1997) (quoting *Butner v. United States*, 440 U.S. 48, 54, 99 S.Ct. 914, 59 L.Ed.2d 136 (1979)).[2] The Ninth Circuit (and possibly the Fifth), on the other hand, have rejected *Klaxon* in bankruptcy cases and instead require a federal common law choice-of-law rule. *See In re Lindsay*, 59 F.3d 942, 948 (9th Cir. 1995); *Wallace Lincoln-Mercury Co. v. Gentry*, 469 F.2d 396, 400 n.1 (5th Cir. 1972). *But see Fishback Nursery, Inc. v. PNC Bank, N.A.*, 920 F.3d 932, 935 (5th Cir. 2019) (describing *Klaxon*'s application in bankruptcy as "an open question"). Finally, the Second and Fourth Circuits take a hybrid approach—applying *Klaxon* "in the absence of a compelling federal interest which dictates otherwise." *In re Merritt Dredging Co.*, 839 F.2d 203, 205–06 (4th Cir. 1988); *see also In re Gaston & Snow*, 243 F.3d 599, 607 (2d Cir. 2001) (applying *Klaxon* unless "significant federal policy, calling for the imposition of a federal conflicts rule, exists"). In other words, in contrast to the Eighth Circuit, which would accommodate any overriding federal interest by applying a federal rule of decision, these courts would reach the same result but under the auspices of a choice-of-law rule.

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[2] To be sure, the Eighth Circuit adopted *Klaxon*'s rule in bankruptcy without much reasoning. *See In re Payless Cashways*, 203 F.3d at 1084.

This tripartite circuit split has persisted for decades and created disparities in how bankruptcy courts determine which law governs parties' rights and obligations. As I explain below, however, there is no basis to depart from the established rule from *Klaxon*, and, consistent with the Eighth Circuit's approach, any conflict-of-laws issue is properly resolved as a matter of rule of decision, not choice of law.

II. THE AFFIRMATIVE CASE FOR APPLYING KLAXON IN BANKRUPTCY

The reasons for extending *Klaxon* to bankruptcy are many and exceedingly strong. All relate to the structure of the Bankruptcy Code, the purposes the Code serves, and *Erie* and the Rules of Decision Act. I consider them in turn.

First, while bankruptcy provides an "orderly and centralized" process to restructure the debts of the honest but unfortunate debtor, 1 *Collier on Bankruptcy* ¶ 1.01[1] (16th ed. 2025), it does not create substantive property rights. Instead, consistent with the Rules of Decision Act, 28 U.S.C. § 1652, it is non-bankruptcy law that defines parties' property interests,[3] *Butner*, 440 U.S. at 55, 99 S.Ct. 914; *accord In re Boy Scouts of Am.*, 137 F.4th 126, 164 (3d Cir. 2025). Accordingly, courts exercising bankruptcy jurisdiction regularly look to governing nonbankruptcy law—often "state law"—to determine

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[3] While "property" generally conjures images of real property or tangible items, in bankruptcy (and elsewhere), various intangibles, such as causes of action, similarly constitute property. *See, e.g., In re Kane*, 628 F.3d 631, 637 (3d Cir. 2010).

parties' "rights and obligations when the Code does not supply a federal rule." *In re Wright*, 492 F.3d 829, 832 (7th Cir. 2007) (Easterbrook, J.). And in doing so, those courts frequently encounter the same dilemma they do when sitting in diversity: conflicting laws that purport to govern parties' rights and interests.

As bankruptcy law takes parties' property rights as it finds them, *Butner*, 440 U.S. at 55, 99 S.Ct. 914; *Mission Prod. Holdings, Inc. v. Tempnology, LLC*, 587 U.S. 370, 381, 139 S.Ct. 1652, 203 L.Ed.2d 876 (2019), the fact that parties find themselves wound up in a bankruptcy case should not work to alter the law that would otherwise govern their rights, *cf. Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 820, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985) (rejecting notion that participation in a class action changes the substantive law governing individual plaintiffs' disputes). But adopting a choice-of-law rule unique to bankruptcy risks just that and would subject identically situated parties to different governing laws simply by virtue of one dispute occurring in bankruptcy court while the other unfolds in run-of-the-mill civil litigation.[4] Our

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[4] In addition to diversity cases, *Klaxon* governs choice-of-law questions where jurisdiction is anchored on other bases, including federal questions under 28 U.S.C. § 1331, *Shields v. Consol. Rail Corp.*, 810 F.2d 397, 399 (3d Cir. 1987) (ancillary (now supplemental) jurisdiction); *Sys. Operations, Inc. v. Sci. Games Dev. Corp.*, 555 F.2d 1131, 1136 (3d Cir. 1977) ("Although *Klaxon* was a diversity jurisdiction case, the same principle holds true with respect to pendent jurisdiction claims."); *accord Elliott v. Cartagena*, 84 F.4th 481, 496 n.14 (2d Cir. 2023); *Osborn v. Griffin*, 865 F.3d 417, 443 (6th Cir. 2017); *BancOklahoma Mortg. Corp. v. Cap. Title Co.*, 194 F.3d 1089, 1103 (10th Cir. 1999); *Ideal Elec. Sec. Co. v. Int'l Fidelity Ins. Co.*, 129 F.3d 143, 148 (D.C. Cir. 1997); *Paracor Fin., Inc. v. Gen. Elec. Cap. Corp.*, 96

bankruptcy system does not demand—and, indeed, militates against—such a disparity. *See BFP v. Resol. Tr. Corp.*, 511 U.S. 531, 544–45, 114 S.Ct. 1757, 128 L.Ed.2d 556 (1994) (absent a clear and manifest conflict, "the Bankruptcy Code will be construed to adopt, rather than to displace, pre-existing state law"). And nothing in the text of the Code or the statutes granting bankruptcy jurisdiction warrants a departure from the ordinary rule of *Klaxon*. *See* Zachary D. Clopton, *Horizontal Choice of Law in Federal Courts*, 169 U. Pa. L. Rev. 2193, 2212 (2021).

Second, influential bankruptcy scholarship buttresses this conclusion. As renowned scholars have advocated, the bankruptcy system in many ways "mirror[s] the agreement one would expect the creditors to form among themselves were they able to negotiate such an agreement from an *ex ante* position." Thomas H. Jackson, *Bankruptcy, Non-Bankruptcy Entitlements, and the Creditors' Bargain*, 91 Yale L.J. 857, 860 (1982). This view, coined the "creditors' bargain" theory, conceptualizes bankruptcy's primary role as a means to resolve the collective action problem posed by self-interested

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F.3d 1151, 1164 (9th Cir. 1996); *Sommers Drug Stores Co. Emp. Profit Sharing Tr. v. Corrigan*, 883 F.2d 345, 353 (5th Cir. 1989); *Bi-Rite Enters., Inc. v. Bruce Miner Co.*, 757 F.2d 440, 442 (1st Cir. 1985); *ITCO Corp. v. Michelin Tire Corp., Com. Div.*, 722 F.2d 42, 49 n.11 (4th Cir. 1983), and interpleader under 28 U.S.C. § 1335, *Griffin v. McCoach*, 313 U.S. 498, 503, 61 S.Ct. 1023, 85 L.Ed. 1481 (1941). Moreover, outside of federal court, state courts employ the forum's choice-of-law rules, *see* Restatement (Second) of Conflict of L. § 5 cmt. b (A.L.I. 1971) ("A court applies the law of its own state, as it understands it, including its own conception of Conflict of Laws.")—the practice that *Klaxon* aims to mirror.

creditors who, absent a centralized insolvency resolution system, would engage in individual collection actions under applicable nonbankruptcy law, inefficiently picking the debtor apart and "destroying value for the collective body of creditors." Kenneth Ayotte & David A. Skeel Jr., *Bankruptcy Law as a Liquidity Provider*, 80 U. Chi. L. Rev. 1557, 1564 (2013). Without bankruptcy's centralization, "[a]n unsecured creditor who seizes the debtor's assets early enough in time, when the debtor has enough to pay, will receive full payment," while "[l]ate-arriving creditors are left out in the cold when the assets are not sufficient to pay the firm's debts." *Id.*

Viewed through this lens, among its other features, bankruptcy facilitates the orderly resolution of competing creditor entitlements that exist under governing non-bankruptcy law. Such a system takes as a given creditors' preexisting property interests and "does not ... justify the implementation of a different set of relative entitlements, unless doing so is necessary as a part of the move from the individual remedies system" that exists outside of bankruptcy. Thomas H. Jackson, *The Logic and Limits of Bankruptcy Law* 21 (1986).

True, the Bankruptcy Code does change parties' "relative entitlements" in some circumstances in aid of debtor rehabilitation. *See, e.g.*, 11 U.S.C. §§ 364(d); 365(e), (i); 502(b); *see also* Daniel J. Bussel et al., *Bankruptcy* 33 (11th ed. 2021). But among the Code's voluminous rules, these provisions fall in the minority.[5] And as the creditors' bargain theory

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[5] To be sure, bankruptcy does not have to work this way. The Constitution reserves to Congress the authority to legislate

advances, non-bankruptcy entitlements generally should endure within bankruptcy, *see* Ayotte & Skeel, *supra*, at 1564–65 ("The second element of the Creditors' Bargain theory is the claim that resolution of common-pool problems may require altering the procedural rights of creditors, but that it typically does not require altering the substantive values of those rights as established by nonbankruptcy law."); *see also* 7 *Collier on Bankruptcy* ¶ 1100.01 (16th ed. 2025) (noting the importance of "preserv[ing] creditors' and stakeholders' existing legal rights to the greatest extent possible"), counseling in favor of adopting *Klaxon* to preserve parity with parties' pre-bankruptcy positions vis-à-vis one another.

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for "the entire 'subject of Bankruptcies,' " *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 370, 126 S.Ct. 990, 163 L.Ed.2d 945 (2006) (quoting U.S. Const. art. I, § 8, cl. 4), which encompasses "nothing less than ... the relations between ... [a] debtor, and [its] creditors," *Wright v. Union Cent. Life Ins. Co.*, 304 U.S. 502, 513–14, 58 S.Ct. 1025, 82 L.Ed. 1490 (1938) (internal quotation marks omitted). Congress could enact legislation that impairs any number of entitlements created by non-bankruptcy law. In this way, *Butner* is merely descriptive of the bankruptcy system that Congress has chosen to enact: "Congress has generally left the determination of property rights in the assets of a bankrupt's estate to state law." 440 U.S. at 54, 99 S.Ct. 914. It does not stand for the proposition that our Nation's bankruptcy laws *cannot* determine parties' relative entitlements, as scholars have pointed out. *See, e.g.*, Anthony J. Casey, *Chapter 11's Renegotiation Framework and the Purpose of Corporate Bankruptcy*, 120 Colum. L. Rev. 1709, 1751 (2020) (advancing a theory of Chapter 11 that "support[s] a soft version of *Butner*" positing that, "[i]n the absence of any evidence of hold up, nonbankruptcy provisions should remain intact ... simply because in the absence of hold up there is no role for bankruptcy law").

Third, extending *Klaxon* to the bankruptcy context is fully consistent with—and supported by—*Erie* and the Rules of Decision Act. *Klaxon* is a product of *Erie*, which announced "[t]here is no federal general common law." 304 U.S. at 78, 58 S.Ct. 817. Instead, where federal law does not govern, "[t]he laws of the several states" are "regarded as rules of decision ... in cases where they apply." 28 U.S.C. § 1652. While *Erie* itself was a diversity case, it "reflects the principle now well established that federal courts should apply state law to legal issues, unless there is some definable federal interest sufficient to justify applying corresponding and possibly inconsistent federal rules of decision." 19 Wright & Miller's Federal Practice & Procedure § 4520 (3d ed. May 2025 update). *Klaxon* reflects the same principle, for "[a] choice-of-law rule is no less a rule of state law than any other." *A.I. Trade Fin., Inc. v. Petra Int'l Banking Corp.*, 62 F.3d 1454, 1464 (D.C. Cir. 1995); *see also* Russell J. Weintraub, *The* Erie *Doctrine and State Conflict of Laws Rules*, 39 Ind. L.J. 228, 242 (1964) ("[T]he choice-of-law rules of a state are important expressions of its domestic policy."). Thus, it would seem that wherever *Erie* travels, *Klaxon* ought to follow. *See* Clopton, *supra*, at 2198 ("In short, *Klaxon* all the way down.").

In the bankruptcy arena, the Bankruptcy Code supplies the federal rules of decision that Congress has deemed necessary to effectively govern the relationship between the debtor and its creditors. Even a cursory review of the Code's "hundreds of interlocking rules," *Harrington v. Purdue Pharma L.P.*, 603 U.S. 204, 209, 144 S.Ct. 2071, 219 L.Ed.2d 721 (2024), reveals that Congress took care to include many provisions that aim "to protect [ ] national" interests, *In re Trib. Co. Fraudulent Conveyance Litig.*, 946 F.3d 66, 94 (2d Cir. 2019); *see, e.g.*, 11 U.S.C. §§ 362(a) (automatic stay of collection of prepetition debts, including state-court litigation); 365(e) (invalidating *ipso facto* clauses); 546(e) (safe harbor for certain pre-petition securities transactions); 555–56, 559–61 (protections for post-petition securities, commodities, repurchase, swap, and netting transactions); 1110 (providing preferred rights to aircraft and vessel lessors).

As these provisions illustrate, Congress identified and manifested in the Code the specific federal interests it wished to protect; it did not leave readers to divine untold rules from some brooding cloud of federal interests hanging over bankruptcy. As we invariably do when construing federal statutes, we look to its text to discern meaning, *In re Imerys Talc Am., Inc.*, 38 F.4th 361, 375 (3d Cir. 2022), and we "presume that [Congress] says in a statute what it means and means in a statute what it says," *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992). So while "the Bankruptcy Clause confers broad authority on Congress," *Siegel v. Fitzgerald*, 596 U.S. 464, 476, 142 S.Ct. 1770, 213 L.Ed.2d 39 (2022), to establish "uniform Laws on the subject of Bankruptcies," U.S. Const. art. I, § 8, cl. 4, Congress has not dictated a particular choice-of-law rule to govern in bankruptcy cases.

This is a glaring omission in a sea of provisions relating to bankruptcies and not one we should presume Congress simply overlooked. To the contrary, we must respect the presumption that state law governs "until Congress strikes a different accommodation." *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 740, 99 S.Ct. 1448, 59 L.Ed.2d 711 (1979). It is not the role of federal courts to extend federal interests beyond those Congress has prescribed. *See Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641, 101 S.Ct. 2061, 68 L.Ed.2d 500 (1981); *In re One2One Commc'ns, LLC*, 805 F.3d 428, 444 (3d Cir. 2015) (Krause, J., concurring); *cf. Cassirer v. Thyssen-Bornemisza Collection Found.*, 596 U.S. 107, 116, 142 S.Ct. 1502, 212 L.Ed.2d 451 (2022) (concluding that, when an exception to foreign sovereign immunity applies under the Foreign Sovereign Immunities Act, federal courts must apply *Klaxon* because the statute already protects the unique federal interest of foreign relations). Instead, "the issue of whether to displace state law ... is primarily a decision for Congress," *Miree v. DeKalb Cnty.*, 433 U.S. 25, 32, 97 S.Ct. 2490, 53 L.Ed.2d 557 (1977), and "[w]e should not assume that Congress intended to set the courts completely adrift from state law with regard to questions for which it has not provided a specific and definite answer in an act ... so intimately related to state law," *Richards v. United States*, 369 U.S. 1, 11, 82 S.Ct. 585, 7 L.Ed.2d 492 (1962). In these circumstances, with a "federal statutory regulation [so] comprehensive and detailed," the usual rule applies that "matters left unaddressed in such a scheme are presumably left subject to the disposition provided by state law," negating the need to "adopt a court-made rule to supplement" the Code. *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 85, 114 S.Ct. 2048, 129 L.Ed.2d 67 (1994).

Accordingly, there is no need to craft a choice-of-law rule unique to bankruptcy to preserve some "undefined federal interests" that do not appear in the Code.[6] *CoreCivic, Inc. v. Governor of N.J.*, 145 F.4th 315, 330 (3d Cir. 2025) (Ambro, J., dissenting). Rather, when a provision of the Bankruptcy Code governs, the Supremacy Clause obviates any choice-of-law analysis, for federal law always trumps conflicting state law. U.S. Const. art. VI, cl. 2; *see also infra* Section IV. And when the Code or other federal law does not supply the rule of decision, the Rules of Decision Act commands that governing non-federal law fills the gap. 28 U.S.C. § 1652. Outside of bankruptcy, that means *Klaxon* controls, and nothing about the bankruptcy context warrants departing from that rule.

Of course, *Erie*, and consequently *Klaxon*, arose in the context of diversity jurisdiction, so the extension of the policies those cases embody to other contexts is not obvious. And that uncertainty has caused some of our sister circuits to either reject *Klaxon* in bankruptcy cases or hedge on its application. *See, e.g., In re Lindsay*, 59 F.3d at 948; *In re Gaston & Snow*, 243 F.3d at 601–02; *In re Merritt Dredging*, 839 F.2d at 206. To be sure, that hesitation is not unfounded.

[6] This is not to say that the Bankruptcy Code can never embody federal rules that do not appear in its specific provisions. Indeed, the Code can, and does, provide such rules of decision, such as where "pre-Code practice" has not been expressly abrogated by statute, *In re Hertz Corp.*, 120 F.4th 1181, 1198 (3d Cir. 2024), or where a rule "has long been considered fundamental to the Bankruptcy Code's operation," *Czyzewski v. Jevic Holding Corp.*, 580 U.S. 451, 465, 137 S.Ct. 973, 197 L.Ed.2d 398 (2017).

As scholars have noted, "[p]art of the explanation for the departures from *Klaxon* can be found in Supreme Court dicta" in *Vanston Bondholders Protective Committee v. Green*, 329 U.S. 156, 67 S.Ct. 237, 91 L.Ed. 162 (1946). Clopton, *supra*, at 2204; *see also* Tobias Barrington Wolff, *Choice of Law and Jurisdictional Policy in the Federal Courts*, 165 U. Pa. L. Rev. 1847, 1875–78 (2017). There, the Supreme Court considered whether, and to what extent, an insolvent debtor must pay interest on delinquent interest payments due under a prepetition bond indenture under Chapter X of the Bankruptcy Act. *Vanston*, 329 U.S. at 159, 67 S.Ct. 237. In doing so, the Supreme Court admonished:

> [O]bligations, such as the one here for interest, often have significant contacts in many states so that the question of which particular state's law should measure the obligation seldom lends itself to simple solution. In determining which contact is the most significant in a particular transaction, courts can seldom find a complete solution in the mechanical formulae of the conflicts of law.... In determining what claims are allowable and how a debtor's assets shall be distributed, a bankruptcy court does not apply the law of the state where it sits.

Id. at 161–62, 67 S.Ct. 237. And it is this language upon which some courts have seized to conclude *Klaxon* has no application in bankruptcy cases because it is inconsistent with some amorphous federal interest. *See, e.g., In re SMEC, Inc.*, 160 B.R.

86, 91 (M.D. Tenn. 1993); *In re McCorhill Publ'g, Inc.*, 86 B.R. 783, 792 (Bankr. S.D.N.Y. 1988).

But on closer inspection, *Vanston* says nothing about what choice-of-law rule a court should employ in bankruptcy cases when non-federal law provides the rule of decision. Rather than rejecting *Klaxon*'s application in favor of fashioning a bespoke federal choice-of-law rule for bankruptcy cases, the Supreme Court concluded that the bankruptcy courts "administer and enforce the Bankruptcy Act ... in accordance with authority granted by Congress to determine how and what claims shall be allowed under equitable principles," whereas "[w]hen and under what circumstances federal courts will allow interest on claims against debtors' estates being administered by them has long been decided by *federal law*." *Vanston*, 329 U.S. at 162–63, 67 S.Ct. 237 (emphasis added). Thus, *Vanston* did not resolve the question of what choice-of-law rule courts employ when non-federal law governs a dispute in a bankruptcy case. Instead, it merely determined that when federal law provides a rule of decision that conflicts with state law, federal law controls—a proposition that flows directly from the Constitution. U.S. Const. art. VI, cl. 2; *see also In re Gaston & Snow*, 243 F.3d at 607 (interpreting *Vanston* in this way). *Vanston*, then, embodies nothing more than foundational and uncontroversial principle that federal law reigns supreme.

In sum, the structure of the Bankruptcy Code, the purposes of our bankruptcy system, and federal courts' obligation to respect the application of state law under *Erie* and the Rules of Decision Act all support *Klaxon*'s extension to bankruptcy cases.

III. NOTHING REQUIRES A FEDERAL CHOICE-OF-LAW RULE IN PLACE OF *KLAXON*

Aside from seemingly the Eighth Circuit, no other Court of Appeals has extended *Klaxon*—without reservation—to the bankruptcy context. The Ninth Circuit, as well as the Second and Fourth Circuits, have also addressed the question, taking different approaches but each evincing an unwarranted suspicion of *Klaxon*'s relevance beyond diversity cases. I address each approach in turn.

The Ninth Circuit has long eschewed *Klaxon*'s rule in favor of federal choice-of-law rules. *In re Lindsay*, 59 F.3d at 948. In doing so, it stated that "the risk of forum shopping which is avoided by applying state law has no application [in bankruptcy cases], because [they] can only be litigated in federal court," and instead "[t]he value of national uniformity of approach" on this question prevails over a patchwork of state choice-of-law regimes. *Id.* Thus, "[i]n federal question cases with exclusive jurisdiction in federal court, such as bankruptcy, the court should apply federal, not forum state, choice of law rules." *Id.*

There are two flaws in this reasoning. First, it confuses the basis for federal jurisdiction with the question of governing law. A "federal jurisdictional grant ... is not in itself a mandate for applying federal law in all circumstances." *United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 591, 93 S.Ct. 2389, 37 L.Ed.2d 187 (1973). Instead, as is by now clear, "it is the source of the right sued upon, and not the ground on which federal jurisdiction over the case is founded, which determines the governing law." *Maternally Yours v. Your Maternity Shop*, 234 F.2d 538, 540 n.1 (2d Cir. 1956).[7] In other words, the observation that federal courts possess exclusive jurisdiction over bankruptcy cases is correct as far as it goes, but it merely identifies a potential choice-of-law question—it does nothing to resolve it. Instead, the existence of federal jurisdiction begets the downstream question of which law governs the dispute and how to decide that question in instances of conflict. That is a question of parties' *rights*, not federal courts' *jurisdiction*. *See Shutts*, 472 U.S. at 818, 105 S.Ct. 2965. But by reflexively employing a federal common law choice-of-law rule, the Ninth Circuit's approach risks altering parties' rights by selecting different law than would govern outside of bankruptcy.

That points up the second problem with the Ninth Circuit's approach. The *Lindsay* court touts a federal choice-of-law rule as carrying a great deal of "value" without greater explanation, seemingly elevating "national uniformity" for uniformity's sake. 59 F.3d at 948. But uniformity at what cost? Even accepting the

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[7] *See also DelCostello v. Int'l Bhd. of Teamsters*, 462 U.S. 151, 159 n.13, 103 S.Ct. 2281, 76 L.Ed.2d 476 (1983) ("[W]here Congress directly or impliedly directs the courts to look to state law to fill in details of federal law, *Erie* will ordinarily provide the framework for doing so."); 19 Wright & Miller's Federal Practice & Procedure § 4520 (3d ed. May 2025 update) ("[T]he law to be applied is not selected by reference to the basis of the court's subject matter jurisdiction .... In other words, the choice of applicable law turns upon the source or genesis of the right or issue being adjudicated.")

premise that national uniformity has inherent value,[8] the value in uniformity does not outweigh the significant incongruities a bespoke bankruptcy choice-of-law rule portends. A federal choice-of-law rule in bankruptcy cases risks altering parties' substantive rights. State law governs many issues in bankruptcy cases, but none arises more frequently than property interests. *See, e.g., Butner*, 440 U.S. at 55, 99 S.Ct. 914. And the fact that a dispute turns up "in the context of a federal bankruptcy" proceeding "doesn't change much." *Rodriguez v. FDIC*, 589 U.S. 132, 137, 140 S.Ct. 713, 206 L.Ed.2d 62 (2020). So "[s]ince state, rather than federal, substantive law is at issue there is no need for a uniform federal rule." *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 508, 121 S.Ct. 1021, 149 L.Ed.2d 32 (2001). Indeed, as the Fourth

[8] In *Gaston & Snow*, the Second Circuit gestured at the notion that "an interest in uniformity can justify the creation of federal common law," 243 F.3d at 606, and cited the Supreme Court's decision in *Kimbell Foods* for that proposition. But *Kimbell Foods* does not speak to whether a federal choice-of-law rule should govern in bankruptcy. There, the Supreme Court determined that "the priority of liens stemming from federal lending programs must be determined with reference to federal law," *Kimbell Foods*, 440 U.S. at 726, 99 S.Ct. 1448, which obviates the need of a choice-of-law inquiry because the Supremacy Clause requires application of federal rules of decision. Having concluded that federal law, rather than state law, provides the governing rule, the Court went on to define the content of that federal common law rule. And at that second step, the Court noted that "[c]ontroversies directly affecting the operations of federal programs, although governed by federal law, do not inevitably require resort to uniform federal rules" before "reject[ing] generalized pleas for uniformity" in favor of a federal common law rule that "adopt[s] the readymade body of state law as the federal rule of decision." *Id.* at 727–28, 730, 740, 99 S.Ct. 1448.

Circuit rightly noted, "[i]t would be anomalous to have the same property interest governed by the laws of one state in federal diversity proceedings and by the laws of another state where a federal court is sitting in bankruptcy." *In re Merritt Dredging*, 839 F.2d at 206. But that disparity is exactly what the Ninth Circuit's approach invites, and it does so with no basis in the Code or the statutes granting federal courts jurisdiction over bankruptcy cases. Parties' property rights do not depend on the basis for a court's jurisdiction.

The approaches of the Second and Fourth Circuits are flawed as a doctrinal matter, though difficult to distinguish from the Eighth Circuit's in practice. Those courts have rightly observed that, in the ordinary course, the fact that a choice-of-law question arises in bankruptcy does not provide sufficient reason to depart from *Klaxon* because state law generally provides the substantive law governing a dispute, so *Erie* and the Rules of Decision Act control. *See In re Gaston & Snow*, 243 F.3d at 607; *In re Merritt Dredging*, 839 F.2d at 206.

They also theorize, however, that there may be exceptional cases when a "compelling federal interest," *In re Merritt Dredging*, 839 F.2d at 206, would require the application of a federal common law choice-of-law rule. Thus, they purport to adopt a safety valve by applying *Klaxon* only "in the absence of a compelling federal interest which dictates otherwise." *Id.*; *see also In re Gaston & Snow*, 243 F.3d at 607 ("We necessarily limit our holding to cases where no significant federal policy, calling for the imposition of a federal conflicts rule, exists."). In positing that carveout, these courts hypothesize a scenario where some federal interest compels abandonment of *Klaxon*. Though this rule may appear on its face to conflict with the rule from *Klaxon*, in practice, it does not. Tellingly, neither court has actually identified—much less confronted—such a situation. And the prospect of them ever doing so seems fanciful because their hypothesis runs headlong into the presumption against, and stringent criteria for, the making of federal common law.

At the outset, it is not clear whether the federal interest the Fourth and Second Circuits hypothesize would need to conflict with a state's choice-of-law rule or the substantive law that choice-of-law rule selects. If the former, it is particularly difficult to imagine what federal interest would conflict with the use of a specific choice-of-law rule given the absence of a federal choice-of-law rule provision in the Bankruptcy Code and the Code's indifference to the law that determines parties' rights and interests. *See infra* pp. 461-63. If it is the latter, then the real problem is not the use of a state's choice-of-law rule at all. Rather, as the Eighth Circuit has properly characterized it, the problem is the incompatibility between the non-bankruptcy law chosen to govern a dispute and the federal interest, because permitting a state law to "trump" the federal interest expressed in the Bankruptcy Code "would effectively convert the [ ] choice of law [question] to an 'anti-preemption' [question]." *In re Schriock Constr.*, 104 F.3d at 202. In short, the resolution to that conflict is application of a federal rule of decision and its priority over state law pursuant to the Supremacy Clause, not abandonment of *Klaxon*.

Even moving past this ambiguity, embracing the alternative to *Klaxon*—a federal choice-of-law rule—must "begin[ ] with the recognition that federal choice of law rules are a species of federal common law." *In re Gaston & Snow*, 243 F.3d at 605. But "those cases in which judicial creation of a special federal rule would be justified ... [are] 'few and restricted.' " *O'Melveny*, 512 U.S. at 87, 114 S.Ct. 2048 (quoting *Wheeldin v. Wheeler*, 373 U.S. 647, 651, 83 S.Ct. 1441, 10 L.Ed.2d 605 (1963)). Crucially, the creation of federal common law is appropriate only in "situations where there is a 'significant conflict between some federal policy or interest and the use of state law.' " *Id.* (quoting *Wallis v. Pan Am. Petroleum Corp.*, 384 U.S. 63, 68, 86 S.Ct. 1301, 16 L.Ed.2d 369 (1966)). Indeed, "such a conflict [is] a precondition for" federal common law-making. *Id.* But where none exists, federal law "supplies no rule of decision," leaving non-bankruptcy law to govern the controversy. *Rodriguez*, 589 U.S. at 138, 140 S.Ct. 713.

In order to justify the Second and Fourth Circuits' approach that departs from *Klaxon*, yet requires a choice-of-law analysis—i.e., employing a federal common law choice-of-law rule—two conditions must be true: (1) there must be a sufficiently weighty federal interest in conflict with otherwise governing non-federal law to warrant fashioning a federal rule of decision to resolve conflicts among non-bankruptcy law, but (2) that interest must not be sufficiently weighty to justify fashioning a federal common law rule of decision. The former must be true to justify the "[j]udicial lawmaking" involved in crafting federal common law rules—lawmaking that "plays a necessarily modest role under a Constitution that vests the federal government's 'legislative Powers' in Congress." *Id.* at 136, 140 S.Ct. 713 (quoting U.S. Const. art. I, § 1). The latter must be true in order to preserve any choice-of-law question at all, for if the federal interest is sufficiently important to justify creation of a federal rule of decision, then there is no "choice" among laws because the Constitution invariably resolves such conflicts in favor of federal law. U.S. Const. art. VI, cl. 2. In other words, for the Second and Fourth Circuits' approach to be correct—as opposed to the Eighth Circuit's, which accounts for an overriding federal interest as a matter of rule of decision, *see In re Schriock Constr.*, 104 F.3d at 202—a federal interest has to fall into the goldilocks zone: not too strong, yet not too weak.

Yet a review of the Bankruptcy Code and its policies establishes neither condition. The Code is agnostic about which body of non-bankruptcy law governs parties' rights—it simply "takes the [interest] as it finds it." *Bartenwerfer v. Buckley*, 598 U.S. 69, 82, 143 S.Ct. 665, 214 L.Ed.2d 434 (2023). That is to say, the Bankruptcy Code embodies no federal interest that favors the application of any particular non-bankruptcy law over another. And this makes good sense. It is "the basic federal rule" that "entitlements in bankruptcy arise in the first instance from the underlying substantive law creating the ... obligation." *Raleigh v. Ill. Dep't of Revenue*, 530 U.S. 15, 20, 120 S.Ct. 1951, 147 L.Ed.2d 13 (2000). Sometimes, federal non-bankruptcy law will control that issue. *See, e.g., Bd. of Trs. of Teamsters Loc. 863 Pension Fund v. Foodtown, Inc.*, 296 F.3d 164, 168 (3d Cir. 2002). Other times, it may be state or foreign law that does. Either way, the Bankruptcy Code directs courts to consider parties' interest under whichever law governs outside of bankruptcy, and it then establishes a collection of rules to deal with those interests.

The Supreme Court's decision in *Butner* is not to the contrary. There, the Court famously held that "[p]roperty interests are created and defined by state law. Unless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding." 440 U.S. at 55, 99 S.Ct. 914. At first glance, this passage might seem to support the Second and Fourth Circuits' approach—after all, the Supreme Court included the proviso "[u]nless some federal interest requires a different result." *Id.* But on closer inspection, this line from *Butner* cannot be read as suggesting the possibility of a different choice-of-law rule to apply in bankruptcy.

Butner addressed whether "the right to the rents collected during the period between [a] mortgagor's bankruptcy and the foreclosure sale of the mortgaged property ... is determined by a federal rule of equity or by the law of the State where the property is located." *Id.* at 49, 99 S.Ct. 914. In other words, the Supreme Court considered which body of law—state or federal—supplies the rule of decision for allocation of rents. It concluded, as a general matter, "[p]roperty interests are created and defined by state law." *Id.* at 55, 99 S.Ct. 914. But it also recognized that, while uncommon, federal law can sometimes define parties' property interests, especially where the United States is a party.[9] *See, e.g., Clearfield Tr. Co. v. United States*, 318 U.S. 363, 366, 63 S.Ct. 573, 87 L.Ed. 838 (1943). For this reason, the Court acknowledged that where federal law does govern property rights, that law controls. But *Butner* cannot reasonably be read to suggest that federal law provides the choice-of-law rule to decide among conflicting non-federal laws when it is those laws that provide the rule of decision. That is because *Butner* posits a scenario in which state property law is displaced due to "some federal interest [that] requires a different result," 440 U.S. at 55, 99 S.Ct. 914, not that this federal interest favors one state law over others. *See Travelers Cas. & Sur. Co. of Am. v. Pac. Gas & Elec. Co.*, 549 U.S. 443, 451, 127 S.Ct. 1199, 167 L.Ed.2d 178 (2007) (juxtaposing *Butner* and *Vanston* to illustrate this point). Put another way, reading *Butner* to license creation of a federal common law choice-of-law rule renders the proviso meaningless because, read in such a way, state law still governs the substantive property interest while federal law simply chooses among conflicting state laws. That plainly is not the dichotomy *Butner* envisioned. Instead, *Butner* stands for the far more straightforward proposition that state law generally governs parties' property interests except in the unusual case where federal law provides the rule of decision. It offers no insight, however, into

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[9] The scenario is far from hypothetical, as the federal government is "one of the Nation's largest lenders," *Dep't of Agric. Rural Dev. Rural Housing Serv. v. Kirtz*, 601 U.S. 42, 45, 144 S.Ct. 457, 217 L.Ed.2d 361 (2024), and is a frequent creditor in bankruptcies.

how to choose among conflicting laws when non-federal law governs.[10]

This result does not derogate those federal interests that do exist. To be sure, there are many areas of law in which Congress has legislated extensively. *See, e.g.*, Sherman Antitrust Act, 15 U.S.C. §§ 1–7; Securities Act of 1933, 15 U.S.C. § 77a *et seq.*; Securities Exchange Act of 1934, 15 U.S.C. § 78a *et seq.*; Investment Company Act of 1940, 15 U.S.C. §§ 80a-1 to 80a-64; Lanham Act, 15 U.S.C. § 1051 *et seq.*; Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9601 *et seq.* Perhaps none is a greater expression of a federal interest than those statutory provisions that completely preempt state law, i.e., those where a federal interest "is so powerful," *Franchise Tax Bd. v. Constr. Laborers Vacation Tr. for S. Cal.*, 463 U.S. 1, 23, 103 S.Ct. 2841, 77 L.Ed.2d 420 (1983), that "federal law does not merely preempt a state law to some degree" but instead "substitutes a

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[10] My concurring colleague disagrees, asserting that "[f]ederal courts can and do develop federal choice-of-law rules that select state substantive law." Concurring Op. 476. But the cited cases do not support that proposition; they merely recognize that courts can create federal common law rules of decision—not choice-of-law rules—that incorporate the contents of state law. *See Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 107–09, 111 S.Ct. 1711, 114 L.Ed.2d 152 (1991) (creating a rule of decision for derivative actions that incorporates the contents of state law rather than "displac[ing] state law in this area"); *Semtek*, 531 U.S. at 508–09, 121 S.Ct. 1021 (describing the issue as "a classic case for adopting, as the federally prescribed *rule of decision*, the law that would be applied by state courts," rather than creating "a contrary federal rule" (emphasis added)); *see also infra* note 13.

federal cause of action for the state cause of action," 14C Wright & Miller's Federal Practice & Procedure § 3722.2 (Rev. 4th ed. May 2025 update). Those instances are few, but important. *See Avco Corp. v. Aero Lodge No. 735, Int'l Ass'n of Machinists & Aerospace Workers*, 390 U.S. 557, 560, 88 S.Ct. 1235, 20 L.Ed.2d 126 (1968) (Section 301 of the Labor Management Relations Act); *Metro. Life. Ins. Co. v. Taylor*, 481 U.S. 58, 66, 107 S.Ct. 1542, 95 L.Ed.2d 55 (1987) (Section 502(a) of the Employee Retirement Income Security Act); *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 11, 123 S.Ct. 2058, 156 L.Ed.2d 1 (2003) (Sections 85 and 86 of the National Bank Act).

But again, in these instances—and all others where federal law supplies the rule of decision—there is no choice-of-law question, making *Klaxon* inapplicable. That is because the Constitution resolves vertical choice-of-law questions in absolute terms: "[I]f a state measure conflicts with a federal requirement, the state provision must give way." *Swift & Co. v. Wickham*, 382 U.S. 111, 120, 86 S.Ct. 258, 15 L.Ed.2d 194 (1965). In all other cases, non-federal law enjoys the usual presumption against "displacement." *Boyle v. United Techs. Corp.*, 487 U.S. 500, 507, 108 S.Ct. 2510, 101 L.Ed.2d 442 (1988). So it is only in the absence of a federal rule of decision—that is, in the absence of a federal interest warranting displacement of non-federal law—that a choice-of-law question arises. And at that juncture, the Bankruptcy Code is agnostic about which law governs, leaving "no reason [for] such interests [to] be analyzed differently" than if they had arisen outside of bankruptcy. *Butner*, 440 U.S. at 55, 99 S.Ct. 914.

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The daylight between these positions—especially between those of the Eighth Circuit and the Second and Fourth Circuits—can be elusive, and the debate can easily be labeled esoteric. Relative to the number of questions governed by state law that arise in bankruptcies across the country, those that present genuine choice-of-law questions are admittedly few. And those whose outcome would change depending on the application of *Klaxon* versus a federal choice-of-law rule are likely fewer still. But apart from doctrinal clarity, which carries its own virtue, resolution of this question in the manner I have proposed serves two important purposes.

First, federal courts exercise limited powers. Perhaps nowhere is that power more at its nadir than in the area of fashioning federal common law. As the Supreme Court has admonished since *Erie*, those contexts that necessitate a federal common law rule are fleeting, and the criteria for recognizing such a rule are exacting. It is incumbent on us to candidly recognize the limits of our authority as a function of the Constitution's separation of powers. After all, "[t]he Framers 'built into the tripartite Federal Government ... a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other.' " *Clinton v. Jones*, 520 U.S. 681, 699, 117 S.Ct. 1636, 137 L.Ed.2d 945 (1997) (omission in original) (quoting *Buckley v. Valeo*, 424 U.S. 1, 122, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976) (per curiam)). Acknowledging that the federal courts' role in crafting common law is necessarily "modest," *Rodriguez*, 589 U.S. at 136, 140 S.Ct. 713, does much to guard against encroachment upon Congress's authority to legislate on the subject of bankruptcies.

Second, with doctrinal clarity and the acknowledgment of federal courts' limited authority comes clearer notice to litigants as to what rule they can expect to govern their rights. As discussed, the Ninth Circuit's departure from *Klaxon* is misguided. As for the Second, Fourth, and Eighth Circuits, their approaches in practice always have, and always will, lead to the same result—*Klaxon* applies in bankruptcy, but federal law necessarily provides the rule of decision "when some federal interest requires a different result." *In re Schriock Constr.*, 104 F.3d at 202. But by framing the question as choice-of-law instead of rule-of-decision and leaving the door open for a different choice-of-law rule in theory, the Second and Fourth Circuits invite needless litigation over *Klaxon*'s applicability and leave lingering uncertainty about which law will govern parties' disputes. They hypothesize a category of cases that, in reality, is a null set. No federal interest exists that will displace a state's choice-of-law rule without simultaneously requiring displacement of state substantive law in favor of a federal rule of decision. Instead of perpetuating the uncertainty surrounding the choice-of-law rule that governs in bankruptcy, we should recognize what practice teaches and give courts and litigants alike notice of the governing framework: The rule from *Klaxon* extends to bankruptcy cases.[11]

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[11] My concurring colleague agrees that "state choice-of-law rules will almost always apply" in bankruptcy but insists that "[r]are is not never." Concurring Op. at 474-75———. It is telling, however, that the concurrence does not identify a single

IV. IDIOSYNCRATIC STATE CHOICE-OF-LAW RULES DO NOT LICENSE ABANDONING *KLAXON*

For their part, among the options in this three-way circuit split, the parties urge us to adopt the Second and Fourth Circuits' hybrid approach to *Klaxon*, cautioning that we "should not adopt a rule that would require bankruptcy courts to follow idiosyncratic state choice-of-law rules even when doing so would create conflicts, encourage forum-shopping, or undermine significant federal interests." Appellees' Second Supp. Br. 11; *see also* Appellants' Second Supp. Br. 4. And to illustrate their point, Appellees pose the example of "a hypothetical forum state ... reject[ing] the internal-affairs doctrine [to] allow its own idiosyncratic rules to dictate who speaks for a foreign corporation." Appellees' Second Supp. Br. 10. They insist that in such a scenario, "the federal interest in preserving the internal-affairs doctrine and orderly bankruptcy filings would warrant a federal choice-of-law rule vindicating the internal affairs doctrine."[12] *Id.* at 11.

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instance—even a hypothetical one—that would require the application of a federal common-law choice of law rule, but would not result, in any event, in the application of federal law as the rule of decision.

[12] Apart from the reasons I describe below, I agree with the majority that such a scenario is fanciful because it would violate the Constitution. Maj. Op. 447 ("[W]hen it comes to control over corporate decision-making, a state 'has no interest in regulating the internal affairs of foreign corporations.' " (quoting *Edgar v. MITE Corp.*, 457 U.S. 624, 645–46, 102 S.Ct. 2629, 73 L.Ed.2d 269 (1982))).

But choice of law is not a panacea, nor need we make it one. Instead, among other constraints, the Constitution places limits on the extent to which states may exert regulatory authority over parties' disputes and that resolve many of the concerns the parties raise here. Four constitutional provisions in particular—the Supremacy Clause, the Full Faith and Credit Clause, the Privileges and Immunities Clause, and the Due Process Clause of the Fourteenth Amendment, each of which is discussed below—provide a federal backstop to permissible state choice-of-law regimes.

First, and most intuitively for choice-of-law purposes, is the Supremacy Clause. U.S. Const. art. VI, cl. 2. In "split[ting] the atom of sovereignty" for our federal union, *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838, 115 S.Ct. 1842, 131 L.Ed.2d 881 (1995) (Kennedy, J., concurring), the Framers "provide[d] 'a rule of decision' for determining whether federal or state law applies in a particular situation," *Kansas v. Garcia*, 589 U.S. 191, 202, 140 S.Ct. 791, 206 L.Ed.2d 146 (2020) (quoting *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 324, 135 S.Ct. 1378, 191 L.Ed.2d 471 (2015)). The Supremacy Clause supplies a bright-line rule to resolve "vertical" choice-of-law questions, i.e., those that implicate a conflict between federal and state law. *Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677, 691, 126 S.Ct. 2121, 165 L.Ed.2d 131 (2006). When federal and state law are "in conflict or at cross-purposes," the Supremacy Clause embodies the "clear rule" that federal law prevails. *Arizona v. United States*, 567 U.S. 387, 399, 132 S.Ct. 2492, 183 L.Ed.2d 351 (2012).

Thus, when state courts consider which law governs a dispute, the existence of a controlling federal rule resolves any choice-of-law question, "[f]or the policy of the federal [law] is the prevailing policy in every state." *Testa v. Katt*, 330 U.S. 386, 393, 67 S.Ct. 810, 91 L.Ed. 967 (1947). In this way, the Supremacy Clause protects the federal authority to enact federal rules of decision to control in circumstances "necessary to protect uniquely federal interests." *Rodriguez*, 589 U.S. at 136, 140 S.Ct. 713 (quoting *Radcliff Materials*, 451 U.S. at 640, 101 S.Ct. 2061).

Often, those federal interests will be embodied in a federal statute. But in few, yet important, contexts, federal courts have recognized the need to fashion "federal common law—substantive rules of decision not expressly authorized by either the Constitution or any Act of Congress—that supplant state law," 19 Wright & Miller's Federal Practice & Procedure § 4514 (3d ed. May 2025 update), often when the controversy's subject matter closely relates to the federal government or falls within an area of exclusive federal competence, *see, e.g., Norfolk S. Ry. Co. v. Kirby*, 543 U.S. 14, 23, 125 S.Ct. 385, 160 L.Ed.2d 283 (2004) (admiralty); *Boyle*, 487 U.S. at 505–06, 108 S.Ct. 2510 (civil liabilities of contractors under federal procurement contracts); *Clearfield Tr.*, 318 U.S. at 366, 318 U.S. at 366, 63 S.Ct. 573 (rights and duties of the United States under federally issued commercial paper); *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110, 58 S.Ct. 803, 82 L.Ed. 1202 (1938) (apportionment of water rights between states).

To be sure, federal courts' common law-making authority "plays a necessarily modest role," and the Supreme Court has "underscore[d] the care federal courts should exercise before taking up an invitation to try their hand at common lawmaking." *Rodriguez*, 589 U.S. at 136, 138, 140 S.Ct. 713. But in the narrow circumstances that command a federal rule of decision absent constitutional or statutory authority, the Supremacy Clause ensures that federal courts may still fashion such a rule and that contrary state law will yield.[13] *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427, 84 S.Ct. 923, 11 L.Ed.2d 804 (1964) (recognizing the preemptive force of federal common law), *superseded on other grounds by statute*, Pub. L. 88-633, 78 Stat. 1013, *as recognized in, Fed. Republic of Ger. v. Philipp*, 592 U.S. 169, 179, 141 S.Ct. 703, --- L.Ed.2d —— (2021). After all, "exclusive state power takes up only where federal power leaves off." John Hart Ely, *The Irrepressible Myth of* Erie, 87 Harv. L. Rev. 693, 705 (1974). So that vertical choice-of-law rule, enshrined in our Constitution, does much to ensure that state choice-of-law rules do not unduly "undermine significant federal interests." Appellees' Second Supp. Br. 11.

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[13] When adopting a federal common law rule, federal courts must assess both "(1) the competence of federal courts to formulate a federal rule of decision, and (2) the appropriateness of declaring a federal rule rather than borrowing, incorporating, or adopting state law in point." *McVeigh*, 547 U.S. at 692, 126 S.Ct. 2121. So in some circumstances, federal courts may "adopt the readymade body of state law as the federal rule of decision until Congress strikes a different accommodation," and state law yields only in the sense that it is supplanted by an identical federal rule. *Kimbell Foods*, 440 U.S. at 740, 99 S.Ct. 1448.

Second, the Full Faith and Credit Clause occupies a modest, but important, position among the constitutional provisions bearing on choice of law. In relevant part, it provides that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." U.S. Const. art. IV, § 1, cl. 1. As the Supreme Court has recognized, the Clause's purpose "was to alter the status of the several states as independent foreign sovereignties ... and to make them integral parts of a single nation throughout which a remedy upon a just obligation might be demanded as of right, irrespective of the state of its origin." *Milwaukee Cnty. v. M.E. White Co.*, 296 U.S. 268, 277, 56 S.Ct. 229, 80 L.Ed. 220 (1935); *see also Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430, 439, 64 S.Ct. 208, 88 L.Ed. 149 (1943).

In modern jurisprudence, much of the Full Faith and Credit Clause's function—and that of the statute with which it shares a name, 28 U.S.C. § 1738—occurs in the recognition of judgments rendered by foreign states. *See, e.g., Baker v. Gen. Motors Corp.*, 522 U.S. 222, 233, 118 S.Ct. 657, 139 L.Ed.2d 580 (1998). But as the Supreme Court has recognized, the Full Faith and Credit Clause continues to have an enduring role in the regulation of "credit owed to [foreign] laws." *Id.* at 232, 118 S.Ct. 657. Indeed, "where the policy of one state statute comes into conflict with that of another, the necessity of some accommodation of the conflicting interests of the two states is ... apparent." *Alaska Packers Ass'n v. Indus. Accident Comm'n of Cal.*, 294 U.S. 532, 547, 55 S.Ct. 518, 79 L.Ed. 1044 (1935).

Apart from its other commands, the Full Faith and Credit Clause, at a minimum, requires that a forum state confronting a horizontal choice-of-law question have "some rational basis" for applying its law over that of a sister state. *Id.* at 547–48, 55 S.Ct. 518. That basis must be above and beyond mere favoritism toward forum law, for a state does not have a legitimate interest in discriminating against another state's law simply by virtue of its foreign origin. *See First Nat'l Bank of Chi. v. United Air Lines*, 342 U.S. 396, 398, 72 S.Ct. 421, 96 L.Ed. 441 (1952); *Hughes v. Fetter*, 341 U.S. 609, 613, 71 S.Ct. 980, 95 L.Ed. 1212 (1951); *cf. Metro. Life Ins. Co. v. Ward*, 470 U.S. 869, 878, 105 S.Ct. 1676, 84 L.Ed.2d 751 (1985) (holding that a state does not have a legitimate interest purely in favoring domestic economic interests over foreign ones).

Of course, the Full Faith and Credit Clause "does not require one state to substitute for its own statute, applicable to persons and events within it, the conflicting statute of another state, even though that statute is of controlling force in the courts of the state of its enactment with respect to the same persons and events." *Pac. Emps. Ins. Co. v. Indus. Accident Comm'n of Cal.*, 306 U.S. 493, 502, 59 S.Ct. 629, 83 L.Ed. 940 (1939). And no doubt, in many cases, forum states will have rational, nondiscriminatory reasons for applying their law over that of others. *See, e.g., Cardillo v. Liberty Mut. Ins. Co.*, 330 U.S. 469, 476, 67 S.Ct. 801, 91 L.Ed. 1028 (1947). But the Full Faith and Credit Clause does "set[ ] certain minimum requirements which each state must observe when asked to apply the law of a sister state," *Wells v. Simonds Abrasive Co.*, 345 U.S. 514, 516, 73 S.Ct. 856, 97 L.Ed. 1211 (1953), and it "requires that a state base its assertion of legislative jurisdiction on a claim that its interests are superior," not simply that conflicting law is foreign, Kermit Roosevelt III, *The Myth of Choice of Law: Rethinking Conflicts*, 97 Mich. L. Rev. 2448, 2505 n.240 (1999). This constitutional floor provides yet another constraint on state choice-of-law regimes.

Third, the Privileges and Immunities Clause protects out-of-staters from discrimination on the basis of their foreign citizenship.[14] *See Supreme Ct. of N.H. v. Piper*, 470 U.S. 274, 285, 105 S.Ct. 1272, 84 L.Ed.2d 205 (1985); *see also Tyler Pipe Indus., Inc. v. Wash. State Dep't of Revenue*, 483 U.S. 232, 265, 107 S.Ct. 2810, 97 L.Ed.2d 199 (1987) (Scalia, J., concurring in part and dissenting in part) (grounding the protection "against rank discrimination against citizens of other States" in the Privileges and Immunities Clause). In full, it provides that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. Const. art. IV, § 2, cl. 1. Much like the Full Faith and Credit Clause, the Privileges and Immunities

[14] This rule may sound identical to the constraint provided by the Full Faith and Credit Clause discussed above. But the two clauses play distinct roles. The Full Faith and Credit Clause concerns the respect owed by one state to the laws and judgments of another, while the Privileges and Immunities Clause concerns states' treatment of citizens of foreign states. *Compare* U.S. Const. art. IV, § 1, cl. 1 ("Full Faith and Credit shall be given in *each State* to the public Acts, Records, and judicial Proceedings of *every other State*." (emphasis added)), *with* U.S. Const. art. IV, § 2, cl. 1 ("The *Citizens* of each State shall be entitled to all Privileges and Immunities of Citizens in *the several States*." (emphasis added)).

Clause was intended "to help fuse into one Nation a collection of independent, sovereign States." *Toomer v. Witsell*, 334 U.S. 385, 395, 68 S.Ct. 1156, 92 L.Ed. 1460 (1948).

The Clause does not guarantee that citizens of each state are entitled to all of the same rights and benefits of citizens in other states, *see Piper*, 470 U.S. at 284, 105 S.Ct. 1272, but only those that are "fundamental" to "the vitality of the Nation as a single entity," *Baldwin v. Fish & Game Comm'n of Mont.*, 436 U.S. 371, 382–83, 98 S.Ct. 1852, 56 L.Ed.2d 354 (1978) (quotation omitted). It does, however, "bar discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States." *Toomer*, 334 U.S. at 396, 68 S.Ct. 1156.

The Supreme Court has recognized that access to a state's courts is among the privileges and immunities protected by the Constitution. *McKnett v. St. Louis & S.F. Ry. Co.*, 292 U.S. 230, 233, 54 S.Ct. 690, 78 L.Ed. 1227 (1934); *Canadian N. Ry. Co. v. Eggen*, 252 U.S. 553, 562, 40 S.Ct. 402, 64 L.Ed. 713 (1920). And implicit in that guarantee is the constituent promise that a state may not withhold the application of its law to a citizen of another state in a situation in which it would extend that law to one of its own citizens solely by virtue of the out-of-stater's foreign citizenship. *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 180, 19 L.Ed. 357 (1868) (the Privileges and Immunities Clause "secures to [citizens of a foreign state] in other States the equal protection of their laws"); *see also* Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional*

Foundations of Choice of Law, 92 Colum. L. Rev. 249, 265–66 (1992). Thus, the Privileges and Immunities Clause "place[s] the citizens of each State upon the same footing with citizens of other States," thereby demanding citizens of foreign states derive the same benefit from a state's law that it would extend to its own citizens and prohibiting discrimination against out-of-staters because of their foreign citizenship. *Paul*, 75 U.S. at 180.

Fourth, and finally, the Due Process Clause of the Fourteenth Amendment substantively limits to which disputes states may extend their law.[15] In providing that "[n]o State shall ... deprive any person of life, liberty, or property, without due process of law," U.S. Const. amend. XIV, § 1, the Clause requires "that for a State's substantive law to be selected in a constitutionally permissible manner, that State must

[15] The Supreme Court's articulation of the Fourteenth Amendment Due Process Clause's limitations on state choice-of-law rules has been subject to nearly universal criticism. *See, e.g.*, Roosevelt, *supra*, at 2506–07; Louise Weinberg, *Choice of Law and Minimal Scrutiny*, 49 U. Chi. L. Rev. 440, 460–63 (1982). In comparing choice of law with the Court's personal jurisdiction jurisprudence, Professor Linda Silberman famously quipped, "[t]o believe that a defendant's contacts with the forum state should be stronger under the due process clause for jurisdictional purposes than for choice of law is to believe that an accused is more concerned with where he will be hanged than whether." Linda J. Silberman, Shaffer v. Heitner, *The End of an Era*, 53 N.Y.U. L. Rev. 32, 88 (1978). I do not take a side in this debate here. My point, rather, is that wherever the constitutional boundaries lie, so long a states' choice-of-law regimes fall within them, federal courts have no authority under the Bankruptcy Code, Rules of Decision Act, or statutes granting bankruptcy jurisdiction to supplant state choice-of-law rules in favor of federal ones.

have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair," *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312–13, 101 S.Ct. 633, 66 L.Ed.2d 521 (1981) (plurality). Thus, where a state does not have sufficient contacts with a dispute, it lacks legitimate interests warranting extension of its law to the dispute, rendering application of its law "sufficiently arbitrary and unfair as to exceed constitutional limits." *Shutts*, 472 U.S. at 822, 105 S.Ct. 2965; *accord John Hancock Mut. Life Ins. Co. v. Yates*, 299 U.S. 178, 182, 57 S.Ct. 129, 81 L.Ed. 106 (1936); *Home Ins. Co. v. Dick*, 281 U.S. 397, 407–08, 50 S.Ct. 338, 74 L.Ed. 926 (1930). And in doing so, the Due Process Clause protects litigants against "unfair surprise or frustration of legitimate expectations" of the law governing their dealings.[16] *Allstate*, 449 U.S. at 318 n.24, 101 S.Ct. 633.

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[16] The Supreme Court has somewhat collapsed the inquiries under the Full Faith and Credit Clause and the Due Process Clause for choice-of-law purposes. *See, e.g., Sun Oil Co. v. Wortman*, 486 U.S. 717, 729 n.3, 108 S.Ct. 2117, 100 L.Ed.2d 743 (1988); *see also* Herma Hill Kay et al., *Conflict of Laws* 381 (10th ed. 2018) (noting the convergence in the two analyses). Yet each imposes a different command: As explained above, the Full Faith and Credit Clause governs the respect owed to laws among states, while the Due Process Clause confers an individual right to be free from application of a state's law when that state has no meaningful connection to the dispute. *Compare* U.S. Const. art. IV, § 1, cl. 1 ("Full Faith and Credit shall be given in *each State* to the public Acts, Records, and judicial Proceedings of *every other State*." (emphasis added)), *with* U.S. Const. amend. XIV, § 1 ("No *State* shall ... deprive any *person* of life, liberty, or property, without due process of law." (emphasis added)).

By recounting these well-trodden constitutional constraints, I do not seek to "embark upon the enterprise of constitutionalizing choice-of-law rules." *Sun Oil*, 486 U.S. at 727–28, 108 S.Ct. 2117. Rather, these constitutional safeguards demonstrate that by extending the rule of *Klaxon* to bankruptcy cases, federal courts are not bound to reflexively apply impermissibly parochial state choice-of-law rules as Appellees warn. *See* Appellees' Second Supp. Br. 9–11. But absent running afoul of the limitations imposed by the Constitution, I find no basis (or authority) in federal bankruptcy law to constrain a state's authority to prescribe the choice-of-law rules that shall govern in its courts. Indeed, it is a feature of our federal system that it "leaves to a state, within the limits permitted by the Constitution, the right to pursue local policies diverging from those of its neighbors," and "it is not for the federal courts to thwart such local policies by enforcing an independent 'general law' of conflict of laws." *Klaxon*, 313 U.S. at 496, 61 S.Ct. 1020.

Where states do not transcend constitutional barriers, *Klaxon*'s rule best serves the purposes of the Bankruptcy Code consistent with *Erie*, the Rules of Decision Act, and the presumption against federal common law-making. So just as *Klaxon* and *Erie* aim to preserve the substantive law governing a dispute notwithstanding the "accident of diversity,"[17] *Klaxon*,

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[17] Of course, *Klaxon*'s interest in diminishing forum-shopping incentives between state and federal courts, *see* 313 U.S. at 496, 61 S.Ct. 1020, does not neatly map onto bankruptcy, as federal courts possess original and exclusive jurisdiction over bankruptcy cases, 28 U.S.C. § 1334(a). But just as plaintiffs may choose their favored forum in non-bankruptcy cases, consistent

313 U.S. at 496, 61 S.Ct. 1020 (citing *Erie*, 304 U.S. at 74–77, 58 S.Ct. 817), extending *Klaxon* in this manner avoids altering the substantive law governing a dispute simply because of the "happenstance of bankruptcy," *Lewis v. Mfrs. Nat'l Bank of Detroit*, 364 U.S. 603, 609, 81 S.Ct. 347, 5 L.Ed.2d 323 (1961).

* * *

The question of *Klaxon*'s applicability to bankruptcy has persisted for nearly 80 years. This case, just as with others our Court has encountered, permits us to elide the question of which choice-of-law methodology to employ. But we have the responsibility not to perpetuate this uncertainty. I hope that, in the appropriate case, we will resolve this question and give guidance to bankruptcy and district courts in our Circuit in a way that is consistent with the Bankruptcy Code, *Erie* and the Rules of Decision Act, and the policies underlying the grant of bankruptcy jurisdiction to federal courts.

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with proper venue, to gain a favorable choice-of-law rule, *see Ferens v. John Deere Co.*, 494 U.S. 516, 523, 110 S.Ct. 1274, 108 L.Ed.2d 443 (1990); *Van Dusen v. Barrack*, 376 U.S. 612, 639, 84 S.Ct. 805, 11 L.Ed.2d 945 (1964), debtors too may choose a forum for purposes of a specific choice-of-law regime in bankruptcy cases where venue properly lies. And that sort of horizontal forum shopping incentive is "attributable to," and an irreducible component of, "our federal system." *Klaxon*, 313 U.S. at 496, 61 S.Ct. 1020.

AMBRO, Circuit Judge, concurring

The *Erie* doctrine—taken from *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), and its progeny—is the North Star for determining whether federal or state law should apply in federal court. The answer is state law unless the matter is governed by superseding federal law, such as the Constitution, a congressional enactment, or federal common law. *See* Charles A. Wright, Arthur R. Miller, & Edward H. Cooper, 19 *Federal Practice and Procedure* § 4501 (3d ed. 2025). *Erie* questions occur most often when federal courts sit in diversity-of-citizenship jurisdiction because those disputes usually involve only state substantive law. State law, however, includes more than just the underlying substantive law. The Supreme Court told us in *Klaxon v. Stentor Electric Manufacturing Co.*, 313 U.S. 487, 61 S.Ct. 1020, 85 L.Ed. 1477 (1941), that it includes choice-of-law rules as well.

What force, if any, does *Klaxon* have in bankruptcy, where the parties' primary rights and interests are often governed by state law? We need not answer that question in a holding, as the parties agree on the law that governs: New Jersey's. *See* Wright, Miller & Cooper § 4506 (collecting cases for the proposition that courts need not determine which state's choice-of-law regime applies when the parties do not dispute that question).

Though "a pretty good reason for having 'skimmed over the conflicts problem as if none existed' was that none did exist," Henry Friendly, *In Praise of Erie – And the New Federal Common Law*, 39 N.Y.U. L. Rev. 383, 401 (1964) (citation omitted), the question whether *Klaxon* applies in bankruptcy has spawned interesting academic debate. Answers span the spectrum. *Compare, e.g.*, Zachary D. Clopton, *Horizontal Choice of Law in Federal Court*, 169 Pa. L. Rev. 2193, 2203–06 (2021) (*Klaxon* applies without exception), *with* Tobias Barrington Wolff, *Choice of Law and Jurisdictional Policy in the Federal Courts*, 165 Pa. L. Rev. 1847 (2017) (*Klaxon* applies only in diversity actions). Our concurring colleague has staked out her position that *Klaxon* always applies in bankruptcy, no exceptions. Because I am uncomfortable with that view, I instead take the opportunity to make some nonbinding observations about *Erie* and choice of law.

I. ERIE AND KLAXON

A brief refresher on the *Erie* doctrine. Despite the almost mystical fascination that has long surrounded *Erie*, it stands for three basic propositions.

First, "[t]here is no federal *general* common law." *Erie*, 304 U.S. at 78, 58 S.Ct. 817 (emphasis added). "[N]either Congress nor the federal courts can, under the guise of formulating rules of decision for federal courts, fashion rules which are not supported by a grant of federal authority contained in Article I or some other section of the Constitution." *Hanna v. Plumer*, 380 U.S. 460, 471, 85 S.Ct. 1136, 14 L.Ed.2d 8 (1965). When the Constitution *does* authorize Congress or courts to do so, however, *Erie* has no application, and federal law displaces contrary state law through the Supremacy Clause.

Second, without a federal statute or constitutionally authorized federal common-law rule, the Rules of Decision Act, 28 U.S.C. § 1652, commands federal courts to apply the rules of decision of their forum states "in cases where they apply." The Supreme Court has developed a framework for determining when a state law falls within the scope of the Rules of Decision Act. *See Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 427–28, 116 S.Ct. 2211, 135 L.Ed.2d 659 (1996); *Hanna*, 380 U.S. at 468, 85 S.Ct. 1136. The specifics of that framework are irrelevant for our purposes.

Third, when a Federal Rule (*e.g.*, the Federal Rules of Civil Procedure) conflicts with state law, then the Rules Enabling Act, 28 U.S.C. § 2072, not the Rules of Decision Act as construed by *Erie* and other cases, determines which law applies. *See Hanna*, 380 U.S. at 463–64, 85 S.Ct. 1136; *Burlington N. R.R. Co. v. Woods*, 480 U.S. 1, 4–5, 107 S.Ct. 967, 94 L.Ed.2d 1 (1987). The Rules Enabling Act is also irrelevant for our purposes.

Klaxon followed *Erie* and held that a federal court sitting in general diversity-of-citizenship jurisdiction is required to use the choice-of-law rules of its forum state. *Klaxon*, 313 U.S. at 496–97, 61 S.Ct. 1020. The Court's reasoning was sparse, but its decision is best understood as falling into the *Erie* doctrine's second bucket—absent some constitutionally authorized federal law, the Rules of Decision Act kicks in. State choice-of-law rules are state rules of decision under that statute. *See A.I. Trade Fin., Inc. v. Petra Int'l Banking Corp.*, 62 F.3d 1454, 1464 (D.C. Cir. 1995) ("A choice-of-law rule is no less a rule of state law than any other ...."). But if Congress or federal courts invoke some source of constitutional authority to promulgate federal choice-of-law rules, then federal courts would instead find themselves in the first bucket. The Rules of Decision Act, and thus *Klaxon*, would no longer apply.

II. FEDERAL COMMON LAW AFTER *ERIE*

Although *Erie* ended the *general* federal common law, the Supreme Court has been unequivocal in recognizing that the *Erie* doctrine does not entirely displace federal common law. As Justice Brandeis acknowledged in a decision released on the same day as *Erie*, federal courts may still formulate special federal common law on issues of uniquely federal interest. *See Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110, 58 S.Ct. 803, 82 L.Ed. 1202 (1938) (concluding that interstate water apportionment "is a question of 'federal common law' upon which neither the statutes nor the decisions of either State can be conclusive"); *see also Boyle v. United Techs. Corp.*, 487 U.S. 500, 504, 108 S.Ct. 2510, 101 L.Ed.2d 442 (1988) (noting that federal courts may still formulate federal common law in certain areas implicating "uniquely federal interests").

For example, federal courts may still generate common-law rules when "the policy of the law is so dominated by the sweep of federal statutes and doctrines developed under them that the legal relations they affect must be deemed governed by federal law." Wright, Miller, & Cooper § 4514. Likewise, it can sometimes "be inferred from congressional or constitutional intent that the federal courts should supply the necessary rule of decision by pronouncing common law to fill the interstices of a pervasively federal substantive framework." *Id.*

To be sure, the "cases in which judicial creation of a special federal rule would be justified ... are ... 'few and restricted.' " *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 87, 114 S.Ct. 2048, 129 L.Ed.2d 67 (1994) (quoting *Wheeldin v. Wheeler*, 373 U.S. 647, 651, 83 S.Ct. 1441, 10 L.Ed.2d 605 (1963)). Before federal courts develop common-law rules, "a significant conflict between some federal policy or interest and the use of state law must first be specifically shown." *Atherton v. FDIC*, 519 U.S. 213, 218, 117 S.Ct. 666, 136 L.Ed.2d 656 (1997) (quoting *Wallis v. Pan Am. Petrol.*, 384 U.S. 63, 68, 86 S.Ct. 1301, 16 L.Ed.2d 369 (1966)). But when that happens, federal courts no doubt have the power to create special federal common law, including choice-of-law rules.

To recap: When Congress or federal courts validly promulgate some federal rule of decision under a source of constitutional authority, then federal law displaces contrary state law. Absent that kind of federal law, then the Rules of Decision Act applies, which commands federal courts to apply state rules of decision. Even after *Erie*, federal courts retain the power to promulgate special federal common-law rules when a strong federal interest requires such rules. Those cases, however, are rare.

III. WHAT CHOICE-OF-LAW RULES GOVERN WHEN FEDERAL COURTS SIT IN BANKRUPTCY?

This leaves our main questions: (1) Does *Klaxon* apply in federal bankruptcy litigation, and if so, (2) may federal courts ever use special federal common-law choice-of-law rules instead?

The circuits are split. The Ninth Circuit limits *Klaxon* to diversity cases, and thus federal courts must apply federal choice-of-law principles in bankruptcy cases. *In re Lindsay*, 59 F.3d 942, 948 (9th Cir. 1995).[1] The Eighth Circuit has arguably held that *Klaxon* applies categorically in federal bankruptcy cases without exception. *In re Payless Cashways*, 203 F.3d 1081, 1084 (8th Cir. 2000). I say "arguably" because that decision passes on the issue in a single conclusory sentence with no further analysis. It is thus hard to conclude that the Eighth Circuit contemplated and rejected the possibility of exceptions. Finally, the Second and Fourth Circuits have held that *Klaxon* applies in federal bankruptcy proceedings unless a strong federal interest justifies creating federal choice-of-law rules as a matter of federal common law. *In re Merritt Dredging Co.*, 839 F.2d 203, 206 (4th Cir. 1988); *In re Gaston & Snow*, 243 F.3d 599, 605–06 (2d Cir. 2001).

I believe that the Second and Fourth Circuits have it right. The Ninth Circuit is wrong because *Erie*, and thus *Klaxon*, is not limited to federal diversity jurisdiction. Whenever federal courts encounter an issue whose resolution is not a matter of federal law,

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[1] The Fifth Circuit at one time took a similar view but seems more recently to have second-guessed whether it conclusively settled the question. *Compare Wallace Lincoln-Mercury Co. v. Gentry*, 469 F.2d 396, 400 n.1 (5th Cir. 1972) ("In this federal bankruptcy case the District Court is not obliged to use the choice-of-law methodology of the forum state, Louisiana."), *with Fishback Nursery, Inc. v. PNC Bank, N.A.*, 920 F.3d 932, 935 (5th Cir. 2019) ("[I]t is an open question in this circuit as to whether courts exercising bankruptcy jurisdiction should apply forum or federal choice-of-law rules.").

the Rules of Decision Act compels them to use state substantive law, which includes choice-of-law rules. If the Eighth Circuit held that *Klaxon* applies without exception in federal bankruptcy cases, it is wrong as well. Federal courts after *Erie* retain constitutional power to promulgate special federal common-law rules, including choice-of-law rules, when strong federal interests justify doing so. "*Erie* did not fence off a 'local law field' constitutionally immune to federal influence; it was quite clear that exclusive state power takes up only where federal power leaves off." John Hart Ely, *The Irrepressible Myth of Erie*, 87 Harvard L. Rev. 693, 705 (1974).

A. *Erie* and *Klaxon* Apply Outside General Diversity Jurisdiction.

I believe it is wrong to conclude that *Erie* applies only in federal diversity cases. It applies to any "questions which arise in federal court but whose determination is not a matter of federal law." *Merritt Dredging*, 839 F.2d at 206; *see also Fagin v. Gilmartin*, 432 F.3d 276, 285 n.2 (3d Cir. 2005) (Ambro, J.) (invoking *Erie* to apply New Jersey law in a federal securities-law case brought under federal-question jurisdiction). Given the three-bucket framework I described above, this makes sense. Without on-point federal law, the Rules of Decision Act governs. And that statute does not turn on the basis of federal jurisdiction. *Erie* applies just as much when a court is sitting in its federal-question or bankruptcy jurisdiction as it does in general diversity. *See, e.g., United Mine Workers v. Gibbs*, 383 U.S. 715, 726, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966) (applying *Erie* in pendent jurisdiction cases); *Griffin v. McCoach*, 313

U.S. 498, 503, 61 S.Ct. 1023, 85 L.Ed. 1481 (1941) (applying *Erie* in interpleader cases).[2]

If we accept that *Erie* applies whatever the basis of federal jurisdiction, then it does not take much more analysis to conclude that the same is true for *Klaxon*. Both *Erie* and *Klaxon* "make clear that federal law may not be applied to questions which arise in federal court but whose determination is not a matter of federal law." *Merritt Dredging*, 839 F.2d at 206. That includes in bankruptcy. As the Fourth Circuit explained, "[i]t would be anomalous to have the same property interest governed by the laws of one state in federal diversity proceedings and by the laws of another state where a federal court is sitting in bankruptcy." *Id.*

B. Federal Courts May Still Apply Federal Common-Law Choice-of-Law Rules in

[2] *Vanston Bondholders Protective Comm. v. Green* suggests that federal courts have wide latitude to devise common-law choice-of-law rules in bankruptcy. 329 U.S. 156, 161–62, 67 S.Ct. 237, 91 L.Ed. 162 (1946). When the Court decided that case, however, the Rules of Decision Act covered only common-law claims, and so it would not have applied to claims created by federal bankruptcy law. Clopton, *supra*, at 2205 n.76 ("For those who believe that the Rules of Decision Act plays an important role in *Erie* cases, that statute exclusively referred to common[-]law claims until two years after *Vanston* ...."). The Court's mature *Erie* cases came only later. *See, e.g., Day & Zimmermann, Inc. v. Challoner*, 423 U.S. 3, 96 S.Ct. 167, 46 L.Ed.2d 3 (1975); *Hanna*, 380 U.S. 460, 85 S.Ct. 1136, 14 L.Ed.2d 8; *Byrd v. Blue Ridge Rural Elec., Inc.*, 356 U.S. 525, 537, 78 S.Ct. 893, 2 L.Ed.2d 953 (1958).

Bankruptcy Cases When Strong Federal Interests Warrant Doing So.

Klaxon applies in bankruptcy proceedings when addressing state-law questions; that much we agree on. The sole remaining wrinkle is whether federal courts sitting in bankruptcy must *always* apply the forum state's choice-of-law rules when the underlying issue is governed by state law. That is where I part with our concurring colleague. In Judge Krause's view, federal courts sitting in bankruptcy jurisdiction can *never* create federal common-law choice-of-law rules for some combination of five reasons.[3]

First, the Bankruptcy Code generally absorbs state laws to define the parties' property interests, and so it follows that state choice-of-law rules must also apply. Conc. Op. 453-55. *Second*, the Bankruptcy Code is intended to facilitate the orderly resolution of competing creditors' claims without significantly affecting their underlying entitlements, and federal choice-of-law rules, if allowed, could change the outcome. *Id.* at –454-56. *Third*, federal courts have limited power to make federal common law. *Id.* at 460-61. *Fourth*, if there were some reason to create a federal rule of decision in bankruptcy, federal courts would be better off creating a rule of decision rather than a choice-of-law rule. *Id.* at 460-62. And *fifth*, any federal interest strong enough to generate a federal

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[3] To avoid confusion on what follows, Judge Krause in part offers numbered reasons to extend *Klaxon* to the bankruptcy context. Those numbered reasons do not correspond to the numbered reasons I note below for why she believes federal courts in bankruptcy can never create special federal choice-of-law rules.

choice-of-law rule would be explicit in the Bankruptcy Code itself; the absence of choice-of-law rules in the Code means there is never any such interest. *E.g. id.* at 461-62.

None of the first four arguments supports the claim that federal courts can never create choice-of-law rules in bankruptcy—they support only the lesser claim that state choice-of-law rules will almost always apply. As noted, I agree with that conclusion. My colleague's fifth argument, however, is where we part, as the Supreme Court has recognized that even when bankruptcy otherwise looks to state law, sufficiently strong federal interests may warrant creating special federal common law.

1. Bankruptcy typically absorbs state law.

Our concurring colleagues observes, rightly, that federal courts sitting in bankruptcy "regularly look to governing non-bankruptcy law—often 'state law'—to determine parties' 'rights and obligations when the Code does not supply a federal rule.' " Conc. Op. 454 (citation omitted). If federal courts in bankruptcy used special federal choice-of-law rules that differed from those of the forum state, then the parties' choice of forum (or even the basis of federal jurisdiction) could change their primary rights.

This is true, but it does not establish more than we already know—*Klaxon* should ordinarily apply in bankruptcy. That federal courts confronted with state-law questions should use state choice-of-law rules to avoid jurisdiction-shopping is not an interest unique to bankruptcy. Yet even federal courts sitting in diversity jurisdiction may theoretically formulate special federal common law to protect important federal interests. *See, e.g., Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 84 S.Ct. 923, 11 L.Ed.2d 804 (1964) (applying act-of-state doctrine in diversity case). And when courts do so, neither *Erie* nor *Klaxon* prevents them from using those rules instead of state law.

At most, that bankruptcy ordinarily absorbs state substantive law supports a background presumption that federal courts in bankruptcy will rarely have a good reason to create federal choice-of-law rules. It does not support the broader argument that federal courts can never create special choice-of-law rules in bankruptcy.

2. Bankruptcy should rarely alter the parties' underlying entitlements.

Our concurring colleague next cites "renowned scholars" endorsing the " 'creditors'[-]bargain' theory," which "conceptualizes bankruptcy's primary role as a means to resolve the collective action problem posed by self-interested creditors who, absent a centralized insolvency resolution system, would engage in individual collection actions under applicable non-bankruptcy law." Conc. Op. 455. On this view, bankruptcy ordinarily should not alter the parties' underlying entitlements.

I take no position on whether the creditors'-bargain theory is the best interpretation of the Bankruptcy Code as a whole. But even if it were, it would not provide an argument in support of the claim that federal courts sitting in bankruptcy lack the power to create federal choice-of-law rules. As above, this argument at most suggests that the circumstances are rare under which federal courts could justifiably create federal common law that affects the parties' underlying rights and entitlements. Rare is not never. There may be times when the purpose of the Bankruptcy Code may be best served by special federal choice-of-law rules. It may be unlikely that such a circumstance would arise, but it strikes me as overconfident and unnecessary to disclaim the possibility once and for all.

3. Federal common law is rare.

Judge Krause next observes, again correctly, that "the creation of federal common law is appropriate only in 'situations where there is a significant conflict between some federal policy or interest and the use of state law.' " Conc. Op. 461 (quoting *O'Melveny*, 512 U.S. at 87, 114 S.Ct. 2048). " '[S]uch a conflict [is] a precondition for' federal common law-making." *Id.*

Once again, the premise is true, but it does not support the conclusion. If anything, Judge Krause acknowledges that federal courts *can* create federal common-law rules when there is a sufficiently strong federal interest threatened by state law. As with her argument that bankruptcy should rarely change the parties' underlying rights and interests, this argument mistakes rareness for impossibility. For common lawmaking to be rare, rather than impossible, courts must be able to do it in at least some cases.

Judge Krause also appeals at times to separation-of-powers principles and cautions against leaving courts "to divine untold rules from some brooding cloud of federal interests." Conc. Op. 456. But this misses the point. No one has suggested that federal courts can or should exercise freewheeling lawmaking power or identify federal interests without congressional guidance. *See generally CoreCivic, Inc. v. Governor of N.J.*, 145 F.4th 315 (3d Cir. 2025) (Ambro, J., dissenting) (rejecting that view). But *Congress* may express federal interests through statute—for example, the Bankruptcy Code—and *courts* may, in rare circumstances, create federal common law to give effect to those congressionally endorsed interests, particularly when applying state law would undermine Congress's objectives.

4. Federal courts should create substantive rules of decision instead of choice-of-law rules.

Next, Judge Krause claims that it is hard to imagine a case involving a federal interest strong enough to justify federal common law, but not strong enough to justify a substantive rule of decision rather than a choice-of-law rule. In her view, "for the Second and Fourth Circuits' approach to be correct, ... a federal interest has to fall into the goldilocks zone." Conc. Op. 461. Maybe so, but it will not surprise the reader to hear that this also is not an argument against the power of federal courts to create federal choice-of-law rules in bankruptcy. It is an argument for the claim that the circumstances when courts would need to do so are "few and restricted." *O'Melveny*, 512 U.S. at 87, 114 S.Ct. 2048 (quoting *Wheeldin*, 373 U.S. at 651, 83 S.Ct. 1441). Judicial humility cautions against making the sweeping claim, in the absence of a case or controversy before us, that no such interest can exist just because one has not presented itself.

5. The Bankruptcy Code contains all relevant federal interests, and a choice-of-law rule is not among them.

The only argument my colleague makes that theoretically supports her claim that federal courts can never develop choice-of-law rules in bankruptcy is that the Bankruptcy Code is a comprehensive and reticulated statutory regime whose text exhausts all potential federal interests that could justify federal common-law rules. The lack of special choice-of-law rules in the Code means, in her view, that there is no such interest.

That premise is faulty because it would apply with equal strength to the power of federal courts to create substantive common-law rules in bankruptcy. Yet the Supreme Court has rejected that argument: "Property interests are created and defined by state law ... [*u*]*nless some federal interest requires a different result*." *Butner v. United States*, 440 U.S. 48, 55, 99 S.Ct. 914, 59 L.Ed.2d 136 (1979) (emphasis added). If the Supreme Court has recognized that strong federal interests can sometimes allow federal courts to devise special rules of decision governing the parties' underlying property interests, I do not know why those interests could not also justify special choice-of-law rules.

Judge Krause claims that *Butner* stands only for the limited proposition that a strong federal interest can justify a federal substantive rule, "not that this federal interest [could] favor[ ] one state law over others." Conc. Op. 462. But *Butner* does not turn on the difference between substantive law and choice-of-law rules. It supports the broader principle that the selection of state rules of decision in bankruptcy must yield to overriding federal interests. On Judge Krause's view, a sufficiently strong federal interest could warrant a federal substantive rule, but never a choice-of-law rule. The unstated assumption seems to be that there could not be a strong federal interest that would justify a federal choice-of-law rule that ultimately selects state substantive law instead of a federal substantive rule. But that assumption is also faulty. Federal courts can and do develop federal rules that select state substantive law. *See, e.g., Kamen v. Kemper Fin. Servs.*, 500 U.S. 90, 111 S.Ct. 1711, 114 L.Ed.2d 152 (1991) (formulating federal common-law rule for demand futility in federal derivative actions that incorporates the corporate law of the state of incorporation); *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 508, 121 S.Ct. 1021, 149 L.Ed.2d 32 (2001) (formulating federal common-law rule for preclusion in general diversity actions and "adopting, as the federally prescribed rule of decision, the law that would be applied by state courts in the State in which the federal diversity court sits").

Judge Krause insists that cases like *Kamen* and *Semtek* are distinguishable because they involved "federal common law rules of decision—not choice-of-law rules—that incorporate the contents of state law." Conc. Op. 462 n.10. But it is unclear how that distinction defends her central claim, which I understood to be that any federal interest strong enough to authorize federal common law can justify nothing less than a uniform substantive rule. If federal courts can sometimes formulate a rule of decision whose content absorbs the law of the defendant's state of incorporation, then I do not understand why, at least in theory, they could not also formulate a choice-of-law rule that selects the law of the defendant's state of incorporation.

* * *

It is worth stepping back to get a clear view of my concurring colleague's argument. As I understand her, she does not believe *Erie*'s constitutional rule prohibits federal courts from developing special federal common law when the Constitution or federal statute authorizes them to do so. Nor does she believe that federal courts properly exercising their limited common-lawmaking authority lack the power to create a rule of decision that always incorporates the contents of state substantive law. At its core, her argument is merely that she cannot imagine a case in which a federal court would need to create a federal choice-of-law rule in bankruptcy. As she rightly notes, I cannot think of such a case either. Conc. Op. —— n.11. But this is not an argument that federal courts lack the authority to make choice-of-law rules in bankruptcy.

IV. CONCLUSION

We should not succumb to the "beguiling tendency" to make "[c]onflict-of-law problems ... more complicated than they are." *Vanston*, 329 U.S. at 169, 67 S.Ct. 237 (Frankfurter, J., concurring). If *Klaxon*'s application in bankruptcy becomes an issue, then I would endorse the sensible, never-say-never approach of the Second and Fourth Circuits: Absent an "overwhelming federal policy [that] requires us to formulate a choice of law rule as a matter of independent federal judgment, we adopt the choice of law rule of the forum state." *Merritt Dredging*, 839 F.2d at 206; *see also Gaston*, 243 F.3d at 607 ("We necessarily limit our holding to cases where no significant federal policy, calling for the imposition of a federal conflicts rule, exists.").

APPENDIX C

United States District Court,
D. New Jersey.

Peter Protopapas in his capacity as Court-Appointed Receiver and the Official Committee of Talc Claimants, Appellants,

v.

Whittaker, Clark & Daniels, Inc., Appellee.

Civil Action No. 23-4151 (ZNQ)
Signed May 31, 2024

OPINION

QURAISHI, *District Judge*

THIS MATTER comes before the Court upon Peter Protopapas', in his capacity as a Court Appointed Receiver ("Receiver"), and the Official Committee of Talc Claimants' ("Talc Claimants," together "Appellants") joint filing of an appeal of the District of New Jersey Bankruptcy Court's ("Bankruptcy Court") decision to deny a motion to dismiss a Chapter 11 bankruptcy filed by Whittaker, Clark & Daniels ("WCD" or "Appellee"). (ECF No. 1.)[1] The Court has carefully considered the parties' submissions and decides the Motion without oral argument pursuant to Federal Rule of Civil Procedure 78 and Local Civil Rule 78.1. For the reasons set forth below, the Court **DISMISSES** Appellants' appeal.

I. BACKGROUND AND PROCEDURAL HISTORY

A. BACKGROUND ON WCD

WCD was a New York corporation that from 1918 through 2004 supplied "minerals and pigments" to industrial customers. (WCD Brief ("WCD Br."), ECF No 22 at 15.)[2] WCD reincorporated in New Jersey in

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[1] This case was consolidated with Docket Number 23-4156 following a joint motion by the parties in this case. (ECF No. 6.)

[2] Throughout this opinion, references to documents from the various bankruptcy court dockets will be cited as: [Applicable District] Bk. Dkt. [No.]. References to the South Carolina action *Sarah J. Plant and Parker Plant v. Avon Products, Inc., et al.*, C/A No. 2022-CP-40-1265 (S.C. C.P.) will be cited, as appropriate, from documents filed either with this Court or with the District of New Jersey Bankruptcy Court. All references to documents filed with the district court's docket in this case will cite to the document's ECF No. as filed with the district court.

1972. (*Id.*) At its peak, WCD was "one of the largest talc and industrial compound supply and distribution businesses in the United States." (ECF No. 18-1 at 851; *see also* WCD Br. at 15.) Brilliant National Services ("Brilliant") purchased WCD's stock in 1988. (Appellants' Brief ("App. Br."), ECF No. 18 at 18.) WCD, Brilliant, and affiliate entities L.A. Terminals, Inc. ("LAT") and Soco West, Inc. ("Soco", collectively, "Debtors"), are all owned by Berkshire Hathaway. (App. Br. at 18.) WCD, LAT, and Soco are direct or indirect subsidiaries of Brilliant. (*Id.*)

In 2004 the operating assets and intellectual property of WCD and the affiliate entities were sold to Bain Capital under the umbrella of Benntag N.A., at which time WCD "kept tort liabilities involving asbestos and talc."[3] (WCD Br. at 15; App. Br. at 19.) WCD, Soco, and Brilliant also retained liability for environmental remediation costs and obligations relating to their, and their predecessors in interest, "production or handling of hazardous materials which contaminated certain properties" as well as specific assets including "asbestos- and environmental-related insurance receivables and certain real estate." (App. Br. at 19-20.) In 2004 WCD stopped operating

For consistency across the many filings in this case, all page numbers across filing systems will refer to those stamped by the relevant court's e-filing system and not to the internal pagination of the parties, and internal citations will be converted accordingly.

[3] Specifically, WCD, Soco, and Brilliant "retained [ ] all liability for [ ] tort claims resulting from exposure to products containing talc, asbestos, or chemical compounds that they (or their predecessors in interest) processed or distributed." (App. Brief at 19.)

commercially, and became what Appellants in this case characterize as "a nonoperating shell entity whose corporate existence has been maintained for the sole purpose of managing legacy asbestos- and talc-related liabilities." (*Id.* at 20.)

In 2007 the Debtors were purchased by National Indemnity Company, an affiliate of Berkshire Hathaway. (*Id.*) Since the purchase, the Debtors have paid out $300 million related to asbestos and environmental claims. (*Id.*) As of Appellants' Petition Date, there were approximately 1,012 asbestos- and talc-related litigation claims pending against WCD, and one environmental-related claim. (*Id.*)

B. THE SOUTH CAROLINA ACTION

On March 3, 2023 a jury rendered a verdict of over $29 million against WCD in the South Carolina Court of Common Pleas ("South Carolina court") case *Sarah J. Plant and Parker Plant v. Avon Products, Inc., et al.*, C/A No. 2022-CP-40-1265 (S.C. C.P.) related to asbestos exposure in cosmetics leading to mesothelioma. (*Id.*) Following the verdict, plaintiffs in the South Carolina action Sarah J. Plant and Parker Plant (together, "Plant") filed a motion asking the South Carolina court to appoint a receiver for WCD under the South Carolina Code § 15-65-10(4) ("S.C. § 15-65-10(4)"). (*Id.* at 21 (citing ECF No. 18-1 at 91).) S.C. § 15-65-10(4) allows for the appointment of a receiver by a judge of the circuit court in cases where, "a corporation ... is insolvent or in imminent danger of insolvency ... and, in like cases, of the property within this state of foreign corporations." S.C. § 15-65-10(4).

Justice Jean Hoefer Toal (ret.), a retired Chief Justice of the Supreme Court of South Carolina who has now been appointed to the trial court bench to oversee South Carolina's asbestos cases, presided over the case. (App. Br. at 21.) Justice Toal granted the motion on an expedited basis on March 10, 2023, finding that based on documents in front of the court, existing jury verdicts, and the court's knowledge of additional pending litigations against WCD, "WCD appears to actually be insolvent and it is certainly in imminent danger of insolvency." ("Receivership Order", ECF No. 18-1 at 12.) Justice Toal appointed Peter Protopapas as receiver under the statute "pursuant to the South Carolina Law" and conferred the "power and authority [sic] fully administer all assets of WCD, accept service on behalf of WCD, engage counsel on behalf of WCD and take any and all steps necessary to protect the interests of WCD whatever they may be." (*See generally id.* at 8-15.) The Receivership Order specified "the powers of a receiver are as broad as the law permits" and noted "[n]othing in this order is intended to limit the power of the receiver to bring claims against any entity or individual." (*Id.* at 12.) The Receivership Order further enumerated additional rights of the Receiver including collecting accounts receivable from tenants and changing locks to premises at which property was situated. (*Id.* at 13.)

On March 16, 2023, WCD filed a motion for reconsideration of the Receivership Order, asking Justice Toal to vacate the receivership. (App. Br. at 22 (citing ECF No. 18-1 at 111); *see generally* ECF No. 18-1 at 211-222.) During the reconsideration hearing ("Reconsideration Hearing") on April 18, 2023, Plant's counsel argued on the record "to the extent there is a consideration of a bankruptcy filing ... I just want it in the record for any bankruptcy judge that's looking at this issue that at the present time a receivership is in place" and that during a receivership "the property of [WCD] ... it's in the property of the Court." (ECF No. 18-1 at 218.) Counsel further urged Justice Toal to agree on the record that once a receivership was in place WCD did not "have the authority to enter a bankruptcy. They don't control [the property]." (*Id.*)

Justice Toal replied on the record that she was "well aware" of the asset situation and "that was the main factor in [her] signing the order so quickly" given she was not clear on WCD's asset picture and wanted to make sure someone "would not simply declare bankruptcy and that entity would still be controlling things." (*Id.*) In an oral decision, Justice Toal then held that she was "deny[ing] the motion to reconsider and dissolve the receivership" and that she was "satisfied ... there [were] sufficient connections with South Carolina of the [WCD] assets ... to justify the receivership." (*Id.* at 220.) Her order did not modify the existing Receivership Order. (*Id.* at 220.) Justice Toal ordered the parties to submit proposed final orders that would be "in some kind of shape for Appellate Courts to review." (App. Br. at 23 (citing ECF No. 18-1 at 221).)

On April 24, 2023, Plant's counsel submitted a proposed order to the South Carolina court, which included language in a footnote that stated "WCD no longer has the rights to administer [the property of the corporation]. This removal of rights includes ... the ability of the company to institute a bankruptcy proceeding." (WCD Br. at 23 (citing ECF No. 18-1 at 1006 n.12).) WCD's counsel was required to submit their comments on the proposed order to the South Carolina court on April 27, 2023. (App. Br. at 26.)

C. THE CHAPTER 11 BANKRUPTCY PETITION

One day before the due date for its submission to the South Carolina court on Plant's proposed Reconsideration Order, WCD and its affiliate debtor entities filed a Chapter 11 bankruptcy in the District of New Jersey. (*Id.*)[4] A newly constituted WCD Board of Directors (the "Filing BOD") approved the filing of the bankruptcy petition. (*Id.*)[5] WCD's bankruptcy docket in the District of New Jersey Bankruptcy Court is number 23-13575.

The Receiver filed a motion to dismiss the bankruptcy action on May 3, 2023 (N.J. Bk. Dkt. 62), followed by an Amended Motion to Dismiss on May 19, 2023 (N.J. Bk. Dkt. 117). Creditors were appointed to the Official Committee of Talc Claimants by the United States Trustee Martha Hildebrandt according to § 1102(a)(1) of the Bankruptcy Code on May 24, 2023. (N.J. Bk. Dkt. 121.) The Talc Claimants then joined the Receiver's Amended Motion to Dismiss. (N.J. Bk. Dkt. 132.) On June 6, 2023, a hearing on the joint motion took place in front of the Honorable Michael B. Kaplan, C.J.B.C. (N.J. Bk. Dkt. 175; *see*

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[4] Only the WCD bankruptcy is at issue in this appeal.

[5] The Filing BOD was not constituted at the time Justice Toal issued the Receivership Order. Because a different WCD Board of Directors was constituted at the time of the Order, in this Opinion the Court differentiates between the newly the Filing BOD that approved the Chapter 11 Petition and the WCD Board of Directors more generally addressed in Justice Toal's Receivership Order.

generally ECF No. 18-1 at 1115-1191.) Appellants' arguments in front of the Bankruptcy Court relied on the Filing BOD's lack of authority to file a Chapter 11 Bankruptcy Petition in light of the Receivership Order, and further argued that the *Rooker-Feldman* doctrine applied, which prohibits federal appellate review of a state court judgment.[6] (*Id.*) Following oral argument, the Bankruptcy Court denied the joint Amended Motion to Dismiss, resulting in the order under appeal in the instant action. (ECF No. 1-2; N.J. Bk. Dkt. 211; *see generally* "Bk. Op.," N.J. Bk. Dkt. 210.)

In an 18-page Letter Opinion filed on June 20, 2023, the Bankruptcy Court held that "WCD's bankruptcy was filed by entities with proper authority" and that "there exists no cause for dismissal." (Bk. Op. at 4-5.) Further, the Bankruptcy Court wrote its opinion did not "intend to examine the merits of the South Carolina Court's ruling with respect to the appointment of the Receiver", "revisit[ ] whether the South Carolina Court had jurisdiction to enter the Receivership Order" or "look[ ] behind the Receivership Order into the Receiver's motives, experience, or qualifications." (*Id.* at 3.) As such, the Bankruptcy Court determined the *Rooker-Feldman* doctrine did not apply since the Bankruptcy Court's ruling was not violative of Justice Toal's order and did

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[6] The *Rooker-Feldman* doctrine prevents a federal court from exercising jurisdiction where the relief sought by the plaintiff would essentially "reverse a state court decision or void its ruling." *Taliaferro v. Darby Twp. Zoning Bd.*, 458 F.3d 181, 192 (3d Cir. 2006).

not "review[ ] or reject[ ] the underlying judgment." (*Id.* at 5.)

Next, the Bankruptcy Court held that the Receivership Order in this case did not remove the WCD Board of Directors' authority to file for bankruptcy. (*Id.* at 6.) The Bankruptcy Court relied on the text of the Receivership Order itself, a review of South Carolina laws on the power of receivers, and federal bankruptcy law to determine that the order of appointment of the Receiver did not give him the exclusive authority to file for bankruptcy. (*Id.* at 7.) The Bankruptcy Court held that under New Jersey state law, the applicable law for a New Jersey corporation, the Board of Directors was authorized to file for bankruptcy. (*Id.* at 9.)

The Bankruptcy Court then examined the impact of Justice Toal's statements at the Reconsideration Hearing regarding a potential bankruptcy filing. (*Id.* at 8.) However, he found that neither South Carolina law nor the Receivership Order itself vested a receiver with the power to divest the board of a foreign corporation of its power to declare bankruptcy. (*Id.* at 9.) The Bankruptcy Court held that Appellants' counsel had a "mistaken understanding of the Receivership Order's effect" and that such an interpretation did not square either with federal bankruptcy law or available authorities. (*Id.* at 10.) Further, the Bankruptcy Court found that Justice Toal's comments at the Reconsideration Hearing did not amount to either a separate holding or modification of her existing order, and the Bankruptcy Court could not interpret it as supplanting the language of the enacted Receivership Order. (*Id.* at 12.)

Appellants filed an appeal in the District Court on July 3, 2023 (N.J. Bk. Dkt. 246) concurrently with a Motion for Certification of Direct Appeal to the United States Court of Appeals for the Third Circuit (N.J. Bk. Dkt. 248). Appellees filed an Objection to the Motion for Certification of Direct Appeal (N.J. Bk. Dkt. 289), and Appellants replied (N.J. Bk. Dkt. 314). After a hearing on July, 27, 2023 (N.J. Bk. Dkt. 328) the Bankruptcy Court denied the application for certification to the Third Circuit on July 31, 2023 (N.J. Bk. Dkt. Nos. 331, 337). The District Court received the Notice of Appeal from the Bankruptcy Court and the Designation of Bankruptcy record on August 3, 2023. (ECF Nos. 1 and 2.) Appellants filed their brief with the District Court on September 12, 2023 (App. Br.), Appellee responded (WCD Br.), and Appellants replied (ECF No. 23).

II. LEGAL STANDARD

A district court has appellate jurisdiction over a bankruptcy court's final judgments, orders, and decrees. 28 U.S.C. § 158(a). A district court reviews a bankruptcy court's "legal determinations de novo, its factual findings for clear error and its exercise of discretion for an abuse thereof." *In re Rashid*, 210 F.3d 201, 205 (3d Cir. 2000); *see* *In re Cohn*, 54 F.3d 1108, 1113 (3d Cir. 1995) ("On appeal the district court ... may affirm, modify, or reverse a bankruptcy judge's judgment, order, or decree or remand with instructions for further proceedings. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous ....") (quoting

Frmr. Fed. R. Bankr. P. 8013); *see also In re Great Atl. & Pac. Tea Co., Inc.*, Civ. No. 14-4170, 2015 WL 6395967, at *2 n.1 (S.D.N.Y. Oct. 21, 2015) (although Fed. R. Bankr. P. 8013 was removed in the new Federal Rules of Bankruptcy Procedure "logic still compels the same conclusion with respect to the appellate powers of the District Court"). When addressing mixed questions of law and fact, the Court divides the questions into their respective components and applies the appropriate standard to each. *In re Brown*, 951 F.2d 564, 567 (3d Cir. 1991).

III. DISCUSSION

Section 1112(b) of the Bankruptcy Code provides that bankruptcy actions may be dismissed if the movant establishes cause. 11 U.S.C. § 1112(b)(1). Appellants contend that WCD's bankruptcy petition was filed by a party with no standing to do so - and as a result, unauthorized - and therefore should have been properly dismissed under Section 1112(b). This case comes down to the question of whether the Bankruptcy Court erred in finding there was no cause to dismiss the bankruptcy action.

Appellants in this case argue error on three grounds regarding the bankruptcy court's denial of the motion to dismiss: (1) the Bankruptcy Court "ignor[ed] the plain text of the receivership order and substitut[ed] its own flawed interpretation", (2) the Bankruptcy Court erred by not interpreting the Receivership Order consistently with Justice Toal's on-the-record remarks during the Reconsideration Hearing, and (3) the Bankruptcy Court erred by "relying on its policy preferences" and created an "exception to the rule that state law dictates who may authorize a bankruptcy petition on behalf of a corporate debtor." (App. Br. at 17-18.) All issues in this appeal are legal issues rather than factual issues, and therefore the Court will review the Bankruptcy Court's legal determinations de novo.

For the reasons below, this Court finds the Bankruptcy Court did not err and affirms its judgment in this case.

A. Interpretation of the Receivership Order

Appellants argue that the Filing BOD lacked authority to petition for bankruptcy on WCD's behalf. (App. Br. at 33.) The meat of Appellants' argument is that under South Carolina law Justice Toal divested the WCD Board of Directors of its ability to authorize a bankruptcy. (*Id.*) Appellants' position is that "when a state court appoints a general receiver to manage a corporation's affairs, that receiver obtains the sole authority to put the corporation into bankruptcy." (*Id.* at 34) (citing *In re WC 1st & Trinity GP, LLC v. Milligan*, Civ. No. 20-995, 2021 WL 6750934, at *2 (W.D. Tex. Mar. 18, 2021).) Appellants further argue the text of the Receivership Order plainly divested the WCD Board of Directors of its power by its terms, and that interpretation otherwise is an error by the Bankruptcy Court. (*Id.* at 37.)

Appellees argue the opposite: that the Bankruptcy Court made "precisely the right call" when he determined that the only proper place to look to the Receiver's powers was the text of the Receivership Order itself, which was silent on the question of the Board of Directors and power to declare bankruptcy. (WCD Br. at 14, 50-51.) The Bankruptcy Court properly determined that "under South Carolina law, the Receiver's power derived solely from the order of appointment," and the plain language of the order of appointment here did not "expressly grant[ ] the Receiver exclusive authority to file for bankruptcy or otherwise displace[ ] the [WCD Board of Director's] authority to manage WCD's corporate affairs." (*Id.* at 25-26.) Further, because WCD is incorporated in New Jersey, it is a "foreign corporation" under South Carolina law and therefore the Receiver's powers are limited by the enacting receivership statute. (*Id.* at 29, 63) (citing S.C. Code Ann. § 33-1-400 ("defining 'foreign corporation' as a 'corporation for profit incorporated pursuant to a law other than the law of this State' ").)

1. The Bankruptcy Court's Analysis of the Receivership Order

This Court finds that the Bankruptcy Court did not err in its analysis of the plain language of the Receivership Order and the powers it conferred under South Carolina law under its enacting statute S.C. § 15-65-10(4). The Bankruptcy Court appropriately applied South Carolina law and the text of the Receivership Order itself to determine the powers explicitly conferred on the Receiver by Justice Toal's order. The Bankruptcy Court held that while the case law that exists for receiverships under S.C. § 15-65-10(4) is sparse, such caselaw "clearly establishes that—because a receiver's authority is derived solely from the court ... —a receiver has no power other than that given him or her by the order of appointment." (Bk. Op. at 7 (citing *Kirven v. Lawrence*, 244 S.C. 572 (1964); *In re Fifty-Four First Mortg. Bonds*, 15 S.C.

304 (1881)).) The Bankruptcy Court's review of the Receivership Order found it silent on the question of the WCD Board of Directors and power to declare bankruptcy, and that it only in passing referenced WCD's status as a foreign corporation and how that impacted the enactment of the Receiver's role under South Carolina law. (*Id.* at 8-9.)

Under South Carolina law, "[a] court order or judgment is construed like any written instrument." *Campione v. Best*, 435 S.C. 451, 458 (Ct. App. 2021) (citation omitted). "Whether a court order is clear and unambiguous is a question of law for the court." *Id.* Further, "[i]f the language employed is plain and unambiguous, there is no room for construction or interpretation, and the effect thereof must be declared in the light of the literal meaning of the language used." *Doe v. Bishop of Charleston*, 407 S.C. 128, 135 (2014) (quoting *Weil v. Weil*, 299 S.C. 84, 90 (Ct. App. 1989)). The Bankruptcy Court correctly held that absent language or authority in the alternative, the plain language of the Receivership Order did not supplant New Jersey's default rule that the Filing BOD was authorized to file for bankruptcy. (Bk. Op. at 9.)

The Bankruptcy Court pointed out that while the language of the Receivership Order is broad, it is still enacted "*pursuant to the South Carolina Law*" and expressly included the limiting language that it is "as broad as the law permits" (*Id.* at 6 (citing ECF No. 18-1 at 12) (emphasis added in opinion).) The enacting statute in question limits the power of a receiver over a foreign corporation to "the property within this state." S.C. § 15-65-10(4). This is intuitive –

traditionally, a state court's power is limited to its territorial boundaries. *See Mallory v. Norfolk S. Ry. Co.*, 600 U.S. 122, 128 (2023) (observing the history of the Anglo-American legal tradition's recognition that "a tribunal's competence was generally constrained only by the 'territorial limits' of the sovereign that created it"); *see also World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980) (noting states are limited "by their status as coequal sovereigns in a federal system").

WCD correctly points out that this is why mechanisms such as ancillary receiverships, in which receivers can apply to secure out of state property from local courts, exist in states including New Jersey and South Carolina.[7] (App. Br. at 34) (citing *Umland v. United Pub. Serv. Co.*, 111 N.J. Eq. 563, 567 (Ch. 1932) ("[I]t is the customary practice for the receiver to apply to the courts of the state where the property is located for what is ordinarily denominated ancillary receivership.")); *see also* N.J. Stat. Ann. § 14A:14-2 (observing in the 1968 Commissioner's notes on decisions that "[w]hile this section makes no mention of foreign corporations ... when read in connection with R.S. 14:14-4 and 14:15-2, [they] confer a limited jurisdiction on the New Jersey courts to appoint receivers for the New Jersey property of foreign corporations"); *Farmer v. CAGC Ins. Co.*, 424 S.C. 579, 583 (Ct. App. 2018) (referring to an ancillary receivership in South Carolina relating to a primary receivership established by North Carolina). If, as

[7] There is no evidence in the record showing that the Receiver in this case applied to the New Jersey court for an ancillary receivership. (WCD Br. at 35.)

Appellants argue, the South Carolina state court receivership automatically reached past the boundaries of the state, there would be no need for such a system.

2. Legal Authorities

Further, there is little evidence in the case law stemming from S.C. § 15-65-10(4), and Appellants have not provided any, that receiverships under the statute commonly block foreign corporations from declaring bankruptcy or that receivers otherwise enjoy extensive control over foreign corporations.[8]

[8] There appears to be only one other trial court order citing S.C. § 15-65-10(4) with regard to a foreign corporation, from a case also in front of Justice Toal. The party in that case made a similar argument to the Appellee's here regarding the limitations of the receivership over foreign corporations. *See, e.g., Childers v. Davis Mechanical Contractors, Inc.*, Civ. No. 2021-CP-40-03484, 2023 WL 10365071, at *1 (S.C. Com. Pl. Mar. 30, 2023) (in which Justice Toal's order assumed arguendo that a party's interpretation that S.C. § 15-65-10(4) only applied to its property within South Carolina was correct). Other court judgments citing the statute do not address the issue. South Carolina precedent more broadly also pulls against Appellants' contention that the Receivership Order would automatically reach beyond its borders and into the governance of a foreign corporation without any specific language indicating as much. In *Clark v. Preferred Accident Insurance Company of New York*, the South Carolina Supreme Court wrote that "[e]very State has jurisdiction to determine for itself the liability of property within its territorial limits, to seize and sell such under the process of its Courts." 231 S.C. 167, 175 (1957). The *Preferred Accident Insurance* court held that in cases where a receiver has been appointed by an out-of-state court, a local receiver could still sequester local property within South Carolina on behalf of local creditors, regardless of the decision by the out-of-state court. *See*

Although Appellants argue that the Bankruptcy Court did not "seriously engage[ ] with the Receivership Order's text" and was looking for "magic words," this position is not supported by either the language of the order itself or any caselaw showing South Carolina courts relying on S.C. § 15-65-10(4) to create the type of cross-territorial receiverships endorsed by the Appellants. (App. Br. at 34, 37.) More generally, the case law Appellants provide to support their arguments does not persuasively argue otherwise.

Generally, this Court agrees with the Bankruptcy Court that the cases Appellants rely on "for the proposition that the appointment of a receiver automatically displaces a board" are "factually distinguishable and ... not controlling." (Bk. Op. at 17 n.6.) Appellants cite *In re WC 1st & Trinity GP, LLC v. Milligan* for the proposition that "a state court can vest authority to file a bankruptcy petition entirely in a receiver." (App. Br. at 34) (citing *WC 1st*, 2021 WL

Preferred Acc. Ins. Co. of N. Y., 231 S.C. at 174–75 ("[T]he local property in a state of a foreign corporation for which [a] receiver ... has been appointed in another state is subject ... to sequestration by the appointment of a local receiver [ ] by the creditors of the corporation, which ... will take precedence over the rights or title of the [out-of-state] receiver.") (citing *Clark v. Williard*, 294 U.S. 211, 214-215). The *Preferred Accident Insurance* court would be unlikely to hold that a local receiver had precedence over property within the territory over a receiver appointed by an out-of-state court if, as Appellants argue, state court receivers automatically controlled corporations and assets beyond their state borders. Further, such a position would violate the rights of other states to dispose of the property within their territories discussed elsewhere in the decision.

6750934, at *2.) However, several factors distinguish *WC 1st* from the present case. First, the district court in *WC 1st* examined the effect of a state court receivership order over domestic Texas debtors governed by the Texas Business Organizations Code. *In re WC1st and Trinity LP*, No. 20-10886, W.D. Tex. Bk. Dkt. 51 ("WC 1st Bk. Op.") at 2 (Bankr. W.D. Tx. Sept. 14, 2020). Since it is undisputed that WCD is a New Jersey corporation incorporated under the laws of New Jersey, i.e., a foreign corporation under South Carolina law, the comparison here is inapposite. Second, the Texas statute enacting the receivership in question in *WC 1st* is entirely distinct from the South Carolina enacting statute and is, in fact, limited to domestic entities, as evidenced by its title "§ 11.404 Appointment of Receiver to Rehabilitate Domestic Entity." W.D. Tex. Bk. Dkt. 8-13 at 204, 216 (recording the Texas state trial court agreeing at hearing that the receivership was enacted under Texas Business Organizations Code § 11.404). Third, the Receivership Order in *WC 1st* specifically included language that clarified that "[t]he Receiver is granted **the sole and exclusive right to file voluntary petitions** for relief" under the Bankruptcy code. *WC 1st* Bk. Op. at 2 (emphasis in original); *see also* W.D. Tex. Bk. Dkt. 8-2 ¶ 39. Even if the other facts of the cases were not distinguishable, in *WC 1st* the bankruptcy court clearly stated "[h]ere, we have a state court order that gave the Receiver the sole authority to file bankruptcy." (*Id.* at 3.) The Receivership Order at issue in the instant case indisputably does not include explicit language delegating such power. *Compare* Receivership Order, ECF No. 18-1 at 8-15, *with* W.D. Tex. Bk. Dkt. 8-2 ¶ 39. When *WC 1st* is read as a whole, the case supports the Bankruptcy Court's decision to rely squarely on the Receivership Order's plain language and its boundaries within South Carolina law, and provides an example of a receivership order in which a state court clearly gave sole authority to file for bankruptcy to the local receiver.

Appellants' other case on this point, *In re Monroe Heights Development Corporation Inc.*, is also inapposite and unpersuasive. No. 17-10176, 2017 WL 3701857, at *1 (Bankr. W.D. Pa. Aug. 22, 2017); *dismissed*, 573 B.R. 613 (Bankr. W.D. Pa. 2017). The bankruptcy court in *Monroe* found (1) the debtor was a domestic corporation subject to a court order in its home state; (2) the person who filed for bankruptcy was a shareholder rather than the Board of Directors, and under the default Pennsylvania law would not have had authority to file for bankruptcy; and (3) the Receivership Order itself also clearly specified that no agent of the debtor had authority to commence a bankruptcy proceeding. 2017 WL 3701857, at *1; *see also* Monroe Receivership Order, W.D. Pa. Bk. Dkt. 9-2 at 16.

In the case at hand, the Court agrees with the Bankruptcy Court's assessment that, "[d]espite the Receiver's arguments to the contrary, he is unable to identify any South Carolina state law or language in the Receivership Order that provides for" the WCD Board of Directors to be displaced or divested of its ability to file for bankruptcy. (Bk. Op. at 17.) Having reviewed the authorities, this Court reaches the same conclusion on appeal. The Bankruptcy Court therefore correctly held that absent plain language in the

Receivership Order, caselaw, or authorities otherwise, the law of the state of incorporation controls who can properly file a bankruptcy petition. *Matter of Giggles Restaurant, Inc.*, 103 B.R. 549, 552-54 (Bankr. D.N.J. 1989) (applying New Jersey law for a New Jersey corporation). The Court affirms the Bankruptcy Court's opinion that under New Jersey state law, the text of the Receivership Order did not change the fact that WCD's Board of Directors held the power to file for bankruptcy and properly did so.

B. The Reconsideration Hearing

Appellants further argue that the Bankruptcy Court should have looked beyond the four corners of the Order and taken into account Justice Toal's comments at the Reconsideration Hearing. (App. Br. at 39-51.) Appellants' position is that Justice Toal's comments at the hearing amounted to an official interpretation of her order, and that by not deferring to said interpretation the Bankruptcy Court violated the *Rooker-Feldman* doctrine. (*Id.* at 47.) Appellees disagree.

The Court affirms the Bankruptcy Court's holding that Justice Toal's comments at the hearing do not change the limits of the Receivership Order itself and "do[ ] not constitute a ruling." (Bk. Op. at 12.) The Receivership Order itself was not ambiguous, and under South Carolina law there was no room for additional interpretation without ambiguity. *Bishop of Charleston*, 407 S.C. at 135 ("If the language employed is plain and unambiguous, there is no room for construction or interpretation, and the effect thereof must be declared in the light of the literal meaning of the language used.") (citation omitted).

While courts are "empowered to interpret their orders," it does not necessarily hold that comments made briefly during a related hearing automatically add language or powers to an unambiguous prior order. *Campione*, 435 S.C. at 458. Justice Toal's comments at the Reconsideration Hearing were not, in themselves, an "order" construing her "own previous order," and therefore do not benefit from the same level of "due deference and great weight" as if she had made a holding interpreting her previous order. *Eddins v. Eddins*, 304 S.C. 133, 136 (Ct. App. 1991); *see also* ECF No. 18-1 at 219-220 (recording Justice Toal's statements that she was "simply hearing these motions about whether to reconsider and whether to vacate" the Receivership Motion and that the holding was that she was "going to deny the motion to reconsider and to dissolve the receivership.") The Bankruptcy Court was correct to refuse to "read further into any colloquy undertaken in the context of the Reconsideration Motion" and to focus instead on the textual interpretation of the unambiguous Receivership Order and its contextual legal framework. (Bk. Op. at 12) (emphasis removed).

Further, because Justice Toal's commentary is not in itself a holding, the Bankruptcy Court's decision not to rely on it cannot be violative of the *Rooker-Feldman* doctrine, which only applies to federal review of state court orders.[9]

[9] Given that the Court has affirmed the Bankruptcy Court's decision that the Filing BOD had the proper authority to file for WCD's bankruptcy, it does not reach Appellants' argument regarding what they called the Bankruptcy Court's

IV. CONCLUSION

For the reasons stated above, the Court will affirm the decision of the Bankruptcy Court and will **DISMISS** this appeal. An appropriate Order will follow.

"secondary holding" and any alleged exception to the default bankruptcy rules.

APPENDIX D

UNITED STATES BANKRUPTCY COURT,
D. NEW JERSEY.

RE: IN RE WHITTAKER, CLARK & DANIELS, INC., ET AL.

Case No.: 23-13575

Signed June 20, 2023

OPINION

MICHAEL B. KAPLAN, *Chief Judge*

Dear Counsel,

Presently before the Court is an amended Motion to Dismiss (the "Motion," ECF No. 117) filed by Peter Protopapas in his capacity as court-appointed receiver seeking dismissal of the chapter 11 bankruptcy petition filed on behalf of Whittaker, Clark & Daniels, Inc. ("WCD"[1]). The Official Committee of Talc Claimants ("TCC") filed a joinder (ECF No. 132). WCD filed opposition (ECF No. 124) and the court-appointed receiver filed a Reply (ECF No. 156). The Court has reviewed the parties' submissions and fully considered the arguments made during the hearing on June 6, 2023. For the reasons stated herein, the Motion is denied.

I. JURISDICTION

The Court has jurisdiction over this contested matter under 28 U.S.C. §§ 1334(a) and 157(a) and the Standing Order of the United States District Court dated July 10, 1984, as amended September 18, 2012, referring all bankruptcy cases to the bankruptcy court. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2)(A) & (O). Venue is proper in this Court pursuant to 28 U.S.C. § 1408. The Court issues the following findings of fact and

[1] Related entities Brilliant National Services, Inc., Soco West, Inc., and L.A. Terminals, Inc., also filed for bankruptcy. *See* Case Nos. 23-13576, 13-13578, and 23-13581. The cases are jointly administered with WCD's bankruptcy serving as the lead case. *See Order Granting Motion for Joint Administration,* ECF No. 72 in Case No. 23-13575. However, the pending motion to dismiss relates only to WCD's bankruptcy filing, and there are no pending motions to dismiss with respect to the related filings.

conclusions of law as required by Fed. R. Bankr. P. 7052[2]

II. BACKGROUND

The relevant background is set forth in the jointly-submitted stipulated facts. *Stipulated Facts*, ECF No. 157. WCD was incorporated in New Jersey in December 1972. In 2004, WCD ceased all operations "but continued their corporate existence to manage alleged asbestos and environmental liabilities related to the historical processing and distribution of cosmetic and industrial compounds." *Id.* at ¶ 3. On March 3, 2023, a jury rendered a verdict against WCD exceeding $29 million in an action in South Carolina involving Sarah J. Plant (the "Plant Action"), over which Justice Toal of the South Carolina Court of Common Pleas (the "South Carolina Court") presided. *Id.* at ¶ 7. On March 10, 2023, the South Carolina Court granted the Plant Action plaintiffs' request for the appointment of a receiver over WCD (the "Receivership Order"). *Receivership Order – Ex. 3 to Stipulated Facts*, ECF No. 157. WCD sought reconsideration (the "Reconsideration Motion") and, at the conclusion of oral argument on April 18, 2023, Justice Toal denied the motion in a bench ruling. *See Tr. of Apr. 18, 2023 Hrg. – Ex. 8 to Stipulated Facts*, ECF No. 157. The parties were directed submit forms of order memorializing her ruling. However, the WCD board of directors (the "Board") filed voluntary bankruptcy for WCD in this Court prior to the entry

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[2] To the extent that any of the findings of fact might constitute conclusions of law, they are adopted as such. Conversely, to the extent that any conclusions of law constitute findings of fact, they are adopted as such.

of an order on the Reconsideration Motion in the South Carolina Court. The instant Motion followed.

In his Motion, Mr. Protopapas, who is the receiver (the "Receiver") appointed by the South Carolina Court, seeks dismissal of WCD's chapter 11 bankruptcy case. The crux of the Receiver's argument is that the Board lacked authority to approve a WCD bankruptcy filing and that only he—as receiver—has such power. WCD raises several arguments in opposition. The Court addresses each, in turn. In doing so, the Court does not intend to examine the merits of the South Carolina Court's ruling with respect to the appointment of the Receiver. Likewise, the Court is not revisiting whether the South Carolina Court had jurisdiction to enter the Receivership Order. Nor, obviously, is the Court looking behind the Receivership Order into the Receiver's motives, experience, or qualifications. Rather, this Court addresses the South Carolina Court's expectations, albeit erroneous and shared by plaintiffs' counsel, that placing the Debtor's assets under the courts' control through the appointment of a receiver implicitly precludes the Debtor's bankruptcy filing, undertaken in a manner consistent with applicable state law and the Debtor's organizational documents. It is the province of this Court to question whether such expectations, standing alone, suffice to achieve such a result. Simply put, the Bankruptcy Code—specifically 11 U.S.C. § 543—answers the question in the negative. For the reasons set forth below, the Receiver's Motion to Dismiss and the TCC's Joinder are denied.

A. The Receiver's Standing

WCD first challenges the Receiver's standing to file the Motion. The Court rejects this argument. As counsel for the Receiver points out, this Court may *sua sponte* raise the issue of dismissal where cause appears to exist and—relying on this Court's decision in *3P Hightstown*—the Receiver argues this Court *must* dismiss an improperly-filed case. *See Receiver's Reply* 3-4, ECF No. 156 (citing *In re 3P Hightstown, LLC*, 631 B.R. 205, 209 (Bankr. D.N.J. 2021) (collecting cases explaining that a bankruptcy court can *sua sponte* dismiss a bankruptcy petition for cause under § 1112(b) and is required to dismiss a case without relying on § 1112(b) if the petition was filed without the prerequisite authority) (citations omitted)). In response to this argument, WCD's Counsel contends that—even if this Court finds cause for dismissal—it is not compelled to dismiss the case and, instead, has discretion to *refuse to* dismiss based on the best interests of the creditors. WCD argues that *3P Hightstown* improperly relies on a Supreme Court case, *Price*, that pre-dates § 1112(b). *See Price v. Gurney*, 324 U.S. 100, 104, 65 S. Ct. 513, 515, 89 L.Ed. 776 (1945). Counsel for the Receiver counters that, because the case was improperly filed, this Court need not look to § 1112(b). *Tr. of June 6, 2023 Hrg.* 14:25-15:2 ("You don't even have to reference Section 1112. You don't even get to Section 1112. The case must be dismissed if there is no authority, which is what we argue here."). Indeed, there is case law that cuts both ways. *Compare In re ComScape Telecommunications, Inc.*, 423 B.R. 816, 829–30 (Bankr. S.D. Ohio 2010) (collecting cases holding that § 1112(b) provided grounds for dismissal of case filed by individual who lacked authority to file the petition on behalf of the debtor company) *with* In re *Mid-S. Bus. Assocs., LLC*, 555 B.R. 565, 570 (Bankr. N.D. Miss. 2016) (citing *Price v. Gurney*, 324 U.S. 100 for the proposition that "a bankruptcy petition filed without proper corporate authority must be dismissed *independent of any finding of 'cause' under § 1112(b)*, because if the Debtor did not have sufficient corporate authority for the filing of its petition, then this Court lacks subject matter jurisdiction over the case") (emphasis added). Because—for reasons discussed below—this Court concludes that WCD's bankruptcy was filed by entities with proper authority, it likewise concludes that there exists no cause for dismissal, and this Court need not engage in an academic exercise as to whether dismissal of an improperly-filed case would be discretionary under § 1112(b) or mandatory independent of § 1112(b).

B. The Rooker-Feldman Doctrine

This doctrine—whose name is derived from two Supreme Court cases—precludes lower federal courts from exercising appellate jurisdiction over final state court judgments.[3] The Receiver asserts that *Rooker-Feldman* mandates dismissal of WCD's bankruptcy filing because a finding that WCD had authority to file would amount to re-litigation of issues already decided by the South Carolina Court. WCD contends that, because the Receivership Order in the instant case was an interlocutory order, the *Rooker-Feldman* doctrine is inapplicable and the Receivership Order is

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[3] *See* *D.C. Court of Appeals v. Feldman*, 460 U.S. 462, 103 S. Ct. 1303, 75 L.Ed. 2d 206 (1983); *Rooker v. Fid. Tr. Co.*, 263 U.S. 413, 44 S. Ct. 149, 68 L.Ed. 362 (1923).

not entitled to full faith and credit. *See WCD's Obj.* 18, ECF No. 124 (citing S.C. Code Ann. § 14-3-330). The Court need not address the applicability of this doctrine because—even assuming it applies—the Court's present ruling is not violative. The Supreme Court has clarified that the *Rooker-Feldman* doctrine applies in only those narrow circumstances where state court losers ask a federal court to review and reject the state court's judgment. *See* *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 125 S. Ct. 1517, 161 L.Ed. 2d 454 (2005); *Vuyanich v. Smithton Borough*, 5 F.4th 379, 387 (3d Cir. 2021). Here, however, this Court is not reviewing or rejecting the underlying judgment or otherwise issuing a ruling that is inconsistent with the South Carolina Court's judgment. A more detailed discussion on this issue follows.

C. Authority to File for Bankruptcy

At the heart of this dispute is who—the Board or the Receiver—held authority to commence the WCD bankruptcy filing. The parties agree that, prior to the appointment of the Receiver, the Board could have authorized the filing of a voluntary bankruptcy petition for WCD. However, the Receiver contends that, after the entry of the Receivership Order, he possessed the sole and exclusive authority to commence a filing. Based on a review of the Receivership Order, case law, applicable South Carolina statutes, and federal bankruptcy statutes, this Court cannot agree. Indeed, as the Receiver argues, an order appointing a receiver *can* remove a board of directors' authority to file bankruptcy. The

Receivership Order in the instant case, however, did no such thing.

The Receiver relies on language of the Receivership Order, which he describes as "broad." Admittedly, the Receivership Order affords the Receiver a host of powers and duties. However, it makes no mention of dissolution of the Board or of the authority to file for bankruptcy. While the Receiver emphasizes language in the Receivership Order that grants him "the power and authority [to] fully administer *all* assets of WCD," the Court notes that the Receiver omits the qualifying language immediately preceding the highlighted portion. *Receivership Order* 5, ECF No. 157 (emphasis added). Read in full, the Order states that Mr. Protopapas "is appointed Receiver in this case *pursuant to the South Carolina Law* with the power and authority [to] fully administer all assets of WCD." *Id.* (emphasis added). The Receivership Order later acknowledges that "the powers of a receiver are as broad as the law permits," *id.*, before continuing to identify specific powers and duties afforded to the Receiver in the instant case—none of which include the exclusive power to file for bankruptcy or to deprive the Board of that right.

The motion resulting in the Receivership Order sought the appointment of receiver under S.C. Code Ann. § 15-65-10. That statute is a civil remedy and contemplates the appointment of a receiver where—as is relevant here—a corporation "is insolvent or in imminent danger of insolvency." § 15-65-10(4); *see also Receivership Order* 5, ECF No. 157 (finding that "the application is meritorious under the applicable statute because WCD appears to actually be insolvent and it is certainly in imminent danger of insolvency"). Unfortunately, there appears to be a dearth of case law addressing the powers of a receiver appointed under § 15-65-10. *See, e.g.*, *Zurich Am. Ins. Co. v. Covil Corp.*, No. 1:18-CV-932, 2019 WL 3205676, at *3 n.6 (M.D.N.C. July 16, 2019) (stating that § 15-65-10 "addresses when a receiver may be appointed but not the scope of their powers"). And the few cases this Court has been able to locate are not from this century. However, the dated case law clearly establishes that—because a receiver's authority is derived solely from the court, and because a receiver is subject only to the court's direction—a receiver has no power other than that given him or her by the order of appointment. *See e.g.*, *Kirven v. Lawrence* (S.C. 1964) 244 S.C. 572, 137 S.E.2d 764; *In re Fifty-Four First Mortg Bonds*, 15 SC 304 (1881) (holding that a receiver is an executive officer of the court, administering the assets of the estate under the direction of the court, and his authority resting only in the orders by which he is appointed). Thus, this Court is constrained to look to the Receivership Order when interpreting the power afforded the Receiver in this case.

The Receiver urges this Court to look beyond the Receivership Order to Justice Toal's oral ruling on the subsequent Motion for Reconsideration. Specifically, the Receiver points to the following exchange between Mr. Branham (plaintiffs' counsel) and Justice Toal:

> MR. BRANHAM: Okay. The last thing I want to say is, I am concerned enough about their insolvency to just note this for the record. You have entered a receivership. I don't know

> what you're going to do here. But assuming that you maintain the receivership, the property of Whittaker Clark & Daniels, as any custody alleges, it's in the property of the Court. Once that receivership order, it's in the property of the Court. And so to the extent there is a consideration of a bankruptcy filing, which I have some concerns about, I just want it in the record for any bankruptcy judge that's looking at this issue that at the present time a receivership is in place.

And as the Court well knows**, once that receivership order is in place, they no longer hold the property, the receiver holds the property. The receiver is proper party to the bankruptcy.** They don't have the authority to enter a bankruptcy. They don't control it.

Now, if Your Honor vacates it and all that kind of thing, that changes things. But as we stand here right this second, they do not have the authority to enter into a voluntary bankruptcy.

THE COURT: I'm well aware, that was the main factor in my signing the order so quickly is that I wanted to be sure that something other than kind of amorphous organization I wasn't quite sure about in terms of asset picture, control or anything else would not simply declare bankruptcy and that entity would still be controlling things. **I wanted a receiver that I knew would take it seriously, to look at the asset picture and see what was going on.**

And that is what we've set up under the South Carolina receivership, this receivership as we have for many, many others. I get that.

Tr. of Apr. 18, 2023 Hrg. – Exhibit 8 to Stipulated Facts 166:14 – 168:3, ECF No. 63-4 (emphasis added). Clearly, counsel was under the impression that with the Court's appointment of the Receiver having control over the assets, only the Receiver could put WCD into bankruptcy. Admittedly, Justice Toal's response suggests that she too shared this belief. To the extent that Justice Toal's comment that the entity whose assets were under the Receiver's control "*would* not simply declare bankruptcy" can be interpreted as her understanding that the Board *could* not declare bankruptcy—meaning, that they lacked the authority to declare bankruptcy—this understanding is misguided. As previously discussed, a receiver's powers are derived from the order appointing him or her. In this case, the Receivership Order makes no mention of bankruptcy or of the dissolution of the Board. Nor does South Carolina law expressly vest a receiver with such exclusive authority or automatically displace the existing management. It is well-settled that applicable state law determines whether a bankruptcy filing was authorized. *See* *Price*, 324 U.S. at 106, 65 S. Ct. 513 (holding that those "who purport to act on behalf of the corporation" must have "been granted authority by local law to institute the proceedings"); *In re Sino Clean Energy, Inc.*, 901 F.3d 1139, 1142 (9th Cir. 2018) ("[S]tate law dictates which persons may file a bankruptcy petition on behalf of a debtor corporation."); *In re ComScape Telecommunications, Inc.*, 423 B.R. at 829–32 (collecting cases and stating that "bankruptcy courts generally look to state law to determine who is authorized to file a voluntary petition for a corporation, partnership or other kind of organizational entity"). Pursuant to applicable state law in this case—New Jersey state law—the Board was authorized to file for bankruptcy.

The Court recognizes that, during oral argument on this Motion, Mr. Branham emphasized repeatedly his belief that that Receivership Order did, in fact, provide the Receiver with exclusive authority to file for bankruptcy. Indeed, in response to the Debtor's argument that Justice Toal had not divested the Board of power to file for bankruptcy in her ruling on the Reconsideration Motion, Mr. Branham agreed. Specifically, he explained "[s]he said, I already gave it to you in the first order. I don't need to give it to you again." *Tr. of June 6, 2023 Hrg.* 63:25-64:1, ECF No. 191. When this Court inquired what language of the Receivership Order gave this relief, counsel responded, "The entirety of the order." *Id.* at 64:7. Mr. Branham further stressed that this Court should focus on what Justice Toal *meant* when she issued the Receivership Order. However, as stated previously, this Court is constrained to interpret the Receiver's powers based on the Receivership Order itself.

This Court will not, and cannot, give force to any subjective belief that the Receivership Order achieved something beyond the powers outlined therein—especially when that expansive interpretation would contravene case law and the Bankruptcy Code; specifically, 11 U.S.C. § 543, which compels the turnover of property of the estate held by a receiver. *See also* 11 U.S.C. § 101(11)(C) (defining a receiver as a custodian "that is appointed or authorized to take charge of property of the debtor ... for the benefit of the debtor's creditors"); *Sovereign Bank v. Schwab,* 414 F.3d 450, 454 (3d Cir. 2005). Thus, this Court cannot give weight to the Receiver's argument, which is based on Mr. Branham's mistaken understanding of the Receivership Order's effect. Likewise, to the extent the South Carolina Court shared Mr. Branham's understanding, this Court cannot alter the Receivership Order's language or ultimate legal impact to afford it that subjective, desired effect. Indeed, it remains open to pure speculation as to whether Justice Toal would have taken the next extraordinary step of displacing the board of directors of a foreign corporation as part of a provisional remedy, as a means to prevent a bankruptcy filing. To the extent she were so inclined, this Court would expect an explicit direction in that regard in her Receivership Order. In this same vein, it is worth noting that the Receivership Order was very specific and explicitly identified many powers. Given the detail and length of the Receivership Order, it is a notable omission that it fails to specifically reference the displacement of the Board or the Receiver's exclusive authority to file for bankruptcy.

The Court finds further support for its conclusion in another exchange with counsel during oral argument. The Court queried whether the Receiver could leave the Board in place to operate and manage the company if he so chose. When Mr. Branham responded in the affirmative, the Court asked whether, as a corollary, that meant the Board stayed in place until such time as the Receiver took a formal step to dissolve or remove them. Mr. Branham responded:

No, because [Justice Toal] indicated, she was clear on the record, that the intent of that order, what that order actually did was preclude the authority to run that company and hand it to Mr. Protopapas. That's what she did in that order. He didn't have to do anything more affirmatively to say, you don't have authority. She had already said it.

Tr. of June 6, 2023 Hrg., 65:8-13. As an initial matter, the response does not answer the "bigger picture" question raised by the Court about the general procedure and mechanics of a receivership. In any event, this Court again disagrees with Mr. Branham's interpretation. As Mr. Branham concedes, the Receivership Order precludes the Board from running certain aspects of the company and gives those controls to the Receiver. The Receivership Order is clear as to those aspects. However, this Court disagrees with the notion that an order appointing a receiver does not have to affirmatively reference the authority granted to a receiver and/or taken away from a board of directors. The case law belies this position. *See e.g.*, *Kirven v. Lawrence* 244 S.C. 572 (stating that a receiver has no power other than that given him or her by the order of appointment); *In re Fifty-Four First Mortg Bonds*, 15 SC 304 (same). Therefore, as to affirmative removal of the Board's authority to file for bankruptcy, contrary to Mr. Branham's statement, Justice Toal had not "already said it." *Tr. of June 6, 2023 Hrg.* 65:12-13. The Receivership Order was silent as to this power.

This Court takes seriously counsel's allegation that this Court is improperly sitting in review of Justice Toal's order. *See, e.g. Tr. of June 6, 2023 Hrg.*

66:14-21. That is precisely what this Court is avoiding. This Court is not examining the merits of the South Carolina Court's ruling; nor is it challenging Justice Toal's authority or jurisdiction to enter the Receivership Order, or her rationale in doing so. Instead, the Court undertakes only to assess the Receivership Order's impact, if any, on the Board's ability to file bankruptcy in this jurisdiction. That analysis requires this Court to focus on the powers afforded the Received by text of the Receivership Order and by the South Carolina Court's affirmative rulings. Ultimately, Justice Toal's comments—explaining that her concern over potential bankruptcy filing was a factor in her decision to appoint a receiver—remain precisely that: comments. The transcript excerpt highlighted by the Receiver does not constitute a ruling. Rather, Justice Toal's oral ruling was limited to denying the motion seeking reconsideration and dissolution of the receivership. *Tr. of Apr. 18, 2023 Hrg.* at 174:25—175:3 ("So what I'm going to do is this: I'm going to deny the motion to reconsider and to dissolve the receivership. And I do that on the record now.").

Other portions of the transcript on the Reconsideration Motion reflect that Justice Toal knew there remained open questions regarding the scope of the Receiver's powers and that she anticipated litigation on the issue. *Tr. of Apr. 18, 2023 Hrg.* 175:12-14 ("If there gets to be some litigation about how in charge the receiver is, that will just have to be as it is. I think I've done what I could to protect the potential of these assets."). This Court will not read further into *any* colloquy undertaken in the context of the Reconsideration Motion. Instead, applicable case law dictates that this Court look to the Receivership Order to determine the scope of the Receiver's powers. Again, nothing in the Receivership Order grants the Receiver sole authority to file for bankruptcy or divests the Board of such authority.

This Court finds additional support for its ruling in analogous South Carolina statutes. This Court identified South Carolina case law discussing the powers of receivers appointed under another state statute: S.C. Code Ann. § 33-14-320. That statute contemplates the appointment of a receiver or custodian in the course of a judicial dissolution, which—admittedly—is a different context that the appointment of a receiver as a civil remedy to protect creditor assets under § 15-65-10. Nevertheless, the Court finds the statute and the cases interpreting it instructive. Just as an impartial receiver may be appointed under § 15-65-10 to preserve property, *see In re Citizens' Exch. Bank of Denmark*, 140 S.C. 471, 139 S.E. 135, 143 (1927), a receiver may be appointed under § 33-14-320 for the purpose of placing company assets in "impartial hands" so "that the proceeds may be administered according to the priorities of the claims thereto." *Shapemasters Golf Course Builders, Inc. v. Shapemasters, Inc.*, 360 S.C. 473, 479, 602 S.E.2d 83, 87 (Ct. App. 2004) (quoting *National Cash Register Co. v. Burns*, 217 S.C. 310, 316, 60 S.E.2d 615, 618 (1950)).

Further, just as the concern that property will be lost or materially injured or impaired is cause for appointment of a receiver under § 15-65-10, South Carolina courts have acknowledged similar concerns when discussing appointment of a receiver under § 33-

14-320. *See* Shapemasters, 360 S.C. at 479 (explaining that "the potential harm in not having an unbiased party to protect a corporation's assets," is sufficient to render a decision not to appoint a receiver under § 33-14-320 immediately appealable). Indeed, Justice Toal recognized this concern in her rulings. Specifically, she discussed the need to "protect the potential of these assets" in her oral ruling on the Reconsideration Motion, *Tr. of Apr. 18, 2023 Hrg.* 175:15, and the need to make an "expedited ruling in this matter to preserve the status quo" in her Receivership Order under § 15-65-10. Accordingly, this Court looks to § 33-14-320 for guidance in interpreting the scope of the Receiver's duties in this case and finds further support for the conclusion that the Receivership Order here did not divest the Board of its authority to file for bankruptcy.

Section 33-14-320 addresses the appointment of both receivers and custodians. Notably, the South Carolina Appellate Court recognizes that "[r]eceivers and custodians are distinguishable." *Shapemasters Golf Course Builders, Inc. v. Shapemasters, Inc.*, 360 S.C. 473, 479, 602 S.E.2d 83, 86 (Ct. App. 2004). While a receiver "(i) may dispose of all or any part of the assets of the corporation wherever located, at a public or private sale, **if authorized by the court**; and (ii) may sue and defend in his own name as receiver of the corporation in all courts of this State," a custodian "may exercise all of the powers of the corporation, **through or in place of its board of directors or officers, to the extent necessary to manage the affairs of the corporation in the best interests of its shareholders and creditors.**" S.C. Code Ann. § 33-14-320 (emphasis added). Thus, while a receiver's abilities are limited to protecting assets and aiding in effectuating judgments under § 15-65-10 or "wind[ing] up and liquidat[ing] the business and affairs" under § 33-14-320, only a custodian is vested with the power to "manage the affairs of the corporation," *see Shapemasters*, 360 S.C. at 479. Here, Mr. Protopapas is a receiver. His duties are limited to those that can be inferred from the statute or those set forth in the Receivership Order. He is not a custodian acting in place of the Board and, absent a court order affording him such status, he is not the entity authorized to file for bankruptcy.[4]

Finally, the Court finds additional support in case law cited by the parties. First, in a decision out of the Western District of Pennsylvania, *In re Monroe*, the bankruptcy court considered which entity—a shareholder or court-appointed receiver—had the authority to file for bankruptcy. *In re Monroe Heights Dev. Corp., Inc.*, No. 2017 WL 3701857 (Bankr. W.D. Pa. Aug. 22, 2017), dismissed, 573 B.R. 613 (Bankr. W.D. Pa. 2017). In making its decision, the *Monroe* court discussed two other relevant cases—each of which involved a debtor who filed bankruptcy after the appointment of a receiver under state law: *In re*

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[4] Mr. Branham asserted during oral argument that the Receiver in the instant case was not winding up the company's affairs, as would a receiver appointed under § 33-14-320, but was "marshaling and controlling the company to marshal the assets for the benefit of the creditors [under § 15-65-10]." *Tr. of June 6, 2023 Hrg.* 62:12-14, ECF No. 191. The Court acknowledges that the respective purposes of the two statutes are different. Nevertheless, the distinction drawn between the powers of a receiver and custodian in § 33-14-320 remains instructive and persuasive.

Corp. & Leisure Event Prods., Inc. (“*Leisure*”), 351 B.R. 724 (Bankr. D. Ariz. 2006), and *Sino Clean Energy Inc. by & through Baowen Ren v. Seiden*, 565 B.R. 677, 682 (D. Nev. 2017), *aff'd sub nom.* *In re Sino Clean Energy, Inc.* (“*Sino*”), 901 F.3d 1139 (9th Cir. 2018). The courts in *Leisure* and *Sino* reached essentially opposite results. The *Leisure* court held that federal bankruptcy law preempted state law and, thus, the corporate debtor and its officers and directors properly filed for bankruptcy. The *Sino* court, on the other hand, found that the former board members, who had been replaced by the receiver months prior, were without authority to file for bankruptcy. Like the court in *Monroe*, this Court does not view *Leisure* and *Sino* as irreconcilable. Both courts applied the same concepts and analysis—just to highly dissimilar facts.

In *Leisure*, the receiver was appointed at the request of a creditor and the bankruptcy was filed shortly after the receiver's appointment. In *Sino*, the receiver was appointed because of a dispute between shareholders and the board of directors, and the bankruptcy was filed by the former board nearly a year after the receiver's appointment, and more than seven months after the receiver had dismissed and replaced the board. The facts of the instant case more closely resemble those in *Leisure* and *Monroe*; specifically, this case also involves the appointment of a receiver at the request of a creditor and a bankruptcy filing shortly thereafter. And—as the *Monroe* court points out—*Leisure's* holding recognized “that an exception to the general rule of deferral to state law to determine who is authorized to file a voluntary petition for a corporation is necessary in cases involving a creditor-driven intracorporate dispute in order to vindicate federal bankruptcy law supremacy." In re *Monroe*, 2017 WL 3701857, at *14; *see also* *id.* at *16. This Court agrees.[5]

Like the courts in *Leisure, Sino,* and *Monroe*, this Court declines to establish a bright line rule for when this exception should apply. Instead, the applicable statutes and case law suggest that the decision is discretionary. *See, e.g.*, 11 U.S.C. § 543(d)(1) (affording bankruptcy courts discretionary powers to compel or not compel a receiver to turn over property to the estate); 11 U.S.C. § 305(a)(1) (affording bankruptcy courts discretionary powers to abstain or suspend proceedings if the interests of creditors and the debtor would be better served). The *Sino* court likewise observed that exceptions may apply in certain circumstances. *See* *Sino*, 565 B.R. at 682 n.26 ("Perhaps this case would be different if appellants could show that a receiver was biased or significantly delayed in appointing a new board, thus interfering with the corporations' ability to get into bankruptcy court in a timely matter.").

The case law demonstrates that the outcome of this discretionary decision depends in large part on

[5] In affirming the bankruptcy court's ruling in *Sino*, the Ninth Circuit likewise recognized the limited holding in *Leisure*, describing it to mean that "where a state court purports to enjoin a corporation from filing bankruptcy altogether, federal law preempts that injunction." *In re Sino Clean Energy, Inc.*, 901 F.3d 1139, 1142 (9th Cir. 2018). Because the company in *Sino* was "fully able to file for bankruptcy through valid filings made by its eligible board of directors," the holding in *Leisure* was "inapposite." *Id.* This lends further support to the conclusion that the rulings in *Leisure* and *Sino* are not wholly irreconcilable.

the point from which the court starts. The *Monroe* and *Sino* courts began with the presumption that the appointment of the receiver vested the authority to file bankruptcy exclusively in the receiver's hands, and a debtor could rebut that presumption. The *Leisure* court, however, "started with the view that those formerly in control of a corporation should still be able to file a bankruptcy for it ... leaving it up to the receiver to show why under the particular facts of the case that view was wrong and the case should not proceed." *In re Monroe*, 2017 WL 3701857, at *17 (discussing *Leisure*). For reasons previously discussed, this Court finds that the Board in the present case possessed the authority to file for bankruptcy under state law; therefore, an inquiry into whether an exception to the general rule applies is unnecessary. However, were this Court to undertake such an analysis, this Court's reasoning aligns more closely with that in *Leisure* and it would be inclined to start with the presumption outlined therein. Nevertheless, even starting with the converse presumption set forth in *Monroe* and *Sino*—and assuming that the Receiver in the instant case possessed the exclusive authority to file for bankruptcy under state law by virtue of his appointment—given the facts of the instant case, the Court finds that access to the bankruptcy system is of paramount importance and, thus, this case presents a worthy exception to the general rule that state law dictates who may file bankruptcy on behalf of a corporate debtor. In so finding, the Court considers the unique qualities of asbestos-related bankruptcies, Congressional intent in structuring a scheme under 11 U.S.C. § 524(g) to address such claims and the considerable interests of future, unidentified claimants.

III. CONCLUSION

Ultimately, this Court cannot conclude that the Receivership Order displaced the Board and/or divested it of its ability to file for bankruptcy under state law. Despite the Receiver's arguments to the contrary, he is unable to identify any South Carolina state law or language in the Receivership Order that provides for this relief.[6] Moreover, even assuming that

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[6] The cases on which the Receiver relies for the proposition that the appointment of a receiver automatically displaces a board are factually distinguishable and, in any event, are not controlling. In *Monroe*, the order appointing the receiver specifically "vested [the receiver] with the standing and all power and sole authority of ... the board of directors or manager of the Defendant[.]" *Order Appointing Receiver* ¶ 22, ECF No. 9-2 in Case No. 17-10176 (W.D. Pa. Bankr. Ct.). No such language appears in the Receivership Order in the instant case. In *Sino*, the board of directors had been dismissed by the receiver more than seven months before they filed for bankruptcy. Thus, "the individuals who filed the bankruptcy petition were not members of the board of directors of [the company] at the time they filed the petition, and they were not authorized to file a bankruptcy petition on behalf of [the company]." *In re Sino Clean Energy, Inc.*, 901 F.3d 1139, 1141 (9th Cir. 2018). Here, however, the Receiver had not dismissed the Board. Likewise, in *Oil & Gas Co. v. Duryee*, 9 F.3d 771, 772 (9th Cir. 1993), the state court issued a temporary restraining order that specifically enjoined the company's former president from filing for bankruptcy on its behalf, but he filed anyway. Here, the South Carolina Court issued no such injunction. The receiver cites to *Monmouth Inv. Co. v. Means*, 151 F. 159, 166 (8th Cir. 1906) in support of his argument that a receiver displaces a board. However, the quoted language has been paraphrased to afford it a meaning beyond its initial intent and, in any event, it is dicta. Finally, the Receiver's reliance on South Carolina case law characterizing the

appointment of the Receiver established him as the sole entity with authority to file bankruptcy under state law, this Court determines that the circumstances weigh in favor of preserving the constitutional right to bankruptcy and, thus, warrant an exception to the general rule that state law determines who has authority to file bankruptcy for a corporation. For the reasons set forth above, the Court denies the Receiver's Motion to Dismiss and the TCC's Joinder. The Court will enter an Order consistent with this Opinion.

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appointment of a receiver as a "practical displacement of the boards of directors," *Brookshire v. Farmers' All. Exch.*, 73 S.C. 131, 52 S.E. 867, 867 (1905), and indicating that a receiver "stands in the shoes of the debtor," *Carroll v. Cash Mills*, 125 S.C. 332, 118 S.E. 290, 297 (1923), is unavailing. As an initial matter, the cases cited predate the Bankruptcy Code. Regardless, there is no dispute that, upon appointment, a receiver takes on many of the rights, responsibilities, and duties of a board of directors. That fact, and the case law cited in the Receiver's briefs, do nothing to support the Receiver's contention that the exclusive right to file for bankruptcy is automatically included among those rights.

APPENDIX E

UNITED STATES COURT OF APPEALS,
THIRD CIRCUIT.

No. 24-2210, No. 24-2211, No. 25-1044

IN RE: WHITTAKER CLARK & DANIELS INC.,
DEBTOR

WHITTAKER CLARK & DANIELS INC; BRILLIANT NATIONAL SERVICES INC; L.A. TERMINALS INC.; SOCO WEST INC.

v.

BRENNTAG AG; BRENNTAG CANADA INC.; BRENNTAG GREAT LAKES LLC; BRENNTAG MID-SOUTH INC.; BRENNTAG NORTH AMERICA INC.; BRENNTAG NORTHEAST INC.; BRENNTAG PACIFIC INC.; BRENNTAG SOUTHEAST INC.; BRENNTAG SOUTHWEST INC.; BRENNTAG SPECIALTIES LLC (F/K/A BRENNTAG SPECIALTIES, INC., AND AS MINERAL AND PIGMENT SOLUTIONS, INC.); COASTAL CHEMICAL CO. LLC; MINERAL PIGMENT SOLUTIONS INC.; THOSE PARTIES LISTED ON APPENDIX A TO THE COMPLAINT; JOHN AND JANE DOES 1-1000;

OFFICIAL COMMITTEE OF TALC CLAIMANTS,
APPELLANT

(Amended Pursuant To Court Order of 4/7/25)

April 27, 2026

(District Court Nos. 312-3:23-bk-13575; 0312-3:23-cv-04151; 312-3-3:23-cv-04156)

Present: SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY, PHIPPS, FREEMAN, MONTGOMERY-REEVES, CHUNG, BOVE, MASCOTT, Circuit Judges and[1] AMBRO, Senior Judge

ORDER

The petition for panel rehearing filed by appellant**, Official Committee of Talc Claimants,** in the above-entitled cases having been submitted to the judges who participated in the decision of this Court, panel rehearing is **granted.** The Clerk is directed to file the amended opinions contemporaneously with this order. The amended majority opinion was revised throughout in response to the arguments set out in Committee's petition. The amended concurring opinions were revised to reflect formatting and internal cross-reference changes throughout. As the revisions to the amended majority opinion do not affect the disposition of the appeal, the judgments will remain as filed.

[1] Judge Ambro's vote is limited to panel rehearing.

The petition for rehearing en banc filed by appellant, **Official Committee of Talc Claimants**, in the above-entitled cases having been submitted to all available circuit judges of the circuit in regular active service, and no judge of the circuit in regular active service, asked for rehearing en banc, rehearing en banc is **denied.**

BY THE COURT,

s/ Thomas L. Ambro
Circuit Judge

Dated: April 27, 2026
cc: All Counsel of Record