No. 19-490

IN THE
Supreme Court of the United States

JONATHAN S. METCALF,
Petitioner,

v.

MICHAEL FITZGERALD, ET AL.,
Respondents.

On Petition for a Writ of Certiorari
to the Connecticut Supreme Court

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

BRUCE L. ELSTEIN
GOLDMAN, GRUDER &
WOODS, LLC
105 Technology Drive
Trumbull, CT 06611

ADAM G. UNIKOWSKY
Counsel of Record
JENNER & BLOCK LLP
1099 New York Ave., NW,
Suite 900
Washington, DC 20001
(202) 639-6000
aunikowsky@jenner.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

I. THE COURT SHOULD RESOLVE THE ACKNOWLEDGED CONFLICT OF AUTHORITY IN THIS CASE. 1

II. THE CONNECTICUT SUPREME COURT'S DECISION IS WRONG. 7

CONCLUSION 9

TABLE OF AUTHORITIES

CASES

Baker Botts L.L.P. v. ASARCO LLC, 135 S. Ct. 2158 (2015) 4

Bernhard-Thomas Building Systems, LLC v. Dunican, 944 A.2d 329 (Conn. 2008) 6

Butner v. United States, 440 U.S. 48 (1979) 8

Chicago Title & Trust Co. v. Forty-One Thirty-Six Wilcox Building Corp., 302 U.S. 120 (1937) 8

Citgo Asphalt Refining Co. v. Frescati Shipping Co., Ltd., 139 S. Ct. 1599 (2019) 4

Clark v. Rameker, 573 U.S. 122 (2014) 4

Graber v. Fuqua, 279 S.W.3d 608 (Tex. 2009) .. 1, 5, 10

Harris v. Viegelahn, 135 S. Ct. 1829 (2015) 4

Husky International Electronics, Inc. v. Ritz, 136 S. Ct. 1581 (2016) 4

Intel Corp. Investment Policy Committee v. Sulyma, 139 S. Ct. 2692 (2019) 4

International Shoe Co. v. Pinkus, 278 U.S. 261 (1929) 7, 8

Mission Product Holdings, Inc. v. Tempnology, LLC, 139 S. Ct. 1652 (2019) 4

MSR Exploration, Ltd. v. Meridian Oil, Inc., 74 F.3d 910 (9th Cir. 1996) 2

Paradise Hotel Corp. v. Bank of Nova Scotia, 842 F.2d 47 (3d Cir. 1988) 3

PNH, Inc. v. Alfa Laval Flow, Inc., 958 N.E.2d 120 (Ohio 2011)....................................2, 3, 5

Retirement Plans Committee of IBM v. Jander, 139 S. Ct. 2667 (2019) 4

Rotkiske v. Klemm, 139 S. Ct. 1259 (2019) 4

Stellwagen v. Clum, 245 U.S. 605 (1918) 8

Stone Crushed Partnership v. Kassab, Archbold, Jackson & O'Brien, 908 A.2d 875 (Pa. 2006)...2, 5

Taggart v. Lorenzen, 139 S. Ct. 1795 (2019)................4

U.S. Express Lines, Ltd. v. Higgins, 281 F.3d 383 (3d Cir. 2002) 3

STATUTES

11 U.S.C. § 105(a)..9

OTHER AUTHORITIES

S. Ct. R. 10(b) 6

Respondents concede that there is a split of authority on the question presented: whether the Bankruptcy Code preempts state-law vexatious litigation claims arising from adversary actions in bankruptcy proceedings. Respondents do not dispute that this case is an ideal vehicle to resolve that split.

Respondents' primary argument against certiorari is that there is only a 3-1 split, rather than a 4-2 split as Petitioner contends. Even if Respondents are correct, a 3-1 split is more than sufficient to justify granting certiorari. This Court routinely grants certiorari in cases presenting 1-1 and 2-1 splits, especially in the bankruptcy context. Moreover, there is no reason to await additional percolation in the lower courts: courts on both sides of the split have recognized the split, analyzed the arguments on both sides, and picked a side. The arguments on both sides of the split have been aired, and this Court should grant review to resolve it.

Respondents also contend that the decision below is correct. But they fail to show that the bare grant of authority to bankruptcy judges to regulate conduct in their courtrooms is sufficient to preempt the traditional common-law tort of vexatious litigation. The petition should be granted, and the judgment should be reversed.

I. THE COURT SHOULD RESOLVE THE ACKNOWLEDGED CONFLICT OF AUTHORITY IN THIS CASE.

Respondents concede that the decision below conflicts with *Graber v. Fuqua*, 279 S.W.3d 608 (Tex.

2009). BIO 10. Respondents further concede that the decision below reaches the same conclusion as *MSR Exploration, Ltd. v. Meridian Oil, Inc.*, 74 F.3d 910 (9th Cir. 1996), and *Stone Crushed Partnership v. Kassab, Archbold, Jackson & O'Brien*, 908 A.2d 875 (Pa. 2006). BIO 11. Thus, Respondents concede that there is, at a minimum, a 3-1 split on the question presented, with the Connecticut Supreme Court, Ninth Circuit, and Pennsylvania Supreme Court on one side and the Texas Supreme Court on the other side.

Contrary to Respondents' claim, the split is 4-2, not 3-1. The decision below reaches the same conclusion as *PNH, Inc. v. Alfa Laval Flow, Inc.*, 958 N.E.2d 120 (Ohio 2011). Respondents claim that *PNH* is distinguishable because both parties to the suit were creditors, BIO 10-11, but that fact did not factor into the Ohio Supreme Court's decision at all: both the Ohio Supreme Court's rule and its rationale plainly apply to a vexatious litigation claim brought by a debtor. The Ohio Supreme Court concluded that "[t]he United States Bankruptcy Code preempts state-law causes of action for misconduct committed by a litigant during a bankruptcy court proceeding." 958 N.E.2d at 127. It reasoned that "Congress has established a comprehensive legislative scheme intended to promote the uniformity of bankruptcy law, which provides for federal remedies to deter the abuse of bankruptcy proceedings." *Id.* at 126-27. "Permitting additional state-law claims for misconduct occurring during a bankruptcy proceeding would, in our view, impermissibly disrupt the uniformity of bankruptcy law by establishing separate remedies for Ohio litigants in a

field of law that Congress intended to occupy exclusively." *Id.* at 127. The court's analysis applies equally to vexatious litigation claims brought by debtors.

The decision below also conflicts with *U.S. Express Lines, Ltd. v. Higgins*, 281 F.3d 383 (3d Cir. 2002). In *Higgins*, the court held that "the Federal Rules of Civil Procedure do not preempt claims for abuse of process and similar torts providing relief for misconduct in federal litigation." *Id.* at 393. The court observed that "[d]espite the broad scope of remedies available in the [Bankruptcy] Code and the general exclusivity of the federal courts in bankruptcy, we have held that a state claim for malicious abuse of process was not preempted." *Id.* The court cited *Paradise Hotel Corp. v. Bank of Nova Scotia*, 842 F.2d 47 (3d Cir. 1988), in which the court held that a debtor did not waive a bad-faith claim against a creditor by failing to raise it in the bankruptcy proceeding. 842 F.2d at 51-52. Respondents characterize the statements in *Higgins* as dicta, BIO 9, but *Higgins* relied on *Paradise Hotel*'s *holding* that the state-law vexatious litigation claim could proceed. As for *Paradise Hotel*, Respondents deem it to be non-binding because it addressed involuntary petitions (as opposed to adversary proceedings) and did not expressly address federal preemption. BIO 9-10. But they do not explain how their proposed blanket preemption rule can be reconciled with *Paradise Hotel*'s holding that the state-law claim at issue could proceed.

Even accepting Respondents' premise that the split is 3-1 rather than 4-2, however, the Court should grant

certiorari. Respondents assert that the Court should deny review because "the issue arises infrequently." BIO 12. But the Court routinely grants certiorari in cases presenting 1-1 and 2-1 splits; a 3-1 split is more than enough to warrant this Court's review. For instance, just this Term, this Court has granted certiorari to resolve splits in *Rotkiske v. Klemm*, 139 S. Ct. 1259 (2019) (2-1 split); *Citgo Asphalt Refining Co. v. Frescati Shipping Co., Ltd.*, 139 S. Ct. 1599 (2019) (2-1 split); *Retirement Plans Committee of IBM v. Jander*, 139 S. Ct. 2667 (2019) (2-1 split); and *Intel Corp. Investment Policy Committee v. Sulyma*, 139 S. Ct. 2692 (2019) (1-1 split). In the bankruptcy context, it is especially common for this Court to grant certiorari to resolve 1-1 and 2-1 splits. *See, e.g.*, *Taggart v. Lorenzen*, 139 S. Ct. 1795 (2019) (2-1 split); *Mission Product Holdings, Inc. v. Tempnology, LLC*, 139 S. Ct. 1652 (2019) (2-1 split); *Husky Int'l Elecs., Inc. v. Ritz*, 136 S. Ct. 1581 (2016) (2-1 split); *Baker Botts L.L.P. v. ASARCO LLC*, 135 S. Ct. 2158, 2163 (2015) (1-1 split); *Harris v. Viegelahn*, 135 S. Ct. 1829, 1836 (2015) (1-1 split); *Clark v. Rameker*, 573 U.S. 122, 126-27 (2014) (1-1 split). The 3-1 split in this case is no less cert-worthy. And, as the Connecticut Supreme Court catalogued, this issue arises constantly in lower courts. Pet. App. 13a-15a (collecting cases). Thus, the issue does not "arise[] infrequently." BIO 12.

Moreover, this is not a split that would benefit from additional percolation. Courts on both sides of the split have identified the split and grappled with the arguments on both sides. *See* Pet. App. 29a ("We disagree with the minority approach to the preemption

analysis"); *PNH*, 958 N.E.2d at 125 (acknowledging the "split of authority regarding whether the Bankruptcy Code preempts state-law causes of action that allow the recovery of damages for a litigant's abuse of a bankruptcy court proceeding"); *Stone Crushed*, 908 A.2d at 881 (acknowledging that "courts have not uniformly determined whether the Bankruptcy Code preempts state law concerning a state action for abuse of process or wrongful use of civil procedure"); *Graber*, 279 S.W.3d at 620 n.13 (stating that "[w]hile some jurisdictions hold that bankruptcy statutes preempt malicious prosecution claims predicated on the bringing of an adversary proceeding, the opinions of those jurisdictions do not bind us; nor do the arguments that they have accepted persuade us" (internal citations omitted)). The split is now mature, and additional percolation would serve no purpose.

Respondents offer no sound reason to defer resolution of this split. Respondents do not dispute that this case is a perfect vehicle. Pet. 15-16. Although Respondents make several assertions regarding the facts of this case, BIO 1-5, those assertions have never been tested in court; it is undisputed that the decision below turned entirely on the federal preemption question that has divided lower courts. Nor do Respondents dispute Petitioner's showing that the split can lead to forum-shopping. Pet. 15.

Respondents observe that most of the cases in the split are state supreme court cases, rather than federal court of appeals cases. BIO 11, 12. That is not a surprise: this case concerns the availability of a state-law cause of action, so one would expect that the

question would more commonly arise in state court. In any event, this Court's rules make clear that the Court resolves splits of authority on questions of federal law arising from state supreme courts, not only federal appellate courts. *See* S. Ct. R. 10(b) (Supreme Court may grant certiorari when "a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals").

Respondents also assert that "the question of state remedies lacks practical importance because of the availability of federal remedies in the Bankruptcy Code." BIO 12. But the practical importance of the question arises because—as Respondents themselves concede—"some state laws may provide additional remedies unavailable under the Bankruptcy Code." BIO 13. The Connecticut Supreme Court similarly "agree[d] that the penalties and damages available under a successful state law claim for vexatious litigation are potentially more extensive than those available under the Bankruptcy Code." Pet. App. 19a. For instance, state-law plaintiffs may obtain multiple damage awards. *Id.* State-law plaintiffs can also obtain damages to compensate them for injuries that linger after the bankruptcy proceeding concludes, such as reputational harms. *See Bernhard-Thomas Bldg. Sys., LLC v. Dunican*, 944 A.2d 329, 334 (Conn. 2008) (noting that one purpose of the vexatious litigation cause of action is "to compensate a wronged individual for damage to his reputation" (quotation marks omitted)). Indeed, those are exactly the damages Petitioner seeks

here, Pet. App. 3a—underscoring that this case is a perfect vehicle.

The Court should grant review to resolve this acknowledged and mature split of authority on a recurring question of federal bankruptcy law.

II. THE CONNECTICUT SUPREME COURT'S DECISION IS WRONG.

The Connecticut Supreme Court's decision is also wrong on the merits. The Bankruptcy Code does not preempt vexatious litigation claims. The fact that a bankruptcy court has the general authority to sanction litigants does not implicitly establish that state-law remedies are preempted. Pet. 16-19.

Respondents rely (BIO 15) on *International Shoe Co. v. Pinkus*, 278 U.S. 261 (1929), for the proposition that in the field of bankruptcy, "[t]he national purpose to establish uniformity necessarily excludes state regulation." *Id.* at 265. But the facts of *International Shoe* are a far cry from this case. In *International Shoe*, the state law at issue was an "insolvency law." *Id.* at 264. "It provides for surrender by insolvent of all his unexempt property to be liquidated by a trustee for the payment of debts under the direction of the court." *Id.* (citation omitted). "It classifies creditors, prescribes the order of payment of their claims and gives preference to those fully discharging the debtor in consideration of pro rata distribution." *Id.* (citation omitted). Not surprisingly, this Court held that the statute was preempted: "Congress did not intend to give insolvent debtors seeking discharge, or their creditors seeking to collect claims, choice between the

relief provided by the Bankruptcy Act and that specified in state insolvency laws." *Id.* at 265.

International Shoe does not hold that the Bankruptcy Code preempts all state laws touching on bankruptcy. To the contrary, it merely reflects the "settled" proposition that "a state may not pass an insolvency law which provides for a discharge of the debtor from his obligations." *Stellwagen v. Clum*, 245 U.S. 605, 615 (1918). And it is clear that Connecticut's vexatious litigation laws are not "insolvency statutes." They merely provide redress for misconduct that occurs in any type of litigation—including bankruptcy litigation.

For other types of laws, this Court has made clear that "state laws are … suspended only to the extent of actual conflict with the system provided by the Bankruptcy Act of Congress." *Id.* at 613; *see Butner v. United States*, 440 U.S. 48, 54 n.9 (1979) (same); *Chicago Title & Tr. Co. v. Forty-One Thirty-Six Wilcox Bldg. Corp.*, 302 U.S. 120, 127 (1937) (same). Here, beyond their broad assertion of field preemption, Respondents are unable to identify any way in which Connecticut's vexatious litigation laws actually conflict with the Bankruptcy Code. Respondents claim that "[n]o longer would federal bankruptcy courts determine whether a creditor's claim is justified or frivolous: state courts would do so instead, under a patchwork of standards." BIO 16. Not so. Federal courts would have the same authority to sanction creditors as they always had. State courts could also hear vexatious litigation claims—but only to the extent they apply a legal standard consistent with the federal

legal standard for frivolousness. Pet. 17-18. Nothing about that regime undermines the authority of bankruptcy courts.

Respondents also assert that Congress enacted "a comprehensive system of remedies that displaces state law." BIO 18; *see* BIO 16-18. But with respect to adversary proceedings in bankruptcy, it did not. Bankruptcy courts have the general power to issue sanctions under Rule 9011, and the general power to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a). But these provisions do not reflect the type of reticulated scheme that warrants preemption. Indeed, federal courts outside of bankruptcy have the same broad authority to sanction litigants, *see Graber*, 279 S.W.3d at 613-15, and Respondents do not suggest that federal law generally preempts vexatious litigation claims arising out of federal court proceedings. Respondents point to provisions of the bankruptcy code authorizing remedies in other contexts, such as violations of the automatic stay, BIO 16-17, but those statutes reveal that Congress enacted targeted remedies to address specific problems; they do not indicate an implicit intent to foreclose all state-law remedies in all contexts.

The Court should hold that the Bankruptcy Code does not preempt vexatious litigation claims arising from adversary proceedings in bankruptcy.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ADAM G. UNIKOWSKY
Counsel of Record
JENNER & BLOCK LLP
1099 New York Ave., NW,
Suite 900
Washington, DC 20001
(202) 639-6000
aunikowsky@jenner.com

BRUCE L. ELSTEIN
GOLDMAN, GRUDER & WOODS, LLC
105 Technology Drive
Trumbull, CT 06611