No. 05-1429

In The Supreme Court of the United States

TRAVELERS CASUALTY & SURETY COMPANY OF AMERICA,
Petitioner,

v.

PACIFIC GAS AND ELECTRIC COMPANY,
Respondent.

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

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF *CERTIORARI*

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QUESTIONS PRESENTED FOR REVIEW

1. A surety has issued bonds to assure a company's performance of certain obligations. The company files for bankruptcy, but has not defaulted and has embraced the underlying obligations. Even though the surety's position is unimpaired, it intervenes in the bankruptcy case to take steps that have no impact on its legal rights. Is it proper to deny the surety attorneys' fees under a contract that calls for the payment of fees in connection with "enforcing" its contractual rights?

2. The surety files a claim against the bankruptcy debtor, but then withdraws the claim, stipulating it was meritless. The surety further participates in the bankruptcy proceeding to enforce disclosure obligations that are purely a matter of bankruptcy law. Although the surety did not prevail, and its intervention did not secure any right that it would not have had by operation of law, the surety nevertheless seeks attorneys' fees. Was the Court of Appeals correct in rejecting the claim for attorneys' fees?

CORPORATE DISCLOSURE STATEMENT

Respondent Pacific Gas and Electric Company ("PG&E") is wholly owned by PG&E Corporation, which is a publicly traded company. No parent or publicly held company owns 10% or more of PG&E Corporation's stock.

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

BLANK PAGE

INTRODUCTION[1]

Petitioner Travelers Casualty & Surety Company of America ("Travelers") gratuitously intervened in the bankruptcy proceeding of Respondent Pacific Gas and Electric Company ("PG&E"). Although the bankruptcy did nothing to impair Travelers' position under its contracts with PG&E, Travelers hired a team of lawyers to file and defend a claim. It then stipulated the claim was meritless. Next, Travelers' legal team negotiated changes to various bankruptcy documents, even though (as the courts below all held) those changes did nothing to enhance or protect the rights Travelers already enjoyed by operation of law.

Travelers then presented PG&E with a bill for its attorneys' fees. It invoked a contractual provision requiring PG&E to reimburse any legal expenses Travelers might incur "enforcing" its contractual rights.

The Bankruptcy Court, District Court and Court of Appeals all agreed that Travelers could not recover its legal fees. So Travelers turns to this Court for a ruling that an *unimpaired* creditor who *unsuccessfully* intervenes in a bankruptcy proceeding and presses arguments that arise only under bankruptcy law should be permitted to siphon off funds from other creditors to pay its lawyers.

No court—at any level—has ever awarded attorneys' fees in this rather unique context. Travelers incorrectly argues that there is a "longstanding, widespread, [and] entrenched" conflict among the circuits on other applications of the rule the Court of Appeals invoked in reaching its conclusion, citing nine circuits that have supposedly lined up on either side of the line. Pet. 3. Never mind that not a

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[1]The Petition for Writ of Certiorari is cited as "Pet.," and the Appendix to the Petition is cited as "Pet. App." The Excerpts of Record and the Supplemental Excerpts of Record before the Court of Appeals are cited as "ER" and "SER," respectively. PG&E's Request for Judicial Notice filed with the Court of Appeals will be cited as "RJN."

single one of those nine circuits suggests that there is a split in authority on the rules to be applied to creditors seeking attorneys' fees. The truth is the cases are not in conflict on the general rule. The worst that can be said is that every once in a while circuits might reach different conclusions about fact-bound applications of the rule to certain situations not presented here.

Even if there were a conflict on the general rule, and it were squarely presented here, this case would still not be cert-worthy. First, the rule—even in its broadest application—governs a relatively small universe of creditors, and, even for them, the stakes are typically so low that litigation over these sorts of claims is uncommon. Moreover, this case is a poor vehicle for deciding the legal issue Travelers presents. En route to deciding that issue, this Court would have to grapple with a knotty question of contract interpretation that has no salience to anyone but the parties here. Beyond that, the rule the Court of Appeals applied is correct.

STATEMENT OF THE CASE

A. PG&E Files For Bankruptcy But Does Not Trigger Any Liability For Travelers.

PG&E filed a voluntary Chapter 11 bankruptcy petition in 2001. PG&E continued to operate and manage its business as a so-called "debtor in possession." *See* 11 U.S.C. §§1107(a), 1108. Contemporaneously with the petition, PG&E filed an "Emergency Motion" seeking permission to continue honoring its workers' compensation obligations. That very day, the Bankruptcy Court approved the request. Pet. App. 5a; ER 2. There is no dispute that PG&E has satisfied its workers' compensation obligations, and has never suggested that it had any intention of defaulting on them. Pet. App. 5a.

This is a critical fact from the perspective of Travelers' financial exposure. Travelers had issued surety bonds to third parties assuring PG&E's performance of its obligation to pay workers' compensation benefits. Pet. App. 5a. In a series of indemnification agreements, PG&E, in turn, had agreed to indemnify Travelers in the event Travelers is ever called upon to cover a defaulted payment under the surety bonds. Pet. App. 5a; ER 5-6, 168-70. But, as the courts below all recognized and Travelers stipulated, "Travelers has not had to assume any liability pursuant to the bonds as a result of default" because "PG&E has not defaulted on its workers' compensation obligations." Pet. App. 5a; *see* Pet. App. 2a; ER 170. In other words, the bankruptcy filing did not saddle Travelers with any burdens, and did not impair Travelers' financial or legal position in any way. Pet. App. 2a.

B. Travelers Files A Claim, But Stipulates It Is Meritless.

Nevertheless, Travelers filed a claim against PG&E in the bankruptcy proceeding. ER 3. This claim (which the parties have referred to as the "Original Claim") did not assert that PG&E defaulted, nor that PG&E currently owed Travelers any money. Pet. App. 5a. Rather, the claim was based upon the contingency that PG&E might some day default on its workers' compensation obligations, and in the event it did, Travelers could be liable for the payments. *Id.* If Travelers ever did make those payments, it would have two rights. First, it would have the right to turn to PG&E and demand reimbursement for the outlay. *Id.* Second, it would have a right of subrogation—the right to stand in the shoes of any injured employees whose payments it covered and assert their claims. *Id.* Travelers asserted nothing but these contingent reimbursement and subrogation rights.

PG&E objected to the claim, asserting an ironclad defense: "[C]ontingent" claims of this sort have no place in a bankruptcy proceeding; in bankruptcy parlance, they are "disallowed." *See* 11 U.S.C. §502(e)(1)(B) ("the court shall disallow any claim . . . to the extent that . . . such claim . . . is contingent . . ."); *id.* §509. Only reimbursement claims that have actually materialized, by virtue of a default of the underlying obligations, are allowable. Otherwise, the debtor would be liable to the primary obligee (here, the injured employee) and the surety (Travelers) for the same debt. Similarly, prospective or contingent subrogation rights are not valid claims in a bankruptcy proceeding. *See* 11 U.S.C. §509(a).

Travelers' legal team wrote a brief arguing that its claim was allowable. ER 112. But before the Bankruptcy Court could resolve the issue, Travelers conceded otherwise. It entered into a stipulation that the claim was disallowed because "Travelers has not been called upon to satisfy any of the obligations assured by, or to make any payment with respect to, any of its Surety Bonds or the Indemnity Agreements." ER 170-71. Based on this stipulation, the Bankruptcy Court disallowed the claim. ER 174.

The parties also stipulated that "[n]othing [in the stipulation] shall prejudice or impair Travelers' subrogation rights under applicable law, or the Debtor's right to object to Travelers' asserted subrogation rights." ER 171. As the Bankruptcy Court observed, this provision did not reserve for either party a benefit that it would not have had as a matter of right without regard to this term. ER 319-20.[2]

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[2]The same can be said of another term of the stipulation, which preserved Travelers' statutory right to reconsideration of the disallowance of its claims under certain circumstances (*see* 11 U.S.C. §502(j)) and PG&E's right to oppose any such reconsideration. *See* ER 171.

The stipulation also acknowledged that Travelers was free to assert a claim for reimbursement of the attorneys' fees it incurred in connection with pursuing the claim it withdrew. ER 172-73. If valid, this claim for attorneys' fees would be treated like any other unsecured debt. ER 172. That was an empty assurance, for the parties also agreed that PG&E would be free to object to any such claim. *Id.*

C. The Reorganization Plans All Preserve PG&E's Workers' Compensation Obligations.

In any Chapter 11 bankruptcy, the documents that shape subsequent duties and obligations are the plan of reorganization (as confirmed by the bankruptcy court) and the related disclosure statement. There is no dispute that every iteration of PG&E's plan and disclosure statement—and, indeed, every iteration of all the competing plans proposed by creditors—undertook that PG&E would continue to comply fully with all of its workers' compensation obligations. SER 2, 4-5. Nor did any proposed plan or disclosure statement purport to limit or modify any of PG&E's obligations to Travelers or any of Travelers' subrogation rights. Travelers has never asserted its reimbursement or subrogation rights were in jeopardy. *See* SER 7-12.

Nevertheless, Travelers demanded additional assurances. The parties negotiated what is often called "comfort language"—unnecessary, but innocuous, language that soothes the creditor without conveying any real legal benefit. First, PG&E added language underscoring what the plan already said, that PG&E would continue to honor its workers' compensation obligations. *See* ER 87, 93. Second, PG&E added language to confirm what was already true as a matter of law, that nothing in the plan would affect the subrogation rights of any surety of workers' compensation claims. ER 87-88, 91-94. Travelers has never asserted that,

absent this language, the plan would have purported to cut off Travelers' potential reimbursement and subrogation rights. ER 318.

Whenever that comfort language was inserted into any iteration of the plan or disclosure statement, it was coupled with a companion clause reserving PG&E's converse right to object to asserted subrogation rights. *See, e.g.*, ER 87 ("Nothing herein shall affect . . . the rights of the Debtor to object, pursuant to the Bankruptcy Code, to the existence of any such subrogation rights"); ER 88, 91, 93. While Travelers now asserts that PG&E added this language later, and thereby unilaterally modified the language the two had negotiated (*see* Pet. 8), the truth is that the very same language was contained in every iteration of the plan Travelers cites. ER 86-89, 90-94.

The final plan that the Bankruptcy Court ultimately confirmed, in 2003, included both PG&E's undertaking to continue honoring its workers' compensation obligations and the reciprocal language preserving both Travelers' subrogation rights and PG&E's right to oppose subrogation claims. *See* RJN Ex. 1.

One facet of the plan made it a rarity in the bankruptcy world: The final plan, like every proposed plan before it, provided for the full payment of all allowed claims, with interest. So this was one of the extraordinarily rare bankruptcies in which every creditor was paid 100 cents on the dollar (and then some).

D. Travelers Seeks Attorneys' Fees For Its Meritless Claim And Superfluous Comfort Provisions.

Shortly after signing the stipulation, Travelers proceeded to file an Amended Claim, demanding that PG&E cover the legal fees and other expenses it incurred in connection with its interventions in the bankruptcy proceeding. ER 175. The claim was not premised on any

right under the Bankruptcy Code, which would never provide attorneys' fees under these circumstances. *See Renfrow v. Draper*, 232 F.3d 688, 693 (9th Cir. 2000). Rather, Travelers invoked a provision of its indemnity agreements with PG&E. The agreements specified that PG&E would be obliged to pay attorneys' fees incurred in "recovering or attempting to recover any salvage in connection [with the surety bonds] or enforcing by litigation or otherwise any of the [indemnification] agreements." ER 41, 45; *see* Pet. 5 (quoting the provision more fully).

Travelers insisted that this provision gave it a right to reimbursement of the attorneys' fees it incurred to press and defend the Original Claim, which it abandoned by stipulation recognizing it was meritless. ER 170-72. Travelers also asserted that the contract obliged PG&E to pay the fees Travelers incurred agitating for comfort language, and quibbling over PG&E's reservation of the right to object to any subrogation claim. ER 277-79. Travelers insisted that PG&E unilaterally inserted the latter reservation, even though the very same language appeared in both the stipulation and every iteration of the plan. ER 278. The legal bill came to $167,000, nearly half of which Travelers attributed to litigating the concededly meritless claim. ER 186, 277-295.

PG&E objected to Travelers' attorneys' fees claim on several grounds, two of which are especially relevant here. The first was an issue of contract interpretation: Travelers had no right to attorneys' fees under the indemnity agreement, because its contingent claim and subsequent negotiations were not directed at "enforcing . . . any of the [indemnification] agreements." ER 45; *see* Pet. 5. Second, as a matter of bankruptcy law, recovery of attorneys' fees incurred with respect to purely bankruptcy law matters—as opposed to state law matters such as the terms, enforceability or breach of a contract—is not permissible.

When all was said and done, Travelers' intervention was the bankruptcy equivalent of a visit from Goldilocks: unwelcome, disruptive, costly and entirely gainless for all involved.

E. The Bankruptcy Court And District Court Reject Travelers' Demand For Attorneys' Fees.

The Bankruptcy Court disallowed the claim for attorneys' fees, merging elements of both of PG&E's arguments. Pet. App. 20a-21a, 23a-25a. The main focus was a long line of Ninth Circuit decisions—most notably, *Fobian v. Western Farm Credit Bank (In re Fobian)*, 951 F.2d 1149, 1153 (9th Cir. 1991)—holding that a creditor may not collect attorneys' fees incurred solely in litigating issues of federal bankruptcy law, as opposed to protecting rights under state law. Applying the *Fobian* rule, the court concluded that none of the attorneys' fees Travelers sought were incurred in protecting Travelers' state law rights; all were incurred in litigating issues relevant only to federal bankruptcy law. Pet. App. 24a; ER 321, 328, 371-74. The Bankruptcy Court also went out of its way to observe that Travelers had no basis for filing the Original Claim in the first place, noting that Travelers' capitulation spoke volumes about the merits of that claim. ER 328.

The Bankruptcy Court also touched upon the issue of contract interpretation. It found that neither PG&E's objections to the Original Claim nor PG&E's reorganization plans did anything to threaten Travelers' rights (*see* ER 328, 339, 351, 371-74), which is tantamount to a conclusion that Travelers was not thereby "enforcing" its rights under the indemnification agreements. Beyond that, the Bankruptcy Court observed that Travelers had no right "under any theory" to assert a claim against PG&E for attorneys' fees incurred in defending the meritless Original Claim. ER 321; *see* ER 328.

On appeal to the District Court, PG&E once again asserted both grounds for affirmance. Pet. App. 4a; ER 398. The District Court affirmed. Pet. App. 19a. While the District Court also focused mainly on the ground that creditors may not recover attorneys' fees incurred with respect to "matters [that] involve exclusively bankruptcy proceedings" (Pet. App. 17a), it too made findings that can only be understood as supporting PG&E's contract interpretation argument. The District Court noted, for example, that "the measures employed by Travelers cannot be considered 'an action on the contract[s]' or bonds." *Id.*

F. The Court Of Appeals Rejects The Attorneys' Fee Claim Based On Uncommon And Especially Unsympathetic Facts.

The Court of Appeals affirmed in an unpublished memorandum opinion with no precedential value. Pet. App. 1a n.*. The Court of Appeals echoed the analysis of the lower courts, emphasizing two points that were especially relevant to its holding. First, "[n]othing in the federal bankruptcy proceedings required Travelers to satisfy any of the obligations assured by, or to make any payments with respect to, any of its surety bonds or indemnity agreement with [PG&E]." Pet. App. 2a. Second, "Travelers did not prevail on any claim it asserted in the bankruptcy proceedings." *Id.* The Court of Appeals went out of its way to underscore the absurdity of awarding attorneys' fees when these two factual elements converged:

> [I]f unimpaired, non-prevailing creditors were authorized to obtain an attorney fee award in bankruptcy for inquiring about the status of unimpaired inchoate and contingent claims, the system would likely be overwhelmed by fee applications, with no funds available for

> disbursement to impaired creditors or debtor reorganization. (Pet. App. 3a)

Like the Bankruptcy Court and the District Court before it, the Court of Appeals, too, made observations that bore on PG&E's alternative contractual ground. It pointed out, for example, that "Travelers' objection to the reorganization plan . . . claimed only that the debtor failed to provide 'adequate information' about the reorganization plan" (Pet. App. 2a), which is a far cry from an effort to "enforc[e]" a contractual right.

REASONS TO DENY THE PETITION

This case is about an esoteric rule governing the award of attorneys' fees in bankruptcy cases in a limited set of circumstances. Specifically, this case is about one application of the rule to a rare scenario: where the creditor insinuates itself into a bankruptcy proceeding even though the debtor has not defaulted on the relevant obligations, and the creditor fails to secure itself any rights that it did not already have by operation of law. This Court should deny review for four reasons.

First, contrary to Travelers' insistence, there is no circuit conflict. On the narrow issue presented here, the Court of Appeals reached a conclusion that is not in conflict with any opinion from any court at any level. Travelers does not cite a single case that allows an unimpaired creditor like Travelers to recover attorneys' fees for pressing unsuccessful demands. *See* Part I(A), *infra*. Even on the slightly broader issue—the legitimacy of the Ninth Circuit's *Fobian* rule—there is no conflict. While Travelers asserts that nine different circuits are locked in a conflict that is "longstanding, widespread, [and] entrenched" (Pet. 3), none of the cases that supposedly illustrate the split mentions anything about a split or criticizes a sister circuit's holding with respect to the *Fobian* principles. Instead, Travelers

manufactures the circuit split by: (1) misstating the Ninth Circuit's rule; and (2) asserting that courts have "reject[ed]" the *Fobian* rule simply because they find it inapplicable to the facts before them. Pet. 2; *see* Part I(B), *infra*.

Second, as abstruse questions of bankruptcy law go, this one is about as unimportant as can be. The *Fobian* rule applies only in the narrow set of circumstances where a party presses issues that are purely a matter of federal bankruptcy law. Even within those circumstances, the rule has little impact on most creditors, whether because some are entitled to attorneys' fees by statute anyway or because fee awards are typically discounted drastically. *See* Part II, *infra*.

Third, fairly included within the question presented is a thorny issue of contract interpretation that has no import to anyone other than the parties in this case. PG&E has consistently argued, at every level, that it does not matter whether the *Fobian* rule applies to the peculiar circumstances presented here, because Travelers is not, in any event, entitled to fees under the indemnity agreements. If this Court grants certiorari, it will be treated to extensive briefing and argument on this inconsequential contract issue, and may well never reach the question Travelers is pressing. *See* Part III, *infra*.

Finally, the Court of Appeals was right, and its ruling is consistent with this Court's decisions. The various courts that follow the *Fobian* rule are not creating federal common law; they are interpreting the statute Congress wrote. *See* Part IV, *infra*.

I.

THIS CASE DOES NOT PRESENT A CIRCUIT CONFLICT EITHER ON THE NARROW ISSUE ACTUALLY DECIDED OR ON THE SLIGHTLY BROADER QUESTION TRAVELERS WISHES TO PRESENT.

Travelers urges this Court to take this case as a vehicle for addressing the validity of the *Fobian* rule, which it renders (inaccurately, as we shall see) as: "whether a litigant may recover attorneys' fees under a contract or state statute where the issues litigated involve matters of federal bankruptcy law." Pet. i. Travelers' primary basis for seeking certiorari is that nine circuits have split, 5-4, on this question. This position is doubly wrong. First, the question presented on the specific—seemingly unique—facts of this case is far narrower, and not subject to a split in authority at any level. Second, even on the slightly broader (though still narrow) question of the *Fobian* rule's validity, the circuits are not in conflict.

A. There Is No Circuit Split—Or Even Contrary Authority—On The Narrow Question Presented On These Facts.

While citing and discussing precedents decided on broader grounds, the Court of Appeals recognized that this case presents an exceedingly narrow version of the question it had confronted in past cases. As the Court of Appeals understood, the issue presented on the peculiar facts of this case is whether "*unimpaired, non-prevailing* creditors were authorized to obtain an attorney fee award in bankruptcy for inquiring about the status of *unimpaired inchoate and contingent claims*." Pet. App. 3a (emphasis added). It was relevant to the Court of Appeals—as undoubtedly it would be to this Court—that "[n]othing in the federal bankruptcy

proceedings required Travelers to satisfy any of the obligations assured by, or to make any payments with respect to, any of its surety bonds or indemnity agreement with [PG&E]," and that "Travelers did not prevail on any claim it asserted in the bankruptcy proceedings." Pet. App. 2a.

Travelers does not cite a single opinion from another circuit—or, indeed, from any court at any level—that awards attorneys' fees on these facts. There is no reported decision holding that a *non-prevailing* party is entitled to recover attorneys' fees incurred in litigating *purely bankruptcy matters* (rather than state law rights), where recovery is sought from a debtor *who has not defaulted* on any obligations owed to the creditor and the intervention was otherwise unnecessary. The most analogous case is from the Sixth Circuit, which circuit Travelers counts on the anti-*Fobian* side of the ledger, and that case, too, rejects the attorneys' fees claim. *See Capitol Indus., Inc. v. Regal Cinemas, Inc. (In re Regal Cinemas, Inc.)*, 393 F.3d 647 (6th Cir. 2004). Like this case—and unlike every other case Travelers cites as evidence of a conflict—*Regal Cinemas* involved a creditor who had no allowable claim, but nevertheless sought attorneys' fees, under a contract, for the effort it expended pursuing claims that were disallowed. *Id.* at 651. The Sixth Circuit rejected the claim for fees, concluding that the Code does not allow naked fees to be recovered shorn from effort to recover on an otherwise valid debt. *Id.*

The most Travelers can do is point to broad statements in other factual contexts, and posit that the various courts would apply those statements with equal force to this set of facts—if ever they were to encounter the same scenario. But Travelers offers no reason to believe that this factual scenario—which, so far as appears from published decisions, never presented itself in the past—is likely to arise with any greater frequency in the future. And Travelers offers no reason why this Court should rush to address the scenario

now, rather than letting the issue percolate and waiting to see whether a conflict materializes.

B. There Is No Circuit Split Even On The Broadest Application Of The *Fobian* Rule.

Even ignoring the specific factual context presented here, and pretending this case presents the broadest possible application of the *Fobian* rule, this case still presents no circuit split.

If, as Travelers asserts, there were a "conflict among the courts of appeals [that] is longstanding, widespread, [and] entrenched" (Pet. 3), and if nine circuits have lined up on either side of a great legal schism (*see* Pet. 15), surely several of them would have called attention to the conflict. Or at least one of them would have. Not a single one of the cases Travelers invokes—on either side of the supposed divide—identifies a conflict over the *Fobian* principles.

It is not that the circuits are being uncharacteristically coy about their disagreements, or putting on a façade to spare the lower courts. The explanation is that the courts of appeals across the nation are applying essentially the same rules. That is obviously true of the four circuits that have explicitly adopted the *Fobian* rule. *See* Pet. 13 (citing cases from the Second, Seventh and Tenth Circuits). But it is also true of the five circuits Travelers places on the other side of the secret divide, even if they do not expressly announce, "We hereby embrace *Fobian*."

Uniformly, the supposedly contrary cases start, as the Ninth Circuit does, with the premise that "[t]here is no general right to attorney's fees under the Bankruptcy Code." *Renfrow*, 232 F.3d at 693 (citations omitted); *see, e.g.*, *Jordan v. Southeast Nat'l Bank (In re Jordan)*, 927 F.2d 221, 226-27 (5th Cir. 1991) ("the Bankruptcy Code does not does not expressly award attorney's fees to a creditor who successfully contests the dischargeability of his claim"),

overruled on other grounds by In re Coston, 991 F.2d 257 (5th Cir. 1993) (per curiam). They generally agree that nevertheless "a prevailing party in a bankruptcy proceeding may be entitled to an award of attorney fees in accordance with applicable state law if state law governs the substantive issues raised in the proceedings." *Ford v. Baroff (In re Baroff)*, 105 F.3d 439, 441 (9th Cir. 1997); *see, e.g., TranSouth Fin. Corp. v. Johnson*, 931 F.2d 1505, 1507 (11th Cir. 1991) ("attorney's fees are properly awarded to a creditor prevailing in a bankruptcy claim if there exists a statute or valid contract providing therefor").

To be sure, in close cases, different courts might give different answers to the question whether "state law governs the substantive issues." *Compare In re Sheridan*, 105 F.3d 1164, 1167 (7th Cir. 1997) (state reciprocity statute held inapplicable to specific facts presented) *with Cadle Co. v. Martinez (In re Martinez)*, 416 F.3d 1286, 1290 (11th Cir. 2005) (rejecting the *Sheridan* holding on similar facts without disagreeing with the fundamental approach dictated by *Fobian*). For example, several of the circuits appear to agree that battles over whether a debt should be discharged—which means that the debt is cancelled when the bankruptcy case is over (*see* 11 U.S.C. §523(a))—is a dispute "on the contract," for which attorneys' fees are available. *See, e.g., Alport v. Ritter (In re Alport)*, 144 F.3d 1163, 1168 (8th Cir. 1998); *Davidson v. Davidson (In re Davidson)*, 947 F.2d 1294, 1298 (5th Cir. 1991); *TranSouth*, 931 F.2d at 1508-09; *Jordan*, 927 F.2d at 226-27; *Martin v. Bank of Germantown (In re Martin)*, 761 F.2d 1163, 1168 (6th Cir. 1985). While there is a sense in which "bankruptcy discharge [is] . . . plainly an issue of bankruptcy law" (Pet. 13), those courts generally reason that this issue involves enforcement of the contract, because the dischargeability question essentially is a fight about the prospect of the creditor being fully paid on the contractual obligation. *See, e.g., Martin*, 761 F.2d at 1168. The Ninth Circuit, on the

other hand, has held that attorneys' fees can be awarded for some discharge skirmishes and not others. *Compare Am. Express Travel Related Servs. Co. v. Hashemi (In re Hashemi)*, 104 F.3d 1122, 1126-27 (9th Cir. 1996) (declining to award attorney's fees incurred in objecting to debtor's discharge *on bankruptcy law grounds*) *with Renfrow*, 232 F.3d at 695 (creditor that successfully objected to discharge in connection with establishing the validity of underlying debt—a state law issue—was awarded a portion of attorneys' fees incurred), *and Baroff*, 105 F.3d at 443 (debtor was entitled to attorneys' fees incurred in successfully defending objection to discharge because bankruptcy court decided the proceeding on a threshold state law issue—that the creditors did not have valid claims by virtue of a pre-petition release). In the unlikely event it is worth this Court's energy to sort through these differential outcomes, the Court is free to do so in a future case that presents the conflict. But since this case does not arise out of the discharge context, the Court's intervention here will do nothing to address that possible discrepancy.

In an effort to demonstrate a conflict over the *Fobian* rule, Travelers invokes seven Bankruptcy Code cases from five circuits (beyond the four circuits that explicitly embrace the rule). *See* Pet. 2, 13.[3] Travelers manufactures the appearance of conflict through two devices. First, Travelers consistently mischaracterizes the Ninth Circuit rule. The distortion of the rule starts at the very inception of Travelers' Petition—indeed, in the question presented, itself. Travelers describes it as a rule that forbids "a litigant [to] recover attorneys' fees under a contract or statute where the issues

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[3]An eighth case, which is omitted from Travelers' first list (*see* Pet. 2), but materializes in the second iteration, was decided under the former Bankruptcy Act, which Congress repealed twenty-seven years ago—and is otherwise distinguishable for many of the reasons discussed below. *See* Pet. 13 (citing *Worthen Bank & Trust Co., N.A. v. Morris (In re Morris)*, 602 F.2d 826 (8th Cir. 1979)).

litigated *involve* matters of federal bankruptcy law." Pet. i (emphasis added); *see also* Pet. 11, 20. If that were the Ninth Circuit rule, it *would* be in conflict with the rest of the circuits. As Travelers amply demonstrates, there are plenty of circumstances where a creditor can be awarded attorneys' fees even though the "litigated issues [did] *involve* . . . federal bankruptcy law." *See* Pet. 12-15 (emphasis added). The litigation is taking place, after all, in *bankruptcy* court.

But that is not the rule in the Ninth Circuit—or anywhere else in the country. *See Renfrow*, 232 F.3d at 695. The question under the *Fobian* rule is not whether the bankruptcy law is "involve[d]," but whether (as noted above) the issues being litigated "involved *solely* issues of federal bankruptcy law" (Pet. App. 16a (emphasis added)), and whether they are "uniquely" and "exclusively" bankruptcy matters (Pet. App. 17a). It, therefore, does Travelers no good to contrast the purported Ninth Circuit rule with seven cases that "follow the [alternative] rule that creditors may recover fees incurred in litigating federal bankruptcy issues." Pet. 13. Put that way, the Ninth Circuit follows the alternative rule, too. *See, e.g.*, *Renfrow*, 232 F.3d at 695 (creditor that successfully objected to discharge, *under bankruptcy law*, was awarded portion of attorneys' fees incurred in connection with establishing the validity of underlying debt); *Baroff*, 105 F.3d at 443 (debtor was entitled to attorneys' fees incurred in successfully defending objection to discharge, *under bankruptcy law*, because bankruptcy court decided the proceeding on a threshold state law issue, namely, that the creditors did not have valid claims by virtue of a pre-petition release).

Similarly, Travelers insists that the Ninth Circuit has adopted the principle that "the parties' contractual allocation of liability for attorneys' fees is invalid unless *authorized* by federal law" (Pet. 15 (emphasis in original))—that it simply does not matter what the contract says. That is not the standard that the Ninth Circuit has articulated. It is not at all

clear that the Ninth Circuit has adopted any such hard and fast rule. The Ninth Circuit's typical articulation of the rule is: "Because state law necessarily controls an action on a contract, a party to such an action is entitled to an award of fees *if the contract provides for an award and state law authorizes fee shifting agreements.*" *Baroff*, 105 F.3d at 441 (emphasis added). The italicized words indicate that the touchstone for the Ninth Circuit is the contract itself. The *Fobian* rule applies only if "the substantive litigation raise[s] federal bankruptcy law issues *rather than* 'basic contract enforcement questions.'" *Id.* (citing *Fobian*, 951 F.2d at 1153) (emphasis added). When the Ninth Circuit says the *Fobian* rule applies only where the intervention "involve[s] *solely* issues of federal bankruptcy law," it evidently means that "[t]he question of the applicability of the bankruptcy laws to particular contracts *is not a question of the enforceability of a contract* but rather involves a unique, separate area of federal law." *Fobian*, 951 F.2d at 1153 (emphasis added; internal quotation marks omitted); *see Hashemi*, 104 F.3d at 1126 (same).

Based at least upon what the Ninth Circuit *says* it is doing in these cases, the language of the contract (or the provision of state law) is quite relevant in determining whether attorneys' fees will be awarded. The Ninth Circuit consistently focuses on whether or not the creditor's intervention is an "action on a contract," which is to say an action to "enforce" a contract. *See Fobian*, 951 F.2d at 1153 ("This was not a traditional 'action on the contract'"); *see also Renfrow*, 232 F.3d at 693 ("'state law necessarily controls an *action on a contract*'") (quoting *Baroff*, 105 F.3d 439 at 441) (emphasis added and omitted); *Hashemi*, 104 F.3d at 1126-27 (attorneys' fees are not recoverable because this was "not an *action on the contract*") (emphasis added). Likewise several of the circuits that Travelers puts in the *Fobian* camp explicitly consider contract or statutory language even with respect to purely bankruptcy matters.

See Burns v. Great Lakes Higher Educ. Corp. (In re Burns), 3 F. App'x 689, 691 (10th Cir. 2001) (unpublished) ("Oklahoma has strictly construed [the state statute]. Therefore, [the statute] does not apply here") (citation omitted); *Sheridan*, 105 F.3d at 1167 ("this federal action does not qualify as one 'with respect to the contract' under the Florida statute"). Admittedly, in one Ninth Circuit case (involving a statute, not a contract), the Ninth Circuit has spoken more expansively. *See DeRoche v. Arizona Indus. Comm'n (In re DeRoche)*, 434 F.3d 1188, 1192 (9th Cir. 2006) (stating that the "character of the particular state statute is irrelevant"); *see also Hassen Imports P'ship v. KWP Fin. VI (In re Hassen Imports P'ship)*, 256 B.R. 916, 923 (B.A.P. 9th Cir. 2000). But the most this imprecise language does is to raise doubts about exactly what the Ninth Circuit rule is—questions that the Ninth Circuit is best situated to resolve free from this Court's editorial input.

The second device Travelers uses to manufacture the appearance of circuit conflict is to invoke cases that *distinguish* the prevailing rule but to mischaracterize them as "rejecting *Fobian*." Pet. 2. The best example is *Three Sisters Partners, L.L.C. v. Harden (In re Shangra-La, Inc.)*, 167 F.3d 843 (4th Cir. 1999), which Travelers features at length as the poster child for circuit conflict. *See* Pet. 14. Contrary to Travelers' claim, the case did not reject *Fobian*'s holding; it rejected *Fobian*'s relevance—both because the specific statutory provision in question called for a different analysis and because the ultimate issue being litigated was an issue of contract interpretation. *See* 167 F.3d at 848.

Shangra-La arose in the context of a debtor's decision to ratify (or "assume," in bankruptcy parlance) a commercial lease agreement as tenant, exercising a specific statutory right—under Section 365 of the Bankruptcy Code—to hold the landlord to its obligations under the terms of the lease. *See* 11 U.S.C. §365. The same provision that grants the right, imposes limitations. In order to assume the lease, the

debtor must (1) cure certain defaults under the lease; and (2) compensate the landlord for "actual pecuniary loss[es]" *resulting from those defaults*. 11 U.S.C. §365(b)(1)(A) & (B).

This statutory rule played a central role in that case. The lease agreement had a fee-shifting provision, and the question before the court was whether the landlord's compensable "pecuniary loss[es]" under Section 365 could include attorneys' fees. The court's answer was that attorneys' fees *might* be compensable, but only to the extent that the fees "were expended as the result of a default under the . . . lease . . . and are recoverable under the [lease] and applicable state law." *Shangra-La*, 167 F.3d at 849 (citations omitted). Significantly, the court remanded the case with instructions to award attorneys' fees *only* to that extent. *Id.* at 849-50 ("[Section] 365(b)(1)(B) does not create an *independent* right to an award of attorneys' fees") (emphasis added). It left it to the lower court to determine whether the creditor could recover fees in connection with its effort to seek relief from the automatic stay and to object to the assumption of the lease, which are more clearly matters of pure bankruptcy law. *Id.* at 850.

In reaching this conclusion, the Fourth Circuit did not "reject[]" the Ninth Circuit's *Fobian* rule wholesale, as Travelers asserts. Pet. 14. It is true, as Travelers emphasizes, that the Fourth Circuit said that this formulation "inappropriately focuses on the presence of issues peculiar to bankruptcy law." *Id.* (quoting *Shangra-La*, 167 F.3d at 848). But, as is evident from the next sentence (which Travelers omits), what that meant was that "the state law/bankruptcy law dichotomy relied upon by the bankruptcy court cannot serve to solve the puzzle of a landlord's right to post-petition attorneys' fees *under [Section] 365(b)(1)(B) of the Bankruptcy Code*." 167 F.3d at 848 (emphasis added). The court was indicating only that the standard could not be transported uncritically from one context to another. The

court explained, by "ordering that default be cured . . . and that pecuniary losses be paid . . . , [Section 365] sends us back to state *contract law* for a determination of the terms of default and the landlord's rights upon default under the lease." *Id.* at 848 (emphasis added). Far from indicating a circuit split, the Fourth Circuit reached a conclusion that is consistent with current Ninth Circuit law, for the Ninth Circuit itself has recognized that the *Fobian* rule is inapplicable in the face of a Bankruptcy Code provision that specifically incorporates state law. *See Kord Enters. II v. California Commerce Bank (In re Kord Enters. II)*, 139 F.3d 684, 687 (9th Cir. 1998) (relying on the plain language of Bankruptcy Code Section 506(b) to hold that—despite the *Fobian* rule—a creditor holding a security interest in collateral that is worth more than the amount of the underlying claim is entitled to attorneys' fees in accordance with the terms of its contract).[4]

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[4]Elsewhere, Travelers cryptically asserts—without further explanation—that an Eleventh Circuit case "reject[s] . . . [the] Ninth Circuit's *Fobian* analysis" and that an Eighth Circuit case "reject[s] *Fobian*." Pet. 2 (citing *Martinez*, 416 F.3d 1286, and *Alport*, 144 F.3d 1163). In fact, the first case merely distinguishes Ninth Circuit authority "under the facts and circumstances of this case." *Martinez*, 416 F.3d at 1290-91. And the second cites *Fobian* with approval for the basic rule that creditors *may* be entitled to an award of attorneys' fees in bankruptcy. *See Alport*, 144 F.3d at 1168.

II.

THE PRECISE CIRCUMSTANCES UNDER WHICH A SMALL CLASS OF CREDITORS CAN SIPHON ATTORNEYS' FEES FROM A BANKRUPTCY ESTATE IS NOT AN ISSUE OF NATIONAL IMPORTANCE.

The Bankruptcy Court was being generous when it said, "this is . . . a frankly obscure area of the law." Pet. App. 25a.

This case is not about whether a creditor may meddle in a bankruptcy proceeding, even though the debtor has not defaulted on any obligation owed to the creditor and is unlikely ever to do so. (It may.) This case is not about whether such a creditor has the latitude to waste the resources of other creditors and the bankruptcy court by filing claims, only to stipulate that they are meritless, or by insisting on line-editing plan language to reserve legal rights that are already reserved by operation of law. (It does.) This case is about whether the interloper has a right to force the bankruptcy estate—which is to say, all the creditors with legitimate claims—to cover the legal expenses it incurs in doing so. Assuming one could muster an argument that such a right exists and is desirable, there is no pressing national need to pronounce it as a nationwide norm.

Even expanding this case to the broadest level—to an inquiry into the validity of the *Fobian* rule in all potential applications—this case is exceedingly modest in scope and impact. The rule is not of interest to all creditors, nor even to all creditors that have contractual fee-shifting arrangements, but only to those creditors with contractual fee-shifting arrangements that are broad enough to cover any sort of participation in a bankruptcy proceeding. The rule is of no relevance to creditors who file claims because the debtor has defaulted on an obligation and incur legal fees in litigation

over the validity of the debt; if the debtor defaults, and the default is covered by a contractual fee-shifting provision, all circuits agree that the creditor can claim attorneys' fees. The rule has a potential impact only on creditors that are seeking reimbursement for activities that a court might deem "pure bankruptcy" matters.

The impact even on this narrow sliver of creditors is likely to be minimal. Within this sliver would be three basic classes of creditors: oversecured creditors (those whose debts are secured by collateral that is more valuable than the amount of the debt); undersecured creditors (those whose debts are secured by collateral whose value would not cover the amount of the debt); and unsecured creditors (the masses who hold no collateral). The *Fobian* rule has no relevance to oversecured creditors, because the Bankruptcy Code already "specifically grants attorneys' fees to oversecured creditors." *Kord Enters. II*, 139 F.3d at 687 (citing 11 U.S.C. §506(b)). The rule has little salience to undersecured creditors, who typically wield enough power and influence over the debtor (by virtue of their security interest in the debtor's property) that they can work out consensually any dispute over the appropriate amount of fees.

That leaves only the unsecured creditors within the sliver. For them, "[t]he bankruptcy court is a little like a soup kitchen, ladling out whatever is available in ratable portions to those standing in line." *XL/Datacomp, Inc. v. Wilson (In re Omegas Group, Inc.)*, 16 F.3d 1443, 1445 (6th Cir. 1994). Their primary concern is the debt they are clamoring to recover. That is far more important to the creditor than the (presumably much smaller) fee award they might stand to recover in connection with their efforts to collect the debt. Moreover, even a substantial fee award will almost always have diminished value, for these awards are reduced proportionately with the rest of the debt. A creditor who collects ten cents on the dollar for a debt will never

garner more than a tenth of the attorneys' fees that are awarded.

In light of these diminished stakes, contentious litigation over unsecured creditors' rights to collect attorneys' fees incurred during a bankruptcy case rarely materializes. Even in this case—with the uncommon feature of unsecured creditors who are paid 100 cents on the dollar—the cost of litigating Travelers' entitlement to attorneys' fees has already far outstripped the meager $167,000 at stake.

Finally, even if Travelers is correct that different circuits might reach different conclusions about fees in some narrow subset of cases, the differences are innocuous. No debtor would shop for a forum based upon the difference. And the outcome of bankruptcy proceedings for any particular creditor depends upon vicissitudes that are far more unpredictable and consequential than whether the *Fobian* rule controls attorneys' fees for some intervention or another.

III.

THIS CASE IS AN INAPPROPRIATE VEHICLE FOR ADDRESSING THE QUESTION TRAVELERS PRESENTS BECAUSE IT FAIRLY INCLUDES A THORNY, FACT-BOUND CONTRACTUAL ISSUE THAT COULD OBVIATE RESOLUTION OF THE LEGAL ISSUE PRESENTED.

The question Travelers presents rests on a false premise. Incorporated in the very first sentence is the premise that the indemnification agreements "included a provision that [Travelers] is entitled to recover its attorneys' fees in connection with . . . litigating its rights during the course of [PG&E's] bankruptcy case." Pet. i. Travelers has never contested that if this provision did not cover its

activities in the bankruptcy proceeding, then it would have no basis at all for demanding attorneys' fees.

At every step of the litigation, PG&E has maintained that the premise now built into Travelers' question presented is false: Travelers had no claim to attorneys' fees under the indemnification agreements. As Travelers indicates in its Petition, the operative language is the phrase promising attorneys' fees for "*enforcing by litigation or otherwise any of the [indemnification] agreements herein contained.*" Pet. 5 (emphasis in original) (quoting ER 41). PG&E has maintained throughout that Travelers was not "enforcing" the indemnification agreements when it intervened in the bankruptcy, because the agreements were neither breached nor in danger of being breached. It is a position that appeared to persuade the courts below, and PG&E will continue to press it here, should this Court grant certiorari.[5]

Thus, in the worst case scenario, this Court will have expended resources in plenary review of a purportedly important issue it ends up not deciding. In the best case, this Court will decide the issue Travelers has presented, but en route it will have wasted resources pondering knotty contractual issues that have no salience beyond this case.

IV.

THE COURT OF APPEALS' DECISION IS CORRECT.

Travelers does not question the legal underpinnings of the rule the Court of Appeals followed here. Travelers does

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[5]Travelers is free to assert the relevance of language in the indemnity agreements beyond the language it emphasizes. But that approach will simply multiply the number of inconsequential contract questions this Court will be entertaining: Was the bankruptcy intervention an "expense . . . by reason of executing [the] Bonds"? ER 41. Was the expense "incurred by reason of making any investigation on account thereof"? And so forth.

not dispute that "[i]t is the general rule in the United States that in the absence of legislation providing otherwise, litigants must pay their own attorney's fees." *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 415 (1978). Nor does it dispute that while "[t]he Bankruptcy Code does contain some fee provisions[,] . . . it does not contain any provisions that create a general right for the prevailing party to be awarded attorney's fees in federal bankruptcy litigation." *DeRoche*, 434 F.3d at 1191 (citation omitted). And Travelers does not seem to challenge the axiom that "[w]hen a cause of action is federal, . . . we ordinarily do not look to state law in considering whether to award attorney's fees." *Sheridan*, 105 F.3d at 1167 (citing *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 259 n.31 (1975); *F.D. Rich Co. v. United States ex rel. Indus. Lumber Co.*, 417 U.S. 116, 127 (1974)).

Despite these undisputed propositions, Travelers insists on a right to claim attorneys' fees here, even though: PG&E never defaulted; Travelers' financial position was unimpaired by the bankruptcy filing; Travelers admitted the claim it filed was meritless; it did not prevail on any point it pressed in the bankruptcy proceeding; the only positions it pressed related to matters that had no bearing on its future rights; and its interventions arose purely as a matter of federal bankruptcy law. Travelers does not point to any provision of the Bankruptcy Code that grants attorneys' fees to anyone who wishes to meddle in bankruptcy proceedings to press meritless claims and negotiate changes that serve only to waste resources—an omission that is especially telling because when Congress has wanted to award attorneys' fees to particular creditors, it has done so explicitly. *See* 11 U.S.C. §506(b). Nor does Travelers point to any case from this Court that promotes such a counterintuitive and wasteful rule of law.

Instead, Travelers relies mainly on *Security Mortgage Co. v. Powers*, 278 U.S. 149 (1928), which this Court

decided more than seventy-five years ago under the long-since repealed 1898 Bankruptcy Act. *See* Pet. 3, 13, 15. True, the creditor in that case sought attorneys' fees. But that is where the similarity ends, for the creditor there could scarcely have been situated more differently from Travelers. The case involved an oversecured creditor (one with collateral more valuable than the amount of the debt) not a completely unsecured creditor like Travelers (with no collateral). *Security Mortgage*, 278 U.S. at 151. Unlike PG&E here, the debtor there had defaulted on an obligation. *Id.* at 152. In fact the attorneys' fees the creditor sought to collect were incurred in connection with a proceeding in which the creditor prevailed in state court under state law—not, as here, in connection with an intervention, untethered to any actual debt, pressing purely bankruptcy issues in bankruptcy court. *Id.* And the attorneys' fees were due by virtue of a state statute that specifically awarded fees in connection with that state court collection action. *Id.* at 152-53. It was only in this context that the Court held that certain portions of the attorneys' fees obligation that arose under state law could be recovered in bankruptcy as part of the underlying debt.

Although Travelers does not assert that this case is factually similar, it argues that the obligation supposedly created by contract in this case should be treated like the debt created by the state statute in that case. Travelers' position seems to be that *if* the indemnity agreements actually did require PG&E to cover legal fees in connection with any conceivable bankruptcy intervention Travelers might undertake, no matter how frivolous, *then* federal bankruptcy law does not stand in the way.[6] Both the factual premise and the legal conclusion are wrong.

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[6]No doubt, Travelers hopes to renew before this Court its arguments—rejected by three courts—that its Original Claim was not meritless and its interventions did advance its interests. But Travelers

(continued . . .)

As a matter of fact, as we have seen (and as the courts below evidently believed), the indemnification agreements were more modest in coverage. *See* pp.7-9, *supra*. So the argument fails at the premise.

As to the legal conclusion, let us assume that the Court of Appeals opinion here could be read as a holding that federal law would trump a contractual provision that expressly reallocated attorneys' fees under these circumstances, a reading, as we have seen, that is not at all obvious. *See* pp.16-19, *supra*. Even if that were obviously the Ninth Circuit's rule, such a rule would be perfectly consistent with this Court's jurisprudence. It is one thing to say that a bankruptcy court must recognize the obligation to cover attorneys' fees when that obligation arises out of state statutes or contracts that are directed at compensating a creditor for efforts necessary to collect on an underlying debt. But this Court has never suggested, much less held, that private parties can turn a bankruptcy proceeding into a feeding frenzy for the officious, not only encouraging them to file frivolous claims and seek accommodations that serve no one's interests, but compensating them for doing so—at the expense of other creditors. Surely a bankruptcy court would not be expected to follow a state statute that declared: "Bankruptcy creditors who incur legal fees in connection with any bankruptcy intervention whatever shall be entitled to collect those fees from the debtor." *See Kord Enters. II*, 139 F.3d at 687; *In re Vinson*, 337 B.R. 147, 149-50 (Bankr. E.D. Mich. 2006), *rev'd on other grounds*, No. 06-10478, 2006 WL 1662838 (E.D. Mich 2006). By the same token, a bankruptcy court should not enforce a contract that achieves the same result under state law for one creditor. *See*

(. . . continued)
has not presented those fact-bound issues for review, and even if it did, they are unworthy of this Court's attention. So Travelers is stuck defending the legal rule as applied to the facts found.

Norfolk & W. Ry. Co. v. Am. Train Dispatchers' Ass'n, 499 U.S. 117, 129-30 (1991) (contracts can be preempted, if Congress so intended); *Fallick v. Kehr*, 369 F.2d 899, 904 (2d Cir. 1966) ("[A]n advance agreement to waive the benefits of the Act would be void"); *Hassen Imports*, 256 B.R. at 923; *Knepp v. Credit Acceptance Corp. (In re Knepp)*, 229 B.R. 821, 842 (Bankr. N.D. Ala. 1999) ("Courts have long held that a pre-dispute agreement to waive benefits conferred by the bankruptcy laws is wholly void as against public policy").

Thus, if the *Fobian* rule were indeed read to override contractual language in this context, it is not a "new federal common law rule of decision." Pet. 18. As Travelers acknowledges, none of the courts of appeals embracing the *Fobian* rule so much as mention federal common law. Pet. 19. Rather, if *Fobian* does override contracts, it is because the courts are applying ordinary principles of statutory construction to conclude that Congress did not intend to allow private parties to adjust the rule barring the award of attorneys' fees in connection with the enforcement of rights or obligations created purely as a matter of federal bankruptcy law.

Equally meritless is Travelers' contention that "[t]he *Fobian* line of cases conflicts with this Court's precedents restricting the ability of federal courts to establish categorically how claims are to be treated under the Bankruptcy Code." Pet. 19. As an initial matter, there is no prohibition against categorical rules—particularly when it comes to what claims are allowed or disallowed, which is, by statute, determined almost entirely in categorical terms.[7] The

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[7] *See, e.g.*, 11 U.S.C. §502(b)(2) (disallowing claims for unmatured interest); *id.* §502(b)(3) (disallowing claims for taxes assessed against estate property exceeding the value of the estate's property interest); *id.* §502(b)(6) (disallowing lease rejection claims exceeding certain threshold); *id.* §502(b)(7) (disallowing employment contract termination claims exceeding certain threshold).

cases Travelers cites for the supposed categorical prohibition against categorical rules impose no such constraint. *See* Pet. 19-20. These cases merely hold that when the Bankruptcy Code calls for an equitable determination to be applied case by case, categorical rules are impermissible. *See United States v. Noland*, 517 U.S. 535, 540-41 (1996) (equitable subordination of certain tax penalty claims under 11 U.S.C. §510(c)); *United States v. Reorganized CF&I Fabricators, Inc.*, 518 U.S. 213, 228-29 (1996) (same). In any event, the *Fobian* rule is not a categorical rule. Under at least one reading of the cases, the rule depends on a close reading of the contract's terms. *See* pp.17-18, *supra*. But under any reading, the rule requires the court to analyze attorneys' fee claims case by case, as the lower courts clearly did in this case, to determine whether "the substantive litigation raise[s] federal bankruptcy law issues rather than 'basic contract enforcement questions.'" *Baroff*, 105 F.3d at 441 (citing *Fobian*, 951 F.2d at 1153).

CONCLUSION

The Petition for Writ of Certiorari should be denied.

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Respectfully submitted,

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