No. 11-1229

IN THE
Supreme Court of the United States

STATE OF MICH. WORKERS' COMP. AGENCY ET AL.,
Petitioners,

v.

ACE AM. INS. CO. ET AL.,
Respondents.

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

BRIEF OF RESPONDENT INSURERS IN OPPOSITION

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QUESTIONS PRESENTED

The decision below is unpublished and non-precedential. The petition asserts two questions arising from that decision, neither of which—by definition—implicates any broad issue of law affecting anybody beyond the parties in this case, and neither of which is properly presented here in any event:

1. Whether a state may assert sovereign immunity against a claim in an *in rem* bankruptcy proceeding when the state lacks a direct interest in the estate *res*—an issue not pressed or passed upon below, implicating no circuit conflict, and not properly presented on the facts of this case, because the state *does* have a direct interest in the *res*.

2. Whether a state may assert sovereign immunity against a bankruptcy court's exercise of jurisdiction over a state-law statutory claim of workers' compensation liability—a question also implicating no circuit conflict and also not presented here, because the bankruptcy court has *not* exercised jurisdiction over such a state-law claim.

PARTIES TO THE PROCEEDING

Petitioners are the State of Michigan Funds Administration and the State of Michigan Workers' Compensation Agency.

Respondents include ACE American Insurance Company and Pacific Employers Insurance Company, which are referred to collectively herein as "the Insurers."

DPH Holdings Corporation, formerly known as Delphi Corporation, is also a respondent.

RULE 29.6 STATEMENT

Pacific Employers Insurance Company is a wholly owned subsidiary of ACE American Insurance Company.

ACE American Insurance Company is a wholly owned subsidiary of INA Holdings Corporation. ACE Limited, a publicly traded Swiss corporation, is the ultimate, indirect parent of both Pacific Employers Insurance Company and ACE American Insurance Company, although it does not directly own stock in either entity.

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INTRODUCTION

The petition for a writ of certiorari has nothing to recommend it. None of the recognized criteria for review is present, while all of the usual reasons for denying review are:

- The decision below is unpublished and non-precedential.
- Neither question presented implicates any circuit conflict.
- Neither question presented is actually presented here—the first question presented was not raised by petitioners below, and both rest on a blatant misrepresentation of the bankruptcy court's actions.
- The case is exceedingly factbound, procedurally complicated, and without broader application.
- The case is at an interlocutory stage, and indeed petitioners are currently seeking exactly the relief in the district court that they say has already been denied to them by the court of appeals.
- The decision below is correct.

Perhaps there are important questions about the scope of state sovereign immunity in bankruptcy still to be answered by this Court. But they are not the questions that petitioners raise, and this is not the case to answer them.

STATEMENT OF THE CASE

The petition arises from an "adversary proceeding" filed in bankruptcy court to address the scope of insurance policies belonging to the estate of the now-defunct Delphi Corporation and certain of its affili-

ates (referred to collectively as "Delphi" for ease of reference). Delphi—which was headquartered in Michigan and conducted a substantial portion of its operations there—was authorized by petitioners under Michigan law to self-insure against workers' compensation liability (rather than purchasing workers' compensation insurance) and was, in fact, self-insured for such liability in Michigan and other states. Delphi also purchased two sets of insurance policies from respondents ACE American Insurance Company and Pacific Employers Insurance Company (collectively, "the Insurers"). The first set of policies—the Retention Policies—were "excess" policies providing coverage for workers' compensation liabilities exceeding Delphi's substantial self-insured retained limits. The second set of policies—the Deductible Policies—were intended to cover workers' compensation liabilities for the small number of Michigan employees who worked for Delphi subsidiaries that were not self-insured in Michigan.

In 2005, Delphi and certain of its affiliates filed for Chapter 11 protection in bankruptcy court. In accordance with the Bankruptcy Code, Delphi "assumed" the Deductible Policies and Retention Policies, which are all property of the bankruptcy estate.

Petitioners[1] filed claims against the estate, contending that because Delphi was a self-insured em-

[1] There are two petitioners here: the State of Michigan Funds Administration (the "Funds") and the State of Michigan Workers' Compensation Agency (the "Agency"). In the proceedings below, petitioners argued that they should be treated differently for sovereign immunity purposes. Because they do not renew that argument here, they are referred to collectively as "petitioners" unless otherwise noted.

ployer, its estate is responsible for the Michigan workers' compensation claims of its employees and assessments petitioners charged to Delphi as a self-insurer. But after discovering administrative notices filed with the state noticing the issuance of the Deductible Policies, petitioners also advised the Insurers that the state would also seek to hold *the Insurers* liable for insurance coverage for Delphi's *self-insured* workers' compensation liability.

In response, the Insurers initiated the adversary proceeding at issue in this case, which seeks to establish that neither the Deductible Policies nor the Retention Policies (collectively, "the Policies") cover Delphi's self-insured workers' compensation liability. In the alternative, the Insurers seek equitable reformation of the Policies to conform to the contracting parties' mutual understanding and intent.

A. The Michigan Workers' Compensation Scheme

1. The Michigan Worker's Disability Compensation Act of 1969, as amended, imposes mandatory workers' compensation obligations on Michigan employers. Mich. Comp. Laws § 418.101 *et seq*. The Act is administered by the Michigan Workers' Compensation Agency (the "Agency"), one of the petitioners here. *Id*. § 445.2011(II.O). An employer may satisfy its obligations under the Act in either of two ways: "(a) [b]y receiving authorization from the director [of the Agency] to be a self-insurer," or "(b) [b]y insuring against liability with an insurer authorized to transact the business of worker's compensation insurance within this state." *Id*. § 418.611(1).

The Act also creates a Funds Administration (the "Funds"), the other petitioner here, which includes a "self-insurers' security fund" (SISF). *Id.* § 418.501(1). The SISF meets a self-insured employer's workers' compensation obligations if the employer becomes insolvent or otherwise unable to pay. *Id.* § 418.537(2). The Funds is operated by three trustees, one of whom is the director of the Agency. *Id.* § 418.511. The SISF is granted "the rights of the injured employee as a creditor of the insolvent employer," and has the authority to "obtain reimbursement to the fund from an insolvent employer for any funds paid out as benefits to the employees of the insolvent employer." *Id.* § 418.553.

2. The Act regulates insurance policies issued to Michigan employers that are not self-insured. For example, the Act requires (with certain exceptions) that each employer "not permitted to be a self-insurer" be covered completely by a single policy. *Id.* § 418.621(2). And the Act requires each policy to contain particularly worded provisions—referred to herein as the "Michigan endorsement"—which are deemed controlling to the extent they conflict with other terms in the policy. *Id.* § 418.621(4)-(5). Insurers issuing policies to non-self-insured employers are required to "file with the director [of the Agency], within 30 days after the effective date of the policy, a notice of the issuance of the policy and its effective date," commonly known as a "Form 400." *Id.* § 418.625. Each Form 400 includes, among other

things, the policy's effective date and policy number. *E.g.*, A-96.[2]

B. The Policies

It is undisputed that since 1999, petitioners have approved Delphi as a self-insured employer for virtually all of its Michigan workers' compensation claims. A-83. Delphi does, however, have two types of policies covering certain specific obligations. First, the Retention Policies provide *excess* coverage, over a substantial self-insured retention, for virtually all of Delphi's Michigan employees. A-80. Second, the Deductible Policies provide coverage for certain Delphi subsidiaries that were not authorized to be self-insured in Michigan. A-81-82. Because the Deductible Policies provide first-dollar coverage for certain Delphi employees—i.e., the very small number who did *not* work at Delphi's self-insured plants—the Deductible Policies contain the Michigan endorsement required for policies covering obligations that are not self-insured. The Deductible Policies require reimbursement to the Insurers for any amounts the Insurers pay on an insured's behalf within the deductible amount. The Retention Policies, which are only excess to the self-insurance Delphi retained for most employees, are not required to and thus do not contain the Michigan endorsement. Except for policy year October 2002 through October 2003, when no Deductible Policy was written, both sets of Policies span from 2000 to 2009, i.e., the pre- and post-petition period. A-80-82.

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[2] "A-__" refers to the relevant page number of the Joint Appendix filed in the court of appeal.

Being self-insured, Delphi (not the Insurers) had since 1999 defended, covered, and paid all self-insured Michigan workers' compensation claims against it, and continued to do so with the consent and approval of the bankruptcy court after filing its Chapter 11 petition. A-83.

C. Delphi Bankruptcy, Assumption Of The Policies, And Plan Confirmation

On October 8, 2005, Delphi filed with the bankruptcy court a voluntary Chapter 11 petition for reorganization relief under the Bankruptcy Code, 11 U.S.C. § 101 *et seq*. A-79. Just a few weeks later, on November 10, 2005, petitioners filed an appearance in the case. A-550.

In December 2005, Delphi moved the bankruptcy court to approve a renewal of and entry into certain insurance policies, including the Policies, and to "assume" (pursuant to 11 U.S.C. § 365) those Policies that had been entered into pre-petition. Delphi explained in reference to its self-insured obligations:

> The Debtors' workers compensation liability under the Agreements represents a small percentage of the Debtors' total workers' compensation liability. The Debtors maintained first dollar workers' compensation insurance coverage only in the states where they do not have a high concentration of employees. *In the states where the Debtors have a high concentration of employees, such as Michigan, the Debtors are self-insured for workers' compensation claims.* In the self-insured states, the Debtors maintain excess workers' compensation insurance coverage with the Insurers for claims in excess

> of the respective state's self-insured retention. By this Motion, [the] Debtors also seek to renew their excess workers' compensation insurance coverage.

A-908 n.5 (emphasis added). The bankruptcy court granted the debtors' motion on January 6, 2006, in the "Insurance Agreement Order." A-205-09. Under the Insurance Agreement Order, "all payment and reimbursement obligations owing to the Insurers from the Debtors under the Agreements are hereby accorded administrative priority status pursuant to section 503(b)(1)(A) of the Bankruptcy Code." A-208.

On October 1, 2007, to resolve claims by the Insurers, the debtors entered into a stipulation reiterating that, "[p]ursuant to the Insurance Agreement Order … all payment and reimbursement obligations owing to the [Insurers] from the Debtors under the Assumed Agreements shall be accorded administrative priority status pursuant to section 503(b)(1)(A) of the Bankruptcy Code." A-217.

The bankruptcy court confirmed Delphi's chapter 11 plan on January 25, 2008, but the plan did not go into effect. A-1029. In June 2009, Delphi submitted a proposed amended reorganization plan. A-745-831. On July 14, 2009, petitioners objected to Delphi's requested amendment, expressly arguing that Delphi is self-insured under the Michigan workers' compensation scheme, and that the proposed plan did not provide for the payment of Delphi's prepetition workers' compensation liability. A-733-42.

The bankruptcy court confirmed the amended reorganization plan on July 30, 2009, notwithstanding petitioners' objection, discharging Delphi's pre-

petition workers' compensation obligations. A-1024-1113, A-1120. The modified plan of reorganization became effective October 6, 2009. A-1120.

D. Claims Against The Debtor, And Against The Insurers

On July 14, 2009, the Funds filed an administrative expense claim against Delphi in the amount of $5,557,750, for post-petition injuries sustained by Delphi's employees through July 2, 2009. A-282-86. The Funds asserted that "the basis for the claim stems from the status of Delphi … as a self-insured employer for purposes of workers' compensation claims in the state of Michigan." A-283. The Funds contended that "[t]hese obligations should be treated as administrative expenses"—i.e., priority claims paid ahead of general creditors in the bankruptcy case—"because [petitioners] allowed Delphi to remain self-insured during the entire bankruptcy and it has continued to make compensation payments during the bankruptcy." A-285. Indeed, the estate "has been greatly enhanced by its ability to remain self-insured during the pendency of the bankruptcy proceedings," the Funds argued, because by "remaining self-insured, Debtor has been able to avoid paying policy premiums to a private insurer to cover its substantial Michigan workers' compensation obligations." *Id.*

On July 29, 2009, the Funds filed two proofs of claim for pre-petition workers' compensation liability, totaling $61,753,912. A-292 (proof of claim for $36,293,480.00); A-297 (proof of claim for $25,460,432.50). On December 23, 2009, the bankruptcy court disallowed those pre-petition-injury

claims as untimely, and the district court affirmed on appeal. A-1287-1304.

At the same time petitioners were emphasizing Delphi's self-insured status in their administrative expense claim filings, they informed the Insurers by letter (dated July 15, 2009) that the state's "insurance coverage records … show that [Delphi has] been insured for all workers' compensation liability in Michigan with [the Insurers]." A-151. The "insurance coverage records" were Form 400s, which simply provided notice of the issuance of the Deductible Policies (not their terms or the extent of coverage)—referring to the Policies specifically by policy number and effective date—but which mistakenly identified "Delphi Corporation" as a covered legal entity, rather than just the non-self-insured subsidiaries actually covered by the Deductible Policies. A-94-145. The Insurers have since filed amended forms.

E. The Adversary Proceeding—Petitioners Assert Coverage Obligations Based On The Policies

The Insurers immediately responded to petitioners and denied coverage. A-152-57. They also initiated an adversary proceeding against Delphi and petitioners in the bankruptcy court on October 6, 2009. A-77-89. The complaint explained that the adversary proceeding "stems from underlying claims that have been filed or that may be filed with [petitioners] against Delphi seeking workers' compensation benefits." A-78. These workers' compensation claims, the complaint noted, "were covered by Delphi as a self-insured employer and not by the [Policies.]" A-78. The complaint further stated that petitioners

"have taken the improper position, including the filing of documents in this Court, which erroneously allege that [the Insurers are] … obligated to provide insurance coverage for the [self-insured workers' compensation claims]." A-78. Accordingly, the complaint sought a declaratory judgment of (i) no coverage under the Policies, or, in the alternative, (ii) equitable reformation of the Policies "to reflect the mutual understanding and intent of the parties." A-86-88; *see* Fed. R. Bankr. P. 7001(7), (9) (declaratory and equitable claims may be brought in adversary proceeding).

The Insurers also filed claims for payment of administrative expenses in the amount of $67,311,622.50—the amount of petitioners' proofs of claim and administrative expenses, subject to adjustments. A-842-50. The claims were based on Delphi's assumption of the Policies pursuant to the Insurance Agreement Order, and reflected the amount Delphi would owe to the Insurers if petitioners prevailed against the Insurers on the claims first lodged against Delphi. SPA-54.

On November 30, 2009, Delphi answered the complaint, and filed counterclaims and a crossclaim. A-173-201. While Delphi agreed with the Insurers that the Deductible Policies were not intended to cover Delphi's self-insured obligations, the counterclaims and crossclaim sought a declaratory judgment that the Insurers cannot recover from the estate under the Deductible Policies as to the self-insured claims, and that neither the Insurers nor petitioners have a right of recovery against the estate based on the Insurer's filing of the Form 400s. A-189-201.

On November 10, 2009 (and further on December 21, 2009), petitioners moved to dismiss the adversary complaint, asserting a lack of subject matter jurisdiction, sovereign immunity, and failure to state a claim. In the alternative, they moved the court to abstain in favor of the Michigan courts and workers' compensation administrative process. A-90-92; A-302-16. Petitioners expressly asserted "these policies, on their face, readily evidence Plaintiffs' obligations to cover the ongoing workers' compensation benefits due for injuries sustained at Delphi's Michigan operations during the respective effective policy dates." A-310. Petitioners also argued that, irrespective of the Deductible Policies themselves, the Insurers were liable for Delphi's self-insured workers' compensation obligations simply because the Insurers filed Form 400s referring to the Deductible Policies. *E.g.*, A-310. Petitioners made clear, however, that they were not resting solely on the Form-400-based argument: "Even if this Court could not consider the [Form 400s] that Plaintiffs filed within the last 8 of 9 years," petitioners insisted, "a review of the Deductible Policies"—specifically, the Michigan endorsement—"shows no merit" to the Insurers' argument that those Policies afforded no coverage. A-305.

F. Bankruptcy Court Proceedings

1. Before ruling on petitioners' motion to dismiss, the bankruptcy court held oral argument. A-375-521. At argument, much time was devoted to understanding whether petitioners' theory of the Insurers' liability was based solely on the Form 400s, or whether it was also based on the Deductible Policies. In order to definitively resolve that question, the

bankruptcy court proposed that the parties stipulate that "the insurers are not liable under the policies," and that a Michigan tribunal would decide "whether the delivery of the [Form 400s] gives rise to liability to the workers' compensation claim … separate and apart from any liability under the policies." A-515.

In response, counsel for Delphi circulated a stipulation under which the parties would "consent to the entry of judgment in favor of [the Insurers] with respect to the claims asserted in the Complaint; *provided*, *however*, that the foregoing judgment shall not affect the Complaint to the extent the Complaint seeks a determination as to [petitioners'] argument that [the Insurers are] … liable for [Delphi's Michigan workers' compensation obligations] based on certain notices [i.e., the Form 400s] filed by [the Insurers]." A-1314. The stipulation further provided that the Form 400 theory "is separate from and independent of the question of insurance coverage under the [Policies], does not depend upon a determination that there is insurance coverage under the [Policies], and does not give rise to any claims against DPH Holdings." A-1314.

Delphi's counsel informed the court that "DPH Holdings [was] willing to enter into the Stipulation," and that the Insurers had "reported to DPH Holdings that … they agree in principle with the approach taken by the Stipulation." A-1309. But petitioners refused to agree: "[Petitioners], however, informed DPH Holdings … that they will not enter into any stipulation that resolves the insurance coverage questions before this Court." A-1309. Accordingly, the bankruptcy court was compelled to address petitioners' motion to dismiss.

2. The bankruptcy court denied petitioners' motion to dismiss.

a. The court first determined that it had subject matter jurisdiction. While that conclusion is not challenged by petitioners here, several of the bankruptcy court's findings respecting its jurisdiction are relevant to petitioners' sovereign immunity claim. In arguing that the bankruptcy court lacked jurisdiction, petitioners contended that their coverage claims raised only the question whether the Insurers had coverage obligations resulting from the Form 400 notices, and did not implicate the actual Policies the Insurers had with Delphi. The bankruptcy court squarely rejected that understanding of the case: it was "clear," the court explained, that petitioners were "not prepared to limit their legal theories to the [Form 400 theory], but want[ed] also to be able to point to the existence of the insurance policies and to deal with their terms as a basis for establishing the insurers' liability for the workers' compensation claims." App. 63a.

The court then explained why determining liability under the Policies would affect the bankruptcy estate. In assuming the pre-petition Policies and entering into the others post-petition, "Delphi agreed that it would be liable for all amounts owing to the insurers under the policies." App. 56a. The Insurers' position, the court recognized, was that given that agreement, if the Insurers were held liable for Delphi's self-insured workers' compensation obligations, then the Insurers would have an administrative expense priority claim against the estate. App. 56a-57a. Accordingly, the proceeding implicates both the "scope of the debtor's insurance" and the

"existence of the insurers' possible claims against the debtor's estate." *Id.* Further, the court found, petitioners had "conceded" that if the Insurers are held liable, then petitioners "would *not* have a claim against the debtor's estate," because the Insurers, rather than the estate, would bear the liability and have a claim against the estate for the deductible amount. App. 57a. Either outcome—creating a claim by the Insurers against the estate, or extinguishing a claim by petitioners against the estate—"clearly would have a very substantial effect on the debtor's estate," the court concluded, since "the debtors' cash position is very tight and, of course, any administrative claim would need to be paid in full, in cash." *Id.* Petitioners did not challenge that analysis on appeal.

Based on its analysis of the effect of the adversary proceeding both on the claims allowance process and on property of Delphi's estate, the court found that it had subject matter jurisdiction under 28 U.S.C. § 1334(b). App. 57a-64a.

b. After finding subject matter jurisdiction, the court addressed and rejected petitioners' assertion of sovereign immunity. The court explained, among other things, that because the adversary proceeding implicated the allowance and disallowance of claims against the estate, it was governed by the Supreme Court's decision in *Central Virginia Community College v. Katz*, 546 U.S. 356 (2006), which held that the Bankruptcy Clause of the Constitution abrogated the states' sovereign immunity as to actions ancillary to the bankruptcy court's *in rem* jurisdiction. App. 65a-66a.

c. Finally, the court rejected petitioners' remaining arguments, including that the bankruptcy court should abstain in favor of the Michigan state administrative process. App. 71a-82a. The court explained that it had "previously focused on whether non-bankruptcy law claims [i.e., the Form 400 issue] could be severed from core bankruptcy matters [i.e., the scope of the Policies], to permit those non-bankruptcy matters that would not lead to the allowance or disallowance of claims to go forward in Michigan." App. 79a. That effort, however, "did not bear fruit," and thus the court was "left with … the exercise of core bankruptcy jurisdiction," because the issues raised in the Adversary Proceeding "would set the table for (and even potentially determine) the issue of the allowance of the insurers' and/or the [petitioners'] claims against Delphi." *Id.*

3. The bankruptcy court granted petitioners' motion for a stay pending appeal, on the agreed-to condition that they would not proceed with workers' compensation actions in Michigan. App. 37a-38a.

G. District Court Ruling

The district court granted leave to appeal the bankruptcy court's rulings on subject matter jurisdiction and sovereign immunity. *See* 28 U.S.C. § 158(a)(3).

The district court affirmed the bankruptcy court's determination. Like the bankruptcy court, the district court rejected petitioners' assertion that the proceeding was limited to their theory that the Insurers are liable for Delphi's workers' compensation obligations under the Form 400s. The court explained that the Insurers "request[] only a declarato-

ry judgment as to coverage under the Policies for claims filed with [petitioners] against Delphi seeking workers' compensation, as well as reformation if the Policies are determined to provide insurance to Delphi." App. 16a n.4. Thus, the court limited the scope of its determination to "whether the Bankruptcy Court has jurisdiction over the present matter: whether, *according to the Policies*, [the Insurers are] responsible for the pending workers' compensation claims." *Id.* (emphasis added).

As to subject matter jurisdiction, the court agreed with the bankruptcy court that the adversary proceeding is a core bankruptcy proceeding, because in adjudicating the adversary proceeding, the bankruptcy court "will make threshold decisions that will ultimately determine the validity and priority of the claims filed by [petitioners] and whether [the Insurers] will be entitled to administrative expenses." App. 20a-21a.

The court also rejected petitioners' sovereign immunity defense. The court explained that the adjudication of this dispute "will have an effect on the amount and priority of claims to the estate," specifically including "claims … asserted by [petitioners]." App. 28a. "Moreover, the Adversary Proceeding seeks the Court's determination of [the Insurers'] liabilities under the Policies, which are assets of the estate." App. 29a. Thus, the district court agreed with the bankruptcy court that the controversy falls within *Katz*, because it is "necessary to effectuate the Bankruptcy Court's *in rem* jurisdiction over the estate and its equitable distribution." *Id.*

H. Court Of Appeals Decision

The Second Circuit unanimously affirmed, in an unpublished, non-precedential, per curiam decision (per Jacobs, C.J., and Parker and Raggi, J.J.). The court first explained that there was bankruptcy jurisdiction because (among many other reasons) the "adversary proceeding bears upon Delphi's liability for workers' compensation claims." App. 5a. For example, "[i]f, as [petitioners] believe, the Insurers—and not Delphi—are liable for the injured workers' claims, then [petitioners'] claims against Delphi would be disallowed because the claims would run against the Insurers instead." App. 5a-6a.

The court of appeals also rejected petitioners' sovereign immunity defense. It explained that under this Court's precedent, a State cannot assert sovereign immunity against "proceedings implicating the bankruptcy court's traditional *in rem* authority … as well as 'proceedings necessary to effectuate the *in rem* jurisdiction of the bankruptcy courts.'" App. 7a (quoting *Katz*, 546 U.S. at 378, and citing *Tenn. Student Assistance Corp. v. Hood*, 541 U.S. 440, 448 (2004)). "Since the adversary proceeding here is an *in rem* proceeding (or, at least, is otherwise necessary to effectuate the *in rem* jurisdiction of the Bankruptcy Court), it does not offend [petitioners] sovereign immunity." *Id.*

Petitioners' main argument on appeal was that the adversary proceedings did not really concern the Policies at all, but was instead an attempt by the Insurers to have the bankruptcy court decide whether they were liable based only on the filing of the Form 400 notices. Pet. Appeal Br. 38-39. The court of ap-

peals rejected that argument, explaining that the "adversary complaint makes clear that the proceeding is focused on the parties' responsibilities under the contracts," and that "[t]here is no Form 400-based claim in the Insurers' adversary complaint." App. 8a. The court explicitly stated that it "express[ed] no view and render[ed] no decision as to whether the Bankruptcy Court has jurisdiction over any claim or challenge to the liability of the Insurers for filing the Form 400 Notices." App. 9a n.2. And the court likewise "express[ed] no view and render[ed] no decision as to whether resolution of any such claim brought in federal court against [petitioners] would invade their sovereign immunity." *Id*.

I. Post-Appeal Proceedings

1. After the Second Circuit's decision, petitioners filed a motion for panel rehearing and for "clarification," arguing that the court of appeals' statement that the Form 400 issue was not before it conflicts with what petitioners incorrectly asserted was the bankruptcy court's purportedly contrary view. Pet. Appeal Mot. for Panel Rh'g 7-9. The court of appeals denied the motion. App. 85a-86a. Petitioners did not seek en banc review.

2. After the disposition of the appeal, but before filing this petition, petitioners returned to the bankruptcy court. Based on the court of appeals' express statement that petitioners' Form 400-based claims were not before the court, petitioners asked the bankruptcy court to excuse them from the terms of the stay, so that they could initiate workers' compensation proceedings in Michigan against the Insurers. The bankruptcy court stated that it was will-

ing to lift the stay so petitioners could press their Form 400 claims in Michigan, but only if petitioners agreed that the scope of the Policies—assets of the estate—would not be litigated in the Michigan workers' compensation proceedings. And as they had over two years earlier, petitioners again refused to agree. "Because Michigan is not prepared to limit the … Form 400 issue to an issue that does not involve the policy," the court explained, "it appears to me that I need to decide, first, the policy issue. Once the policy issue is decided, you can go and decide the Form 400 issue." Tr. of Mar. 22, 2012 Hrg. 22-23.

3. Petitioners sought leave to appeal that determination to the district court. Petitioners also filed this petition.

REASONS FOR DENYING THE PETITION

This Court's decisions in *Hood* and *Katz* set forth two key principles governing the states' sovereign immunity in bankruptcy proceedings. First, sovereign immunity is not even implicated when a bankruptcy court exercises *in rem* jurisdiction, at least when there is no request for "monetary damages or any affirmative relief from a State," and no State is subjected "to a coercive judicial process." *Hood*, 541 U.S. at 450; *see id.* at 447-52. Second, "[i]nsofar as orders ancillary to the bankruptcy courts' *in rem* jurisdiction … implicate States' sovereign immunity from suit, the States agreed in the plan of the Convention not to assert that immunity." *Katz*, 546 U.S. at 373.

The petition sets forth two additional questions concerning state sovereign immunity in bankruptcy:

1. The first is whether a state may assert sovereign immunity in an *in rem* action when the state has no direct interest in the *res*. Even if that question were interesting in theory—if it implicated a circuit conflict (it does not) or even arose from a published decision establishing a rule of law for sovereign immunity in other cases (it does not)—it would not be subject to review here, because it was not pressed or passed upon below, and because it rests on the false premise that petitioners here lack any interest in the estate *res*. The first question presented, in short, is not presented at all.

2. Petitioners' second question is whether the bankruptcy court may exercise jurisdiction to decide petitioners' claim of liability arising out of Form 400 filings. Again, petitioners do not contend that the decision below creates a circuit conflict, nor could it: the unpublished decision does not establish any rule of law at all. Equally significant, the court of appeals' decision made explicitly clear that this case presents no occasion to address petitioners' second question, because the underlying adversary proceeding simply does not concern petitioners' Form 400 liability claim. The bankruptcy court instead is exercising jurisdiction only to resolve the Insurers' claim that the *Policies* do not provide coverage. Petitioners' insistence that the bankruptcy court seeks to resolve their Form 400 theory rests on a stark and repeated mischaracterization of the bankruptcy court's actions. Contrary to the central premise of petitioner's argument, the bankruptcy court has *never* injected the Form 400 theory of liability into the bankruptcy proceedings. Just the opposite: the bankruptcy court has repeatedly attempted to *ex-*

clude petitioners' Form 400 claim from the case and has offered, on a number of occasions, to sever it from the Insurers' claim concerning the Policies. It is *petitioners* who have repeatedly refused to accept that severance—including within the past two months—and thereby permit the Form 400 claim to proceed separately in the state forum. This Court need not and should not intervene to solve a problem that, if it exists at all, is one of petitioners' own making.

The petition should be denied.

I. THE FIRST QUESTION PRESENTED DOES NOT MERIT REVIEW

A. The First Question Presented Was Neither Pressed Nor Decided Below

Petitioners finally concede that the bankruptcy court has *in rem* jurisdiction to resolve a dispute over the Policies. Pet. 15-16. They now argue instead that a state may escape such a proceeding when the state has no interest in the bankruptcy *res*—i.e., when the state has no claim against the estate, and when the debtor has not asserted an action against the state under the bankruptcy laws. Pet. 16.

Petitioners did not raise that argument below. Rather, they argued that the adversary proceeding did not actually involve the scope of the Policies, but instead was an attempt by the Insurers to smuggle the Form 400 claim into the bankruptcy proceeding under the ruse of construing the Policies. And that Form 400 claim, they insisted, could not be properly adjudicated by the bankruptcy court. Pet. Appeal Br. 38-39. As the court of appeal described it, peti-

tioners' argument concerning sovereign immunity was "that the adversary proceeding is only nominally about the insurance contracts and is actually about whether the Insurers are liable under Michigan law for filing Form 400 Notices of coverage." App. 7a-8a.

The Second Circuit addressed and rejected not the argument petitioners raise here, but rather their antecedent premise that the Insurers' adversary proceeding actually challenged petitioners' Form 400 claim. That premise was wrong, the court explained, because the "adversary complaint makes clear that the proceeding is focused on the parties' responsibilities under the contracts," and "[t]here is no Form 400-based claim in the Insurers' adversary complaint." App. 8a. "Although [petitioners] may ultimately prevail on the merits on their Form 400 theory," the court explained, "that argument ultimately bears on the merits of whether the Insurers are liable apart from their contractual obligations, which is not the question before us on collateral review of the District Court's denial of the motion to dismiss the adversary complaint." *Id.*

This Court is "a court of review, not of first view." *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005). The Court should not be the first to address petitioners' new contention that they are immune from the adversary proceeding, *even if* it implicates only the Policies. Among other things, that new contention rests on the incorrect factual premise that petitioners have no interest in construction of the Policies. *See infra* at 29-31. The potential for factual mistakes is among the many reasons this Court requires that arguments be thoroughly ventilated in the low-

er courts before they are reviewed here. That rule precludes review of the first question presented.

B. The First Question Presented Implicates No Circuit Conflict, And Has No Significance Beyond The Facts Of This Case

The first question presented should also be denied because it implicates no circuit conflict and is otherwise unimportant.

Petitioners do not even attempt to identify any conflict among the circuits concerning the scope of the states' sovereign immunity in bankruptcy proceedings. Nor can they cite even a single case, in *any* court, that has considered the question on which they seek review. That petitioners cannot identify even one case that grapples with their first question presented is good evidence that the question presented has no importance or application beyond this case, which is an independent reason to deny certiorari.

Indeed, petitioners' attempted explanation of the petition's importance serves only to demonstrate the novelty of the issue they raise. Apart from invoking the general importance of sovereign immunity (Pet. 24-26), petitioners argue that this case is worthy of this Court's attention because the adversary proceeding is preventing petitioners from moving ahead with workers' compensation proceedings in Michigan. Pet. 23-24. But that is only so because petitioners have throughout this case argued *both* that the Insurers are liable for Delphi's workers' compensation liability simply because they mistakenly filed Form 400 notices, *and* that the Policies cover that workers' compensation liability. Petitioners have

repeatedly been told that they could proceed with workers' compensation proceedings so long as they give up reliance on the Policies, which, again, are property of the bankruptcy estate, and over which petitioners agree the bankruptcy court may exercise *in rem* jurisdiction. They have repeatedly refused, presumably because they know their Form 400 theory—i.e., that an insurer may be liable for the workers' compensation liability of a self-insured entity merely because the insurer erroneously filed a purely administrative notice form with a state entity—is facially absurd and will never prevail on its own terms. Insurers' Appeal Br. 29-33. Whatever their reason, however, petitioners' purported predicament is entirely of their own making, unlikely to be presented in any other case, and has nothing to do with the proper scope of sovereign immunity in bankruptcy proceedings.

C. The Decision Below Is Correct

It is unsurprising that no other circuit decisions—or decisions at any level—disagree with the decision below. It is an unexceptional application of settled precedent of this Court.

1. Petitioners emphasize the supposedly "controversial" nature of this Court's decision in *Katz* (Pet. 14), which held that "[i]nsofar as orders ancillary to the bankruptcy courts' *in rem* jurisdiction … implicate States' sovereign immunity from suit, the States agreed in the plan of the Convention not to assert that immunity." *Katz*, 546 U.S. at 373. But that holding is largely beside the point, because this case is squarely controlled by the Court's prior decision in *Hood*, which focuses not on sovereign immunity from

ancillary proceedings, but on sovereign immunity from the *in rem* proceeding itself. As this Court explained, a bankruptcy court's *in rem* jurisdiction "is premised on the debtor and his estate, and not on the creditors," 541 U.S. at 447, and it permits the court "to determin[e] all claims that anyone, whether named in the action or not, has to the property or thing in question," *id.* at 448 (quotation omitted). "The proceeding is one against the world." *Id.* (quotation omitted). Accordingly, "when the bankruptcy court's jurisdiction over the res is unquestioned, the exercise of its *in rem* jurisdiction to discharge a debt does not infringe state sovereignty." *Id.*; *see id.* at 452 ("the bankruptcy courts' exercise of *in rem* jurisdiction is not" "an affront to States' sovereignty").

It made no difference, the *Hood* Court further reasoned, that the discharge proceeding in *Hood* required the commencement of an adversary proceeding against the state, even though such a proceeding "has some similarities to a traditional civil trial," including the issuance of process. *Id.* at 452. An adversary proceeding "is considered part of the original bankruptcy case" and "still within the bankruptcy court's *in rem* jurisdiction." *Id.* The Court distinguished a discharge proceeding from a proceeding "by the bankruptcy trustee seeking to recover property in the hands of the State." *Id.* at 454. Unlike a recovery action, the debtor in an *in rem* discharge proceeding "does not seek damages or affirmative relief from a State." *Id.* at 451.

Like the discharge proceeding at issue in *Hood*, the Insurers' adversary proceeding invokes the bankruptcy court's *in rem* jurisdiction. The Policies are indisputably property of the estate, and the

bankruptcy court has exclusive *in rem* jurisdiction over those assets. 28 U.S.C. § 1334(e). The adversary complaint seeks a declaration that those assets do not cover Delphi's self-insured workers' compensation liability (or, in the alternative, an equitable reformation of the Policies to achieve that result), and thus falls squarely within the traditional *in rem* jurisdiction of the bankruptcy court, as petitioners concede. Pet. 15. The bankruptcy court thus had jurisdiction to resolve claims asserted in the adversary proceeding, and petitioners had no basis for asserting sovereign immunity against them.

Petitioners' contrary argument is meritless. They contend that "it is a *non sequitur* to say that because the Bankruptcy Court has *in rem* jurisdiction [over the adversary proceeding], which involves the Debtor's own contracts, it also has the much greater and intrusive power to assert jurisdiction over governmental entities." Pet. 16. Petitioners simply misunderstand *in rem* jurisdiction—it is not asserted "over governmental entities," or over any other entity *in personam*. It is asserted only over the estate and its property, and thus—as *Hood* squarely holds—it precludes *anyone*, including states, from making claims against the *res* outside the court's jurisdiction. Petitioners attempted to do exactly that here when they contended that the Policies cover Delphi's workers' compensation liability. All three courts below correctly held that petitioners could not assert sovereign immunity against the bankruptcy court's disposition of that claim.[3]

2. Even if the adversary proceeding were not an *in rem* proceeding within the scope of *Hood*, petitioners' sovereign immunity defense would still founder on *Katz*, because the proceedings below are at least ancillary to the bankruptcy court's *in rem* jurisdiction.

Katz holds that states generally cannot assert immunity against claims arising in proceedings ancillary to the exercise of bankruptcy jurisdiction. 546 U.S. at 362. The states understood at the time of the Constitutional Convention in 1787 "that laws 'on the subject of Bankruptcies' included laws providing, in certain limited respects, for more than simple adjudications of rights in the res." *Id.* at 370 (quoting U.S. Const. art. I, § 8, cl. 4). Accordingly, "[i]nsofar as orders ancillary to the bankruptcy courts' *in rem* jurisdiction … implicate States' sovereign immunity from suit, the States agreed in the plan of the Convention not to assert that immunity." *Id.* at 373; *see id.* at 378 ("In ratifying the Bankrupt-

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[3] Relying on a footnote in *Hood*, petitioners argue that its holding precludes the assertion of sovereign immunity only where (1) "a state entity assert[s] a claim against the estate *res*," or (2) "the debtor assert[s] a claim against the state based on rights under the bankruptcy laws." Pet. 16. But petitioners here *did* assert a claim against Delphi's estate. *Supra* at 8-9. And petitioners misread *Hood* in any event. This Court made clear that sovereign immunity *can* be implicated by the exercise of *in rem* jurisdiction, but only when "money damages or any affirmative relief from the State" is sought, or when an action "subject[s] an unwilling State to a coercive judicial process." 541 U.S. at 450. Here, however, the adversary proceeding merely requires the bankruptcy court to interpret insurance contracts that are the property of the bankruptcy estate—a classic, routine exercise of *in rem* jurisdiction.

cy Clause, the States acquiesced in a subordination of whatever sovereign immunity they might otherwise have asserted in proceedings necessary to effectuate the *in rem* jurisdiction of the bankruptcy courts.").

That principle controls here. Even if the Insurers' adversary complaint were read to implicate something beyond a "simple adjudication[] of rights in the res," *id.* at 370, the complaint is at the very least ancillary to the bankruptcy court's *in rem* jurisdiction. As explained, and as the courts below have all found, adjudication of the scope of the Policies will directly affect the allowance or disallowance and priority of claims against Delphi, and will have a significant impact on the estate's assets and how they are distributed. *Supra* at 13-17. Claim allowance, priority determination, and asset distribution are traditional and permitted exercises of the bankruptcy court's *in rem* jurisdiction.

Petitioners contend that the principle of *Katz* precludes the assertion of sovereign immunity only as to "preferences or … other right[s] created or provided to the Debtor against [a State] by the Bankruptcy Code," or a "state claim on the estate *res*." Pet. 15. But petitioners *do* have a claim on the estate *res*—they have an administrative expense claim of over $5 million that will be directly affected by the resolution of the dispute over the scope of the Policies. And even if they did not, the scope of the holding in *Katz* is not so narrow as they contend. The question under *Katz* is whether an action is *necessary to effectuate* the bankruptcy court's *in rem* jurisdiction. As discussed, even if this adversary proceeding were not simply an *in rem* adjudication of

rights in the *res*, it is certainly at least necessary to effectuate the bankruptcy court's *in rem* jurisdiction. Indeed, the adversary complaint, which seeks no affirmative relief from the State, represents a much more limited encroachment on state sovereignty than did the action in *Katz*, which sought to recover property already in the state's possession. 546 U.S. at 360. It follows *a fortiori* that petitioners cannot assert sovereign immunity in this action.[4]

D. The First Question Presented Is Not Implicated On The Facts Of This Case

Even if the first question presented were otherwise worthy of review, this case would be a uniquely unsuitable vehicle through which to resolve it. The entire premise of the first question presented is that while the Policies are property of the bankruptcy estate over which the bankruptcy court may exercise *in rem* jurisdiction, petitioners are not "parties to the [Policies] and … have sought nothing from the estate *res* in this adversary proceeding" (Pet. 16), which petitioners believe distinguishes this case from this

[4] Petitioners did not argue below—and do not argue here—that the *stay order* preventing them from proceeding with workers' compensation actions in Michigan is what violates their sovereign immunity. They cannot so argue, because petitioners themselves agreed to forestall any proceeding in a Michigan forum as a condition of the stay of the adversary proceeding pending their appeal. App. 35a-39a. In any event, the stay is plainly "necessary to effectuate the *in rem* jurisdiction of the bankruptcy court[]" here, *Katz*, 546 U.S. at 370, because it prevents a Michigan tribunal from directly altering the *res* by deciding the scope of the Policies and thereby substantially affecting not only a core estate asset, but also the allowance, disallowance, and priority of claims against the estate, as well as the distribution of estate assets.

Court's precedent in *Hood* and *Katz*. Pet. 15-16. That premise is false, as all three courts below held.

To begin, while it is true that petitioners are not parties to the Policies, they administer the workers' compensation obligations imposed on employers, enforce the mandated insurance requirements, and represent the Policies' purported beneficiaries—former Delphi employees who have filed workers' compensation claims. Petitioners argue in that capacity not only that the Insurers are liable under their Form 400 theory, but also that the Policies provide workers' compensation coverage. *See supra* at 11, 13. Petitioners thus *have* sought something from the estate *res*—payments under insurance contracts that are property of the estate. Even petitioners do not argue that *Katz* and *Hood* would permit a state to avoid the bankruptcy court's jurisdiction when the state asserts coverage under insurance contracts that are property of the bankruptcy estate.

Petitioners also have a direct interest in the Policies arising from the $5 million-plus administrative expense claims they filed against the estate based on Delphi's self-insured workers' compensation liability (as well as over $60 million in pre-petition-based claims later deemed untimely). The disposition of that claim directly depends on whether the Policies are formally construed to provide coverage to workers' compensation claimants. As the bankruptcy court specifically found, a ruling that the Policies cover Delphi's workers' compensation liability will result in the disallowance of petitioners' administrative expense claim, since it is premised on Delphi's self-insured status. The same ruling could also lead to the allowance of the Insurers' substantial claim

against Delphi, which is premised on Delphi's assumption of the Policies. It is thus irrelevant whether *Hood* and *Katz* in theory permit a state to assert sovereign immunity where the state seeks "nothing from the estate *res*" (Pet. 16)—here petitioners have directly sought over $5 million from the estate in the form of an administrative expense claim, which turns on the availability of coverage under the Policies.

Given that petitioners plainly do have multiple interests in the Policies—both as claimants on the estate and as representatives of claimants on the Policies—the facts here simply do not present any question concerning sovereign immunity from a bankruptcy proceeding where the state *lacks* any interest in the estate.

II. THE SECOND QUESTION PRESENTED DOES NOT MERIT REVIEW

The second question presented is whether a bankruptcy court may properly assert jurisdiction over petitioners' Form 400 theory—what petitioners call "a state-law statutory claim that does not involve the discharged debtor." Pet. i. That question is not worthy of review by this Court for all the usual reasons—the decision below is non-precedential, petitioners do not and cannot allege a circuit conflict, and they cannot even demonstrate that this question has ever arisen in any other case. An unpublished, sui generis decision is not the stuff of certiorari review.

And there is more. The Second Circuit specifically held that petitioners' Form 400 theory is not presented by the adversary complaint, and thus that the

court was not resolving any question about bankruptcy jurisdiction or sovereign immunity concerning that theory. Further, petitioners are currently seeking resolution of this precise question in the lower courts, rendering interlocutory review by this Court unnecessary.

A. The Second Circuit Expressly Held That The Issue Raised In The Second Question Is Not Presented In This Case

Petitioners say that their sovereign immunity bars the exercise of jurisdiction over the question whether the filing of the Form 400s alone establishes workers' compensation liability. The Second Circuit did not hold otherwise. It instead held that petitioners' Form 400-related argument is not even presented in this case. The "adversary complaint makes clear," the court explained, "that the proceeding is focused on the parties' responsibilities under the contracts." App. 8a. "There is no Form 400-based claim in the Insurers' adversary complaint." *Id.* The court therefore said it "express[ed] no view and render[ed] no decision as to" the *exact* question petitioners now seek to raise, *viz.*, "whether the Bankruptcy Court has jurisdiction over any claim or challenge to the liability of the Insurers for filing the Form 400 Notices," or "whether resolution of any such claim brought in federal court against [petitioners] would invade their sovereign immunity." App. 9a n.2. This Court can hardly review a question the court of appeals said it could not, would not, and did not answer.

Indeed, it bears emphasis that petitioners are unable to proceed with workers' compensation ac-

tions in Michigan *not* because the bankruptcy court seeks to decide the merits of petitioners' Form 400 claim. The Michigan proceedings remain stayed only because petitioners have repeatedly insisted that the Insurers are *also* liable under the Policies, and they have refused to accept severance of that claim from their Form 400 theory. Indeed, the bankruptcy court just recently explained—yet again—that it believed it had jurisdiction over petitioners' coverage claim against the Insurers "only to the extent it implicates the policies." Tr. of Mar. 22, 2012 Hrg. 24. And the bankruptcy court has repeatedly offered petitioners the option of stipulating that the Policies themselves do not provide coverage, which would permit them to proceed with a pure Form 400 theory in Michigan without undermining the bankruptcy estate by relitigating the question of coverage under the Policies. Petitioners have consistently refused, thereby leaving open the prospect that a Michigan forum, and not the bankruptcy court, would determine rights and obligations under the Policies and issue rulings with immediate consequences for the allowance and disallowance of claims and for the distribution of estate assets. The whole purpose of the bankruptcy court's *in rem* jurisdiction is to avoid such a result.

B. The Second Question Presented Is In Any Event The Subject Of Ongoing Litigation In The Lower Courts

This Court is not the only judicial forum in which petitioners are seeking to litigate their claim to immunity based on their Form 400 theory. Indeed, while petitioners argue here that the Second Circuit affirmed the bankruptcy court's exercise of jurisdic-

tion over the Form 400 issue, they argued precisely the opposite to the bankruptcy court, asking the bankruptcy court to lift the current stay and allow them to proceed in Michigan based on the Second Circuit's statement that the Form 400 question is *not* at issue in this case. Tr. of Mar. 22, 2012 Hrg. 17-47. The bankruptcy court, as explained, refused insofar as petitioners declined to stipulate that the Policies do not provide coverage, which would limit their claim to liability based on the Form 400 filings. *Id.*

Petitioners have now sought leave from the district court to appeal that decision, and have argued that the district court "should continue to recognize that in accordance with … the Second Circuit's decision," the "Form 400-based claim is not properly before any of the federal courts." Mot. for Leave to Appeal, No. 09-01510, ECF No. 109, at 13 (S.D.N.Y.). That motion remains pending.

That argument cannot be reconciled with the petition's reading of the Second Circuit opinion as holding conclusively that the Form 400 theory is subject to bankruptcy-court jurisdiction and is not subject to sovereign immunity. Petitioners' current argument in the district court confirms that there is no such holding below, and hence nothing for this Court to review. And the possibility that the lower courts could grant petitioners the relief they seek is all the more reason this Court should avoid intervening in the case at this interlocutory stage.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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