No. 16-317

IN THE

Supreme Court of the United States

DEUTSCHE BANK TRUST COMPANY AMERICAS, ET AL.,

Petitioners,

v.

ROBERT R. MCCORMICK FOUNDATION, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF OF T. ROWE PRICE RESPONDENTS

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CORPORATE DISCLOSURE STATEMENT

The corporate disclosure statement for the T. Rowe Price Respondents is contained within pages (i) – (xxxvii) of the Brief in Opposition to the Petition for *Certiorari*.

SUPPLEMENTAL BRIEF OF T. ROWE PRICE RESPONDENTS

Pursuant to Rule 15.8 of the Rules of this Court, Petitioners have cited the recent decision in *In re Northington*, 876 F.3d 1302 (11th Cir. 2017). *See* Supp. Br., App. la-49a. Respondents T. Rowe Price Equity Income Fund, Inc., T. Rowe Price Mid-Cap Value Fund, Inc., T. Rowe Price Balanced Fund, Inc., and T. Rowe Price Equity Index Trust (the "T. Rowe Price Respondents") agree with the joint brief filed by Respondents Susquehanna Capital Group et al., that *Northington* deepens no relevant circuit split on the first question presented (whether the presumption against federal preemption of state law applies in the bankruptcy context), and says little of relevance about the third (whether section 546(e) of the Bankruptcy Code preempts state-law fraudulent-conveyance suits brought by creditors).

The T. Rowe Price Respondents[1] write separately to point out that if there were now a relevant circuit split as to *implied* preemption in Title 11 cases (and there is not, for the reasons explained in the Susquehanna brief), *Tribune* would be the wrong case to resolve it, because resolution would not affect the outcome in *Tribune*. That is because this Court has already *expressly* held that the "reverter" mechanism deployed by the *Tribune* petitioners is impermissible. *Northington* provides no grounds to overcome the latter problem, and so this Court should deny *certiorari* on the first and third questions presented.

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[1] The T. Rowe Price Respondents are joint respondents on the Brief of Respondents in Opposition to the Petition for *Certiorari*.

ARGUMENT

Suppose debtor D, owing creditor C $100, fraudulently transfers $1 million to E. Outside of bankruptcy, state law permits C to avoid the transfer to E to the extent of $100, in order to recover his debt. *See, e.g.,* 6 Del. C. §1307(a)(1) (creditor in Delaware fraudulent transfer action may obtain "[a]voidance of the transfer … to the extent necessary to satisfy the creditor's claim").

But if D commences bankruptcy proceedings, his trustee succeeds to the avoidance rights of C and *of all other creditors*. 11 U.S.C. §544(b). When that happens, the avoidance rights of C and all other creditors are "absorbed" in the trustee's "great and comprehensive remedy" to avoid, for the benefit of the entire bankruptcy estate and all of the debtor's creditors, all fraudulent transfers made by the debtor. *Glenny v. Langdon*, 98 U.S. 20, 28 (1878).

Once the representative of a bankruptcy estate acquires this comprehensive avoidance power, the power is forever changed. In *Trimble v. Woodhead*, 102 U.S. 647 (1880), this Court squarely held that once a bankruptcy estate is created, its representative acquires a comprehensive avoidance power, which cannot thereafter disaggregate into the discrete creditor-by-creditor powers that existed before bankruptcy, and revert to the creditors.

Trimble involved a creditor's fraudulent conveyance claim that arose under Kentucky law prior to the debtor's bankruptcy. The debtor went into proceedings under the Bankruptcy Act of 1867, ch. CLXXVI, § 2 (repealed 1878), 14 Stat. 517 (1867) (the "1867 Act"). In those proceedings, the "assignee" - the 1867 equivalent of the modern bankruptcy trustee -- did not pursue the avoidance action. After the

bankruptcy case was closed, the creditor tried to restart the pre-existing state-law fraudulent transfer action.

The Court held that effort was barred, because an avoidance claim that arose under state law prior to bankruptcy could not revert to a creditor after the debtor's bankruptcy. 102 U.S. at 649. "We do not see on what principle the failure of the assignee to sue within two years transfers his right of action to the [creditor,]" the Court concluded. *Id.*; *see also Moyer v. Dewey*, 103 U.S. 301, 303 (1880) (stating that *Trimble* holds that "the right to bring such an action as this—the right to the property so fraudulently conveyed—is vested in the assignee alone, and that his failure to sue within the two years allowed by the bankrupt law does not transfer this right of property or right of action to a creditor of the bankrupt.").

In *Trimble*, this Court relied on its earlier decision in *Glenny*, where a debtor concealed from his creditors and the assignee the true value of a cause of action that the debtor owned before his bankruptcy. 98 U.S. at 23. The claim was fraudulently conveyed from the estate, and then back to the debtor. Thereafter the creditors brought suit against the assignee for nonfeasance and the debtor for fraud. While this Court dismissed the case on jurisdictional grounds, it observed that the complaining creditors could sue neither defendant:

> [Creditors] can have no remedy which will reach [fraudulently conveyed] property except through the assignee, not only for the reasons already assigned, but because *their remedies are absorbed in the great and comprehensive remedy* under the commission by virtue of which the assignee is to collect and distribute

> among them the property of their debtor....

98 U.S. at 28 (emphasis added) (citation omitted); *see id.* at 22 (action based upon fraudulent transfer "vested in the assignee" and could not be brought by the creditor acting alone).

Later bankruptcy statutes have superseded the 1867 Act, but *Trimble* and *Glenny* remain the law today, for amendments to bankruptcy statutes do not overrule prior precedent except where Congress expressly provides in the statutory text or the legislative history. *Dewsnup v. Timm*, 502 U.S. 410, 419 (1992).[2] The successor statute to the 1867 Act, the Bankruptcy Act of 1898, ch. 541, §§ 1 *et seq*., 30 Stat. 544 (1898), remained the law for 80 years, and did not alter the *Trimble* rule. For example, one court construing a similar situation that arose under the Bankruptcy Act dismissed a creditor's post-bankruptcy effort to pursue a pre-petition avoidance claim, noting that "[i]n order to bring this action, it was incumbent upon the plaintiff either to petition the bankruptcy court to compel an action by a trustee, or to obtain leave to prosecute the suit on behalf of the estate." *Samuel H. Pardes, Inc. v. Henley Fashions, Inc.*, 118 N.Y.S. 2d 578 (N.Y. Sup. Ct. 1953).

The bankruptcy code, enacted in 1978, *did* expressly modify the *Trimble* rule – but only where the

[2] As the Second Circuit noted in the decision below, *Trimble* "is a very old decision, but has not been expressly overruled." *In re Tribune Company Fraudulent Transfer Litigation*, 818 F.3d 98, 117 (2d Cir. 2016).

debtor's bankruptcy case is dismissed.[3] Under the familiar doctrine of *expressio unius exclusio alterius est,* Congress's mere limitation of what it might have revoked altogether retained the effectiveness of *Trimble* in proceedings where, as here, a bankruptcy case is *not* dismissed, but proceeds to plan confirmation.

The first and third questions presented go to whether federal law *impliedly* preempts plaintiff creditors from proceeding on fraudulent transfer claims that they say have "reverted" to them from the bankruptcy estate, and the Susquehanna respondents have aptly summarized the reasons that *Northington* adds nothing material to the law of implied preemption. But this Court need not reach any question of implied preemption to deny *certiorari*. Its venerable holding in *Trimble*, never legislatively overruled except in cases where a bankruptcy case is dismissed, expressly bars such an action. Because nothing in *Northington* undermines this Court's decisions in *Trimble* and *Glenny*, *certiorari* is not warranted on the first and third questions presented.

[3] Where a bankruptcy case is dismissed, claims of this character do revert to creditors. 11 U.S.C. §349(b). The *Tribune* case was not dismissed, but proceeded through reorganization.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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