No.

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

PETITION FOR A WRIT OF CERTIORARI

JAY TEITELBAUM
Teitelbaum Law Group, LLC
1 Barker Avenue
White Plains, NY 10601
(914) 437-7670
jteitelbaum@tblawllp.com
Counsel for the Retirees

LAWRENCE S. ROBBINS
Counsel of Record
ROY T. ENGLERT, JR.
ALAN E. UNTEREINER
JOSHUA S. BOLIAN
MEGAN D. BROWDER
Robbins, Russell, Englert, Orseck, Untereiner & Sauber LLP
2000 K Street, N.W.
Washington, DC 20006
(202) 775-4500
lrobbins@robbinsrussell.com
Counsel for the Noteholders

July 6, 2020

QUESTIONS PRESENTED

1. Whether the court of appeals correctly held, in conflict with the decisions of four other circuits and of this Court, that the presumption against preemption of state law does not apply to creditor-rights claims once federal bankruptcy law has been invoked.

2. Whether the court of appeals correctly held that laws allowing creditors to avoid certain fraudulent transfers, which long have existed in every State, are preempted because they are an obstacle to the "purposes and objectives" of 11 U.S.C. § 546(e), notwithstanding this Court's unanimous holding in *Merit Management Group, LP* v. *FTI Consulting, Inc.*, 138 S. Ct. 883 (2018), that Section 546(e) does not have the purpose that the court of appeals ascribed to it.

3. Whether, notwithstanding the holding in *Merit* that Section 546(e) does *not* exempt fraudulent transfers from avoidance merely because a financial institution acted as a conduit, the court of appeals correctly held that Section 546(e) *does* exempt certain fraudulent transfers from avoidance if executed via a bank as a conduit, on the ground, left open in *Merit*, that the bank's customer is itself a "financial institution."

PARTIES TO THE PROCEEDING

Petitioners, plaintiffs-appellants below, are (i) Retirees of Tribune Company owed retirement benefits, as set forth in the appendix, Pet. App. 169a-172a, and (ii) Noteholders of Tribune Company, namely Deutsche Bank Trust Company Americas, Delaware Trust Company, and Wilmington Trust Company.

Respondents, defendants-appellees below, are former shareholders of Tribune Company, as set forth in the appendix. Pet. App. 173a-295a.

Certain defendants-appellees below are not respondents here. Regarding a previous petition for certiorari in this case, Justices Kennedy and Thomas noted "that there might not be a quorum in this Court." Pet. App. 74a. To make more likely that there will be a quorum for this petition, petitioners abandon the case and let the judgment below stand as to the following defendants-appellees:

Advanced Series Large Cap, T. Rowe Price Retirement Plan Services, Inc.

Aegon/Transamerica Series Trust T. Rowe Price Equity Income

AIM Counselor Series Trust (Invesco Counselor Series Trust)

AIM Variable Insurance Funds (Invesco Variable Insurance Funds)

AQR Capital Management LLC

AQR R. C. Equity Australia Fund

AST T. Rowe Price Asset Allocation Portfolio

Bank of America, National Association as Directed Trustee of Bank of America Pension-T. Rowe Price

Bank of New York Mellon Corporation

BlackRock

BlackRock Institutional Trust

BlackRock Institutional Trust Company, N.A. (Equity Index Fund)

BlackRock Institutional Trust Company, N.A. (Equity Index Fund B)

BlackRock Institutional Trust Company, N.A. (Equity Index Plus Fund A)

BlackRock Institutional Trust Company, N.A. (Equity Value Fund)

BlackRock Institutional Trust Company, N.A. (Russell 1000 Alpha Tilts Fund BL)

BlackRock Institutional Trust Company, N.A. (Russell 1000 Index Fund)

BlackRock Institutional Trust Company, N.A. (Russell 1000 Value Fund B)

BlackRock Institutional Trust Company, N.A. (Russell 1000 Value Fund)

BlackRock Institutional Trust Company, N.A. (Russell 2500 Index Fund)

BlackRock Institutional Trust Company, N.A. (Russell 3000 Index Fund)

BlackRock Institutional Trust Company, N.A. (S&P 500 Index V.I. Fund)

BlackRock Institutional Trust Company, N.A. (US Equity Market Fund A)

BlackRock Institutional Trust Company, N.A. (US Equity Market Fund B)

BlackRock Institutional Trust Company, N.A. f/k/a Barclays Global Investors N.A.

BlackRock Institutional Trust Company, National Association f/k/a Barclays Global Investors, N.A.

BlackRock Variable Series Funds, Inc.

Boston Partners Asset Management

Charles Schwab & Co., Inc.

Charles Schwab Investment Management, Inc.

Cheetah & Co.

College Retirement Equities Fund

Deutsche Asset Management, Inc. (Scudder)

Deutsche Bank Secs Inc.

Deutsche Bank Securities Inc.

Deutsche Bank Securities Inc., in Its Individual and Custodial Capacities

DFA Investment Dimensions Group, Inc.

DFA U.S. Core Equity Fund of Dimensional Funds

DFA U.S. Vector Equity Fund of Dimensional Funds

Dimensional Investment Group, Inc.

Dreyfus Active Midcap Fund

Dreyfus Basic S&P 500 Stock Index Fund

Dreyfus Index Funds, Inc.

Dreyfus S&P 500 Stock Index Fund

Dreyfus Stock Index Funds, Inc.

Dreyfus/Laurel Funds Inc.

DWS Equity 500 Index Portfolio

DWS Investments VIT Funds, as Issuer of a Series Known as DWS Equity 500 Index VIP

Eaton Vance Management

Eaton Vance Management, Inc.

Eaton Vance Multi Cap Growth Portfolio

Eaton Vance Tax Managed Global Buy Write Opportunities Fund

Eaton Vance Tax Managed Growth Portfolio

Eaton Vance Tax Managed Multi-Cap Growth Portfolio

Federated Capital Appreciation Fund II (f/k/a Federated Clover Value Fund II)

Federated Capital Income Fund, Inc.

Federated Clover Value Fund (f/k/a Federated American Leaders Fund)

Federated Equity Funds

Federated Equity Income Fund, Inc.

Federated Income Securities Trust

Federated Index Trust

Federated Insurance Series

Federated Investment Counseling

Federated Investment Management Company

Federated Investors

Federated Investors Corporation

Federated Investors, Inc.

Federated Managed Volatility Fund II (f/k/a Federated Capital Income Fund II f/k/a Federated Equity Income Fund II)

Federated Managed Volatility Fund II (f/k/a Federated Capital Income Fund II)

Federated Max-Cap Index Fund

Federated MDT Stock Trust

Federated Muni and Stock Advantage Fund

FGTFEBP for the Fidelity US Equity Index Commingled Pool

Fidelity Advisor Series I

Fidelity Commonwealth Trust

Fidelity Concord Street Trust

Fidelity Securities Fund-Leveraged Company Stock Fund

Fidelity US Equity Index Commingled Pool

Fortis Clearing Americas LLC 695

Foulard & Co.

Goldman Sachs Variable Insurance Trust

ING Investors Trust

Invesco Asset Mgmt (Japan) Ltd.

Invesco Perpetual

Invesco SPG Index Trust

iShares Trust (iShares Dow Jones U.S. Consumer Services Sector Index Fund)

iShares Trust (iShares Dow Jones U.S. Index Fund f/k/a iShares Dow Jones U.S. Total Market Index Fund)

iShares Trust (iShares Morningstar Mid Value Index Fund)

iShares Trust (iShares Russell 1000 Index Fund)

iShares Trust (iShares Russell 1000 Value Index Fund)

iShares Trust (iShares Russell 3000 Index Fund)

iShares Trust (iShares Russell 3000 Value Index Fund)

iShares Trust (iShares Russell Midcap Index Fund)

iShares Trust (iShares Russell Midcap Value Index Fund)

iShares Trust (iShares S&P 500 Index Fund)

iShares Trust (iShares S&P 500 Value Index Fund)

J.P. Morgan

J.P. Morgan Securities LLC f/k/a J.P. Morgan Securities Inc.

J.P. Morgan Securities Ltd.

J.P. Morgan Securities, LLC f/k/a J.P. Morgan Securities Inc.

J.P. Morgan Services, Inc.

John Doe as Owner of Federated Investment Counseling

John Doe as Owner of State Street Global Advisors, Inc. -- S&P 500 Equal Weight CTF

John Doe, as Trustee for T. Rowe Price Equity Income Trust

John Doe, as Trustee of Invesco SPG Index Trust

John Doe, as Trustee of the Federated MDT Stock Trust

John Doe, as Trustee of the T. Rowe Price Structured Research Common Trust Fund

JPMorgan Chase Bank National Association

JPMorgan Chase Bank, National Association

MainStay VP Funds Trust (f/k/a MainStay VP Series Fund, Inc.), as issuer of a series known as MainStay VP Common Stock Portfolio

MainStay VP Funds Trust (f/k/a MainStay VP Series Fund, Inc.), as issuer of a series known as MainStay VP Mid Cap Core Portfolio

MainStay VP Funds Trust (f/k/a MainStay VP Series Fund, Inc.), as issuer of a series known as MainStay VP S&P 500 Index Portfolio

Maxim T. Rowe Price Equity/Income Portfolio

Mellon Capital Management Corporation

Metropolitan Stock Index Fund

MML Equity Income Fund

MML Equity Income Fund, T. Rowe Price Retirement Plan Services, Inc.

Morgan Stanley Select Dimensions Investment Series

Pacific Select

Pacific Select Fund

Principal Variable Contracts Funds Inc.

Putnam Fiduciary Trust Company, as Trustee of the Putnam S&P 500 Index Fund

Putnam S&P 500 Index Fund

Robert W Baird Co. Inc.

Schwab 1000 Index Fund

Schwab Capital Trust

Schwab Fundamental US Large Company Index Fund

Schwab Investments

Schwab S&P 500 Index Fund (f/k/a Schwab Institutional Select S&P 500 Fund)

Schwab Total Stock Market Index Fund

Sherbet & Co.

Spinningrod & Co.

State Street Global Advisors

State Street Global Advisors (Japan) Co., Ltd.

State Street Global Advisors Fund

State Street Global Advisors World Fund

State Street Global Advisors, Inc.

State Street Global Advisors, Inc. Boston

Steve H. Kagan

T. Rowe Price Associates

T. Rowe Price Associates (Spinningrod & Co.)

T. Rowe Price Associates Inc. (Cheetah & Co.)

T. Rowe Price Associates Inc. (Sherbet & Co.)

T. Rowe Price Associates, Inc.

T. Rowe Price Associates, Inc. (Foulard & Co.)

T. Rowe Price Associates, Inc. (Taskforce & Co.)

T. Rowe Price Balanced Fund - Large Cap Core Fund, Inc.

T. Rowe Price Balanced Fund, Inc.

T. Rowe Price Equity Income Fund a/k/a T. Rowe Price Equity Income Trust

T. Rowe Price Equity Income Trust c/o T. Rowe Price Associates, Inc.

T. Rowe Price Equity Index 500 Fund

T. Rowe Price Equity Index Trust

T. Rowe Price Equity Series, Inc.

T. Rowe Price Group Inc.

T. Rowe Price Index Trust, Inc.

T. Rowe Price Institutional Com Trust Fund Equity Index Trust

T. Rowe Price Mid-Cap Value Fund, Inc.

T. Rowe Price Retirement Plan Services, Inc.

T. Rowe Price Structured Research Common Trust Fund

T. Rowe Price Total Equity Market Index Fund

T. Rowe Price Trust Company

T. Rowe Price, as Owner of Advanced Series Large Cap

T. Rowe Price, as Owner of MML Equity Income Fund

Taskforce & Co.

Tax-Managed U.S. Equity Series of the DFA Investment Trust Company

Tax-Managed U.S. Marketwide Value Series of the DFA Investment Trust Company

Teachers Insurance Annuity Association of America

The Bank of New York Mellon Corporation

The Bank of New York Mellon as trustee of SPDR S&P MidCap 400 ETF Trust a/k/a SPDR MidCap 400 Trust

The DFA Group Trust

The DFA Investment Trust Company

The Dreyfus/Laurel Funds Inc.

The MainStay Funds Trust, as issuer of a series known as MainStay S&P 500 Index Fund

The MainStay Funds, as issuer of a series known as MainStay Common Stock Fund

The MainStay Funds, as issuer of a series known as MainStay Equity Index Fund

The Thomas Decedent's Trust U/D/T 6/12/1981

The Vanguard Group, Inc.

TIAA Board of Overseers, as Trustee

TIAA-CREF Funds

TIAA-CREF Institutional Mutual Funds

TIAA-CREF Investment Management, LLC

TIAA-CREF Life Funds

Transamerica BlackRock Large Cap Value VP (f/k/a Transamerica T. Rowe Price Equity Income VP)

Transamerica Series Trust (f/k/a Aegon/ Transamerica Series Trust)

U.S. Core Equity 1 Portfolio of DFA Investment Dimensions Group, Inc.

U.S. Core Equity 2 Portfolio of DFA Investment Dimensions Group, Inc.

U.S. Large Cap Value Series of The DFA Investment Trust Company

U.S. Large Company Portfolio of Dimensional Investment Group, Inc. (f/k/a U.S. Large Company Series of the DFA Investment Trust Company)

U.S. Vector Equity Portfolio of DFA Investment Dimensions Group, Inc.

USAA Federal Savings Bank, in its Custodial Capacity

USAA Investment Management Company

USAA Mutual Funds Trust

VA U.S. Large Value Portfolio of DFA Investment Dimensions Group, Inc.

Vanguard Asset Allocation Fund

Vanguard Balanced Index Fund (a/k/a Vanguard Balanced Index Equity Fund)

Vanguard Consumer Discretionary Index Fund

Vanguard Equity Income Fund

Vanguard Fenway Funds

Vanguard Fiduciary Trust Company, as Trustee of its sponsored and managed collective investment funds

Vanguard Fiduciary Trust Company, custodian, Steve H. Kagan IRA Rollover Account

Vanguard Fiduciary Trust Company, Russell 1000 Value

Vanguard FTSE Social Index Fund

Vanguard Growth & Income Fund

Vanguard High Dividend Yield Index Fund

Vanguard Index 500 Fund

Vanguard Index Funds

Vanguard Institutional Index Fund

Vanguard Institutional Index Funds

Vanguard Institutional Total Stock Market Index Fund

Vanguard Large Cap Index Fund

Vanguard Malvern Funds

Vanguard Mid-Cap Index Fund

Vanguard Mid-Cap Value Index Fund

Vanguard Quantitative Funds

Vanguard Scottsdale Funds

Vanguard Structured Large-Cap Equity Fund

Vanguard Tax Managed Growth & Income Fund

Vanguard Tax-Managed Fund

Vanguard Tax-Managed Funds

Vanguard Total Stock Market Index Fund

Vanguard Valley Forge Funds

Vanguard Value Index Fund

Vanguard Variable Insurance Fund

Vanguard Variable Insurance Funds

Vanguard VVIF Equity Fund Index

Vanguard VVIF Equity Income VGI

Vanguard VVIF Midcap Index Fund

Vanguard Whitehall Funds

Vanguard Windsor Funds

Vanguard Windsor II Fund

Vanguard World Fund (f/k/a Vanguard World Funds)

VFTC - Vanguard Company Stock Account 21

Wells Fargo Bank, N.A.

Wells Fargo Investment, LLC

William F. Thomas Jr., as Trustee of the Thomas Decedent's Trust U/D/T 6/12/1981

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, the undersigned counsel for the Retirees certifies that the Retirees are either individuals or entities in which no corporation or other entity owns 10% or more of any interest.

The undersigned counsel for the Noteholders make the following disclosures with respect to the Noteholders:

Deutsche Bank Trust Company Americas is a wholly owned subsidiary of Deutsche Bank Trust Corporation. Deutsche Bank Trust Corporation is a wholly owned subsidiary of DB USA Corporation. DB USA Corporation is a wholly owned subsidiary of Deutsche Bank AG. No corporation directly or indirectly owns 10% or more of any class of Deutsche Bank AG's equity interests.

Delaware Trust Company is a wholly owned subsidiary of Corporation Service Company, which is wholly owned by WMB Holdings, Inc. No corporation owns 10% or more of WMB Holdings, Inc.'s equity interests.

Wilmington Trust Company is a wholly owned subsidiary of Manufacturers and Traders Trust Company. Manufacturers and Traders Trust Company is a wholly owned subsidiary of M&T Bank Corporation. No corporation owns 10% or more of M&T Bank Corporation's equity interests.

RELATED PROCEEDINGS

Pursuant to Supreme Court Rule 14.1(b)(iii), a list of proceedings directly related to this case is set forth in the appendix. Pet. App. 296a-305a.

TABLE OF CONTENTS

Page

Table of Contents—Continued **Page**

TABLE OF AUTHORITIES

Cases **Page(s)**

Cases—Continued **Page(s)**

Cases—Continued **Page(s)**

Cases—Continued **Page(s)**

Statutes and Rule

Statutes and Rule—Continued **Page(s)**

Statutes and Rule—Continued **Page(s)**

Other Authorities

Other Authorities—Continued **Page(s)**

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-68a) is reported at 946 F.3d 66. The opinion of the district court (Pet. App. 128a-158a) is reported at 499 B.R. 310.

JURISDICTION

The court of appeals' judgment was entered on December 19, 2019. The court of appeals denied rehearing on February 6, 2020. Pet. App. 159a-160a. This Court's general order dated March 19, 2020, extended the due date for this petition to July 6, 2020. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 546(e) of Title 11 of the United States Code provides:

> Notwithstanding sections 544, 545, 547, 548(a)(1)(B), and 548(b) of this title, the trustee may not avoid a transfer that is a margin payment, as defined in section 101, 741, or 761 of this title, or settlement payment, as defined in section 101 or 741 of this title, made by or to (or for the benefit of) a commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities clearing agency, or that is a transfer made by or to (or for the benefit of) a commodity broker, forward

> contract merchant, stockbroker, financial institution, financial participant, or securities clearing agency, in connection with a securities contract, as defined in section 741(7), commodity contract, as defined in section 761(4), or forward contract, that is made before the commencement of the case, except under section 548(a)(1)(A) of this title.

Section 101(22) of Title 11 of the United States Code provides, in part:

> The term "financial institution" means—
>
> (A) a Federal reserve bank, or an entity that is a commercial or savings bank, industrial savings bank, savings and loan association, trust company, federally-insured credit union, or receiver, liquidating agent, or conservator for such entity and, when any such Federal reserve bank, receiver, liquidating agent, conservator or entity is acting as agent or custodian for a customer (whether or not a "customer", as defined in section 741) in connection with a securities contract (as defined in section 741) such customer.

Sections 544 and 548 of Title 11 of the United States Code are reproduced in the appendix. Pet. App. 161a-168a.

STATEMENT

This case presents the question whether state creditor-rights laws, which have been on the books since the Founding, remain available to creditors (or instead are preempted) once a debtor invokes the protections of federal bankruptcy law. In a sharp but deliberate break with the law in several other

Circuits, the Second Circuit held that state creditor-rights law is entirely preempted once a company goes into Chapter 11. On that basis, the Second Circuit sustained the dismissal of billions of dollars in fraudulent-transfer claims arising from the demise of Tribune Co. in one of the largest leveraged buyout (LBO) failures in American history.

Until the Second Circuit ruled otherwise, state creditor-rights laws and federal bankruptcy law had coexisted comfortably. Each body of law has its own domain and rules. Each provides a cause of action to avoid certain fraudulent transfers of property. State law vests the cause of action in the transferor's creditors. Federal law vests it in the transferor's bankruptcy trustee.

Federal law bars the trustee from avoiding certain transfers made "by" a "financial institution," 11 U.S.C. § 546(e), whereas state law has no such exception. This Court has construed Section 546(e) not to encompass transfers merely because a financial institution acted as a conduit between the debtor that transferred the property and the recipient. *Merit Mgmt. Grp., LP* v. *FTI Consulting, Inc.*, 138 S. Ct. 883, 888 (2018).

Federal law, with inapplicable exceptions, does not expressly preempt state fraudulent-transfer law. So state fraudulent-transfer law is preempted, if at all, only impliedly. And there is a presumption against preemption, which this Court and the Third, Eighth, Ninth, and Eleventh Circuits have applied to the Bankruptcy Code.

But the Second Circuit held below that Section 546(e) preempts state fraudulent-transfer law. *First*, it held that the presumption against preemption does not apply because "the Bankruptcy Code constitutes a wholesale preemption of state laws regarding creditors' rights." Pet. App. 34a. *Second*, the court held that state law is an obstacle to Section 546(e)'s supposed purpose of "promot[ing] finality and certainty for investors," Pet. App. 56a (quotation marks omitted)—even though this Court held in *Merit*, 138 S. Ct. at 897, that such a purpose is "contradicted by the [statute's] plain language." *Third*, the court held that, if any individual or entity uses a financial institution as a conduit to transfer property, then the transferor itself becomes a "financial institution" whose transfers are thereby exempted by Section 546(e). That holding answers a question expressly left open in *Merit* in a way that would deprive *Merit* of practical significance.

A. Statutory Framework

"[R]ules banning and invalidating fraudulent transfers . . . predate the first bankruptcy statute by centuries." RONALD J. MANN, BANKRUPTCY AND THE U.S. SUPREME COURT 176 (2017). "Many states adopted" statutes similar to England's 1571 Statute of Elizabeth "long before the adoption of a general federal bankruptcy law in 1898." *Ibid.*

Constructively fraudulent transfers of property—those made "without receiving a reasonably equivalent value in exchange" while the transferor is insolvent, unable to pay its debts, or inadequately capitalized—are now barred in every State. See, *e.g.*, Uniform Fraudulent Transfer Act §§ 4(a)(2), 5(a).

"[A]n insolvent debtor may not make what are essentially gifts that deprive creditors of assets available to pay debts." Pet. App. 39a.

The Bankruptcy Code, enacted in 1978, expressly gives state law a central role, after an entity enters bankruptcy, by authorizing the bankruptcy trustee to avoid fraudulent transfers voidable under state law. 11 U.S.C. § 544(b)(1). The Code also creates *additional*, federal powers to avoid constructive fraudulent transfers and vests them in the trustee. *Id.* § 548(a)(1)(B). The Code thus carries forward and amplifies the longstanding policy of English, state, and federal law of avoiding such transfers.

Of recent origin are exceptions to those broad powers of a bankruptcy trustee to avoid fraudulent transfers. One such exception, 11 U.S.C. § 546(e)—which this Court construed in *Merit*—is at issue in this case.

As originally enacted, the exception was undeniably narrow. It applied only to "a margin payment to or deposit with a commodity broker or forward contract merchant" or "a settlement payment made by a clearing organization." Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 764(c), 92 Stat. 2549, 2619. It had nothing to do with securities markets.

In 1982, Congress replaced the original provision with Section 546(d), which provided that "the trustee may not avoid a transfer that is a margin payment, . . . or settlement payment, . . . made by or to a commodity broker, forward contract merchant, stockbroker, or securities clearing agency." Act of July 27, 1982, Pub. L. No. 97-222, § 4, 96 Stat. 235, 236. In

1984, Congress added "financial institution[s]" to the exception and moved it to Section 546(e). See Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, §§ 351(2), 461(d), 98 Stat. 333, 358, 377.

In its current form, the exception prevents "the trustee" from avoiding certain transfers under Sections 544(b)(1) and 548(a)(1)(B). 11 U.S.C. § 546(e). The excepted transfers include, as relevant here, transfers in connection with a securities contract "made by or to" a "financial institution." *Ibid.*

B. Relevant Facts

This case, like others involving Section 546(e), concerns the application of fraudulent-transfer law to an LBO. The Court has explained that, in an LBO:

> the buyer (B) typically borrows from a third party (T) a large share of the funds needed to purchase a company (C). B then pays the money to C's shareholders. Having bought the stock, B owns C. B then pledges C's assets to T so that T will have security for its loan. Thus, if the selling price for C is $50 million, B might use $10 million of its own money, borrow $40 million from T, pay $50 million to C's shareholders, and then pledge C assets worth $40 million (or more) to T as security for T's $40 million loan. . . . [I]f the deal sours and C descends into bankruptcy, beware of what might happen: Instead of C's $40 million in assets being distributed to its existing creditors, the money will go to T to pay back T's loan—the loan that allowed B to buy C. . . . Since C's shareholders receive money while C's creditors lose their claim

> to C's remaining assets, unsuccessful leveraged buyouts often lead to fraudulent conveyance suits.

Czyzewski v. *Jevic Holding Corp.*, 137 S. Ct. 973, 980 (2017).

The company bought out here was Tribune Co., which owned the Chicago Tribune and other media properties. Prompted by Tribune's largest shareholders (among them respondents here), the company's management invented bogus projections; got an obscure valuation firm, employing unprecedented techniques, to issue a solvency opinion after two well-known firms declined; and made blatant misrepresentations about Tribune's ability to refinance its debt, all to transfer to the company's shareholders "over $8 billion at a premium price—above [Tribune's] trading range." Pet. App. 11a. Management then gave itself a handsome payday and jumped ship as the company sank into bankruptcy less than a year later. Tribune's was among the largest LBO failures in American history, leaving the company's retirees and pre-LBO creditors (among them, petitioners here) with $8 billion of unpaid, allowed claims. *Ibid.*

C. Procedural History Before *Merit*

1. As explained above, bankruptcy trustees may initiate litigation to avoid fraudulent transfers. 11 U.S.C. §§ 544(b)(1), 548(a)(1). The bankruptcy court authorized Tribune's creditors' committee to initiate such litigation.[1] The committee then sought to avoid

[1] In addition to the bankruptcy trustee, a debtor-in-possession or creditors' committee may bring an avoidance action on behalf of the bankruptcy estate. See *Merit*, 138 S. Ct. at 888 n.1.

as intentionally fraudulent Tribune's LBO payments to respondents. Pet. App. 12a; see 11 U.S.C. § 548(a)(1)(A). But it did not seek to avoid those payments as constructively fraudulent under either Section 548 or Section 544.

Tribune's creditors (petitioners) brought state-law causes of action to avoid constructively fraudulent transfers. Pet. App. 14a. Those actions had been automatically stayed when Tribune entered bankruptcy. But the bankruptcy court, on petitioners' motion and with the creditors' committee's support, lifted the stay. Pet. App. 12a-13a. Those no-longer-stayed lawsuits were eventually transferred to the Southern District of New York. *Ibid.*

The bankruptcy court then confirmed a plan of reorganization for Tribune. The plan provided that Tribune would pay petitioners only 33 cents per dollar of debt but that petitioners' state-law actions could continue. Pet. App. 14a.

2. The district court dismissed petitioners' claims. Pet. App. 128a-158a. It held that petitioners lacked statutory "standing." Pet. App. 151a-157a.

Notably, however, the district court rejected respondents' argument that Section 546(e) preempts state fraudulent-transfer statutes. It explained that Section 546(e) applies by its terms only to the bankruptcy *trustee*, not to creditors like petitioners. Pet. App. 136a-139a. It added that Congress had not acted on calls to make Section 546(e) expressly preempt state law and that Congress elsewhere had expressly preempted state fraudulent-transfer statutes. Pet. App. 140a-143a. The court concluded that "Congress

said what it meant and meant what it said; as such, Section 546(e) applies only to the trustee and does not preempt" creditors' claims under state law. Pet. App. 146a (citation omitted).

3. In 2016, the court of appeals affirmed but on the opposite grounds: It held that petitioners *had* statutory "standing" (Pet. App. 89a-92a) but that Section 546(e) *does* preempt the state fraudulent-transfer statutes under which petitioners sued. Pet. App. 92a-127a.

The court relied on implied "purposes and objectives" preemption. Pet. App. 94a (quotation marks omitted). It began by determining that the presumption against preemption does not apply because, "[o]nce a party enters bankruptcy, the Bankruptcy Code constitutes a wholesale preemption of state laws regarding creditors' rights." Pet. App. 96a. Next, the court reasoned that the meaning of "trustee," as used in Section 546(e), is not sufficiently plain to foreclose implied preemption. Pet. App. 96a-98a, 101a-114a. Applying "purposes and objectives" preemption, the court held, finally, that Section 546(e) embodies the broad purpose, undermined by state fraudulent-conveyance law, of assuring the finality of securities transactions. Pet. App. 114a-123a.

D. *Merit*

1. When the court of appeals issued its 2016 decision, Second Circuit precedent established that a transfer "involving" a financial institution "even as a conduit" constituted a transfer "by or to" a "financial institution" within the meaning of Section 546(e). *In re Quebecor World (USA) Inc.*, 719 F.3d 94, 100 (2d

Cir. 2013). Thus, it sufficed to trigger Section 546(e), in the Second Circuit's view, that a bank had processed Tribune's transfers to respondents.

Petitioners filed a petition for certiorari seeking review of the Second Circuit's 2016 decision. *Deutsche Bank Tr. Co. Ams.* v. *Robert R. McCormick Found.*, No. 16-317. The petition raised the "conduit" question under Section 546(e) as well as the preemption questions presented in this petition.

2. *Merit*, decided while No. 16-317 was pending, abrogated Second Circuit law; this Court held that a transfer is not made "by or to" a "financial institution" merely because a financial institution acted as a conduit. The Court analyzed how Section 546(e) "operates in the context of a transfer that was executed via one or more transactions, *e.g.*, a transfer from A → D that was executed via B and C as intermediaries, such that the component parts of the transfer include A → B → C → D." 138 S. Ct. at 888. *Merit* answered that courts should "look to the transfer that the trustee seeks to avoid (*i.e.*, A → D) to determine whether that transfer meets [Section 546(e)'s] criteria." *Ibid.* The conduit entities, B and C, "are simply irrelevant to the analysis under § 546(e)." *Id.* at 895.

In so holding, *Merit* rejected the argument that "Congress' purpose in enacting" Section 546(e) was "to advance the interests of parties in the finality of" "securities and commodities transactions." *Id.* at 896 (quotation marks omitted). That "perceived purpose," the Court held, is "contradicted by the plain language of" Section 546(e). *Id.* at 897. That language "protects only certain transactions 'made by or to . . . ' certain

covered entities," not all securities transactions. *Ibid.* (quoting 11 U.S.C. § 546(e)).

3. At argument in *Merit*, Justice Breyer asked whether financial-institution conduits might still be relevant to the application of Section 546(e), even if they did not give rise to a blanket exemption. Justice Breyer noted that "the definition of financial institution," 11 U.S.C. § 101(22)(A), "says that not only" banks and similar entities are included but "also the customers of each of those financial institutions in an instance where the bank is acting as agent or custodian for [the] customer." *Merit* Tr. 15:20-16:5. On that premise, the execution of a transfer via a bank as a conduit could lead to Section 546(e) protection because the transferor—the bank's "customer" for which the bank acted as "agent"—itself qualifies as a "financial institution."

This Court's unanimous opinion reserved judgment on that theory. *Merit*, 138 S. Ct. at 890 n.2.

E. The Second Circuit's Revised Opinion

1. After *Merit* was decided, Justices Kennedy and Thomas issued a statement respecting petitioners' prior certiorari petition. Pet. App. 74a. They suggested that the Second Circuit revisit its 2016 decision in light of *Merit*. They advised that consideration of the petition would be deferred and that the Court might lack a quorum. (Presumably the possible lack of a quorum resulted from the many mutual funds that were respondents. To address that concern, petitioners have dropped numerous respondents from the current petition based on petitioners' review of

financial disclosures made by the Members of the Court. See p. ii, *supra*.)

Petitioners then moved that the Second Circuit recall its mandate and remand the case to the district court for further consideration in light of *Merit*. Petitioners argued that, besides rejecting the Second Circuit's "conduit" interpretation of Section 546(e), *Merit* also rejected the assessment of statutory purpose that formed the basis of the court of appeals' "purposes and objectives" analysis.

Respondents opposed the motion, contending among other things that the theory about which Justice Breyer had inquired at argument in *Merit*—which respondents had never previously raised—dictated the same result that the Second Circuit had reached before *Merit*. Petitioners, on reply, argued that the effort to inject that theory into the case made remand even more essential because consideration of that argument, if not waived or forfeited, required development of a factual record.

2. The court of appeals recalled its mandate, but it neither remanded the case nor allowed additional briefing. Instead, 19 months later, it issued an amended opinion siding with respondents.

The court of appeals adhered to its view that Section 546(e) protects the transfers at issue, this time applying the theory Justice Breyer had raised at argument in *Merit*. Specifically, the Second Circuit held that the transferor, Tribune, was a "financial institution" because, at the time of the transfer, it was the conduit bank's "customer" and the bank was its "agent." Pet. App. 22a-28a.

The process by which the Second Circuit made that finding was remarkable in its own right. Respondents had never made this argument in the district court or in merits briefing in the court of appeals. They raised it for the first and only time in opposition to petitioners' motion to recall the mandate. C.A. Opp. of Defendants-Appellants to Mot. to Recall Mandate 16-21 (Apr. 20, 2018). Nevertheless, rejecting petitioners' request that this question be decided in the first instance by the district court after discovery of relevant facts, and with no further briefing, the court selectively reviewed documents filed in *other* cases, Pet. App. 24a-25a, 28a, despite Fed. R. Civ. P. 12(d). It held that a bank named Computershare Trust Company, N.A., had processed Tribune's payments as the company's "agent," thus rendering Tribune itself a "financial institution" for purposes of Section 546(e).[2]

The court also held, as it had in 2016, that Section 546(e) preempts state fraudulent-transfer law. Its rationale did not change. Compare Pet. App. 31a-65a (amended) with Pet. App. 92a-127a (original). The court merely added four paragraphs attempting to harmonize its pre-*Merit* holding with *Merit*. Pet. App. 65a-67a.

REASONS FOR GRANTING THE PETITION

This preemption case required the Second Circuit to determine the respective domains of a rule and its

---

[2] Having taken those extraordinary procedural liberties, the Second Circuit unsurprisingly got the pertinent evidence entirely wrong. See C.A. Pet. for Reh'g 9-12 (Jan. 2, 2020).

exception. The rule—universal in Anglo-American jurisprudence for centuries, amplified by Congress in the Bankruptcy Code, and explained by this Court in unanimous decisions in 2017 and 2018—is that fraudulent transfers of property are voidable.[3] The narrow, reticulated exception—in effect since 1984—is that, "[n]otwithstanding" certain Bankruptcy Code provisions that authorize "the trustee" to bring avoidance actions, "the trustee may not avoid a transfer" that meets certain conditions, specified at length. 11 U.S.C. § 546(e).

The court of appeals paid little heed to the policy underlying the rule (preventing an insolvent debtor from depriving creditors of assets) and expansively construed the policy underlying the narrow exception, as if it were the only congressional purpose that mattered. That was wrong. Indeed, this should have been an easy case because of the following principles adopted by this Court, *all* of which were cited to the court of appeals but *none* of which that court addressed at all:

- "[A] 'clear and manifest purpose' of pre-emption *is always required*" before federal legislation may supersede the historic police powers of the states. *Puerto Rico Dep't of Consumer Affairs* v. *Isla*

[3] See *Jevic*, 137 S. Ct. at 980; *Merit*, 138 S. Ct. at 888. When Congress enacted *additional* remedies for fraudulent transfers in the Bankruptcy Code, it did not "'creat[e] a new cause of action, and remedies therefor, unknown to the common law' . . . . Rather, Congress simply reclassified a pre-existing, common-law cause of action . . . ." *Granfinanciera, S.A.* v. *Nordberg*, 492 U.S. 33, 60 (1989) (citation omitted).

Petroleum Corp., 485 U.S. 495, 503 (1988) (emphasis added).

- The presumption against preemption applies in bankruptcy cases. *BFP* v. *Resolution Trust Corp.*, 511 U.S. 531, 546 (1994).

- "Implied preemption analysis does not justify a freewheeling judicial inquiry into whether a state statute is in tension with federal objectives," because "such an endeavor would undercut the principle that it is Congress rather than the courts that pre-empts state law." *Chamber of Commerce of U.S.* v. *Whiting*, 563 U.S. 582, 607 (2011) (plurality opinion of Roberts, C.J., joined by Scalia, Kennedy & Alito, JJ.) (quotation marks omitted); accord *Arizona* v. *United States*, 567 U.S. 387, 437 (2012) (Thomas, J., concurring in part and dissenting in part).

- "Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Whitman* v. *Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001).

In its zeal to reach the opposite result, however, the court of appeals applied a mistaken presumption *of* preemption (in conflict with four other circuits); allowed the narrow exception in Section 546(e) to supplant the broad, time-tested rule that fraudulent transfers are avoidable; and robbed *Merit* of all practical significance by holding that Congress had hidden the elephant of exempting virtually all transactions not made with dollar bills in the mousehole of Section 101(22)'s definition of "financial institution."

Those holdings on recurring issues govern cases involving enormous amounts of money in the courts of the Nation's financial center. And their importance will only grow as bankruptcy filings increase following the economic troubles caused by COVID-19.

I. The Court Of Appeals' Holding That The Presumption Against Preemption Does Not Apply Creates A Circuit Split And Conflicts With This Court's Decisions

The decision below reiterates the Second Circuit's idiosyncratic position that, once an entity enters bankruptcy, the presumption against preemption is inapplicable to creditor rights embodied in state law. This Court has held precisely the opposite, and the Second Circuit placed itself in conflict with numerous courts of appeals that have appropriately followed this Court's decisions.

1. "[B]ecause the States are independent sovereigns in our federal system," the Court has "long presumed that Congress does not cavalierly pre-empt state-law causes of action." *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 485 (1996); accord *Bond* v. *United States*, 572 U.S. 844, 858 (2014). State laws coexist alongside their federal counterparts and are "not to be superseded . . . unless that was the clear and manifest purpose of Congress." *Wyeth* v. *Levine*, 555 U.S. 555, 565 (2009) (quotation marks omitted). A party arguing for preemption thus "bear[s] the considerable burden of overcoming the starting presumption that Congress does not intend to supplant state law." *De Buono* v. *NYSA-ILA Med. & Clinical Servs. Fund*, 520 U.S. 806, 814 (1997) (quotation marks omitted).

The court of appeals, however, held that this presumption against preemption does not apply in the context of creditors' rights where a bankruptcy case is involved. Citing the "history of significant federal presence" in the area of creditors' rights, Pet. App. 33a-34a (quotation marks omitted), the court held that "the Bankruptcy Code constitutes a *wholesale preemption* of state laws regarding creditors' rights," Pet. App. 34a (emphasis added).

In the Second Circuit's view, moreover, such "wholesale preemption of state laws" is not confined to fraudulent-transfer claims like petitioners'. Rather, the court broadly proclaimed, *all* "state law claims" are "preempted when the Chapter 11 proceedings commenced and were not dismissed." *Ibid.* As a commentator observed, that holding "seems, in conflict with Supreme Court precedent, to be jettisoning the presumption against preemption that ordinarily applies in bankruptcy cases." David S. Kupetz, *Federal Preemption of State Constructive Fraudulent Transfer Law Applied to Financial Institutions Serving as Conduits in the Tribune Company Case*, in NORTON ANNUAL SURVEY OF BANKRUPTCY LAW 125, 150 (2017 ed.).

Implementing its "wholesale preemption" concept, the Second Circuit applied a presumption *of* preemption, holding that, for petitioners to prevail, a contemporaneous reader must "have *necessarily* concluded" that petitioners' understanding of the statute was correct. Pet. App. 38a (emphasis added). Having thus lowered the bar for preemption, the court of appeals absolved itself of any responsibility to decide whether petitioners construed Section 546(e) correctly. Instead, the court boldly declared—

applying its presumption *of* preemption—"We need not resolve these issues . . . . [Purported ambiguities and anomalies the court identified] are sufficient . . . to dispel the suggestions found in some discussions of these issues of a clear textual basis for appellants' theory in the Code and an overall consistency with congressional purpose." Pet. App. 51a.

2. Every other court of appeals to have addressed the issue has held, in conflict with the Second Circuit, that the presumption against preemption applies in the context of creditors' rights.

The Third Circuit recognizes a "strong presumption against inferring Congressional preemption . . . in the bankruptcy context." *Rosenberg* v. *DVI Receivables XVII, LLC*, 835 F.3d 414, 419 (3d Cir. 2016) (quoting *In re Federal-Mogul Glob. Inc.*, 684 F.3d 355, 365 (3d Cir. 2012)). It confronted the question, like the preemption question here, whether a provision that applies by its terms only to "the debtor," 11 U.S.C. § 303(i), preempted related claims brought by non-debtors under state law. Applying the presumption, it held that state law was not preempted. *Rosenberg*, 835 F.3d at 418-22.

The Eleventh Circuit similarly has "h[e]ld that the Bankruptcy Code prevents and counteracts the ordinary operation of" a state statute on the property rights of pawn shops "only if we find some clear textual indication that Congress intended that result." *In re Northington*, 876 F.3d 1302, 1312 (11th Cir. 2017). By analogy to this Court's *BFP* decision, discussed below, the *Northington* court observed that "the states . . . have long regulated pawn transactions," *ibid.*, and held that there was no preemption.

The Eighth Circuit, in *Melikian Enterprises, LLLP* v. *McCormick*, 863 F.3d 802 (8th Cir. 2017), considered whether the Bankruptcy Code impliedly preempted a state anti-deficiency statute. In holding that it did not, the court began with the "general presumption against finding implied preemption," *id.* at 806 (quotation marks omitted), and applied that presumption in the context of creditors' rights.

The Ninth Circuit has likewise held that "the presumption against displacing state law by federal bankruptcy law is just as strong in bankruptcy as in other areas of federal legislative power." *Pac. Gas & Elec. Co.* v. *California ex rel. California Dep't of Toxic Substances Control*, 350 F.3d 932, 943 (9th Cir. 2003).

Those holdings—most of which are recent—cannot be reconciled with the court of appeals' declaration and application of "wholesale preemption" here. Pet. App. 34a. The conflict is mature and is unlikely to go away unless this Court resolves it.

3. The court of appeals' rejection of the presumption against preemption in the domain of creditors' rights also conflicts with this Court's decisions.

The court of appeals asserted that the presumption does not "fully appl[y]" because "regulation of creditors' rights has 'a history of significant federal presence.'" Pet. App. 33a-34a (quoting *United States* v. *Locke*, 529 U.S. 89, 90 (2000)). This Court, by contrast, has held that the presumption applies "[i]n *all* pre-emption cases" where state and federal laws coexist. *Lohr*, 518 U.S. at 485 (emphasis added). Even in the context of drug labeling, a field "the Federal Government has regulated . . . for more than a century,"

the presumption applies out of "respect for the States as independent sovereigns." *Wyeth*, 555 U.S. at 565 n.3 (quotation marks omitted).

This Court has applied that principle in bankruptcy cases, including one involving the fraudulent-transfer provisions of the Bankruptcy Code. In *BFP*, the question was whether the Code supplanted state foreclosure law. 511 U.S. at 546. There was tension between then-Section 548(a)(2)(A) of the Code and state foreclosure laws. The Code allowed a trustee to avoid transfers for less than "reasonably equivalent value," but the allegedly preempted state laws allowed sales for less than "fair market value." *Id*. at 547-48. The petitioners argued that the Code's requirement of "reasonably equivalent value" meant that the state laws were preempted.

Although this Court recognized that "[t]he Bankruptcy Code can of course override [state law] by implication," it required a clear intent to do so: "[W]here [Congress's] intent to override is doubtful, our federal system demands deference to long-established traditions of state regulation." *Id*. at 546. It concluded that Congress had not clearly intended to supplant state foreclosure law, and so the Code was read "to adopt, rather than to displace, pre-existing state law." *Id*. at 545. Federal respect for state sovereignty demanded that the analysis begin with the presumption that the Code did not replace wide-reaching, and long-extant, state laws.

In *Midlantic National Bank* v. *New Jersey Department of Environmental Protection*, 474 U.S. 494 (1986), the Court held that "Congress did not intend for the Bankruptcy Code to pre-empt all state

laws" relevant to trustees. *Id.* at 505. Far from preempting traditional areas of state law, the Court explained, the Code relies on them. In support, the Court pointed to 28 U.S.C. § 959(b), which requires trustees to manage property in their possession "according to the requirements of the valid laws of the State." 474 U.S. at 505 n.7 (quoting § 959(b)). This Court recognized that, although not part of the Bankruptcy Code, Section 959(b) demonstrates the interconnectedness of the Code with state laws. The Code does not work the "wholesale preemption of state laws regarding creditors' rights" that the Second Circuit perceived. Pet. App. 34a.

4. The Second Circuit's refusal to apply the presumption against preemption was erroneous for still more reasons.

Even if the presumption applied only where there is a long history of state regulation, it would apply here. State policing of fraudulent transfers predates the American Revolution. *Husky Int'l Elecs., Inc.* v. *Ritz*, 136 S. Ct. 1581, 1587 (2016); 1 GARRARD GLENN, FRAUDULENT CONVEYANCES AND PREFERENCES § 58 (1940). More broadly, "[i]n the colonial era, many of the states had comprehensive laws regulating debtor-creditor relations." Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 12 (1995). Protecting creditors' property has long been an area of state regulation. Indeed, "protection against fraud" is among "the oldest [purposes] within the ambit of the police power." *California* v. *Zook*, 336 U.S. 725, 734 (1949).

Moreover, the Bankruptcy Code relies extensively on state law. See *Patterson* v. *Shumate*, 504 U.S. 753,

758 (1992) (collecting references to "state law" in the Code); *Butner* v. *United States*, 440 U.S. 48, 54-55 (1979). It would be nonsensical for the Code to preempt wholesale the laws on which it relies for implementation.

5. Whether the presumption against preemption applies in the bankruptcy context is of paramount importance. The presumption is a "cornerstone[]" of any preemption analysis. *Wyeth*, 555 U.S. at 565. And the Bankruptcy Code balances many competing interests, both state and federal. Congress treaded lightly when abrogating state regulation.

Application of the presumption ensures that Congress's careful balance is not upset. The court of appeals' "wholesale preemption" approach, in contrast, poses significant challenges to long-settled law with effects both broad and deep. Hundreds of thousands of individuals seek bankruptcy protection every year, and that number is likely to rise in the coming years. ADMIN. OFFICE OF U.S. COURTS, U.S. BANKRUPTCY COURTS—BUSINESS AND NONBUSINESS CASES FILED, BY CHAPTER OF THE BANKRUPTCY CODE (TABLE F-2). Large Chapter 11 reorganizations often involve many billions of dollars, as this case illustrates. Uncertainty about such a basic proposition as whether the presumption against preemption applies is extremely detrimental.

II. Apart From Its Erroneous Refusal To Apply A Presumption Against Preemption, The Court Of Appeals' Implied-Preemption Holding Is Irreconcilable With *Merit* And With This Court's Preemption Law

Whereas this Court in *Merit* pellucidly stated that Section 546(e) does not have the broad purpose of advancing the interests of parties in the finality of securities transactions, the Second Circuit stubbornly insisted that it does. Pet. App. 65a. On that basis, the Second Circuit held that Section 546(e) broadly preempts state laws that allow avoidance of transfers related to securities transactions. That holding contradicts Section 546(e)'s text, context, and history. The Second Circuit's rationale rests on untethered policy notions and exemplifies—in a particularly consequential way—the danger of freewheeling "purposes and objectives" preemption.

1. The decision below is irreconcilable with *Merit*. The Second Circuit reached its preemption holding by ascribing to Section 546(e) a purpose that *Merit* expressly rejected.

The court conceded that "a primary premise upon which [it] relied" was "that Section 546(e) was intended to promote finality in the securities markets." Pet. App. 65a (quotation marks omitted). That is an understatement. The court's understanding of Section 546(e)'s purpose was *pivotal* to its preemption holding, as "purposes" preemption was the sole doctrine that the court applied. Pet. App. 32a n.13. And the court firmly concluded that Section 546(e)'s "purpose was to promote finality and certainty for

investors." Pet. App. 56a (quotation marks and modifications omitted); see Pet. App. 52a, 57a-58a.

Merit expressly rejected that premise. Like the court of appeals here, the petitioner there claimed that, in Section 546(e), "Congress took a comprehensive approach to securities and commodities transactions that was prophylactic, not surgical, and meant to advance the interests of parties in the finality of transactions." *Merit*, 138 S. Ct. at 896 (quotation marks omitted). This Court disagreed, holding that, "[e]ven if this were the type of case in which the Court would consider statutory purpose," the *Merit* petitioner "fail[ed] to support its purposivist arguments." *Id.* at 896-97.

Merit explained that the purpose that the court of appeals ascribed to Section 546(e) is "contradicted by the plain language of" the statute. *Id.* at 897. As *Merit* construed it, Section 546(e) is simply too narrow a statute to have the broad purpose of promoting the finality of securities transactions. Contrary to the court of appeals' holding that "Section 546(e) protects transactions rather than firms," Pet. App. 57a, the statute does not shield from avoidance all securities transactions. It shields such transactions only if they happen to have been "'made by or to . . .' certain covered entities." 138 S. Ct. at 897 (quoting 11 U.S.C. § 546(e)). And many parties to securities transactions, like the "individual investors" that concerned the court below, Pet. App. 59a, are not covered, see 11 U.S.C. § 546(e). Another subject of the court of appeals' concern—most "public companies," Pet. App 58a—also are not covered, unless they happen to be "stockbroker[s]," "financial participant[s]," or the like, see 11 U.S.C. § 546(e).

The court of appeals' broad construction of the definition of "financial institution"—aside from purporting to locate Congress's policy in an unlikely place—does nothing to bring coherence to the postulated policy. It leaves far too many statutory holes.

For example, Section 546(e), like the rest of the Bankruptcy Code, applies only to persons that have *entered bankruptcy*. Unless and until an entity invokes the protections of the Code, Section 546(e) does nothing to protect finality. If, before a company goes into Chapter 11, a creditor secures a judgment under state law setting aside a transfer of property as constructively fraudulent, Section 546(e) has nothing to say about the matter. Furthermore, certain kinds of businesses, such as insurance companies and banks, are not authorized to file for bankruptcy. 11 U.S.C. § 109(b)(2). Yet such businesses routinely engage in transfers in connection with securities contracts. Congress, if intent (as the court of appeals supposed) on assuring at all costs the finality of securities transactions, would not have left such gaping holes in the scope of that protection.

And the list goes on. Section 546(e) would, under the Second Circuit's construction of "financial institution," cover transfers made through certain conduits (like banks) but not others named in the statute (like stockbrokers). Similarly, it would cover transfers in connection with some contracts (like securities contracts) but not others named in the statute (like forward contracts). And, as the court of appeals recognized, Section 546(e) does not assure finality against an enormous class of causes of action, namely intentional-fraudulent-transfer actions. Pet. App.

10a. Yet such intentional-fraud claims may be based on precisely the same conduct that gives rise to claims of constructive fraud. See Uniform Fraudulent Transfer Act § 4(b)(8)-(9) (elements of constructive fraud are indicia of intentional fraud).

None of those exceptions would make sense if the statute had the broad purpose of "protect[ing] investors from the disruptive effect of after-the-fact unwinding of securities transactions." Pet. App. 57a. Indeed, after-the-fact unwinding of transactions is what *all* fraudulent-transfer actions do. If Congress had intended to exempt securities transactions from fraudulent-transfer actions at all costs, it would have done so in a statute that would apply whether or not the transferor has commenced a bankruptcy case.

2. *Merit* aside, the decision below is wrong.

a. State fraudulent-transfer law cannot conflict with the purposes of Congress because Congress made clear that Section 546(e) applies only to "the trustee" invoking federal law, not creditors invoking state law.

"Congress' intent"—the "ultimate touchstone in every pre-emption case"—"primarily is discerned from the language of the pre-emption statute and the statutory framework surrounding it." *Lohr*, 518 U.S. at 485, 486 (quotation marks omitted). Although other considerations are relevant, *id.* at 486, "[i]mplied preemption analysis does not justify a free-wheeling judicial inquiry into whether a state statute is in tension with federal objectives; such an endeavor would undercut the principle that it is Congress rather than the courts that pre-empts state law."

Whiting, 563 U.S. at 607 (plurality opinion) (quotation marks omitted).

Congress was explicit about the scope of Section 546(e): "*the trustee* may not avoid" the specified transfers. 11 U.S.C. § 546(e) (emphasis added). In bankruptcy, "trustee" means specific persons invested by the Code with "trustee" powers (see note 1, *supra*), and with specific rights and duties. *E.g.*, 11 U.S.C. §§ 321-323, 704, 1106(a). It does not and cannot mean "creditors invoking state law." See *Hartford Underwriters Ins. Co.* v. *Union Planters Bank, N.A.*, 530 U.S. 1, 6-7 (2000) (holding that a Bankruptcy Code provision, 11 U.S.C. § 506(c), limited by its terms to "the trustee," was in fact limited to the trustee). If Congress had intended that Section 546(e) affect such creditors, it would have been easy to write a different statute.

Unable to hold that "trustee" does not mean trustee, the court of appeals stated merely that the term's meaning is "not plain." Pet. App. 39a. The court based that conclusion on an array of supposed "anomalies" that would arise if "trustee" were confined to its literal meaning. None of those purported "anomalies," however, justified recourse to ad hoc "purposes" preemption.[4]

---

[4] For example, the court reasoned that Section 544(b)(1) supposedly "vests" creditors' state-law causes of action in the trustee, and thus such causes of action must "revert" to creditors before creditors may pursue them. Yet, the court of appeals stated, it is unclear whether and if so in what form those causes of action "revert" to creditors after they cease to be "vested" in the trustee. Pet. App. 40a, 42a-44a, 47a-49a, 50a. This

b. That Congress was creating a limited exception only to the *trustee's* powers under the Bankruptcy Code, not enacting a broad exception to *creditors'* powers under state law, is confirmed by Section 546(e)'s structure, context, and legislative history.

Section 546(e) could hardly reach beyond trustees because it is structured as an exception only to powers held by trustees (and those invested with a "trustee's" powers). "The very first clause—'Notwithstanding sections 544, 545, 547, 548(a)(1)(B), and 548(b) of this title'— . . . indicates that § 546(e) operates as an exception to the avoiding powers afforded to the trustee." *Merit*, 138 S. Ct. at 893. Those federal-law powers belong only to the "trustee"; no creditor can invoke them. To hold that Congress intended Section 546(e) to prevent non-trustees like petitioners from invoking state-law rights is thus to conclude, illogically, that Congress intended an exception broader than its rule.

The context of other exceptions to avoidance powers further shows that Congress intended to limit Section 546(e) to trustees. See Pet. App. 142a-143a (discussing this "powerful evidence that Congress did not intend for Section 546(e) to preempt state law"). Section 544(b)(2), for example, exempts charitable contributions from the trustee's avoidance powers. But that Section, unlike Section 546(e), adds that "[a]ny claim *by any person*" to recover such contributions "under Federal or State law . . . shall be preempted." 11 U.S.C. § 544(b)(2) (emphasis added).

"reverter" concern (like other "anomalies" the Second Circuit hypothesized) lacks any support in the text of the Bankruptcy Code.

The absence of such a provision in Section 546(e) is "powerful evidence" that Congress did not intend that Section to preempt creditors' state-law claims. See *Wyeth*, 555 U.S. at 575.

Statutory history likewise indicates that Section 546(e) was not intended to displace state law. When Congress added the expansive preemption clause of Section 544(b)(2), it made only technical amendments to Section 546(e). Religious Liberty and Charitable Donation Protection Act of 1998, Pub. L. No. 105-183, § 3(b)(2), (c)(1), 112 Stat. 517, 518. It since has amended Section 546(e) repeatedly—without adding any preemption language like that of Section 544(b)(2).

3. This case is a good vehicle for revisiting "purposes and objectives" preemption. Justices Thomas and Gorsuch recently urged abandoning that doctrine altogether. *Kansas* v. *Garcia*, 140 S. Ct. 791, 807 (2020) (Thomas, J., concurring). They stated that it is "contrary to the Supremacy Clause" and invites "atextual speculation about legislative intentions." *Id.* at 808. Justice Kavanaugh, too, joined an opinion criticizing the doctrine because it could "displac[e] perfectly legitimate state laws on the strength of 'purposes' that only we can see." *Virginia Uranium, Inc.* v. *Warren*, 139 S. Ct. 1894, 1908 (2019) (opinion of Gorsuch, J.). Other Justices, even if they might not go so far, have warned against "freewheeling judicial inquiry into whether a state statute is in tension with federal objectives," *Whiting*, 563 U.S. at 607 (plurality opinion) (quotation marks omitted), and recognized more broadly that "[o]nly the written word is the law," *Bostock* v. *Clayton County*, No. 17-1618 (June 15, 2020), slip op. 2.

The decision below relied solely on purposes and objectives preemption, Pet. App. 31a-32a n.13, and vividly exemplifies misuse of the doctrine. Its analysis of Section 546(e)'s purpose has as many citations to the Yale Law Journal as it has citations to Section 546(e). Pet. App. 52a-61a. And much of the discussion dispensed with Congress's intent altogether, instead offering commentary on the "new and substantial risks" that the panel thought investors "would face" "if [petitioners'] theory [were] adopted." Pet. App. 58a; see Pet. App. 58a-60a.

4. The Second Circuit's holding squarely conflicts with the holdings of courts that, although they are not appellate, have outsize importance in bankruptcy. The Delaware district court has held that Section 546(e) does not preempt creditors' state-law fraudulent-transfer claims. *PHP Liquidating, LLC* v. *Robbins*, 291 B.R. 603, 607 (D. Del. 2003) ("Section 546(e) is not a bar" because "[Plaintiff] is . . . [an] assignee of the unsecured creditors."), aff'd on other grounds, 128 F. App'x 839 (3d Cir. 2005). The Delaware bankruptcy court has gone further, criticizing the court of appeals' ruling here. *In re Physiotherapy Holdings, Inc.*, No. 13-12965, 2016 WL 3611831, at *7, *8 (Bankr. D. Del. June 20, 2016) (noting that "States have traditionally occupied the field of fraudulent transfer law" and that "the policy concerns voiced by the *Tribune II* court find minimal support").

Although these are not decisions of courts of appeals, "very large" Chapter 11 bankruptcy cases are "geographically concentrated in the District of Delaware and the Southern District of New York." FEDERAL JUDICIAL CENTER, A GUIDE TO THE JUDICIAL MANAGEMENT OF BANKRUPTCY MEGA-CASES 1 (2d ed.

2009). A schism between New York and Delaware on an issue most relevant to large bankruptcy cases is therefore highly consequential. Bankruptcy practitioners have lamented this "significant disagreement and uncertainty among courts and jurisdictions on the preemptive effect of" Section 546(e). Daniel J. Merrett & Danielle Barav-Johnson, *Taking Stock: United States Supreme Court Presented with Opportunity To Settle Meaning of Section 546(e)*, 25 NORTON J. BANKR. L. & PRACTICE 651, 667 (2016).

Moreover, "bolstering creditors' rights" is a "primary objective of avoidance powers." *In re Cybergenics Corp.*, 226 F.3d 237, 244 n.9 (3d Cir. 2000). State fraudulent-transfer law, which has existed for as long as the States have, fosters that important purpose. Yet, because of the analytic errors discussed above, all state-law constructive-fraudulent-transfer actions regarding the types of transactions covered by Section 546(e) are now barred in the Nation's financial center.

III. The Court Of Appeals' "Financial Institution" Holding Severely Undermines This Court's Decision In *Merit*

1. This Court held in *Merit* that a transfer is not "made by" a "financial institution" under Section 546(e) just because it is executed via a bank, but the court of appeals effectively held the opposite. It did so by construing the definition of "financial institution" so broadly that any individual or entity that uses a bank as a conduit to transfer property would qualify as a "customer" of the bank, and the bank the customer's "agent," thereby rendering the customer a

"financial institution" in its own right. That rationale would deprive *Merit* of any practical significance.

a. As explained above, p. 11, *supra*, *Merit* declined to decide "what impact, if any, [the Bankruptcy Code's definition of 'financial institution'] would have in the application of" Section 546(e). 138 S. Ct. at 890 n.2. The court below decided that very question. In its view, the "payments at issue [were] subject to Section 546(e)" because "Tribune, which made the payments, was a covered entity" under the statute. Pet. App. 22a. And Tribune was a covered entity, the court held, because, as a "customer" of the bank that supposedly processed the payments and supposedly acted as its "agent" in so doing, Tribune itself "was a 'financial institution.'" Pet. App. 23a.

This case therefore squarely presents the opportunity to answer the question that *Merit* left open. The Court regularly "grant[s] certiorari to resolve [a] question left open by" a previous case. *FEC* v. *Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431, 440 (2001); see, *e.g.*, *Brown* v. *Legal Found. of Washington*, 538 U.S. 216, 220 (2003) ("We now confront th[e] questions" on which a previous decision "express[ed no] opinion."); *Dolan* v. *City of Tigard*, 512 U.S. 374, 377 (1994) ("We granted certiorari to resolve a question left open by [a prior] decision.").

b. The court of appeals' answer to the open question would deprive *Merit* of practical significance. If such an event is to occur, it should be because of a decision by this Court, not a lower court. Cf. *State Oil Co.* v. *Khan*, 522 U.S. 3, 20 (1997) ("[I]t is this Court's prerogative alone to overrule one of its precedents.").

In a broad swath of Section 546(e) cases—those involving a transfer in connection with a securities contract (or a settlement payment) executed via a bank (or other entity listed in Section 101(22)(A)) as a conduit[5]—Section 546(e) *would not* apply under *Merit*, but it *would* apply under the court of appeals' decision here.

The issue in such cases is whether the transfer was made "by" (or "to") a "financial institution" within the meaning of Section 546(e). *Merit* held that "execut[ion]" of the transfer "via" banks "as intermediaries" does not turn the transfer into one by a financial institution. 138 S. Ct. at 888. But the court of appeals construed the definition of "financial institution" so broadly that it would encompass any person who executed the transfer via banks as conduits.

The court of appeals reached that improbable result by adopting the broadest conceivable construction of every relevant portion of the "financial institution" definition in 11 U.S.C. § 101(22)(A). The court construed the term "customer" to include any person who "deposit[s]" the "aggregate purchase price" for shares with a bank, for the bank to "pa[y] the tendering shareholders." Pet. App. 25a. Similarly, the court held that a bank "is acting as agent" if it "accept[ed] the funds and effectuat[ed] the transaction," so long as the payor "maintained control over key aspects of the undertaking." Pet. App. 28a.

---

[5] This case and *Merit* both involved such transfers. *Merit*, 138 S. Ct. at 892 n.5, 895; Pet. App. 25a, 29a. So did every case forming the circuit split that *Merit* resolved. See *Merit*, 138 S. Ct. at 892 n.6 (listing cases).

So construed, "financial institution" extends logically to any individual or entity that pays for anything through a bank. Here, no less than in *Merit*, the theory is implausibly "so broad as to render any transfer non-avoidable unless it were done in cold hard cash." *FTI Consulting, Inc.* v. *Merit Mgmt. Grp., LP*, 830 F.3d 690, 695 (7th Cir. 2016), aff'd, 138 S. Ct. 883 (2018).

2. The decision below is wrong. Congress did not vastly expand Section 546(e) with an obscure definition that would alchemize anyone who makes a non-cash transaction into a "financial institution."

a. In the Bankruptcy Code as elsewhere, "[s]tatutory construction . . . is a holistic endeavor," and provisions are "often clarified by the remainder of the statutory scheme." *United Sav. Ass'n of Texas* v. *Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988) (Scalia, J.). Here, statutory context shows that the definition of "financial institution" cannot be construed as broadly as the court of appeals read it.

The definition of "financial institution" must be viewed in the context of Section 546(e). Section 546(e)'s application turns on the "overarching transfer," not its "component transactions." *Merit*, 138 S. Ct. at 897. But the definition, as the decision below construed it, would make the component transactions central to the inquiry in a wide array of cases. See pp. 32-33, *supra*.

Congress's actions confirm that the definition plays a limited role in the application of Section 546(e). Congress enacted Section 546(e) before it defined "financial institution." See *Merit*, 138 S. Ct.

at 890. And it never explained the new definition, classing it as a "[m]iscellaneous [a]mendment[]" with others that did such things as substitute "stockbroker" for "stock broker." Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 421, 98 Stat. 333, 368. The definition thus is an improbable home for a sweeping change to Section 546(e). As this Court recently reaffirmed, "Congress 'does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions.'" *Bostock*, *supra*, slip op. 30 (quoting *Whitman*, 531 U.S. at 468). The employers in *Bostock* could not invoke that canon because "Title VII's prohibition of sex discrimination in employment is a major piece of federal civil rights legislation[,] . . . written in starkly broad terms." *Ibid.* Nothing could be more different from an unexplained addition to the 22nd numbered paragraph of a definitional provision of the Bankruptcy Code.

Moreover, the court of appeals' holding is doubly inconsistent with the *noscitur a sociis* canon. First, the term "financial institution" is listed alongside "commodity broker, forward contract merchant, stockbroker," "financial participant, [and] securities clearing agency." 11 U.S.C. § 546(e). The other terms refer to businesses that process financial instruments. Under the court of appeals' holding, by contrast, "financial institution" could refer to *any* kind of person that uses a bank to make transfers.[6] Second, the term

[6] For example, a court in the Second Circuit was led by the decision below to hold that a power-generation company was a "financial institution" and thus to dismiss claims for more than $700 million. *In re Boston Generating LLC*, No. 10-14419, 2020 WL 3286207, at *33-*36 (Bankr. S.D.N.Y. June 18, 2020).

"agent" is listed alongside "custodian." *Id.* § 101(22)(A). "Custodian" is narrowly defined as "receiver or trustee of any of the property of the debtor" and similar roles. *Id.* § 101(11). A "custodian" thus can bind the debtor, just as an agent as commonly defined can bind its principal. But the court of appeals construed "agent" to include a conduit with no power to bind the principal.

b. Even considered in isolation, the words used to define "financial institution" do not support the court of appeals' holding.

A bank does not "act[] as agent," 11 U.S.C. § 101(22)(A), merely by processing payments subject to another's control, as the court of appeals held. Agency requires far more. For example, agents owe fiduciary duties, *Hollingsworth* v. *Perry*, 570 U.S. 693, 714 (2013), such as duties not to aid the principal's competitors and to keep the principal's information confidential, Restatement (Third) of Agency §§ 8.04, 8.05(2). Agents also have "power to affect the legal rights and duties of" principals, such as binding them in contract. *Id.* § 1.01 cmt. c. The court of appeals' construction of "agent" required none of those things. Pet. App. 27a-28a.[7]

True agency thus would involve more than executing transfers. It would exist when, for example, a bank has discretionary authority to manage its customer's investments. In such situations, the bank is

[7] Discovery in a related case shows that the bank here expressly *disclaimed* those indicia of agency. Appellant Br. 48, *In re Tribune Co. Fraudulent Conveyance Litig.*, No. 19-3049 (2d Cir. Jan. 7, 2020).

the decisionmaker with the power to commit the customer to the transfer. The customer-of-a-bank-acting-as-agent language at issue would make sense in such instances. But it makes no sense where, as here, the bank merely transmitted funds in a ministerial capacity.

The court of appeals separately erred by ignoring the statute's verb tense. A bank "customer" is itself a "financial institution" only if the bank "*is acting* as agent." 11 U.S.C. § 101(22)(A) (emphasis added). When a "status" of this kind is "expressed in the present tense," the status is "determined at the time suit is filed," not (as the court of appeals held, Pet. App. 23a-28a) "at the time of the conduct giving rise to the suit." *Dole Food Co.* v. *Patrickson*, 538 U.S. 468, 478-79 (2003).

3. The "financial institution" question is important. Given that payment in a transaction is almost always made through a bank, the Second Circuit's capacious construction of Section 546(e) would eviscerate the avoidance powers to which that section is an exception. Those powers "help implement the core principles of bankruptcy." *Merit*, 138 S. Ct. at 888 (quotation marks omitted). The scope of Section 546(e) is particularly important to LBO cases with high financial stakes, like the dispute here. See Mark J. Roe & Frederick Tung, *Breaking Bankruptcy Priority: How Rent-Seeking Upends the Creditors' Bargain*, 99 VA. L. REV. 1235, 1284 (2013).

4. It is also important to resolve the "financial institution" question in this case, not in some future case. The Second Circuit is home to some of the Nation's most consequential bankruptcy disputes.

The Court has granted certiorari in such disputes from that Circuit with no division of authority. *Travelers Indem. Co.* v. *Bailey*, 557 U.S. 137, 141 (2009). And the Second Circuit is especially relevant to Section 546(e) litigation. Nearly half of the federal decisions available on Westlaw that cite Section 546(e) arose there. Hence, awaiting further percolation of the issue would allow billions of dollars to change hands, or not, based on the erroneous decision below.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

JAY TEITELBAUM
Teitelbaum Law Group, LLC
1 Barker Avenue
White Plains, NY 10601
(914) 437-7670
jteitelbaum@tblawllp.com
Counsel for the Retirees

LAWRENCE S. ROBBINS
Counsel of Record
ROY T. ENGLERT, JR.
ALAN E. UNTEREINER
JOSHUA S. BOLIAN
MEGAN D. BROWDER
Robbins, Russell, Englert, Orseck, Untereiner & Sauber LLP
2000 K Street, N.W.
Washington, DC 20006
(202) 775-4500
lrobbins@robbinsrussell.com
Counsel for the Noteholders

July 6, 2020