No. 20-8

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

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AMICI CURIAE BRIEF OF ELEVEN BANKRUPTCY TRUSTEES IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE[1]

Amici curiae are bankruptcy trustees who have been involved in some of the nation's most significant bankruptcy cases, including Bernard L. Madoff Investment Securities, MF Global Holdings, Adelphia Communications Corporation, Sears Holdings, Toys "R" Us, Lyondell Chemical, Jevic Holdings, Taylor, Bean & Whitaker Mortgage Corp., and TOUSA, Inc. Amici are Jeffrey H. Beck, Jeffrey A. Brodsky, Eugene I. Davis, Jonathan L. Flaxer, Edward T. Gavin, Mark E. Holliday, Thomas P. Jeremiassen, Robert A. Kors, Neil F. Luria, Irving H. Picard, and Nader Tavakoli.

Amici write in service of their interest in the sound, equitable, and predictable administration of the bankruptcy system. Indeed, their ability to fulfill their fiduciary obligation to maximize recoveries for all creditors depends upon it.

The Second Circuit's decision unnecessarily creates uncertainty in what was otherwise a recognized principle of bankruptcy law—*i.e.*, that the Bankruptcy Code *does not* strip creditors of their state-law claims. The Second Circuit, however, held that it was "unclear" whether the Bankruptcy Code deprives creditors of their state-law fraudulent-transfer claims. Although the Second Circuit failed to resolve this perceived ambiguity, it relied upon this holding to conclude that Congress's use of the word "trustee" in § 546(e) was also "ambiguous." The Second Circuit then resorted to

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[1] Rule 37 statement: The parties were notified and consented to the filing of this brief more than 10 days before its filing. *See* SUP. CT. R. 37.2(a). No party's counsel authored any of this brief; amici alone funded its preparation and submission. *See* SUP. CT. R. 37.6.

legislative history and speculative theories of congressional intent regarding the scope and purpose of § 546(e) to conclude that Congress intended the reference to "trustee" in § 546(e) to include "creditors." The Second Circuit's unconstrained (and unsupported) purposive interpretation of § 546(e) will have detrimental effects on bankruptcy trustees, whose duty it is to maximize the assets available for distribution to creditors and stakeholders.

First, the Second Circuit's decision hinders the ability of trustees to efficiently administer the estate and maximize creditor recoveries by creating uncertainty regarding whether creditors retain their state-law fraudulent-transfer claims upon bankruptcy. Contrary to the Second Circuit's decision, courts across the country have consistently held that trustees may abandon their representative authority to recover fraudulent transfers, and when they do, the authority to pursue state-law fraudulent-transfer claims reposes in the debtor's creditors. Indeed, under certain circumstances—such as the lack of adequate funding or the applicability of a legal bar, like § 546(e), to the trustee's claims—it is in the best interest of *all creditors* for a trustee to permit some or all of them to pursue their own fraudulent-transfer claims. Any recovery on those claims results in a dollar-for-dollar reduction of their claims against the estate, thereby increasing the trustee's distributions to all other creditors. A trustee's abandonment of certain federal-law claims can thus facilitate a trustee's ability to conserve the assets of the estate and to maximize distribution to creditors by providing an avenue for creditor recovery that otherwise would not exist. The Second Circuit's decision hinders the ability of trustees to efficiently administer a bankruptcy estate by finding ambiguities where none exist.

Second, by interjecting its own beliefs regarding congressional intent into § 546(e), the Second Circuit expanded the scope of the statute beyond its text, limiting (or at least purporting to limit) claims by trustees under Chapter 5 of the Bankruptcy Code. In *Merit Management Group, LP v. FTI Consulting, Inc.*, 138 S. Ct. 883 (2018), this Court held that § 546(e) must be applied as written, without resort to judicially created notions of the statute's purpose. The Second Circuit failed to follow this mandate by ascribing presumed purposes to § 546(e) that are wholly absent from the language of the statute itself. It is vitally important to this nation's bankruptcy trustees to have courts apply bankruptcy law in a manner consistent with the statutory text. Prior to this Court's unanimous decision in *Merit*, many courts broadly applied § 546(e) based on perceived congressional purposes. Those courts incorrectly foreclosed viable claims likely worth hundreds of millions of dollars to bankruptcy estates, and thus creditors. The Second Circuit's decision casts doubt on whether it, and lower courts in the circuit, will correctly construe and apply § 546(e) to avoidance claims brought by trustees, threatening creditor recovery in bankruptcy cases, especially those in the Second Circuit, which often involve some of this nation's largest debtors.

The Second Circuit's decision is at odds with the language of the Bankruptcy Code and creates substantial uncertainty in a critical area of bankruptcy law. Accordingly, the Court should grant the petition for certiorari.

SUMMARY OF ARGUMENT

Congress gave bankruptcy trustees expansive powers to recover fraudulent, preferential, and other transfers for the benefit of the estate. The powers are based upon deeply

rooted principles of equity that have existed at common law for centuries. These same principles also served as the basis for statutes, enacted by every State, that establish creditor claims to avoid certain transfers made by a debtor as fraudulent. In the interest of developing an efficient and equitable system for administering bankruptcy estates while maximizing the value returned to all creditors, Congress granted bankruptcy trustees powers to recover assets transferred by a debtor that far exceed those granted to creditors under state law. Indeed, whereas state law allows a creditor to recover a fraudulent transfer only to the extent necessary to satisfy its individual claim, the Bankruptcy Code permits a trustee to recover an entire transfer for the benefit of all creditors regardless of whether any single creditor (or creditors) would have been able to do so.[2]

As the breadth of these federal-law avoidance powers began to encroach upon and threaten other national policy concerns, Congress began placing certain limits on those powers, including the safe harbors of § 546. In 1978, Congress enacted the predecessor to § 546(e) to protect certain aspects of the securities settlement system from claims by trustees. While Congress has since expanded the scope of § 546(e) and enacted similar "safe harbors," all of these provisions expressly limit the avoidance powers granted to *trustees under federal law*. Simply put, nothing in the language of § 546, or the Bankruptcy Code as a whole, evinces an intent by Congress to have the safe harbors apply

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[2] In enacting § 544(b), Congress expressly rejected limiting a trustee's recovery to the amount of a particular creditor's claims, deciding to retain the rule announced in *Moore v. Bay (In re Sassard & Kimball, Inc.)*, 284 U.S. 4 (1931). *See Liebersohn v. I.R.S. (In re C.F. Foods, L.P.)*, 265 B.R. 71, 86 n.20 (Bankr. E.D. Pa. 2001) (noting that it was "the subject of much debate," but that Congress ultimately decided to retain the rule).

to fraudulent-transfer claims granted to *creditors under state law*.

Nevertheless, ignoring this Court's precedent and the express language of the Bankruptcy Code, the Second Circuit incorrectly held that § 546(e) impliedly preempts state-law claims owned by individual creditors. To reach this extra-textual conclusion, the Second Circuit first found "ambiguities" in the language and structure of the Bankruptcy Code concerning the post-petition rights of creditors to pursue their pre-petition fraudulent-transfer claims. But no such ambiguities exist, and this holding, which serves as the fundamental premise to the Second Circuit's preemption analysis, conflicts with the jurisprudence of numerous courts across the country.

Using these illusory "ambiguities" as justification, the Second Circuit then turned this Court's preemption jurisprudence on its head by relying upon its own perception of congressional motives rather than the plain language of the statute. Although this Court has debated the breadth of the so-called "obstacle" prong of conflict-preemption principles, conflict preemption indisputably requires more than a one-sided review of legislators' mental processes to determine if a true conflict exists between federal and state law.

Thus, this Court's review is necessary for two independent reasons of national importance. First, trustees, in accordance with their fiduciary duties and the primary objective of the Bankruptcy Code, should be able to use every tool at their disposal to maximize creditor recovery. By finding "ambiguities" in the Bankruptcy Code that do not exist and questioning whether the Bankruptcy Code strips creditors of their state-law claims, the Second Circuit has cast doubt on the ability of trustees to exercise their

fiduciary duties. In fact, trustees, with the approval of the bankruptcy court, often work collaboratively with creditors regarding their state-law claims. Creditors sometimes choose to assign their claims—including, but not limited to, fraudulent-transfer claims—to a "litigation," "liquidating," or "creditor" trust administered by the bankruptcy trustee. In other cases, the trustee and debtor's creditors decide that the trustee will abandon his statutory authority to bring federal-law avoidance actions so that creditors can assert their state-law avoidance claims individually. Either way, bankruptcy courts frequently approve these arrangements, especially as part of plan confirmations for this nation's large and complex Chapter 11 bankruptcies. The Second Circuit's decision jeopardizes this collaborative process of the bankruptcy system.

Second, the Second Circuit's reasoning contravenes this Court's decision in *Merit*. By ignoring the statutory text and ascribing purposes to § 546(e) found neither in the statute nor the Bankruptcy Code, the Second Circuit has erroneously expanded the reach of the safe harbor. Although the Second Circuit now claims that its expansive reading of § 546(e) is limited to the preemption context, the Second Circuit's post-*Merit* opinion is essentially the same as its pre-*Merit* opinion. By, among other things, continuing to erroneously hold that § 546(e) protects the market from an "entire genre of harms," the Second Circuit decision will likely restrict avoidance actions by trustees under the Bankruptcy Code.

ARGUMENT

I. There Are No "Ambiguities, Anomalies, or Conflicts" in the Bankruptcy Code Regarding Creditors' Rights to Pursue State-Law Claims After the Automatic Stay Is Lifted.

The Second Circuit based its preemption holding not on the statutory text, but rather on a finding that § 546(e) and related provisions of the Bankruptcy Code contain "ambiguities" and "anomalies." Specifically, the Second Circuit first found that it was unclear whether, and to what extent, creditors' state-law avoidance actions are transferred to the estate upon a debtor's bankruptcy and whether such claims "revert" to creditors upon the trustee's failure to act on them. Although the Second Circuit declined to resolve these issues, it nevertheless relied upon its perceived ambiguities to ignore the plain language of § 546(e), holding that "[a] contemporaneous reader would not, therefore, necessarily have believed it plain that Section 546(e)'s reference only to a trustee's et al. avoidance claim meant that creditors could bring their own claims." *Deutsche Bank Tr. Co. Ams. v. Robert R. McCormick Found. (In re Tribune Co. Fraudulent Conveyance Litig.)*, 946 F.3d 66, 89 (2d Cir. 2019).

These "ambiguities" stem from the flawed premise that there is a provision in the Bankruptcy Code that transfers all or part of creditors' substantive state-law claims to the trustee. But no such provision exists. When this unsupported premise is removed, so too are all the "ambiguities" identified by the Second Circuit. And, as the Second Circuit itself recognized, if no ambiguities exist, then there is no basis to disregard what this Court has described as the "clear" text of § 546(e), which, by its terms, is limited to claims asserted by trustees under the Bankruptcy Code.

See In re Tribune Co., 946 F.3d at 90; *see also Merit*, 138 S. Ct. at 893.

a. The Bankruptcy Code Authorizes Trustees to Pursue Fraudulent Transfer Actions for the Benefit of the Estate, But It Does Not Strip Creditors of Their State-Law Claims.

The Bankruptcy Code grants the trustee exclusive statutory authority to bring claims to recover property fraudulently transferred by the debtor for the benefit of all creditors. Sections 544(b) and 548(a) grant the trustee broad avoidance powers under federal law. 11 U.S.C. §§ 544(b), 548. And § 550 gives trustees sweeping recovery rights to collect fraudulently transferred property. The purpose of these provisions is to give a trustee authority to recover fraudulent transfers on behalf of the estate and for the benefit of all creditors. *Official Comm. of Unsecured Creditors of Cybergenics Corp. v. Chinery (In re Cybergenics Corp.)*, 226 F.3d 237, 243 (3d Cir. 2000) (holding that to fulfill their duty to creditors, trustees "have a variety of statutorily created powers, known as avoidance powers, which enable them to recover property on behalf of the bankruptcy estate").

Although a trustee's avoidance powers are broad, neither § 544(b) nor § 548(a) grants a trustee standing to assert creditors' state-law claims. Instead, both provisions grant trustees unique *federal-law claims* to avoid fraudulent transfers. 11 U.S.C. §§ 544(b), 548(a), 550; *see Tow v. Rafizadeh (In re Cyrus II P'ship)*, 413 B.R. 609, 614 (Bankr. S.D. Tex. 2008) (explaining that § 544(b) claims are "federal causes of action rooted in federal bankruptcy law"). Indeed, there is no provision of the Bankruptcy Code that purports to transfer creditors' substantive state-law claims to the estate. To be clear, the fact that § 544(b) incorporates other

"applicable law"[3] does not mean that a trustee is directly pursuing a creditor's state-law claim when it brings a § 544(b)(1) action under the Bankruptcy Code.

In other words, the Bankruptcy Code creates a critical distinction, ignored by the Second Circuit, between a creditor's substantive state-law claim and the authority of a trustee to recover fraudulent transfers under federal law. This distinction is evidenced by the application of the automatic stay, which prevents creditors from pursuing their state-law claims upon the filing of bankruptcy. Because a trustee does not have standing to assert any individual creditor's state-law claim, the Bankruptcy Code ensures that such claims are stayed while the trustee considers whether to exercise his federal-law rights. Specifically, § 362(a)(6) stays any action by a creditor to "recover a claim against the debtor that arose before the commencement of the case." 11 U.S.C. § 362(a)(6). A fraudulent-transfer action is such a claim because it is an action to recover a debt owed by a debtor by pursuing third parties for the amount of the debt. *See F.D.I.C. v. Hirsch (In re Colonial Realty Co.)*, 980 F.2d 125, 132 (2d Cir. 1992) ("While a fraudulent transfer action may be an action against a third party, it is also an action 'to recover a claim against the debtor.' Absent a claim against the debtor, there is no independent basis for the action against the transferee.") (citation omitted). The automatic stay serves the bankruptcy policy of an efficient and equitable administration of the debtor's estate by preventing a race to the courthouse by individual creditors and giving

[3] The "applicable law" is often fraudulent-transfer statutes under state law, but it also can be federal law. *See In re 45 John Lofts, LLC*, 599 B.R. 730, 742 (Bankr. S.D.N.Y. 2019) ("The term 'applicable law" refers to causes of action available under both federal and state law.").

the trustee sufficient time to determine how best to maximize overall creditor recovery.

The trustee's rights to pursue fraudulent-transfer claims, however, are of limited duration. The trustee has only two years to exercise his federal-law avoidance powers. *See* 11 U.S.C. § 546(a) (providing a two-year period for a trustee to commence an avoidance action under Chapter 5). Similarly, the automatic stay over creditor claims is temporary. A bankruptcy court may lift the stay, and it expires upon certain events, including the discharge of the debtor. 11 U.S.C. § 362(c), (d).

Thus, when Chapter 5 is read as a whole and put into context, including with the automatic stay, it is unambiguous that the code temporarily shifts the authority to recover property fraudulently transferred by a debtor from creditors to the trustee, but does not otherwise strip creditors of their substantive claims under state law. *See* 11 U.S.C. §§ 544(b), 548(a); *Hanlin v. Frazer (In re Vandevort)*, No. BAP CC-09-1078-MOPAR, 2009 WL 7809927, at *6 (B.A.P. 9th Cir. Sept. 8, 2009) ("[T]he filing of a bankruptcy petition does not strip creditors of state-created rights to avoid transfers, it merely shifts that right to the creditors' representative.") (citation omitted); *USAmeriBank v. Leopard (In re Leopard)*, No. 2:13-CV-02251-RDP, 2014 WL 2740320, at *4 (N.D. Ala. June 17, 2014) ("The bankruptcy filing merely shifted the right to pursue that [fraudulent-transfer] claim to the Trustee while the bankruptcy petition was pending"); *Klingman v. Levinson*, 158 B.R. 109, 113 (N.D. Ill. 1993) (stating that a creditor may resume prosecution of its state-law fraudulent-transfer claim "when the trustee no longer has a viable cause of action"). Because a trustee's representative capacity to assert fraudulent-transfer claims for a period of time does not divest creditors

of their claims, the right to pursue the state-law fraudulent transfer claims can repose in the creditors, as explained below.

b. Creditors May Pursue Their Individual Claims in the Absence of Trustee Action.

It is a well-recognized principle that if a trustee does not exercise his rights, or if it abandons them and the bankruptcy court lifts the automatic stay, then the ability to pursue fraudulent-transfer claims reposes in creditors. When this happens, absolutely nothing in the Bankruptcy Code suggests that a creditor has a different, or otherwise impaired, *state-law claim* than existed prior to a debtor's bankruptcy.

It is within the trustee's sound discretion as a fiduciary to determine whether to utilize his federal-law avoidance powers. If, in fulfillment of his fiduciary duties, the trustee decides not to pursue his federal fraudulent-transfer claims, and a bankruptcy court determines it is appropriate to lift the automatic stay, then the purpose of the automatic stay and the bankruptcy policies of efficient and equitable estate administration have been satisfied. As a result, creditors regain the authority to proceed with their previously stayed claims as if the debtor (an entity otherwise not a party to a fraudulent-transfer claim) had not filed for bankruptcy. Because this is the only reasonable interpretation of the statutory language, there is no ambiguity.

In fact, the First, Third, Fourth, Sixth, and Ninth Circuit Courts, as well as numerous other district and state courts across the country, all have recognized that creditors regain the right to pursue their own state-law claims upon the expiration of the automatic stay or the trustee's

abandonment of his broader federal-law claims. *See, e.g.*, *Artesanias Hacienda Real S.A. DE C.V. v. N. Mill Cap., LLC (In re Wilton Armetale, Inc.)*, No. 19-2907, 2020 WL 4460000, at *8 (3d Cir. Aug. 4, 2020) ("Artesanias [the creditor] had constitutional standing to sue North Mill and Leisawitz Heller for plundering Wilton's [the debtor's] assets. The bankruptcy merely deprived Artesanias of the statutory authority to bring those claims, transferring that power to the trustee. But by abandoning those claims, the trustee resurrected Artesanias's power to prosecute them."); *In re Vandevort*, 2009 WL 7809927, at *6 (holding that "prepetition standing of a creditor plaintiff is not 'lost' but rather its rights are superseded unless and until [the trustee's federal-law] claims are abandoned"); *Nat'l Am. Ins. Co. Hatchett v. United States*, 330 F.3d 875, 886 (6th Cir. 2003) ("Though the trustee has the exclusive right to bring an action for fraudulent conveyance during the pendency of the bankruptcy proceedings, the Bankruptcy Code does not extinguish the right of the Government [a creditor] to bring a state law action for fraudulent conveyance after the debtor receives a discharge in bankruptcy."); *Nat'l Am. Ins. Co. v. Ruppert Landscaping Co.*, 187 F.3d 439, 441 (4th Cir. 1999) (recognizing that a creditor regains standing to bring fraudulent-transfer claims after the trustee abandons his standing to do so); *Unisys Corp. v. Dataware Prods., Inc.*, 848 F.2d 311, 314 (1st Cir. 1988) ("It is clear to us that the right of action to sue DPI [the fraudulent transferee] . . . once abandonment by the trustee took place, reposed in Unisys [the creditor] free of any stay."); *Klingman*, 158 B.R. at 113 ("The trustee's exclusive right to maintain a fraudulent conveyance cause of action expires and creditors may step in

(or resume actions) when the trustee no longer has a viable cause of action.").[4]

There is nothing in the text or structure of the Bankruptcy Code suggesting that when a creditor regains the right to pursue a state-law claim that existed prior to bankruptcy, the claim reposes in a different or altered form. Rather, the creditors simply regain the right to pursue the claim that existed prior to bankruptcy. *See In re Wilton Armetale*, 2020 WL 4460000, at *8 (holding that, when trustee abandoned his claims, the creditor's claims "'spr[ang] back to life' and so restored [the creditor's] power to pursue its claims").

Congress recognized that creditors can regain authority to pursue their state-law claims, free of any restrictions imposed on trustees, when it passed a limited preemption of state-law fraudulent-transfer claims upon a debtor's bankruptcy. Section 544(b)(2) contains an express-preemption provision regarding the right of creditors to recover certain charitable contributions made by a debtor. This provision, enacted in 1998, provides: "*Any claim* by *any person* to recover a transferred contribution described in the

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[4] *See also First Bank of Dalton v. Manton Family P'ship, LLLP (In re Manton)*, 585 B.R. 630, 636 (Bankr. N.D. Ga. 2018) (holding that sections "544 and 548 provide exclusive standing to a trustee to prosecute a fraudulent conveyance action unless the trustee has abandoned that claim or the automatic stay has been lifted"); *In re Leopard*, No. 2:13-CV-02251-RDP, 2014 WL 2740320, at *4 (N.D. Ala. June 17, 2014) (same); *Barber v. Westbay (In re Integrated Agri), Inc.,* 313 B.R. 419, 427–28 (Bankr. C.D. Ill. 2004) ("A creditor regains standing to pursue a state law fraudulent conveyance action, in its own name and for its own benefit, once the statute of limitations expires on the bankruptcy trustee's right to bring the claim."); *In re Kampen*, 190 B.R. 99, 103–04 (Bankr. N.D. Iowa 1995) (same); *Christian v. Mason*, 219 P.3d 473, 480 (Idaho 2009) (same).

preceding sentence under Federal or State law in a Federal or State court *shall be preempted* by the commencement of the case." 11 U.S.C. § 544(b)(2) (emphasis added). This express-preemption provision conclusively demonstrates that Congress understood that creditors maintain their state-law fraudulent-transfer claims and can pursue them in certain instances after the automatic stay is lifted. This language in § 544(b)(2) directly contradicts the Second Circuit's conclusion that it is "unclear" whether creditors may, in certain instances, have standing to pursue their state-law fraudulent-transfer claims after a bankruptcy filing. *In re Tribune*, 946 F.3d at 89 (ignoring § 544(b)(2) when stating that "[a] contemporaneous reader would not, therefore, necessarily have believed it plain that Section 546(e)'s reference only to a trustee's et al. avoidance claim meant that creditors could bring their own claims").

* * * * *

If Congress wanted to prevent all creditor state-law claims, it could have done so by enacting a "wholesale preemption" of state fraudulent-transfer law.[5] But Congress did not do so. Instead, Congress granted trustees the exclusive, but *temporary*, authority to bring fraudulent-

[5] Further, if state-law fraudulent-transfer claims were a concern, Congress would have barred all such claims, irrespective of a debtor's bankruptcy. Congress, however, has not passed such a law. Notably, despite the similarities between receiverships and bankruptcies, Congress has not prevented equity receivers—whom are often appointed by the Securities & Exchange Commission in cases concerning securities frauds—from pursuing state-law claims to recover securities-related payments. *See Ashmore for Wilson v. Dodds*, 262 F. Supp. 3d 341, 354 (D.S.C. 2017) ("In enacting the Bankruptcy Code, federal lawmakers decided to make § 546(e)'s safe harbor provision apply only to bankruptcy trustees . . . No bankruptcy trustee has been named here, and, thus, the Receiver is not barred.").

transfer claims, and *stayed*, but did not preempt, state-law claims. Congress would not have needed to pass an express-preemption provision for charitable contributions if it believed that creditors lost their state-law claims upon a debtor's bankruptcy or that such claims "reverted" to creditors with the limitations Congress placed on the trustee's federal-law claims. When taken as a whole, it is evident that Congress understood that the Bankruptcy Code neither deprives creditors of their state-law claims nor alters such claims upon the reversion of the authority to bring them. This is what virtually all courts to have considered the issue have recognized.

Thus, in § 546(e), when Congress referred solely to claims by "the trustee" and used the phrase "[n]otwithstanding sections 544, 545, 547, 548(a)(1)(B), and 548(b) of this title," Congress meant what it said. There is no ambiguity. Section 546(e) limits only the avoidance powers granted to trustees under the Bankruptcy Code.

II. Section 546(e) Does Not Preempt State-Law Creditor Claims.

Because trustees owe a fiduciary duty to creditors, have an obligation to maximize creditor recovery, and often also serve as trustees for trusts created under court-approved plans of reorganization in which creditor claims are directly assigned, trustees have an interest in seeing creditors' state-law rights adequately protected. As set forth above, the Second Circuit incorrectly held that it is "unclear" whether Congress understood that creditors maintained their state-law remedies. The Second Circuit then relied on this erroneous conclusion to hold that the use of the word "trustee" in § 546(e) is ambiguous. *In re Tribune*, 946 F.3d at 90. But courts cannot simply inject "ambiguity" into a statute as a means to "elevate abstract and unenacted

legislative desires above state law."[6] *Virginia Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1907 (2019); *see also Kansas v. Garcia*, 140 S. Ct. 791, 804 (2020) ("[A]ll preemption arguments[] must be grounded 'in the text and structure of the statute at issue.'" (quoting *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993)).

a. Section 546(e) Expressly Applies to Chapter 5 Claims by Trustees, Not to State-Law Claims by Creditors.

The text of § 546(e) is clear that it operates only as an exception to the substantive avoidance powers afforded to trustees under federal law. That is exactly what this Court recognized in *Merit*. 138 S. Ct. at 893 (holding that "546(e) operates as *an exception to the avoiding powers afforded to the trustee* under the substantive avoidance provisions" in Chapter 5 of the Bankruptcy Code (emphasis added)).

Several aspects of the statutory language reveal that Congress did not intend § 546(e) to preempt state-law claims brought by creditors. First, as this Court held in *Merit*, the "*text makes clear* that the starting point for the § 546(e) inquiry is the substantive avoiding power under the provisions expressly listed in" sections 544, 545 547, and 548. *Merit*, 138 S. Ct. at 893 (emphasis added). Congress could have drafted a broader provision by, for example,

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[6] Even if the Second Circuit were correct about the ambiguities in the Bankruptcy Code, any such ambiguities cannot be used to bootstrap a finding of congressional preemption of state law. To the contrary, the existence of any ambiguities in the statute evidences the lack of congressional intent to preempt state-law creditor claims. *See Altria Grp., Inc. v. Good*, 555 U.S. 70, 77 (2008) ("[W]hen the text of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily 'accept the reading that disfavors pre-emption.'" (citation omitted)).

making the exception apply to "otherwise applicable law" or by simply stating that no person "may [] bring a[] claim or action" to recover a transfer made in connection with a securities contract after the commencement of the case. Congress, however, did not enact such a sweeping exception. Rather, it expressly limited the application of § 546(e) to specific avoidance powers in Chapter 5 of the Bankruptcy Code.

Second, § 546(e) specifically identifies the plaintiff whose claims are limited. It provides that "*the trustee* may not avoid a transfer" that is, among other things, a transfer "in connection with a securities contract." 11 U.S.C. § 546(e) (emphasis added). Again, Congress could have drafted a more-encompassing exception, but it did not.

In sum, Congress created federal-law claims to aid trustees in recovering assets for creditors. Congress then limited the very same claims that it created. *See Merit*, 138 S. Ct. at 894 ("As the Seventh Circuit aptly put it, the Code 'creates both a system for avoiding transfers and a safe harbor from avoidance—logically these are two sides of the same coin.'") (citation omitted)). Because § 546(e) is simply an exception to a specific federal right created by Congress, there is no indication of preemptive intent.

b. It Is Not the Province of Courts to Alter the Balance Struck by the Statute.

As this Court has repeatedly recognized, "it is not for courts to alter the balance struck by the statute." *Law v. Siegel*, 571 U.S. 415, 427 (2014). Yet, that is precisely what the Second Circuit did.

In passing § 546(e), Congress struck a balance between the competing national interests of maximizing

creditor recoveries from bankrupt entities and protecting the integrity of the national securities markets. To maximize creditor recovery, Congress gave trustees broad powers to avoid and recover fraudulent and preferential transfers. *See* 11 U.S.C. §§ 544, 547, & 548; *U.S. v. Sims (In re Feiler)*, 218 F.3d 948, 954 (9th Cir. 2000) (noting that Congress conferred "broad avoidance powers on the trustee"). Recognizing the breadth of a trustee's avoidance powers, courts often describe the powers granted to trustees to recover fraudulent transfers as "extraordinary." *E.g.*, *Gibson v. U.S. (In re Russell)*, 927 F.2d 413, 416 (8th Cir. 1991); *In re Frank Santora Equip. Corp.*, 256 B.R. 354, 372 (Bankr. E.D.N.Y. 2000).

As the national economy evolved, these "extraordinary" avoidance powers of trustees began to encroach upon the integrity of the national securities markets. Thus, in 1978, Congress limited a trustee's avoidance powers by enacting the predecessor to § 546(e) to protect the securities settlement system. Although Congress has since expanded the scope of § 546(e), the "securities safe harbor" exists within the Bankruptcy Code as a limitation on a trustee's broad avoidance powers. This limitation, therefore, must be understood within the context of the powers that it limits and the balance that Congress struck in enacting these limitations.

As set forth above, the text and structure of § 546(e) demonstrates that Congress intended only to limit a bankruptcy trustee's Chapter 5 avoidance powers. The rationale for limiting a trustee's ability to avoid transfers simply does not apply to claims brought by creditors because, as reflected in the statutory language, a trustee's ability to recover transfers is far greater than that of a creditor. First, a trustee can recover an entire fraudulent transfer under

§ 544(b), regardless of the size of the creditor's claim upon which the trustee's claim relies. *See, e.g.*, *In re Integrated Agri, Inc.*, 313 B.R. at 428 ("A creditor bringing a UFTA claim in state court may only recover a sum capped by the amount of its own debt, while a bankruptcy trustee under Section 544(b) may recover the entire value of the avoided transfer, even if it far exceeds the amount of the debt owing to the actual creditor upon whose existence the trustee's rights rely."); *see also Geron v. Craig (In re Direct Access Partners, LLC)*, No. 15-11259 (MEW), 2019 WL 2323674, at *8 (Bankr. S.D.N.Y. May 30, 2019) (same). Second, under § 548, a trustee does not need to identify any actual creditor that could have avoided the transfer outside of bankruptcy. *See* 11 U.S.C. § 548. Accordingly, even if a defendant-transferee would have had certain defenses to a creditor's state-law claim, such defenses are wholly inapplicable to a § 548 claim. *See In re Cybergenics Corp.*, 226 F.3d at 243 n.8 (holding that, "unlike section 544(b), [§ 548] is not contingent upon the identification of an actual unsecured creditor with a state law cause of action"). Third, a trustee has powers, such as the power to avoid a preferential transfer, that a creditor lacks under state law. *See* 11 U.S.C. § 547.

Congress circumscribed the extraordinary powers it granted to trustees under Chapter 5 of the Bankruptcy Code. But there is no reason to assume—as the Second Circuit did based on its selective reading of legislative history—that Congress intended § 546(e) also to limit the narrower rights that creditors have under state law.

III. The Second Circuit's Broad Interpretation of § 546(e) Based on Perceived Legislative Goals Contravenes This Court's Holding in *Merit*.

Section 546(e) protects certain transfers from a trustee's broad avoidance powers. But, as this Court held in

Merit, the safe harbor must be applied as written. Disregarding this Court's precedent, the Second Circuit's opinion is nothing more than "an attack on the text of the statute." *See Merit*, 138 S. Ct. at 896 (rejecting argument that Congress's purpose in enacting § 546(e) "was prophylactic, not surgical," and meant to "advanc[e] the interests of parties in the finality of transactions"). The Second Circuit's failure to follow *Merit* will affect bankruptcy trustees in their pursuit of claims under the Bankruptcy Code. Because the Second Circuit essentially ignored this Court's mandate, amici believe that this Court should grant certiorari.

The Second Circuit, by relying on select statements made during congressional hearings, held that § 546(e) protects "transactions consummated *through* [commodities and securities firms] . . . to protect investors from the disruptive effect of after-the-fact unwinding of securities transactions." *In re Tribune*, 946 F.3d at 92 (emphasis added). But, as this Court clearly held in *Merit*, "[t]ransfers through a covered entity, conversely, appear nowhere in the statute." *Merit*, 138 S. Ct. at 897. The Second Circuit, again by citing congressional hearings, likewise held that the purported "broad language used in Section 546(e) *protects transactions rather than firms*, reflecting a purpose of enhancing the efficiency of securities markets in order to reduce the cost of capital to the American economy." *In re Tribune*, 946 F.3d at 92 (emphasis added). Yet, as this Court held in *Merit*, § 546(e) protects only certain firms from a trustee's avoidance claims; it does not provide a safe harbor for all transactions that might happen to involve a securities firm generally. *Merit*, 138 S. Ct. at 897 (rejecting defendant's arguments and holding "we do have a good reason to believe that Congress was concerned about transfers '*by* an industry hub' specifically") (emphasis in original)).

In yet another misuse of legislative history, the Second Circuit held that Congress passed § 546(e) to "protect the process or market from the entire genre of harms" and that the legislative history somehow "clearly reveal[ed]" this unstated purpose. *In re Tribune*, 946 F.3d at 92. The Second Circuit reached this conclusion by finding that a House report "reflect[ed] a concern over the use of avoidance powers not only after the bankruptcy of a commodities or securities firm, but also after a 'customer' or 'other participant' in the securities markets enters bankruptcy." *Id.* (citation omitted). Leaving aside the fact that the House report does not say what the Second Circuit claims it says, the Second Circuit's holding finds no support in the statutory text. A customer of a stockbroker or commodity broker is not a covered entity under § 546(e). The Second Circuit cannot add language to the statute to fit its own perception of congressional intent.

Section 546(e) is not ambiguous. The Second Circuit, whether in the context of a preemption analysis or otherwise, should not have speculated about congressional motives. Rather, as this Court stated in *Merit*, application of the safe harbor should be confined to the statutory text.

CONCLUSION

Bankruptcy trustees should be able to exercise their right not to pursue certain federal-law actions when they determine that an estate and its creditors would be better served by allowing the creditors to pursue their own state-law remedies. Until the Second Circuit's opinion, this proposition was not in doubt. In light of the ambiguities that the Second Circuit has erroneously interjected into the Bankruptcy Code for the purpose of disregarding the otherwise clear statutory text, this case presents an ideal

vehicle for this Court to address the § 546(e) preemption issue, as well as to reaffirm its holding in *Merit*. Accordingly, the petition for writ of certiorari should be granted.

Respectfully submitted,

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