No. 19-_____

IN THE
Supreme Court of the United States

JAKE LATURNER, TREASURER
OF THE STATE OF KANSAS,
Petitioner,

v.

UNITED STATES OF AMERICA AND
ANDREA LEA, IN HER OFFICIAL CAPACITY
AS AUDITOR OF THE STATE OF ARKANSAS,
Respondents.

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

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QUESTIONS PRESENTED

1. Whether States that have exercised their historic power to escheat title to abandoned United States savings bonds may redeem those bonds as successor owners, as the Third Circuit has concluded, or whether federal law preempts such redemption, as the Federal Circuit held below.

2. Whether Treasury regulations requiring presentation of a bond serial number may operate as a time bar to prevent a bond owner who has lost that serial number from ever redeeming that bond.

PARTIES TO THE PROCEEDINGS

Petitioner Jake LaTurner, Treasurer of the State of Kansas, was a plaintiff in the district court proceedings and an appellee in the court of appeals proceedings.

Respondent United States of America was the defendant in the district court and the appellant in the court of appeals proceedings.

Respondent Andrea Lea, in her official capacity as Auditor of the State of Arkansas, was a plaintiff in the district court proceedings and an appellee in the court of appeals proceedings.

RELATED PROCEEDINGS

The plaintiffs in the consolidated appeals before the Federal Circuit (Kansas and Arkansas) brought suit against the United States to redeem abandoned U.S. savings bonds to which those States have succeeded as owners. Nine similar suits brought by other States have been stayed by the Court of Federal Claims (Kaplan, J.) pending the resolution of those appeals:

Atwater v. United States, No. 1:16-cv-1482 (Fed. Cl. filed Nov. 9, 2016) (Florida)

Ball v. United States, No. 1:16-cv-221 (Fed. Cl. filed Feb. 12, 2016) (Kentucky);

Fitch v. United States, No. 1:16-cv-231 (Fed. Cl. filed Feb. 12, 2016) (Mississippi);

Fitzgerald v. United States, No. 1:19-cv-678 (Fed. Cl. May 8, 2019) (Iowa);

Kennedy v. United States, No. 1:15-cv-1365 (Fed. Cl. filed Nov. 12, 2015) (Louisiana);

Loftis v. United States, No. 1:16-cv-451 (Fed. Cl. filed Apr. 11, 2016) (South Carolina);

Sattgast v. United States, No. 1:15-cv-1364 (Fed. Cl. filed Nov. 12, 2015) (South Dakota);

Williams v. United States, No. 1:16-cv-1021 (Fed. Cl. filed Aug. 18, 2016) (Ohio);

Zoeller v. United States, No. 1:16-cv-699 (Fed. Cl. filed June 15, 2016) (Indiana).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

CONSTITUTION, STATUTES, AND REGULATIONS

ADMINISTRATIVE MATERIALS

OTHER MATERIALS

Petitioner Jake LaTurner, Treasurer of the State of Kansas, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-23a) is reported at 933 F.3d 1354. The opinions and orders of the Court of Federal Claims (App. 24a-33a, 34a-100a, 101a-140a) are reported at 135 Fed. Cl. 501, 133 Fed. Cl. 47, and 123 Fed. Cl. 74, respectively.

JURISDICTION

The court of appeals entered its judgment on August 13, 2019, and denied petitions for rehearing on December 11, 2019 (App. 141a-142a). On February 26, 2020, Chief Justice Roberts extended the time for filing a petition for a writ of certiorari to and including May 8, 2020. App. 150a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

Kansas Statutes Annotated § 58-3979 and § 58-3980 and relevant provisions of Part 315 of Title 31 of the Code of Federal Regulations (2014) are reproduced at App. 143a-149a.

INTRODUCTION

The federal government issued the first U.S. savings bonds 85 years ago, in the wake of the Great Depression. While helping the government fund critical national expenditures, savings bonds also provided middle-class Americans a way to save for their future through federally backed securities promising a modest, but riskless, long-term return. The most popular savings bonds – dubbed "War Bonds" because they helped the government finance World War II – took 30 or 40 years to mature, at which point they stopped

earning interest. But bonds' relatively small denominations, combined with their decades-long maturity terms, means that many owners lose, forget about, or even die without redeeming their bonds. The evidence in the Court of Federal Claims established that, since the first long-term savings bonds started maturing in the 1960s and '70s, the U.S. Department of the Treasury made only a limited and token effort (which ended nearly a decade ago and even then applied only to bonds maturing beginning in the 2000s) to advise bond owners that their bonds had matured. As a result, the federal government quietly holds tens of billions of dollars' worth of interest-free debts owed to its citizen-lenders.

States have sovereign power to "assume title to abandoned personal property." *Delaware v. New York*, 507 U.S. 490, 497 (1993). That power, reserved to the States under the Tenth Amendment, also carries with it political incentives: State Treasurers are elected officials for whom the return of abandoned or lost property is considered a feature of effective leadership. Every year, State unclaimed-property administrators return to citizens billions' worth of abandoned property, tangible and intangible. Beginning in 2004, several States requested that Treasury grant those States custody of the proceeds of U.S. savings bonds originally registered to Americans in those States. Those States, through their unclaimed-property laws, sought to replace Treasury as the payor or debtor on the bonds and, thereby, to enable the bond owners in those States to seek payment from the States instead of from Treasury.

Those States' efforts failed because the States claimed only custody of the proceeds of the bonds and not title ownership of the bonds themselves through

escheat. On appeal from the district-court decision sustaining Treasury's denial of the States' request, the Third Circuit ruled that federal law preempted the States' custody-based escheat laws as applied to U.S. savings bonds. But that "result d[id] not nullify state escheat laws" generally as to U.S. savings bonds. *Treasurer of New Jersey v. United States Dep't of Treasury*, 684 F.3d 382, 412 (3d Cir. 2012) ("*New Jersey*"), *cert. denied*, 569 U.S. 1004 (2013). Rather, the Third Circuit explained, the statute and Treasury's regulations recognized the States could use escheat to obtain title "ownership of the bonds – and consequently the right to redemption – through 'valid[] judicial proceedings'" that transfer to the States title to the abandoned bonds. *Id.* (quoting 31 C.F.R. § 315.20(b) (2014)) (alteration in original). *New Jersey* followed in the footsteps of *Arizona v. Bowsher*, 935 F.2d 332 (D.C. Cir. 1991), which likewise recognized the "manifest" importance of the distinction between escheat that transfers *title* ownership rather than mere *custody* of federal funds. *Id.* at 335.

The Federal Circuit in this case faced precisely the title-based claim the Third Circuit discussed in *New Jersey*, but it reached the opposite conclusion. Kansas (followed by other States) presented Treasury with state-court judgments granting it title ownership – not mere custody – of long-ago matured but unredeemed U.S. savings bonds. It asked that Treasury grant Kansas's redemption request under the same regulation the Third Circuit said in *New Jersey* authorized that redemption. Treasury refused. Notwithstanding *New Jersey*, the Federal Circuit approved Treasury's action. It held that Treasury's regulations do *not* recognize title escheatment.

The court below erred badly. To conclude that federal law *preempts* the sort of state claim the Third Circuit said federal law *recognizes*, the panel below ignored nearly a century of settled preemption jurisprudence. Mindful of the important role of state sovereigns in our federal system, this Court has held that traditional state powers – such as the power to escheat abandoned property – can be preempted only when Congress expresses a "clear and manifest" intent to do so. *E.g.*, *Altria Grp., Inc. v. Good*, 555 U.S. 70, 77 (2008). The Federal Circuit neither searched for nor found any preemptive purpose, much less a clear or manifest one. Instead, it *reversed* that burden, holding that, "[a]bsent Federal law authorizing" the States' escheatment of title, state escheatment laws are preempted. App. 11a.

This Court should resolve the appellate disagreement the Federal Circuit created and reject that court's overreaching approach to preemption. No future case will better present the issue, because all future Tucker Act claims will be resolved the same way, in the same court, under the panel's precedential opinion. Moreover, the stakes of the case merit prompt intervention. For decades, Treasury promised that States with title could escheat abandoned bonds, redeem those bonds for payment, and try to locate citizens Treasury would never otherwise notify. Indeed, in the Third Circuit case, the Solicitor General – representing Treasury – confirmed that reading of Treasury's regulations. Only now, after States acted in reliance on Treasury's previous interpretation of its regulations by enacting state statutes to take title to abandoned bonds and engaged in a lengthy due process procedure to comply with Treasury's previous advice, Treasury has reneged.

Treasury's ever-shifting positions concerning title ownership endanger "a principle as old as the Nation itself: The Government should honor its obligations." *Maine Cmty. Health Options v. United States*, No. 18-1023, slip op. 30 (U.S. Apr. 27, 2020). The Court should review this important case and reverse the judgment of the Federal Circuit.

STATEMENT

1. The United States created the savings bond program in 1935 to finance critical national expenditures and provide middle-class Americans a way to make a safe "savings type" of investment.[1] Savings bonds have been issued in various "series," denoted by letters of the alphabet, but by far the most popular was the Series E bond, which could be purchased first with a 40-year, and later with a 30-year, maturity term. Between 1941 and 1980, when the series was retired, Treasury issued more than 4.5 billion E bonds.[2] The last E bonds matured and stopped earning interest in 2010, yet billions of dollars' worth of E bonds remain unredeemed.[3]

Each "savings bond is a contract between the United States," as borrower, "and the bond owner," as lender. App. 2a-3a. Treasury's regulations set forth the terms of that contract. App. 3a. Although preemptive at times, the regulations commonly look to and honor state law. For example, on a bond owner's death, they

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[1] TreasuryDirect, *Beginnings of the Savings Bond Program*, https://www.treasurydirect.gov/indiv/research/history/history_sbbegin.htm (last visited Apr. 23, 2020).

[2] *See* TreasuryDirect, "Matured Unredeemed Savings Bonds as of Dec 31, 2019," https://www.treasurydirect.gov/foia/sbmud.xlsm (last visited Apr. 23, 2020).

[3] *See id.* Accounting for all series, at least $8 billion worth of savings bonds has been matured for more than a decade.

look to whether "the estate has been settled . . . through judicial proceedings" in the decedent's State and empower "the persons entitled" by those state proceedings to "request payment" of the decedent's savings bonds. 31 C.F.R. § 315.71(b).[4]

Likewise, and consistent with States' "centuries-old" sovereignty over property within their borders, App. 2a, the regulations allowed a state-court order to transfer bond ownership: that is, for a state-court decision to change the identity of the creditor. Though the regulations limited bond transfers in some ways, they long required Treasury to "recognize a claim against an owner of a savings bond . . . if established by valid, judicial proceedings" according to requirements "specifically provided in this subpart." 31 C.F.R. § 315.20(b).[5]

2. That regulation, 31 C.F.R. § 315.20(b), featured prominently in *Treasurer of New Jersey v. United States Department of Treasury*, 684 F.3d 382 (3d Cir. 2012) ("*New Jersey*"), *cert. denied*, 569 U.S. 1004 (2013). Several States, relying on "'custody' escheat statutes rather than 'title' escheat statutes," requested that Treasury transfer to them the proceeds of matured, but unredeemed, savings bonds registered to residents of those States. *Id.* at 389. Treasury

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[4] The 2014 publication of the Code of Federal Regulations contains the version of the regulations that govern this case. *See* App. 37a n.1. References are to that publication unless otherwise indicated. The pertinent regulations are set forth at App. 144a-149a.

[5] While this case was pending before the Court of Federal Claims, Treasury amended § 315.20(b) to prospectively prohibit transfers effected by state-court title escheat judgments. *See* Final Rule, Regulations Governing United States Savings Bonds, 80 Fed. Reg. 80,258, 80,264 (Dec. 24, 2015).

refused, arguing that the States' lack of title ownership of the bonds in question was decisive. Citing § 315.20(b), Treasury told the Third Circuit that it could not honor the States' claim to custody of the bond proceeds because its regulations require *Treasury* to pay out on the bonds when presented with a valid redemption request by the owner. *See* Treasury *New Jersey* 3d Cir. Br. 6, 26.[6] Disbursing those funds to the States would "substitute the State for the United States as the obligor on the bond" and either (1) impermissibly alter the bond owner's right to receive payment "from the United States" or (2) "expose Treasury to multiple obligations" – first to the State and then to the title owner – "on a single bond." *Id.* at 26-27.

By contrast, Treasury explained, its regulations *would* recognize a State that took title "ownership of a U.S. savings bond through valid judicial proceedings." *Id.* at 6, 14. In that event, payment to the State *is* payment from the United States to the bond owner, thereby discharging the federal government's obligations under the bond contract and eliminating any exposure to a second claim for payment.

Treasury's position was unsurprising. Beginning in 1952, Treasury had repeatedly acknowledged the force of the distinction between a State with custody and a State with title. *See* App. 131a (cataloguing Treasury's prior "unambiguous statements").[7] Treasury

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[6] Br. for Appellees, *New Jersey*, No. 10-1963, 2011 WL 6935510 (3d Cir. Dec. 23, 2011), https://bit.ly/2qSbMQD ("Treasury *New Jersey* 3d Cir. Br.").

[7] One such statement appeared on a frequently-asked-questions ("FAQ") webpage that Treasury took down "[a]t some point during this litigation" (after adopting its litigating position). App. 129a n.11.

had explicitly rejected the suggestion that payment to a State that had escheated title ownership "violat[ed]" any portion of "the [savings bond] agreement." App. 105a-106a. Rather, such a payment honors that agreement, Treasury repeatedly explained, because it is "payment to the bondholder in the person of his successor." App. 106a.

Treasury prevailed in *New Jersey*. Affirming the district court, the Third Circuit held that the States had no valid custodial claim to the bond proceeds, and it distinguished the *title*-based claims that 31 C.F.R. § 315.20(b) long recognized. *See* 684 F.3d at 412-13. Specifically addressing that scenario, the court noted that its "result d[id] not nullify state escheat laws for, as provided in the federal regulations and as recognized by the Treasury, third parties, including the States, may obtain ownership of the bonds – and consequently the right to redemption – through 'valid[] judicial proceedings.'" *Id.* at 412 (quoting 31 C.F.R. § 315.20(b)) (second alteration in original).

Several States sought review in this Court, and the Solicitor General successfully opposed certiorari.[8] He explained that Treasury has "provided guidance to the States about how" their abandoned-property laws may "apply to U.S. savings bonds." Treasury *New Jersey* Sup. Ct. BIO 3. Specifically, "a State must complete an escheat proceeding that . . . awards title to the bond to the State, substituting the State for the original bondholder as the lawful owner." *Id.* at 4. That process, the Solicitor General explained, was covered by § 315.20(b), which contemplates "cases in which a

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[8] *See* Br. for Resps. in Opp., *Director, Dep't of Revenue of Montana v. Department of Treasury*, No. 12-926, 2013 WL 1803570 (U.S. Apr. 26, 2013), https://bit.ly/2qSiYMk ("Treasury *New Jersey* Sup. Ct. BIO").

third party obtains ownership of the bond through valid judicial proceedings." *Id.* at 3 (citing the regulation).

That regulatory condition was not satisfied in *New Jersey*, the Solicitor General explained, because the petitioner States did not "claim to have obtained title to any of the U.S. savings bonds at issue in this case, and so they do not assert a right to receive payment under the federal regulations that authorize payment to a third party that obtains ownership of a bond through valid judicial proceedings (*i.e.*, 31 C.F.R. 315.20(b), 353.20(b))." *Id.* at 5. Therefore, transferring the proceeds of the bonds at issue in *New Jersey* to the petitioner States "would directly conflict with the federal regulatory requirement that the Department of the Treasury may make payments only to the registered owner of the bond or a party that has obtained title to the bond through a judicial proceeding." *Id.* at 13.

3. In reliance on Treasury's repeated statements, including those the Solicitor General made in this Court on Treasury's behalf, a number of States enacted statutes authorizing them to escheat title ownership of matured but long-unredeemed (and therefore abandoned) savings bonds registered to citizens with last-known addresses in those States after completing a process designed to protect the due process rights of the original owners and their families. *See*, *e.g.*, Kan. Stat. Ann. §§ 58-3979, 58-3980; *see also Texas v. New Jersey*, 379 U.S. 674, 675 (1965) (recognizing States' "ancient" sovereign power to escheat title).[9]

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[9] These laws place the States in the shoes of the *owner* of the bond (rather than, as in *New Jersey*, the shoes of the bond's payor) and thus satisfy Treasury's regulations. Notably, however, and as a matter of state unclaimed-property policy, the laws

4. In 2013, the State Treasurer of Kansas secured a state-court escheat judgment granting it title to unredeemed savings bonds registered to owners with last-known addresses in Kansas that had matured eight or more years earlier (and thus were likely lost, forgotten, or abandoned). The judgment covered both the bonds represented by the few physical certificates Kansas had in its possession as well as the many more for which the certificates were lost. Kansas requested that Treasury recognize its title ownership and redeem all the bonds – both by accepting the bond certificates and by redeeming the lost bonds under Treasury's lost-bond regulation. *See* 31 C.F.R. § 315.25.

Treasury recognized Kansas's ownership of the bonds for which it possessed the certificates and redeemed those, without suggesting that federal law preempted or barred Kansas from redeeming those bonds. But, as to the lost bonds, Treasury refused, denying that § 315.20(b) required it to recognize the transfer of ownership to Kansas. Kansas sued in the Court of Federal Claims. App. 6a-7a.[10] Treasury moved to dismiss the Kansas case, arguing that, despite its prior statements to this Court, § 315.20(b) did not recognize the State's title ownership and moreover that federal law preempted Kansas's title escheat law. The Court of Federal Claims denied Treasury's

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provide for payment to the original owner if the owner identifies herself to the State. *See*, *e.g.*, Kan. Stat. Ann. § 58-3980 (State must pay citizen who demonstrates original ownership). That payment is not made by the State on Treasury's behalf; it is a payment by the State of state funds that postdates satisfaction of the bond contract.

[10] Later suits by additional States followed, but those suits were stayed pending the resolution of the suit brought by Kansas and another brought by Arkansas. App. 7a-8a. Like Kansas, Arkansas applied for and received an extension of the deadline within which to petition for certiorari.

motion (in substantial part), holding that the text of § 315.20(b) allowed Kansas to escheat title and that no deference was due Treasury's novel interpretation of the regulation because that position was "merely a post-hoc rationalization." App. 128a.[11]

After limited discovery, the parties cross-moved for partial summary judgment on liability. Treasury renewed its arguments that § 315.20(b) did not require Treasury to recognize Kansas's title ownership and that federal law preempted Kansas's law. It also argued, for the first time, that, even if Kansas had valid title ownership of the savings bonds, the bonds were not "los[t]" within the meaning of 31 C.F.R. § 315.25 and thus Kansas could not redeem them despite its ownership.

The Court of Federal Claims again denied Treasury's motion in substantial part, ruling that Kansas owned the escheated savings bonds. The court first explained that, far from preempting Kansas's escheatment statute, "federal law itself (i.e., 31 C.F.R. § 315.20(b)) *requires* Treasury to recognize claims of ownership based on title-based escheatment statutes." App. 86a-87a (emphasis added). Citing and distinguishing the Third Circuit's decision in *New Jersey*, the court reasoned that "[t]itle-based escheatment statutes do not raise the concerns identified [in *New Jersey*] because once ownership transfers to a state, the state is not the obligor on the bonds; it is their owner." App. 89a.

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[11] The Court of Federal Claims also noted that the obvious purpose of the government's then-proposed (and now-adopted) mid-litigation regulatory change was "to change th[e] regulations to reflect the position that the government is taking in this case." App. 136a n.13; *see supra* note 5.

In addition, the Court of Federal Claims rejected Treasury's argument that honoring the States' assumption of title ownership would impermissibly place a time limit on the bond owners' right to redeem their matured bonds. That argument failed, the court explained, because title escheatment "determines the identity of the bond owner, and not the time period within which the bond owner may redeem it." App. 87a.

The Court of Federal Claims expressed skepticism about Treasury's new argument that the bonds were not lost and that Kansas, as owner, could not redeem them under the regulations. The court observed that the bonds are clearly "lost" as a matter of plain English – *i.e.*, location unknown to their owner (Kansas). App. 81a-82a. Ultimately, however, it was "neither necessary nor appropriate" to interpret regulations governing payment at that stage of the case because only ownership was being litigated. App. 83a.

5. Treasury appealed.[12] In addition to renewing its arguments before the Court of Federal Claims, Treasury added another new argument: even if Kansas owned the savings bonds, *and* even if those bonds were "lost," Kansas could never redeem the bonds because of their age. Treasury, the argument went, must deny redemption requests for bonds matured more than six years earlier "unless the claimant supplies the [bonds'] serial number[s]," 31 C.F.R. § 315.29(c), and that is data Kansas currently lacks.

Kansas defended the Court of Federal Claims' rulings and also responded to Treasury's new redemption argument. It first noted that appellate resolution

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[12] The appeal consolidated parallel Court of Federal Claims rulings in favor of Kansas and Arkansas.

of the issue was inappropriate because it had not been decided below or subject to any discovery. Kansas then explained that, on the merits, a clerical requirement that redemption requests include serial numbers does not prohibit the redeeming owner from *obtaining* those serial numbers from Treasury. Reading the regulation Treasury's way – to impose a memory test or recordkeeping obligation on bond owners – would permanently preclude redemption of, and utterly devalue, bonds matured for six years or more and whose owners misplaced the bond certificates and serial numbers. Moreover, there was no evidence that Treasury had ever applied the regulation that way.

6. A panel of the Federal Circuit reversed. App. 1a-23a.

The panel held that federal law preempted Kansas's escheatment statute without considering the distinction between custody and title ownership that was critical to the decision in *New Jersey*. The panel did not identify any congressional purpose to *displace* the States' historic escheatment power (much less a "clear" or "manifest" one). *See Altria Grp., Inc. v. Good*, 555 U.S. 70, 77 (2008) ("historic" state power preempted only where doing so is "the clear and manifest purpose of Congress") (citation omitted). Rather, the panel asked whether § 315.20(b) *permitted* state escheat judgments to be recognized. Calling the state escheat process a "restriction," the panel held that, "[a]bsent Federal law authorizing such a state law restriction, the result is clear: the federal law takes precedence and the state law is preempted." App. 11a (citation omitted).[13]

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[13] In framing the escheatment laws this way, the panel accepted Treasury's classification of those laws as imposing a

Applying that test, the panel concluded that § 315.20(b) did not authorize title escheatment by States. App. 11a-14a. Unlike the panel in *New Jersey* (and contra Treasury's statements to the Third Circuit and this Court in that case), the panel reasoned that § 315.20(b) did not recognize escheat because the regulation's text, which refers generally to "judicial proceedings" determining ownership, did not specifically mention escheat. App. 13a-14a. *But see New Jersey*, 684 F.3d at 412-13 ("[A]s recognized by the Treasury, third parties, including the States, may obtain ownership of the bonds – and consequently the right to redemption – through 'valid[] judicial proceedings'") (quoting 31 C.F.R. § 315.20(b)) (second alteration in original).

The panel also held in the alternative that States could not redeem the bonds even if they owned them and even if they were lost because "the States do not have the bond serial numbers." App. 17a (citing 31 C.F.R. § 315.29(c)). The panel did not acknowledge that it was deciding an issue not passed upon below and without evidence of how Treasury has applied that regulation in the past.

7. Kansas and Arkansas petitioned the Federal Circuit for rehearing en banc. The full court called for a response to the petitions and later denied them. App. 141a-142a. The Chief Justice granted an extension for the filing of this petition.

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time limit on redemption. App. 11a. The panel did not address the lower federal court's explanation that escheatment did not affect redemption timing but rather changed the identity of the bond's owner. *See supra* p. 12.

REASONS FOR GRANTING THE PETITION

In allowing Treasury to abandon decades of statements allowing States to escheat title ownership of a matured U.S. savings bond, the Federal Circuit created a disagreement among the federal courts of appeals and made erroneous new preemption law that contravenes this Court's precedents. The result is a decision that tramples longstanding principles of federalism and questions the willingness of the United States to honor its legal obligations as a debtor. That decision merits this Court's review.

I. THE FEDERAL CIRCUIT'S DECISION IS AT ODDS WITH DECISIONS FROM THE THIRD AND D.C. CIRCUITS

Two prior decisions from the federal courts of appeals highlight the critical distinction between escheat that grants a State title ownership of a savings bond, which federal law permitted, and escheat that merely grants a State custody of federal funds, which federal law preempts. The Federal Circuit broke with those courts by ignoring that distinction.

A. The Third And D.C. Circuits Accept The Key Distinction Between Title And Custody

1. *New Jersey* is the mirror image of this case. In *New Jersey*, seven States sought to recover from Treasury the "proceeds of matured but unredeemed" savings bonds on behalf of the registered owners of those bonds, even though the States did not possess the bond certificates. 684 F.3d at 386. The States' claim to those proceeds was based on "'custody' escheat statutes rather than 'title' escheat statutes in that under them the State does not take title to abandoned property." *Id.* at 389. The Third Circuit rejected the States' attempt.

The court first observed that, *since 1952*, Treasury has taken the position "that the Federal Government would pay the proceeds of savings bonds to [a State] if it actually obtained title to the bonds, but would not do so where the State merely obtained a right to the custody of the proceeds." *Id.* at 390 (citing 1952 Treasury bulletin). Quoting another Treasury statement, this one from 2000, the court further explained that

> Treasury recognizes escheat statutes that provide that a State has succeeded to the legal ownership of securities because in such case payment of the securities results in full discharge of the Treasury's obligation and this discharge is valid in all jurisdictions.
>
> But, payment of securities to a State claiming only as a custodian results in the substitution of one obligor, the Department of the Treasury, for another, the State. Not only is there serious question whether there is authority for a State to effect such a substitution, but also there seems to be no basis for believing that payment to a State custodian would discharge Treasury of its obligation.

Id. at 391 (quoting 2000 FAQ webpage cited at App. 52a).[14] In other words, payment to a State with title satisfies the Treasury's obligation on its debt; payment to a State without title leaves the Treasury exposed to a second claim for payment from the bond's actual owner. *See* App. 88a-90a.

Mindful of that distinction, the *New Jersey* court reasoned that federal law preempted a State's attempt to obtain custody of the savings bonds proceeds because releasing funds to the State as custodian would

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[14] Treasury revised this FAQ webpage "[a]t some point during this litigation" after Kansas cited it in its briefing. App. 129a n.11.

contravene federal regulations requiring payment *by the United States* to the bond owner at redemption. "[A]pplication of the States' unclaimed property acts would interfere with the terms of the contracts between the United States and the owners of the bonds because . . . they effectively would substitute the respective States for the United States as the obligor." *New Jersey*, 684 F.3d at 408.

The same issue would not arise, the court explained, if the States were title owners of the bonds. That is because, "*as provided in the federal regulations* and as recognized by the Treasury, third parties, including the States, may obtain ownership of the bonds – and consequently the right to redemption" – by taking title ownership under § 315.20(b). *Id.* at 412 (citing the regulation) (emphasis added). Such ownership would render the States "successors" to the registered bond purchasers, and payment to a state owner would therefore satisfy Treasury's obligation and discharge, rather than breach, the bond contract.

2. *Arizona v. Bowsher*, 935 F.2d 332 (D.C. Cir. 1991), likewise recognized that, at the intersection of state escheat law and federal payment obligations to citizens, "the distinction" between custodial possession and title ownership "is manifest." *Id.* at 335. There, 23 States sued the Comptroller General of the United States as well as the Treasury Department, claiming a custodial right to funds the Treasury, by federal statute, was holding in trust for citizens owed money by federal agencies. *Id.* at 333-34 (citing 31 U.S.C. § 1322).[15] The court observed that the States sought "only temporary custody over the money." *Id.* at 334.

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[15] The statute at issue in *Bowsher* did not apply to U.S. savings bonds. *See* 31 U.S.C. § 1321(a)(1)-(91).

The Supremacy Clause thwarted the States' claims, the court held, because it would alter the federally regulated relationship between the federal government, as debtor, and the citizens entitled to the funds. The purpose of the relevant federal statute was to locate "all unclaimed money accounts" within the Treasury to make them "more accessible" to eventual claimants; re-locating the money to the States "would surely make it less, not more, accessible to claimants, who presumably picture the federal government as the relevant payor." *Id.* at 335 (citation to legislative history omitted).

As the Third Circuit did in *New Jersey*, however, the D.C. Circuit qualified its holding. Unlike the States' custodial claims, *title* "escheat of the claimant's right" to the money "might well substitute the state for the claimant and entitle" the State "to payment" as the owner of the funds. *Id.* Nothing in its ruling, the court stressed, "prevent[ed] state substitution for the claimant where that is consistent with" federal law. *Id.*

B. The Third And D.C. Circuits Would Have Decided This Case Differently

The critical role played by the distinction between title ownership and mere custody in *New Jersey* and *Bowsher* leaves little doubt that those circuits would have affirmed the Court of Federal Claims. The concern that most animated the Third and D.C. Circuits was that a State with custody of federal funds interposes itself as the "obligor" of the relevant debt. *New Jersey*, 684 F.3d at 408; *accord Bowsher*, 935 F.2d at 335 (federal government is "the relevant payor"). That concern is absent when the State has title ownership: in that event, the State steps not into the shoes of the debtor but rather into the shoes of the creditor or bond owner. Payment to the State in that posture does not

complicate or alter the federal government's obligation; it performs it by paying the successor-owner.

More specifically, the Third Circuit explicitly stated that Treasury regulations in force at the time (and that govern this case) *permitted* "the States [to] obtain [title] ownership of the bonds – and consequently the right to redemption." *New Jersey*, 684 F.3d at 412 (citing 31 C.F.R. § 315.20(b)). The Federal Circuit held the opposite. It held (with minimal analysis) that § 315.20(b) unambiguously does *not* recognize transfers of ownership through escheat proceedings. App. 13a-14a. The disagreement is square.

New Jersey noted that States that came to court with title ownership might not necessarily prevail in a similar case if "the Government abandoned its long held position . . . and refused to recognize the enforceability of the judgment with respect to savings bonds." 684 F.3d at 413 n.28. But that qualification has no application here because Treasury did not argue that it was "abandon[ing]" its long-held position. On the contrary, Treasury argued "that its prior statements are entirely consistent with" the position it took in the Federal Circuit. App. 12a. Thus, the question the Third Circuit left open is *not* the question this case presents. Rather, this case presents precisely the situation that the Third Circuit – and Treasury – said would have resulted in the States prevailing. *See New Jersey*, 684 F.3d at 412 ("our result does not nullify state escheat laws").

Indeed, Treasury itself repeatedly took that position in *New Jersey*. "[T]he federal regulations," it told the Third Circuit, citing 31 C.F.R. § 315.20, "include cases in which a third party establishes its ownership of a U.S. savings bond through valid judicial proceedings. *A State may satisfy this ownership requirement*

through escheat." Treasury *New Jersey* 3d Cir. Br. 14 (citation omitted, emphasis added). Then, in this Court, the Solicitor General doubled down: "the Department has long advised the States that to receive payment on a U.S. savings bond a State must complete an escheat proceeding that satisfies due process and that awards title to the bond to the State, substituting the State for the original bondholder as the lawful owner." Treasury *New Jersey* Sup. Ct. BIO 4.

The Federal Circuit decided that question precisely the opposite way: notwithstanding the Third Circuit's conclusion, and notwithstanding Treasury's statements to the Third Circuit and this Court, the Federal Circuit held that § 315.20(b) unambiguously did *not* contemplate title transfers through escheat proceedings. App. 13a-14a.[16]

II. CORE FEDERALISM PRINCIPLES AT STAKE IN THIS BILLION-DOLLAR CASE MERIT THIS COURT'S INTERVENTION

A. The Federal Circuit's Invented Preemption Standard Tramples State Sovereignty

The States' authority to escheat property is a traditional and fundamental aspect of state sovereignty and has been recognized as such since the Founding. *See*, *e.g.*, *Delaware v. New York*, 507 U.S. 490, 497, 502

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[16] Notably, and without any evidence, the Federal Circuit was "dubious" the briefs the United States filed in this Court and in the Third Circuit "reflect[ed] Treasury's 'fair and considered judgment' on the question of whether 31 C.F.R. § 315.20(b) require[d] Treasury to recognize escheat claims." App. 13a. The Federal Circuit's assertion is particularly hard to credit given the many decades in which States had sought guidance from Treasury on the very question at issue here: is title ownership sufficient for States to stand in the shoes of original bond owners when the physical bond cannot be found?

(1993); *Bowsher*, 935 F.2d at 335 (title escheat has "a patina of ancient history"). For that reason, in preemption cases, this Court requires a heightened showing that it is "the clear and manifest purpose of Congress" to displace the "historic" state power. *Altria Grp., Inc. v. Good*, 555 U.S. 70, 77 (2008) (citation omitted); *see also Kansas v. Garcia*, 140 S. Ct. 791, 806 (2020) (federal immigration law did not preempt Kansas criminal law; "criminal law enforcement has been primarily a responsibility of the States"). "That approach is consistent with both federalism concerns and the historic primacy of state regulation" in certain areas, such as health, safety, and private property. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996).

That principle of federalism has been settled law in this Court for nearly a century. *See Altria*, 555 U.S. at 77; *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) ("[T]he historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."); *Napier v. Atlantic Coast Line R.R. Co.*, 272 U.S. 605, 611 (1926) ("The intention of Congress to exclude states from exerting their police power must be clearly manifested."). The Federal Circuit's departure from that long line of cases, in favor of a far less demanding showing, upends that well-worn standard.

Notwithstanding this Court's clear guidance, which Kansas relied on in its briefs below, the Federal Circuit never acknowledged that escheatment is a core state power subject to preemption only upon the "clear and manifest purpose" of Congress. Instead, the panel ruled that, "[a]bsent Federal law" affirmatively "authorizing" state escheat, federal law preempted state title escheat statutes. App. 11a.

That analysis was not only in the teeth of this Court's cases; it was outcome-determinative and led the Federal Circuit to err. The Federal Circuit was unable to point to any provision of federal law affirmatively evincing Congress's purpose to displace state-law escheat.

The panel first asserted a "conflict between state and Federal law" on the basis of a statute authorizing "Treasury to prescribe regulations" allowing bond owners "to keep their bonds after maturity" and regulatory language allowing for redemption at "any time" after maturity. App. 10a. But those provisions govern the *timing* of redemption by the bond's owner and are inapposite here. As the Court of Federal Claims explained, escheatment "determines the *identity* of the bond owner, and not the time period within which the bond owner may redeem it." App. 87a (emphasis added). The state laws at issue in this case do not alter the right to redeem at any time after the bond matures; rather, that redemption right is *transferred* to the new owner as occurs with any state judicial proceeding that transfers ownership of a savings bond. *See* Treasury *New Jersey* Sup. Ct. BIO 4 (title escheat "substitut[es] the State for the original bondholder as the lawful owner").

The Federal Circuit also cited a statute *authorizing* Treasury to promulgate "restrictions on transfer," App. 10a, but it cited no regulation actually *adopting* a relevant restriction. That absence proves the panel's error. The most relevant regulation governing transfer expressly *allowed* bond ownership to transfer pursuant to a state-law escheat judgment. *See New Jersey*, 684 F.3d at 412 (citing 31 C.F.R. § 315.20(b)).

The absence of any statutory or regulatory language clearly displacing state unclaimed-property law as to

savings bonds is particularly significant because, elsewhere in the U.S. Code, Congress has demonstrated the requisite "clear and manifest" purpose to preempt those laws in unmistakable terms. For example, the statute at issue in *Bowsher* explicitly directs Treasury to handle unclaimed money in 91 denominated "trust funds," 31 U.S.C. § 1321(a) – a list that excludes U.S. savings bonds – "without regard to the State law or the law of other jurisdictions of deposit concerning the disposition of unclaimed or abandoned property," *id.* § 1322(a), (c)(1). In other statutes, Congress has provided specifically for the "[d]isposition of unclaimed property," *e.g.*, 12 U.S.C. § 216b (heading), in ways that would necessarily preempt a competing state-law scheme. *See*, *e.g.*, *id.* (disposition of unclaimed property recovered from closed national banks); 24 U.S.C. § 420 (disposition of unclaimed property of deceased Armed Forces Retirement Home residents). Congress's silence here – coupled with regulations that *recognize* state-court judgments concerning ownership – confirms that the state laws at issue here were not preempted. *See Wyeth v. Levine*, 555 U.S. 555, 574-75 (2009) (where Congress expressly preempted state law governing medical devices but not prescription drugs, its "silence on the issue" was "powerful evidence" against preemption).

At bottom, the panel was satisfied that federal law preempted the Kansas state law because "[e]scheat proceedings are not mentioned" in 31 C.F.R. § 315.20(b). App. 14a. But "[m]ere silence" cannot "establish a clear and manifest purpose." *City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 432 (2002) (citation omitted). Rather, "because the States are independent sovereigns in our federal system," this Court has "long presumed that Congress does not cavalierly pre-empt" state law – not least when the state

law is "'in a field which the States have traditionally occupied.'" *Lohr*, 518 U.S. at 485 (quoting *Rice*, 331 U.S. at 230). The Federal Circuit's refusal to recognize that longstanding doctrine requires this Court's correction. *Cf. Sorich v. United States*, 555 U.S. 1204, 1208 (2009) (Scalia, J., dissenting from denial of certiorari) (noting serious "federalism interests" at stake).

B. The Decision Below Upends A Longstanding Federal Commitment To Honor State Law

As the Third Circuit recounted in *New Jersey*, Treasury itself long "recognized" that "third parties, including the States, may obtain ownership of the bonds – and consequently the right to redemption – through 'valid[] judicial proceedings'" under § 315.20(b). 684 F.3d at 412 (alteration in original).[17] That court traced Treasury statements dating back nearly 70 years emphasizing the critical distinction between title and custody and announcing the government's policy that "'Treasury recognizes escheat statutes that provide that a State has succeeded to the legal ownership of securities because in such case payment of the securities results in full discharge of the Treasury's obligation.'" *Id.* at 391 (quoting 2000 FAQ webpage); *accord id.* at 390-91 (citing 1952 statement); App. 42a-46a (Court of Federal Claims citing additional statements and letters); App. 105a-107a (same); App. 128a-131a (same).

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[17] After this litigation began, Treasury promulgated a rule amending § 315.20(b) to explicitly exclude escheat. App. 15a, 27a n.2. The new rule is not before the Court, but, if the amendment is to have any force, it must be that the prior rule did recognize escheat. It moreover shows Treasury's ability to express a clear preemptive purpose in its regulations when that is what it wishes to do. *See supra* Part II.A.

The Federal Circuit dismissed those *decades* of clear statements as unimportant to its analysis and not likely "Treasury's 'fair and considered judgment,'" App. 13a – again, notwithstanding contrary reasoning in *New Jersey* and repeated representations to the Third Circuit and this Court. *See* 684 F.3d at 391-92 (2000 FAQ webpage is Treasury's "interpretation of federal savings bond regulations"); *supra* p. 16. In so doing, the court below risked serious harm to the federal government's credibility as a legally bound debtor.

The United States created the savings bonds program in 1935 to finance critical national expenditures like World War II; in turn, Treasury "pledge[d] [the United States'] full faith and credit" behind each obligation[18] and promised small savers "an absolutely safe" investment with "a reasonable return."[19] But because bonds take decades to mature, billions' worth of Treasury's debts have never been repaid to those bonds' owners, and the size of Treasury's unpaid debt, currently more than $26 billion, grows every year.

States like Kansas attempt to correct that discrepancy in the very manner Treasury long held out as permissible. *Cf. American Express Travel Related Servs., Inc. v. Sidamon-Eristoff*, 669 F.3d 359, 365 (3d Cir. 2012) (purpose of abandoned-property laws is "to reunite . . . abandoned property with its owner"). Yet rather than honor its debt to the successor bond

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[18] Treasury, *A History of the United States Savings Bonds Program* 4 (1991), https://www.treasurydirect.gov/indiv/research/history/history_sb.pdf.

[19] Treasury, *United States Savings Bonds Program: A Study Prepared for the Committee on Ways and Means, U.S. House of Representatives* 13, 30 (Jan. 1981), *available at* https://catalog.hathitrust.org/Record/000102054.

owners in the very manner it committed to do, the federal government changed its mind, preferring to keep these long-abandoned debts as donations – and not loans – to the public fisc. The Federal Circuit blessed Treasury's about-face, to the tune of billions of unearned dollars.

Letting Treasury elude its lenders is not without a cost. As this Court recently observed, quoting Alexander Hamilton, "'States . . . who observe their engagements . . . are respected and trusted: while the reverse is the fate of those . . . who pursue an opposite conduct.'" *Maine Cmty. Health Options*, slip op. 30.[20] Hamilton considered that particularly true for the "debt of the United States," which he called "the price of liberty." Hamilton Papers 69. "The faith of America has been repeatedly pledged for it, and with solemnities, that give peculiar force to the obligation." *Id.* By approving Treasury's Lucy-with-the-football approach to its obligations as a debtor, the Federal Circuit undermined that solemn pledge.

III. THE FEDERAL CIRCUIT'S ALTERNATIVE HOLDING IS NO OBSTACLE TO CERTIORARI

The Federal Circuit cited "an additional reason" for reversing the Court of Federal Claims. App. 15a. It believed that, even if the States are the bonds' title owners, they may never redeem them in light of 31 C.F.R. § 315.29(c). That "reason" is no obstacle to certiorari.

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[20] Quoting Report Relative to a Provision for the Support of Public Credit (Jan. 9, 1790), *in* 6 The Papers of Alexander Hamilton 68 (Harold C. Syrett ed., 1962) ("Hamilton Papers") (first alteration added), *online version available at* https://founders.archives.gov/documents/Hamilton/01-06-02-0076-0002-0001.

The presence of an important and circuit-splitting issue meriting this Court's review justifies reviewing additional questions present in the case to the extent necessary. *Cf. Janus v. American Fed'n of State, Cnty. & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2462 (2018) ("Before reaching this question, however, we must consider a threshold issue."). That justification carries additional force here, where the preemption question is unlikely to recur if certiorari is denied. Under the Tucker Act, future disputes of this nature – if any – will all arise in the Federal Circuit. *See* 28 U.S.C. § 1491(a)(1). If § 315.29(c) dooms any certiorari petition, the government will always argue, and under the decision below always win, the same point in future litigation.

Moreover, deciding the additional issue will not unduly burden the Court, because the Federal Circuit's decision on that issue can be easily disposed of.

First, the Federal Circuit's holding was premature; it can (and should) be vacated on that basis. As the case reached the Federal Circuit, the parties had briefed, and the Court of Federal Claims had decided, only the question whether the plaintiff States could take title ownership of the savings bonds. The question whether § 315.29(c) would bar – or even apply to – an eventual redemption request by those state owners was not briefed or subjected to any discovery. Indeed, the Court of Federal Claims noted that it was "neither necessary nor appropriate" to decide questions concerning bond *redemption* while ruling on the antecedent question of bond *ownership*. App. 83a. As that court explained:

> Kansas has not yet been afforded its rights as an owner of the bonds to make a claim for their proceeds based on the theory that they are "lost."

> It also has not been given access to the information that it needs to make such a claim, including the serial numbers of the absent bonds, or the names of their original owners.

Id.

The Federal Circuit's willingness to reach out and rule on a question of redemption mechanics that was not briefed or decided below was improper, especially in a case of this magnitude. To deprive the parties "the opportunity to litigate, and the [Court of Federal Claims] in the first instance to decide," how § 315.29(c) should be interpreted, *In re England*, 375 F.3d 1169, 1182 (D.C. Cir. 2004) (Roberts, J.), violates appellate best practices, offends fundamental fairness, and, of course, risks error. Therefore, this Court can simply vacate as prematurely decided the Federal Circuit's § 315.29(c) holding as a "threshold issue," *Janus*, 138 S. Ct. at 2462, then decide the critical preemption question and remand the case for proper litigation of the § 315.29(c) question at a later stage.

Second, even if the issue must be decided, the Federal Circuit's interpretation of § 315.29(c) was manifestly incorrect.

Section 315.29(c) provides that "[n]o claim filed six years or more after the final maturity of a savings bond will be entertained, unless the claimant supplies the serial number of the bond." The panel read that rule as a substantive recordkeeping requirement for owners: with respect to a bond that matured six or more years ago, an owner who has lost her physical bond certificate and forgotten (or never knew) her bond serial number can *never* redeem her bond. She is a bond owner with no rights whatever.

That is an absurd result that, in any event, cannot be justified by the regulation's text. The requirement

that the claimant "suppl[y] the serial number" much more naturally reads as a procedural requirement. Yes, a redemption request six-plus years after maturity must include the serial number. But an owner without that number need not forfeit the entire value of her bond; on the contrary, nothing in the rule prohibits the owner from contacting Treasury and attempting to learn what the serial number is. Nor does anything in the rule require (or even permit) Treasury to refuse such a request. Furthermore, there was no discovery into how § 315.29(c) is applied in practice or Treasury's practices when faced with requests for serial-number information from bond owners who lost their bonds.

The Federal Circuit's interpretation of § 315.29(c) is also at odds with that court's own opinion. At Treasury's urging, the Federal Circuit held that federal law allows bond owners to redeem their bonds in perpetuity. The state laws were problematic, so the argument went, because they penalize owners who "do not redeem their bonds promptly enough." App. 11a. Yet the Federal Circuit's reading of § 315.29(c) imposes a far harsher penalty. By the panel's lights, the owner of a bond who lacks the certificate and serial number has just six years before forfeiting all rights to the bond's proceeds forever – a stunning repudiation of the promise of a safe investment backed by the federal government's full faith and credit.

CONCLUSION

The petition for a writ of certiorari should be granted.

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