No. 19-1279

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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August 5, 2020

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INTRODUCTION

Seven years ago, this Court declined to grant certiorari in a similar case on the Solicitor General's representation that, if a State enacted and followed a title escheatment process, Treasury would recognize the State as the successor title owner of the savings bond. The Third Circuit had accepted that representation as well. Now, in this case, faced with state laws and processes that recognize an assignment to the State of title to a savings bond through escheat, the government has reneged. It persuaded the Federal Circuit to issue a ruling that conflicts with a core principle underpinning the Third Circuit judgment and to concoct a theory of preemption that is internally inconsistent and contrary to this Court's jurisprudence under the Supremacy Clause. All so that Treasury can avoid paying its debts.

The government's opposition lacks merit.

It says there is no circuit split. But the Third Circuit determined that Treasury's regulations *allow* States to obtain title "ownership of the bonds" under state law and "consequently the right to redemption," *New Jersey*, 684 F.3d at 412-13, whereas the Federal Circuit held that the same regulations *preempt* state title escheat laws from granting States title ownership and the right to redeem.

The government claims it never took the position that title-based escheat "would be any less impermissible" than custodial escheat. But the Solicitor General *told this Court* that a State that "complete[s] an escheat proceeding . . . that awards title to the bond" can "receive payment" on that bond. Treasury *New Jersey* Sup. Ct. BIO 4.

The government contends that transferring title to a State conflicts with the original bond owner's right

to redeem her bond "at any time." But Treasury *is* willing to recognize state-law title transfers, all of which prevent the original bond owner from redeeming her bond.

Over the last several decades, the government has taken a range of positions concerning States' rights to be paid the proceeds of abandoned savings bonds. Those positions have little in common but this: the government does not want to repay the money it borrowed from its citizens. The result of the government's inconsistency is a circuit split and a Treasury Department seeking to renege on the government's full faith and credit. This Court should grant certiorari to reverse the Federal Circuit.

ARGUMENT

I. THE DISTINCTION BETWEEN TITLE OWNERSHIP AND CUSTODIAL POSSESSION IS DISPOSITIVE IN THE THIRD CIRCUIT AND IRRELEVANT IN THE FEDERAL CIRCUIT

The Third Circuit in *Treasurer of New Jersey v. U.S. Department of Treasury*, 684 F.3d 382, 412-13 (3d Cir. 2012) ("*New Jersey*"), explained that "the federal regulations" at issue here *permit* "the States[to] obtain ownership of the bonds – and consequently the right to redemption – through 'valid[] judicial proceedings.'" The Federal Circuit, by contrast, held that state title-escheat laws "*conflict*" with federal law, are preempted, and cannot confer on States ownership of, and the right to redeem, bonds. BIO 10-11 (emphasis added). The decisions squarely conflict.

A. The Third Circuit Would Have Affirmed The CFC's Judgment

In asserting (at 16) that *New Jersey* "reached the same conclusion" as the Federal Circuit, the government cites *New Jersey* for a proposition it expressly

disavowed. Far from rejecting a "theory of escheatment," BIO 16, the Third Circuit said its ruling in favor of the federal government "*d[id] not* nullify state escheat laws," *New Jersey*, 684 F.3d at 412 (emphasis added). That is because of the key distinction that court drew between a State that "succeed[s] to the title and ownership" of a bond and "a State acting merely as custodian of" a bond. *Id.* at 391 (quoting Treasury).

The distinction between legal title and mere custody was critical to the Third Circuit's decision, and therefore part of its holding. *See* Henry J. Friendly, *In Praise of* Erie – *And of the New Federal Common Law*, 39 N.Y.U. L. Rev. 383, 385-86 (1964).[1] The court reasoned that the States' custody-escheat laws "would interfere with the terms of the contracts between the United States and the owners of the bonds" by "substitut[ing] the respective States for the United States as the obligor on affected savings bonds." 684 F.3d at 408. That concern is not present when a State takes legal title. Title ownership "substitut[es] the State *for the original bondholder* as the lawful owner" and leaves the United States' obligation unaffected, as the Solicitor General himself explained to this Court. Treasury *New Jersey* Sup. Ct. BIO 4 (emphasis added).

The government attempts (at 16) to write off the custody-title distinction by selectively quoting *New Jersey*'s footnote 28. There, the Third Circuit confirmed that it was "distinguishing, as does the Government itself, [custody-based] acts from title-based acts." 684 F.3d at 413 n.28. The government omits

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[1] The same is true of *Arizona v. Bowsher*, 935 F.2d 332 (D.C. Cir. 1991), which reasoned that "the need for the distinction" between custodial possession and escheated ownership was "manifest" in that case. *Id.* at 335.

that portion of the footnote. And the court declined to rule only on the specific scenario where, "confronted with a judgment of escheat under a title-based escheat act, *the Government abandoned its long held position . . . and refused to recognize*" the States' claim. *Id.* (emphasis added). The government omits the italicized text and ignores that no such "abandon[ment]" is presented here; the government says (at 13) its positions have been perfectly consistent.

B. Treasury's Prior Statements Confirm *New Jersey*'s Significance

It is unsurprising that *New Jersey* determined that a State with title ownership could have prevailed. That was Treasury's position. *See* Pet. 7-9.

The government asserts (at 14) that "nothing in" its prior brief to this Court "suggested that a transfer of *title*" under state law "would be any less impermissible" than the custody-based laws at issue in *New Jersey*. The Solicitor General's brief speaks for itself:

> [Treasury's] regulations include an exception, however, for cases in which a third party obtains ownership of the bond through valid judicial proceedings. 31 C.F.R. 315.20(b) . . . .
>
> Accordingly, 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.

Treasury *New Jersey* Sup. Ct. BIO 3-4 (citations and parenthetical omitted). Indeed, *in this case*, Treasury redeemed the abandoned escheated bonds in Kansas's possession "in the normal course," C.A. App. 366, before later adopting a litigating position that that "normal course" redemption was actually a "waiver" of its rules, App. 133a-134a.

The government also suggests (at 13 n.2) that title escheat might have been permitted if the States also had "possession" of the bonds. But the *New Jersey* plaintiffs lacked possession, too. *See* App. 131a. Nothing in *New Jersey* or Treasury's briefs suggested that was dispositive. Rather, the key element missing from the States' claims was title ownership – an element the Federal Circuit rejected as legally irrelevant.

II. THE FEDERAL CIRCUIT INVENTED A PERMISSIVE PREEMPTION STANDARD THAT INFRINGES STATE SOVEREIGNTY

Certiorari is also warranted to correct the Federal Circuit's novel and dangerous preemption precedent.

A. The Federal Circuit Did Not Require The Government To Demonstrate Congressional Intent To Displace States' Historic Escheat Power

Federal law can preempt a historic police power, such as escheat, only on a showing that it is "the clear and manifest purpose of Congress." *Altria Grp., Inc. v. Good*, 555 U.S. 70, 77 (2008) (citation omitted). The Federal Circuit applied a far less demanding standard. It reasoned that federal law preempted state title-escheat laws "absent Federal authorization for the state legislation." App. 11a. The panel thus placed the burden *on the States* to identify federal law clearly *allowing* the States to exercise their historic authority. That holding is flatly inconsistent with settled preemption doctrine. *See* Pet. 20-22.

The government asserts (at 11) that the Federal Circuit "applied the same conflict-preemption principles that this Court . . . applied in" *Free v. Bland*, 369 U.S. 663 (1962). Not so. *Free* applied the well-settled "clear purpose" test.

In *Free*, this Court held that federal law preempted state community property law allowing a son to succeed to his deceased mother's co-ownership of a savings bond. *Id.* at 664, 670. The Court relied on a Treasury regulation that said (and still says) that, "[i]f one of the coowners named on a bond has died, the surviving coowner will be recognized as its sole and absolute owner." 31 C.F.R. § 315.70(b)(1).[2] Based on that unmistakable text (and prior Treasury statements), the Court found a "*clear purpose of the regulations*" to preempt contrary state law. 369 U.S. at 668 (emphasis added).

The government also contends, quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947), that preemptive purpose may be demonstrated "when 'state policy produces a result inconsistent with the objective of the federal statute.'" BIO 11 (quoting 331 U.S. at 230) (alterations omitted). But in *Rice*, too, this Court found preemption only on a robust showing of congressional purpose. Unlike the panel below, *Rice* began from "the assumption that the 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." 331 U.S. at 230. It then found that the state law in question, which regulated grain-warehousing, "would thwart the federal policy Congress adopted" based on two clear and manifest indicators: a statutory amendment to the federal Warehouse Act providing that federal authority "shall be exclusive"; and legislative history stating "in plain terms . . . that the matters regulated by the Federal Act cannot be regulated by the States." *Id.* at 232-33, 234.

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[2] That regulation was previously codified at 31 C.F.R. § 315.61 (1979). *See Free*, 369 U.S. at 664-65.

The Federal Circuit's approach to preemption cannot be reconciled with *Free* and *Rice*. The panel pointed (at App. 10a) to regulations governing the *timing* of bond redemption and asserted that those regulations were inconsistent with transfer of ownership to a State. It never identified (or even searched for) any evidence of a "clear purpose" in those regulations to displace state escheat law. *Cf. Free*, 369 U.S. at 667-68 ("Treasury has consistently maintained that the purpose of these regulations is to establish the right of survivorship regardless of local state law"); *Rice*, 331 U.S. at 234 ("as stated by the House Committee, the purpose of the amendment . . . was to make the Act 'independent of any State legislation'") (citing legislative history).

B. Application Of The Incorrect Standard Led The Federal Circuit To Err

Had the panel actually searched for a preemptive purpose, it would have come up empty. As *Free* itself recognized, citing the very regulation at issue here, Treasury's regulations do not "insulate the purchasers from all claims regarding ownership." 369 U.S. at 670 & n.12.

The government, like the Federal Circuit, relies on Treasury regulations that allow bond owners to redeem their bonds "at any time after maturity." BIO 10; *accord* App. 10a. That reliance is misplaced for at least three reasons.

First, time periods constraining redemption processes govern the relationship between the obligor and the obligee, not between the obligee and possible successor obligees. For example, savings *bonds* may be redeemed "at any time after two months from [the] issue date," 31 C.F.R. § 315.35(c); *see* BIO 10, while United States savings *notes* are "redeemable any time

one year or more after the issue date," 31 C.F.R. § 342.7(a). Those regulations tell the owner of the security – whoever it is or will be – when *Treasury* will recognize redemption requests. They have nothing to do with ownership transfers, which are governed by separate regulations. *See id.* §§ 315.15, 315.20; *cf. Free*, 369 U.S. at 670 (Treasury regulations "do not go that far" regarding ownership).

Second, a demanding "clear purpose" test for preemption is especially sensible here because this is not an area where Congress "hide[s] elephants in mouseholes." *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 468 (2001). Congress has enacted numerous statutes expressly preempting state unclaimed-property law using language absent from the savings bond statute and regulations. *See* Pet. 22-23. The government has no response.

Third, the government concedes (at 13 n.2, 23) that its current regulations grant Treasury discretion to recognize state escheatment of title ownership. That is a fatal admission. Because on Treasury's own view federal law permits a State to succeed to title ownership of a bond notwithstanding the original owner's right to redeem "at any time," that timing regulation plainly does not evidence any "clear purpose" to preempt state laws authorizing title escheat.

III. THE FEDERAL CIRCUIT'S ALTERNATIVE HOLDING IMPOSES THE SORT OF "TIME LIMIT" THE GOVERNMENT DISCLAIMS

Treasury spent years arguing that application of state unclaimed-property law would violate the Treasury regulation protecting every bond owner's right to redeem his bond "at any time." Treasury then argued for the first time in the Federal Circuit that bond owners who have misplaced the certificate and do not

know their bond's serial numbers have just six years to redeem their matured bond. After that, the bond is worthless. Their loan becomes a donation.

The Federal Circuit should not have considered that new argument. *See* Pet. 27-28. The government does not dispute that the Court of Federal Claims did not pass upon the issue. In any event, the panel misinterpreted the relevant regulation.[3]

Although the most conventional way to redeem a bond is by surrendering the physical bond certificate, the regulations provide that "payment[] is authorized for the loss, theft, destruction, mutilation, or defacement" of a savings bond. 31 C.F.R. § 315.25. Addressing lost bonds specifically, 31 C.F.R. § 315.29(c) requires that, when a bond owner makes a "claim" to redeem a lost bond six or more years after it matures, she must include the serial number of the bond. That procedural requirement says nothing about whether a bond owner may – separate from her formal "claim" – obtain from Treasury information about her bond. And though the government balks (at 19) at the suggestion that Treasury could be "required to help" its citizen-lenders, Treasury's regulations say otherwise. Upon request, "[r]ecords relating to the . . . ownership of . . . Treasury securities . . . will ordinarily be disclosed only to the owners of such securities." 31 C.F.R. § 323.2(b).[4]

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[3] Certiorari on this threshold issue is appropriate, as it will permit the Court to reach an important and disputed issue. *See Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2462 (2018); Pet. 27; *cf.* BIO 18.

[4] Treasury's estimate of the cost to locate the serial numbers for Kansas's bonds is irrelevant to the meaning of a regulation applicable to all owners, including individuals. In any event, Treasury's estimate of *2,000 years* of employee time, *see* BIO 19,

The government never confronts the inherent contradiction in the panel's (and its own) view of § 315.29. The application of state abandoned-property law, the argument goes, penalizes owners who "do not redeem their bonds promptly enough." App. 11a. Yet § 315.29 would be far harsher: the owner of a lost bond who does not know the serial number has six years before her rights vanish.

The government also incorrectly suggests (at 21) that the bonds at issue here may not be "lost" to begin with. If Kansas is correct that it is the title owner of the savings bonds at issue, then of course the bonds are "lost." Kansas does not know where they are.[5]

More importantly, that issue has not yet arisen in these consolidated cases and is no barrier to certiorari. To date this litigation has concerned the question whether Kansas holds title ownership to the savings bonds at issue. "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.'" App. 83a. Questions concerning application of the lost-bond regulations – including § 315.29 – are proper subjects for a remand.

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was disputed (and not ruled on) below. Kansas's expert – who specializes in optical character recognition – opined that Treasury's estimate "fail[ed] to leverage modern technology," C.A. App. 840, and dramatically overstated the difficulty of the task, *see id.* at 862 (estimating $3.5 million maximum total cost "to digitize and locate" records, and noting that digitizing would equip Treasury for future situations requiring "similar search process[es]").

[5] Even as to the original owners, the bonds are almost certainly lost or abandoned. Treasury protests (at 4) that these bonds are being actively redeemed at the rate of "$7000 to $10,000 each day." At that rate, Treasury will pay off its $26 billion debt in 7,000 years. Obviously, this Court's review is needed to protect bond owners against Treasury's self-interested self-dealing.

IV. RATIFYING TREASURY'S CONDUCT THREATENS DAMAGING LONG-TERM CONSEQUENCES

These cases implicate Treasury's credibility as a lender, billions in unpaid debts, and the venerable principle that "[t]he Government should honor its obligations." *Maine Cmty. Health Options v. United States*, 140 S. Ct. 1308, 1331 (2020).

The government's explanation (at 23-24) of why these cases lack prospective significance reads more like a confession that it has nearly pulled off the perfect bait-and-switch. For decades, Treasury told the States that, if they "succeed[ed] to the title of the bondholder," they could be paid the proceeds of savings bonds. App. 43a-44a (quoting 1952 guidance); *accord id.* at 44a-45a (repeated statements from 1970-1999), 52a (2000 webpage), 49a (2011 Third Circuit brief), 51a (Solicitor General's 2013 brief to this Court). But when a State actually adhered to Treasury's insistence on that approach to escheat, Treasury reneged. Then, in the middle of the resultant litigation, Treasury changed its regulations "to reflect" its new position, App. 136a n.13 – the better to deprive the case of "continuing importance," BIO 23-24.

Treasury's conduct makes a mockery of this Nation's full faith and credit. Only this Court's review can restore the integrity of the government's most solemn obligation as a debtor: repaying money it borrowed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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