NO. 19-1285

In the Supreme Court of the United States

ANDREA LEA, in her official capacity as Auditor of the State of Arkansas,

Petitioner,

v.

UNITED STATES and JAKE LATURNER, Treasurer of the State of Kansas,

Respondents.

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

REPLY BRIEF FOR PETITIONER

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Starting in 1952 and for over sixty years thereafter, the Treasury Department gave a clear and consistent set of instructions to States explaining how they could obtain and safeguard, through escheatment, abandoned savings bonds that have matured but have not been redeemed by their owners: if the State "succeeded to the title and ownership of the securities pursuant to valid escheat proceedings," Pet.App.161a, then Treasury would redeem the abandoned bond to the State as the bondholder's rightful "*successor or representative*," Pet.App.157a. Respondent even set out that "considered interpretation of federal law" in briefing before this Court in 2013. Pet.App.175a-176a. But when Treasury was faced later that year with redemption requests from a number of States who *had complied* with its instructions, it abruptly reversed course. And we are now given to understand that Treasury's six decades of clear guidance about what steps States should take to obtain abandoned bonds through escheatment merely set forth conditions that were "necessary, though not sufficient" to obtain the bonds, Opp.14—and that there are other "necessary" conditions that went *entirely unmentioned* for over sixty years (*even when they would have been relevant* to the States' requests).

The Court of Federal Claims recognized this conduct for what it is: "a game of 'whack-a-mole' in which the federal government's rationale for denying [redemption] requests changes each time the states satisfy the most recently articulated condition for doing so." Pet.App.45a. And Respondent's efforts to defend this gamesmanship—or at the least avoid this Court's review—all fail. Its argument that Treasury

had no obligation to recognize Arkansas as the owner of the bonds that have escheated to it, in addition to flouting decades of Treasury's own representations, is flatly contrary to the text of the regulations that *authorized* the transfer—for reasons that neither Respondent nor the Federal Circuit panel below have rebutted or even addressed. Respondent's preemption argument therefore never gets off the ground—after all, federal law cannot invalidate, through the doctrine of obstacle preemption, *the very thing it expressly authorizes*. And Respondent's backup argument that Petitioner nevertheless cannot redeem the bonds because she does not know their serial numbers also fails: Under the regulations, Petitioner does not need to know the serial numbers to begin with; even if serial numbers were required, Treasury has no warrant for stonewalling her efforts to identify them; and even if both *those* points are set aside, Respondent is still not off the hook, for the result of its alternative argument is a taking of Petitioner's property interest in the bonds, for which it owes just compensation, if nothing else.

The end result of the Government's bait-and-switch tactics is a money-grab of epic proportions: it has raked in over *$3 billion* in bond-proceeds from Petitioner and the other States that advanced escheatment-based claims in the trial court, and it has also cleared the way to seize the *entire $26 billion* of matured-but-unredeemed bonds nationwide. Respondent cannot credibly help itself to a windfall of this magnitude and then claim that its machinations "do not warrant this Court's review." Opp.24.

1. The Federal Circuit's primary holding below—that the abandoned savings bonds at issue "belong to the original bond owners, not the States,"

Pet.App.3a—is contrary to the plain text of Treasury's regulations and over *six decades* of uniform regulatory practice, and Respondent fails to show otherwise. Respondent acknowledges that bonds may be validly transferred—before or after maturity—as "specifically provided in [Treasury's] regulations," Opp.3, and those regulations provided (at the time relevant to this litigation) that Treasury must recognize a transfer in bond ownership that is "established by valid, judicial proceedings," 31 C.F.R. § 315.20(b) (2015). Because Petitioner obtained title to the abandoned bonds here through a valid state-court escheatment proceeding, the Federal Circuit's (and Respondent's) conclusion that Arkansas does not own the bonds is unsupportable.

The panel below advanced a different interpretation of Section 315.20(b), based on the portion of the provision that requires Treasury to recognize a transfer effected by valid judicial proceedings "only as specifically provided in this subpart." Rather than reading this language as qualifying *the manner* in which the validity of judicial proceedings is established, the panel read this proviso as limiting *the types* of judicial proceedings capable of transferring title to those "proceedings specifically referenced" later in the regulations: "bankruptcy, divorce, and a gift causa mortis." Opp.12. Our Petition catalogued the serious textual difficulties with that interpretation, Pet.20-21 (as did the Court of Federal Claims, Pet.App.77a-79a): in short, it renders significant portions of the regulation superfluous and is contrary to the provision's obvious purpose. Respondent briefly attempts to defend the Federal Circuit's interpretation, but it completely fails to justify *or even mention* these fatal textual flaws,

Opp.12-13 (as did the Federal Circuit, Pet.App.13a-14a).

Instead of analyzing the regulatory text establishing Petitioner's ownership, Respondent takes a lengthy detour through preemption jurisprudence. Treasury's regulations "allow bond owners to redeem their U.S. savings bonds at any time after maturity," Respondent says, and Arkansas's escheatment law instead "deem[s] those bonds abandoned or unclaimed merely because their owners have not redeemed the bonds within a certain period after maturity." Opp.10. It concludes that Arkansas escheatment law thus "produces a result inconsistent with the objective of the federal [regulations]" and is preempted. Opp.11 (brackets omitted).

Respondent's preemption excursion is a wild-goose chase. Because Treasury's regulations allow savings bonds to be *transferred* from one owner to another, Arkansas's escheatment statute does nothing to abridge a bondholder's right "to redeem their U.S. savings bonds at any time after maturity," Opp.10, it merely *transfers* that right to a new bondholder, as *specifically authorized by federal law itself*. Respondent never explains how federal law can even conceivably *preempt* the very thing it *expressly authorizes*. Treasury retorts that "Section 315.20(b) applies only to 'valid' judicial proceedings," and here the escheat proceedings are not "valid" because they "rested on state laws that are preempted." Opp.13. The circularity of that contention is too obvious to require response.

Indeed, a valid escheatment judgment is no different on this score than the types of transfers that Respondent *admits* are authorized. Opp.12. A divorce

decree or bankruptcy judgment transferring ownership in savings bonds cuts off the transferor's right "to redeem their U.S. savings bonds at any time after maturity" too, Opp.10—by conveying that right to the transferee instead. If Respondent's preemption theory were right, it would necessarily entail that every bankruptcy judgment or divorce decree that transfers title to savings bonds is preempted—despite the regulatory text expressly authorizing the transfers.

Respondent's argument that Section 315.20(b) does not extend to escheatment proceedings, though unpersuasive, is at least logically consistent; but its contention that Petitioner's valid escheatment judgment is preempted *even if* it is authorized by federal law simply makes no sense.

2. Respondent's refusal to recognize Petitioner's ownership is also contrary to over six decades of Treasury's own solemn commitments. As detailed in our Petition, for decades the Government consistently took the position that while it could not recognize escheatment-based claims of States that merely obtained *custody* over abandoned bonds, where the State obtained ownership through *title* escheatment—as Arkansas did here—the judgment of escheatment constituted a valid judicial proceeding that Treasury was bound to honor. Pet.14-20. These representations go all the way back to 1952, App.157a, and they include its successful effort, in briefing before the Third Circuit and this Court in the *Treasurer of New Jersey v. United States Department of the Treasury* litigation, to prevent several States from claiming *custody* escheatment over abandoned bonds. 684 F.3d 382 (3d Cir. 2012). As the Solicitor General explained on Treasury's behalf in that case, Treasury's "considered interpretation of federal law" entitled

States "to receive payment on a U.S. savings bond" under Section 315.20(b)'s provision governing "valid judicial proceedings" if it "complete[s] an escheat proceeding that satisfies due process and that awards title to the bond to the State." Pet.App.175a-176a.

Respondent now attempts to wave those six-decades-worth of assurances away. It insists that it "never determined" that States could obtain ownership through escheatment laws that apply "merely because an owner has not redeemed the bond within a certain period of time," and it further claims that its previous statements did not speak to escheatment where "the State did not possess [the bonds it] claimed to own." Opp.13. These claims are false—indeed, the attempted escheatment at issue in the *Treasurer of New Jersey* case shared *both* of those features: those state statutes "deemed" savings bonds escheated "after time periods that differ from State to State," and they covered bonds that the States *did not possess*. 684 F.3d at 389-90, 392. Yet *even in that context*, Treasury explained that as it had "long advised state governments," "to receive payment on a U.S. savings bond, a State must go through an escheat process that satisfies due process and awards title to the bond to the State." Pet.App.172a. In its briefing before the Third Circuit and this Court, Treasury *did not so much as whisper* that *even if* a State went through this "escheat process" it *still could not* obtain title to abandoned savings bonds if it did not "possess" them (or if its escheatment statute was based on the absence of redemption "within a certain period of time"). Opp.13.

We are now told that Respondent's representations to this Court may safely be ignored because it "did not state" that it "would recognize *every* title

escheat judgment," but rather identified title escheatment as a condition that was "necessary, though not sufficient." Opp.14. But again, in 2013 Respondent told the Court this:

> The Department has provided guidance to the States about how [escheat] laws may apply to U.S. savings bonds in light of the strict limitations on redemptions and transfer established by the federal scheme.… [T]he regulations generally provide that payment on a U.S. savings bond will be made only to the registered owner, thus precluding payment to a State invoking its unclaimed-property statute. The 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, substituting the State for the original bondholder as the lawful owner.

App.175a-76a. Respondent *did not* characterize this "guidance" on how "to receive payment on an U.S. savings bond" as merely identifying one "necessary" condition, nor did it mention the *other* conditions it now claims are also "necessary"—even though those conditions would have been dispositive in *Treasurer of New Jersey*. If Respondent is allowed to back out from under its explicit statements to this Court in 2013 through this kind of "necessary-versus-sufficient" logic game, one wonders what *other* now-inconvenient representations are up for grabs.

3. Respondent also fails to rehabilitate the Federal Circuit's alternative holding that Arkansas cannot *redeem* the bonds, even if it *owns* them, because it "do[es] not have the physical bonds or the bonds' serial numbers." Opp.17. As explained in our Petition, these considerations cannot bar Arkansas from redeeming its bonds, because when a new owner obtains title to savings bonds pursuant to a "valid[ ] judicial proceeding," 31 C.F.R. § 315.20(b) (2015), all it need do to "establish the validity of [the] judicial proceeding[ ]" and obtain payment on the transferred bonds is submit "certified copies of the final judgment, decree, or court order," *id.* § 315.23(a). Respondent asserts, without explanation or argument, that there is "no basis" for this reading of Section 315.23, but it does not address the textual support for this interpretation laid out in the Petition (at Pet.24-25).

In any event, even if Arkansas *were* subject to "the general requirements for redeeming a bond," the fact that Petitioner does not possess the physical bond certificates, or know their serial numbers, does not bar her request to redeem them. Petitioner provided Treasury sufficient information for it to determine the missing serial numbers from its own books and records, and it can hardly refuse to turn over this "information which [Arkansas] needs in order to receive the fruits of [its contract]," consistently with the implied duty of good faith and fair dealing. *Pittsburgh Terminal Corp. v. Baltimore & Ohio R.R. Co.*, 680 F.2d 933, 941 (3d Cir. 1982); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 205 (Am. Law Inst. 1981). Respondent protests that its record-keeping system is such a shambles that it would cost on the order of "$100 million" for it to identify the serial numbers in question, Opp.19, but Petitioner and

the other States in question have repeatedly offered to cover the necessary costs.

That also suffices to dispose of the contention that implying a duty requiring the Government to cooperate with bondholders, in good faith, in identifying the information needed to redeem their bonds would be "inconsistent" with the regulatory requirement that bondholders seeking to redeem lost bonds must supply their serial numbers. Opp.19-20. Respondent itself insists that this requirement is designed to protect Treasury "against the extra-ordinary cost and burden of locating bonds without the bond serial number," Opp.19, so it simply serves no purpose where the bondholder *is itself willing to shoulder that cost and burden.*

Finally, Respondent argues that Petitioner also failed to satisfy the regulatory requirement that lost bonds may be redeemed only upon "satisfactory evidence of the loss." 31 C.F.R. § 315.25; Opp.21. Not so. Arkansas *has* submitted "satisfactory evidence" of the loss: a valid escheatment judgment explaining that the bonds are owned by the State but that it does not possess them and cannot locate them without Treasury's assistance. This situation easily fits within the ordinary meaning of the term "lost." *See* Pet.App.47a.

4. If Respondent's various stratagems to avoid redeeming Arkansas's savings bonds were to succeed, it would result in a massive, unconstitutional taking. After all, the alternative "redemption" holding adopted below proceeds on the assumption that Arkansas *validly owns* the abandoned bonds in question (that is what makes it an "independent ground," Opp.18, for the panel's disposition). But if

Arkansas *cannot redeem* the bonds it owns because Treasury refuses to cooperate in identifying them, then *no one can redeem them*, and the result is that their proceeds end up in Respondent's pocket. The Fifth Amendment's Takings Clause bars the Government from "transform[ing] private property into public property" through "*ipse dixit*" in this manner. *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980). Respondent regurgitates the panel's argument below that no taking has occurred because Arkansas is in the same position as the original bondholders, who also "would be required to supply the serial numbers of any bonds they had lost." Opp.22. But Arkansas *is not* in the same position: by definition, unlike the original bondholder, a State that owns abandoned bonds through a judgment of escheatment *was never in a position* to know their serial numbers.

5. This Court's review of the important legal questions discussed above is independently justified because the Federal Circuit's disposition of them is directly contrary to the Third Circuit's decision in *Treasurer of New Jersey*, 684 F.3d 382. While that decision rejected an attempt to obtain *custody* escheatment over abandoned bonds, it *expressly explained* that its analysis *would not apply* to title escheatment, since

> 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,' 31 C.F.R. § 315.20(b), so long as they submit certified copies of the judgment or order affecting ownership and other

> evidence that may be necessary to support the validity of the judgment or order.

Id. at 412-13. To be sure, the Third Circuit "did not *hold* that a title-based escheat law would actually be treated differently for preemption purposes," Opp.16 (emphasis added), but there can be no question that *Treasurer of New Jersey* adopted an interpretation of Section 315.20(b)—*at Treasury's prompting*—that is irreconcilable with the interpretation adopted below.

6. Finally, this Court's review is called for by the extraordinary nature of the Government's conduct in this case—and by the magnitude of its financial implications. For over sixty years, Treasury fended off States' attempts to redeem escheated bonds by explaining that custody escheatment was insufficient, but that the Government would honor the claim of a State "who *succeeds to the title of the bondholder*." Pet.App.157a (emphasis in original). But when this position became inconvenient in 2013, Treasury abruptly changed course and repudiated all of its prior representations. Indeed, even Respondent's representations to this Court have gone by the boards. This kind of bait-and-switch gamesmanship would be bad enough from any contracting party, but it is especially ill-befitting the United States Government.

The stakes are significant. The outcome of this case will not be limited to the estimated $242 million-worth of bonds owned by Arkansas. The decision below also invalidates, at one stroke, the savings-bond-specific escheatment statutes adopted by no fewer than twenty-three additional States, *see* Brief of 24 States as *Amici Curiae* at 12-17 (June 11, 2020)—including ten States that have claims pending in the trial court worth roughly $3.2 *billion*. Moreover, the

outcome in this case also carries implications for *the entirety* of Nation's matured but unredeemed savings-bond debt—worth *$26 billion and counting*. Even if the regulatory fix the Government hurried through on Christmas Eve 2015 "deprive[s] the questions presented here of prospective significance," given the amounts at issue and the Government's shifting positions, there is no question that the matter "warrant[s] this Court's review." Opp.23-24.

CONCLUSION

The Court should grant the writ.

July 31, 2020

Respectfully submitted,

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