No. 20-8

IN THE

Supreme Court of the United States

DEUTSCHE BANK TRUST COMPANY AMERICAS, ET AL.,

Petitioners,

v.

ROBERT R. MCCORMICK FOUNDATION, ET AL.,

Respondents.

On Petition for a Writ Of Certiorari to the United States Court Of Appeals for the Second Circuit

BRIEF OF PUBLIC LAW SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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[1] This brief is filed with the consent of the parties. Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, and no person other than *amici* and their counsel made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The Court of Appeals made two decisions in this case with broad significance to the law of federal preemption. The first was that this Court's general presumption against preemption in construing federal statutes, articulated in *Rice* v. *Santa Fe Elevator Co.*, 331 U.S. 218, 230 (1947), had no application because bankruptcy has "a history of significant federal presence." Pet. App. at 33a-34a. Nearly every regulatory field has a significant federal presence, and so the Court of Appeals' misreading of this Court's preemption precedents threatens to disrupt preemption analysis not just in bankruptcy but across the board. This Court has at times said that *Rice* governs *all* preemption cases, *see Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 485 (1996); at a minimum, it governs those areas with a "historic presence of state law," *Wyeth* v. *Levine*, 555 U.S. 555, 565 n.3 (2009). Because the Bankruptcy Code incorporates state law and states have regulated fraudulent transfers since the early Republic, *Rice* should apply under either standard.

The Court of Appeals' second key holding was that, although the relevant statutory text concededly supported the continued availability of state law, Petitioners' state law claims were nonetheless preempted because they conflicted with the general 'purposes and objectives' of the Bankruptcy Code. Pet. App. at 51a, 57a. This Court has made clear, however, that implied preemption, "like all preemption arguments, must be grounded 'in the text and structure of the statute at issue.'" *Kansas* v. *Garcia*, 140 S. Ct. 791, 804 (2020). Because the Court of Appeals eschewed any textual preemption arguments and construed Congress's implicit purposes very broadly, this case offers an opportunity to rein in "purposes and objectives" preemption.

ARGUMENT

This Court's preemption jurisprudence rests on two "cornerstones." *Wyeth*, 555 U.S. at 565. "First, the purpose of Congress is the ultimate touchstone in every preemption case." *Id.* The second is the "assumption that the historic police powers of the States were not to be superseded . . . unless that was the clear and manifest purpose of Congress." *Id.* The Court of Appeals radically constricted the second principle's scope by restricting the presumption against preemption to those areas with no significant federal presence. And it flouted the first principle by relying on open-ended and implicit purposes with little connection to the text Congress actually enacted.

I. THE PRESUMPTION AGAINST PREEMPTION APPLIES TO THIS CASE.

This Court has sent contradictory signals concerning whether the presumption against preemption applies in all, or only some, statutory contexts.[2] Because applying different rules of construction to ill-defined categories of regulation is impracticable, the better view is that the presumption should apply in all preemption cases. But whether or not the Court accepts that principle, the state-law creditors' rights claims at issue in this case should have benefited from the presumptive respect accorded to all exercises of the states' 'historic police powers.'

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[2] *Compare, e.g.*, *Lorillard Tobacco Co.* v. *Reilly*, 533 U.S. 525, 541-42 (2001) (stating the presumption applies whenever "federal law is said to bar state action in a field of traditional state regulation"), *with Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 485 (1996) (stating the presumption applies "[i]n all preemption cases").

A. The presumption against preemption plays a critical role in contemporary federalism jurisprudence.

The scope of federal preemption of state law is the central question in contemporary American federalism doctrine.[3] This Court's enumerated powers jurisprudence has generally given wide scope to Congress's regulatory authority, *see, e.g.*, *United States* v. *Comstock*, 130 S. Ct. 1949 (2010); *Gonzales* v. *Raich*, 545 U.S. 1 (2005), with the result that that authority is now, with important but relatively narrow exceptions, concurrent with that of the States. This Court has balanced the expansion of federal regulatory authority, however, by developing a rule of statutory construction disfavoring federal preemption of state law. *See, e.g.*, *Rice* v. *Santa Fe Elevator Co.*, 331 U.S. 218, 230 (1947).[4] Given this broad scope of *potential* federal regulatory authority, *Rice*'s limiting rule of construction is the most critical component of this Court's federalism doctrine in terms of preserving meaningful state autonomy.[5]

By eliminating state regulatory authority so far as preemption extends, preemption undermines key values of federalism, such as States' ability to respond to geographically divergent conditions and voter preferences, experiment with innovative policies, and compete with other jurisdictions to offer the most

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[3] *See generally* Ernest A. Young, *"The Ordinary Diet of the Law": The Presumption Against Preemption in the Roberts Court,* 2011 SUP. CT. REV. 253, 257-65; Garrick B. Pursley, *Preemption in Congress*, 71 OHIO ST. L.J. 511, 513 (2010).

[4] *See* Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767, 805-07 (1994) (tracing the historical development of the Court's preemption doctrine).

[5] *See* Young, *Ordinary Diet, supra*, at 265-83.

attractive mix of policies.[6] Two primary structural constraints check preemption's scope. First, this Court has long suggested that the principal institutional safeguard for state autonomy derives from the States' representation in the national political process. *See Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985). That is why Congress's purpose must be "the ultimate touchstone" of preemption analysis. *Medtronic*, 518 U.S. at 485. It also supports *Rice*'s presumption, because "a presumption against preemption promotes legislative deliberation" about a proposed federal statute's impact on state law.[7] As Justice O'Connor wrote, "'to give the state-displacing weight of federal law to mere congressional *ambiguity* would evade the very procedure for lawmaking on which *Garcia* relied to protect states' interests.'"[8]

Our constitutional structure augments these "political safeguards" of federalism with *procedural* safeguards as well. Article I's lawmaking procedures "safeguard federalism . . . by requiring the participation and assent of multiple actors"; hence, the Constitution protects states "both by limiting the powers assigned to the federal government and by rendering that government frequently incapable of exercising them.'"[9]

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[6] *See Gregory* v. *Ashcroft*, 501 U.S. 452, 458 (1991); *Wyeth*, 555 U.S. at 583-84 (Thomas, J., concurring in the judgment).

[7] Robert R. M. Verchick & Nina Mendelson, *Preemption and Theories of Federalism*, in PREEMPTION CHOICE: THE THEORY, LAW, AND REALITY OF FEDERALISM'S CORE QUESTION (William W. Buzbee ed., 2009).

[8] *Gregory*, 501 U.S. at 464 (quoting LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 6-25 (2d ed. 1988))

[9] Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1339-40 (2001).

The Supremacy Clause thus requires "that pre-emptive effect be given only to those federal standards and policies that are set forth in, or necessarily follow from, the statutory text that was produced through the constitutionally required bicameral and presentment procedures." *Wyeth*, 555 U.S. at 586 (Thomas, J., concurring in the judgment).

B. The Court of Appeals erred by excluding the presumption against preemption from areas with 'a history of significant federal presence.'

In this case, the Court of Appeals erred both by engaging in an unworkable enterprise and by applying an incorrect standard to that enterprise. Any effort to limit the *Rice* presumption to some subset of preemption cases requires courts to distinguish fields presumptively belonging to the states (areas involving "historic police powers of the States"[10]) from those presumptively belonging to the national government (areas of "unique federal concern"[11]). That task evokes the pre-1937 regime of "dual federalism," which attempted to divide regulatory authority into separate and exclusive spheres of state and national power.[12] This Court abandoned that effort after the New Deal crisis, largely because it could not consistently define the boundary between the spheres.[13] Likewise, in *Garcia*, this Court rejected a test for state immunity from federal regulation based on traditional state functions as inherently unworkable.[14]

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[10] *Rice*, 331 U.S. at 230.

[11] *Boyle* v. *United Technologies*, 487 U.S. 500, 508 (1988).

[12] *See generally* Edward S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1 (1950).

[13] *See* Young, *Ordinary Diet*, *supra*, at 257-59.

[14] 469 U.S. at 530-31, 545-47.

Reviving a similar distinction within preemption law would encourage inconsistency and enhance judicial discretion by tasking judges to apply an indeterminate standard.[15] And it would undermine the structural safeguards of state representation and lawmaking procedure that the *Rice* presumption is designed to enforce.

This case illustrates the trouble with such efforts at classification. The Constitution explicitly confers a bankruptcy power on Congress,[16] and federal law extensively regulates the bankruptcy field. Yet the states have established and enforced creditors' rights for centuries, and the Bankruptcy Code incorporates state law at nearly every turn. *See infra* Section I.C. It is, in all candor, accurate to say *both* that this case involves the states' traditional police powers *and* that it arises in an area of uniquely federal concern.

The Court of Appeals resolved this difficulty by adopting a default rule that *Rice*'s presumption would not apply to any area with "a history of significant federal presence." Pet. App. 33a-34a. It borrowed that phrase from *United States* v. *Locke*, 529 U.S. 89, 90 (2000), which suggested the presumption did not apply to a case involving state regulation of ocean-going oil tankers. But *Locke* sent profoundly mixed signals on the scope of the *Rice* presumption.

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[15] This Court's enumerated powers jurisprudence, by contrast, has insisted on the presence of commercial activity but generally not turned on the particular regulatory field in which Congress seeks to legislate. *See, e.g.*, *Nat'l Fed'n of Independent Business* v. *Sebelius*, 567 U.S. 519, 552 (2012) (opinion of Roberts, CJ); *id.* at 653-54 (Scalia, Kennedy, Thomas, and Alito, J., dissenting); *United States* v. *Lopez*, 514 U.S. 549, 565-66 (1995).

[16] U.S. CONST. Art. I, § 8, cl. 4.

Locke said that "an 'assumption' of nonpre-emption is not triggered when the State regulates in an area where there has been a history of significant federal presence." 529 U.S. at 108. But it also framed its analysis on *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151 (1978), which addressed preemption under the same federal statute—the Ports and Waterways Safety Act of 1972 (PWSA). *Ray* began by applying *Rice*'s presumption against preemption, *see id.* at 157, and *Locke* affirmed *Ray*'s "basic analytic structure," endorsed its "interpretation of the PWSA [as] correct and controlling," and praised its "due recognition [of] the traditional authority of the States and localities to regulate some matters of local concern," 529 U.S. at 104. Critically, *Locke*'s actual result turned on the Court's finding that while Title I of the PWSA saved state regulation based on local conditions, the challenged regulations fell under Title II, which preempted the field of design, construction, and operation of vessels. *See id.* at 111-16. Field preemption is rare, and it requires a great deal more than a "significant federal presence."[17]

If a significant federal presence ousts the *Rice* presumption, then it will have little or no remaining application because the federal government is involved in nearly every regulatory field. Unsurprisingly, this Court simply has not followed *Locke*'s "history of significant federal presence" language in subsequent cases.[18] In

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[17] *See also Pacific Gas & Elec. Co.* v. *PUC of Calif.*, 461 U.S. 190, 205-06, 212 (1986) (acknowledging that Congress had preempted the field of nuclear safety, but applying the *Rice* presumption to other aspects of nuclear power regulation).

[18] *Locke* itself relied upon cases that applied the *Rice* presumption notwithstanding a 'history of significant federal

construing preemption under the federal immigration laws, for example, this Court emphasized that "a high threshold must be met if a state law is to be preempted for conflicting with the purposes of a federal Act." *Chamber of Commerce* v. *Whiting*, 563 U.S. 582, 607 (2011). *Wyeth* v. *Levine*, 555 U.S. at 565 n.3, insisted on a presumption against preemption notwithstanding the federal government's longstanding role regulating drug safety. And *Rush Prudential HMO, Inc.* v. *Moran*, 536 U.S. 355, 365 (2002), applied *Rice*'s presumption to a case involving health benefits provided as part of an employee welfare benefit plan, despite the extensive history of federal involvement in employee benefits pursuant to the Employee Retirement Income Security Act (ERISA).

This Court's cases *not* applying the presumption against preemption generally fall into three categories. The first involve statutes that the Court had already interpreted to reflect Congress's unusually broad preemptive intent. *Barnett Bank of Marion Cty, N.A.* v. *Nelson*, 517 U.S. 25 (1996), for example, relied upon an interpretive history under the National Bank Act going back all the way to *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819). That history "interpret[ed] grants of both enumerated and incidental 'powers' to national banks as grants of authority not normally limited by, but rather ordinarily pre-empting, contrary state law." 517

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presence.' 529 U.S. at 108. *Jones* v. *Rath Packing Co.*, 430 U.S. 519 (1977), invoked *Rice* in a case under the federal food safety statutes tracing their lineage back to the Meat Inspection Acts of 1906, 1890, and 1891, as well as the New Deal's Food, Drug, and Cosmetic Act of 1937 (FDCA). And *Medtronic* was decided under the Medical Device Amendments to the FDCA, which tasked federal agencies with a primary role prior to a product's approval, while state tort law serves a valuable post-approval role. *See* 518 U.S. at 475. *See also Merck Sharp & Dohme Corp.* v. *Albrecht*, 139 S. Ct. 1668, 1672-73 (2019).

U.S. at 32.[19] But the Court has generally construed the strong preemptive force of such statutes narrowly and not ousted the *Rice* presumption from all cases arising in the particular regulatory field.[20]

A second and closely related category contains cases where the statutory language was sufficiently clear to obviate recourse to interpretive presumptions.[21] Hence, *Kansas* v. *Garcia*, 140 S. Ct. 791 (2020), required no canons of construction to reject the arguments for express and implied preemption. And this Court's most recent bankruptcy preemption case likewise eschewed any presumption because it found Congress's explicit preemptive language to be clear. *See Puerto Rico* v. *Franklin Cal. Tax-Free Trust*. 136 S. Ct. 1938 (2016). Many similar examples exist.

The final category—and the one closest to the Second Circuit's holding here—involves areas of "uniquely federal interest."[22] But this category is far narrower than the Second Circuit suggested. Leading cases have involved internal operations of federal administrative

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[19] *See also California* v. *FERC*, 495 U.S. 490, 497-98 (1990) (declining to apply *Rice* because the preemptive effect of a Federal Power Act provision was not a matter of first impression).

[20] *Compare*, *e.g.*, *Gobeille* v. *Liberty Mut. Ins. Co.*, 136 S. Ct. 936, 946 (2016) (holding that *Rice* did not limit the preemptive effect of "a principal and essential feature of ERISA"), *with Moran*, 536 U.S. at 364-65 (applying *Rice* in a case involving a different aspect of ERISA).

[21] *See* Young, *Ordinary Diet*, *supra*, at 308 ("[W]hen . . . the preemption question is not a close one, [the Court] often choose[s] not to invoke *Rice*'s tiebreaker rule.").

[22] *Boyle*, 487 U.S. at 508.

agencies,[23] specifications of national defense contracts,[24] or conduct of federal elections.[25] *Locke*, for example, went out of its way to note that oil tanker safety was governed not only by a federal statute but also by international treaties implicating the national government's conduct of foreign relations.[26] This Court has consistently construed such areas of unique federal interest narrowly, however. *Locke* notwithstanding, for instance, the Court has stated its reluctance to displace state law even in cases implicating foreign affairs, and it has framed those federal interests compelling uniformity with considerable precision.[27]

The Court of Appeals in this case thus erred by pulling a single phrase out of *Locke* and ignoring the great bulk of this Court's preemption cases. As *Wyeth* explained, arguments to set aside the presumption against preemption based on a history of federal regulation "misunderstand[] the principle: We rely on the presumption because respect for the States as 'independent sovereigns in our federal system' leads us to assume that 'Congress does not cavalierly pre-empt state-law causes of action.' The presumption thus accounts for the historic presence of state law but *does not rely on the*

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[23] *See Buckman Co.* v. *Plaintiffs' Legal Comm.*, 531 U.S. 341, 347 (2001) (holding the presumption inapplicable because "[p]olicing fraud against federal agencies is hardly a field which the States have traditionally occupied").

[24] *See Boyle*, 487 U.S. at 504-06.

[25] *See Arizona* v. *Inter-Tribal Council of Ariz. Inc.*, 570 U.S. 1, 13-15 (2013).

[26] 529 U.S. at 102-03.

[27] *See, e.g.*, *Arizona* v. *United States*, 567 U.S. 387, 400, 415 (2012) (invoking the *Rice* presumption in an immigration case implicating relations with Mexico).

absence of federal regulation." 555 U.S. at 565 n.3 (quoting *Medtronic*, 518 U.S. at 485) (emphasis added).

C. The presumption against preemption should apply to bankruptcy cases in general and creditors' rights in particular.

Although the Court of Appeals suggested that this case involves "no measurable concern about federal intrusion into traditional state domains," Pet. App. at 36a, the states have in fact regulated debtor-creditor relations since the eighteenth century. Prior to the enactment of permanent federal bankruptcy legislation in 1898, "many states stepped into the void and passed their own bankruptcy legislation."[28] Notwithstanding the advent of a federal Bankruptcy Code, states continue to regulate debtor-creditor relationships in many crucial ways.[29]

In particular, the states have consistently regulated fraudulent conveyances. Based on England's Statute of 13 Elizabeth, originally passed in 1571, fraudulent conveyance laws have been in force in most states since the founding of the Republic.[30] Currently every state has

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[28] Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 12-14 (1995).

[29] *See* Michelle M. Harner, *Rethinking Preemption and Constitutional Parameters in Bankruptcy*, 59 WM. & MARY L. REV. 147, 185-93 (2017) (collecting references to state debtor-creditor laws).

[30] *See Husky Intern. Electronics, Inc.* v. *Ritz*, 136 S.Ct. 1581, 1587 (2016); ORLANDO F. BUMP, A TREATISE UPON CONVEYANCES MADE BY DEBTORS TO DEFRAUD CREDITORS 8 (4th ed. 1896); Unif. Voidable Transactions Act, Prefatory Note (1984) ("[T]he voidability of fraudulent transfers was part of the law of every American jurisdiction."); Peter Alces & Luther M. Dorr, *A Critical Analysis of the Uniform Fraudulent Transfer Act*, 1985 U. ILL. L. REV. 527, 530-

a fraudulent conveyance law in effect, most of them based on the Uniform Voidable Transactions Act[31] or the Fraudulent Transfer Act.[32] Hence, "[s]tate debtor-creditor laws and federal bankruptcy laws have coexisted in one form or another since Congress enacted the first Bankruptcy Act in 1800."[33]

The federal Bankruptcy Code, moreover, necessarily incorporates state law at every turn. "State law has traditionally governed the formation and enforcement of contracts underlying the [debtor-creditor] relationship, as well as creditors' basic rights and remedies upon a default by the debtor."[34] Likewise, "Congress has generally left the determination of property rights in the assets of a bankrupt's estate to state law." *Butner* v. *United States*, 440 U.S. 48, 54 (1979). More specific incorporations of state law appear throughout the Code. The Code's exemption scheme for debtors' property relies significantly on state law, 11 U.S.C. § 522(b); bankruptcy trustees must "manage and operate the property in his possession . . . according to the requirements of the valid laws of the State . . . ." 28 U.S.C. § 959(b); and a central

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32 (1985) (describing early American fraudulent conveyance jurisprudence).

[31] *Voidable Transactions Act Amendments – Formerly Fraudulent Transfer Act*, UNIFORMLAWS.ORG, https://www.uniformlaws.org/committees/community-home?communitykey=64ee1ccc-a3ae-4a5e-a18f-a5ba8206bf49&tab=groupdetails.

[32] *Fraudulent Transfer Act*, UNIFORMLAWS.ORG, https://www.uniformlaws.org/committees/community-home?communitykey=4226ae7c-91c0-4ce9-b488-8520dbc39ea3&tab=groupdetails

[33] Harner, *supra*, at 170.

[34] *Id.* at 185-86.

provision in this case, 11 U.S.C. § 544(b), permits the trustee to avoid any transactions by the debtor that are voidable under state law. Even where the Code does not explicitly adopt state law, this Court has read state law into the Code's provisions.[35]

Federal bankruptcy law has thus never sought to preempt the field of insolvency or provide a uniform set of federal rules to govern the rights and claims arising in bankruptcy cases. Rather, the general theory of bankruptcy law is that it provides an orderly mechanism for sorting out claims that arise from other sources of law.[36] The Second Circuit's contrary insistence that "the Bankruptcy Code constitutes a wholesale preemption of state laws regarding creditors' rights," Pet. App. at 34a, is both wrong and misleading to future courts.

It is also wildly inconsistent with this Court's decisions. The early case of *Stellwagen* v. *Clum*, 245 U.S. 605 (1918), for example, rejected a preemption challenge to an Ohio law allowing creditors to challenge and avoid fraudulent transfers. This Court said that "[i]t is only state laws which conflict with the bankruptcy laws of Congress that are suspended; those which are in aid of the

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[35] *See, e.g.*, *BFP* v. *Resolution Trust Corp.*, 511 U.S. 531, 545 (1994) (determining that a transfer is for "reasonably equivalent value" within the meaning of the Code's constructive fraudulent transfer provision, 11 U.S.C. § 548(a)(2), if "all the requirements of the State's foreclosure law have been complied with"); *Midlantic Nat'l Bank* v. *New Jersey Dep't of Envnt. Protection*, 474 U.S. 494, 501-02 (1986) (holding that state public health laws limit a bankruptcy trustee's power to abandon property of the estate under 11 U.S.C. § 554(a)).

[36] *See, e.g.*, DOUGLAS BAIRD, ELEMENTS OF BANKRUPTCY LAW 4-5 (6th ed. 2014) (observing that "[b]ankruptcy law is built on nonbankruptcy law" and "changes nonbankruptcy law only when the purposes of bankruptcy require it").

Bankruptcy Act can stand." *Id.* at 615. More recently, this Court's decision in *BFP* presumed that federal bankruptcy law did not "disrupt the ancient harmony" of state law rules governing creditors' rights or "displace traditional state regulation" absent a "clear and manifest" statement from Congress." *BFP* v. *Resolution Trust Corp.*, 511 U.S. 531, 533, 544 (1994). "Otherwise, the Bankruptcy Code will be construed to adopt, rather than to displace, pre-existing state law." *Id.* at 544-45. Likewise, in *Midlantic*, this Court applied a strong presumption that bankruptcy trustees must comply with general state laws that may affect the disposition of the estate's assets. *See* 474 U.S. at 501. Citing both *BFP* and *Midlantic*, Judge William Fletcher concluded that "the presumption against displacing state law by federal bankruptcy law is just as strong in bankruptcy as in other areas of federal legislative power."[37]

The generous treatment of state law reflected in these decisions is particularly appropriate in *this* case, which involves the historically state-dominated question of creditors' rights. Even advocates of broadening the scope of federal preemption in bankruptcy acknowledge the legitimacy of state rules governing creditors' rights.[38] The concern of such advocates generally focuses on state laws that trench upon the core federal bankruptcy

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[37] *Pacific Gas & Elec. Co.* v. *California ex rel. California Dept. of Toxic Substances*, 350 F.3d 932, 943 (9th Cir. 2003); *see also In re Northington*, 876 F.3d 1302, 1311-12 (11th Cir. 2017) (Newsom, J.) (invoking *BFP* for the proposition that "before a federal statute—notably including the Bankruptcy Code—may be read to 'displace traditional state regulation,' the 'federal statutory purpose must be 'clear and manifest'"").

[38] *See* Harner, *supra*, at 193, 214.

concern for discharge of a debtor's financial obligations.[39] The Second Circuit's expansion of preemption beyond that core federal concern thus sets a dangerous precedent.

II. THE COURT SHOULD REJECT THE SECOND CIRCUIT'S "PURPOSES AND OBJECTS" PREEMPTION ANALYSIS.

This Court wrote last term that, "[i]n all cases, the federal restrictions or rights that are said to conflict with state law must stem from either the Constitution itself or a valid statute enacted by Congress. 'There is no federal preemption *in vacuo*' . . . ." *Kansas* v. *Garcia*, 140 S. Ct. at 801 (quoting *Puerto Rico Dept. of Consumer Affairs* v. *Isla Petroleum Corp.*, 485 U.S. 495, 503 (1988)). It follows that "[i]nvoking some brooding federal interest or appealing to a judicial policy preference should never be enough to win preemption." *Virginia Uranium, Inc.* v. *Warren*, 139 S. Ct. 1894, 1901 (2019) (plurality opinion). Yet that is precisely what the Second Circuit did in this case. The Court of Appeals conceded that it was not resting on statutory text or direct conflicts with the federal statute; rather, it relied solely on a broad imperative to "enhanc[e] the efficiency of securities markets" that it derived from "the purposes and history" of § 546(e) of the Bankruptcy Code. Pet. App. at 51a, 57a.

Although several members of this Court have questioned the legitimacy of purposes and objects preemption,[40] this case does not require the Court to

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[39] *See id.* at 197-98 (arguing that this aspect of bankruptcy is exclusively federal, and state laws providing competing discharge mechanisms are preempted).

[40] *See, e.g.*, *Kansas* v. *Garcia*, 140 S. Ct. at 807 (Thomas, J., concurring in the judgment); *see Geier* v. *Am. Honda Motor Co.*, 529

discard it entirely. Rather, this case affords an opportunity to reject freewheeling purposive analysis and tie implied preemption analysis more closely to the statutory text.

A. Preemption analysis should stick closely to the statutory text.

The extent to which preemption decisions may rest on purposes implied from federal statutes is a pervasive issue in preemption law. Contemporary doctrine protects state autonomy by insisting that preemptive federal law be made by Congress (which represents state interests), through a demanding lawmaking procedure (which tends to limit intrusions on state authority). *See supra* Section I.A. Hence implied preemption, "like all preemption arguments, must be grounded 'in the text and structure of the statute at issue.'" *Kansas* v. *Garcia*, 140 S. Ct. at 804.

To be sure, "oftentimes the meaning—or ambiguity—of certain words or phrases may only become evident when placed in context." *King* v. *Burwell*, 135 S. Ct. 2480, 2489 (2015). Courts cannot avoid recurring to statutory purpose altogether in determining the preemptive effect of federal law. But, as Justice Cardozo observed in another context, "[t]he law is not indifferent to considerations of degree." *A.L.A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495, 554 (1935) (Cardozo, J., concurring). The further one gets from the statutory text itself, the more discretion judges have to divine preemption or nonpreemption in the tea leaves of Congress's implicit purposes.

U.S. 861, 907 (2000) (Stevens, J., dissenting) (lamenting the idea of "federal judges . . . running amok with our potentially boundless (and perhaps inadequately considered) doctrine of implied conflict preemption based on frustration of purposes").

Consider, for example, a hypothetical federal product safety law setting a lead maximum in toys at 300 parts per million (ppm). The most obvious purpose of the statute is simply to reduce lead traces. If that is the only purpose considered, then a state law setting a more protective standard of 200 ppm would plainly *not* conflict with Congress's purposes or objects.

Extending the sphere of possible interests, however, might yield a quite different result. Legislative history might reveal a fierce debate between scientists worried about children's health and industry worried about compliance costs, resulting in a compromise at 300 ppm. Courts might thus impute a legislative purpose to limit costs by barring greater regulatory requirements. Or one might infer from the very decision to set a *federal* standard that Congress wished to reap the benefits of national uniformity and predictability. Either of these purposes would favor implied preemption of the 200 ppm state standard.

Or the legislative history, the structure of other product safety statutes, or other evidence might suggest Congress was aware of state-by-state variation in the general prevalence of lead and wished to leave room for states to set more demanding standards where needed, or simply that Congress respected states' institutional autonomy to make their own choices. These purposes would again favor treating the federal standard as a floor for regulatory requirements, not a ceiling,[41] and holding the stricter state law to be consistent with Congress's purpose.

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[41] On the floor/ceiling problem, *see generally* William W. Buzbee, *Asymmetrical Regulation: Risk, Preemption, and the Floor/Ceiling Distinction*, 82 N.Y.U. L. Rev. 1547 (2007).

Or—as often happens—one might find evidence of *all* these concerns in the legislative record or other sources of statutory meaning. One need assume neither willfulness nor bad faith to recognize that judges looking for legislative purposes can often find what they expect or wish to find. Legislative purpose, at some point, is like "looking over a crowd and picking out your friends."[42] Justice Stevens thus appropriately described "purposes and objectives" preemption as "potentially boundless."[43] This mode of analysis must be applied with careful attention to the statutory text.

B. The Court of Appeals' analysis illustrates the pitfalls of "purposes and objectives" preemption.

This case provides a good vehicle for reining in purposes and objects preemption. "Purposes and objects" arguments typically appear alongside other forms of preemption analysis, complicating any effort to address the pitfalls of this particular method. Here, however, the Court of Appeals forthrightly acknowledged that no other preemption arguments were plausibly available. Moreover, the Court's purposive analysis illustrates the dangers of this approach.

The Bankruptcy Code provisions at issue authorize the trustee to avoid certain transfers of property by the debtor, 11 U.S.C. § 544(b), but except certain transfers involving financial institutions, 11 U.S.C. § 546(e). According to the Court of Appeals, "Section 546(e) was intended to protect from avoidance proceedings payments

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[42] Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1983) (quoting Judge Harold Leventhal's view of legislative history).

[43] *Geier*, 529 U.S. at 907 (Stevens, J., dissenting).

by and to commodities and securities firms in the settlement of securities transactions or the execution of securities contracts." Pet. App. at 52a. From this, the Court of Appeals extrapolated to "a larger purpose memorialized in the legislative history[] . . . to promot[e] finality . . . and certainty for investors, by limiting the circumstances . . . under which securities transactions could be unwound." Pet App. at 56a.

This interpretation obviously went beyond the *text* of § 546(e), which addressed only avoidance actions by the trustee. It went beyond the legislative history, which discusses only protecting entities (enumerated in § 546(e)) whose collapse would threaten the stability of the securities markets and clearing system—not investors.[44] But why is *only* § 546(e)'s purpose relevant? That section creates a limited exception to § 544(b), which allows the trustee to avoid transactions including fraudulent conveyances.[45] Fraudulent conveyance law exists both inside and outside bankruptcy and thus embodies a distinct purpose from bankruptcy—that is, to "protect[] creditors against misbehavior by their debtor."[46] Permitting state-law enforcement actions by creditors as well as by the trustee would plausibly further this purpose of the Code's avoidance provisions.

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[44] *See* H.R. Rep. No. 97-420, at 2 (1982).

[45] *See Merit Management Group, LP* v. *FTI Consulting, Inc.*, 138 S. Ct. 883, 893-94 (2018) (stating that the exceptions in § 546 must be read in conjunction with the trustee's affirmative avoidance powers).

[46] Thomas H. Jackson, *Avoiding Powers in Bankruptcy*, 36 STAN. L. REV. 725, 777 (1984); *see also* 5 COLLIER ON BANKRUPTCY ¶ 548.01[1][a] (16th ed. 2015) (the Code's fraudulent transfer provisions "protect creditors from transactions" that "unfairly drain[] the pool of assets available to satisfy creditors' claims").

Beyond this, of course, are the general purposes of federal bankruptcy law.[47] This Court said long ago that "[o]ne of the primary purposes of the Bankruptcy Act is to 'relieve the honest debtor from the weight of oppressive indebtedness, and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes.'"[48] On the other hand, commentators have emphasized the need "to regulate the inherent conflicts among different groups having separate claims against a debtor's assets and income stream."[49] Relatedly, "[b]ankruptcy is designed to assure that the asset 'pie' is as large as possible, given a set of relative entitlements."[50] Focusing on these purposes, it is hard to see how creditors' state-law avoidance claims to recover fraudulent preferences undermine bankruptcy's "fresh start" principle or the creditors' ability to coordinate an orderly distribution of the debtor's assets. And one would expect preservation of state-law remedies to enhance the size of the pie available to creditors.

How should these various purposes be weighed against one another? Having focused exclusively on one

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[47] *See, e.g.*, *Crosby* v. *Nat'l Foreign Trade Council*, 530 U.S. 363, 373 (2000) (stating that preemption analysis should "be informed by examining the federal statute as a whole").

[48] *Local Loan Co.* v. *Hunt*, 292 U.S. 234, 244 (1934) (quoting *Williams* v. *U.S. Fidelity & Guaranty Co.*, 236 U.S. 549, 554 (1915)).

[49] Thomas H. Jackson & Robert E. Scott, *On the Nature of Bankruptcy: An Essay of Bankruptcy Sharing and the Creditor's Bargain*, 75 VA. L. REV. 155, 158 (1989); *see also* Max Radin, *The Nature of Bankruptcy*, 89 U. PA. L. REV. 1, 3-4 (1940).

[50] Jackson, *supra*, at 728.

narrow purpose, the Court of Appeals did not say.[51] Picking and choosing among potentially conflicting purposes simply expands judicial discretion to reach a preferred result. The safest course is to fall back on the choice Congress made in the statute, which restricted avoidance actions by the trustee but left other actions undisturbed.

A second problem is that the Second Circuit's preferred purpose—promoting stable and efficient securities markets—is itself indeterminate. The Court of Appeals offered several pages of policy analysis as to why preempting state-law avoidance claims by creditors might achieve that end, but it provided little evidence that Congress itself followed that course of reasoning. *See* Pet. App. at 52a-61a. And surely one might plausibly take a different view. Aggressive enforcement of rules against fraudulent transfers, for example, might enhance securities markets' stability by deterring large, fraudulent leveraged buy-out transactions that undermine investor confidence.

Our point is simply that "there are *many* competing concerns addressed in bankruptcy policy," *In re Lyondell Chem. Co.*, 503 B.R. 348, 365 (Bankr. S.D.N.Y. 2014), and "[n]o legislation pursues its purposes at all costs." *Freeman* v. *Quicken Loans*, 566 U.S. 624, 637 (2012). Very broad purposes—like protecting the securities markets—can be pursued in many, sometimes contradictory ways. This Court has thus rightly admonished that state law must "do 'major damage' to 'clear and substantial' federal interests" in order to justify implied preemption. *Hillman*

[51] *But see Merit*, 138 S. Ct. at 896-97 (denying that any general purpose to protect securities markets should control over § 546(e)'s specific provisions).

v. *Maretta*, 569 U.S. 483, 491 (2013). Especially where legislation pursues broad goals and balances multiple purposes, courts should stick to the clear preemptive force of the text itself lest they slip into mandating their own preferred outcomes. The Second Circuit's freewheeling analysis in this case vividly illustrates why this is so.

CONCLUSION

The petition for *certiorari* should be granted and the judgment of the United States Court of Appeals for the Second Circuit should be reversed.

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