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.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

In various circumstances, creditors may assert state-law causes of action to "avoid" certain asset transfers and thereby recoup debts owed to the creditors. After a bankruptcy case has been commenced, the Bankruptcy Code likewise authorizes the trustee to avoid specified types of transfers in order to augment the estate. See, *e.g.*, 11 U.S.C. 544(b)(1), 548(a)(1). Section 546(e) of the Code provides (as relevant here) that "the trustee may not avoid * * * a transfer made by or to (or for the benefit of) a commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities clearing agency, in connection with a securities contract, * * * that is made before the commencement of the [bankruptcy] case, except under section 548(a)(1)(A) of this title." 11 U.S.C. 546(e). The term "financial institution" is defined to include, in addition to banks and similar entities, the "customer" of a bank (or similar entity) when that entity "is acting as agent or custodian" for the "customer" "in connection with a securities contract." 11 U.S.C. 101(22)(A). The questions presented are as follows:

1. Whether Section 546(e) impliedly preempts fraudulent-transfer suits brought by creditors under state law, where those suits seek to avoid transfers that Section 546(e) would preclude a trustee from avoiding.

2. Whether the Bankruptcy Code's definition of "financial institution" encompasses the transferor in this case.

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INTEREST OF THE UNITED STATES

This brief is submitted in response to the Court's order inviting the Acting Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

1. a. Since at least the Sixteenth Century, the common law has treated as tortious conduct a debtor's transfer of her assets to a third party in a way that undermines her creditors' rights. *BFP* v. *Resolution Trust Corp.*, 511 U.S. 531, 540-541 (1994). The States have generally adopted this common-law tort rule by enacting the Uniform Voidable Transactions Act or one of its precursors. 37 Am. Jur. 2d *Fraudulent Conveyances and Transfers* § 4 (Supp. 2021). Under these

state laws, a creditor seeking to satisfy a claim against a debtor may bring an "avoidance" action against the third party to whom the debtor transferred her assets. If the action succeeds, the transfer may be "avoided" (*i.e.*, set aside), and the creditor may recoup the transferred assets in order to collect the debt owed to it. See, *e.g.*, Uniform Voidable Transactions Act § 7, at 33-36 (2014).

There are essentially two varieties of fraudulent-transfer claims. An *intentional* fraudulent-transfer claim requires proof that the debtor actually intended to defraud her creditors. A *constructive* fraudulent-transfer claim typically requires proof that the transferor received less than reasonably equivalent value in exchange for the transfer and that the debtor was insolvent before the transfer, or was rendered insolvent by the transfer itself. See, *e.g.*, Uniform Voidable Transactions Act § 4(a), at 19.

b. The Bankruptcy Code authorizes the bankruptcy trustee to avoid fraudulent transfers under specified circumstances. Section 544(b)(1) authorizes a trustee to avoid certain transfers that are "voidable under applicable law by a creditor holding an unsecured claim." 11 U.S.C. 544(b)(1). Section 548(a)(1) establishes a federal cause of action by which the trustee can avoid either an intentional fraudulent transfer, 11 U.S.C. 548(a)(1)(A), or a constructive fraudulent transfer, 11 U.S.C. 548(a)(1)(B).

The Bankruptcy Code also imposes several limitations on the trustee's avoidance power. As most relevant here, Section 546(e) provides that "the trustee may not avoid * * * a transfer made by or to (or for the benefit of) a commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities clearing agency, in connection with a securities contract, * * * that is made before the commencement of the [bankruptcy] case, except under section 548(a)(1)(A) of this title." 11 U.S.C. 546(e).

2. a. In 2007, the Tribune Media Company (Tribune) went through a leveraged buyout. Pet. App. 10a. Thousands of shareholders, including respondents, received payments totaling more than $8 billion in exchange for their Tribune stock. *Id.* at 10a-11a, 130a. To effectuate the buyout, Tribune retained Computershare Trust Company, N.A., a trust company and bank, to act as the "Depositary" for Tribune's payments to its shareholders and the shareholders' transfers of stock to Tribune. *Id.* at 23a-29a.

The buyout did not prevent Tribune's continued decline, and the company filed for bankruptcy in 2008. Pet. App. 11a. The bankruptcy court authorized an Official Committee of Unsecured Creditors (Committee) to stand in the shoes of a bankruptcy trustee. *Id.* at 12a. In 2010 the Committee filed an avoidance action under Section 548(a)(1)(A) against Tribune's former stockholders, alleging that the payments to stockholders in connection with the leveraged buyout constituted intentional fraudulent transfers. *Id.* at 11a-12a.

In 2011, unsecured creditors acting in their own capacities sought to bring state-law claims to avoid the same transfers under a theory of constructive fraud. Pet. App. 12a-13a. Under 11 U.S.C. 362(a), creditor actions to recover debts owed by the bankrupt entity are generally stayed during the pendency of the bankruptcy case, but the creditors asked the bankruptcy court to lift the stay to permit them to pursue their state-law claims. Pet. App. 13a. The court temporarily lifted the stay to allow the creditors to file complaints. *Ibid.* When the court ultimately confirmed Tribune's reorganization plan, it included a provision that allowed the creditors to pursue state-law constructive fraudulent-transfer claims related to the leveraged buy-out. *Id.* at 14a. That permission did not extend to intentional-fraud claims, which had been pursued by the Committee acting as trustee and which would be advanced post-bankruptcy by the Litigation Trust taking the place of the Committee. *Ibid.*

b. In courts around the country, petitioners filed state-law constructive fraudulent-transfer actions against Tribune's former shareholders, including respondents. Pet. App. 12a. Those actions were consolidated with the Litigation Trust's ongoing intentional-fraud claims in a multi-district litigation proceeding in the United States District Court for the Southern District of New York. *Id.* at 14a. Respondents moved to dismiss petitioners' constructive-fraud claims, arguing that petitioners lacked statutory standing and that their claims were preempted by Section 546(e). *Id*. at 15a. The district court accepted respondents' statutory-standing argument but rejected the preemption claim. *Ibid*.

The court of appeals affirmed on alternative grounds, holding that Section 546(e) preempted petitioners' claims. Pet. App. 75a-127a. The Second Circuit had previously construed Section 546(e) to apply whenever a bankruptcy trustee seeks to avoid a transfer made in connection with a securities contract, so long as the overall transaction involved an intermediate transfer to a "financial institution." *Official Comm. of Unsecured Creditors of Quebecor World (USA) Inc.* v. *American United Life Ins. Co.* (*In re Quebecor World* (USA) *Inc.*), 719 F.3d 94, 100 (2013), cert. denied, 571 U.S. 1197 (2014). Under *Quebecor*, Tribune's payments to its stockholders qualified for Section 546(e)'s safe harbor because the transfers had been made *through* Computershare, a "financial institution." See Pet. App. 84a, 118a. The court of appeals held that, if Section 546(e) would bar a trustee's suit to avoid a particular transfer, a creditor's state-law suit to avoid that transfer is preempted by federal law. *Id.* at 92a-127a.

c. In 2016, petitioners filed a petition for a writ of certiorari. See 139 S. Ct. 2050 (2019) (No. 16-317). While that petition was pending, this Court held that Section 546(e)'s safe harbor applies only when the overall transfer the trustee seeks to avoid is "made by or to (or for the benefit of)" a "financial institution" or other entity enumerated in Section 546(e). *Merit Mgmt. Grp., LP* v. *FTI Consulting, Inc.*, 138 S. Ct. 883, 892 (2018). By holding that Section 546(e) does "not protect transfers in which financial institutions served as mere conduits," *ibid.*, that decision abrogated prior rulings like the Second Circuit's decision in *Quebecor*, see *id.* at 892 n.6.

After *Merit Management* was decided, Justices Kennedy and Thomas issued a statement respecting the 2016 petition for a writ of certiorari in this case. Pet. App. 74a. The statement observed that the Court might lack a quorum and that consideration of the petition would be deferred to allow the court of appeals "to consider whether to recall the mandate" in light of *Merit Management*. *Ibid.*

d. The court of appeals recalled the mandate and issued an amended opinion that once again affirmed the district court's dismissal of petitioners' claims. Pet. App. 1a-68a.

The court of appeals first held that, despite *Merit Management*, Tribune's payments to stockholders were covered by Section 546(e) because Tribune itself was a "financial institution" during the leveraged buyout. The Bankruptcy Code defines the term "financial institution" to include the "customer" of a bank (or similar entity) that "is acting as agent or custodian" for the "customer" "in connection with a securities contract." 11 U.S.C. 101(22)(A); see *Merit Mgmt.*, 138 S. Ct. at 890 n.2 (discussing Section 101(22)(A)). The court of appeals explained that, to effectuate the leveraged buyout, Tribune had used Computershare (a "financial institution") as its "Depositary." Pet. App. 25a-31a. The court concluded that, "in connection with" the leveraged buyout, Tribune therefore was Computershare's "customer" and Computershare was Tribune's "agent," so that Tribune's payments to stockholders fell within Section 546(e)'s safe harbor. *Id.* at 26a-30a.

The court of appeals then reiterated its prior holding that, in circumstances where Section 546(e) would prohibit the trustee from avoiding a particular transfer, the Bankruptcy Code preempts state-law suits by creditors seeking to avoid the same transfer. Pet. App. 31a-32a. Applying principles of "conflict" preemption, the court first suggested that allowing creditors to pursue *any* state-law avoidance claims after a bankruptcy petition has been filed could thwart the congressional purposes embodied in 11 U.S.C. 544. Pet. App. 31a, 36a-51a. The court ultimately found it unnecessary, however, to decide whether every state-law avoidance action is preempted. *Id.* at 51a. Instead, it relied on a narrower perceived conflict between petitioners' claims and the objectives of Section 546(e). *Id.* at 52a-61a. The court believed that Congress had enacted Section 546(e) to eliminate uncertainty in the securities markets by ensuring that certain securities transactions may not be unwound even if a party to the transaction becomes insolvent. *Id.* at 52a. The court concluded that allowing petitioners' state-law avoidance actions to go forward would undermine that congressional purpose because petitioners seek to unwind the very transfers that Section 546(e) protects. *Id.* at 52a-61a.

DISCUSSION

The court of appeals erred in finding that creditors' state-law avoidance actions are preempted by Section 546(e). The court's interpretation of the Bankruptcy Code's definition of "financial institution" is also questionable. Neither of those issues, however, warrants the Court's review at this time. Neither of the questions presented is the subject of a circuit conflict, and this Court considered a related question regarding Section 546(e) just three Terms ago. See *Merit Mgmt. Grp., LP* v. *FTI Consulting, Inc.*, 138 S. Ct. 883 (2018). Even if the Court's review of one or both of these issues ultimately becomes necessary, that review would likely benefit from additional analysis of the questions by other courts of appeals.

Petitioners urge this Court to grant certiorari to address whether a presumption against preemption applies when a Bankruptcy Code provision is asserted to preempt state law. This Court does not generally grant review, however, to consider that sort of abstract question regarding proper interpretive methodology. In any event, the alleged conflict is illusory because the court below did not treat the presumption against preemption as categorically inapplicable to bankruptcy suits involving creditor rights. The petition for a writ of certiorari should be denied.

I. ALTHOUGH THE COURT OF APPEALS ERRED IN HOLDING THAT PETITIONERS' CLAIMS ARE PREEMPTED, THAT HOLDING DOES NOT WARRANT THIS COURT'S REVIEW

A. The Bankruptcy Code Does Not Preempt Petitioners' State-Law Avoidance Claims

The "purpose of Congress is the ultimate touchstone in every pre-emption case." *Hughes* v. *Talen Energy Mktg., LLC*, 136 S. Ct. 1288, 1297 (2016) (citation omitted). Courts therefore begin by "focus[ing] on the plain wording" of the statute, "which necessarily contains the best evidence of Congress' preemptive intent." *Chamber of Commerce of the U.S.* v. *Whiting*, 563 U.S. 582, 594 (2011) (citation omitted).

1. The text of Section 546(e) does not express an intent to preempt state-law avoidance claims brought by creditors. The provision states that "the trustee may not avoid" certain transfers "made * * * in connection with a securities contract," 11 U.S.C. 546(e), but it does not address creditor suits. When a Bankruptcy Code provision refers specifically to "the trustee," that provision applies only to the trustee (or the debtor in possession, who has the rights and powers of a trustee, see 11 U.S.C. 1107) and not to other parties. *Hartford Underwriters Ins. Co.* v. *Union Planters Bank, N. A.*, 530 U.S. 1, 6-7 & n.3 (2000).[1]

The absence of express preemptive language in Section 546(e) is particularly significant when that provision is contrasted with Section 544(b)(2) of the Code.

[1] In *Hartford Underwriters*, the Court declined to consider whether a bankruptcy court may allow an interested party "to act in the trustee's stead in pursuing recovery under § 506(c)," observing that the propriety of such "derivative" actions was not before it. 530 U.S. at 13 n.5.

That provision states that a trustee may not avoid certain transfers that qualify as charitable contributions. 11 U.S.C. 544(b)(2). Section 544(b)(2) further provides that "[a]ny claim by any person to recover a transferred contribution * * * shall be preempted by the commencement of the case." *Ibid.* The absence of similar language in Section 546(e) reinforces the conclusion that Section 546(e) does not preempt claims brought by creditors.

2. The court of appeals held that petitioners' claims were impliedly preempted. Pet. App. 31a & n.13. A federal statute may impliedly preempt state law that "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Arizona* v. *United States*, 567 U.S. 387, 399 (2012) (citation omitted). The court below concluded that permitting petitioners' state-law avoidance claims to go forward would thwart Congress's intent, both (a) by impeding the trustee's exercise of her own avoidance powers and (b) by potentially unwinding securities transactions that Section 546(e) is intended to protect. Pet. App. 36a-61a. Both rationales for implied preemption are incorrect.

a. The court of appeals suggested that petitioners' state-law avoidance claims could not go forward because Congress "vest[ed] avoidance powers in the trustee" in order to "simplify proceedings, reduce the costs of marshalling the debtor's assets, and assure an equitable distribution among the creditors." Pet. App. 42a-43a. The trustee's avoidance powers encompass certain transfers that are "voidable under applicable law by a creditor holding an unsecured claim." 11 U.S.C. 544(b)(1). The court inferred that, once a bankruptcy petition has been filed, permitting creditors to pursue state-law avoidance claims would undermine the congressional judgments reflected in Section 544 by allowing individual creditors to seek assets that the trustee might wish to recover for the estate. Pet. App. 43a-44a.

The court of appeals was correct that unrestricted creditor suits, including avoidance actions, could threaten the orderly disposition of a bankruptcy case. That danger is properly addressed, however, not through principles of implied preemption, but through 11 U.S.C. 362(a), the Bankruptcy Code's "automatic stay" provision. Section 362(a) provides a more tailored mechanism to ensure that creditor suits, including avoidance actions, do not impede the trustee's efforts.

i. Section 544 grants the trustee certain avoidance powers, including the power to "avoid any transfer * * * that is voidable under applicable law by a creditor holding [certain] unsecured claim[s]." 11 U.S.C. 544(b)(1). The court of appeals construed that language to vest "creditors' avoidance claims * * * in the federally appointed trustee." Pet. App. 35a-36a. That reading is unsound. Under Section 544(b)(1), the trustee's ability to avoid a particular transfer turns in part on whether a creditor could obtain that relief under state law. But nothing in the statutory text indicates that Congress intended permanently to divest creditors of their own state-law causes of action.

Relying on this Court's decision in *Hartford Underwriters*, 530 U.S. at 6-7, respondents assert (Br. in Opp. 23) that, when a Bankruptcy Code provision grants a right to the trustee, it necessarily precludes other parties from exercising the same right. But in *Hartford Underwriters*, it was undisputed that the only source of the right in question (the right to collect certain administrative expenses associated with the bankruptcy estate) was the Bankruptcy Code provision that gave that authority to the trustee. 530 U.S. at 5. The Court concluded that, because the relevant Code provision granted that power only to the trustee, other parties could not assert it. *Id.* at 6-7. That holding does not suggest that Section 544(b)(1) *strips* creditors of avoidance claims that state law independently authorizes them to pursue.

ii. The court of appeals was correct that, if the Bankruptcy Code placed *no* restrictions on creditors' ability to pursue state-law avoidance claims after a bankruptcy case has been commenced, creditors' litigation of those claims could undermine the trustee's ability to consolidate the estate and equitably distribute assets. The court was wrong, however, in fashioning an atextual preemption rule to prevent that result. A separate Bankruptcy Code provision, Section 362(a), is specifically designed to prevent parallel creditor suits from impeding the trustee's efforts.

Section 362(a) imposes "an automatic stay on efforts to collect prepetition debts outside the bankruptcy forum." *City of Chicago* v. *Fulton*, 141 S. Ct. 585, 589 (2021). Section 362(a) enumerates several actions that are stayed by the filing of a bankruptcy petition. Those include a "judicial * * * action or proceeding against the debtor * * * or to recover a claim against the debtor that arose before the commencement of the [bankruptcy] case," 11 U.S.C. 362(a)(1), as well as "any act to * * * recover" such a claim against the debtor, 11 U.S.C. 362(a)(6). A state-law avoidance suit is a judicial action in which a creditor who has a "claim against the debtor" attempts to "recover" that claim by clawing back assets that the debtor previously transferred to a third party. *Ibid.* Such suits therefore are stayed by Section 362(a)(1) and (6). *FDIC* v. *Hirsch* (*In re Colonial Realty Co.*), 980 F.2d 125, 131-132 (2d Cir. 1992).

The court of appeals expressed doubt about that conclusion, suggesting that the text of Section 362(a) "does not literally apply to" petitioners' current suits because the automatic stay "applies only to actions against 'the debtor.'" Pet. App. 41a, 50a (citation omitted). That textual parsing ignores that the stay applies not only to *suits* "against the debtor," 11 U.S.C. 362(a)(1), but also to lawsuits or other acts to "recover a *claim* against the debtor," 11 U.S.C. 362(a)(1) and (6) (emphasis added). By including both phrases, Congress made the stay applicable to creditor suits like the ones at issue here, which were filed against third parties but are premised on petitioners' claims against the debtor in the bankruptcy proceedings (Tribune), and in which any recovery will be limited to the value of the creditors' claim against the debtor. See *In re Colonial Realty Co.*, 980 F.2d at 131-132.

The automatic-stay provision addresses the potential conflict between creditor and trustee suits through a nuanced mechanism that makes it unnecessary to apply the blunt instrument of preemption. If, as the court of appeals suggested, the Bankruptcy Code broadly preempts state-law avoidance actions once a bankruptcy petition has been filed, then creditors will be deprived of their rights—and state law will be overridden—even when a particular state-law avoidance action would not interfere with the administration of the relevant bankruptcy estate. By contrast, the automatic stay offers a means of balancing the need to ensure that the trustee can perform her tasks against the rights of the creditors and the sovereign interests of the States in vindicating their own laws. Bankruptcy courts are authorized to lift the automatic stay to permit particular state-court actions to go forward, 11 U.S.C. 362(d), and such courts are generally well-equipped to determine whether particular state-law claims would interfere with the administration of a particular bankruptcy case. And unlike preemption rulings, rulings on lift-stay requests are immediately appealable as of right, whether the court grants or denies relief from the automatic stay. See *Ritzen Grp., Inc.* v. *Jackson Masonry, LLC*, 140 S. Ct. 582, 586 (2020).[2]

b. The court of appeals also erred in holding that permitting petitioners' claims to go forward would create an "irreconcilable conflict with the purposes of Section 546(e)." Pet. App. 61a. In the court's view, Section 546(e) reflects a broad congressional purpose to prevent uncertainty in the securities markets by ensuring that certain transactions cannot be unwound. *Id.* at 52a-53a. The court believed that this broad purpose would be thwarted by any creditor suit that seeks to avoid a transaction encompassed by Section 546(e). But the text of Section 546(e) suggests that Congress had a more modest intent to prevent only "trustee" actions directed at the set of transfers the provision describes.

This Court in *Merit Management* rejected a similar effort to override Section 546(e)'s text based on assumptions about congressional purpose. 138 S. Ct. at 897. In

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[2] In the circumstances of this case, the bankruptcy court might have declined to lift the automatic stay because of the potential for unwarranted overlap between petitioners' state-law constructive fraudulent-transfer claims and the Committee's and Litigation Trust's Section 548(a)(1)(A) intentional fraudulent-transfer claims. But respondents did not appeal the lift-stay orders. See Pet. App. 21a.

Merit Management, petitioners asserted that the Court should interpret Section 546(e) to bar transactions made *through* a financial institution, even though the text of the provision covers only "transactions 'made by or to (or for the benefit of)' covered entities." *Ibid.* The *Merit Management* petitioners argued that the provision's "broad language * * * shows that Congress took a 'comprehensive approach to securities and commodities transactions.'" *Id.* at 896 (citation omitted). But the Court rebuffed the attempt to rely on a "perceived purpose" that was "contradicted by the plain language of the safe harbor." *Id.* at 897.

Other limits on Section 546(e)'s coverage reinforce the conclusion that Congress did not intend to preclude every avoidance action that might introduce uncertainty into securities markets. First, the underlying avoidance powers of the trustee do not come into being, and Section 546(e)'s limitation on those powers therefore has no operative effect, until a bankruptcy case is commenced. See, *e.g.*, 11 U.S.C. 544(a)(1). Section 546(e) therefore leaves States free to prioritize the interests of creditors over the stability of securities markets unless and until a bankruptcy petition is filed. Second, Section 546(e) applies only to transfers "by or to (or for the benefit of)" specific types of entities, including "financial institution[s]." Congress thus insulated from trustee avoidance actions only a subset of transfers made "in connection with a securities contract," reflecting some tolerance for the unwinding of securities transactions. *Merit Mgmt.*, 138 S. Ct. at 894 (citation omitted). Finally, Section 546(e) does not apply even to that subset of transfers so long as the trustee pursues them under an intentional-fraud theory because Section 546(e)'s safe harbor specifically excludes avoidance claims brought "under section 548(a)(1)(A) of this title." 11 U.S.C. 546(e); see 11 U.S.C. 548(a)(1)(A) (authorizing the trustee to avoid any transfer made "with actual intent to hinder, delay, or defraud any entity to which the debtor was * * * indebted").

There is nothing anomalous about Congress's decision to limit the authority of bankruptcy trustees exercising power under federal law, without imposing an analogous limit on private plaintiffs pursuing state-law remedies. Unlike federal claims brought by a trustee, suits by private parties implicate the interests of state governments in determining what avoidance remedies should be available to creditors under state law. Respect for that state prerogative may explain Congress's decision to impose on trustee avoidance suits a limitation that it did not impose on private actions brought under state law. That is particularly so because the Bankruptcy Code contains an alternative mechanism, the automatic-stay provision, that is designed to prevent state-law creditor suits from impeding the trustee's administration of the bankruptcy estate. See pp. 11-13, *supra*.

B. This Court's Review Of The Preemption Questions Is Not Warranted

Although the court of appeals erred in holding that petitioners' state-law fraudulent-transfer claims are impliedly preempted, this Court's review is not warranted at this time.

1. Petitioners do not contend that any other circuit has reached a different conclusion regarding Section 546(e)'s preemptive effect on creditors' state-law fraudulent-transfer claims. The absence of a circuit conflict suggests both that the Court's eventual review of this issue would benefit from further analysis by

other courts of appeals, and that the preemption question may not frequently arise. When a debtor confirms a bankruptcy plan, "except as otherwise provided in the plan" and subject to certain statutory carve-outs, "the property dealt with by the plan is free and clear of all claims and interests of creditors," 11 U.S.C. 1141(c), and the plan typically "discharges the debtor from any debt that arose before the date of such confirmation," 11 U.S.C. 1141(d)(1)(A). Accordingly, the preemption question will generally arise only in cases where (as here) a bankruptcy court has granted a motion to lift the automatic stay to permit a creditor to pursue an avoidance action before the bankruptcy plan is confirmed, or the plan specifically permits the creditor to pursue such an action. It is not clear how often such situations arise, and this Court need not weigh in before additional circuits have addressed the issue.

Petitioners observe (Pet. 30) that there is some disagreement between the decision below and decisions of a Delaware district court and a Delaware bankruptcy court. Such a conflict does not generally provide a sufficient basis for this Court's review. See Sup. Ct. R. 10(a). In any event, petitioners overstate the depth of the disagreement. While both of the Delaware courts properly declined to treat Section 546(e) as a bar to creditor claims, only the bankruptcy court analyzed the issue as a preemption question; the district court rested its decision on the fact that a creditor is not literally "the trustee" described in Section 546(e). See *PHP Liquidating, LLC* v. *Robbins*, 291 B.R. 603, 607 (Bankr. D. Del. 2003); *PAH Litig. Trust* v. *Water St. Healthcare Partners L.P.* (*In re Physiotherapy Holdings, Inc.*), No. 13-12965, 2016 WL 3611831, at *5-*10 (Bankr. D. Del. June 20, 2016).

Contrary to petitioners' contention (Pet. 23-27), the decision below does not conflict with *Merit Management*. To be sure, like this Court in *Merit Management*, the court below considered the extent to which Congress's purposes in enacting Section 546(e) bore on that provision's operative legal effect. See pp. 13-14, *supra*. But *Merit Management* did not present any preemption question, and the Court did not address Section 546(e)'s potential effect on suits brought by creditors. And because the Court issued that decision just three Terms ago, the lower courts have had little opportunity to assess its potential implications for controversies like this one.

2. Petitioners contend (Pet. 16-22) that this Court should grant review to decide whether and to what extent a presumption against preemption applies to disputes involving potential Bankruptcy Code preemption of state-law creditor claims. Petitioners argue (*ibid.*) that the Second Circuit's analysis of that interpretive issue conflicts with decisions of four other courts of appeals. That purported conflict provides no sound basis for this Court's review.

It is not clear that the Second Circuit has rejected the application of the presumption in the manner petitioners suggest. Petitioners' understanding of the decision below is based on the court's statement that "the Bankruptcy Code constitutes a *wholesale preemption* of state laws regarding creditors' rights." Pet. 17 (quoting Pet. App. 34a). That statement unquestionably overstates the preemptive force of the Bankruptcy Code. Later in the decision, however, the court appears to have retreated from its absolutist view, asserting that its "bottom line is that the issue before [it] is one of inferring congressional intent from the Code, without significant countervailing pressures of state law concerns," because "the present matter" does not implicate a "measurable concern about federal intrusion into traditional state domains." Pet. App. 36a. That statement unduly minimizes the "federal intrusion into traditional state domains" (*ibid.*) effected by the decision below, which prevents creditors like petitioners from invoking avoidance remedies that States have chosen to provide. But the Second Circuit's articulation of the applicable preemption standard does not appear to conflict with the holding of any other court of appeals.

In any event, abstract differences in the formulation or application of a presumption against preemption would not ordinarily justify plenary review in the absence of a split in authority on the preemptive force of a particular federal law. This Court has generally discussed the circumstances under which a presumption against preemption applies—much as it has discussed and clarified other principles of statutory construction—in the course of resolving particular statutory ambiguities that independently warranted the Court's resolution. When courts of appeals have disagreed about the preemptive force of a particular federal statute, that disagreement may provide an occasion for clarifying the relevant presumption in a concrete statutory context in which courts have come to differing conclusions. But any difference between the formulation of the presumption in one setting and its articulation in a discrete statutory context does not warrant the Court's review.

Finally, this case would be a poor vehicle for clarifying the proper formulation and application of the presumption against preemption because that presumption is not outcome-determinative here. Even without a thumb on the scale, Section 546(e) is best read not to bar petitioners' state-law avoidance claims. See pp. 8-15, *supra.*

II. THE SECOND CIRCUIT'S INTERPRETATION OF THE TERM "FINANCIAL INSTITUTION" IN THE BANKRUPTCY CODE DOES NOT WARRANT THIS COURT'S REVIEW

1. a. Section 546(e) covers transfers by or from a "financial institution" made "in connection with a securities contract." 11 U.S.C. 546(e). Section 101(22)(A) defines the term "financial institution" to include both a bank (or similar entity) *and* a "customer" of such an entity if the entity is "acting as agent or custodian" for the customer "in connection with a securities contract." 11 U.S.C. 101(22)(A); see Pet. App. 23a-24a.

In the decision below, the Second Circuit held that Section 546(e) encompassed the transfers between Tribune and its stockholders because a financial institution, Computershare, served as Tribune's "Depositary" in the transaction. Pet. App. 24a. The court held that, by hiring Computershare as its depositary, Tribune became Computershare's "customer" and Computershare became Tribune's "agent" "in connection with" the leveraged buyout, so that Tribune itself acted as a "'financial institution.'" *Id.* at 24a-29a. The court suggested that a transfer may qualify for Section 546(e)'s protections so long as one of the parties has retained a financial institution to "effectuat[e]" some facet of the transaction, even if the financial institution's role is merely to "accept[] the funds" of its customer and to use those funds to make payments on the customer's behalf. *Id.* at 28a.

That understanding of Section 101(22)(A) would render *Merit Management* a virtual nullity. The *Merit*

Management Court rejected prior lower-court decisions holding that Section 546(e) encompasses transfers made "'through'" enumerated entities that are acting as "intermediar[ies]." 138 S. Ct. at 895-897. The Court held that Section 546(e) did not cover the transfer at issue in that case (between a harness racing company and one of its shareholders), even though two "'financial institution[s]'"—Credit Suisse, as a financer, and Citizens Bank, as a third-party escrow agent—were involved in the transaction. *Id.* at 891-892. Under the court of appeals' view, however, the *Merit Management* transaction likely fell within Section 546(e) because at least one party to the transfer was a customer of Credit Suisse or Citizens Bank, and those financial institutions were retained to effectuate certain aspects of the transaction.

As the court below observed, this Court in *Merit Management* expressly declined to address the potential implications of Section 101(22)(A)'s definition of the term "financial institution." Pet. App. 24a n.9 (quoting *Merit Mgmt.*, 138 S. Ct. at 890 n.2). But the court of appeals' approach would largely negate the precisely crafted limits that Congress placed in Section 546(e). By its terms, the safe harbor for transfers in connection with securities contracts applies only to transfers "*made by or to (or for the benefit of)* a commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities clearing agency." 11 U.S.C. 546(e) (emphasis added). Yet under the court of appeals' interpretation, the safe harbor will apply to virtually every transfer made in connection with a securities contract, since some party to almost every such transfer will rely on a "'financial institution'" to help "effectuat[e]" the transaction. Pet. App.

28a. As this case illustrates, financial institutions are routinely used to facilitate large securities transactions; but even an individual stock purchaser is likely to rely on her bank to carry out some aspect of a securities transaction, *e.g.*, by executing a wire transfer or making payment on a check. That potential effect on the practical scope of Section 546(e)'s coverage bears on the proper understanding of Section 101(22)(A).

b. The court of appeals largely ignored these consequences of its ruling. Accordingly, the court did not consider whether there might be a better way to harmonize the definition of "financial institution" with the limits that Congress sought to place on Section 546(e)'s coverage. For example, the court did not consider whether, in order to qualify as a "financial institution," a party to the transfer must make a bank (or similar entity) its agent for significant aspects of the overall transaction, rather than obtaining from the bank mere ministerial assistance related to some facets of the transaction. The court likewise did not consider whether some limiting construction of the term "customer" or "agent" in Section 101(22)(A) might be adopted to better harmonize that provision with Section 546(e).

No other circuit has addressed whether, or under what circumstances, a party may qualify as a "financial institution" for purposes of Section 546(e) simply by retaining a bank (or similar entity) to help effectuate a securities transaction. Indeed, before *Merit Management*, *no* court had considered this possibility, and the recency of that decision means that few courts have had the chance to do so since. Even if this Court's review is ultimately needed to clarify the meaning of Section 101(22)(A), and thus the scope of Section 546(e)'s safe harbor, the Court would likely benefit from prior consideration of the issue by additional courts of appeals.

2. For two reasons, this case would be a poor vehicle for clarification of Section 101(22)(A).

First, *Merit Management* was decided during the pendency of this case, and before that decision, no court had even considered the possibility that an entity like Tribune might itself qualify as a "financial institution" for purposes of Section 546(e). Accordingly, the parties did not address the issue during the district court proceedings here, and that court had no opportunity to perform any relevant fact-finding. The court of appeals dismissed that difficulty by asserting that none of the material facts are in dispute. Pet. App. 18a n.5. But petitioners vehemently contest that assertion (see, *e.g.*, Pet. 12-13 & n.2), and the uncertainty regarding the facts—as well as the absence of record development in the district court—would likely hamper this Court's review.

Second, in the wake of *Merit Management*, the Litigation Trust, which is the successor in interest to the Committee that had been acting as trustee, has attempted to amend its own complaint to add claims for constructive fraudulent transfer. 2019 WL 1771786, at *3. The Trust argues that the Committee did not originally pursue those claims because pre-*Merit Management* circuit precedent foreclosed that possibility. *Id.* at *5-*6. It therefore asserts that, in the wake of *Merit Management*, it should be permitted to pursue the constructive fraudulent-transfer claims. *Id.* at *4-*12. The district court rejected that assertion, *id.* at *6-*12, but the issue is now on appeal, C.A. Docket 19-3049 (argued

Aug. 24, 2020). The presence of that parallel suit produces an additional complication that will not be present in future cases.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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