13-3992cv(L)

13-3875 (XAP), 13-4178 (XAP), 13-4196 (XAP)

In the United States Court of Appeals for the Second Circuit

IN RE: TRIBUNE COMPANY FRAUDULENT CONVEYANCE LITIGATION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

RESPONSE AND REPLY BRIEF OF PLAINTIFFS-APPELLANTS-CROSS-APPELLEES

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INTRODUCTION AND SUMMARY OF ARGUMENT

Defendants' arguments rest, at bottom, on a fundamental misconception of this Court's role. This Court does not lightly add to federal statutes language that Congress has not enacted. It does not lightly ignore language that Congress *has* enacted. And it certainly does not—lightly or otherwise—rewrite state statutes so that they conform to Defendants' policy preferences.

I. Defendants' "standing" and "reverter" arguments ask this Court to add language to the Bankruptcy Code that just isn't there. Once the automatic stay under Section 362 was lifted (with the consent of the Tribune estate), and later expired under both the Code and Tribune's plan of reorganization, no provision of the Bankruptcy Code conferred an "exclusive" right on the Litigation Trustee to prosecute Plaintiffs' state-law claims. Nor are those state-law claims "property of the estate" that must, therefore, "revert" before they may be pursued by creditors. Defendants' contrary arguments have no grounding in the text of the Bankruptcy Code or in case law.

II. Defendants' preemption argument asks the Court to ignore statutory language—the word "trustee"—on the premise that Congress really meant "trustee and everyone else." But Defendants come nowhere close to overcoming the strong presumption against preemption of traditional state-law concerns. To the contrary, the text, history, and purpose of Section 546(e) and its surrounding provisions confirm that Congress understood—and accepted—that individual creditors could challenge fraudulent "settlement payments" under applicable state law, even when bankruptcy trustees could not do so under their Code-based federal powers.

III. Finally, Defendants' state-law brief asks this Court, in the name of some "brooding omnipresence in the sky," *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting), to revamp the creditors'-rights laws of fifty States so that they effectively mimic the text of Section 546(e), including Defendants' atextual gloss on the word "trustee." Doing so is not this Court's job.

ARGUMENT

I. TRIBUNE'S BANKRUPTCY TEMPORARILY STAYED—BUT DID NOT PERMANENTLY DIVEST—PLAINTIFFS' STATE-LAW CLAIMS

A. Defendants Do Not Defend The District Court's Actual Rationale

The district court dismissed Plaintiffs' claims for a single reason: It believed that "Section 362(a)(1) stays fraudulent conveyance claims by creditors *for as long as the trustee is exercising its avoidance powers*" (SA-012) (emphasis added)—which is to say, *even after the automatic stay has been lifted or expired*. Defendants do not defend that holding; indeed, they disclaim it. *See* Doc. 145 ("Joint Br.") at 30 n.18; *see also id*. at 18. And correctly so: As we explained in our Principal Brief (Doc. 114 at 33-44), Section 362 cannot foreclose creditors from bringing suit *after* the automatic stay has been lifted, let alone after it has expired as a matter of law.[1]

B. There Is No Basis In The Bankruptcy Code For Defendants' "Standing" Argument—That The Litigation Trustee's Action Somehow Forecloses Plaintiffs From Pursuing Their Separate State-Law Claims

Although they disavow the district court's reasoning, Defendants embrace its conclusion: that the Litigation Trustee's federal-law intentional fraudulent conveyance claims under Section 548(a)(1)(A) foreclose Plaintiffs' state-law constructive fraudulent conveyance claims. Indeed, Defendants go further. According to Defendants, the moment a trustee takes steps to avoid some number of fraudulent transfers to some number of defendants under any cause of action, all individual creditors are *permanently* barred from seeking to avoid any of those transfers, in any court, at any time, under any analogous cause of action (even those with different elements). Joint Br. 21-26. This is an audacious assertion, tantamount to a sort of "super-preemption" of creditors' centuries-old rights under state law. *See infra* Part II.A. It would require the deepest and clearest grounding

[1] Some of the arguments in our Principal Brief were directed only to the district court's rationale, which Defendants now don't defend. For example, we argued that dismissing Plaintiffs' claims on the basis of the automatic stay would be an impermissible collateral attack because no one objected when the stay was lifted during the pendency of the bankruptcy or terminated upon confirmation of the Plan. Principal Br. 53-59. Although Defendants argue at length that the Plan does not foreclose them from raising the *other* arguments they make here (Joint Br. 32-36), we never said it did. Those arguments aren't collateral attacks but fail on their own merits. *See infra* Parts I.B and I.C.

in the text of the Bankruptcy Code. And yet there is none: not one word. If, as Defendants now concede, the automatic stay under Section 362 is inapplicable, this preemptive argument they call "standing" lacks any basis at all in the text of the Code.

1. The Bankruptcy Code Does Not Give The Trustee A Perpetual "Exclusive Right" To Avoid Fraudulent Transfers

Defendants contend that Plaintiffs' state-law claims must be dismissed because, upon the filing of a petition, "the relevant Bankruptcy Code sections giv[e] the trustee *the exclusive right* to avoid and recover a 'transfer.'" Joint Br. 25 (emphasis added). But none of the Code provisions Defendants cite for that proposition—Sections 544(a), 544(b)(1), 547(b), 548(a)(1) and 550(a)—says anything like that. By their plain language, those sections give the trustee merely *a* right to bring various types of avoidance actions. They do not convey *"the exclusive right*," let alone an exclusive right *in perpetuity*.

As Defendants note (Joint Br. 20), this Court has sometimes described Section 544 as "allow[ing] the trustee to step into the shoes of a creditor under state law." *Universal Church v. Geltzer*, 463 F.3d 218, 222 n.1 (2d Cir. 2006). But this Court has never held—and the statute does not say—that a trustee permanently displaces creditors when it metaphorically "steps into their shoes." To the contrary, Section 544(b) creates a federal cause of action that "merely gives the trustee the status of a creditor under state law," so that the trustee can challenge transfers that are voidable by creditors under state laws. *Bakst v. Probst (In re Amelung)*, 436 B.R. 806, 809 (Bankr. D.S.C. 2010).[2] The section leaves actual creditors and their state-law claims untouched.[3] *See infra* Part I.C.

To be sure, as we have acknowledged, so long as the trustee's statute of limitations has not run, "the trustee has the exclusive right to bring an action for fraudulent conveyance *during the pendency of the bankruptcy proceedings*." Principal Br. 45 (emphasis added and quotation marks omitted). But that "exclusivity" is simply the consequence of Section 362's automatic stay. *See FDIC v. Hirsch (In re Colonial Realty Co.)*, 980 F.2d 125, 133-35 (2d Cir. 1992); *see also Klingman v. Levinson*, 114 F.3d 620, 629 (7th Cir. 1997) ("The filing of the bankruptcy petition did nothing to pretermit the fraudulent conveyance action; although it had the temporary effect of staying that action."); *In re Dreier* LLP, 429 B.R. 112, 133 (Bankr. S.D.N.Y. 2010) (it is the automatic stay that prevents individual creditors from "interfer[ing] with Trustees' ability to pursue recoveries for the benefit of all creditors"); *Goldin v. Primavera Familienstiftung (In re Granite Partners, L.P.)*, 194 B.R. 318, 325 (Bankr. S.D.N.Y. 1996) ("Where the trustee has standing to sue, the automatic stay prevents creditors or shareholders

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[2] Section 544(b) also gives trustees powers that are very different from those of any creditor under state law. *See infra* Part I.C.

[3] Invocation of Section 544(b) is, in any event, beside the point here as the Litigation Trustee didn't bring a claim under that section. The trustee is proceeding solely under Section 548(a)(1)(A).

from asserting the claim notwithstanding that outside of bankruptcy, they have the right to do so.”). In other words, so long as creditors are stayed under Section 362 from asserting their own state-law rights to avoid fraudulent transfers, the trustee’s rights under Sections 544, 547, 548, and 550 are functionally “exclusive.” But such exclusivity disappears when the stay is lifted or expires. Once that occurs, as it has here, no other Code section gives the trustee an “exclusive right” of avoidance or bars creditors from asserting their own claims under state law.

That point is confirmed by the very cases on which Defendants rely. For example, in *St. Paul Fire & Marine Ins. Co. v. PepsiCo, Inc.*, 884 F.2d 688, 702 (2d Cir. 1989), this Court enjoined a creditor from bringing tort claims against a third party during the pendency of the automatic stay because, it reasoned, those claims could still timely be asserted by the trustee. But this Court made clear that a trustee’s ability to press a claim on behalf of the estate does not permanently disable creditors from bringing such claims. To the contrary, such creditors simply needed to request “a grant of relief from the automatic stay . . . to press [their] claims outside of the bankruptcy proceedings.” *Ibid*. The time period in which “the trustee [is] the proper person to assert claims” lasts no longer than the period of the stay. *Id*. at 701 (citing H.R. Rep. No. 95-595, at 340 (1977) (legislative history of the automatic stay)); *see also* H.R. Rep. No. 95-595, at 341 (noting that the purpose of the stay is to provide “the trustee . . . an opportunity to familiarize himself with the various rights and interests involved and with the property available for distribution," and that, consistent with that purpose, "[t]he stay is not permanent"); *Lumbard v. Maglia, Inc.*, 621 F. Supp. 1529, 1541 (S.D.N.Y. 1985) ("Any issue of [creditor] standing . . . [is] resolved" when "the bankruptcy court has expressly modified the stay to permit the [creditor] to prosecute [his] claim.").

Indeed, Congress was explicit that, far from possessing an exclusive right in perpetuity, the trustee may bring separate, Code-based avoidance claims only for a limited period of time. Section 546(a) provides trustees two years to bring avoidance actions under the provisions on which Defendants rely. Once that window has closed, creditors (and only creditors) may pursue their own state-law fraudulent conveyance actions, just as they could before bankruptcy—subject, of course, to the automatic stay's being lifted or expiring. As we demonstrated in our Principal Brief (at 45), myriad cases are in accord. If Defendants are right that the Code makes a trustee's avoidance powers exclusive in perpetuity, however, *all* of these cases that permit creditors to act if the trustee has not acted—cases decided by multiple courts nationwide—were wrongly decided. And Defendants have articulated no cogent reason why Congress would deprive creditors of their state-law rights where a trustee does not timely file suit, thereby turning a bankruptcy case designed to *benefit* creditors into a free pass for fraudulent transfers made at creditors' expense.

Defendants insist that a trustee's ability to settle fraudulent conveyance claims makes sense only if the trustee enjoys, in perpetuity, exclusive authority to bring such claims. *See* Joint Br. 20, 44; *see also* Doc. 143 ("Reverter Br.") at 7-8. But that argument misapprehends *how* creditor claims are extinguished. The sections that Defendants invoke authorize a trustee to *assert* various causes of action; they do not, however, empower the trustee to bind creditors to the trustee's actions. To settle a claim during the pendency of the bankruptcy, a trustee must move under Fed. R. Bankr. P. 9019 ("Compromise"). As Defendants' own cases make clear, creditors may object to the trustee's proposed settlement. *See, e.g.*, *Haskell v. PWS Holding Corp. (In re PWS Holding Corp.)*, 303 F.3d 308, 315 (3d Cir. 2002); *In re Berg*, 376 B.R. 303, 306 (Bankr. D. Kan. 2007). And *the court*, not the trustee, then may bind individual creditors to the proposed settlement.

The court does so not by invoking the sections Defendants cite, but under Section 105, which empowers courts to preclude, by a permanent injunction, any later action by an individual creditor that would undermine the proposed settlement. Again, the very cases that Defendants cite make the necessity of court action clear. *See, e.g.*, *Marshall v. Picard* (*In re Bernard L. Madoff Inv. Sec. LLC)*, 740 F.3d 81, 86 (2d Cir. 2014) ("[T]he Trustee filed his motion for approval of the Settlement Agreement and for a permanent injunction pursuant to Rules 2002 and 9019 of the Bankruptcy Rules and section 105(a) of the Bankruptcy Code. . . .

[T]he Bankruptcy Court approved the Settlement Agreement, and issued the permanent injunction."); *Dreier*, 429 B.R. at 133 (explaining that the court has "jurisdiction to make the automatic stay permanent following the settlement of a fraudulent transfer claim" because, "[a]bsent that power, the Trustees will be hampered in their ability to pursue and ultimately settle fraudulent transfer claims from a transferee fearful of paying twice for the same transfer—once on the Trustees' claim and a second time on the [individual creditor's] claim").

But all of this is beside the point. Here, the Committee (exercising the powers of a trustee) did *not* settle any state-law fraudulent conveyance claims it might have brought under Section 544(b) regarding the transfers at issue, and no injunction was issued under Section 105. This case thus bears no material resemblance to *Madoff*, where the Court simply affirmed an injunction obtained by a trustee against creditors seeking to bring claims in contravention of the trustee's court-approved settlement agreement with pre-petition transferees. And this Court's observation that the creditors' "fraudulent transfer actions . . . belong exclusively to the Trustee," 740 F.3d at 94, must be viewed in context. As the Court made clear, the creditors had brought their claims "in violation of the Bankruptcy Code's automatic stay provision." *Id*. at 86. Not so here.

The other cases that Defendants cite contradict their own argument. In *In re Tessmer*, 329 B.R. 776, 779 (Bankr. M.D. Ga. 2005), the court acknowledged that creditors "regain the right to sue [if] the trustee abandons the claim or [if] he no longer has a viable cause of action because, for example, the statute of limitations has run" (quotation marks omitted).[4] In *Berg*, the court held that a trustee's "exclusive right" to settle a creditor's claim is not indefinite, but rather expires when the Trustee "no longer has a viable claim or the court orders the claim restored to a creditor." 376 B.R. at 311.

Both of those events took place in this case. Any intentional or constructive state-law fraudulent conveyance claim that the Committee might have brought under Section 544(b) expired on December 8, 2010 (two years after the filing of the bankruptcy petition). From that point on, it was *creditors*—including Plaintiffs—that had the exclusive right to bring their own state-law fraudulent conveyance actions. And, once the stay was lifted, and ultimately expired upon confirmation of the Plan, no provision of the Code foreclosed Plaintiffs from bringing their claims. As the district court recognized, the Code sections that Defendants invoke here do not bar the claims at issue. *See* SA-012-013.

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[4] The creditor in *Tessmer* was foreclosed from bringing suit only because she had agreed to a consent order "that *permanently enjoined* [her] from pursuing her state court action against the" allegedly fraudulent transferee. 329 B.R. at 778 (emphasis in original).

2. The Case Law Does Not Immunize Beneficiaries of Fraudulent Conveyances Against Simultaneous Actions By Plaintiffs And The Litigation Trustee

Because the text of the Bankruptcy Code offers them cold comfort, Defendants contend that "settled law" precludes Plaintiffs from bringing any claim that is "'similar in object and purpose to'" the claim now being brought by the Litigation Trustee—even if, as here, the Plaintiffs' claims are different from those pressed by the Trustee. Joint Br. 23-24 (quoting *Nat'l Am. Ins. Co. v. Ruppert Landscaping Co.*, 187 F.3d 439, 441 (4th Cir. 1999), and citing its progeny). *Ruppert* may well be correct: When creditors bring actions *within* the two-year period during which a trustee may act—and when they do so without court or trustee approval and without obtaining a lifting of the automatic stay—they may well be forbidden to bring any claim "similar in object and purpose" to the fraudulent conveyance actions the trustee is authorized to bring.

But reading *Ruppert* more broadly than that is mistaken. Indeed, every case that Defendants cite for a broader rule involved a creditor seeking to circumvent the automatic stay during the pendency of the bankruptcy and before confirmation of a plan. *See* Principal Br. 41-43. In some cases, that is evident from the opinion itself. *See, e.g., N. Trust Bank, FSB v. Wells Fargo Bank, N.A.*, 464 B.R. 269, 270 (E.D. Va. 2012) (trustee moves for judgment that creditor's suit "violate[d] the automatic bankruptcy stay"). In others, the centrality of the stay is evident from the cases on which the decision rests. *Ruppert*, for example, is grounded in cases that are themselves about the automatic stay. *See* 187 F.3d at 441 (relying on *Steyr-Daimler-Puch of Am. Corp. v. Pappas*, 852 F.2d 132, 136 (4th Cir. 1988), and *Litchfield Co. of S. Carolina Ltd. P'Ship v. Anchor Bank (In re Litchfield)*, 135 B.R. 797, 804 (W.D.N.C. 1992)).

By contrast, as detailed in our Principal Brief (at 14-19, 36-37), Plaintiffs here thrice requested that the bankruptcy court lift the automatic stay so that the claims now at issue could be filed. The bankruptcy court thrice granted those motions, each time lifting the stay to a greater degree, *precisely because* the stay was not needed to address the concerns underlying cases like *Ruppert* and its progeny. Indeed, in explaining its third order, the bankruptcy court stated that its "focus in continuing the stay [on the Plaintiffs' state-law actions] in any form was simply to hinder any activity that would interfere with the confirmation process here," and that it was "now convinced . . . the risk of that happening, looks . . . as of today, to be fairly minimal." A0516. No one appealed from that order. It would be perverse to dismiss Plaintiffs' claims based on a rule meant to vindicate a concern that is not present here.

Nor, as in *Ruppert*, have Plaintiffs "hijack[ed] the bankruptcy process." 187 F.3d at 442. To the contrary, the bankruptcy proceedings resulted in a confirmed Plan—which specifically preserved Plaintiffs' state-law claims. *See*

Principal Br. 20; A0816-0817. Far from an attempt to get more than their *pro rata* distribution at the expense of other creditors, *N. Trust Bank*, 464 B.R. at 270, the preservation of Plaintiffs' claims was a component of the confirmed Plan, which was endorsed by both Tribune and the Committee.

That the Plan preserved these claims subject to Plaintiffs' having "standing" to assert such claims is beside the point. What matters is that the Plan reflects the bankruptcy court's decision that preserving such claims for those individual creditors that wished to pursue them was fair and equitable *to other creditors*. Since the point of *Ruppert* and its progeny is to ensure that the bankruptcy court has an opportunity to make such decisions without worry that certain creditors will try to jump the line, the Plan obviates any *Ruppert* concerns here. *See Baron Financial Corp. v. Natanzon*, 509 F. Supp. 2d 501, 521, 522 (D. Md. 2007) ("It would be an affront to the Bankruptcy Court (as well as nonsensical)" for the district court to "declare [plaintiffs'] lack of standing in an effort to protect the interests of the bankruptcy estate.").

Defendants disparage as irrelevant the Litigation Trustee's support for Plaintiffs' claims. Joint Br. 28-29. Yet the very cases on which Defendants rely (*id.* at 24) appear to treat the trustee's objection as a reason to foreclose the creditor's action. *See, e.g.*, *N. Trust Bank*, 464 B.R. at 270; *In re Bridge Info. Sys., Inc.*, 325 B.R. 824, 835 (Bankr. E.D. Mo. 2005). But the legal validity of

Plaintiffs' claims does not ultimately require the support of the trustee: Plaintiffs have the right to bring avoidance actions under state law; the preservation of those rights was provided for in the Plan; and the confirmation of that Plan terminated the only barrier to assertion of those rights—the automatic stay.[5]

Defendants nevertheless assert that, even after the automatic stay has been lifted or expired, a creditor can exercise its state-law right to avoid a transfer *only* if the trustee chooses not to exercise *any* of its avoidance powers. There is no basis in the statutory text for that assertion. None. The point cannot be overstated.

Because *Ruppert* and its progeny were not always careful to identify the statutory text that supports their holdings, the district court commendably tried to do so. It found support for those cases in Section 362's automatic stay—which is correct *so long as the cases are construed to forbid no more than Section 362 forbids.* The district court went awry, however, when it extended *Ruppert* beyond the confines of the automatic stay. *See* SA-012 n.14. Defendants are wise not to defend that reasoning, but their effort to derive an identical rule from the penumbra of Sections 544, 547, 548, and 550 (Joint Br. 25) is just as infirm.

[5] A trustee's support for, or objection to, creditor suits might bear on a court's decision to lift a stay during the pendency of a bankruptcy case. But the bankruptcy court here found no tension between the Committee's claim and Plaintiffs' claims, and the entire issue became moot upon expiration of the stay at Plan confirmation.

Defendants also try to analogize their proposed rule to one expressly codified in Section 522(h). *See* Joint Br. 22-23. That section provides that a *debtor* can seek to avoid a transfer only if "the trustee does not attempt to avoid such transfer." But the analogy only confirms the flaw in Defendants' argument. Debtors have no right under state law to avoid their own fraudulent transfers. *See infra* Part I.C. To do so, therefore, a debtor requires a grant of power from the Code. Section 522(h) provides such a grant "to enable the debtor to protect his exemptions, in which a trustee might take no interest." *In re Towery*, 53 B.R. 76, 77 (Bankr. W.D. Ky. 1985). "In such cases," however, "the debtor acts not as an individual, but *as trustee*, with derivative powers which would be unavailable to him personally." *Ibid*. It is thus unexceptional that Section 522(h) precludes a debtor from exercising avoidance powers when a trustee has already brought suit; the premise of granting the debtor a limited right to act is that the trustee—whose rights the debtor would be asserting—has not done so in the first place.

Creditors, in contrast, *do* have the independent right to avoid fraudulent transfers under state laws, and such rights *are* "[ ]available to [them] personally." *Ibid*. *See* Principal Br. 31-33; *infra* Parts II.A and II.B. When creditors sue to avoid fraudulent transfers, they invoke causes of action created by state laws. They "do[ ] not invoke a right created by title 11," *Faulkner v. Eagle View Capital Mgmt. (In re Heritage Org., L.L.C.)*, 454 B.R. 353, 360 (Bankr. N.D. Tex. 2011), and so their exercise of that right is neither contingent on, nor derivative of, a trustee's failure to act. Defendants' analogy to Section 522(h) therefore assumes the very thing they must demonstrate: that some part of the Code (other than Section 362) forecloses creditors' state-law avoidance claims. No provision does so.

If anything, Section 522(h) demonstrates that, when Congress wants a party's avoidance claims to depend on whether the trustee has brought its own action, Congress says so. It did so with respect to debtors' fraudulent transfer claims arising solely under the Code, but not with respect to creditors' fraudulent transfer claims arising under state law, independently of the Code. And, "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (alteration and quotation marks omitted).

At bottom, Defendants' argument is that there is something impermissible about different plaintiffs with different lawsuits challenging the same transfers under the laws of different sovereigns. There isn't—particularly where, as here, Plaintiffs have confirmed the unavailability of a double recovery from Defendants. *See* Principal Br. 71-74. Plaintiffs have the right to bring suit under state law. It is

Defendants' burden to show that a provision of federal law forecloses Plaintiffs' ability to assert that right. They cannot do so.

Instead, Defendants make what amounts to a policy argument: It would be more efficient, they say, to allow the trustee to pursue claims without the distraction of individual creditors' claims. That may or may not be true; individual claims may advance, not diminish, the prospects that creditors as a whole will maximize their recovery. But the duty to balance policy preferences belongs to Congress, and Congress has struck that balance through specific statutory commands. During the pendency of a bankruptcy, Section 362's automatic stay provides the trustee with the exclusivity Defendants champion. And, when appropriate, Section 105 permits a court to issue an injunction that permanently bars creditors from bringing suit—even after a bankruptcy has concluded. But neither of those provisions applies here, and that is the end of the matter.

3. The District Court's Blanket Dismissal Of Plaintiffs' Claims Was Premature

The district court concluded that Plaintiffs lacked standing "[u]nless and until the Committee actually and completely abandons [its own] claims." SA-013-014. If that were true, the court should have, at most, held Plaintiffs' claims in abeyance while the Litigation Trustee prosecutes its intentional fraudulent conveyance claim. Principal Br. 74-76. The only reason we did not make such a request below (Joint Br. 37-38) is because, as Defendants acknowledge, the district court's holding that Section 362 applied here was not premised on any argument advanced by a party (*id.* at 30 n.18); it was introduced *sua sponte*. And, although Defendants now assert that holding Plaintiffs' claims in abeyance is impermissible because this case involves "standing" (*id.* at 37-38), the authorities they cite address plaintiffs who lack *Article III* standing. Whatever Defendants mean when they label their argument here as one involving "standing," it is undisputed that Plaintiffs have Article III standing. Defendants have never argued (and could never argue) otherwise.

C. State-Law Fraudulent Conveyance Claims Are Not Property Of The Bankruptcy Estate That Must "Revert" To Creditors

In their "Brief on Reverter," Defendants argue that creditors' individual state-law fraudulent conveyance claims become the property of the bankruptcy estate, and do not "revert" to creditors unless and until the bankruptcy case is dismissed. The district court rejected that argument, holding that "[a] fraudulent conveyance claim is not treated as property of the bankruptcy estate." SA-010-11. The district court was correct.

1. The Plain Text Of Section 541(a) Shows That State-Law Fraudulent Conveyance Claims Do Not Become Property Of The Estate

Defendants' "reverter" argument does not even *cite*—much less grapple with—the statutory definition of estate property set forth in 11 U.S.C. § 541(a). That definition dispositively forecloses their argument.

Section 541(a)(1) provides that the bankruptcy estate comprises "all legal or equitable interests *of the debtor* in property as of the commencement of the case." 11 U.S.C. § 541(a)(1) (emphasis added). A state-law fraudulent conveyance cause of action, however, is *not* property of the debtor, because "a transferor cannot set aside a disposition of assets on the ground that the disposition allegedly constituted a fraudulent transfer." *Eberhard v. Marcu*, 530 F.3d 122, 131 (2d Cir. 2008). Rather, "fraudulent transfer claims have long belonged to a transferor's *creditors*, whose efforts to collect their debts have essentially been thwarted as a consequence of the transferor's actions." *Cybergenics Corp. v. Chinery (In re Cybergenics Corp.)*, 226 F.3d 237, 241 (3d Cir. 2000). *See Tessmer*, 329 B.R. at 779 ("Debtor did not have a cause of action against herself or her parents for the alleged fraudulent conveyance. . . . Instead, she was a possible defendant in such an action.").

Thus, as the court explained in *In re Saunders*, "[t]he fraudulent transfer cause of action itself is not considered property of the estate since the avoidance of such a transfer is not a cause of action assertable by the debtor," as required under Section 541(a)(1). 101 B.R. 303, 305 (Bankr. N.D. Fla. 1989). As discussed below, this Court expressly adopted *Saunders*'s reasoning in *Colonial Realty*, 980 F.2d at 131-32. And this Court is not alone in doing so; other courts have similarly held that fraudulent conveyance causes of action do not become property of the bankruptcy estate, because such actions are not property of the debtor.[6]

The Fifth Circuit may have once disagreed. If still adhered to, however, the Fifth Circuit's view constitutes the minority position and has been rejected by this Court. *See* 5-548 COLLIER ON BANKRUPTCY ¶ 548.01 (16th ed. 2013) ("Early cases, especially from the Fifth Circuit, held that avoidance actions, even before judgment, are property of the estate. The consequence of this holding is that creditors' actions against nondebtor transferees—whether pending or prospective—are stayed. This position, however, has not drawn many adherents, and has been expressly rejected by the Second Circuit. . . . The later view is likely the better reading of the Bankruptcy Code.") (footnotes omitted).

Section 541(a)(1) therefore—by itself—forecloses Defendants' argument that fraudulent conveyance claims are property of the bankruptcy estate. But Defendants' argument is likewise refuted by Section 541(a)(3). That subsection provides that "[a]ny interest in property that the trustee recovers under section 329(b), 363(n), 543, 550, 553, or 723 of this title" constitutes property of the estate. Section 550, in turn, authorizes a trustee to recover fraudulently transferred

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[6] *See, e.g., Guttman v. Fabian (In re Fabian)*, 458 B.R. 235, 258 (Bankr. D. Md. 2011); *Moyer v. ABN Amro Mort. Group, Inc. (In re Feringa)*, 376 B.R. 614, 624 (Bankr. W.D. Mich. 2007); *Tessmer*, 329 B.R. at 779; *Barber v. Westbay (In re Integrated Agri, Inc.)*, 313 B.R. 419, 422 n.2 (Bankr. C.D. Ill. 2004); *Klingman v. Levinson*, 158 B.R. 109, 113 n.1 (N.D. Ill. 1993).

property for the benefit of the estate. Section 541(a)(3) therefore shows that fraudulently transferred property is not property of the estate unless and until it is recovered. *Colonial Realty*, 980 F.2d at 131.

But Section 541(a)(3) also makes clear that *only* the recovered property—and not the fraudulent conveyance claim itself—is property of the estate. Congress specifically addressed fraudulent conveyances in Section 541(a)(3). Congress went out of its way to provide "in a separate definitional subparagraph" (*Colonial Realty*, 980 F.2d at 131 (quotation marks omitted)) that the property recovered in such actions becomes estate property, but it *declined* to address fraudulent conveyance claims themselves. "Because section 541(a)(3) provides that proceeds of the avoiding power causes of action are property of the estate and there is no corresponding provision with respect to the causes of action themselves," the "correct" reading of Section 541(a) is that "fraudulent transfer claims arising out of a leveraged buyout [a]re not" property of the estate. 5-541 COLLIER ON BANKRUPTCY ¶ 541.07, n.1 (16th ed. 2013) (citing *Cybergenics*, 226 F.3d 237); *see also Feringa*, 376 B.R. at 624 ("notably absent from this universe [of estate property defined in Section 541(a)] is any avoidance action that the trustee might have").

"It is a cardinal principle of statutory construction," moreover, that a statute ought to be construed so that "no clause, sentence, or word shall be superfluous, void, or insignificant." *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (quotation marks omitted). Section 541(a)(6) provides that the "[p]roceeds, product, offspring, rents, or profits of or from property of the estate" are themselves property of the estate. If fraudulent conveyance claims are, as Defendants argue, property of the estate, it follows that the property recovered in such actions would *already* constitute property of the estate under Section 541(a)(6) as the "proceeds" of the fraudulent conveyance claim. Defendants' interpretation would therefore "render Section 541(a)(3) to be superfluous." *Steffen v. Gray, Harris & Robinson, P.A.*, 283 F. Supp. 2d 1272, 1284 n.24 (M.D. Fla. 2003). *See also* 5-548 COLLIER ON BANKRUPTCY ¶ 548.01 (stating that the "better" reading of the statute is that fraudulent conveyance claims are not property of the estate because the alternative reading would "make section 541(a)(3) superfluous").[7]

2. **In re Colonial Realty** ***Confirms That State-Law Fraudulent Conveyance Claims Are Not Property Of The Estate***

Finding no support in the text of the Code, Defendants again rely exclusively on case law that (they claim) supports their argument that state-law fraudulent

[7] Defendants' argument would also render neighboring provisions of the Code superfluous. As discussed below (*infra* Part II.C.2), the first sentence of Section 544(b)(2) bars a trustee from avoiding certain charitable contributions, but the second sentence expands the reach of that safe harbor by preempting "[a]ny claim *by any person* to recover a transferred" charitable contribution. 11 U.S.C. § 544(b)(2) (emphasis added). If state-law fraudulent conveyance claims were estate property assertable only by the trustee, why would Congress need to clarify that other "person[s]"—*in addition to* the trustee—are specifically barred from bringing such claims?

conveyance causes of action become property of the debtor's bankruptcy estate. But *Colonial Realty*—the only Second Circuit decision squarely on point—confirms that Section 541 excludes such causes of action from the definition of estate property. Defendants' efforts to run from that decision are unavailing.

The issue in *Colonial Realty* was whether a lawsuit by the Federal Deposit Insurance Corporation ("FDIC") to recover assets fraudulently conveyed by a debtor was subject to Section 362's automatic stay. The district court had stated that fraudulent conveyance actions based on pre-petition transfers of the debtor are property of the bankruptcy estate, relying exclusively on the Fifth Circuit's decision in *Am. Nat'l Bank of Austin v. MortgageAmerica Corp. (In re MortgageAmerica Corp.)*, 714 F.2d 1266, 1275 (5th Cir. 1983), and its progeny. *See FDIC v. Hirsch (In re Colonial Realty Co.)*, Civ. No. 3:91-200X, 1991 WL 487192, at *2 (D. Conn. Dec. 30, 1991). The district court went on to hold that, *because* it was property of the estate, the FDIC's fraudulent conveyance action was stayed by Section 362(a)(3), which enjoins "'any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate.'" *Ibid.* (quoting 11 U.S.C. § 362(a)(3)).

This Court, though it affirmed, rejected the reasoning of the district court and held that a *different* subsection of the automatic stay provision—Section 362(a)(1)—governs fraudulent conveyance actions. In reaching that conclusion, this Court rejected the reasoning of *MortgageAmerica* and adopted the contrary reasoning of *Saunders*. *See Colonial Realty*, 980 F.2d at 131. *Saunders* held that "*neither* a fraudulent transfer action *nor* the property so transferred [is] property of the bankruptcy estate until such property is recovered by a trustee pursuant to his avoiding powers." *Saunders*, 101 B.R. at 306 (emphasis added). Like *Saunders*, this Court's *Colonial Realty* decision held that fraudulently transferred property is not property of the bankruptcy estate until it is recovered. *Colonial Realty*, 980 F.2d at 131. Like *Saunders*, *Colonial Realty* further held that the avoidance action *itself* was not—as the district court had held—"an 'act to obtain possession of property of the estate' within the meaning of § 362(a)(3)." *Id.* at 131-32.

Defendants are therefore wrong to assert (Reverter Br. 8-9) that this Court's decision in *Colonial Realty* "does not question" the lower courts' determination in that case that avoidance claims based on pre-petition transfers are property of the estate. As noted, *Colonial Realty* (1) adopted *Saunders*, which held that fraudulent conveyance actions are not property of the estate; (2) rejected *MortgageAmerica*, the sole basis for the district court's determination that such actions *are* property of the estate; (3) disavowed dicta from Second Circuit cases (including *St. Paul v. PepsiCo*) that cited *MortgageAmerica* approvingly; and (4) affirmed the judgment on the alternative ground that fraudulent conveyance actions constitute "action[s] 'to recover a claim against the debtor'" barred by Section 362(a)(1). *Colonial*

Realty, 980 F.2d at 131-32. *None* of that would have been necessary if this Court had agreed that such actions were property of the estate.

Most importantly, *Colonial Realty* held that fraudulent conveyance actions are not stayed by Section 362(a)(3), which bars "any act to obtain possession of property of the estate . . . or to exercise control over property of the estate." As *Saunders* makes clear, however, if either the fraudulent conveyance action itself or the property transferred were property of the estate, then a fraudulent conveyance action *would* constitute an "act to obtain possession of property of the estate . . . or to exercise control over property of the estate" under Section 362(a)(3). *Saunders*, 101 B.R. at 306. *See In re Ampal-American Israel Corp.*, 502 B.R. 361, 373 (Bankr. S.D.N.Y. 2013) ("If a cause of action is property of the estate, any 'act' by a creditor to assert that claim for its personal benefit violates 11 U.S.C. § 362(a)(3)."). Thus, by holding that fraudulent-transfer actions are not barred by Section 362(a)(3), *Colonial Realty* squarely rejected the proposition that fraudulent conveyance causes of action are estate property.[8]

[8] The leading bankruptcy treatise and numerous courts have correctly understood *Colonial Realty* as holding that fraudulent conveyance actions are not property of the estate. 3-362 COLLIER ON BANKRUPTCY ¶ 362.03, n.50 (16th ed. 2013); 5-548 COLLIER ON BANKRUPTCY ¶ 548.01 & n.51; *Steffen*, 283 F. Supp. 2d at 1284 n.24; *Rubera v. Rubera (In re Rubera)*, 289 B.R. 520, 523 (Bankr. D. Conn. 2003); *Keene Corp. v. Coleman (In re Keene Corp.)*, 164 B.R. 844, 850 (Bankr. S.D.N.Y. 1994).

True, this Court in *Madoff* observed that the creditor's tort claims in that case were "in essence, disguised fraudulent transfer actions, which belong exclusively to the Trustee." 740 F.3d at 94. But the context in which this Court made that statement matters: the *automatic stay* was in effect and thus the trustee *did* enjoy an exclusive—albeit temporary—right to pursue the fraudulent conveyance claim. *Madoff* does not hold, however, that such claims become property of the estate under Section 541 or any other section of the Code. The binding precedent construing Sections 541 and 362 is not *Madoff* but *Colonial Realty*.

Furthermore, the dispositive issue in *Madoff* was not whether fraudulent conveyance claims were property of the estate, but rather whether the bankruptcy court had *jurisdiction* to enjoin various state-law claims while the automatic stay was in effect.[9] That question turned on whether the "'outcome'" of the state-law claims "'might have any 'conceivable effect' on the bankruptcy estate.'" *Id.* at 88 (quoting *Quigley Co. v. Law Offices of Peter G. Angelos (In re Quigley Co.)*, 676 F.3d 45, 57 (2d Cir. 2012)). As the Court noted in *Madoff*, any property recovered by the trustee in a federal avoidance action would become property of the estate under Section 541(a)(3). *See* 740 F.3d at 91. If an individual creditor brought a

[9] The plaintiffs in *Madoff* asserted state-law conspiracy and conversion claims. 740 F.3d at 85-86.

successful state-law action, however, the property recovered through that action would become property of the creditor, not the estate. There would therefore be less property for the trustee to recover for the estate. *Madoff* simply held that the court had jurisdiction over creditor state-law claims brought during the stay because their "outcome" could, in that way, have a "conceivable effect" on the estate. That holding does not turn on whether fraudulent conveyance claims *themselves* are estate property.[10]

[10] This Court's statement, in a footnote, that the "appellants' claims are property of the estate *in that they are 'derivative'* of the Trustee's fraudulent conveyance action" is not to the contrary. 740 F.3d at 93 n.12 (emphasis added). To determine whether the bankruptcy court had jurisdiction to enjoin the state-law claims, this Court had to determine whether those claims were "derivative" (*i.e.*, whether they sought "relief against third parties that pushed the debtor into bankruptcy"), or "non-derivative" (*i.e.*, whether the creditors had "a claim for injury that is particularized as to them" and which therefore could not be asserted by the trustee). *Id.* at 88-89 (quotation marks omitted). This Court held that the state-law claims at issue were derivative because the allegations in the state-law "complaints echo[ed] those made by the Trustee." *Id.* at 91. The footnote in *Madoff* simply cites that determination—that the claims were "derivative" and not particularized to the individual creditors—as the basis for the Court's holding that the bankruptcy court had jurisdiction to enjoin the claims. *Id.* at 93 n.12. As the Court also recognized, however, "derivative" claims often—*but not always*—"involve[]" property of the estate. *Id.* at 88. This Court's determination in *Madoff* that the state-law claims there were "derivative" of the trustee's claim therefore does nothing to alter the rule—compelled by the text of Section 541 and by *Colonial Realty*—that Plaintiffs' state-law claims here are not property of the estate. The relevant holding of *Colonial Realty* was not cited to this Court in the briefs in *Madoff*, and this Court did not cite *Colonial Realty* in *Madoff*. If there were any inconsistency between the two decisions, *Colonial Realty* would control. *See United States v. Punn*, 737 F.3d 1, 11 (2d Cir. 2013) (noting that, because a panel of this Court cannot overrule rulings of prior panels, this Court "must seek an

Citing *PWS Holding*, *supra*, Defendants protest that a trustee's ability to settle fraudulent transfer claims "would make no sense if the claims were not property of the bankruptcy estate." Reverter Br. 7-8. As explained above, however, the *bankruptcy court*—not the trustee—has the power to bind third parties to a settlement. *See supra* Part I.B. Indeed, in *PWS Holding*, the Third Circuit reaffirmed its "conclusion in *Cybergenics* that fraudulent transfer claims do *not* constitute assets of the debtor in possession." 303 F.3d at 315 (emphasis added). It went on to hold that a creditor was barred from bringing a fraudulent conveyance claim, because the trustee had settled it *and* because the court had *confirmed* a reorganization plan that extinguished such claims. *See also Tessmer*, 329 B.R. at 779-780 (bankruptcy court can bind creditors to a settlement agreement even though state fraudulent conveyance actions are not property of the estate). Those considerations are absent here.

3. Defendants' Other Arguments Are Unavailing

Dusting off two "rarely addressed" cases that antedate the Bankruptcy Code by a century, Defendants rely on *Trimble v. Woodhead*, 102 U.S. 647 (1880), and *Glenny v. Langdon*, 98 U.S. 20 (1878). Reverter Br. 17. As the district court correctly held (SA-011 n.12), those cases—which interpret the *Bankruptcy Act of*

understanding of [a subsequent case] that reconciles its outcome with prior Circuit case law").

1867—are no longer good law on this issue because their statutory predicate has been repealed and replaced with something very different.

The Bankruptcy Act of 1867 provided that "all the property conveyed by the bankrupt in fraud of his creditors" shall, by "virtue of the adjudication of [the] bankruptcy and the appointment of his assignee, be at once vested in such assignee." Act of March 2, 1867, ch. 176, § 14, 14 Stat. 517, 523. *Trimble* simply relied on the Court's decision in *Glenny*. *See Trimble*, 102 U.S. at 649, 650; Reverter Br. 11. *Glenny*, in turn, was expressly grounded on the 1867 Act's "vesting" provision:

> Creditors can have no remedy which will reach property fraudulently conveyed, except through the assignee, for two reasons: 1. *Because all such property, by the express words of the Bankrupt Act, vest[s] in the assignee* by virtue of the adjudication in bankruptcy and of his appointment. 2. Because they cannot sustain any suit against the bankrupt.[11]

98 U.S. at 27-28 (emphasis added); *see also id.* at 22 ("Beyond all doubt, the suit in this case is brought to recover property conveyed by the bankrupts in fraud of

[11] The second reason is a reference to the fact that, under the 1867 Act, "no creditor whose debt is provable shall be allowed to prosecute to final judgment any suit at law or in equity therefor against the bankrupt until the question of the debtor's discharge shall have been determined." *Glenny*, 98 U.S. at 27 (citing Rev. Stat. § 5106). The 1867 Act provided that such suits "shall, upon the application of the bankrupt, be stayed to await the determination of the court in bankruptcy." 14 Stat. at 526-27, § 21. That stay provision has nothing to do with whether state-law avoidance actions are estate property.

their creditors, *which, by the express words of the Bankrupt Act, vested in the assignee*.") (emphasis added).

When Congress enacted the Bankruptcy Code of 1978, however, it *deleted* the provision that vested fraudulently conveyed property in the trustee, and replaced it with Section 541(a)(3).[12] *Glenny* and *Trimble* were based on a statutory definition of estate property that Congress *repealed*.[13] This Court has definitively construed Section 541(a)(3), in accordance with its text, to provide that fraudulently conveyed property, unless and until recovered by the estate, is *not* property of the estate. *Colonial Realty*, 980 F.2d at 131. The text and definitive judicial interpretation of the 1978 Code, not its long-repealed predecessor, govern.

Defendants protest that "amendments to bankruptcy statutes do not overrule prior *precedent* except where Congress expressly provides." Reverter Br. 13 (emphasis in original). Replacing the statute on which a precedent is based with a completely new, and materially different, statute meets even that stringent test. In any event, Defendants mischaracterize the law. Only a "major change in pre-Code practice" requires any special justification at all in this regard, and the required

[12] The Bankruptcy Acts of 1898 and 1938, like the 1867 Act, vested "property transferred by [the bankrupt] in fraud of his creditors" in the trustee. Bankruptcy Act of 1898, § 70a, 30 Stat. 544, 566; Bankruptcy Act of 1938, § 70a, 52 Stat. 840, 880.

[13] It is telling that, in their discussion of *Trimble* and *Glenny*, Defendants exclusively cite the *1967 edition* of Collier. *See* Reverter Br. 14, 15, 16.

justification is not express overruling of precedent, only statutory clarity. *Dewsnup v. Timm*, 502 U.S. 410, 419-420 (1992); *accord Nostas Assocs. v. Costich (In re Klein Sleep Products, Inc.)*, 78 F.3d 18, 28 (2d Cir. 1996) (either "a clear Code directive, or legislative history that directly addresses the issue," will suffice); *Coltex Loop Cent. Three Partners, L.P. v. BT/SAP Pool C Assoc., L.P. (In re Coltex Loop Cent. Three Partners, L.P.)*, 138 F.3d 39, 43 (2d Cir. 1998) ("Where the statutory language is clear the Supreme Court will reject prior bankruptcy practice, without an expression of intention in the legislative history to reject the practice.").[14] And the requisite clarity may be furnished by something as small as a comma. *United States v. Ron Pair Enterprises*, 489 U.S. 235, 240-42, 245-46 (1989). The language of Section 541 is amply clear enough to supersede *Glenny* and *Trimble*.

Defendants focus on the Code's addition of Section 349(b)(1)(B), which provides that dismissal of a bankruptcy case "revests the property of the estate in the entity in which such property was vested immediately before the commencement of the case." *See* Reverter Br. 16, 20, 21. But the relevant provision here is Section 541(a) of the Code (which *defines* "property of the estate") not

[14] This Court in *Coltex* correctly anticipated that the Supreme Court would hold that an important pre-Code precedent, *Case v. Los Angeles Lumber Products Co.*, 308 U.S. 106 (1939), was superseded by the Code, without any mention in the legislative history. *See Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 443 (1999) (citing *Coltex*).

Section 349 (which just says what happens to "property of the estate" upon dismissal).

Defendants' entire "reverter" argument constitutes question-begging. Defendants assume that creditors' state-law claims become property of the estate *because* trustees have the power to avoid fraudulent transfers that are avoidable by a creditor under state law. But trustees have that power by virtue of Section 544(b), a federal cause of action whose exercise does not depend on creditor claims becoming property of the estate.

Section 544(b) does require, as an element of the trustee's federal cause of action, that there be a creditor with an allowed claim who could set aside the transfer under state law. When a trustee brings suit under Section 544(b), however, it is not asserting *that creditor's state-law claim*; the trustee is asserting the trustee's own, distinct *federal* claim. *See, e.g.*, *Integrated Agri*, 313 B.R. at 428; *Cybergenics*, 226 F.3d at 243-44.[15] Section 544(b) does not make creditors' own state-law claims property of the estate.

To be sure, as we've explained, the automatic stay *suspends* creditors' right to prosecute their state-law claims. Once the stay is lifted or expires (as here),

[15] The most obvious difference between an actual creditor's claim under state law and one that a trustee brings under federal law is that, "once avoidable pursuant to [§ 544(b)], the transfer is avoided in its entirety for the benefit of all creditors, not just to the extent necessary to satisfy the individual creditor actually holding the avoidance claim." *Cybergenics*, 226 F.3d at 243.

however, creditors are free to prosecute the state-law claims that they had all along, not because those claims "revert" to the creditors—they never vested in the estate in the first place—but simply because those claims are no longer suspended by the stay. *See Integrated Agri*, 313 B.R. at 427-28.

Defendants also argue that, even if creditors' own state-law fraudulent conveyance claims revert to individual creditors, they do so encumbered by Section 546(e)'s safe harbor. *See* Reverter Br. 20-23. But that argument—like all of Defendants' "reverter" arguments—simply assumes that individual creditors' state-law fraudulent conveyance claims become property of the estate. They don't. Defendants' lengthy discussion about the "disclaiming," "revesting," "assignment," and "disaggregation" of estate property is therefore irrelevant.

II. SECTION 546(e) DOES NOT PREEMPT PLAINTIFFS' STATE-LAW CLAIMS

The relevant text of Section 546(e) could not be clearer: "Notwithstanding sections 544, 545, 547, 548(a)(1)(B), and 548(b) of this title, *the trustee* may not avoid a transfer that is a . . . settlement payment . . . except under section 548(a)(1)(A) of this title" (emphasis added). Remarkably, Defendants contend that this language *expressly* bars state-law avoidance actions brought by *individual creditors* (not just Code-based actions brought by the bankruptcy trustee). That argument (never made below) is plainly wrong. So too is Defendants' contention that Section 546(e) impliedly preempts the state laws that authorize creditor avoidance actions. That argument runs afoul of the strong presumption against preemption, is belied by the Code's text and legislative history, and would thwart rather than promote Congress's intent. The district court correctly rejected Defendants' contention as an improper rewrite of Section 546(e).

A. Defendants Face A "Heavy Burden" To Overcome The "Particularly Strong" Presumption That Section 546(e) Does Not Preempt State Law

"[B]ecause the States are independent sovereigns in our federal system, [the courts] have long presumed that Congress does not cavalierly pre-empt state-law causes of action." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996); *accord Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005). This presumption against preemption "provides assurance that 'the federal-state balance' will not be disturbed unintentionally by Congress or unnecessarily by the courts." *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977) (citation omitted). It is a "cornerstone[ ] of . . . pre-emption jurisprudence." *Wyeth v. Levine*, 555 U.S. 555, 565 (2009). And it applies not only when a party claims that a federal statute *expressly* preempts state law, s*ee, e.g.*, *Altria Grp., Inc. v. Good*, 555 U.S. 70, 77 (2008); *Bates*, 544 U.S. at 449, but also when preemption is claimed impliedly—on the basis that state law allegedly frustrates a federal interest. *See, e.g.*, *Hillman v. Maretta*, 133 S. Ct. 1943, 1950 (2013); *Wyeth*, 555 U.S. at 565 & n. 3; *California v. ARC Am. Corp.*, 490 U.S. 93, 101 (1989); *English v. Gen. Elec. Co.*, 496 U.S.

72, 89 (1990); *Hillsborough Cnty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 715 (1985); *In re Methyl Tertiary Butyl Ether (MTBE) Products Liab. Litig.*, 725 F.3d 65, 97 (2d Cir. 2013); *Steel Inst. of N.Y. v. City of N.Y.*, 716 F.3d 31, 36 (2d Cir. 2013).

Moreover, although the presumption against preemption applies "[i]n all pre-emption cases," *Lohr*, 518 U.S. at 485, it "applies with particular force when Congress has legislated in a field traditionally occupied by the States," *Altria Grp.*, 555 U.S. at 77.[16] Because of the presumption, "a 'clear and manifest purpose' of pre-emption *is always required*" before federal legislation may supersede the historic police powers of the states. *Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 503 (1988) (emphasis added); *see also, e.g.*, *Wyeth*, 555 U.S. at 565 (same); *Steel Inst. of N.Y.*, 716 F.3d at 36 (quotation marks omitted); *Envtl. Encapsulating Corp. v. City of N.Y.*, 855 F.2d 48, 58 (2d Cir. 1988).

[16] *See also, e.g.*, *U.S. Smokeless Tobacco Mfg. Co. v. City of N.Y.*, 708 F.3d 428, 432 (2d Cir. 2013) ("This assumption is particularly strong where, as here, a state or locality seeks to exercise its police powers . . . ."); *N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health*, 556 F.3d 114, 123 (2d Cir. 2009) ("The presumption against preemption is heightened 'where federal law is said to bar state action in fields of traditional state regulation.'") (quoting *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995)); *Wadsworth v. Allied Prof. Ins. Co.*, No. 13-1163-cv, slip op. 14 (2d Cir. Apr. 4, 2014).

As this Court recently recognized, one field where the presumption against preemption "is particularly strong" is that of state tort laws designed to "protect the . . . property rights of . . . citizens." *MTBE Products*, 725 F.3d at 96. Indeed, "protection against fraud" is among "the oldest [purposes] within the ambit of the police power." *California v. Zook*, 336 U.S. 725, 734 (1949); *see also Wright v. Salzberger*, 9 P.2d 860, 861 (Cal. Ct. App. 1932) (recognizing that constructive fraudulent transfer laws "and like enactments have frequently been held to be within the police power of the state"); *Badger State Bank v. Taylor*, 688 N.W.2d 439, 448 (Wis. 2004) (discussing the history of state protection against fraudulent conveyances).

State policing of fraudulent conveyances antedates the American Revolution, and to this day the subject remains an area of extensive state regulation. *See generally* 1 GARRARD GLENN, FRAUDULENT CONVEYANCES & PREFERENCES § 58 (1940 ed.); *Orr v. Kinderhill Corp.*, 991 F.2d 31, 34-35 (2d Cir. 1993). When Congress enacted *additional* remedies for fraudulent conveyances in the Bankruptcy Code, it did not "'creat[e] a new cause of action, and remedies therefor, unknown to the common law' . . . . Rather, Congress simply reclassified a pre-existing, common-law cause of action that was not integrally related to the reformation of debtor-creditor relations . . . ." *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 60 (1989) (citation and footnote omitted).

Although Defendants concede that there is "a long history of state law on fraudulent transfer" (Joint Br. 48), they assert that *United States v. Locke*, 529 U.S. 89 (2000), held that the presumption against preemption does not apply where "there is a history of significant federal presence in [an] area of regulation." But Defendants overstate the relevance of *Locke* and understate the role that state law plays in the Bankruptcy Code.

In *Locke*, the Supreme Court declined to apply the presumption against preemption in the field of "national and international maritime commerce." 529 U.S. at 108. But it did so *only* because that field "ha[d] been *substantially occupied* by federal authority for an extended period of time." *Wachovia Bank, N.A. v. Burke*, 414 F.3d 305, 314 (2d Cir. 2005) (emphasis added and quotation marks omitted); *see also Union Pac. R.R. v. California Pub. Utilities Comm'n*, 346 F.3d 851, 864 n.17 (9th Cir. 2003) ("the maritime law at issue in *Locke* . . . ha[d] been almost exclusively federally regulated since the Founding"). "[R]eliance on *Locke* is misplaced" when dealing with areas where "States continue to have considerable authority." *Pinney v. Nokia, Inc.*, 402 F.3d 430, 454 n.4 (4th Cir. 2005); *see also Green v. Fund Asset Mgmt., L.P.*, 245 F.3d 214, 229 (3d Cir. 2001). *Cf. Wyeth*, 555 U.S. at 565 n.3 ("The presumption . . . accounts for the historic presence of state law but does not rely on the absence of federal regulation.").

The contours of fraudulent conveyance law are largely defined by state law, and *the Bankruptcy Code extensively relies on such state law*. *See* 11 U.S.C. § 544(b); *Patterson v. Shumate*, 504 U.S. 753, 758 (1992) (collecting other references to "state law" in the Bankruptcy Code). The Supreme Court has therefore recognized that, although "[t]he Bankruptcy Code can of course override [state law] by implication," only the clearest implication will suffice: "[W]here [Congress's] intent to override is doubtful, our federal system demands deference to long-established traditions of state regulation." *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 546 (1994). Consistent with the presumption against preemption, preemption under the Bankruptcy Code thus exists only "when the implication is *unambiguous*." *Ibid*. (emphasis added).

That is a "heavy" burden for Defendants to carry. *MTBE Products*, 725 F.3d at 101; *accord Hattem v. Schwarzenegger*, 449 F.3d 423, 431 (2d Cir. 2006). As we discuss below, far from reflecting "a clear and manifest purpose of pre-emption," *Isla Petroleum*, 485 U.S. at 503 (quotation marks omitted), the Bankruptcy Code in general, and Section 546(e) in particular, reflect just the opposite. The text, statutory structure, and legislative history of the relevant provisions all reflect Congress's decision *not* to preempt Plaintiffs' state-law claims.

Even if Congress's purpose and intent were ambiguous, preemption would be inappropriate just the same, because the presumption against preemption demands that the party arguing *for preemption* "bear the considerable burden of overcoming the starting presumption that Congress does not intend to supplant state law." *De Buono v. NYSA-ILA Med. & Clinical Servs. Fund*, 520 U.S. 806, 814 (1997) (quotation marks omitted). That requires Defendants here to provide "compelling evidence of an intention to preempt." *Gen. Motors Corp. v. Abrams*, 897 F.2d 34, 41-42 (2d Cir. 1990). If their evidence leaves any doubt about Congress's intent, Section 546(e) cannot preempt Plaintiffs' state-law claims.

B. Section 546(e) Does Not Expressly Preempt Plaintiffs' Claims

Defendants argue here—for the first time—that when Section 546(e) bars a "trustee" from bringing certain avoidance actions under federal law it also "expressly" bars individual "creditors" from bringing such actions themselves under state law. Joint Br. 41-42. This is an odd argument to be making for the first time on appeal: If the statute spoke as clearly in this regard as Defendants now assert, Defendants surely would have pressed this argument below. Quite tellingly, they didn't, and the argument is now forfeited. *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 124 n.29 (2d Cir. 2005). But it is wrong in any event.

First, although Defendants do not characterize their argument as one for express preemption, it plainly is. In substance, Defendants insist that, notwithstanding the broad sweep of state law, Section 546(e) "express[ly] command[s] that the debtor's creditors '*may not avoid*' . . . [fraudulent] transfers under state law." Joint Br. 44 (emphasis added). If true, that would be the hornbook definition of express preemption. *See* BLACK'S LAW DICTIONARY (9th ed. 2009) (Preemption is "[t]he principle (derived from the Supremacy Clause) that a federal law can supersede or supplant any inconsistent state law or regulation.").

It is no wonder why Defendants hesitate to call their argument what it is: "[W]hen the text of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily 'accept the reading that disfavors pre-emption.'" *Altria Grp.*, 555 U.S. at 77 (quoting *Bates*, 544 U.S. at 449). That canon requires this Court to do nothing more than take Congress at its word: As Judge Sullivan held, "Section 546(e) addresses its prohibition on avoiding settlement payments only to the bankruptcy trustee." SA-004-05. And that is enough to dispose of Defendants' "express" argument.

Second, the argument fails as a matter of plain statutory construction. Section 546(e) has a singular subject—"*the* trustee"—a term of art that refers to a singular party: the statutory "representative of the estate." 11 U.S.C. § 323(a); *see Onink v. Cardelucci (In re Cardelucci)*, 285 F.3d 1231, 1234 (9th Cir. 2002) (use of the definite article "the" is intended to mean a singular, identifiable person). Section 546(e) does not, by its terms, disempower "any person," or "any creditor," or "any party in interest"—all terms that the Code uses when a provision is intended to affect a broader group. *See*, *e.g.*, 11 U.S.C. § 101 (10) (defining "creditor"); *id.* § 1109(b) ("A party in interest, including the debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor, an equity security holder, or any indenture trustee, may raise and may appear and be heard on any issue in a case under [Chapter 11].").

Similarly, the introductory clause of Section 546(e)—"[n]otwithstanding sections 544, 545, 547, 548(a)(1)(B), and 548(b) of this title"—ties its prohibitions to the federal-law avoidance powers of "the trustee" created by those very sections. In contrast, Plaintiffs' right to bring suit here is not grounded in any of those provisions. It is "a pre-existing . . . cause of action that was not integrally related to the reformation of debtor-creditor relations." *Granfinanciera*, 492 U.S. at 60. It was created by the common law (*ibid.*) and codified in state law. *See* A0467-0470, ¶¶ 314-329 and A0899-0905, ¶¶ 115-160 (alleging claims under 740 Ill. Comp. Stat. 160/5(a)(2), 160/6(a), 160/8, 160/9; N.Y. Debt. & Cred. Law §§ 273, 274, 278, 289; Mass. Gen. Laws ch. 109A, §§ 5(a)(2), 6(a), 8, 9). And when the Code makes exceptions to those non-bankruptcy laws, including exceptions in adjacent subsections, it refers to them as such. *See, e.g.*, 11 U.S.C. § 541(c)(1) ("notwithstanding any . . . nonbankruptcy law"); *id*. § 1123(a) ("Notwithstanding any otherwise applicable nonbankruptcy law . . . .").

Defendants ask this Court to ignore what Section 546(e) actually says because, in their view, two other provisions alter the plain meaning of the statute: [1] a subsection of a venue provision in Title 28 (not in the Bankruptcy Code) and [2] a portion of the subsection title of Section 544. *See* Joint Br. 42. But "Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001). That canon applies doubly in the case of "a subchapter heading[, which] cannot substitute for the operative text of the statute." *Florida Dep't of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 47 (2008); *accord Lawson v. FMR LLC*, 134 S. Ct. 1158, 1169 (2014).

At bottom, Defendants' argument is merely a restatement of their "standing" argument that, upon the filing of a petition, the trustee is the "exclusive" party with standing to bring an avoidance action—which fails for reasons we've already explained. Joint Br. 42. Upon the lifting or expiration of Section 362's stay, the trustee is not the "exclusive" party who can bring avoidance actions (*see supra* Part I.B.1), and so it makes no sense to assume—let alone is it "expressly" provided—that Section 546(e) has a greater domain than its own text provides.

Third, if accepted, Defendants' argument would render incorrect numerous cases interpreting other subsections of Section 546. If "the trustee *is* the creditors for purposes of any state-law fraudulent-transfer claim" (Joint Br. 43), then such claims "may not be commenced" after the two-year period specified in Section 546(a). As demonstrated in our Principal Brief (at 45) and above (*supra* Part I.B.1), however, myriad cases hold the contrary—that creditors *can* bring suit under state law even after a trustee's statute of limitations has run, and that they can do so *precisely because* the creditors are *not* the trustee. *See, e.g.*, *Hatchett v. United States*, 330 F.3d 875, 887 (6th Cir. 2003) ("[T]he statute of limitations in § 546[(a)(1)] applies only to actions by trustees. . . . [T]his state law action by the [non-trustee plaintiff] for fraudulent conveyance . . . has nothing to do with the rights of the trustee."); *Gleischman Sumner Co. v. King, Weiser, Edelman & Bazar*, 69 F.3d 799, 800 (7th Cir. 1995) (same).

Fourth, a unanimous Supreme Court concluded in *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A*, 530 U.S. 1, 6-7 (2000), that the term "trustee," as it is used in the Code, must be narrowly interpreted to mean only an estate representative: "[T]he statute appears quite plain in specifying who may use [it]—'[t]he trustee' . . . . [T]he fact that the sole party named—the trustee—has a unique role in bankruptcy proceedings makes it entirely plausible that Congress would provide a power to him and not to others."

Defendants attempt to distinguish *Hartford Underwriters* on the immaterial ground that the Court was interpreting a provision that grants a power to the trustee (Section 506(c)), whereas Section 546(e) is one that limits a trustee's power. Joint Br. 45. But that entirely misses the Court's point, which was that "Congress says in a statute what it means and means in a statute what it says there." 530 U.S. at 6 (quotation marks omitted). Because Congress explicitly named the "trustee," that is the party to whom the section must be applied. *Ibid*. Defendants' distinction played no part in the Court's decision—it was clear that, "when the statute's language is plain, the sole function of the courts . . . is to enforce it according to its terms." *Ibid*. (quotation marks omitted).

C. Defendants Come Nowhere Close To Overcoming The Presumption That Section 546(e) Does Not Impliedly Preempt Plaintiffs' State-Law Claims

Because Section 546(e) does not say what Defendants would like it to say, they ask this Court to look past its plain language and hold that creditor actions are impliedly preempted in the name of "federal policies ensuring finality and stability." Joint Br. 50. But "[i]mplied preemption analysis does not justify a freewheeling judicial inquiry into whether a state statute is in tension with federal objectives," because "such an endeavor would undercut the principle that it is Congress rather than the courts that preempts state law." *Chamber of Commerce of U.S. v. Whiting*, 131 S. Ct. 1968, 1985 (2011) (plurality opinion of Roberts, C.J., joined by Scalia, Kennedy & Alito, JJ.) (quotation marks omitted); *accord Arizona v. United States*, 132 S. Ct. 2492, 2522 (2012) (Thomas, J., concurring in part and dissenting in part).

For that reason, as Justice Scalia has written for a unanimous Supreme Court, "a 'clear and manifest purpose' of pre-emption *is always required*" before federal legislation can be found to supersede the historic police powers of the states. *Isla Petroleum*, 485 U.S. at 503 (emphasis added). That requirement applies equally as against assertions of implied preemption. *See supra* Part II.A (collecting cases). Indeed, as this Court has recognized, "implied preemption . . . rests . . . on inference" about congressional intent, and "[i]nference and implication will only rarely lead to the conclusion that it was the 'clear and manifest purpose' of the federal government to supersede the states' historic power." *Envtl. Encapsulating*, 855 F.2d at 58 (citation omitted).

State law thus "'must do 'major damage' to 'clear and substantial' federal interests before the Supremacy Clause will demand that state law will be overridden.'" *Hillman*, 133 S. Ct. at 1950 (quoting *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979)). "Indeed, federal law does not preempt state law . . . unless the repugnance or conflict [between the two] is so direct and positive that the two acts cannot be reconciled or consistently stand together." *MTBE Products*, 725 F.3d at 102 (quotation marks omitted). That is a "high threshold." *Hattem*, 449

F.3d at 429; *accord Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 110 (1992) (Kennedy, J., concurring in part and concurring in the judgment), *quoted in Whiting*, 131 S. Ct. at 1985 (plurality opinion). "The mere fact of 'tension' between federal and state law is generally not enough to establish an obstacle supporting preemption, particularly when the state law involves the exercise of traditional police power." *Madeira v. Affordable Hous. Found., Inc.*, 469 F.3d 219, 241 (2d Cir. 2006).

As we show below, Defendants come nowhere close to carrying their burden under these cases. To the contrary: the text, structure, and history of the Code confirm that Congress struck a sensible balance in Section 546(e). It limited the ability of trustees, who exercise powers far greater than those of individual creditors, to bring avoidance actions during the pendency of a bankruptcy, when such bankruptcy had the greatest chance of destabilizing the markets. But, consistent with the Code's larger purpose of maximizing creditor recoveries, Congress left in place the non-bankruptcy right of such creditors, at their own expense, to pursue beneficiaries of fraudulent conveyances after the bankruptcy has concluded or the automatic stay has been lifted.

1. *The Plain Language Of Section 546(e) Reflects No Intent To Preempt State Law*

"In every preemption case, . . . 'the purpose of Congress is the ultimate touchstone.'" *MTBE Products*, 725 F.3d at 96 (quoting *Wyeth*, 555 U.S. at 565).

And "[t]he best evidence of [a section's] purpose is the statutory text adopted by both Houses of Congress and submitted to the President." *West Virginia University Hospitals, Inc. v. Casey*, 499 U.S. 83, 98–99 (1991); *see also Mary Jo C. v. N.Y. State & Local Ret. Sys.*, 707 F.3d 144, 162 (2d Cir. 2013). Indeed, the "cardinal canon . . . that a legislature says in a statute what it means and means in a statute what it says there," *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992), applies with no less force when discerning Congress's purpose in enacting a statute, or its intent to preempt. *See, e.g.*, *Wyeth*, 555 U.S. at 599 (Thomas, J., concurring) (in implied preemption cases, as in all other cases, "[s]tatutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose") (quotation marks omitted); *Premium Mortgage Corp. v. Equifax, Inc.*, 583 F.3d 103, 106 (2d Cir. 2009) ("When addressing questions of express or implied pre-emption, . . . we are to begin as we do in any exercise of statutory construction, with the text of the provision in question.") (citations, quotation marks, and punctuation omitted).

The Supreme Court's decision in *Whiting* illustrates the point. Petitioners there argued that a federal law prohibiting the Secretary of Homeland Security from imposing certain employee-screening requirements on employers also, by implication, preempted comparable state laws. 131 S. Ct. at 1985. The Court rejected the argument. "[B]egin[ning] . . . with the relevant text" of the statute, the Court held that the provision at issue "limits what the Secretary of Homeland Security may do—nothing more." *Ibid*.

So too here. As one lower court recently observed, "if Congress intended section 546(e) to be more broadly applicable" than its text provides, "'it could simply have said so.'" *Weisfelner v. Fund 1 (In re Lyondell Chem. Co.)*, 503 B.R. 348, 358 (Bankr. S.D.N.Y. 2014) (quoting *Hartford Underwriters*, 530 U.S. at 7); *accord Development Specialists, Inc. v. Kaplan (In re Irving Tanning Co.)*, No. 12–01024, Doc. 43 at 7 (Bankr. D. Me. Feb. 7, 2013) (rejecting preemption argument because, among other things, "the plain meaning of 546(e) is that the reference to trustee therein is to the statutory trustee or debtor in possession or direct successor thereto"); *see also PHP Liquidating, LLC v. Robbins*, 291 B.R. 603, 607 (D. Del. 2003) (distinguishing between an "avoidance action . . . brought by a trustee . . . [that] would be barred by Section 546(e) of the Bankruptcy Code," and one brought by "a direct assignee of the unsecured creditors," which would not), *aff'd on other grounds*, 128 F. App'x 839 (3d Cir. 2005).

Because the statutory text cuts so strongly against their position, Defendants urge this Court simply to ignore it, arguing that, as a matter of policy, the "identity of the plaintiff" is irrelevant. Joint Br. 54. Even as a policy matter, Defendants are wrong; as we explain *infra* Part II.D.4, substantial policies support Congress's decision to limit actions by the trustee under the Code, while permitting actions by individual creditors under state law. But Defendants' more fundamental error lies in their invitation to this Court to make policy judgments in the first place. Implied preemption is not an occasion to disregard every canon of statutory construction. It demands that a court base its analysis on the "text, structure, and history" of the purportedly preemptive federal law. *Arizona*, 132 S. Ct. at 2505; *see also Drake v. Lab. Corp. of Am. Holdings*, 458 F.3d 48, 62 n.15 (2d Cir. 2006) ("[W]e do not think that the implied preemptive effect of the federal regulatory scheme reaches any further than our analysis of the regulatory text indicates.").

2. The Surrounding Provisions Confirm That Congress Did Not Intend Section 546(e) To Preempt Plaintiffs' Claims

That Congress intended the prohibitions in Section 546(e) to apply only to "the trustee," and not to individual creditors such as Plaintiffs here, is confirmed by the section's surrounding provisions.

As we've previously noted (*supra* Part I.C), Section 544(b)(1)—which itself is cross-referenced in Section 546(e)—empowers a bankruptcy trustee, for two years after the petition date, to avoid any transfer that is voidable by a creditor under state law. *See* 11 U.S.C. § 544(b)(1). Section 544(b)(2), in turn, provides that a bankruptcy trustee may not employ Section 544(b)(1) to avoid certain kinds of transfers to charitable organizations. *See id.* § 544(b)(2). The *first* sentence of

Section 544(b)(2) thus creates a "charitable contribution safe harbor" that, like Section 546(e), operates solely against the bankruptcy trustee.

But Congress did not stop there. The second sentence of Section 544(b)(2) expands the reach of that safe harbor to prohibit claims by plaintiffs *other* than the bankruptcy trustee, providing that "[a]ny claim *by any person* to recover a transferred contribution . . . under Federal or State law in a Federal or State court shall be preempted by the commencement of the case." 11 U.S.C. § 544(b)(2) (emphasis added). That such a second sentence is conspicuously absent from Section 546(e) is "powerful evidence" that Congress did not intend that section to preempt state-law claims that belong to individual creditors, such as Plaintiffs here. *Wyeth*, 555 U.S. at 574-75 (rejecting implied preemption in part because Congress had enacted express preemption in a closely related area). As Section 544(b)(2) demonstrates, Congress is explicit when it wants to bar avoidance actions brought by someone other than the trustee.

Defendants point out that "'the existence of an express pre-emption provision does not bar the ordinary working of conflict pre-emption principles or impose a special burden that would make it more difficult to establish the pre-emption of laws falling outside the clause.'" Joint Br. 65 (quoting *Arizona*, 132 S. Ct. at 2504). That is true but irrelevant. We do not contend that the *mere existence* of an express preemption provision forecloses the possibility of implied preemption—the narrow proposition the Court rejected in *Arizona*. But such a provision, when considered in the context of the statutory language as a whole, provides powerful evidence of Congress's intent, which is the touchstone of any implied preemption analysis. "[W]here the legislature has inserted a provision in only one of two statutes that deal with closely related subject matter, it is reasonable to infer that the failure to include that provision in the other statute was deliberate rather than inadvertent." *In re Federal-Mogul Global Inc.*, 684 F.3d 355, 373 (3d Cir. 2012) (quotation marks omitted); *see also Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 63 (2006) ("We normally presume that, where words differ as they differ here, Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (quotation marks omitted); *Mississippi ex rel. Hood v. AU Optronics Corp.*, 134 S. Ct. 736, 742 (2014) (similar); *Drawbridge Special Opp. Fund LP v. Barnet (In re Barnet)*, 737 F.3d 238, 249 (2d Cir. 2013) ("Congress' silence is particularly inexplicable" if Congress intended a particular result, "in light of the fact that Congress did expressly" achieve that result with respect to a different subsection of the same statute).

Wyeth illustrates the point. In that case, a brand-name drug manufacturer argued that the purposes of federal drug labeling regulation would be obstructed if it had to comply with a state-law duty to provide a stronger warning. 555 U.S. at 573. The Court rejected that argument, in part because Congress had enacted an express preemption provision for medical devices but had not done so for prescription drugs. As the Court put it, Congress's "silence on the issue, coupled with its certain awareness of the prevalence of state tort litigation, is powerful evidence" against implied preemption. *Id*. at 575; *see also infra* Parts II.C.3 & II.C.4 (surveying the legislative history of Sections 544 and 546 and Congress's awareness of potential state-law suits by creditors). This case is no different: the express preemption of certain creditor state-law actions in Section 544(b)(2) is merely one of many signs that Congress did not intend nearby Section 546(e) to be similarly preemptive.

Indeed, as Justice O'Connor has written for a unanimous Supreme Court, "[t]he case for federal pre-emption is particularly weak where Congress has indicated its awareness of the operation of state law in a field of federal interest, and has nonetheless decided to 'stand by both concepts and to tolerate whatever tension there [is] between them.'" *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 166–67 (1989) (quoting *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 256 (1984)). Section 544(b)(2) plainly reflects Congress's awareness that individual creditors can assert claims under state fraudulent transfer laws despite a current or prior bankruptcy involving the transferor. And it reflects, as well, Congress's deliberate line-drawing for different types of claims: For certain charitable contributions, avoidance claims by individual creditors (in addition to avoidance claims by bankruptcy trustees) are preempted; for certain payments to shareholders, only certain avoidance claims by trustees are foreclosed.

"The clear lack of Congressional intent to preempt state law . . . is even more telling given the explicit language that Congress uses when it intends to displace state nonbankruptcy law in other provisions of the Bankruptcy Code." *Integrated Solutions, Inc. v. Serv. Support Specialties, Inc.*, 124 F.3d 487, 493 (3d Cir. 1997). As noted earlier, in addition to Section 544(b)(2), numerous other provisions of the Code demonstrate that, when Congress wishes to preempt state law, it does so expressly. *See, e.g.*, 11 U.S.C. § 341(c) ("Notwithstanding any local court rule, provision of a State constitution, any otherwise applicable nonbankruptcy law . . . ."); *id.* §§ 366(c)(4), 704(c)(2)(B), 1123(a), 1142(a), 1302(d)(2)(B). Congress did not do so here, and "[i]t is unlikely that the drafters of legislation so long and minutely contemplated as the 1978 Bankruptcy Code would have used two distinctly different forms of words for the same purpose." *203 N. LaSalle St. P'ship*, 526 U.S. at 450; *see also Law v. Siegel*, 134 S. Ct. 1188, 1196 (2014) ("The [Bankruptcy] Code's meticulous—not to say mind-numbingly detailed—enumeration of exemptions and exceptions to those exemptions confirms that courts are not authorized to create additional exceptions.").

Defendants acknowledge the close relationship between the first sentence of Section 544(b)(2) and Section 546(e); in their words, the two "accomplish the same purpose." Joint Br. 65. They also concede that, because the first sentence of Section 544(b)(2) explicitly "denies *the trustee*" the power to avoid charitable contributions, "[t]o avoid any implication that others could step into the void, Congress *needed* to specify [ ] that no other party could bring such a claim." *Id*. at 65-66 (emphasis added). Yet they maintain, incongruously and without explanation, that no such "void" was created by Section 546(e). But the inexorable implication of Defendants' concessions is the opposite: Like the first sentence of Section 544(b)(2), Section 546(e) limits a power granted *to the trustee* by Section 544, among others. But only Section 544(b)(2) takes the extra step, in its second sentence, to bar creditor actions.

3. The Legislative History Of Section 546(e) Further Confirms That Congress Intended To Limit Only The Avoidance Powers Of Bankruptcy Trustees

The plain meaning of the statutory text is confirmed by legislative history. Congress has been asked, repeatedly, to preempt state laws that permit creditors to challenge fraudulent transfers that the trustee cannot challenge because of Section 546(e). At every turn Congress has declined to do so (even as it agreed to preempt other types of creditor suits under Section 544(b)(2)). This Court should not do what Congress deliberately has chosen not to do.

i. *The Legislative History Of Section 546(e) Reveals An Exclusive Focus On The Avoidance Powers Of Bankruptcy Trustees*

What is now Section 546(e) originated in a narrow provision first enacted as part of the Bankruptcy Code of 1978. In 1976, William Bagley, the Chairman of the Commodity Futures Trading Commission ("CFTC"), wrote to Congress with concerns regarding "the treatment which commodity customers will be accorded by a trustee in bankruptcy." *H.R. 31 and H.R. 32, Bankruptcy Act Revision: Hearings Before the Subcomm. on Civil and Constitutional Rights of the Comm. on the Judiciary*, 94th Cong. ["Bankr. Act Rev."], at 2378 (1976). One such concern involved "the treatment by [a] trustee of margin deposits and payment made to a clearing house" "in the event of the bankruptcy of a futures commission merchant"—concerns prompted by a case in which the trustee of a bankrupt commodities broker had used its avoidance powers to challenge, under New York law, millions of dollars in payments made to both a futures exchange and a futures clearing house association. *Id*. at 2405-406 (describing *Seligson v. N.Y. Produce Exch.*, 394 F. Supp. 125 (S.D.N.Y. 1975)).[17] To ensure "the financial stability of [such] clearing houses," Bagley asked Congress to ensure that "margin payments . . . be protected from reversal *by the trustee in bankruptcy*." Bankr. Act Rev. at 2406 (emphasis added).

[17] *See also infra* Part II.D.4 (explaining the unique risk posed by avoidance actions targeted at market intermediaries).

Congress obliged. Section 764(c) of the Code provided that "*the trustee* may not avoid a transfer that is a margin payment to or deposit with a commodity broker or forward contract merchant or is a settlement payment made by a clearing organization." Pub. L. No. 95-598, § 764(c), 92 Stat. 2549 (1978) (emphasis added). The House Report acknowledged that the addition was "derived largely from" Bagley's letter. H.R. Rep. No. 95-595, at 271-73. It further explained that "Section 764 indicates the extent to which . . . avoiding powers may be used by the trustee" and "Subsection (c) insulates variation margin payments and other deposits from th[ose] avoiding powers." *Id*. at 391-92. The Senate Report was even more explicit: The "policy established by this subchapter [*i.e.*, Section 764(c)] is that margin payments made to clearing organizations *are not voidable by the trustee in bankruptcy*." S. Rep. No. 95-989, at 8 (1978) (emphasis added). *Accord id*. at 106 (explaining that the amendment "lists certain transfers which are not voidable *by the trustee*") (emphasis added).

In 1982, Congress revisited the safe harbor to further "preserve the financial integrity of the nation's commodity and securities markets." H.R. Rep. No. 96-1195, at 7 (1980). Contrary to the sweeping purposes attributed to Congress by the Defendants and their *amici* (*see, e.g.*, Joint Br. 50), Congress had a very particular concern in mind: "that the financial failure of" a market intermediary—such as a broker or clearinghouse—could "have such an [e]ffect upon an entire marketplace so as to pose the potential for a massive disruption of the entire industry." H.R. Rep. No. 96-1195, at 6. The 1978 Act had "provide[d] a number of protections to commodity brokers and commodity clearing organizations," but it had not provided similar protections to the securities industry. *Id*. at 6. To remedy that disparity, Congress replaced Section 764(c) with Section 546(d), which "clarif[ied] that" the protections afforded to the commodities industry "appl[ied] to stockbrokers and securities clearing agencies," as well. *Id*. at 6-7.[18]

The legislative history, however, reiterated that the safe harbor simply "make[s] clear that *the trustee* may not avoid as a preference or fraudulent transfer, a margin payment, deposit or settlement payment made by or to a commodity broker, forward contract merchant, stockbroker or securities clearing agency." *Id*. at 7 (emphasis added); *see also id*. at 17 (Section 546(d) "limits *the trustee's* avoiding powers") (emphasis added). Indeed, nothing in the entire legislative history of Section 546(e)—in all of its iterations and changing section numbers—suggests that the section preempts state law or otherwise limits avoidance actions brought by individual creditors.

[18] *See* Pub. L. No. 97-222, § 4, 96 Stat. 235, 236 (1982) (providing, in pertinent part, that "*the trustee* may not avoid a transfer that is a margin payment, . . . or settlement payment, . . . made by or to a commodity broker, forward contract merchant, stockbroker, or securities clearing agency") (emphasis added).

In 1984, Congress moved the safe harbor from Section 546(d) to Section 546(e), where it remains today. *See* Pub. L. No. 98-353, § 351(2), 98 Stat. 333 (1984). The legislative history again made clear that Congress's primary concern was that "the insolvency of one commodity or security firm [might] spread[ ] to other firms[, . . .] possibly threatening the collapse of the affected market"—and that the concern was best addressed by "ensur[ing] that *the avoiding powers of a trustee* are not construed to permit margin or settlement payments to be set aside except in cases of fraud." H.R. Rep. No. 97-420, at 1-2 (1982) (emphasis added).

This singular focus on the "avoiding powers of a trustee" has persisted as a refrain through subsequent iterations of Section 546(e). Congress has amended Section 546(e) on six more occasions since 1984, but Congress has never suggested that its purpose was to create a sweeping substantive immunity, untethered to a trustee's avoidance power, for any third-party transferee of a settlement payment.[19] To the contrary, even as it greatly expanded the universe of entities and transactions that were entitled to the protection of Section 546(e), Congress has

[19] *See* Pub. L. No. 109-390, § 5(b)(1) (2006); Pub. L. No. 109-8, § 907(o)(3) (2005); Pub. L. No. 105-183, § 3(c)(1) (1998); Pub. L. No. 103-394, § 501(b)(4)(A) (1994); Pub. L. No. 101-311, § 203 (1990); Pub. L. No. 99-554, § 283(l) (1986).

never expanded the plaintiffs affected by the section beyond "a trustee under the Bankruptcy Code." H.R. Rep. No. 109-648, at 6 (2006).

Cases interpreting and applying Section 546(e)—including those on which Defendants principally reply—share this view of the legislative history. As the court explained in *Hechinger Inv. Co. of DE v. Fleet Retail Fin. Group (In re Hechinger)*, 274 B.R. 71, 88 (D. Del. 2002) (cited at Joint Br. 55):

> [I]t is clear from the case law and legislative history of [Section 546(e)] that *the broad avoidance power given to a trustee in bankruptcy* led to the potential risk that the avoidance of a major transfer would have a disruptive effect on settled securities transactions. To address this danger, *Congress passed section 546(e) to narrow the trustee's avoidance power under certain circumstances* to protect the nation's financial markets from the instability caused by the reversal of settled securities transactions.

(emphasis added and quotation marks and citation omitted); *accord Enron Creditors Recovery Corp. v. Alfa, S.A.B. de C.V.*, 651 F.3d 329, 334 (2d Cir. 2011) (Section 546(e) "restrict[s] *a bankruptcy trustee's power* to recover payments that are otherwise avoidable under the Bankruptcy Code.") (emphasis added).

Section 546(e) was enacted as "an exception to various other Code provisions that allow *a trustee or debtor-in-possession* to avoid certain transfers." *Contemporary Indus. Corp. v. Frost*, 564 F.3d 981, 984 (8th Cir. 2009) (emphasis added). It is significant not only that the statute applies solely to the trustee or debtor-in-possession, but also that *it is an exception to other specified Code provisions*. As we have shown, creditors' ability to bring state-law causes of action to recover fraudulent conveyances was not created by the Code, but instead preexisted the Code and, in any particular case, exists before bankruptcy and—unless limited by some case-specific action—after bankruptcy as well.

ii. Congress Has Long Known That Section 546(e) Permits Individual Creditor Actions Just Like Those At Issue In This Case—And Yet Has Declined To Preempt Them

Defendants dismiss thirty-four years of legislative history because, in their view, Congress "never contemplated that creditors would bring their own actions." Joint Br. 61. *Amici* parrot that assertion. *See* Doc. 165 ("SIFMA Br.") at 20. But they are flatly mistaken. Congress was asked—and declined—to enact the very preemption Defendants now say it intended all along. As the district court recognized, despite multiple opportunities and invitations to amend Section 546(e) in this respect, Congress has left it untouched. SA-007. If Congress "thought state-law suits posed an obstacle to its objectives, it surely would have enacted an express pre-emption provision at some point." *Wyeth*, 555 U.S. at 574.

In 1976, when CFTC Chairman Bagley wrote to Congress requesting that margin payments "be protected from reversal by the trustee in bankruptcy," he *also* requested that "[a]ny such provision should also clearly preempt state law in this area." Bankr. Act Rev. at 2406. When (in bills brought to the floor in 1977) it became clear that Congress had declined that invitation, Commodity Exchange Inc. ("Comex"), the leading futures exchange at the time, wrote to Congress expressing its concern with that decision. Comex acknowledged that the proposed legislation provided that "*the trustee* may not avoid a transfer that is a margin payment to, or deposit with, a[ ] . . . clearing association," but asked Congress to go further. *See Bankruptcy Reform Act: Hearings Before the Subcomm. on Improvements in Judicial Machinery of the Comm. on the Judiciary*, 95th Cong., at 1290 (1977) (emphasis added). Referencing one of the very state laws under which Plaintiffs here have brought suit (*i.e.*, New York's Debtor and Creditor Law), Comex urged that

> [t]he bankruptcy law should be amended to provide that state law inconsistent with provisions of the bankruptcy law relating to preferential or fraudulent payments is not valid. . . . Comex believes that it is essential that the law in this area be uniform and it urges that S. 2266 be amended to provide that the federal bankruptcy law prevail over state laws with respect to preferential or fraudulent payments . . . .

Id. at 1296-97.[20] Congress again declined the invitation.

Defendants try to dismiss these demurrers as irrelevant because (they say) neither Bagley nor Comex *explicitly* raised the possibility that individual creditors might bring suit to avoid transactions that fell within the bankruptcy trustee's safe harbor. *See* Joint Br. 61. But Defendants do not say why Comex would ask to

[20] In a footnote, Comex also mentioned—without citation, explanation, or identification of the source—that it had been "suggested" that "the supremacy doctrine" might act to override state law in this area. Comex itself apparently was unconvinced by that suggestion, recommending (unsuccessfully) that "the subject [be] covered by express language in the statute."

preempt state laws if trustees were already going to be foreclosed from bringing such avoidance suits.

In any case, any doubt that Congress has long known that individual creditors can bring suit to avoid transfers that trustees cannot was definitively dispelled when Congress debated and enacted Section 544(b)(2) as part of the Religious Liberty and Charitable Donation Protection Act of 1998 ("RLCDPA"). *See* Pub. L. No. 105-183, § 3(b)(2). As noted earlier, that section not only forecloses a trustee from avoiding a charitable contribution, but *also* provides that "any claim by any person to recover a transferred contribution . . . under Federal or State law . . . shall be preempted." *See supra* Part II.C.2.

Early drafts of the RLCDPA included, like Section 546(e), only a prohibition on trustees; they did not include the provision preempting creditor suits. At a hearing on the draft bill, the Chair of the National Bankruptcy Conference ("NBC") said precisely what Defendants now claim Congress was never told: A prohibition that applies only to a bankruptcy trustee "leaves in place the ability of individual creditors to pursue actions under State law and could result in a multiplicity of litigation."[21] The NBC's written statement was even more

[21] *Bankruptcy Issues in Review: The Bankruptcy Code's Effect on Religious Freedom and a Review of the Need for Additional Bankruptcy Judgeships: Hearing Before the Subcomm. on Administrative Oversight and the Courts of the S. Comm. on the Judiciary*, 105th Cong., at 42 (1997) (statement of Donald S. Bernstein).

explicit: The proposed provision, which was directed only to trustees, "cannot fully immunize charitable organizations because, under state law, creditors can pursue individual causes of action directly against the recipient of the transfer."[22]

Indeed, Congress heard testimony to that effect from multiple witnesses.[23] As Prof. Douglas Laycock explained:

> The current draft of H.R. 2604 cuts off the trustee's claims under § 544(b) and § 548(a)(2), so the trustee cannot sue. The trustee has no claim, and neither the claim nor the money will ever become property of the estate. An individual creditor who sues the church or charity . . . thus would not be interfering either with the trustee or with property of the estate. So the current draft actually frees up the individual creditors to sue without waiting for the end of the bankruptcy proceeding. Any individual creditor could sue a church or other charity protected by the current draft of H.R. 2604. Instead of one potential plaintiff—the trustee—there would be many potential plaintiffs—every individual creditor.[24]

Such suits were not hypothetical. In *Cedar Bayou Baptist Church v. Gregory-Edwards, Inc.*, 987 S.W.2d 156 (Tex. App. 1999)—a case noted by every congressional witness—a creditor alleged that his debtor's contributions to a local church were fraudulent transfers. After the debtor's bankruptcy trustee declined to

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[22] *Id*. at 44.

[23] *See Religious Liberty and Charitable Donations Protections Act of 1997; and Religious Fairness in Bankruptcy Act of 1997: Hearing Before the Subcomm. on Commercial and Administrative Law of the H.R. Comm. of the Judiciary*, 105th Cong. ("1998 Hrg."), at 41 (1998) (statement of Steven T. McFarland, Esq., Director, Center for Law and Religious Freedom) ("Presently, H.R. 2604 would fix the problem under section 544 of a trustee using state fraudulent transfer law . . . . However, there is nothing to preclude third-party creditors . . . .").

[24] *Id*. at 35.

bring an avoidance action, the creditor waited until the debtor had emerged from bankruptcy and then sued to avoid the contributions himself under state law. The trial court's award nearly bankrupted the church. Laycock advised Congress that, if it wanted to foreclose such suits in the future, it could not simply prohibit trustees from bringing suit; it needed to preempt creditor state-law claims expressly, as well.[25]

Congress ultimately enacted *verbatim* language that Laycock had proposed as the second sentence of Section 544(b). During floor debate, the Representative introducing the bill made special note of the addition, calling it a "substantial change" from earlier drafts and explaining that its purpose was to "prevent[] creditors from using remedies available under state law to avoid transfers of religious or charitable contributions." 144 CONG. REC. H3999-02 (June 3, 1998) (statement of Rep. Gekas). *See also ibid*. (statement of Rep. Bentsen) (addressing the need for the RLCDPA to foreclose future versions of the *Gregory-Edwards* case).

Despite its now-unmistakable awareness that creditors could bring suit to avoid transfers falling within a trustee's safe harbor, however, Congress again declined to enact a similar express preemption in Section 546(e)—*even as it made other amendments to Section 546(e) in the RLCDPA*. *See* Pub. L. No. 105-183,

[25] *Ibid*.

§ 3(c)(1). That is telling, because "[i]t seems unlikely . . . that Congress did not have [Section 544(b)(2)] in mind when it amended [Section 546(e)] inasmuch as both sections were amended at the same time in the same statute." *Manufacturers Hanover Trust Co. v. Commissioner*, 431 F.2d 664, 666 n.1 (2d Cir. 1970). *See also Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 174-75 (2009) ("[w]hen Congress amends one statutory provision but not another, it is presumed to have acted intentionally," and "negative implications raised by disparate provisions are strongest when the provisions were considered simultaneously when the language raising the implication was inserted") (quotation marks omitted).

As noted earlier, Defendants acknowledge the similarity of Sections 544(b)(2) and 546(e). Joint Br. 65. Yet they suggest that the former sheds no light on the latter. But what those subsections share—indeed, the reason they reside in the same subchapter of the Code and cross-reference each other—is that both are safe harbors *from the avoidance powers of a bankruptcy trustee*. In enacting those safe harbors, Congress was explicitly told what Defendants claim Congress never knew: that foreclosing a trustee from bringing an avoidance action under the Bankruptcy Code does not preempt individual creditors from asserting individual avoidance claims under state law. Congress has known that for at least sixteen years and yet has declined to add to Section 546(e) the express preemption provision it added to Section 544(b)(2).

There is more. Five years after RLCDPA's enactment, in *PHP Liquidating*, *supra*, the United States District Court for the District of Delaware was asked to address the *exact* question at issue here: Does Section 546(e) bar only a bankruptcy trustee's claims to avoid settlement payments, or does it also bar claims brought by individual creditors? The court said it did only the former: Section 546(e) applies only to a bankruptcy trustee, and does *not* bar claims asserted by individual creditors to avoid settlement payments. 291 B.R. at 607. [26] "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *Lorillard v. Pons*, 434 U.S. 575, 580 (1978). Congress has amended Section 546(e) twice since *PHP Liquidating*. The section still does not contain an express preemption provision.

D. Plaintiffs' State-Law Claims Are Consistent With The Bankruptcy Code's Purpose And Do Not Conflict With Section 546(e)

The "text, structure, and history," *Arizona*, 132 S. Ct. at 2505, of Section 546(e) and its surrounding provisions do not reflect "a clear and manifest purpose [to] pre-empt[ ]" individual creditors' state-law claims, *Isla Petroleum*, 485 U.S. at 503 (quotation marks omitted). Indeed, those sources demonstrate

[26] Defendants contend that *PHP Liquidating* could not have put Congress on notice because the court dismissed that case for lack of standing. Joint Br. 64. That misunderstands the import of that case. *PHP Liquidating* put Congress on notice that such state-law claims exist and could stand, as Defendants claim, as a "challenge" to Congress's objectives.

quite the opposite: Congress was well aware of the possibility of such claims but believed it could sufficiently minimize disruption to the financial markets by simply limiting the Code-based avoidance powers available to bankruptcy trustees.

Even if Congress had no notion that individual creditors might someday bring suit themselves, however, state-law fraudulent transfer claims still would not be preempted by Section 546(e) because they are not so "repugnan[t]" to the Bankruptcy Code's many policy objectives that they "cannot be reconciled or consistently stand together" with the specific market-stabilizing objectives of Section 546(e). *MTBE Products*, 725 F.3d at 102 (quotation marks omitted). To the contrary, Plaintiffs' claims promote the Bankruptcy Code's overarching goal of maximizing creditor recovery and do not implicate the central concern of Section 546(e)—trustee avoidance actions directed at market intermediaries in the aftermath of a bankruptcy.

1. Congress's Decision Not To Preempt Plaintiffs' Non-Bankruptcy Claims Reflects The Bankruptcy Code's Overall Goal Of Maximizing Creditor Recovery

In arguing that Plaintiffs' claims frustrate the purpose of Section 546(e) in particular, Defendants misunderstand the scope of the preemption inquiry. Preemption can be implied only when state law "do[es] major damage to" (*Hillman*, 133 S. Ct. at 1950 (quotation marks omitted)) the "purpose and intended effects" of "the federal statute *as a whole*" (*Crosby v. Nat'l Foreign Trade

Council, 530 U.S. 363, 373 (2000) (emphasis added)); *accord Mary Jo C.*, 707 F.3d at 162 (same); *MTBE Products*, 725 F.3d at 97 (preemption must be warranted in light of the "'*full* purposes and objectives of Congress'") (quoting *Arizona*, 132 S.Ct. at 2501) (emphasis added). Any alleged conflict between Plaintiffs' claims and Section 546(e) is thus only "part, but much less than all, of the necessary inquiry." *Lyondell*, 503 B.R. at 365.

Indeed, numerous Supreme Court opinions emphasize this critical flaw in Defendants' argument. In *Crosby*, the Court held that a Massachusetts state law barring state entities from buying goods or services from companies doing business with Burma was impliedly preempted by a federal law that imposed its own comprehensive set of mandatory and conditional sanctions. In concluding that the former frustrated the latter, the Court emphasized repeatedly that it was considering "the entire scheme of the statute," which demonstrated that the "state law undermine[d] the intended purpose and 'natural effect' of at least three provisions of the federal Act." *Crosby*, 530 U.S. at 373 (quotation marks omitted). The Court reached that conclusion by considering the statutory text of multiple sections of the federal law, *id*. at 374-78, and legislative history that showed that Congress had considered and rejected approaches just like those embodied in the Massachusetts law, *id*. at 378-80 & nn.13, 15.

The Court's analysis in *Arizona*, upon which Defendants heavily rely, likewise reflects the duty to focus on the *entire* statute and the competing policies it effectuates, the balances it strikes, the compromises it reflects, and Congress's choice of means to its ends. There, the Court held that an Arizona law making it a misdemeanor for an unauthorized alien knowingly to apply for, solicit, or do work in the state was impliedly preempted by the Immigration Reform and Control Act of 1986 ("IRCA"). *Arizona*, 132 S. Ct. at 2503. Tellingly, however, the Court did so based not on a single provision of the Act read in isolation, but rather on the entire framework of IRCA, which—as reflected in numerous statutory provisions and regulations, as well as the Act's legislative history, *id*. at 2503-05—demonstrated that "the full purposes and objectives of Congress" were to regulate immigration with sanctions on employers and not on employees. *Id*. at 2505 (quotation marks omitted).

Here, in contrast, Defendants' entire argument about the scope of Congress's interest in market stability is drawn from the text of a *single* subsection of Title 11 (and one whose very text and legislative history cut against their argument). The flaw in such a narrow analysis, as the district court recognized, is that, in addition to reducing the risk of market disruption, "Congress pursues a host of other aims through the Bankruptcy Code, not least making whole the creditors of a bankruptcy estate." SA-006. Indeed, "maximizing property available to satisfy creditors"—a goal advanced by Plaintiffs' claims—is one of the Code's most fundamental purposes. *203 N. LaSalle St. P'ship*, 526 U.S. at 453; *Cybergenics*, 226 F.3d at 244 n.9 ("bolstering creditors' rights is the primary objective of avoidance powers"). For that reason, there is nothing odd about Congress's decision to permit creditors to bring non-bankruptcy claims themselves, even as it foreclosed trustees from bringing certain Code-based claims.

There is, of course, tension among many of the Code's provisions. *See, e.g.*, *QSI Holdings, Inc. v. Alford*, 382 B.R. 731, 738 (W.D. Mich. 2007) (noting the tension between provisions intended to avoid disruption to securities markets and the avoidance provisions of the Bankruptcy Code), *aff'd*, 571 F.3d 545 (6th Cir. 2009). But such tension, and the need to balance competing interests, is precisely why it is inappropriate to infer preemption from the purported purpose of any one particular section standing alone. Striking that balance is Congress's job. *See infra* Part II.D.5

2. Plaintiffs' Claims Are Not An Improper "Work-Around," Nor Do They Render Section 546(e) Meaningless

Preemption still would not be warranted even if the *only* policies this Court were to consider were those animating Section 546(e). Although Defendants repeatedly assert that permitting individual creditors to bring suit under state law is a "work around" and would "render the safe harbor close to a dead letter" (Joint Br. 66), they ignore the obvious: The section will continue to do what it has done for thirty-four years—foreclose bankruptcy trustees from exercising their expansive, Code-based powers to avoid certain settlement payments. And, in doing so, Section 546(e) acts as a powerful safe harbor because a bankruptcy trustee who is exercising authority conferred by federal law poses a far greater threat than an individual creditor who is prosecuting a claim under state law.

For example, "Section 544(b) of the Bankruptcy Code . . . allow[s] a trustee to avoid a fraudulent transfer without regard to the size of the claim of the creditor whose rights and powers the trustee was asserting," whereas "state fraudulent transfer laws . . . provide[] that the creditor in a fraudulent transfer action may not recover more than the amount necessary to satisfy the creditor's [own] claim." *Tronox Inc. v. Anadarki Petroleum Corp. (In re Tronox Inc.)*, 464 B.R. 606, 615–16 (Bankr. S.D.N.Y. 2012) (citing *Moore v. Bay*, 284 U.S. 4 (1931)); *accord Cybergenics*, 226 F.3d at 243. Indeed, it is for this very reason that Plaintiffs asserted claims to recover only on account of their own claims against Tribune, and not the many more billions of dollars in unpaid claims held by other creditors who have chosen not to sue Defendants.

Furthermore, unlike an individual creditor prosecuting its claim outside of bankruptcy court, a bankruptcy trustee is funded by the bankruptcy estate, and receives significant procedural advantages such as nationwide long-arm jurisdiction in a single forum and the ability to serve process by mail. *See* Fed. R. Bankr.

P. 7004(b), (d). Individual creditors, in contrast, have to bear their own expenses, including those associated with locating and serving defendants in actions that must then be brought in multiple fora. These differences belie Defendants' sky-is-falling assertion that creditors will bring such actions in every case. Joint Br. 69. In many cases they won't, because the benefit of acting alone will not outweigh the expense. Indeed, as Defendants themselves concede (Joint Br. 63 n.32), though Section 546(e) was enacted thirty-four years (and multiple recessions) ago, individual creditors have brought cases like this only a handful of times.

Nor is Section 546(e) rendered meaningless simply because it does not foreclose every suit against a market participant. As the district court recognized, the section's domain is, by its terms, a limited one. SA-005. Section 546(e) does not apply before the commencement of a bankruptcy case, when individual creditors are free to avoid settlement payments, nor does it apply after the dismissal of a bankruptcy case. Even during the pendency of a bankruptcy case, the statute does not provide complete immunity from claims asserted by a bankruptcy trustee. For example, by its plain language, Section 546(e) does not provide a defense against a bankruptcy trustee's intentional-fraudulent-transfer claims to avoid settlement payments—even though the potential market disruption is the same regardless of whether the trustee pursues a theory of intentional or constructive fraud. *See infra* Part II.D.4. Nor does Section 546(e) provide a defense against claims to avoid debt obligations incurred to provide the financing for settlement payments—even though Sections 544 and 548 permit a bankruptcy trustee to avoid obligations that are owed to financial institutions.[27] Nor does Section 546(e) provide a defense where the challenged transfer otherwise is void under applicable state corporate law,[28] or where the defense was not asserted on a timely basis.[29]

Given the measured scope of the statute, Defendants' argument that the purpose of Section 546(e) will be frustrated unless it is stretched beyond its express language rings hollow. *See English*, 496 U.S. at 88-89 (declining to hold that Congress impliedly preempted a private plaintiff's state-law claim for punitive damages, even though federal law would have precluded that plaintiff from recovering punitive damages under federal law). Indeed, as the legislative history states, Section 546(e) was "intended to minimize," not eliminate, "the

[27] *See, e.g.*, *Geltzer v. Mooney (In re MacMenamin's Grill Ltd.)*, 450 B.R. 414, 429 (Bankr. S.D.N.Y. 2011) ("[S]ection 546(e) provides only that 'the trustee may not avoid a transfer'; it does not, by its plain terms, extend the safe harbor to the trustee's avoidance of the incurrence of an obligation.").

[28] *See, e.g.*, *Enron Corp. v. Bear, Stearns Int'l Ltd. (In re Enron Corp.)*, 323 B.R. 857, 859 (Bankr. S.D.N.Y. 2005) ("The Court holds that because, under [applicable state] law, an act in violation of the [State's] distribution statute is considered void, such action is a nullity and, as such, the underlying transaction cannot form the basis of a securities transaction that supports a settlement payment. Therefore, section 546 of the Bankruptcy Code does not protect such payment from the trustee's avoidance powers.").

[29] *See, e.g.*, *Adelphia Recovery Trust v. FPL Grp., Inc. (In re Adelphia Commc'ns Corp.)*, 452 B.R. 484, 492-93 (Bankr. S.D.N.Y. 2011) (failure to assert a Section 546(e) defense in a timely fashion waives it).

displacement caused in the commodities and securities markets in the event of a major bankruptcy affecting those industries." H.R. Rep. No. 97-420, at 1. It achieves that end regardless of whether individual creditors can bring suit.

In fact, the type of measured legislative reaction reflected in Section 546(e)—where Congress limits federal causes of action in the interest of market stability, but leaves untouched their state-law analogs—is not uncommon. For example, in 1995, Congress enacted the Private Securities Litigation Reform Act (the "PSLRA") to curtail class actions that allege fraud in connection with the sale of securities. Among other things, the PSLRA amended the federal Racketeer Influenced and Corrupt Organizations Act ("RICO") to eliminate securities fraud as a predicate act of racketeering. *See* 18 U.S.C. § 1964(c). Congress intended this amendment to mitigate the perceived adverse impact that RICO treble-damage claims, which accompanied nearly all securities-fraud actions, were having on the capital markets. *See* H.R. Rep. No. 104-369, at 31 (1995). Significantly, however, Congress did not preempt state-law analogs to RICO that still permitted treble-damage claims that allege securities fraud as a predicate act.[30] *See* JOHN E. FLOYD,

[30] *See, e.g.*, Ariz. Rev. Stat. Ann. §§ 13-2301(D)(4)(xviii) (securities fraud as predicate act), 13-2314.04(A) (treble damages); La. Rev. Stat. Ann. §§ 51:712(D)(1) (securities fraud as predicate act), 15:1356(E) (treble damages); N.J. Stat. Ann. §§ 2C:41-1(a)(p) (securities fraud as predicate act), 2C:41-4(c) (treble damages).

RICO STATE BY STATE: A GUIDE TO LITIGATION UNDER THE STATE RACKETEERING STATUTES 1-3 (2d ed. 2011).

Likewise, indirect purchasers generally may not bring suit under the federal antitrust laws, but state-law antitrust claims by indirect purchasers are not preempted. *Compare Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), *with ARC Am.*, *supra*. Defendants might pejoratively call such claims a "work-around" or "end run," but those labels by themselves do not help to distinguish between permitted and preempted state-law claims.

Defendants' attempt to disparage Plaintiffs' claims as an improper "work-around" is thus no more persuasive than an argument that a state-law racketeering claim is a "work-around" for RICO or that a state-law antitrust claim is a "work-around" for the Sherman Act. There is nothing improper about creditors asserting state-law claims that Congress, in its effort to weigh competing policy considerations and respect the integrity of longstanding state-law creditor protections, has expressly left available. Nor does doing so render meaningless the limits that Congress has established for the federal-law claims it created for use by trustees. The differences between the state-law claims that can be asserted by creditors and the federal-law claims that can be asserted by trustees exist by design, and therefore are "not the sort of sharp conflict between state law and federal policy that justifies preemption." *Marsh v. Rosenbloom*, 499 F.3d 165, 179 (2d Cir. 2007).

3. The Cases On Which Defendants Rely Do Not Support Their Argument

Defendants cannot cite any case that has held that Section 546(e) preempts claims asserted by individual creditors. Instead, Defendants rely heavily on cases that did not involve claims asserted by individual creditors at all. Joint Br. 55-56. And the reasoning of those cases strongly cuts *against* the proposition that Section 546(e) preempts Plaintiffs' claims.

In the cases that Defendants cite, a bankruptcy trustee (or a successor or estate representative) asserted state-law claims such as unjust enrichment against the transferees of settlement payments.[31] The courts found such claims preempted by Section 546(e), but did so because they believed the claims to be "merely 're-labeled' avoidance actions" brought precisely by the type of plaintiff that Section 546(e) *expressly* reaches. *U.S. Mortgage*, 492 B.R. at 810; *see also Hechinger*, 274 B.R. at 96 ("Claims that Congress deemed unavoidable under sections 544(b) and 546(e) of the Bankruptcy Code can not [sic] be avoided by simply re-labeling avoidance claims as unjust enrichment claims."); *Contemporary Indus.*, 564 F.3d

[31] *See Contemporary Indus.*, 564 F.3d at 984; *Hechinger*, 274 B.R. at 75-76; *AP Servs. LLP v. Silva*, 483 B.R. 63, 64 (S.D.N.Y. 2012); *U.S. Bank, N.A. v. Verizon Commc'ns*, 892 F. Supp. 2d 805, 812 (N.D. Tex. 2012); *Bond v. Sparks (In re U.S. Mortgage Corp.)*, 492 B.R. 784, 789 (Bankr. D.N.J. 2013).

at 988; *AP Servs*, 483 B.R. at 71 n.65; *U.S. Bank*, 892 F. Supp. 2d at 824. The courts' concern was that trustees could sidestep Section 546(e) by merely changing two words in a complaint—from "fraudulent conveyance" to "unjust enrichment."

Those same courts made clear, however, that their holdings were narrow and limited to such attempts by trustees to bring claims that are "substantially identical" to the avoidance actions they are expressly barred from bringing by Section 546(e). *See, e.g.*, *Contemporary Indus. Corp. v. Frost (In re Contemporary Indus. Corp.)*, No. A99–8135, 2007 WL 5256918, at *5 (D. Neb. June 29, 2007). They did not, in contrast, view implied preemption as an invitation to expand the bar of Section 546(e) beyond the clear import of its statutory text. *See, e.g., U.S. Bank*, 892 F. Supp. 2d at 826 (rejecting the argument that Section 546(e) impliedly preempted state-law claim to invalidate the assumption of a new debt obligation because the section "uses the word 'transfer,'" which "mean[s] that the safe harbor applies only to transfers of property, and not the incurrence of obligations").

For reasons already explained, state-law fraudulent conveyance actions brought by individual creditors outside of bankruptcy are not "substantially identical" to Code-based fraudulent conveyance actions brought by a bankruptcy trustee. They involve different types of plaintiffs, with different powers, at different times, in different courts. Indeed, in *Hechinger*, the court explained why expanding Section 546(e)'s safe harbors to reach creditors' claims would be categorically different from merely holding it to preempt "re-label[ed]" claims brought by a bankruptcy trustee: "[S]ection 546(e) applies *only to claims asserted in bankruptcy*." 274 B.R. at 96, 97 (emphasis added). It is simply "inapplicab[le] . . . to proceedings outside of bankruptcy." *Id*. at 97. The court's reasoning would need to be turned upside down to support Defendants' position here.

4. Plaintiffs' Claims Do Not Implicate The Policy Concerns Raised By Defendants' Amici

Though several *amici* ask this Court to preempt creditor state-law claims in the name of market stability, none attempts to show that the actual claims brought in this case threaten such stability or even implicate the policy concerns *amici* raise. They don't.

As described earlier (*supra* Part II.C.3), Congress did not enact Section 546(e) out of concern that *any* avoidance action connected to the bankruptcy of *any* market participant might threaten market stability. Defendants' *amici* admit as much. SIFMA Br. 22 (acknowledging that, in cases of intentional fraud, transfers may be undone by the trustee). Rather, Congress enacted Section 546(e) to counteract a particular kind of risk. In the clearance and settlement system, parties "use intermediaries to make trades of [securities] which are instantaneously credited, but in which the actual exchange of [securities] and consideration therefor takes place at a later date." *Zahn v. Yucaipa Capital Fund*, 218 B.R. 656, 675 (D.R.I. 1998). In this system, the intermediaries' role is "critical" because of the lapse of time in between the date of a trade (when the intermediary credits and debits the counterparties' accounts) and the date of settlement (when the securities and consideration are actually exchanged). *Id.* at 676. The system "depends upon a series of guarantees, made by all parties in the chain," including the intermediary, "that they will live up to their obligations regardless of a default by another party in the chain." *Ibid.* If the "pre-bankruptcy trades by a bankrupt intermediary could be set aside" through avoidance, then "the guarantees that allow the system to function would be threatened," and "a bankruptcy by one party in the chain could spread to other parties in the chain, threatening a collapse of the entire industry." *Ibid.*

As Judge Gerber recognized in *Lyondell*, actions directed at "LBO payments [made] to stockholders at the very end of the asset transfer chain, where the stockholders are the ultimate beneficiaries of the constructively fraudulent transfers, and can give the money back to injured creditors with no damage to anyone but themselves" "would not create systemic risk." 503 B.R. at 372-73.[32] For that reason,

[32] The vast majority of Defendants here are such ultimate beneficiaries. To the extent Plaintiffs have also sued mere conduits, existing state law may authorize their dismissal, and protocols have been established to expedite that process.

> at least in the context of an action against cashed out beneficial holders of stock, at the end of the asset dissipation chain, state law fraudulent transfer laws do not "stand as an obstacle" to "purposes and objectives of Congress"—even if one were to ignore the remainder of bankruptcy policy and focus solely on the protection against the "ripple effects" that caused section 546(e) to come into being.

Id. at 373.

Neither Defendants nor their *amici* offer any contrary analysis. They simply assert that the "purpose of Section 546(e) is to promote market stability by assuring market participants that, except in cases of actual fraud, transfers they receive as part of a securities transaction will not be clawed back." SIFMA Br. 26; *see also* Doc. 161 ("SEC Br.") at 13. In so asserting, however, *amici* ignore the fact that the very market stability they say Congress elevated above all else is itself undercut by Congress's decision to permit intentional-fraudulent-conveyance claims. And, though Defendants blithely assert that claims of intentional fraudulent conveyance will be "rare" "because of their exacting nature" (Joint Br. 52), they ignore the fact that the indicators of constructive fraudulent-conveyance—insolvency and an exchange for less than reasonably equivalent value—are themselves badges of intentional fraudulent conveyance, as well. *See, e.g.*, *Max Sugarman Funeral Home, Inc. v. A.D.B. Investors*, 926 F.2d 1248, 1254-55 (1st Cir. 1991). Indeed, it is often more difficult—and more expensive—to prove constructive fraudulent conveyance claims than it is to prove intentional ones. *See, e.g.*, John H. Ginsberg et al., *Befuddlement Betwixt Two Fulcrums:*

Calibrating the Scales of Justice to Ascertain Fraudulent Transfers in Leveraged Buyouts, 19 AM. BANKR. INST. L. REV. 71, 72, 90 (2011) (noting that proving insolvency "is exceedingly expensive" and "the outcome [often] unpredictable").

Moreover, there can be no "domino effect" on the market when the only affected parties are at the end of the chain, as the court explained in *Lyondell*. "The inviolability of payments to shareholders is simply not basic to the operation of the clearance and settlement systems" that Section 546(e) seeks to protect. *Wieboldt Stores, Inc. v. Schottenstein*, 131 B.R. 655, 664 n.11 (N.D. Ill. 1991). The market systems would "only [be] incidentally affected, if at all, if former shareholders are required to return payments they received in an LBO." *Ibid*. Indeed, because there is hardly any securities transaction that cannot easily be brought within Section 546(e)'s scope, *amici's* claim that the section was established for their protection amounts to an assertion that Congress intended to give fraudulent transferees a free pass. *See also* Irving E. Walker & G. David Dean, *Structuring a Sale of Privately-Held Stock to Reduce Fraudulent-Transfer Claims Risk*, 28 AM. BANKR. INST. J. 16, 72 (2009) (advising practitioners to use "a financial institution, instead of a law firm," as escrow agent so that "an otherwise fraudulent transfer of funds . . . may be exempted from avoidance"). It didn't.

Amici respond that, in *Enron*, this Court construed the term "settlement payments," as used in Section 546(e), as having a broader domain than simply payments made to or from an intermediary. SIFMA Br. 27; SEC Br. 13. Yet that response highlights the fundamental flaw of their preemption argument. The court in *Enron* "reach[ed] [its] conclusion by looking to the statute's plain language." *Enron*, 651 F.3d at 339; *see also Quebecor World (USA) Inc. v. Am. United Life Ins. Co. (In re Quebecor World (USA) Inc.)*, 719 F.3d 94, 98 (2d Cir. 2013) (relying on "the plain wording" of the statute). (For the record, Plaintiffs preserved below—and hereby preserve here—the position that *Enron* and *Quebecor* were wrongly decided and should be reconsidered by this Court en banc or by the Supreme Court in an appropriate case. It hardly matters, however, because on the whole those cases *support* the arguments we are making here.)

Here, looking at the plain language, as *Enron* and *Quebecor* instruct, would of course, be fatal to Defendants' larger argument—which is why they everywhere else urge this Court to disregard Congress's plain language and to focus, instead, on its purported purpose. But what is sauce for the goose is sauce for the gander. If this Court is to going to look behind the statutory text, it must consider the history that animated Congress to enact Section 546(e)—which the Court in *Enron* expressly "decline[d] to address," 651 F.3d at 339—and which "evidence[s] [no] desire to protect individual investors who are beneficial recipients of insolvents' assets," *Lyondell*, 503 B.R. at 373.

5. *It Is For Congress, Not The Courts, To Decide How To Balance Competing Policies*

Courts "do not sit to assess the relative merits of different approaches to various bankruptcy problems." *Hartford Underwriters*, 530 U.S. at 13-14. Section 546(e) surely reflects Congress's concern that some sorts of Code-based avoidance actions pose some degree of risk to financial markets. But "no legislation pursues its purposes at all costs, and every statute purposes, not only to achieve certain ends, but also to achieve them by particular means." *Freeman v. Quicken Loans, Inc.*, 132 S. Ct. 2034, 2044 (2012) (quotation marks, citation, and alterations omitted).

Congress made an informed decision that the best way to balance its desire to reduce the risk of market disruption with the Code's larger goal of maximizing creditor recovery was to circumscribe the Code-based avoidance powers of bankruptcy trustees, so that a bankruptcy would not create new causes of action against market intermediaries. Congress did not, in contrast, choose to foreclose every avoidance action against every market participant: As the statutory text shows, Section 546(e) does not eliminate trustees' powers entirely, nor does it foreclose individual creditors from bringing suit themselves. "Unless it leads to absurd or futile results"—and it does not—this Court "must enforce what Congress has commanded whether or not [it] agree[s] with [Congress's] policy choices." *Bell v. Bell (In re Bell)*, 225 F.3d 203, 219 (2d Cir. 2000) (quotation marks omitted). "[V]ague notions of a statute's 'basic purpose' are . . . inadequate to overcome the words of its text regarding the specific issue under consideration"—guidance that "is especially true with legislation such as [the Code], an enormously complex and detailed statute that resolved innumerable disputes between powerful competing interests." *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 261-62 (1993).

In no fewer than three decisions (two unanimous) construing the Bankruptcy Code in just the last two years, the Supreme Court has rejected the interpretive approach that Defendants urge, reminding lower courts that Congress balanced various competing interests—including avoiding "economic harm" to "creditors"—in the detailed provisions of the Code and that "it is not for courts to alter the balance struck by the statute." *Siegel*, 134 S. Ct. at 1197-98; *accord RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 132 S. Ct. 2065, 2073 (2012); *Hall v. United States*, 132 S. Ct. 1882, 1893 (2012). As the Court put it in *Hall*:

> Certainly, there may be compelling policy reasons [to prohibit the challenged conduct] . . . . But if Congress intended that result, it did not so provide in the statute. Given the statute's plain language, context, and structure, it is not for us to rewrite the statute, particularly in this complex terrain of interconnected [bankruptcy] provisions and exceptions enacted over nearly three decades. . . . Congress is entirely free to change the law by amending the text.

132 S. Ct. at 1893 (quotation marks omitted). "[T]he pros and cons [of doing so] . . . are for the consideration of Congress, not the courts." *RadLAX*, 132 S. Ct. at 2073.

III. PLAINTIFFS' CLAIMS ARE COGNIZABLE UNDER STATE LAW

In their "State Law Brief" (Doc. 144), Defendants make the startling assertion that state constructive fraudulent conveyance laws do not apply to "cleared and settled securities transactions." State Law Br. 13. Defendants feign candor by admitting—as they must—that "the Uniform Acts do *not* expressly prohibit avoidance of such transactions." *Ibid*. (emphasis added). But they fail to acknowledge the converse—that the plain language of the Uniform Fraudulent Conveyance Act ("UCFA") *expressly permits* avoidance of such transactions, stating that "*[e]very conveyance* made . . . by a person who is or will be thereby rendered insolvent *is fraudulent* as to creditors without regard to . . . actual intent if the conveyance is made . . . without a fair consideration." *See, e.g.*, N.Y. Debt. & Cred. Law § 273 (emphasis added). So too does Section 5 of the Uniform Fraudulent Transfer Act ("UFTA"). Defendants spend forty-one pages concocting reasons why this Court should disregard the considered judgments of the legislatures of fifty States and create out of whole cloth an exception to statutory law that those legislatures have not seen fit to enact. This Court should decline that invitation.

Defendants begin with a factual premise that is demonstrably wrong—that no "state has imposed liability in circumstances similar to these." State Law Br. 9. In fact, for more than a century, States have imposed such liability.

"Since at least 1914, [the Delaware Chancery Court] has recognized that . . . 'the undoubted weight of authority' teaches that a 'corporation cannot purchase its own shares of stock when the purchase diminishes the ability of the company to pay its debts, or lessens the security of its creditors.'" *SV Inv. Partners, LLC v. ThoughtWorks, Inc.*, 7 A.3d 973, 987 (Del. Ch. 2010) (alterations omitted) (quoting *In re Int'l Radiator Co.*, 92 A. 255, 255 (Del. Ch. 1914)), *aff'd*, 37 A.3d 205 (Del. 2011). And, since at least 1921, that same court has recognized claims for constructive fraudulent conveyance where a "corporation was heavily insolvent" and it transferred a large portion of its assets and "received nothing in exchange . . . except shares of stock." *Keedy v. Sterling Elec. Appliance Co.*, 115 A. 359, 362-63 (Del. Ch. 1921) (interpreting the Bulk Sales Act). Nor is Delaware alone in this regard.[33] No wonder, then, that the Third Circuit has observed that "it [is] settled, as a general matter at least, that the fraudulent conveyance provisions of the [Uniform Acts] extend to leveraged buyouts," and that "challenges to

[33] *See, e.g.*, *Addison v. Tessier*, 335 P.2d 554, 557 (N.M. 1959) (affirming judgment setting aside constructive fraudulent conveyance involving stock payment); *Nevada Land & Mortgage Co. v. Lamb*, 524 P.2d 326, 327 (Nev. 1974) (a corporation may not "divide [its] assets among stockholders when the corporation is insolvent").

leveraged buyouts tend to be predicated on the constructive fraud provisions" of the Uniform Acts. *Moody v. Sec. Pac. Bus. Credit, Inc.*, 971 F.2d 1056, 1064 (3d Cir. 1992).

Indeed, as Defendants elsewhere concede, *the very case* that prompted the enactment of Section 546(e) was one in which a court recognized that New York state constructive fraudulent conveyance law *did* reach "cleared and settled" transactions. *See* Joint Br. 60 (discussing *Seligson*); *see also supra* Part II.C.3. Defendants' argument that there has been "no instance" in which a court has recognized the claims brought here is therefore as puzzling as it is wrong.

Defendants also argue in the alternative that, even if state law once recognized the claims brought here, it would not do so today because the Uniform Acts "incorporat[e] policy choices embodied in the Bankruptcy Code," and therefore necessarily incorporate Section 546(e)'s safe harbor. State Law Br. 24. That argument, too, is wrong. The cases on which Defendants rely construe state statutory text that is derived from, or is nearly identical to, statutory text used in the Code. Looking to federal bankruptcy law for guidance in construing terms that are used in a state statute (and often modeled on federal bankruptcy law) is decidedly different from creating an entirely new *exception* to the state statute, when that exception is nowhere expressed in the statute itself.

That is all the more true because "state law is not concerned with the structure of the Bankruptcy Code or with ensuring that the Bankruptcy Code's principles not be undermined." *Old CarCo LLC v. Daimler AG (In re Old CarCo LLC)*, 435 B.R. 169, 189 & n.17 (Bankr. S.D.N.Y. 2010) (citing *HBE Leasing Corp. v. Frank*, 48 F.3d 623, 634 (2d Cir. 1995) (UFCA and Code have different purposes)). The fact that a "particular claim is being brought in the context of a bankruptcy proceeding [does] not alter the state law." *Ibid*. Indeed, it is for that reason, as we've previously discussed, that courts have consistently held that other limits on a trustee's avoidance powers—such as the statute of limitations in Section 546(a)—do not apply to creditor claims brought under state law. *See* Principal Br. 45.

At bottom, Defendants ask this Court to dismiss Plaintiffs' claims because, they say, such claims are "novel." State Law Br. 1. They are not; state law has recognized them for years. But it would not matter even if the claims were novel. "Th[e] broad sweep [of the UFCA] does not justify exclusion of a particular transaction . . . simply because it is innovative or complicated." *United States v. Tabor Court Realty Corp.*, 803 F.2d 1288, 1297 (3d Cir. 1986). "If the UFCA is not to be applied to leveraged buy-outs"—or cleared and settled securities transactions, or whatever else Defendants want to call their fraudulent transfers—"it should be for the state legislatures, not the courts, to decide." *Ibid*.

CONCLUSION

For the foregoing reasons, the district court's order should be reversed as to "standing" and affirmed in all other respects.

Dated: April 11, 2014

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the Court's November 21, 2013, Order For Case Management Relief (Doc. 89) because this brief contains 21,886 words, excluding those parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). I further certify that this brief complies with the typeface requirements of Fed. R. App. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface, 14-point Times New Roman, using Microsoft Word.

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CERTIFICATE OF SERVICE

I hereby certify that on April 11, 2014, I caused a true and correct copy of the foregoing to be filed with the Court by CM/ECF, and caused additional copies to be served upon counsel for all parties by CM/ECF and by e-mail.

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