No.

IN THE

Supreme Court of the United States

DEUTSCHE BANK TRUST COMPANY AMERICAS, ET AL.,

Petitioners,

v.

ROBERT R. MCCORMICK FOUNDATION, ET AL.,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Second Circuit correctly held—contrary to several other courts of appeals—that the presumption against federal preemption of state law does not apply in the bankruptcy context.

2. Whether the Second Circuit correctly held—following the Third, Sixth, and Eight Circuits, but contrary to the Seventh and Eleventh Circuits—that a fraudulent transfer is exempt from avoidance under 11 U.S.C. § 546(e) when a financial institution acts as a mere conduit for fraudulently transferred property, or whether instead the safe harbor applies only when the financial institution has its own beneficial interest in the transferred property.

3. Whether the Second Circuit correctly held—contrary to this Court's decisions holding that it is for Congress, and not the courts, to balance the multiple purposes of the Bankruptcy Code, and that courts must therefore rely first and foremost on the text of the Code—that 11 U.S.C. § 546(e) is properly construed to extend far beyond its text and impliedly preempt fraudulent-transfer actions brought by private parties (as opposed to the "trustee" expressly mentioned in the statute.)

RULE 14.1(b) STATEMENT

Petitioners are Retirees of the Tribune Company owed retirement benefits as well as a group of Noteholders, all plaintiffs-appellants-cross-appellees below. The Retiree Petitioners and Noteholder Petitioners are set forth in the appendix. Pet. App. 97a-100a.

Respondents are former Tribune Company shareholders. They are set forth in the appendix. Pet. App. 101a-250a.

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, the undersigned counsel for the Retiree Petitioners certifies that the Retiree Petitioners are either individuals or entities in which no corporation or other entity owns 10% or more of any interest.

The undersigned counsel for the Noteholder Petitioners make the following disclosures with respect to the Noteholder Petitioners, which are Deutsche Bank Trust Company Americas, Law Debenture Trust Company of New York, and Wilmington Trust Company:

Deutsche Bank Trust Company Americas is a banking institution governed by the laws of the State of New York, with a principal place of business at 60 Wall Street, New York, N.Y. 10005. Deutsche Bank Trust Company Americas is a wholly owned subsidiary of Deutsche Bank Trust Corporation. Deutsche Bank Trust Corporation is a wholly owned subsidiary of Taunus Corporation. Taunus Corporation is a wholly owned subsidiary of Deutsche Bank AG. No corporation directly or indirectly owns 10% or more of any class of Deutsche Bank AG's equity interests.

Law Debenture Trust Company of New York is a limited purpose trust company governed by the laws of the State of New York, with a principal place of business at 400 Madison Avenue, Suite 4D, New York, N.Y. 10017. Law Debenture Trust Company of New York is a wholly owned subsidiary of The Law Debenture Corporation, plc. The Law Debenture Corporation plc has no parent corporation. No corporation owns 10% or more of Law Debenture plc's equity interests.

Wilmington Trust Company is a bank and trust company governed by the laws of the State of Delaware, with a principal place of business at 1100 North Market Street, Wilmington, DE 19801. Wilmington Trust Company is a wholly owned subsidiary of Wilmington Trust Corporation. Wilmington Trust Corporation is a wholly owned subsidiary of M&T Bank Corporation. No corporation owns 10% or more of M&T Bank Corporation's equity interests.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-53a) is reported at 818 F.3d 98. The opinion of the district court (Pet. App. 54a-84a) is reported at 499 B.R. 310.

JURISDICTION

The court of appeals' judgment was entered on March 29, 2016. The court of appeals denied rehearing on July 22, 2016. Pet. App. 85a-88a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

11 U.S.C. § 546(e) provides, in relevant part:

> 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 . . . made by or to (or for the benefit of) a commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities clearing agency, . . . that is made before the commencement of the case, except under section 548(a)(1)(A) of this title.

Sections 544 and 548(a) of the Bankruptcy Code are reproduced at Pet. App. 89a-96a.

STATEMENT

This case arises out of the disastrous leveraged buyout ("LBO") of the Tribune Company, which siphoned more than $8.2 billion from the company to its shareholders. Pet. App. 10a, 56a. The LBO left

Tribune insolvent, and it quickly filed for bankruptcy. Pet. App. 11a. Shareholders' windfall came at the expense of Petitioners here: Retirees whose benefits will go unpaid and Noteholders who are owed more than $2 billion. Pet. App. 12a.

When Tribune emerged from bankruptcy, its plan of reorganization permitted Petitioners, in their own names, to pursue constructive fraudulent-transfer claims against Tribune's former shareholders—claims that state law has authorized creditors to bring for centuries. The Second Circuit, however, held that, upon the filing of Tribune's bankruptcy petition, creditors lost their ability to assert such claims forevermore, no matter what the debtor's plan of reorganization provided.

As the Second Circuit was constrained to admit, no provision of the Bankruptcy Code expressly precludes individual creditors from bringing fraudulent-transfer claims against a debtor's former shareholders. Rather, the Second Circuit held that Petitioners' claims were *impliedly preempted* by Section 546(e) of the Code—a section that provides, in pertinent part, that a bankruptcy "*trustee* may not avoid a *transfer* that is a . . . settlement payment . . . made by or to (or for the benefit of) a . . . financial institution" or other covered entity. 11 U.S.C. § 546(e) (emphasis added).

The Second Circuit's holding in this regard was wrong, and it presents important and recurring questions concerning three subjects on which courts are divided.

The first is whether the longstanding presumption against preemption applies when the

Bankruptcy Code supplements creditor rights that have long been embodied in state law. Every other court of appeals to address the issue has held that, consistent with this Court's own holdings, the presumption does apply. But the Second Circuit held otherwise.

The second concerns the role that a financial institution must play for a fraudulent transfer to fall within Section 546(e)'s domain—a question on which the courts of appeals are deeply and inarguably divided. The Second Circuit repeatedly has held that Section 546(e) shields all recipients of fraudulently transferred property when a financial institution acts only as a conduit—by passing fraudulently transferred property along to Tribune's former shareholders, for example. The Seventh and Eleventh Circuits, however, have held that the section applies only when a financial institution has a beneficial interest in the transferred property, which is not true for the vast majority of property at issue in this case. See*, e.g.*, *FTI Consulting, Inc.* v. *Merit Mgmt. Grp., LP*, No. 15-3388, 2016 WL 4036408, at *6 (7th Cir. July 28, 2016) (stating that the Seventh and Eleventh Circuits take a different position from five other circuits, including the Second).

The third is the vitality of this Court's holdings that, given the careful balance that Congress has struck in the detailed provisions of the Bankruptcy Code, courts must interpret the Code by starting with its text—and not (as the court of appeals did here) with a single perceived policy goal.

A. Statutory Framework

For centuries, every State has empowered creditors to avoid fraudulent transfers made by their debtor. See *Peters* v. *Bain*, 133 U.S. 670, 685 (1890) ("The statute of Elizabeth (chapter 5) against fraudulent conveyances has been universally adopted in American law as the basis of our jurisprudence on that subject."). Creditors can avoid transfers that are fraudulent either intentionally (where there was "actual intent to hinder, delay, or defraud") or constructively (where the transfer lacked "reasonably equivalent value" and the transferor was insolvent or became insolvent as a result of the transfer). See, *e.g.*, Uniform Fraudulent Transfer Act § 4.

Although creditors are free to bring such claims in their own name outside of bankruptcy, the filing of a bankruptcy petition automatically stays such individual actions so that the newly created estate's trustee can evaluate whether it wants to prosecute fraudulent transfer claims for the benefit of the entire estate. 11 U.S.C. § 362(a). The automatic stay is of limited duration; it may be lifted at any time by the bankruptcy court, and it expires entirely once a debtor is discharged. *Id.* §§ 362(c), (d).

The Bankruptcy Code supplements creditors' state-law causes of action by empowering bankruptcy trustees (which are usually but not always the debtor-in-possession) to avoid fraudulent transfers, as well. Section 548(a)(1)(A) creates a federal cause of action by which a trustee can avoid intentional fraudulent conveyances. And Section 548(a)(1)(B) creates a federal cause of action by which a trustee can avoid constructive fraudulent conveyances.

At the same time, Section 544(b) authorizes the trustee to avoid "any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable law by a creditor holding an unsecured claim." 11 U.S.C. § 544(b)(1). Unlike Section 548(a), Section 544(b) relies, in part, on state fraudulent-conveyance law—the "applicable law"—to define the scope of the action.

A trustee's exercise of its avoidance powers is subject to a limitation codified in Section 546(e) of the Code. That section prohibits, in pertinent part, "the trustee" from using either Section 544 or Section 548(a)(1)(B) to avoid a transfer as a constructive fraudulent conveyance if the transfer is a "settlement payment" made by or to certain categories of financial institutions. 11 U.S.C. § 546(e). As discussed below, the circuits are divided over whether transfers in which financial institutions serve as a mere conduit are shielded from avoidance by Section 546(e).

B. Factual Background

Tribune is a 166-year-old media company. Pet. App. 56a. For years, Tribune had experienced declining revenues, profitability, and stock value. Nevertheless, in April 2007, Tribune's board approved an LBO by billionaire Sam Zell, whereby Zell contributed $315 million in equity, and Tribune borrowed billions more to buy out its shareholders at a premium to the market price. Pet. App. 10a. Shareholders approved the deal and eventually received payments totaling more than $8.2 billion. As with most LBOs, financial institutions served as conduits for the funds paid to shareholders, but (with limited exceptions) were not themselves the shareholders who cashed in stock. Post-LBO, Tribune was saddled with $11 billion in debt.

Less than a year after the LBO was completed, the company—with liabilities exceeding its assets by more than $3 billion—filed a bankruptcy petition under Chapter 11. Pet. App. 11a. Petitioners are a subset of Tribune's unsecured creditors who were left holding a largely empty bag. The Retirees are 186 former employees who collectively hold claims for unpaid retirement benefits exceeding $109 million. The Noteholders are the successor indenture trustees for Tribune's pre-LBO senior notes and subordinated debentures and are still owed more than $2 billion.

In November 2010, the bankruptcy court authorized Tribune's unsecured creditors committee ("the UCC") to exercise the powers of a bankruptcy trustee in order to sue former Tribune shareholders. The UCC's trustee suit, brought under Section 548(a)(1)(A), alleged that the shareholders had participated in an intentional fraudulent conveyance that purposefully drained cash from the company to defraud creditors. Pet. App. 11a. The UCC's trustee suit did not allege any constructive fraudulent-conveyance claims.

Separately, at Petitioners' request the bankruptcy court partially lifted the automatic stay under Section 362(a) so that Petitioners could bring state-law claims against Tribune shareholders (among them, Respondents here) outside of the bankruptcy proceedings. Pet. App. 12a-14a. Petitioners brought suits in various state and federal courts alleging that Respondents had received constructive fraudulent conveyances as part of the LBO. The lawsuits were consolidated into a single multidistrict litigation. See *In re Tribune Co. Fraudulent Conveyance Litig.*, 831 F. Supp. 2d 1371 (J.P.M.L. 2011).

In 2012, the bankruptcy court confirmed a plan of reorganization for Tribune (the "Plan"). Under the Plan, the holders of Tribune's senior notes and the Retirees recovered only 33 cents on the dollar, while the holders of Tribune's subordinated debentures received nothing. The Plan also created a Litigation Trust that would continue to prosecute the intentional-fraudulent-conveyance claims originally brought by the UCC as bankruptcy trustee. At the same time, the Plan separately provided that Petitioners could continue to pursue "any and all [leveraged-buyout]-Related Causes of Action arising under state fraudulent conveyance law," except for intentional fraudulent conveyance claims and other LBO-related claims being prosecuted by the Litigation Trust. The bankruptcy court reiterated this point in the confirmation order, stating that, "[f]or the avoidance of doubt, nothing in the Plan shall or is intended to impair the right of [the Retirees or Noteholders] . . . from prosecuting any Disclaimed State Law Avoidance Claim."

When Tribune emerged from bankruptcy, the automatic stay was terminated. Petitioners' claims were then allowed to move forward.

C. The District Court's Opinion

After Petitioners' claims were consolidated in the Southern District of New York, Respondents moved to dismiss on the ground that Petitioners' constructive-fraudulent-conveyance claims were preempted by 11 U.S.C. § 546(e), and that Petitioners lacked "standing" to bring those claims in any event.

Petitioners preserved the argument that Section 546(e) was inapplicable to LBO transfers, such as the ones here, made *through* financial institutions, but ultimately received by beneficial owners who were not themselves financial institutions. Because that argument was (and remains) foreclosed by Second Circuit law, the district court did not address it. Instead, the district court held (correctly) that Section 546(e) does not bar state-law fraudulent-conveyance claims by individual creditors.

The court first explained that Section 546(e)'s reference to "the trustee" foreclosed Respondents' claim that the provision expressly barred claims by entities other than the bankruptcy trustee. Pet. App. 63a. The court then rejected Respondents' argument that Section 546(e) nevertheless impliedly preempts the creditors' actions.

In reaching that conclusion, the district court acknowledged that, as Respondents had contended, Section 546(e) was enacted in part to enhance stability of the financial markets. But, the court continued, "Congress pursues a host of other aims through the Bankruptcy Code, not least making whole the creditors of a bankruptcy estate." Pet. App. 66a.

The court therefore looked to the text, structure, and history of Section 546(e). In particular, the court noted that Congress repeatedly declined to include express preemption language in Section 546(e) and that Section 546(e) does not apply to a host of avoidance actions (including intentional-fraudulent-conveyance claims), "even though these types of claims pose the very same threat to the stability of securities markets" cited by Respondents. Pet. App. 68a. Moreover, citing 11 U.S.C. § 544(b)(2), the court noted that "Congress had demonstrated elsewhere in the Bankruptcy Code that it knows how to—and is willing to—preempt an individual creditor's state law claims." Pet. App. 68a. It did not do so in Section 546(e).

Given those textual indications, the district court declined to "upend Congress's balance between the operation of state and federal law." Pet. App. 68a. "Congress said what it meant and meant what it said; as such, Section 546(e) applies only to the trustee and does not preempt the Individual Creditors' [state-law] claims." Pet. App. 72a (internal citation omitted).

The district court went on to hold, however, that Petitioners lacked "standing" to pursue their claims because the Bankruptcy Code's automatic stay provision effectively froze individual creditor claims so long as the Litigation Trust's separate claims were still pending. It therefore granted Respondents' motion to dismiss.

D. The Second Circuit's Opinion

The Second Circuit affirmed, but on different grounds. It first held that Petitioners had standing because the bankruptcy court's lifting of the stay and confirmation of the Plan "freed" Petitioners to bring suit. Pet. App. 9a. But the court held that Petitioners' claims are nevertheless preempted by Section 546(e). Pet. App. 9a-10a.

The court's preemption analysis began with the assertion that the so-called "presumption against preemption" long recognized by this Court did not apply because, "[o]nce a party enters bankruptcy, the Bankruptcy Code constitutes a wholesale preemption of state laws regarding creditors' rights." Pet. App. 22a.

The court of appeals also reaffirmed that Section 546(e), which applies to transfers "by or to" certain financial institutions, applies even when such entities serve as "intermediaries" or conduits to a transfer. Pet. App. 25a-26a; 48a. Recognizing that the Second Circuit was constrained by prior panel decisions on that issue, Petitioners had preserved the argument that Section 546(e) does not apply to mere conduits.

The court then addressed Respondents' obstacle-preemption theory. Brushing past the text of Section 546(e)—which on its face does not reach Petitioners' actions because it circumscribes only the powers of "the trustee"—the court held "that the purposes and history of that Section necessarily reflect an intent to preempt the claims before us." Pet. App. 39a-40a. Specifically, the court of appeals focused on Congress's "larger purpose" of "enhancing the efficiency of securities markets" and minimizing disruptions to those markets. Pet. App. 44a-45a. The court determined that the "inference of a preemptive intent is easily drawn" from what it perceived to be Congress's primary policy objectives for enacting Section 546(e). Pet. App. 53a. "Trustee," the court said in substance, must mean "trustee and everybody else."

The court of appeals denied Petitioners' request for panel rehearing and rehearing *en banc*.

REASONS FOR GRANTING THE PETITION

The court of appeals held that, upon the filing of a bankruptcy petition, Section 546(e) forevermore preempts all individual-creditor state-law claims to avoid constructive fraudulent transfers made through financial institutions. This court should grant review of that decision for three reasons.

First, this Court has "long presumed that Congress does not cavalierly pre-empt state-law causes of action." *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 485 (1996). The Second Circuit, however, ruled that this "presumption against preemption" does *not* apply in the bankruptcy context. This Court has held otherwise—as have numerous circuits. As this Court observed in another bankruptcy case involving assertions of preemption, where Congress's "intent to override is doubtful, our federal system demands deference." *BFP* v. *Resolution Trust Corp.*, 511 U.S. 531, 546 (1994). The application of the presumption against preemption—particularly in the bankruptcy context—is a recurring issue of profound importance that implicates the federal-state balance.

Second, the circuits are divided over another threshold question here—the role that a financial institution must play in a transaction for it to fall within Section 546(e)'s safe harbor. The Second Circuit, following the Third, Sixth, and Eighth Circuits, has held that Section 546(e) applies even when, as here, a financial institution serves as a conduit for the transferred property. The Seventh and Eleventh Circuits, however, have held that the safe harbor applies only if the financial institution had a beneficial interest in the property. The issue goes to the core of the trustee's avoidance powers under the Bankruptcy Code and arises frequently in cases involving billions of dollars (as here).

Third, this Court has repeatedly made clear that, because the Bankruptcy Code reflects multiple, often conflicting policies, "it is not for courts to alter the balance struck by the statute." *Law* v. *Siegel*, 134 S. Ct. 1188, 1198 (2014). But that is what the court of appeals did here: Disregarding Section 546(e)'s text—which applies only to avoidance actions by "the trustee," and not by other entities—the court held that Section 546(e) preempts state-law avoidance actions by individual creditors. It reached that conclusion based solely on what it perceived to be Congress's purpose for enacting the safe harbor. As a result, the Second Circuit eviscerated the right of individual creditors to challenge a wide swath of fraudulent transfers. This Court should grant certiorari to resolve the numerous conflicts created or deepened by the decision below and to lend clarity to this critical area of the law.

I. The Second Circuit's Holding That The Presumption Against Preemption Does Not Apply To The Bankruptcy Code Creates A Circuit Split And Conflicts With This Court's Decisions

1. "[B]ecause the States are independent sovereigns in our federal system," this Court has "long presumed that Congress does not cavalierly pre-empt state-law causes of action." *Lohr*, 518 U.S. at 485; *accord Bates* v. *Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005). That 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).

A party arguing for preemption thus "bear[s] 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) (internal quotation marks omitted). As this Court has unanimously held, "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).

According to the Second Circuit, however, the bedrock presumption against preemption of creditors' rights disappears once a bankruptcy case has been filed. The court held that the presumption ceases to apply the moment a debtor files a bankruptcy petition because "there is no measurable concern about federal intrusion into traditional state domains." Pet. App. 24a. The Bankruptcy Code "constitutes a *wholesale preemption* of state laws regarding creditors' rights." Pet. App. 22a (emphasis added).

2. That holding conflicts with decisions of the Third and Ninth Circuits, both of which have held that the Bankruptcy Code does not effect a wholesale abrogation of state law, and that the presumption against preemption applies with equal force in the bankruptcy context.

In *Integrated Solutions, Inc.* v. *Service Support Specialties, Inc.*, 124 F.3d 487 (3d Cir. 1997), the Third Circuit stated that, "[b]ecause we are reluctant to assume federal preemption, . . . any analysis should begin with the basic assumption that Congress did not intend to displace state law." *Id.* at 491 (internal quotation marks omitted). It further held that there was a "strong presumption against inferring Congressional preemption in the bankruptcy context." *Id.* at 493. Applying that presumption, the court concluded that the Bankruptcy Code did not preempt state law prohibiting the assignment of prejudgment tort claims. *Id.* at 489; see also *In re Fed.-Mogul Glob. Inc.*, 684 F.3d 355, 365 (3d Cir. 2012) (holding that that the "strong presumption against inferring Congressional preemption . . . applies in the bankruptcy context") (internal quotation marks omitted).

The Ninth Circuit has reached a similar conclusion. In *PG&E* v. C*alifornia ex rel. California Department of Toxic Substances Control*, 350 F.3d 932 (9th Cir. 2003), the court held that "the presumption against displacing state law by federal bankruptcy law is just as strong in bankruptcy as in other areas of federal legislative power." *Id.* at 943.[1]

3. The Second Circuit's holding that the presumption against preemption does not apply to

[1] See also *In re Irving Tanning Co.*, 496 B.R. 644, 663 (B.A.P. 1st Cir. 2013) (holding that "respect for states as sovereigns in our federal system" demands that the "presumption against preemption" apply in the bankruptcy context just as any other).

the Bankruptcy Code also conflicts with this Court's decisions.

Citing *United States* v. *Locke*, 529 U.S. 89 (2000), the court reasoned that the presumption against preemption applies only "when Congress is legislating in an area recognized as traditionally one of state law *alone*." Pet. App. 21a (emphasis added). But this Court has held quite the opposite: the presumption "does *not* rely on the absence of federal regulation." *Wyeth*, 555 U.S. at 565 n.3 (emphasis added). Even though *Wyeth* involved drug labeling, a field "the Federal Government has regulated . . . for more than a century," the presumption against preemption applied precisely because "'our federal system'" demands "respect for the States as 'independent sovereigns.'" *Id.* (quoting *Lohr*, 518 U.S. at 485). This Court similarly emphasized in *Lohr* that the presumption against preemption applies "[i]n *all* pre-emption cases" where state and federal laws coexist. 518 U.S. at 485 (emphasis added).

The Second Circuit's application of *Locke* is in direct conflict with this Court's decisions in *Wyeth* and *Lohr*. *Locke* reflects only the narrow proposition that the presumption is inapplicable in "area[s] where there has been [such] a history of significant federal presence" that "Congress has left *no* room for state regulation." *Locke*, 529 U.S. at 90-91 (emphasis added). In other words, it is a statement about the scope of field preemption in an area that the federal government has occupied *completely*, such as "national and international maritime commerce." *Id.* at 108; 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"); *Pinney* v. *Nokia, Inc.*, 402 F.3d 430, 454 n.4 (4th Cir. 2005) ("[R]eliance on *Locke* is misplaced" when dealing with areas where "States continue to have considerable authority.").

Yet, without uttering the words "field preemption," the Second Circuit held that, once a bankruptcy petition is filed, traditional state-law tort actions become just like maritime commerce (where there is "no measurable concern about federal intrusion into traditional state domains") because "the Bankruptcy Code constitutes a wholesale preemption of state laws regarding creditors' rights." Pet. App. 22a, 24a.

This Court held just the opposite in *BFP*, where it applied the presumption against preemption in the bankruptcy context. 511 U.S. at 546. In *BFP*, the question was whether the Bankruptcy Code supplanted state foreclosure law. There was tension between then-Section 548(a)(2)(A) of the Code (which allowed a trustee to avoid transfers where the debtor received less than "reasonably equivalent value") and state foreclosure laws (which allow sales for less than "fair market value"). *Id.* at 547-48. The petitioners argued that the Code's requirement of "reasonably equivalent value" meant that laws allowing sales for less than "fair market value" were preempted.

Although this Court recognized that "[t]he Bankruptcy Code can of course override [state law] by implication," it required a clear intent to do so: "[W]here [Congress's] intent to override is doubtful, our federal system demands deference to long-established traditions of state regulation." *Id.* at 546. It concluded that Congress had not clearly intended to supplant state foreclosure law, and so the Code was read "to adopt, rather than to displace, pre-existing state law." *Id.* at 545. Federal respect for state sovereignty demanded that the analysis begin with the presumption that the Code did not replace wide-reaching, and long-extant, state laws. Even in the bankruptcy context, the "cornerstone" presumption against preemption applied.

BFP was not the first time this Court held that the Bankruptcy Code does not preempt all state regulation of debtor-creditor relations. In *Midlantic National Bank* v. *New Jersey Department of Environmental Protection*, 474 U.S. 494 (1986), the Court held that "Congress did not intend for the Bankruptcy Code to pre-empt all state laws" relevant to trustees. *Id.* at 505. Far from preempting traditional areas of state law, the court explained, the Code relies on them. In support, this Court pointed to 28 U.S.C. § 959(b), which requires a trustee to manage property in his possession "according to the requirements of the valid laws of the State." 474 U.S. at 505 n.7. Although not part of the Bankruptcy Code, Section 959(b) demonstrates the interconnectedness of the Code with state laws, and the principle that the Code does *not* work a "wholesale preemption of state laws regarding creditors' rights." Pet. App. 22a.

In *Butner* v. *United States*, 440 U.S. 48, 54-55 (1979), this Court likewise recognized that, at bottom, "[p]roperty interests are created and defined by state law." *Id.* at 55. Unless Congress expresses its intent to displace state property laws, "there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding." *Ibid*. Supplanting state laws, this Court explained, could allow a party to receive "a windfall merely by reason of the happenstance of bankruptcy." *Ibid* (internal quotation marks omitted).

4. The Second Circuit's refusal to apply the presumption against preemption was erroneous. Even if the presumption applies only where there is a long history of state regulation, it would apply here. Protection from fraudulent conveyances, and protection of property against fraud in general, have long been areas of state regulation. 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).

State policing of fraudulent conveyances predates the American Revolution. See generally *Orr* v. *Kinderhill Corp.*, 991 F.2d 31, 34-35 (2d Cir. 1993); 1 GARRARD GLENN, FRAUDULENT CONVEYANCES & PREFERENCES § 58 (1940 ed.). When Congress enacted additional remedies for fraudulent conveyances in the Bankruptcy Code, it "simply reclassified a pre-existing, common-law cause of action." *Granfinanciera, S.A.* v. *Nordberg*, 492 U.S. 33, 60 (1989).

Moreover, 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 references to "state law" in the Bankruptcy Code). It is nonsensical for the Code to work a wholesale preemption of the very laws it relies on for implementation.

5. Whether the presumption against preemption applies in the bankruptcy context is of paramount importance. As this Court has recognized, the presumption is a "cornerstone[ ]" of any preemption analysis. *Wyeth*, 555 U.S. at 565. And as explained in Section III below, the Bankruptcy Code represents a delicate balancing of many competing interests, both state and federal. Congress treaded lightly when abrogating state regulation.

Application of the presumption ensures that Congress's careful balance is not upset. The Second Circuit's approach, which ignores the presumption and concludes that there is a "wholesale preemption," poses significant challenges to long-settled law. As this Court noted in *BFP*, a finding of preemption would cloud title to every foreclosed property where the former owner filed for bankruptcy. 511 U.S. at 546.

Moreover, the reach of the Second Circuit's opinion has already shown itself. Concurrently with its decision in this case, the Second Circuit affirmed dismissal of creditor actions in *Whyte* v. *Barclays Bank PLC*, No. 13-2653-CV, 2016 WL 1138642 (2d Cir. Mar. 24, 2016). A petition for certiorari was filed in that case on August 19, 2016, raising substantially the same issues as this petition.

II. The Courts Of Appeals Are Deeply Divided Over The Scope Of Section 546(e)'s Safe Harbor

1. As the Second Circuit has acknowledged, "[t]here is a split of authority regarding what role a

financial institution must play in the transaction for it to qualify for the section 546(e) safe harbor." *In re Quebecor World (USA) Inc.*, 719 F.3d 94, 98 (2d Cir. 2013). The decision below further entrenches that split.

Section 546(e) provides an exception to other Code provisions that allow the trustee to avoid certain transfers made by the debtor. As relevant here, the safe harbor provides that "the trustee may not avoid a transfer that is a . . . settlement payment . . . *made by or to (or for the benefit of)*" a "financial institution" or other covered entity. 11 U.S.C. § 546(e) (emphasis added).[2] The Second, Third, Sixth, and Eighth Circuits have held that the safe harbor applies even when a financial institution serves only as a conduit for the transferred property. The Eleventh and Seventh Circuits, by contrast, have held that the safe harbor does not protect transfers that merely pass *through* a financial institution—as nearly every transfer these days must.

The Eleventh Circuit was the first court to address the reach of Section 546(e) squarely. *In re Munford, Inc.*, 98 F.3d 604 (11th Cir. 1996), like this case, involved a leveraged buyout. The company (Munford) purchased the outstanding stock of its shareholders by depositing funds with a financial institution, which passed those funds on to Munford's shareholders. Later, the new company filed for bankruptcy and the bankruptcy trustee

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[2] The Code defines "settlement payment" to include "payment[s] commonly used in the securities trade." 11 U.S.C. § 741(8).

sought to avoid the payments. The shareholders argued that the payments were exempt from avoidance under Section 546(e)'s safe harbor.

Relying on the statute's text, the Eleventh Circuit disagreed. Section 546(e), the court explained, "is not applicable *unless* the transfer (or settlement payment) was 'made by or to a commodity broker, forward contract merchant, stockbroker, financial institution, or securities clearing agency.'" *Munford*, 98 F.3d at 610 (quoting 11 U.S.C. § 546(e)). The LBO payments, however, "were made *by* Munford *to* shareholders." *Ibid.* Because none of the covered entities listed in Section 546(e) made or received a transfer payment, the court held, Section 546(e)'s safe harbor did not apply. *Ibid.*

In reaching that conclusion, the court acknowledged that—as is almost always the case—a financial institution was "presumptively involved" in the transaction. *Ibid.* But the "bank here was nothing more than an intermediary or conduit" for the transferred property, and therefore never acquired any beneficial interest in either the funds or the shares. *Ibid.*

The Third, Sixth, and Eighth Circuits later rejected that holding. In *In re Resorts International, Inc.*, 181 F.3d 505 (3d Cir. 1999), the Third Circuit asserted that *Munford*'s holding "is not explicit in section 546." *Id.* at 516. In *Contemporary Industries Corporation* v. *Frost*, 564 F.3d 981 (8th Cir. 2009), the court opined that the language of the statute "does not expressly require that the financial institution obtain a beneficial interest in the funds." *Id.* at 986-87. In *In re QSI Holdings, Inc.*, 571 F.3d 545 (6th Cir. 2009), the Sixth Circuit held that

Section 546(e)'s safe harbor applies even when a financial institution served as a mere conduit. *Id.* at 551.

The Second Circuit then weighed in. In *Enron Creditors Recovery Corp.* v. *Alfa, S.A.B. de C.V.*, 651 F.3d 329 (2d Cir. 2011), the court of appeals rejected the argument that Section 546(e) applies only if a financial intermediary took a beneficial interest in the securities. Then, in *Quebecor*, the Second Circuit clarified that, "[t]o the extent *Enron* left any ambiguity," "we expressly follow the Third, Sixth, and Eighth Circuits in holding that a transfer may qualify for the section 546(e) safe harbor even if the financial intermediary is merely a conduit" for the transfer. *Quebecor*, 719 F.3d at 99.

The Second Circuit reaffirmed that holding again in the decision below, stating that the safe harbor "clearly covers payments, such as those at issue here, by commercial firms to financial intermediaries to purchase shares from the firm's shareholders." Pet. App. 42a; see *id.* 25a-26a (Section 546(e) applies to "financial intermediaries").[3]

After the Second Circuit issued its decision, however, the Seventh Circuit joined the Eleventh in holding that Section 546(e) does *not* "protect[] transfers that are simply conducted *through*

[3] Petitioners had won the preemption issue in the district court and were bound by Second Circuit authority to accept before the three-judge panel the proposition that "settlement payments" include those in which a financial institution is merely a conduit, but at page 82 of their cross-appellee brief they expressly preserved the argument that the prior Second Circuit cases had been wrongly decided.

financial institutions . . . , where the entity is neither the debtor nor the transferee but only the conduit." *FTI Consulting*, 2016 WL 4036408, at *1. Chief Judge Wood explained for the court that the surrounding Code provisions establish that only transfers "made by" the debtor, or "to" entities that incur an actual obligation to the debtor, are avoidable by the trustee. Thus, Section 546(e)'s safe harbor—which shields only those transactions that are avoidable by the trustee in the first place—must likewise apply only where the financial institution has its own beneficial interest in the transfer. *Id.* at *3.

Given the clear split, this case would have ended differently in the Seventh or Eleventh Circuits. As in *FTI Consulting* and *Munford*, Petitioners here challenge transfers made from the debtor company (Tribune) to its shareholders. And, as in *FTI Consulting* and *Munford*, the funds for the transaction merely passed *through* one or more financial institutions on the way to those shareholders.

In the Seventh or Eleventh Circuits, Section 546(e)'s safe harbor would not have shielded the Tribune shareholders from constructive fraudulent conveyance claims. But the Second Circuit held that the safe harbor applied—thus preventing Tribune's creditors from even attempting to recover billions of dollars of fraudulently transferred funds. The circuit split is case dispositive.[4]

2. Whether Section 546(e)'s safe harbor applies where a financial institution served as a mere conduit in a securities transaction is a recurring question of extraordinary importance.

Six courts of appeals have addressed the issue—two in the last six months alone. Those courts have reached opposing conclusions in cases involving the transfer of billions of dollars. In the meantime, lower courts have repeatedly faced the issue and (not surprisingly, given the lack of uniformity among the circuits) are unable to agree on the proper interpretation of the safe harbor either.[5]

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[4] If Section 546(e) does not apply to transfers that pass through conduit financial institutions, then the decision below should be reversed even if the Second Circuit was correct to hold that Section 546(e) preempts creditors' state-law fraudulent-conveyance claims (though as we discuss in Section III, it was not). That is because, even if Section 546(e) preempted state-law claims brought by private parties (not trustees), it would preempt only those claims involving transfers "by or to" financial institutions as set forth in Section 546(e).

[5] Compare, *e.g.*, *Zahn* v. *Yucaipa Capital Fund*, 218 B.R. 656, 676 n.31 (D.R.I. 1998) (safe harbor does not apply to conduits), and *In re Zale Corp.*, 196 B.R. 348, 352-54 (N.D. Tex. 1996) (same), with *U.S. Bank Nat'l Ass'n* v. *Verizon Commc'ns Inc.*, 892 F. Supp. 2d 805, 815-16 (N.D. Tex. 2012) (safe harbor does apply to conduits), and *In re D.E.I. Sys., Inc.*, 996 F. Supp. 2d 1142, 1149-51 (D. Utah 2014) (same); see also 5-546 COLLIER ON BANKRUPTCY ¶ 546.06 (16th ed. 2013) (noting "disagreement among courts" about whether the safe harbor requires financial institutions to hold a beneficial interest in the transaction).

The question goes to the heart of the bankruptcy system. "The powers and duties of a bankruptcy trustee are extensive." *CFTC* v. *Weintraub*, 471 U.S. 343, 352 (1985). Among other things, the Code vests the trustee with "broad powers" to avoid certain transfers made by the debtor. *In re Finley, Kumble, Wagner, Heine, Underberg, Manley, Myerson & Casey*, 130 F.3d 52, 55 (2d Cir. 1997); see 11 U.S.C. §§ 544, 547, 548.

Section 546(e)'s safe harbor carves out a narrow exception to the trustee's expansive avoidance powers—namely, where settlement payments are made "by or to" a financial institution (and where there was no fraudulent intent). The Second Circuit's interpretation of the safe harbor, however, creates a hole in that exception large enough to drive a truck through. In the vast majority of securities transactions, funds will pass *through* a financial institution en route to shareholders. By deeming that financial pit-stop sufficient to trigger Section 546(e)'s safe harbor, the Second Circuit eviscerated the trustee's (and, through its preemption holding, everyone else's) avoidance power with respect to a broad swath of financial transactions. As this case illustrates, the result of that interpretation is to shield $2 billion in constructively fraudulently transferred assets from recovery—and ultimate distribution to creditors.

The parties hurt by an improperly expansive application of Section 546(e) are creditors who invest in corporate debt. Those creditors accept lower returns in exchange for the knowledge that they have priority in bankruptcy over equity holders. The Second Circuit's application of Section 546(e) allows companies to annul that protection. Through LBOs, shareholders retain the entire value of a company at the expense of its creditors. Far from avoiding market displacement, as the Second Circuit surmised, that overexpansive application will upend long-settled expectations in the debt market.

"The Bankruptcy Code standardizes an expansive (and sometimes unruly) area of law, and it is [this Court's] obligation to interpret the Code clearly and predictably using well established principles of statutory construction." *RadLAX Gateway Hotel, LLC* v. *Amalgamated Bank*, 132 S. Ct. 2065, 2073 (2012). Uniformity in the interpretation of the law is particularly important with respect to bankruptcy laws. Indeed, this Court frequently grants certiorari where the courts of appeals have adopted differing interpretations of the Code.[6] This Court should do so here to resolve the circuit split and clarify the scope of Section 546(e)'s safe harbor.

3. The decision below is wrong. To begin with, Section 546(e) provides an exception to the avoidance powers conferred on the trustee by other provisions

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[6] *E.g.*, *Husky Int'l Electronics, Inc.* v. *Ritz*, 136 S. Ct. 1581, 1585 (2016) (Section 523's "actual fraud" requirement); *Bullock* v. *BankChampaign, N.A.*, 133 S. Ct. 1754, 1758 (2013) (Section 523's scienter requirement); *Ransom* v. *FIA Card Services, N.A.*, 562 U.S. 61, 68 (2011) (allowable debtor deductions); *Schwab* v. *Reilly*, 560 U.S. 770, 774 (2010) ("claim of exemption" under Section 522); *Howard Delivery Service, Inc.* v. *Zurich American Ins. Co.*, 547 U.S. 651, 657 (2006) (status of workers' compensation premiums under Section 507); *Fidelity Financial Services, Inc.* v. *Fink*, 522 U.S. 211, 214 (1998) (when a transfer is "perfected" under Section 547); *Barnhill* v. *Johnson*, 503 U.S. 393, 396 (1992) (date of avoidable transfer).

of the Code. And those provisions provide that a trustee can avoid a transfer only to a "transferee." See 11 U.S.C. § 550(a). As every court of appeals to address the issue has held, a party does not qualify as a "transferee unless and until he gained [a] beneficial interest in" the property at issue. *In re Bullion Reserve of North Am.*, 922 F.2d 544, 549 (9th Cir. 1991); see *In re Coutee,* 984 F.2d 138, 140-41 (5th Cir. 1993) (citing circuits holding that a "transferee" must have "dominion or control" over the property). Because a financial intermediary that serves as a conduit "never acquired a beneficial interest in the funds, it was not a 'transferee' in the LBO transaction." *Munford*, 98 F.3d at 610.

As the Seventh Circuit explained in *FTI Consulting*, other Code provisions confirm the point. Section 555, for example, gives certain rights to the same financial entities enumerated in Section 546(e)'s safe harbor where those entities are *counter-parties* to a securities contract with the debtor. That indicates that, under Section 546(e), those same financial entities must also be counterparties to, and not mere conduits for, the challenged transfer. *FTI Consulting*, 2016 WL 4036408, at *4.

The Second Circuit focused on what it viewed as the safe harbor's purpose: "minimizing the displacement caused in the commodities and securities markets," including a potential ripple effect in which the insolvency of one financial firm spreads to others. *Enron*, 651 F.3d at 334 (internal quotation marks and alterations omitted); see Pet. App. 44a-45a. But, as the Seventh Circuit explained, that concern is not implicated where financial institutions serve as mere conduits to a transaction.

FTI Consulting, 2016 WL 4036408, at *6. In any event, "the repercussions of undoing a deal like this" do not "outweigh the necessity of the Bankruptcy Code's protections for creditors." *Ibid*; see also *In re Lyondell Chem. Co.*, 503 B.R. 348, 372-73 (Bankr. S.D.N.Y. 2014) ("Transactions whose reversal would not create systemic risk arguably also include LBO payments to stockholders at the very end of the asset transfer chain").

III. The Second Circuit's Implied-Preemption Holding Conflicts With This Court's Precedents Regarding Interpretation Of The Bankruptcy Code

1. The Bankruptcy Code promotes multiple, sometimes conflicting, purposes. *RadLAX*, 132 S. Ct. at 2073. For that reason, this Court has repeatedly held—in no fewer than three decisions in the past five years—that "it is not for courts to alter the balance struck by the statute." *Law*, 134 S. Ct. at 1198.

Thus in *Law*, a trustee argued that allowing Section 522's "homestead exemption" to apply where the debtor had engaged in misconduct would produce inequitable results for creditors. Rejecting that policy argument, this Court applied the statute's plain meaning. As the Court explained: "Congress balanced the difficult choices that exemption limits impose on debtors with the economic harm that exemptions visit on creditors," and so it was not for the courts to upset that careful balance. 134 S. Ct. at 1197-98.

In *RadLAX*, the Court likewise declined to choose among policy arguments when interpreting a Code provision that, the Court held, authorized "credit-bidding" by lienholders. "[T]he pros and cons of credit-bidding," the Court explained, "are for the consideration of Congress, not the courts." 132 S. Ct. at 2073.

And in *Hall* v. *United States*, 132 S. Ct. 1882 (2012), the Court held that tax liability arising from the post-petition sale of a farm was not "incurred by the estate" within the meaning of Section 503(b). In reaching that conclusion, the Court rejected the argument that its textual conclusion conflicted with Congress's "intent" to provide debtors relief from tax debts:

> there may be compelling policy reasons [for including such sales]. 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 provisions and exceptions enacted over nearly three decades.

Id. at 1893.

The clear teaching from these cases is that the court's task in interpreting the Code is not to determine what *the* policy is for a specific provision. Instead, the court's task is to determine *how far* a provision goes in the service of the multiple policies served by the Code. And to do that, a court must start with "the statute's plain language, context, and structure," *ibid.*—not with what it perceives to be Congress's primary "purpose" in enacting a provision.

2. The Second Circuit's decision squarely conflicts with those precedents. As noted, Section 546(e) provides that "*the trustee* may not avoid a transfer that is a . . . settlement payment." 11 U.S.C. § 546(e) (emphasis added). The question here is whether that language prevents parties *other than* "the trustee"—such as the individual creditors in this case—from bringing state-law fraudulent conveyance actions.

In answering that question, the court below did not "begin with the understanding that Congress says in a statute what it means and means in a statute what it says there." *Hartford Underwriters Ins. Co.* v. *Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (quotation marks omitted). Instead, it began (and ended) with what it perceived to be the *policy* animating Section 546(e). According to the Second Circuit, Congress enacted Section 546(e) in order to "'minimiz[e] the displacement caused in the commodities and securities markets in the event of a major bankruptcy affecting those industries.'" Pet. App. 44a (quoting *Quebecor*, 719 F.3d at 100)). "To allow appellants' [state-law fraudulent conveyance] claims to proceed," the court explained, "we would have to construe Section 546(e) as achieving the opposite of what it was intended to achieve." Pet. App. 40a-41a.

As the district court rightly acknowledged, however, "Congress pursues a host of other aims through the Bankruptcy Code, not least making whole the creditors of a bankruptcy estate." Pet. App. 66a. And it is "not at all clear that Section 546(e)'s purpose with respect to securities transactions trumps all of bankruptcy's other purposes," including maximizing return to creditors.

Pet. App. 66a. This Court, too, has recognized that "maximizing property available to satisfy creditors" is a core purpose of the Code's avoidance provisions. *Bank of America Nat'l Trust & Sav. Ass'n* v. *203 North LaSalle St. P'ship*, 526 U.S. 434, 453 (1999).

Confronted with those competing purposes, however, the Second Circuit did exactly what this Court has instructed it *not* to do: It reweighed "the balance struck by the statute," *Law*, 134 S. Ct. at 1198, and decided that a solitary policy goal—preventing market instability—trumped all others. And, based on that perceived policy goal, the court of appeals inferred that Congress intended to preempt state-law fraudulent-conveyance actions by parties *other than* "the trustee" named in the statute's text. That approach squarely conflicts with this Court's holdings.

3. The Second Circuit's holding that Section 546(e) conflict-preempts individual creditors' fraudulent-conveyance actions is wrong.

This Court's precedents set a particularly "high threshold" for establishing conflict preemption. *Chamber of Commerce of United States* v. *Whiting*, 563 U.S. 582, 607 (2011) (internal quotation marks omitted). In implied-preemption cases, as in all cases, the inquiry "must begin with the language employed by Congress." *Wyeth*, 555 U.S. at 599 (Thomas, J., concurring) (internal quotation marks omitted). Here, "the text, structure, and history" of Section 546(e), *Arizona* v. *United States*, 132 S. Ct. 2492, 2505 (2012), all conclusively show that Congress did *not* intend that provision to preempt state-law fraudulent-conveyance claims by creditors.

To begin with, Section 546(e)'s text could not be clearer. In *Hartford Underwriters* (which the Second Circuit failed to cite), this Court expressly rejected an analogous argument that a Code provision applicable to "the trustee" covered *other* parties. There, the Court addressed whether an administrative claimant could seek recovery under Section 506(c), which provided that "the trustee" may do so. Interpreting the statute's plain text, this Court said no: The provision was "quite plain in specifying" that it applied to "the trustee," and not others. *Hartford Underwriters*, 530 U.S. at 6, 7. So too here: If Congress had intended Section 546(e)'s reference to "the trustee" to mean *other parties* (such as individual creditors) "it could simply have said so." *Id.* at 7.

Congress, moreover, knows how to speak about parties other than a trustee. Yet Section 546(e) does not, by its terms, disempower "any person," or "any creditor," or "any party in interest" from bringing fraudulent-conveyance actions—all terms that the Code uses when Congress intended to affect a broader group. *E.g.*, 11 U.S.C. § 101(10), § 1109(b). Rather, it says that "the trustee" cannot bring certain avoidance actions, thus limiting Section 546(e)'s scope. And that makes complete sense. As noted, Section 546(e) is an *exception* to other provisions of the Code that grant the trustee authority; it therefore naturally applies only to "the trustee" granted those powers in the first place.

Congress also knows how to preempt state-law avoidance actions. Section 544(b)(2), for example, provides that a trustee's avoidance powers cannot be used to avoid certain transfers made to charitable organizations. But, unlike Section 546(e), Section 544 goes on to provide that "[a]ny claim *by any person*" to recover such contributions "under Federal or State law . . . *shall be preempted*." 11 U.S.C. § 544(b)(2) (emphasis added). The absence of such a provision in Section 546(e) is "powerful evidence" that Congress did *not* intend that Section to preempt state-law claims belonging to individual creditors, such as Petitioners here. *Wyeth*, 555 U.S. at 574-75.

Indeed, Congress rejected similar preemption language when it enacted Section 546(e), see Pet. App. 67a; it added a preemption clause to Section 544(b)(2) precisely to bind parties *other than* the trustee, see 144 CONG. REC. H3999-02 (June 3, 1998); it amended 546(e) but declined to add preemption language in *the same bill* in which it enacted Section 544(b)(2), see Pub. L. No. 105-183, § 3(c)(1); and it has since amended Section 546(e) repeatedly—without adding preemption language, see Pet. App. 67a-68a. As in *Wyeth*, that history shows that Congress did not intend Section 546(e) to tacitly preempt state-law actions by individual creditors. 555 U.S. at 574-75.

In the face of this overwhelming evidence, the Second Circuit disparaged the "narrow literalness" of the word "trustee," Pet. App. 44a, and instead looked to what it perceived to be the sole purpose of Section 546(e)—namely, the risk of disruption to "the securities market" generally. Pet. App. 44a. As noted above, the Second Circuit's elevation of that single congressional purpose over all others conflicts with this Court's bankruptcy-law precedents. It also conflicts with this Court's decisions holding that conflict preemption looks to whether state law "stands as an obstacle to the accomplishment and execution of the *full purposes* and objectives of Congress." *Arizona*, 132 S. Ct. at 2501 (emphasis added) (quotation marks omitted). Here, the "text, structure, and history" of the safe harbor show that "Congress has repeatedly indicated that it did not enact Section 546(e) to protect market stability to the exclusion of all other policies." Pet. App. 67a.

Indeed, as the district court here recognized, Section 546(e)'s domain is, by its express terms, a quite limited one. It 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. Pet. App. 68a. And during a bankruptcy case, Section 546(e) permits the trustee to avoid *intentional* fraudulent transfers of settlement payments—even though the potential market disruption is the same regardless whether the fraud was intentional or constructive. If, as the Second Circuit believes, Congress intended Section 546(e) to insulate the financial markets from any possible disruption caused by fraudulent-conveyance actions, Congress could have enacted a broader safe harbor. It didn't.

Implied-preemption analysis does not justify a "freewheeling judicial inquiry into whether a state statute is in tension with federal objectives." *Whiting*, 563 U.S. at 607 (quotation marks omitted). The Second Circuit engaged in just such an inquiry here: It turned a blind eye to the text, structure, and history of Section 546(e), and instead divined a congressional intent to preempt from what it perceived to be Congress's sole purpose for enacting the statute. This Court should take the case to reaffirm that "it is Congress rather than the courts that preempts state law." *Ibid.* (quotation marks omitted).

4. The question whether Section 546(e) preempts state-law avoidance actions by individual creditors is a recurring and important one.

Several courts have recently addressed that very question—and all have disagreed with the Second Circuit's interpretation here. In *Lyondell*, the bankruptcy court held that "state law constructive fraudulent transfer claims brought on behalf of individual creditors are not impliedly preempted, by Section 546(e)." 503 B.R. at 378.[7] *PHP Liquidating, LLC* v. *Robbins*, 291 B.R. 603 (D. Del. 2003), *aff'd on other grounds*, 128 F. App'x 839 (3d Cir. 2005), likewise held that, because the creditor there did not assert its claims "in the capacity of a trustee . . . Section 546(e) is not a bar" to its claims. *Id.* at 607.

And, in *In re Physiotherapy Holdings*, *Inc.*, No. 13-12965, 2016 WL 3611831 (Bankr. D. Del. June 20, 2016)—decided three months after the decision below—the bankruptcy court found the court's "reasoning in *Lyondell* more persuasive [than the Second Circuit's] and therefore adopt[ed] its holding" that Section 546(e) does not preempt individual creditors' state-law claims. *Id.* at *7

[7] Following the Second Circuit's ruling here, the Bankruptcy Court was compelled to reverse itself and has recommended that the district court dismiss the individual creditor claims based on the Second Circuit's opinion.

As noted above, this Court regularly grants certiorari to address conflicting interpretations of the Bankruptcy Code. This Court also frequently reviews preemption cases—scarcely surprising given that such cases directly implicate the "respect for the States as independent sovereigns in our federal system." *Wyeth*, 555 U.S. at 565 n.3 (internal quotation marks omitted). This case, of course, stands at the intersection of both bankruptcy and preemption law. Just last Term, this Court reviewed another case addressing the scope of preemption under the Bankruptcy Code. See *Puerto Rico* v. *Franklin California Tax-Free Trust*, 136 S. Ct. 1938 (2016). It should do so here, too.

"[B]olstering creditors' rights" is a "primary objective of avoidance powers." *In re Cybergenics Corp.*, 226 F.3d 237, 244 n.9 (3d Cir. 2000). That is no less true for state-law fraudulent conveyance actions, which have existed "since the time of the Revolutionary War." *Lyondell*, 503 B.R. at 362. Yet, because of the analytic errors discussed above, all state-law fraudulent conveyance actions regarding the types of transactions covered by Section 546(e) are now barred in the Nation's financial center.

This case well illustrates how the Second Circuit's decision threatens fundamental creditor-protection policies. The Petitioners here are retirees and noteholders who remain owed more than $2 billion after the Tribune LBO. The UCC did not assert claims for constructive fraudulent conveyance. Thus, after the bankruptcy court lifted the automatic stay, the individual creditors challenged the payments as constructive fraudulent conveyances long recognized as unlawful under state law. Because of the decision below, those creditors have no recourse—all because the Second Circuit elevated a single perceived policy goal over all others.

This Court should grant review to resolve the Second Circuit's conflict with this Court's precedents and to confirm that Section 546(e) does not impliedly preempt creditors' state-law fraudulent-conveyance actions.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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