No. 20-8

IN THE
Supreme Court of the United States

DEUTSCHE BANK TRUST COMPANY AMERICAS, ET AL.,

Petitioners,

v.

ROBERT R. MCCORMICK FOUNDATION, ET AL.,

Respondents.

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

SUPPLEMENTAL BRIEF FOR PETITIONERS IN RESPONSE TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

JAY TEITELBAUM
Teitelbaum Law Group, LLC
1 Barker Avenue
White Plains, NY 10601
(914) 437-7670
jteitelbaum@tblawllp.com
Counsel for the Retirees

LAWRENCE S. ROBBINS
Counsel of Record
ROY T. ENGLERT, JR.
JOSHUA S. BOLIAN
CAROLYN M. FORSTEIN
ZACHARY N. FERGUSON
Robbins, Russell, Englert, Orseck, Untereiner & Sauber LLP
2000 K Street, N.W.
Washington, DC 20006
(202) 775-4500
lrobbins@robbinsrussell.com
Counsel for the Noteholders

March 31, 2021

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

Cases—Continued **Page(s)**

Statutes

Other Authorities

SUPPLEMENTAL BRIEF FOR PETITIONERS IN RESPONSE TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

The Acting Solicitor General acknowledges that the Nation's most important commercial court (besides this Court) committed case-dispositive errors when it ruled that federal bankruptcy law nullifies billions of dollars' worth of state-law fraudulent transfer claims held by scores of Tribune retirees and other creditors. She disagrees with the Second Circuit's bottom-line judgment. She does not agree with the Second Circuit on *any* of the three questions presented. She admits (Br. 19) that the decision below renders this Court's decision in *Merit* "a virtual nullity." And she recognizes (Br. 11-12) that the Second Circuit mistakenly resorted to the "blunt instrument" of "purposes and objectives" preemption to address certain practical concerns that the "nuanced mechanism" of the Bankruptcy Code's automatic stay provision is designed to address. Yet she casts those multiple errors as vehicle problems weighing *against* granting certiorari. Ultimately, she suggests that someday some court of appeals will get it right, and then—after more billions of dollars' worth of erroneous decisions and wasted judicial and litigant resources—this Court can address the important and recurring questions presented here.

This Court should take a different path. The Court knows enough to correct the Second Circuit's errors *now*, without awaiting the views of additional courts. Able *amici* support the petition for a writ of certiorari, and other *amici* and respondents' counsel

will surely make the best arguments in defense of the judgment below if this Court grants certiorari. The Nation's other hub of large corporate reorganizations—the United States Bankruptcy Court for the District of Delaware—has already disagreed with the Second Circuit. Further "percolation" would unearth no new arguments worth unearthing but would merely change the vote count on the split of authority. This Court should not let the deeply erroneous judgment below stand.

I. The Preemption Questions Warrant Review

1. The United States correctly recognizes that the Second Circuit's preemption holding is indefensible. There is the statute's text: "When a Bankruptcy Code provision refers specifically to 'the trustee,' that provision applies only to the trustee . . . and not to other parties" like petitioners. U.S. Br. 8. There is its context: "The absence of express preemptive language in Section 546(e) is particularly significant when that provision is contrasted with Section 544(b)(2)." *Ibid.* There is its purpose: "Congress had a more modest intent to prevent only 'trustee' actions," not the "broad congressional purpose to prevent uncertainty in the securities markets" that the Second Circuit supposed. U.S. Br. 13. And there is this Court's case law: "This Court in *Merit Management* rejected a similar effort to override Section 546(e)'s text based on assumptions about congressional purpose." *Ibid.* The Second Circuit's holding, says the Acting Solicitor General, is so wrong that petitioners should prevail even *without* a presumption against preemption. U.S. Br. 18-19.

The United States also correctly recognizes that rejecting preemption will in no way undermine

Chapter 11 restructuring. A separate restraint, the automatic stay, bars actions like petitioners' unless the bankruptcy court decides otherwise. U.S. Br. 11-12. Such courts "are generally well-equipped to determine whether particular state-law claims would interfere with" a bankruptcy case. U.S. Br. 13. The automatic stay therefore is "a nuanced mechanism that makes it unnecessary to apply the blunt instrument of preemption." U.S. Br. 12. The bankruptcy court lifted the automatic stay nine years ago to allow this case to be brought. Pet. App. 13a.

Despite the Second Circuit's egregious errors, the United States opines that this Court's review is unwarranted. Its reasons are unpersuasive.

Preliminarily, the government does not address the Second Circuit's freewheeling mode of analysis, which largely passed over the usual ways to discern Congress's purpose and elevated one perceived purpose above others. Pet. App. 52a-61a; see Public Law Scholars Br. 19-23. That analysis vividly exemplifies why, as some Members of the Court have stated, "[t]he doctrine of 'purposes and objectives' pre-emption impermissibly rests on judicial guesswork." *Kansas* v. *Garcia*, 140 S. Ct. 791, 808 (2020) (Thomas, J., concurring).

That jurisprudential omission aside, the United States urges that, because the inevitable circuit split does not exist *yet*, this Court should let the errors stand. U.S. Br. 15-16. It is wrong for at least three reasons.

First, a lopsided share of cases implicating this preemption question arise in the Second Circuit. That

Circuit is home to many complex bankruptcies; nearly half of all decisions citing Section 546(e) have arisen there. Pet. 38. In just the last year, the decision below has caused courts in the Second Circuit to hold that state-law claims are preempted. *In re Nine West LBO Sec. Litig.*, 482 F. Supp. 3d 187, 203 (S.D.N.Y. 2020); *In re Boston Generating LLC*, 617 B.R. 442, 449, 477-80 (Bankr. S.D.N.Y. 2020). Indeed, *Nine West* was decided in the Second Circuit even though the plaintiffs had sued elsewhere, partly because (as in virtually all securities transactions) Wall Street "entities, advisors, and lenders" were involved. *In re Nine West LBO Sec. Litig.*, 464 F. Supp. 3d 1383, 1385 (J.P.M.L. 2020). And debtor companies seeking to shelter their fraudulent (or merely preferential; see 11 U.S.C. § 547) transfers may forum-shop their bankruptcy filings into the Second Circuit so long as they have one affiliate eligible for venue there, 28 U.S.C. § 1408(2), as virtually all large reorganizing entities do.

Second, the decision below conflicts with the holdings of extraordinarily important trial courts. "Empirical studies and reports have consistently confirmed New York's and Delaware's dominance in handling mega bankruptcies," where Section 546(e) tends to come up. Laura Napoli Coordes, *The Geography of Bankruptcy*, 68 VAND. L. REV. 381, 390 (2015). And Delaware's bankruptcy court has disagreed with the Second Circuit's preemption holding in this case, by name and at length. *In re Physiotherapy Holdings, Inc.*, No. 13-12965, 2016 WL 3611831, at *5-*10 (Bankr. D. Del. June 20, 2016). Delaware's district court, too, has held that creditors may bring state-law avoidance claims despite Section

546(e), though it is true that its decision did not address preemption. U.S. Br. 16.

Third, the proffered reason to await a circuit split—that this Court "would benefit from further analysis" (U.S. Br. 15)—is, here, no reason at all. This case is huge in every sense. Billions of dollars are at stake; thousands of parties (including petitioner retirees long denied their benefits) have an interest; the litigation has consumed more than a decade; and its result affects other big cases. This case thus has attracted prominent practitioners, academics, trade associations, and others as counsel and *amici*. To boot, the Acting Solicitor General explains why the Second Circuit erred. Any further analysis would have marginal value, if any. It is easy to invoke rote considerations—"percolation" and the like—but the *reasons* underlying those considerations are absent.

The Acting Solicitor General's other argument against certiorari is that "the preemption question may not frequently arise." U.S. Br. 16; see *ibid.* ("not clear how often"). In just the past decade, however, the preemption question has arisen in at least five other cases that, together, put at issue almost *$9 billion*. *Nine West*, 482 F. Supp. 3d at 192, 203 ($1.2 billion); *Whyte* v. *Barclays Bank PLC*, 494 B.R. 196, 198-201 (S.D.N.Y. 2013) ($143 million); *Boston Generating*, 617 B.R. at 449, 477-80 ($1 billion); *Physiotherapy*, 2016 WL 3611831, at *1, *5-*10 ($249 million); *In re Lyondell Chem. Co.*, 503 B.R. 348, 354, 364-78 (Bankr. S.D.N.Y. 2014) ($6.3 billion). And such cases are momentous both financially and legally. As the United States notes, "suits by private parties implicate the interests of state governments in determining what avoidance remedies should be

available to creditors under state law." U.S. Br. 15. The preemption issue therefore arises with some frequency and raises weighty issues of federalism.

This issue *does* frequently arise but may seldom receive a fresh look at the court-of-appeals level, especially with the Second Circuit's decision dictating erroneous results in that vital jurisdiction. That combination of facts counsels in favor of, not against, certiorari.

2. The Acting Solicitor General also correctly recognizes that the Second Circuit erred in rejecting the presumption against preemption. The court's decision, she concedes, "unquestionably overstates the preemptive force of the Bankruptcy Code" (U.S. Br. 17) and "unduly minimizes [its] intrusion into traditional state domains" (U.S. Br. 18 (cleaned up)).

She nevertheless recommends denial of review for erroneous reasons. For starters, she is wrong that there "does not appear to" be a circuit split. U.S. Br. 18. She does not dispute that a circuit split exists if the Second Circuit's statement that "the Bankruptcy Code constitutes a wholesale preemption of state laws regarding creditors' rights," Pet. App. 34a, constitutes a holding. And a holding it is.

The Second Circuit elsewhere used similar language to make the same point. See Reply Br. 1-2. Some of that language has been interpreted to defeat the presumption's application to state-law claims of *intentional* fraud, even though such claims under federal law are expressly *exempted* from Section

546(e).[1] The Second Circuit, too, matched its bark with bite: It held that petitioners had to establish that their textual reading of the statute is "necessarily" correct. Pet. App. 38a. It thus imposed on *petitioners* the burden of *avoiding* preemption, rather than properly requiring *respondents* to show that Congress meant more than it said. Indeed, the Second Circuit imposed the heaviest possible burden, demanding that petitioners establish that their reading of the statute's plain text was "necessarily" correct. Far from a "retreat[] from its absolutist view" (U.S. Br. 17), the Second Circuit's actions were a headlong forward charge.

Moreover, the circuit split is not "abstract" (U.S. Br. 18) in any sense that matters. The Second Circuit's holding—like those with which it conflicts—concerns "the Bankruptcy Code," full stop. Pet. App. 34a; see, *e.g.*, *In re Northington*, 876 F.3d 1302, 1312 (11th Cir. 2017) ("[W]e should hold that the Bankruptcy Code [preempts state law] only if we find some clear textual indication."); *Rosenberg* v. *DVI Receivables XVII, LLC*, 835 F.3d 414, 419 (3d Cir. 2016) ("This strong presumption against inferring Congressional preemption also applies in the bankruptcy context." (quotation marks omitted)). The cases in the split thus concern not "discrete statutory

---

[1] "The Court in *Tribune I* held, '[w]hile the issue before us is often described as whether Section 546(e) preempts state fraudulent conveyance laws, that is a mischaracterization. Appellants' state law claims were preempted when the Chapter 11 proceedings commenced and were not dismissed.' Thus, section 546(e) preempts the Trustee's intentional fraudulent transfer claims under [state law]." *Boston Generating*, 617 B.R. at 479 (citation omitted).

context[s]" but the same "particular federal law." See U.S. Br. 18. At any rate, that a question presented is relevant to multiple statutory contexts makes the question more, not less, certworthy. For example, the Court in a recent Term granted certiorari on a "principle[] of statutory construction" without addressing any "particular statut[e]." *Ibid.*; see *Animal Sci. Prods., Inc.* v. *Hebei Welcome Pharm. Co.*, 138 S. Ct. 1865, 1872 (2018) ("Is a federal court determining foreign law under Rule 44.1 required to treat as conclusive a submission from the foreign government describing its own law?"). The Solicitor General supported that grant, advising that "[t]he degree of deference that a court owes . . . is an important and recurring question." U.S. Br. at 12, *Animal Sci. Prods.*, *supra* (Nov. 14, 2017).

Finally, the Acting Solicitor General claims that this case is a poor vehicle because the Second Circuit is wrong "[e]ven without a thumb on the scale." U.S. Br. 18-19. The issue, however, is not merely that the Second Circuit declined to apply the presumption against preemption. It is that the court put its thumb on the *other side* of the scale. Pet. App. 51a ("[A]mbiguities" are "sufficient" to reject the "clear textual basis for [petitioners'] theory."); see p. 7, *supra*. No wonder the court reached an indefensible result.

II. The "Financial Institution" Question Warrants Review

The Second Circuit's construction of the statutory term "financial institution" would, the United States rightly emphasizes, render a recent and unanimous decision of this Court "a virtual nullity." U.S. Br. 19 (discussing *Merit Mgmt. Grp., LP* v. *FTI Consulting,*

Inc., 138 S. Ct. 883 (2018)). The same construction would likewise annul the work of the political branches in setting "precisely crafted limits . . . in Section 546(e)." U.S. Br. 20. Whereas Section 546(e) is carefully drafted to cover only *some* transfers connected to a securities contract, "under the court of appeals' interpretation, [Section 546(e)] will apply to virtually *every* transfer made in connection with a securities contract, since some party to almost every such transfer will rely on" a bank or similar entity. *Ibid.* (emphasis added).

The government nevertheless argues against review because a circuit split is absent and because this case is a poor vehicle. Neither basis is sound.

The proffered rationale for awaiting a circuit split—that "the Court would likely benefit from prior consideration of the issue by additional courts of appeals" (U.S. Br. 22)—is unconvincing, for substantially the reasons it is unconvincing in the preemption context.

First, as explained above (pp. 3-4), questions of Section 546(e)'s reach—and thus of how to construe "financial institution"—are likely to arise with disproportionate frequency in the Second Circuit. Indeed, courts in that Circuit have already found, due to the decision at issue, that both a "fashion retail company" and a "power generation company" are "financial institutions," so that Section 546(e) protects their transfers. *Nine West*, 482 F. Supp. 3d at 191,

199; *Boston Generating*, 617 B.R. at 450-51.[2] Those counterintuitive—if not absurd—conclusions have cost creditors more than $2 billion. See p. 5, *supra*.

Second, since petitioners filed their reply brief, a (non-appellate) court has disagreed at length with the Second Circuit. *In re Greektown Holdings, LLC*, 621 B.R. 797, 825-34 (Bankr. E.D. Mich. 2020). The *Greektown* court was "not persuaded" by the Second Circuit's "financial institution" holding because that holding did "not distinguish between mere intermediaries contracted for the purpose of effectuating a transaction and agents who are authorized to act on behalf of their customers." *Id.* at 827; see also *ibid.* ("Not all actors who 'perform an intermediary role between parties who engage in a transaction[] . . . are agents in any sense.'" (quoting Restatement (Third) of Agency § 1.01 cmt. h)).

Third, as explained above (p. 5), the gravity of this case has attracted and will attract *amici*, including the United States, fully interested in and capable of making the best arguments on both sides.

No better than its circuit-split argument are the government's vehicle-problem arguments. One purported problem—which, again, blames the victim—is that "uncertainty regarding the facts . . . would likely hamper this Court's review." U.S. Br. 22.

---

[2] Defendants in a third case pending in the Second Circuit are arguing that a holding company for "two nationwide retail brands," Sears and K-Mart, should be deemed a "financial institution." Adv. Proc. 19-8250, Docket Entry No. 52, ¶ 84 (Bankr. S.D.N.Y. Nov. 25, 2019); see also Adv. Proc. 20-07007, Docket Entry No. 40, at 17 (Bankr. S.D.N.Y. Jan. 19, 2021).

But there is no uncertainty *for purposes of this Court's review*. No party asks this Court to review the Second Circuit's factual statements. We have noted that those facts are wrong and were arrived at by a procedurally indefensible path. But we did not seek certiorari on that ground. This Court should hardly allow lower courts to evade review by making *additional errors* that do not themselves warrant review.

The other purported vehicle problem is that the existence of a parallel lawsuit brought by the Trustee for the Tribune Litigation Trust "produces an additional complication." U.S. Br. 23. But it is not clear how. Given that rehearing en banc of the decision below was sought and denied, the Trustee suit has little chance of changing the Second Circuit's "financial institution" ruling without action by this Court. Indeed, counsel for the respondents (who also represent appellees in the Trustee's case) has scoffed at the idea that the views of the United States even constitute "authority." *In re Tribune Co. Fraudulent Conveyance Litig.*, No. 19-3049, Docket Entry No. 305, at 1 (2d Cir. Mar. 18, 2021) (letter to clerk of court). This Court must act if the error below is not to metastasize.

* * *

Even if the Court thinks that it should not grant plenary review—despite calling for the views of the United States knowing full well that there is no circuit split yet on the second and third questions—there are other tools this Court can use. Summary reversal is one such tool: The United States has now concluded that the Second Circuit "erred in finding that

creditors' state-law avoidance actions are preempted by Section 546(e)." U.S. Br. 7. A second tool is the Court's power to grant certiorari, vacate a judgment, and remand a case for further consideration in light of an intervening event. Here, the Securities and Exchange Commission appeared as *amicus curiae* before the Second Circuit urging preemption. But this Court's invitation has now yielded the definitive view of the United States, which is 180 degrees opposite what the court below was entitled to think of as the government's view—a view particularly relevant to "purposes and objectives" preemption. Were the United States a party, that would be a confession of error. Yet a third tool, used before in this very case, is to postpone disposition of the petition for a writ of certiorari while individual Justices suggest that the court below recall its mandate. That step was unusual, perhaps even unprecedented, but it is better than letting stand a profoundly erroneous judgment of enormous monetary and jurisprudential consequence.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

JAY TEITELBAUM
Teitelbaum Law Group, LLC
1 Barker Avenue
White Plains, NY 10601
(914) 437-7670
jteitelbaum@tblawllp.com
Counsel for the Retirees

LAWRENCE S. ROBBINS
Counsel of Record
ROY T. ENGLERT, JR.
JOSHUA S. BOLIAN
CAROLYN M. FORSTEIN
ZACHARY N. FERGUSON
Robbins, Russell, Englert, Orseck, Untereiner & Sauber LLP
2000 K Street, N.W.
Washington, DC 20006
(202) 775-4500
lrobbins@robbinsrussell.com
Counsel for the Noteholders

March 31, 2021