No. 16-317

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

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.
ARIEL N. LAVINBUK
DANIEL N. LERMAN
SHAI D. BRONSHTEIN
ROBBINS, RUSSELL, ENGLERT, ORSECK, UNTEREINER & SAUBER LLP
1801 K Street, N.W.
Washington, D.C. 20006
(202) 775-4500
lrobbins@robbinsrussell.com
Counsel for the Noteholders

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SUPPLEMENTAL BRIEF FOR PETITIONERS

Pursuant to Rule 15.8 of the Rules of this Court, petitioners respectfully submit this supplemental brief to call to the Court's attention the recent decision of the United States Court of Appeals for the Eleventh Circuit in *In re Northington*, 876 F.3d 1302 (2017). See App., *infra*, 1a-49a.

The pending petition for a writ of certiorari in the present case presents three questions. The second question presented is substantively identical to the one on which this Court granted certiorari in *Merit Management Group, LP* v. *FTI Consulting, Inc.*, No. 16-784 (argued Nov. 6, 2017). The new *Northington* decision does not bear on that question. Rather, it deepens the circuit split on the *first* question presented, which is whether the presumption against federal preemption of state law applies in the bankruptcy context. *Northington* bears on the third question presented, as well.

As we demonstrated in the petition (Pet. 12-19) and the reply brief (at 5-8), the Second Circuit in the decision below failed to apply the presumption against preemption demanded by this Court's decisions in at least three cases construing the Bankruptcy Code: *BFP* v. *Resolution Trust Corp.*, 511 U.S. 531 (1994); *Midlantic Nat'l Bank* v. *New Jersey Dep't of Envtl. Protection*, 474 U.S. 494 (1986); and *Butner* v. *United States*, 440 U.S. 48 (1979). Instead the Second Circuit concluded (without citation of any of those three cases) that, "[o]nce a party enters bankruptcy, the Bankruptcy Code constitutes a wholesale preemption of state laws regarding creditors' rights." Pet. App. 22a. The Second Circuit could hardly have been any clearer in

announcing that it was applying a presumption *in favor of* preemption under the Bankruptcy Code.

The Eleventh Circuit has now joined the Third and Ninth Circuits in applying the exact opposite presumption—namely, a presumption *against* preemption under the Code: "[T]he Bankruptcy Code prevents and counteracts the ordinary operation of [a relevant state] statute only if we find some *clear textual indication* that Congress intended that result." App., *infra*, 19a (emphasis added).

The Eleventh Circuit panel majority acknowledged that "we are not concerned here with congressional power; Congress has extensive authority in the bankruptcy arena—including the authority to supersede state property law." App., *infra*, 17a (citing U.S. Const. Art. I, § 8, cl. 4). Its point of departure was therefore the same as the Second Circuit's. See Pet. App. 22a (citing same constitutional provision). But the analysis of the two courts then diverged sharply. The Second Circuit, in the *very next sentence* after citing the constitutional provision, announced that "the Bankruptcy Code constitutes a wholesale preemption of state laws regarding creditors' rights." *Ibid*. The Eleventh Circuit, by contrast, properly distinguished Congress's *power* from whether Congress has *exercised* that power: "the issue before us is whether Congress has in fact exercised that authority. In answering that question, we take our cue from the Supreme Court's decision in *BFP v. Resolution Trust Corp.*, 511 U.S. 531 (1994)." App., *infra*, 17a.

The Eleventh Circuit analyzed *BFP* for the next several pages, App., *infra*, 17a-19a, before concluding that the Bankruptcy Code *does not* effect a wholesale

preemption of state laws regarding creditors' rights. Instead, abrogation of creditors' rights provided by state law requires a "clear textual indication that Congress intended that result." App., *infra*, 19a. As the Eleventh Circuit correctly perceived, that standard follows directly from *BFP*—a case that we cited to the Second Circuit (Response and Reply Brief of Plaintiffs-Appellants-Cross-Appellees at 38 (filed Apr. 11, 2014)) but that the Second Circuit's opinion did not even acknowledge.

The fundamental question whether the Bankruptcy Code creates a presumption for or against preemption cries out for resolution by this Court. The Second Circuit's decision below cleanly holds that "the Bankruptcy Code constitutes a *wholesale preemption* of state laws regarding creditors' rights." Pet. App. 22a (emphasis added). The Ninth Circuit's case law, by itself, reflects the deep conflict in the circuits. One Ninth Circuit case is in square conflict with the Second Circuit's holding in this case.[1] But a different Ninth Circuit case cited in the opinion below seems to support the Second Circuit's "wholesale preemption" theory.[2] The Third Circuit and now the Eleventh Circuit, by contrast, have both unequivocally applied the presumption against

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[1] *Pacific Gas & Electric Co.* v. *Cal. ex rel. Cal. Dep't of Toxic Substances Control*, 350 F.3d 932, 943 (9th Cir. 2003)*, quoted in* Pet. 14 and Reply Br. 7.

[2] *In re Miles*, 430 F.3d 1083, 1091 (9th Cir. 2005) ("Congress intended the Bankruptcy Code to create a whole scheme under federal control that would adjust *all* of the rights and duties of creditors and debtors alike . . . ."), *quoted in* Pet. App. 22a.

preemption to the Bankruptcy Code. See Pet. 14; App., *infra*, 19a. There is a pressing need for further guidance from this Court on the first question presented.

The new Eleventh Circuit decision also reflects the certworthiness of the third question presented, which is whether Section 546(e) of the Code pre-empts state-law fraudulent-conveyance suits brought by creditors. Had this case arisen in the Eleventh Circuit, there can be no doubt that the reasoning of *Northington* would have compelled the court of appeals to agree with the district court that "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).

If only a *textual* indication of Congress's intent can lead to preemption of state law, as the Eleventh Circuit has now held, then respondents simply have no argument. The *text* of Section 546(e) refers explicitly to the kinds of avoidance actions that "the trustee may not" bring. 11 U.S.C. § 546(e). It says not a word about restricting the ability of parties *other than* the trustee to bring actions under state fraudulent-conveyance law. And, for centuries, every State has empowered creditors to bring such actions. See Pet. 4, 18-19.[3]

[3] To be sure, the Bankruptcy Code's automatic stay *temporarily* precludes such actions. See Pet. 4. But the *permanent* preemption of such actions lacks an iota of textual support.

In their brief in opposition, respondents urged that the conflicting decisions of the Third and Ninth Circuits should be read narrowly, to apply only to "the different federal and state interests implicated by the statutory provisions at issue in each case." Br. in Opp. 14. They will surely argue that the new Eleventh Circuit decision likewise implicates different "federal and state interests"—and that assertion is half-right. The Georgia pawn statute at issue in *Northington* serves different purposes than the state fraudulent-conveyance laws at issue here. But the conclusion respondents draw—that the presumption against preemption can come and go based on a judicial balancing of federal and state interests, rather than the text of the statute and the intent of Congress—lacks support in the cases and contradicts bedrock principles established by this Court.

The Second Circuit's analysis of the presumption came *before* the court said, "Consider, for example, the present proceeding" (Pet. App. 22a), and it came *before* the court wrote 30 pages about Section 546(e) of the Code (Pet. App. 24a-53a). Likewise, the Eleventh Circuit's analysis of the presumption came *before* the court turned to the specific state statute and Code provisions at issue. This is as it should be. Courts examine statutes *in light of* any applicable presumption, not in deciding whether a presumption applies in the first place.

As the Eleventh Circuit recognized, this Court's cases do not support the proposition that the presumption against preemption varies from case to case depending on what "interests" are at stake—and it would be "impruden[t]" if statutes were to be interpreted "by reference to the goodness or badness

of particular consequences or outcomes." App., *infra*, 25a n.10. Rather, the lessons of *BFP* "guide [the] analysis" regardless of whether the state law at issue concerns pawn shops, as in *Northington*, or "constructively fraudulent transfers," as in both *BFP* and this case. App., *infra*, 17a.

Indeed, 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). Preemption of state law—whether it is express preemption, implied preemption, or field preemption—*always* depends on the intent of Congress. "Implied 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).

Because of that principle, the analysis of "the different federal and state interests implicated by the statutory provisions at issue in each case" (Br. in Opp. 14) occurs *in light of* the presumption against preemption. See also App., *infra*, 19a (the preemption analysis must be done in light of "the acknowledged background principle at work here"). The presumption does not, as respondents' proffered distinction suggests, gain or lose force *after* the federal and state interests are considered. Respondents' distinction is thus no distinction at all. The opinion below is squarely in conflict with decisions of

the Third, Ninth, and now Eleventh Circuits on a case-dispositive, recurring issue of great importance.

CONCLUSION

For the foregoing reasons and those stated in the petition and reply brief, the petition for a writ of certiorari should be granted with respect to Questions 1 and 3. With respect to Question 2, the petition should be held and disposed of as appropriate in light of this Court's disposition of *Merit Management Group, LP* v. *FTI Consulting, Inc.*, No. 16-784.

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.
ARIEL N. LAVINBUK
DANIEL N. LERMAN
SHAI D. BRONSHTEIN
ROBBINS, RUSSELL, ENGLERT, ORSECK, UNTEREINER & SAUBER LLP
1801 K Street, N.W.
Washington, D.C. 20006
(202) 775-4500
lrobbins@robbinsrussell.com
Counsel for the Noteholders

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