No. 12-926

IN THE

Supreme Court of the United States

DIRECTOR OF THE DEPARTMENT OF REVENUE OF THE STATE OF MONTANA; TREASURER OF THE STATE OF KENTUCKY; TREASURER OF THE STATE OF OKLAHOMA; ATTORNEY GENERAL OF THE STATE OF MISSOURI; TREASURER OF THE STATE OF PENNSYLVANIA,
Petitioners,

v.

UNITED STATES DEPARTMENT OF THE TREASURY; SECRETARY OF THE UNITED STATES TREASURY DEPARTMENT; BUREAU OF PUBLIC DEBT, A DIVISION OF THE UNITED STATES TREASURY DEPARTMENT; COMMISSIONER OF THE BUREAU OF PUBLIC DEBT,
Respondents.

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES Page

CONSTITUTION, STATUTES AND REGULATIONS

TABLE OF AUTHORITIES – continued

OTHER AUTHORITIES

INTRODUCTION

Petitioner States and two dozen *amici* States demonstrated that the decision below conflicts with this Court's preemption and intergovernmental immunity decisions and presents a significant federal-state dispute that this Court has a responsibility to address. The United States' opposition, which mischaracterizes Congress' language and ignores this Court's opinions, fails to show otherwise. Contrary to the United States' claim, Congress has not conveyed a "clear and manifest" purpose to preempt state unclaimed property laws. Congress has done that in numerous similar contexts, but it has not done so here. Moreover, the court of appeals expanded the intergovernmental immunity doctrine by applying it to bar the operation of state laws that do not regulate the federal government. The last-gasp vehicle issues conjured up by the United States are illusory.

I. THE COURT OF APPEALS' PREEMPTION RULING CONFLICTS WITH DECISIONS OF THIS COURT.

Petitioners demonstrated that the court of appeals departed from several core components of this Court's preemption doctrine, including the presumption against preemption. Pet. at 13-24. The United States' attempt to reconcile the court of appeals' decision with this Court's holdings is unavailing.

The United States does not dispute that the presumption against preemption applies in this case and that this presumption can only be overcome if Congress conveyed a "clear and manifest" purpose to preempt state law. Opp. at 18-19; see Pet. at 13 (citing *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218,

230 (1947)). It also does not dispute that Congressional silence cannot suffice to overcome the presumption, and that the savings bond statute and its accompanying regulations do not expressly address either state unclaimed property laws or the disposition of matured and unredeemed savings bonds. See Pet. at 16-17.

The United States argues that the court of appeals correctly determined that Congress was not silent on the issue of preemption because Congress made clear that the proceeds of matured and unredeemed bonds "are not 'unclaimed' under the federal statutory and regulatory framework." Opp. at 15; see also *id.* at 14-15 ("Congress has determined that [Treasury] may allow bondholders to redeem savings bonds at any time after maturity"). The United States principally relies upon 31 U.S.C. § 3105(b)(2)(A), which authorizes Treasury to promulgate regulations providing that "owners of savings bonds may keep the bonds after maturity or after a period beyond maturity during which the bonds have earned interest and continue to earn interest." See Opp. at 14-15. That provision, however, merely authorized Treasury to prescribe regulations extending maturity and continuing interest beyond the period Congress specified in § 3105(a) ("bonds shall mature not more than 20 years from the date of issue"). Treasury did this for Series E bonds in 31 C.F.R. § 316.8 ("Extended terms and yields for outstanding bonds"), but those maturities and the associated interest lapsed long ago.

Section 3105(b)(2)(A) is silent as to the appropriate handling of bonds (such as those at issue here) that have reached final maturity and long-ago ceased earning interest, but have not been claimed by the holders. That silence hardly establishes a "clear and

manifest" purpose on the part of Congress to displace state unclaimed property laws. Nor does that lack of a redemption deadline distinguish the bonds from other sorts of contract or debt instruments which the Court has addressed. See *Standard Oil Co.* v. *New Jersey*, 341 U.S. 428, 436 (1951) (state escheat laws apply to unclaimed corporate dividends, notwithstanding understandable absence of both redemption deadline and arrangement between parties regarding unclaimed dividends).[1]

The United States also argues that the court of appeals properly determined that application of the state unclaimed property laws here would conflict with the general contractual requirements for redemption of savings bonds, such as the provisions limiting redemption to registered owners and requiring payment by the United States. Opp. at 13-15. The United States has no response, however, to petitioners' showing that there is no conflict under this Court's preemption precedents because the state laws only operate in the specific circumstance that is not addressed by the federal scheme: where the registered owner fails to assert the contractual right of redemption. See Pet. at 19-20. In this regard, the United States simply ignores *Connecticut Mutual Life Insurance Co.* v. *Moore*, 333 U.S. 541 (1948), and *Standard Oil*, 341 U.S. 428, which both held that there is no conflict between parties' contractual

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[1] The United States (Opp. at 15) also relies upon 31 C.F.R. § 315.35(c), which provides that Series E bonds "will be paid at any time after two months from the issue date at the appropriate redemption value." This regulation merely permits redemption of Series E bonds (at reduced values) before their maturity dates; it demonstrates no "clear and manifest" intent to displace state unclaimed property laws, which apply only after fully matured bonds go unredeemed by the owners.

arrangements, which govern their property rights, and state escheat laws, which come into play only "in case of the owner's failure to make claim," *Standard Oil*, 341 U.S. at 436. See Pet. at 19-20 n.12.

The United States also fails to counter petitioners' showing that the court of appeals ignored this Court's precedents by failing to contrast Congress' silence on unclaimed property in the savings bond statute with its express preemption or displacement of state unclaimed property laws in other contexts. The United States contends that the savings bond statute operates in the same way as the statutes that petitioners cite, Opp. at 16-17, but this is incorrect. 31 U.S.C. § 1322, for example, specifically addresses the disposition of unclaimed property by requiring Treasury to transfer unclaimed moneys into a trust fund. Other federal statutes either expressly preempt state unclaimed property laws or, like § 1322, displace them by specifying the disposition of unclaimed property. See Pet. at 17-18 & n.8. The savings bonds statute does neither. The overwhelming inference to be drawn is that Congress never intended to preempt state laws in this area and the court of appeals simply declined to explain how Congress could have intended preemption with silence here when it so often speaks to unclaimed property.

Petitioners further demonstrated that leaving state unclaimed property laws in place encourages the purchase of U.S. savings bonds by providing comprehensive procedures for ensuring that bondholders collect forgotten proceeds. Pet. at 20. The United States, by contrast, does not dispute that Treasury does not even notify owners when their bonds mature and does not attempt to locate owners. It merely suggests that Treasury's website, which

allows users to search for outstanding bonds, is comparable to the States' efforts. Opp. at 17. This claim is wide of the mark, particularly on a motion to dismiss. The States, unlike the federal government, *affirmatively* attempt to reunite unclaimed property with its rightful owner through extensive advertising and outreach programs, in addition to searchable websites (that are effective only if users already know of their possible claims). See Pet. at 5-6 & n.4. Moreover, the United States acknowledges the limitations of Treasury's website: it only includes bonds issued after 1974, while the bonds in this case date back to 1941.

Petitioners also demonstrated, leaving aside *Moore* and *Standard Oil*, that the court of appeals violated this Court's precedents by speculating about the potential complexity of state redemption procedures and the availability of indemnification, when there was no record on those issues. Pet. at 21-23. The United States defends the Third Circuit on the ground that a court may "take account of . . . potential consequences" in its preemption analysis. Opp. at 20 (citing *Wos* v. *E.M.A.*, 133 S. Ct. 1391, 1398 (2013)). But that is not what the Third Circuit did here. It speculated about possible factual issues that should have been explored through discovery, but were not because the district court resolved the case at the 12(b) phase of the litigation. Because the Third Circuit had no record to go on, its concerns about potential consequences were merely "hypothetical," *Rice* v. *Norman Williams Co.*, 458 U.S. 654, 659 (1982), and therefore "too speculative to support pre-emption." *Hillsborough Cnty.* v. *Automated Med. Labs.*, 471 U.S. 707, 720 (1985); cf. *Anderson Nat'l Bank* v. *Luckett*, 321 U.S. 233, 242 (1944) (rejecting

similar speculation by Comptroller of Currency in effort to refuse escheat of bank deposits).

Finally, the United States does not dispute that this Court has taken a particular interest in ensuring that the standards for preemption are properly and uniformly applied, even in contexts that have not given rise to a circuit split. Pet. at 30-31. The Court has previously done so to prevent unwarranted federal displacement of state laws in areas that the States have traditionally occupied. It should do so again here, as the 24 State *amici* have demonstrated, to avoid creation of a federal escheat power, *de facto*, when none exists. Brief *Amici Curiae* of Kentucky, et al. at 6-7.

II. THE COURT OF APPEALS' INTERGOVERNMENTAL IMMUNITY RULING CONFLICTS WITH DECISIONS OF THIS COURT.

Petitioners further showed that the court of appeals' ruling that the States' requested relief would violate the intergovernmental immunity doctrine conflicts with directly relevant decisions of this Court. Pet. at 24-29. The United States again fails to reconcile the court of appeals' ruling with this Court's holdings.

Petitioners first showed that the holding below that operation of the States' unclaimed property laws would interfere with Congress' power to regulate property belonging to the United States, U.S. Const. art. IV, § 3, cl. 2, conflicts with this Court's decisions holding that the property interest in debt (such as the amounts due on the savings bonds) belongs to the creditors (the savings bond owners) rather than the debtor (the United States). Pet. at 25-27 (citing *Delaware* v. *New York*, 507 U.S. 490, 499 (1993), and

Texas v. *New Jersey*, 379 U.S. 674, 680-82 (1965)). The United States suggests (Opp. at 23) that these decisions merely control who "own[s] the matured bonds" themselves, and not the funds due on them, but this distinction cannot be found in the decisions, which addressed the proper disposition under state unclaimed property laws of the "amounts owed" on the relevant debts. *Texas*, 379 U.S. at 675; *Delaware*, 507 U.S. at 494 (addressing proper disposition of "the funds at issue").

This leaves the United States to argue that its interests under the Property Clause are nevertheless implicated because the funds are currently in the U.S. Treasury, Opp. at 20-21, 23, but the cases it relies upon do not address any issue under the Property Clause and are factually inapposite. *Buchanan* v. *Alexander*, 45 U.S. (4 How.) 20 (1846), and *Department of the Army* v. *Blue Fox, Inc.*, 525 U.S. 255 (1999), both involved attempts by third parties to satisfy debts by either garnishing (*Alexander*) or enforcing a lien (*Blue Fox*) against federal funds that were due to the debtor. Neither situation is presented here. In addition, this Court's legal holding in both cases was that the attempted attachments were barred by sovereign immunity – a defense that the court of appeals correctly held was waived in this case. See *infra* at 9-10. Similarly, *Grupo Mexicano de Desarrollo, S.A.* v. *Alliance Bond Fund, Inc.*, 527 U.S. 308 (1999), presented no question under the Property Clause or concerning the disposition of Treasury funds.[2]

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[2] The United States' contention (Opp. at 22) that petitioners' lawsuit "conflicts" with the Appropriations Clause, U.S. Const. art. I, § 9, cl. 7, is misguided. The Appropriations Clause poses no bar to the relief that petitioners request, as shown by the fact that the United States does not dispute that it would make

Petitioners further demonstrated that the court of appeals' ruling that the accounting requested by the States would violate the intergovernmental immunity doctrine conflicts with this Court's decisions in *Luckett*, 321 U.S. 233, and *Roth* v. *Delano*, 338 U.S. 226 (1949), which rejected similar claims concerning the reporting requirements of state unclaimed property laws. Pet. at 27 (citing Pet. App. at 54a-55a). The United States contends that *Luckett* and *Delano* are inapposite because they involved national banks, which do not enjoy all of the "immunities of the United States," Opp. at 24-25 & n.6, but this Court did not rely on any such distinction in rejecting the banks' claims in those cases. Instead, in each case, the Court fully acknowledged federal aspects, and rejected as insubstantial the claim that such generally-applicable administrative requirements constituted direct regulation. See *Delano*, 338 U.S. at 230-31 (acknowledging that the state requirements would impose obligations on "a federal officer" discharging "federal functions"); see also *Luckett*, 321 U.S. at 252-53 (requiring reports "as appropriate incident to this exercise of authority"). The court of appeals' contrary ruling here simply cannot be squared with *Delano* and *Luckett*. Tellingly, as the United States acknowledges (Opp. at 11), the intergovernmental immunity doctrine originated in *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819), which involved a national bank.

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payments on the bonds at issue to the bondholders (if they come forward) or to the States if they obtain title to the bonds pursuant to title-based escheat laws. Opp. at 4. Petitioners' lawsuit does not call for appropriation of federal funds pursuant to any state laws; rather, it seeks to require the holder of unclaimed property previously created under the federal savings bond statute to report and deliver such property to the States.

III. THE COURT OF APPEALS' PREEMPTION AND INTERGOVERNMENTAL IMMUNITY RULINGS POSE ISSUES OF FUNDAMENTAL IMPORTANCE AND THERE ARE NO BARRIERS TO REVIEW.

Petitioners also demonstrated that the court of appeals' rulings present recurring and important questions of federal preemption and intergovernmental immunity law, in a $16 billion dispute between the federal government and the States that this Court should decide. Pet. at. 29-32. The United States attempts to discount the significance of this litigation and the fact that only this Court can resolve it, Opp. at 28, but the 24 State *amici* confirm the urgent need for this Court to fulfill its "role as a referee" of this federal-state dispute. Brief *Amici Curiae* of Kentucky, et al. at 4.

There is no merit to the United States' claim that this case "presents serious threshold barriers to review" that would prevent consideration of the questions presented. Opp. at 25. As an initial matter, the United States' assertion that this Court should view the court of appeals' preemption and intergovernmental immunity rulings as "alternative grounds" for the decision below, *id.*, ignores petitioners' showing that there is a serious question whether the intergovernmental immunity doctrine stands separate from this Court's preemption principles, and that this case is an ideal vehicle for addressing that important question. See Pet. at 25, 32. See also Brief *Amici Curiae* of Kentucky, et al. at 17-19 (questioning whether intergovernmental immunity stands distinct from preemption or justifies freewheeling judicial inquiry beyond statutory text).

The United States also argues that it has not waived its sovereign immunity from this suit, an

argument that it raised unsuccessfully in the court of appeals. Opp. at 26-28. The court of appeals' conclusion that Section 702 of the APA waives the United States' sovereign immunity from the instant suit was thoroughly reasoned, correctly applied Section 702's plain language, and – as the United States acknowledges, *id.* at 27 n.7 – is consistent with all other circuits' interpretation of that provision. See Pet. App. at 25a-29a. Section 702 waives the United States' sovereign immunity from "an action in a court of the United States seeking relief other than money damages" by a party stating a claim based on agency action or inaction. As the Third Circuit correctly recognized, nothing in the plain language of the statute limits the waiver of immunity to suits brought under the APA or to federal claims. *Id.* at 25a-31a & n.19; see Richard H. Fallon, Jr. et al., *Hart and Wechsler's The Federal Courts and the Federal System* 865 (6th ed. 2009) ("Though codified in the APA, the waiver applies to any suit, whether or not brought under the APA.").[3] The Third Circuit also correctly recognized that petitioners' suit does not seek money damages. Pet. App. at 31a & n.20 (citing *Bowen* v. *Massachusetts*, 487 U.S. 879 (1988)). The United States' continued disagreement with the Third Circuit's unanimous jurisdictional holding does not present a reason for this Court to decline to decide the fundamental constitutional issues presented.

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[3] Because the language of the statute is clear, the United States' reliance on committee hearing statements is unavailing. *See* Opp. at 26-27; *Ratzlaf* v. *United States,* 510 U.S. 135, 147-48 (1994) (this Court "do[es] not resort to legislative history to cloud a statutory text that is clear"). In any event, the court of appeals correctly concluded that the relevant House Report confirms its statutory construction. *See* Pet App. at 30a-31a.

The United States also contends that this Court would have to address the issue of whether an independent basis exists for federal subject matter jurisdiction, a matter that the United States did not raise in the district court, Pet. App. at 32a, but challenged unsuccessfully in the court of appeals. Opp. at 25-26. This argument need not detain the Court. The Third Circuit properly determined that petitioners' Tenth Amendment claim was not "so insubstantial as to be beyond the jurisdiction of the District Court." *Hagans* v. *Lavine*, 415 U.S. 528, 539 (1974); see Pet. App. at 37a-41a. The United States (Opp. at 26) therefore is not correct that further evaluation of "the merits" of the Tenth Amendment claim is necessary to "confirm" jurisdiction. See *Hagans*, 415 U.S. at 542 n.10 ("Once a federal court has ascertained that a plaintiff's jurisdiction-conferring claims are not insubstantial on their face, no further consideration of the merits of the claim[s] is relevant to a determination of the court's jurisdiction of the subject matter.") (internal citation and quotations omitted) (alteration in original). In any event, contrary to the United States' assertion, Opp. at 25-26, petitioners have not "abandoned" the Tenth Amendment. See Pet. at 29.

CONCLUSION

For the foregoing reasons, and for those presented in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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