No. 12-926

In the Supreme Court of the United States

DIRECTOR OF THE DEPARTMENT OF REVENUE OF MONTANA, ET AL., PETITIONERS

v.

DEPARTMENT OF THE TREASURY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
STUART F. DELERY
Principal Deputy Assistant Attorney General
MARK B. STERN
ALISA B. KLEIN
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

Five U.S. States, invoking their own unclaimed-property statutes, seek to compel the United States Department of the Treasury to pay them the proceeds of matured U.S. savings bonds that have not yet been redeemed by their owners. The questions presented are as follows:

1. Whether application of the state laws to funds held by the federal Treasury is preempted by the statutes and regulations governing the savings-bond program.

2. Whether application of the state laws to funds held by the federal Treasury is barred by the doctrine of intergovernmental immunity.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a) is reported at 684 F.3d 383. The order denying rehearing and rehearing en banc (Pet. App. 95a-96a) is unreported. The opinion of the district court (Pet. App. 58a) is available at 2010 WL 457702.

JURISDICTION

The judgment of the court of appeals was entered on June 27, 2012. A petition for rehearing was denied on September 25, 2012. On December 5, 2012, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including January 23, 2013, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. This case concerns the United States savings-bond program. Invoking its constitutional "power '[t]o borrow money on the credit of the United States,'" Congress has "authorized the Secretary of the Treasury, with the approval of the President, to issue savings bonds in such form and under such conditions as he may from time to time prescribe." *Free* v. *Bland*, 369 U.S. 663, 666-667 (1962) (quoting U.S. Const. Art. I, § 8, Cl. 2); see 31 U.S.C. 3105. The purpose of the program is to raise funds for the operation of the federal government. See *Free*, 369 U.S. at 669. To that end, Congress has provided that "[p]roceeds from the bonds * * * shall be used for expenditures authorized by law." 31 U.S.C. 3105(a).

Exercising its statutory authority, the Department of the Treasury (Department) has issued several series of savings bonds (*e.g.*, Series E). The regulations governing the various series are set forth in Chapter 31 of the Code of Federal Regulations and have been incorporated into the bond contracts by reference. As relevant here, they impose a number of restrictions on the redemption of savings bonds. The Department generally may make payment on a bond only to the registered owner. 31 C.F.R. 315.5, 315.15, 315.35, 353.5, 353.15, 353.35. A bond owner obtains payment by presenting the bond to a "paying agent," which is "a financial institution that has been qualified [by the Department] * * * to make payment of savings bonds." 31 C.F.R. 315.2(j), 315.39(a), 353.2(f), 353.39(a). The bond is generally not transferable. 31 C.F.R. 315.15, 353.15.

Congress has also authorized the Secretary to "prescribe 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." 31 U.S.C. 3105(b)(2)(A). Pursuant to that statutory authorization, the Department's regulations allow the bonds to be redeemed at any time after maturity. See 31 C.F.R. 315.35(c) ("A Series E bond will be paid *at any time* after two months from issue date at the appropriate redemption value.") (emphasis added); see also 31 C.F.R. 353.35(b). Because payment on a savings bond is made from the general funds in the federal Treasury, during the period before the bondholder redeems the bond, the funds continue to be available to the federal government for any "expenditures authorized by law." 31 U.S.C. 3105(a).

b. States have enacted statutes enabling them to assume title to or take custody of property that appears to have been abandoned by its owner, "a process commonly * * * called escheat." *Delaware* v. *New York*, 507 U.S. 490, 497 (1993). The Department has provided guidance to the States about how those laws may apply to U.S. savings bonds in light of the strict limitations on redemptions and transfer established by the federal scheme. As discussed above, the regulations generally provide that payment on a U.S. savings bond will be made only to the registered owner, thus precluding payment to a State invoking its unclaimed-property statute. The regulations include an exception, however, for cases in which a third party obtains ownership of the bond through valid judicial proceedings. 31 C.F.R. 315.20(b) ("The Department of the Treasury will recognize a claim against an owner of a savings bond * * * if established by valid, judicial proceedings."); see also 31 C.F.R. 315.23, 353.20(b), 353.23.

Accordingly, the Department has long advised the States that to receive payment on a U.S. savings bond a State must complete an escheat proceeding that satisfies due process and that awards title to the bond to the State, substituting the State for the original bondholder as the lawful owner. See Pet. App. 12a. But given the regulatory prohibition on payment to anyone other than the lawful owner, the Department has also made clear that it will not make payment to a State on a bond if a State does not obtain title to the bond but instead merely seeks "custody" of bond proceeds until the bondholder redeems the bond. See *ibid.*

That guidance was first set forth in a 1952 letter to the State of New York, was reiterated in a 1983 letter to the State of Kentucky, and, since 2000, has appeared on the Department's official website. See Pet. App. 10a-13a & n.8. Petitioners have referred to the online explanation as the "Escheat Decision," *id.* at 11a-12a, and both parties have acknowledged that the Escheat Decision represents the Department's considered interpretation of federal law, *id.* at 13a.

2. Petitioners are officials of five state governments. They sued the Department in the United States District Court for the District of New Jersey to compel the United States to pay them funds out of the federal Treasury equal to the amount of proceeds on certain matured federal savings bonds that have not yet been redeemed by their registered owners. They allege that $1.6 billion of the proceeds of matured U.S. savings bonds are owed to bondholders whose last known addresses were in the States of the original seven plaintiffs in this case (two of whom have not joined the certiorari petition). C.A. App. 87 ¶ 3. Petitioners seek "an order directing the [federal] Government to pay the proceeds

of matured but unredeemed savings bonds to the plaintiff States * * * and for an accounting of the amounts owed." Pet. App. 13a.

Petitioners do not claim to have obtained title to any of the U.S. savings bonds at issue in this case, and so they do not assert a right to receive payment under the federal regulations that authorize payment to a third party that obtains ownership of a bond through valid judicial proceedings (*i.e.*, 31 C.F.R 315.20(b), 353.20(b)). Instead, they rest their demands for payment exclusively on their own unclaimed-property statutes, which each have special provisions that apply to property held by the federal government (or government entities generally). See Pet. App. 9a-10a. Those provisions deem the proceeds of a U.S. savings bond to be "abandoned" if the owner does not redeem the bond within a specified period after maturity—as little as one year. See *id.* at 10a. They require that "all holders of unclaimed property report and deliver to the States such property whose owners have last known addresses in their respective States," C.A. App. 97 ¶ 37, and they impose criminal and civil penalties for non-compliance. Pet. App. 54a.

The state unclaimed-property statutes enable States that take custody of funds to make "beneficial use" of them until they are claimed by the property holder (if ever). Pet. App. 8a. Thus, as the court of appeals observed, although petitioners profess to bring this action in order to help bondholders redeem their bonds, "the objective reality obviously is otherwise": "The truth is that this case is a dispute between the States and the United States as to whether a State or the United States will obtain the benefit of having custody of and availability for use of the proceeds of the matured but unredeemed bonds even if it does not obtain title to the pro-

ceeds of the bonds or title to the bonds themselves." *Id.* at 9a; see also Pet. C.A. Br. 10-11 (acknowledging that where a bondholder cannot be located by a State, the funds will be "use[d] for public purposes pursuant to state law").

3. The case was initially transferred to the United States Court of Federal Claims on the Department's motion. Pet. App. 14a. The United States Court of Appeals for the Federal Circuit, however, ultimately held that the transfer was improper and ordered that it be returned to the District of New Jersey. See *id.* at 14a-15a.

4. The district court dismissed the complaint, holding that it lacked subject matter jurisdiction in part and that the complaint failed to state a claim on which relief could be granted. Pet. App. 58a-94a.

a. The district court held that to the extent petitioners were challenging the Escheat Decision, their claims were barred by sovereign immunity and therefore the court lacked subject matter jurisdiction. See Pet. App. 88a-94a. The waiver of immunity contained in the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, the court held, does not apply to the Escheat Decision because it was not "final agency action" within the meaning of the APA. See Pet. App. 92a-94a. The court stated, however, that "[t]o the extent the States rely * * * on * * * unspecified 'decision[s] to refuse'" to turn over custody of the proceeds of the savings bonds to the States, the waiver applied. *Id.* at 94a.

b. On the merits, the district court concluded that "principles of federal supremacy and implied conflict preemption dictate here that the States' claims be dismissed" under Federal Rule of Civil Procedure 12(b)(6). Pet. App. 80a. The States' requested relief, the court

explained, "would impermissibly interfere with the contract between the United States and the owner of the bond and conflict with the narrow regulations governing redemption of the bonds." *Ibid.* That "relief would effectively replace the promulgated redemption process and potentially expose Treasury to multiple obligations on a single bond, and would therefore also 'intrude upon the rights and duties of the United States' by altering the obligation to involve the States." *Id.* at 84a (quoting *Free*, 369 U.S. at 669). The court rejected petitioners' argument that Congress was "silent on the issue of unredeemed mature bonds," because the "program clearly contemplates that the owners of savings bonds may keep the bonds for a period after maturity." *Id.* at 85a (citing 31 U.S.C. 3105(b)(2)). Accordingly, it concluded that "application of the State Acts to the unredeemed bond proceeds in the custody of the [Department] would conflict with the comprehensive federal savings-bond program, and therefore the State Acts must yield pursuant to the Supremacy Clause." *Id.* at 85a-86a.

The district court also rejected what petitioners characterized as a "Tenth Amendment" argument: that Congress "ha[d] not spoken on the subject of unclaimed savings bonds." Pet. App. 86a. The district court explained that "Congress need not expressly preempt state law" but rather "preemption may occur by implication." *Ibid.*

5. The court of appeals unanimously affirmed the judgment of dismissal. Pet. App. 1a-57a.

a. The court of appeals first rejected the district court's sovereign-immunity determination, holding that the APA's waiver applies even if a plaintiff does not challenge final agency action. See Pet. App. 22a-31a. The court went on, however, to analyze whether "the

District Court lacked an independent basis for federal question jurisdiction [under 28 U.S.C. 1331] because the States are making claims under state, not federal law." Pet. App. 32a. The court ultimately did not decide "whether the District Court had [federal question] jurisdiction by reason of the presence of the preemption issue," but instead concluded that petitioners' Tenth Amendment claim, which the court deemed "colorable and not frivolous," was sufficient to establish federal question jurisdiction over that claim under 28 U.S.C. 1331 and jurisdiction over the state-law claims under the supplemental-jurisdiction statute, 28 U.S.C. 1367. Pet. App. 37a-41a.

b. Turning to the merits of petitioners' challenge, the court of appeals began by explaining that "[s]tate laws may violate the Supremacy Clause in two ways." Pet. App. 42a. "Under the doctrine of federal preemption," it wrote, "state laws are invalid if they 'conflict with an affirmative command of Congress,'" while "under the doctrine of intergovernmental immunity, states may not 'regulate the Government directly or discriminate against it.'" *Id.* at 42a-43a (quoting *North Dakota* v. *United States*, 495 U.S. 423, 434 (1990) (opinion of Stevens, J.)). The court found that as applied to the proceeds of U.S. savings bonds, state unclaimed-property statutes requiring that custody of proceeds be transferred from the federal Treasury to state treasuries would violate both of those doctrines.

With respect to preemption, the court of appeals acknowledged "two guiding principles." Pet. App. 44a. First, it said, the "ultimate touchstone in every preemption case" is "the purpose of Congress." *Ibid.* (quoting *Wyeth* v. *Levine*, 555 U.S. 555, 565 (2009). Second, courts "are guided by a presumption against preemption

* * * because [they] assume 'that the historic police powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *Ibid.* (citations omitted; second alteration in original).

Applying those principles, the court of appeals concluded that "the federal statutes and regulations pertaining to United States savings bonds preempt the States' unclaimed property acts insofar as the States seek to apply their acts to take custody of the proceeds of the matured but unredeemed savings bonds." Pet. App. 44a-45a. The court found that the state laws "conflict with federal law regarding United States savings bonds in multiple ways." *Id.* at 45a. In order to "advanc[e] the goal of making the bonds 'attractive to savers and investors,'" it explained, federal statutes and regulations permit bondholders to redeem them at any time after maturity. *Id.* at 45a-46a & n.25 (quoting *Free*, 369 U.S. at 669). But the state unclaimed-property statutes deem post-maturity bonds to be "abandoned"—a concept alien to the federal statute—and impose procedural hurdles to their redemption that differ from the federal scheme. See *id.* at 46a. "Most critically," the court explained, they would "substitute the respective States for the United States as the obligor on affected savings bonds," even though the bondholder and the United States bargained that the bonds would be "pledged 'on the credit of the United States,' U.S. Const. Art. I, § 8, Cl. 2, and not on the credit of any individual state." Pet. App. 47a.

The court of appeals further determined that petitioners' requested relief was incompatible with the federal scheme because federal law creates "an uncomplicated process involving little more than a trip to a bank"

to redeem the bonds, but under petitioners' view the States could impose complex procedures not envisioned by federal law. Pet. App. 47a-48a. In addition, because bondholders would still have a contractual right of action against the United States even after a State claimed the proceeds, permitting individual States to take custody of bond proceeds could enmesh the federal government in costly litigation in which it would have to seek indemnification from the States, another result not contemplated by the federal scheme. See *id.* at 48a-49a.

Like the district court, the court of appeals rejected petitioners' argument that because the pertinent federal statutes and regulations "do not include provisions for the disposition of abandoned property," they "leave[] room for the operation of [state] unclaimed property acts in this field." Pet. App. 49a. That reasoning, the court explained, rests on a faulty premise, because "the bond proceeds are not 'abandoned' or 'unclaimed' under federal law." *Ibid.* Rather, under 31 U.S.C. 3105(b)(2)(A) and its implementing regulations, "owners of the bonds may redeem them at any time after they mature, and thus Congress has not been silent with respect to the fate of the proceeds of unclaimed bonds." Pet. App. 49a. The court therefore concluded that the States' efforts to "transfer * * * $1.6 billion of federally-held funds to their treasuries" in a way that would work a "substantial realignment of the obligations that the bonds evidence and the procedures for redemption that federal laws and regulations have established" create a stark conflict with federal law. *Id.* at 50a.

The court of appeals alternatively held that application of the state unclaimed-property laws to the proceeds of U.S. savings bonds would contravene the doctrine of intergovernmental immunity. See Pet. App.

50a-55a. Under that doctrine, first articulated in *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819), "the States have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress" to carry into execution the powers vested in the national government. Pet. App. 50a (quoting *McCulloch*, 17 U.S. at 322). The court of appeals determined that applying state unclaimed-property laws to the proceeds of U.S. savings bonds would "interfere with Congress's '[p]ower to dispose of and make all needful Rules * * * and Regulations respecting the . . . Property belonging to the United States'"—*i.e.*, the billions of dollars in funds held by the Department for use in "financ[ing] the operations of the Government" until savings bonds are properly redeemed by their registered owners. *Id.* at 50a-52a (quoting U.S. Const. Art. IV, § 3, Cl. 2) (first brackets in original).

The court of appeals rejected petitioners' argument that the United States lacks any property interest in the proceeds of matured savings bonds. "Although the United States must pay holders of matured bonds the sums due on the bonds when the owners present them for payment," the court explained, "until it does so the funds remain federal property, and the Government may use the proceeds from the sale of savings bonds 'for expenditures authorized by [federal] law,' 31 U.S.C. § 3105(a)." Pet. App. 53a (brackets in original).

The court of appeals also held that "an order compelling the accounting that the plaintiff States request would violate the governmental immunity of the United States." Pet. App. 54a. The requested order, it concluded, would subject the federal government to "onerous record-keeping and reporting requirements, [and]

civil and criminal penalties for failure to comply." *Ibid.* (quoting district court's opinion) (alteration in original).

Finally, the court of appeals summarily disposed of petitioners' claim that the federal statutory and regulatory framework, if interpreted to bar States from taking custody of the proceeds of U.S. savings bonds, would violate the Tenth Amendment because the United States would effectively be exercising an "escheat power." See Pet. App. 56a-57a; see Pet. C.A. Br. 39 ("Plaintiffs maintain that exercise of a federal power to escheat the unclaimed bonds would violate the Tenth Amendment."). The court concluded that "the funds at issue here have not been escheated to the [federal] Government," because it is merely "holding the funds and will disburse them to the bondholders or their successors if they present the bonds for redemption." *Ibid.*

6. The court of appeals denied petitioners' request for rehearing en banc without recorded dissent. See Pet. App. 95a-96a.

ARGUMENT

The court of appeals correctly held that petitioners' claims—which seek to compel the Department of the Treasury to pay petitioners $1.6 billion in funds held in the United States Treasury that Congress has authorized the federal government to use for lawful expenditures—are barred by preemption and intergovernmental immunity. Petitioners do not allege a conflict between the decision below and a decision of another court of appeals. Although petitioners frame their arguments as demonstrating a conflict between the decision below and general principles set forth in this Court's precedents, none of this Court's decisions has addressed the questions presented. Petitioners essentially lodge case-specific objections to two alternative holdings that have

no general applicability beyond the savings-bond context, and their arguments lack merit in any event. This case, moreover, presents significant threshold issues that may prevent the Court from reaching the questions presented. Further review is therefore not warranted.

1. The court of appeals correctly held that state unclaimed-property laws are preempted insofar as they would require the federal government to transfer funds in an amount equal to the proceeds that would be paid on matured U.S. savings bonds from the United States Treasury to state governments.

a. This Court has made clear that federal regulations governing the savings-bond program preempt inconsistent state laws. In *Free* v. *Bland*, 369 U.S. 663 (1962), for example, the Court held that "Treasury Regulations creating a right of survivorship in United States Savings Bonds pre-empt any inconsistent [state] community property law." *Id.* at 664, 670; see also *City of New York* v. *FCC*, 486 U.S. 57, 64 (1988) ("The statutorily authorized regulations of an agency will pre-empt any state or local law that conflicts with such regulations or frustrates the purposes thereof.").

Here, permitting state governments to seize federal funds equal to the proceeds of matured savings bonds—*i.e.*, to require payments from the United States Treasury to state treasuries—would contravene the federal scheme. Most concretely, it would directly conflict with the federal regulatory requirement that the Department of the Treasury may make payments only to the registered owner of the bond or a party that has obtained title to the bond through a judicial proceeding that comports with due process. That requirement leaves no room for the Department to make payments to parties that are not the lawful owners of the bonds. See *Wos* v.

E.M.A., 133 S. Ct. 1391, 1398 (2013) ("Under the Supremacy Clause, [w]here state and federal law directly conflict, state law must give way.") (alteration in original; internal quotation marks and citation omitted).

But in addition, petitioners' position would undermine the central purpose of the savings-bond program: to raise revenue for the United States Government. Congress and the Department of the Treasury intended that the revenue earned from a savings bond would be available for general expenditures until the bond is redeemed by its registered owner or another party that has obtained title to it as permitted by the Department's regulations. See 31 U.S.C. 3105(a). Petitioners, however, would instead transfer that revenue to state treasuries for the States' own use until redemption. See Pet. App. 9a. There is little doubt, therefore, that petitioners' requested relief—depriving the federal Treasury of billions of dollars—would "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941).

As the court of appeals recognized, petitioners' position would also frustrate the federal scheme in other ways. A critical component of the bargain that a person enters into when he or she purchases a U.S. savings bond is that the bond will be backed by the credit of the United States, not a state government. See Pet. App. 47a. But if a State were permitted to take "custody" of bond proceeds at any point after maturity, the State would effectively become the obligor on the bond, not the United States; the bonds would thus effectively be converted into "Montana Savings Bonds" or "Oklahoma Savings Bonds." Particularly given that Congress has determined that the Department may allow bondholders

to redeem savings bonds at any time after maturity, 31 U.S.C. 3105(b)(2)(A), it would not comport with the objectives of federal law to substitute a state government as the obligor on the bond.

Allowing state governments to take custody of the proceeds of savings bonds would also undermine the streamlined redemption procedure established by federal regulations. Although some state governments might enact similarly streamlined procedures, States might well seek to establish other procedures they deemed appropriate for the collection of the proceeds by bondholders exercising their federal right to redeem the proceeds at any time after maturity.[1] And the federal government itself could be enmeshed in costly litigation to seek indemnification from state governments. See Pet. App. 48a-49a.

Petitioners' principal argument is that Congress has not spoken directly to the disposition of "unclaimed" proceeds of a U.S. savings bond. See Pet. 2, 16, 19; Pet. C.A. Br. 22-41. But as the court of appeals recognized, that argument ignores the fact that the bond proceeds they demand are not "unclaimed" under the federal statutory and regulatory framework. See Pet. App. 49a. Rather, federal law provides that a bondholder may redeem a savings bond at any time after maturity, thus permitting bondholders to delay redemption without fear that the proceeds of their bonds will be paid out to a third party. See 31 C.F.R. 315.35(c), 353.35(b). It is therefore puzzling that petitioners contend that "Congress and Treasury have declined to address" the circumstance "where the registered owner has not come

[1] Such procedures might stand as obstacles to the objectives of the federal scheme and be independently preempted on that basis. See *United States* v. *Locke*, 529 U.S. 89, 109 (2000).

forward to redeem a bond at maturity." Pet. 19. They clearly have, and the federal scheme does not leave room for States to upset the bargain between the United States and the bondholder by enacting laws that declare the proceeds of the bonds to be "unclaimed."[2] See *Arizona* v. *Bowsher*, 935 F.2d 332, 333-334 (D.C. Cir.), cert. denied, 502 U.S. 981 (1991); see also Pet. App. 49a ("[T]he bond proceeds are not 'abandoned' or 'unclaimed' under federal law because the owners of the bonds may redeem them at any time after they mature, and thus Congress has not been silent with respect to the fate of the proceeds of the unclaimed bonds.").

Petitioners also point to other federal statutes that they contend expressly preempt state unclaimed-property laws. See Pet. 17-18. But the principal provision on which they rely, 31 U.S.C. 1322, does not contain an express preemption provision. Rather, as petitioners themselves explain in a footnote, the procedure established by Section 1322, which authorizes the Department to pay claims for specified categories of obligations once the obligees present them, "necessarily displaces the operation of state unclaimed property laws." Pet. 18 n.9. So too here: The federal savings-bond scheme requires the Department to pay registered owners at any time after maturity and expressly forbids the Department from making payments to third parties who have not

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[2] Petitioners rely on a 1989 report issued by the General Accounting Office (GAO Report), see Pet. 18 & n.10, but that report, reprinted in the joint appendix submitted to the court of appeals, explained that the amounts that the United States owes to owners of matured federal savings bonds are not "unclaimed" for purposes of federal law "because these moneys are currently payable to the rightful owners upon presentation of a proper claim and without any time limitation." C.A. App. 163 (GAO Report, at 17).

obtained title through a judicial proceeding. Both statutes preempt state unclaimed-property laws because application of those laws to the funds at issue would be inconsistent with the operation and objectives of the governing federal scheme.[3]

Finally, petitioners suggest that application of their unclaimed-property statutes to the matured savings bonds would advance the objectives of the federal program because States would "make affirmative efforts to notify [bondholders] of forgotten unredeemed bonds, as compared to a federal approach that never notifies them." Pet. 20. That is simply mistaken as a factual matter: As the court of appeals explained, the Treasury has created a website that enables a user to determine if he or she has any outstanding, matured Series E bonds issued after 1974. See Pet. App. 6a-7a & n.6. In any event, given the significant potential for state-by-state variation in redemption procedures and the fact that the credit of the United States is central to the bargain reflected in a savings bond, it is clear that application of state unclaimed-property laws to the proceeds of matured savings bonds would frustrate the program's objectives.

b. Petitioners argue that the preemption holding of the court of appeals conflicts with general principles of preemption set forth in this Court's cases. As they implicitly acknowledge, however, this Court has not addressed whether the application of state unclaimed-property laws are preempted as applied to savings

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[3] Nor do the remaining provisions petitioners cite, drawn from other titles of the United States Code, support the inference that Congress would not have intended ordinary conflict-preemption principles to apply to the savings-bond program. See Pet. 17 (citing provisions of Internal Revenue Code and Bankruptcy Code).

bonds or similar federal obligations. Petitioners' arguments, therefore, reflect only their disagreement with the court of appeals' application of the general preemption doctrine to the novel preemption issue presented here. That sort of asserted disagreement does not warrant review by this Court in the absence of any specific conflict.

Petitioners claim, for example, that the court of appeals did not properly apply a presumption against preemption. Although petitioners assert that the court "paid lip service to the presumption," Pet. 15, the court in fact identified such a presumption as a "guiding principle[]" of its preemption analysis. Pet. App. 44a. It did not dispute, moreover, the States' contention "that their unclaimed property acts come * * * with a patina of ancient history * * * and that there is a presumption against preemption of laws of such origin." *Id.* at 53a (citation and internal quotation marks omitted). The court merely concluded that the presumption petitioners urged was overcome in light of the specific provisions of the federal laws and regulations governing U.S. savings bonds, because the States' requested relief would deprive the United States Treasury of billions of dollars that Congress intended it to hold until the bonds were redeemed; work "a substantial realignment of the obligations that the bonds evidence"; and change "the procedures for redemption that federal laws and regulations have established." *Id.* at 50a. Nothing about that case-specific holding warrants this Court's review.

Likewise, petitioners assert that the court of appeals "did not purport to apply" the "'clear and manifest' purpose" standard this Court has sometimes articulated, but it plainly did. See Pet. App. 44a (explaining that "the historic police powers of the States [are] not to be

superseded by the Federal Act unless that was the *clear and manifest purpose* of Congress") (quoting *Wyeth* v. *Levine*, 555 U.S. 555, 565 (2009)) (emphasis added; brackets in original). It found that standard satisfied because application of state unclaimed-property laws to the proceeds of matured U.S. savings bonds would mean that "federal regulations regarding redemption effectively would be nullified." *Id.* at 47a. Petitioners' objection to that conclusion does not demonstrate that the court of appeals ignored an applicable legal standard.[4]

Petitioners also assert that the court of appeals disregarded this Court's decisions by engaging in a "freewheeling inquiry" and relying on "hypothetical or potential" concerns in conducting its preemption analysis, citing a part of the court's opinion discussing the potentially burdensome redemption procedures that States could impose if petitioners' view were accepted. Pet. 21-23 (internal quotation marks omitted). But the court of appeals was explaining that petitioners' position would enable States to "nullif[y]" the federal redemption scheme for matured bonds by substituting whatever redemption procedures they deemed advisable. See Pet. App. 47a-48a. The court then acknowledged that a State could adopt procedures similar to the federal redemption process but would be under no obligation to do so. See *id.* at 48a. Its further statement that "[w]e simply do not know," *ibid.*, merely reflected the fact that the States' arguments would permit (but not require) them to fundamentally alter the federal redemption process.

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[4] Similarly, the fact that other courts of appeals evaluating different federal statutes have concluded that state laws addressing different subject matters are not preempted does not demonstrate a circuit conflict. See Pet. 21 (citing decisions interpreting federal housing, communications, and environmental laws).

This Court's preemption decisions regularly take account of such potential consequences. See, *e.g.*, *Wos*, 133 S. Ct. at 1398 ("If a State arbitrarily may designate one-third of any recovery as payment for medical expenses, there is no logical reason why it could not designate half, three-quarters, or all of a tort recovery in the same way.").

Finally, petitioners suggest that the court of appeals may have applied field preemption rather than conflict preemption principles and improperly relied on the pervasiveness of the federal scheme to support its preemption analysis. See Pet. 23-24. The cited portions of the opinion, however, merely reflect the court of appeals' determination that the extensive federal rules governing matured savings bonds could not be reconciled with state laws deeming the proceeds of the bonds "unclaimed" or "abandoned" and requiring their appropriation for state treasuries. See Pet. App. 49a-50a. That is classic conflict preemption, and it does not diverge from any of this Court's decisions or the general preemption principles they set forth.

2. The court of appeals also correctly concluded, as an alternative ground for its decision, that application of state unclaimed-property laws to funds in the United States Treasury would contravene the doctrine of intergovernmental immunity. Like the preemption question, that straightforward ruling does not call for further review.

a. As the court of appeals held, the United States has a property interest in the undifferentiated Treasury funds that petitioners seek to seize. See Pet. App. 50a-51a. Under the statute governing U.S. savings bonds, the United States Government may use the funds acquired through the savings-bond program for any lawful

expenditure, and neither the statute nor the Department's regulations restrict the use of those funds after a bond has matured but before it has been redeemed. See 31 U.S.C. 3105(a). The court of appeals thus correctly rejected petitioners' argument that "the United States no longer has a beneficial interest in the undisbursed proceeds from the matured but unredeemed bonds." Pet. App. 50a. That the registered owners of outstanding bonds may seek payment under federal law out of general funds in the United States Treasury does not suggest that before they do so, the United States has no property interest in funds held in the Treasury. See *id.* at 53a. As this Court explained in *Buchanan* v. *Alexander*, 45 U.S. (4 How.) 20 (1846), in holding that creditors could not garnish money held by a federal officer to pay seamen's wages, "[s]o long as money remains in the hands of a disbursing officer, it is as much the money of the United States, as if it had not been drawn from the treasury." *Id.* at 20-21. Thus, even when (unlike here) "the United States sets aside money for the payment of specific debts, it does not thereby lose its property interest in that money." *Bowsher*, 935 F.2d at 334; see also *Department of the Army* v. *Blue Fox, Inc.*, 525 U.S. 255, 264 (1999).

Petitioners' attempt to obtain United States property—monies in the federal Treasury—under their own unclaimed-property statutes unquestionably contravenes the intergovernmental-immunity doctrine. It would "regulate[] the United States directly," *North Dakota* v. *United States*, 495 U.S. 423, 435 (1990) (opinion of Stevens, J.), by compelling it to transfer funds to the States that the United States would otherwise use for its own expenditures. Cf. *id.* at 437 (finding no violation where state law "operate[d] against suppliers, not

the Government"). Petitioners' efforts to obtain the payment of monies out of the Treasury, assertedly pursuant to *state* law but not authorized (and indeed prohibited) by *federal* law, also conflicts with the Appropriations Clause, Art. I, § 9, Cl. 7, which provides that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." As this Court explained in *Office of Personnel Management* v. *Richmond*, 496 U.S. 414 (1990), for "a claim for money from the Federal Treasury, the Clause provides an explicit rule of decision": "Money may be paid out only through an appropriation made by law; in other words, the payment of money from the Treasury must be authorized by a statute." *Id.* at 424.

Likewise, petitioners' requested order for an accounting for billions of dollars in outstanding debt obligations would "impose onerous record-keeping and reporting requirements" on the United States. Pet. App. 54a (internal quotation marks and citation omitted). The General Accounting Office has estimated that the administrative costs alone of identifying and tracking payments to States would amount to millions of dollars. C.A. App. 185.

The court of appeals thus correctly determined, as an alternative ground for its decision, that petitioners' claims are barred by the intergovernmental-immunity doctrine.

b. Petitioners assert two conflicts between the court of appeals' intergovernmental-immunity holding and this Court's precedents. Neither has merit.

First, petitioners rely on this Court's decisions holding that the property interest in a debt belongs to the creditor rather than the debtor. See Pet. 25-27 (citing *Delaware* v. *New York*, 507 U.S. 490, 499 (1993), and

Texas v. *New Jersey*, 379 U.S. 674, 680-682 (1965)). That is true, and the Department agrees that the bondholders, not the federal government, own the matured bonds. But petitioners do not seek to acquire a property interest in the bonds themselves, which would require a judicial proceeding transferring title to them. Rather, they seek custody of *funds* held in the United States Treasury, out of which payments on the bonds would be made if and when they are redeemed by the owner. The decisions that they cite do not support the view that a debtor lacks a property interest in its own funds out of which it may make payments to satisfy a debt obligation if and when the creditor redeems it or otherwise establishes a right of recovery. See, *e.g.*, *Grupo Mexicano de Desarrollo, S.A.* v. *Alliance Bond Fund, Inc.*, 527 U.S. 308, 319-320 (1999).

Petitioners misunderstand this basic distinction in asserting that the Department "effectively has disclaimed that the *funds* are subject to its plenary authority." Pet. 26 (citing Gov't C.A. Br. 17, 29) (emphasis altered). The Department made no such concession; the cited portion of its brief below, addressing petitioners' meritless Tenth Amendment argument, merely explains that the United States has not exercised an escheat power because it has not declared that it would not pay the bonds once they are redeemed. The brief makes clear that the United States has a property interest in its own funds. See Gov't C.A. Br. 18-19, 23.[5]

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[5] Petitioners include a "cf." citation to *United States* v. *Klein*, 303 U.S. 276 (1938). See Pet. 26. As the court of appeals explained, that case is inapposite. See Pet. App. 51a. *Klein* involved funds that a private company owed its bondholders under a judgment entered by a federal district court. See *ibid.* A portion of the funds that went unclaimed were then paid into the registry of the court and later

Second, petitioners argue that the court of appeals' determination that ordering the United States to file reports and records under the unclaimed-property statutes would violate the intergovernmental-immunity doctrine also conflicts with decisions of this Court. See Pet. 27-29. The two decisions of this Court on which petitioners rely, however, do not cast doubt on the proposition that ordering the United States to provide an accounting of billions in outstanding debt obligations to each of the fifty States would "regulate[] the United States directly." *North Dakota*, 495 U.S. at 435 (opinion of Stevens, J.). In *Roth* v. *Delano*, 338 U.S. 226 (1949), and *Anderson National Bank* v. *Luckett*, 321 U.S. 233 (1944), the Court held only that States could order national banks—which are private entities—to make an

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transferred to the United States Treasury, pursuant to a federal statute, subject to being paid out to a person entitled to the money if the court so ordered. See 303 U.S. at 279-280. This Court held that a State could acquire title to such unclaimed funds through valid escheat proceedings, but made clear that the United States did not assert "any right, title, or interest" in the funds. *Id.* at 280. Here, by contrast, the funds sought by petitioners are a portion of the general monies in the Treasury. Petitioners seek such funds in an amount equal to the proceeds of federal savings bonds that were sold to raise federal revenue and that (like all monies in the general Treasury) are being used to pay for the programs and operations of the federal government. Moreover, whereas the State in *Klein* obtained title to the unclaimed funds through escheat and claimed those funds pursuant to federal unclaimed-property statutes that expressly provided for an appropriation of funds for payments to proper claimants, see *ibid.*, petitioners have not obtained title to the bonds at issue here, do not claim any funds pursuant to federal law, and do not point to any federal statute appropriating monies in the Treasury to be paid to them.

accounting.[6] That does not suggest that States could do the same to the United States Government. In any event, this argument, even if colorable, would not support petitioners' core claim for a transfer of billions in funds from the United States Treasury to state treasuries and therefore would not provide a substantial ground for further review.

3. For the reasons explained above, there is no reason for this Court to address either the preemption question or the intergovernmental-immunity question presented by this case. Indeed, certiorari would be warranted only if the Court concluded that *both* issues merited further review, because they were alternative grounds for the decision below. A conclusion that the court of appeals erred on only one of the grounds would require affirmance of the judgment of the court of appeals. In fact, the court of appeals' decision on each issue is correct for the reasons explained above, and neither conflicts with any decision of this Court or another court of appeals.

In addition, this case presents serious threshold barriers to review that would likely prevent the Court from reaching the preemption and intergovernmental-immunity questions that petitioners have raised.

First, the court of appeals did not determine that an independent basis exists for federal subject matter jurisdiction over the state-law claims that petitioners press here. Rather, it held that petitioners' now-

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[6] National banks are not part of the federal government and do not enjoy the privileges and immunities of the United States. See, *e.g.*, *Beneficial Nat'l Bank* v. *Anderson*, 539 U.S. 1, 10 (2003) (removal of suit against national bank was based on federal question jurisdiction (28 U.S.C. 1441), not on the removal statute that applies to suits against federal agencies (28 U.S.C. 1442 (2006 & Supp. V 2011)).

abandoned Tenth Amendment argument was not clearly frivolous and so enabled the district court to exercise supplemental jurisdiction over the state-law claims under 28 U.S.C. 1367. See Pet. App. 40a-41a; see *Decatur Liquors, Inc.* v. *District of Columbia*, 478 F.3d 360, 363 (D.C. Cir. 2007) ("If the federal claims are 'obviously frivolous' or 'so attenuated and unsubstantial as to be absolutely devoid of merit,' * * * a federal court lacks subject-matter jurisdiction over those claims and, consequently, any local law claims.") (quoting *Hagans* v. *Lavine*, 415 U.S. 528, 536-537 (1974)). Before reaching the merits of the questions presented, therefore, this Court would be required to confirm that the exercise of jurisdiction over the state-law claims was proper, either by evaluating the merits of petitioners' Tenth Amendment argument or by identifying an independent ground for subject matter jurisdiction over the claims.

Second, although the court of appeals rejected the government's assertion of sovereign immunity, that conclusion was erroneous. It rested on the mistaken view that Section 702 of the APA, 5 U.S.C. 702, waives immunity for *state-law* claims against the federal government—a view that ignores the principle that waivers of sovereign immunity must be construed narrowly. See *Lane* v. *Pena*, 518 U.S. 187, 195 (1996). Congress placed the waiver of immunity into the APA to ensure that it would be confined to the causes of action that Section 702 itself recognizes and codifies—*i.e.*, suits through which a "person suffering legal wrong" or "adversely affected or aggrieved" because of "agency action" has traditionally obtained "judicial review thereof." 5 U.S.C. 702. As then-Assistant Attorney General Scalia explained on behalf of the Department of Justice in expressing support for the 1976 amendment adding the

waiver, "the waiver of immunity, since it is made via section 702, will only apply to claims relating to improper official action; and will be subject to the other limitations of the Administrative Procedure Act." *Administrative Procedure Act Amendments of 1976: Hearings Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 94th Cong., 2d Sess. 105 (1976); see also *Sovereign Immunity: Hearing Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 91st Cong., 2d Sess. 59 (1970) (statement of Chairman of ABA's Administrative Law Section) ("Because the amendment is to be added to 5 U.S.C. § 702 (a provision of the Administrative Procedure Act entitled right of review) it will be applicable only when that provision is applicable."); *id.* at 222 (statement of Prof. Kenneth Culp Davis) (similar).

Petitioners' claim under their own unclaimed-property laws of entitlement to United States Treasury funds equal to the proceeds of matured bonds is not an action for "judicial review" of "agency action." But even if Section 702 is understood to waive the United States' sovereign immunity from non-APA suits under federal law, there is no reason to believe that Congress intended to allow a suit such as this seeking money from the United States Treasury under state law.[7] Moreover, if the actual owners of the bonds sought to redeem the bonds but were denied payment, their remedy would be through an action for money damages under the Tucker Act based on the contract represented by the bond. A suit to recover on the bonds would not be permitted by 5

[7] As the court of appeals observed, other circuits have agreed that Section 702's waiver applies to non-APA claims. See Pet. App. 25a-29a.

U.S.C. 702, because it would be one for "money damages." See *Blue Fox*, 525 U.S. at 261-264. Petitioners cannot avoid that bar in Section 702 by claiming an "escheat" under state law of the money in the Treasury that would be used to pay on the bonds if they were redeemed by the owners.

Thus, even assuming that petitioners' suit is not squarely preempted and barred by intergovernmental immunity, there has been no applicable waiver of the United States' sovereign immunity.

4. There is no basis for petitioners' suggestion that other circuits will not have an opportunity to rule on the questions presented because petitioners "have chosen to consolidate their claims (which could have been brought in multiple circuits) in one lawsuit." Pet. 31. The plaintiffs below comprised only seven States. If any one of the other forty-two States outside of the Third Circuit determines that petitioners' arguments have any merit, that State would have the option of bringing suit in another circuit.

Petitioners argue that the court of appeals' decision has "fundamental importance" because of the large amount of money they seek and the fact that the dispute arises between different sovereigns. See Pet. 29-32. But the mere fact that petitioners have asserted meritless claims for billions of dollars in federal funds does not call for review by this Court in the absence of any circuit conflict or any other indication that the court of appeals departed substantially from governing legal principles. In fact, a number of governing legal principles compelled the rejection of petitioners' claims.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
STUART F. DELERY
Principal Deputy Assistant Attorney General
MARK B. STERN
ALISA B. KLEIN
Attorneys

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