No. _____

IN THE

Supreme Court of the United States

HSBC HOLDINGS PLC, CITIGROUP GLOBAL MARKETS LIMITED, TENSYR LIMITED, AND BA WORLDWIDE FUND MANAGEMENT LIMITED, ET AL.,
Petitioners,

v.

IRVING H. PICARD,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

11 U. S. C. § 550(a) authorizes a bankruptcy trustee to recover the proceeds of voided prepetition debtor transactions from two distinct classes of transferees. First, the trustee may recover from "initial transferees"—*i.e.*, those who received assets directly from the debtor. Second, the trustee may recover from "subsequent transferees"—*i.e.*, those who received a transfer of assets from an initial or subsequent transferee—but only if the trustee overcomes certain defenses specific to subsequent transferees. The Trustee overseeing the liquidation of Bernard L. Madoff Investment Securities LLC sought to recover from subsequent transferees who received transfers from foreign initial or subsequent transferees in foreign transactions governed by foreign laws. The questions presented are:

1. Whether applying Bankruptcy Code Section 550(a)(2) to permit recovery of the proceeds of a foreign transaction that occurred abroad between two foreign parties governed by foreign law constitutes a "domestic" application of Section 550(a)(2) for the purpose of an extraterritoriality analysis.

2. Whether a bankruptcy court's and district court's abstentions from applying U. S. law on grounds of international comity should be reviewed for abuse of discretion, as all seven other circuits that reached the issue have held, or *de novo*, as the court below held.

PARTIES TO THE PROCEEDINGS

The Petitioners in this case are alleged recipients of overseas transfers from foreign investment funds that in turn did business with Bernard L. Madoff Investment Securities LLC, the U. S. debtor. They are set forth in the appendix. App. 185a.

The Respondent is Irving H. Picard, the Trustee for the liquidation of Bernard L. Madoff Investment Securities LLC, who was plaintiff and appellant below.

The Securities Investor Protection Corporation is a party in interest in all liquidation proceedings commenced under the Securities Investor Protection Act. 15 U. S. C. § 78eee(d).

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of the Supreme Court, the undersigned counsel for Petitioners certify the corporate disclosure statements set forth in the appendix. App. 268a.

LIST OF PROCEEDINGS

Pursuant to Rule 14.1 of the Rules of the Supreme Court, a list of directly related proceedings is set forth in the appendix. App. 308a.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is available at 917 F. 3d 85 and is reproduced at App. 1a. The opinion of the United States Bankruptcy Court for the Southern District of New York dismissing certain of Respondent's claims is unreported but available at 2016 WL 6900689 and is reproduced at App. 40a. The opinion of the United States District Court for the Southern District of New York is reported at 513 B. R. 222 and is reproduced at App. 161a.

JURISDICTION

The Second Circuit entered its judgment on February 25, 2019. App. 1a. It denied a timely petition for rehearing *en banc* on April 3, 2019. App. 181a. The mandate of the court of appeals has not been issued, pending the disposition of this Petition. App. 183a. On May 30, 2019, Justice Ginsburg granted an extension of time to file a petition for a writ of certiorari to August 30, 2019. Application No. 18A1241. This Court has jurisdiction under 28 U. S. C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

11 U. S. C. § 548. Fraudulent transfers and obligations

(a)(1) The trustee may avoid any transfer (including any transfer to or for the benefit of an insider under an employment contract) of an interest of the debtor in property, or any obligation (including any obligation to or for the benefit of an insider under an employment contract) incurred by the debtor, that was made or incurred on or within 2 years before the date of the filing of the petition, if the debtor voluntarily or involuntarily—

> (A) made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted[.]

11 U. S. C. § 550. Liability of transferee of avoided transfer

(a) Except as otherwise provided in this section, to the extent that a transfer is avoided under section 544, 545, 547, 548, 549, 553(b), or 724(a) of this title, the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, from—

> (1) the initial transferee of such transfer or the entity for whose benefit such transfer was made; or
>
> (2) any immediate or mediate transferee of such initial transferee.

(b) The trustee may not recover under section (a)(2) of this section from—

(1) a transferee that takes for value, including satisfaction or securing of a present or antecedent debt, in good faith, and without knowledge of the voidability of the transfer avoided; or

(2) any immediate or mediate good faith transferee of such transferee.

INTRODUCTION

This case arises out of the Bernard L. Madoff Investment Securities LLC ("Madoff Securities") Trustee's attempt to obtain more than $4 billion by unwinding foreign transfers from foreign funds governed by foreign laws to predominantly foreign parties, none of which invested directly with Madoff Securities. In the decision below, the Second Circuit wrongly: (1) ruled that it is a "domestic" application of U. S. law, and the presumption against extraterritoriality is not implicated, when the Trustee seeks recovery of transfers from one foreign entity to another that took place on foreign soil, even when such recovery conflicts with foreign law; and (2) adopted a *de novo* standard to review the question of abstention on international comity grounds, rather than the abuse of discretion standard applied by all seven other circuits to address the issue, substituting its own judgment for that of the bankruptcy and district courts that were more intimately familiar with the complex factual record critical to the comity analysis. The Second Circuit fundamentally changed the territorial scope of the U. S. Bankruptcy Code, con-

travening this Court's precedents, those of other circuits, and applicable foreign law—thereby creating the international discord the presumption against extraterritoriality seeks to avoid.

This case is exceptionally important not only to the hundreds of defendants around the world who have billions of dollars at stake in litigation arising from the Madoff Securities Ponzi scheme. It is also exceptionally important to future foreign investors that have indirect connections to U. S. debtors and to foreign countries that have a sovereign interest in administering their own insolvency laws.

* * *

Respondent Irving Picard, the Trustee for the liquidation of Madoff Securities, sued Petitioners under the U. S. Bankruptcy Code to recover billions of dollars in proceeds from foreign transactions. Petitioners responded that the recovery the Trustee sought would constitute an impermissible extraterritorial application of U. S. law. The district and bankruptcy courts agreed, but the Second Circuit reversed. According to the Second Circuit, because the *initial* transfers by Madoff Securities originated from the United States, even the Trustee's attempt to recover *subsequent* transfers between foreign persons that occurred on foreign soil and were governed by foreign law constituted a "domestic" application of the U. S. Bankruptcy Code that did not implicate the presumption against extraterritoriality. The Second Circuit's decision directly conflicts with this Court's precedent and threatens to undermine the presumption against extraterritoriality and open

U. S. courts to an influx of bankruptcy actions that override foreign law, foreign judicial decisions, and foreign local property interests.

Starting with *Morrison* v. *National Australia Bank Ltd.*, 561 U. S. 247 (2010), this Court has repeatedly addressed and corrected Second Circuit rulings that failed to give appropriate scope to the critical presumption that federal statutes do not apply extraterritorially. See also *RJR Nabisco, Inc.* v. *European Community*, 136 S. Ct. 2090, 2106 (2016) (rejecting the Second Circuit's interpretation of the presumption against extraterritoriality). Now, the Second Circuit has decided—in direct conflict with this Court's decision in *WesternGeco* v. *ION Geophysical Corp.,* 138 S. Ct. 2129 (2018)—that a court determining whether an application of a statute is, in fact, extraterritorial need not analyze the "conduct *in [that] case* that is relevant to" the statute's focus. *Id.*, at 2138 (emphasis added). The Second Circuit also disregarded this Court's admonition in *RJR Nabisco* that courts must carefully analyze rights of action to ensure that they do not interfere with foreign law. 136 S. Ct., at 2106. The decision below authorizes courts to disrespect the sovereignty of other nations by applying U. S. law to parties, property, and transactions wholly located abroad. These conflicts with this Court's precedent are untenable and demand review, especially given the Second Circuit's central role in resolving cross-border and multi-jurisdictional disputes that implicate international commerce and foreign law. Correcting that decision is a matter of exceptional importance.

In addition to creating conflicts with this Court's precedent enforcing the presumption against extraterritoriality, the Second Circuit created a circuit split by holding that *de novo* review applies to the decisions of district and bankruptcy courts to abstain from applying Section 550(a)(2) as a matter of international comity. Each of the other seven circuits to consider the issue concluded that whether comity warrants abstention depends on fact-intensive considerations that justify a deferential "abuse of discretion" standard of review.

This Court should grant the writ both to reaffirm the presumption against extraterritoriality and to resolve the circuit conflict over comity-based abstention that the decision below has created.

STATEMENT OF THE CASE

Statutory Framework:

The Securities Investor Protection Act ("SIPA"), 15 U. S. C. §§ 78fff(b), 78fff-1(a), provides for a trustee to administer a bankrupt securities dealer's estate under SIPA and, to the extent not inconsistent with SIPA, the Bankruptcy Code. Absent an express grant of authority in SIPA, a SIPA trustee's rights and powers are limited to those available to an ordinary bankruptcy trustee. *Ibid.*

Accordingly, a SIPA trustee's authority to assert claims to augment the estate is limited to pursuing claims to void prepetition transactions and to whatever other rights would be available to an ordinary bankruptcy trustee. 15 U. S. C. § 78fff-2(c)(3). A bankruptcy trustee has authority to "avoid" certain

prepetition transfers made by a debtor under Bankruptcy Code Sections 544, 547, and 548. Once a transfer is avoided, Section 550 creates two causes of action for the trustee to "recover" proceeds. The trustee can seek recovery from the "initial transferee of such transfer," 11 U. S. C. § 550(a)(1), or from "any immediate or mediate transferee of such initial transferee," 11 U. S. C. § 550(a)(2). Actions against subsequent transferees under Section 550(a)(2) are subject to the Section 550(b) "good faith" defense, as well as the limitations period under Section 550(f), which allows a trustee to bring claims against subsequent transferees within one year of avoidance—regardless of when avoidance occurs. As this case illustrates, this allows a timely secondary recovery action to be brought more than a decade after a debtor's initial transfer.

Neither SIPA nor the Bankruptcy Code includes any express statement about the territorial reach of the power to recover from subsequent transferees.

Factual Background:

Madoff Securities was a Ponzi scheme that fooled thousands of investors into believing it was a successful brokerage firm. App. 7a. In December 2008, it collapsed. App. 7a. Seeking to augment the Madoff Securities estate, the Trustee sought to avoid transfers to three of the largest funds, among others, that invested directly with Madoff Securities. Then, based on those actions, the Trustee brought hundreds of actions against subsequent transferees, including the scores of actions at issue here. App. 5a–6a.

Petitioners are not alleged to have invested with or been customers of Madoff Securities. App. 11a, 81a. Instead, most are foreign persons and entities alleged to have invested in, and redeemed investments from, foreign investment funds (the "Feeder Funds")—organized under the laws of the British Virgin Islands ("BVI"), the Cayman Islands, Bermuda, Luxembourg, and other countries. Those Feeder Funds in turn invested in Madoff Securities. App. 9a–11a, 147a. Other Petitioners allegedly provided services to the Feeder Funds and received payment for those services. See, *e.g.*, Amended Complaint in *Picard* v. *HSBC Bank plc, et al.*, No. 09-01364-BRL (Bkrtcy. Ct. SDNY Dec. 5, 2010), Dkt. No. 170 ¶ 539 (alleging certain defendants received fees for services rendered). Still others allegedly received transfers not from Madoff Securities or an initial transferee, but from entities several transfers removed from Madoff Securities. See, *e.g.*, Complaint in *Picard* v. *ABN Amro Fund Services (Isle of Man) Nominees Ltd., et al.*, No. 12-01697-SMB (Bkrtcy. Ct. SDNY June 6, 2012), Dkt. No. 1 ¶ 44 (alleging funds were further subsequently transferred after receipt from the initial transferee).

The Feeder Funds share certain characteristics:

1. They were foreign legal entities created as investment vehicles under the laws of the BVI, Cayman Islands, Bermuda, and Luxembourg, among others, App. 9a–10a, 147a;

2. They obtained money for investment by selling (directly or indirectly) ownership interests

in themselves to their investors, App. 10a–11a; and

3. Investors in Feeder Funds are not alleged to have held any account with Madoff Securities and are not eligible to share in any distributions from the Madoff Securities liquidation. App. 81a (citing *Kruse* v. *Securities Investor Protection Corp. (In re Bernard L. Madoff Investment Securities LLC)*, 708 F. 3d 422, 426–28 (CA2 2013)).

When Madoff Securities collapsed, many of the Feeder Funds also failed and commenced their own liquidation proceedings in their home jurisdictions outside of the United States. App. 162a. Among those funds were three of the largest groups of Feeder Funds implicated in this case, which account for about $4 billion of the transfers sought by the Trustee here: (i) Harley International (Cayman) Limited ("Harley"), a Cayman Islands company that entered into liquidation in the Cayman Islands; (ii) Fairfield Sentry Limited, Fairfield Sigma, and Fairfield Lambda (the "Fairfield Funds"), BVI companies that entered into liquidation in the BVI; and (iii) Kingate Global Fund, Ltd. and Kingate Euro Fund, Ltd. (the "Kingate Funds"),[1] which entered

[1] On July 17, 2019, the Trustee moved for approval of a settlement agreement he entered into with the Kingate Funds and certain of its principals and service providers that are Petitioners here. The bankruptcy court approved the settlement on August 6, 2019. Order Approving Settlement Agreement in *Picard* v. *Ceretti*, No. 09-01161-SMB (Bkrtcy. Ct. SDNY Aug. 6, 2019), Dkt. No. 417. The settlement agreement will not become effective until the Bermuda court approves its terms.

into liquidation in both Bermuda and the BVI. App. 9a–10a.

The Fairfield Funds' and Kingate Funds' foreign liquidators asserted their own claims under foreign law against the funds' investors and/or service providers (including numerous Petitioners here), seeking to claw back under foreign law the same transfers the Trustee seeks to claw back under the Bankruptcy Code. App. 78a. The dual actions brought by the Trustee and the foreign liquidators thus expose many Petitioners to a risk of double liability—a risk that the Trustee does not dispute. See Reply Brief for Appellant in No. 17-2992 (CA2 May 9, 2018), Dkt. No. 1091, pp. 34–35 (acknowledging risk of double liability). The Trustee also does not dispute that Petitioners include net losers that invested more with the Feeder Funds than they redeemed and thus have already been robbed by Madoff Securities, sometimes for hundreds of millions of dollars. See Petition for Panel Rehearing and Rehearing En Banc of Defendants-Appellees in No. 17-2992 (CA2 Mar. 11, 2018), Dkt. No. 1320, pp. 15–16 (citing oral argument to show Trustee sought to recover from "net losers"). Thus, the Trustee seeks to have these indirect foreign transferees subsidize, to the tune of billions of dollars, the recovery of those who invested directly with Madoff Securities.

Procedural Background:

In 2014, the district court (Rakoff, J.) held that the Trustee could not recover from certain Petitioners because Section 550(a)(2) of the Bankruptcy Code does not apply extraterritorially to subsequent

transfers "received abroad by a foreign transferee from a foreign transferor." App. 179a. The court explained that the "focus" of congressional concern with respect to Section 550(a)(2) is the "transactions that the statute[] seeks to regulate"—that is, the "transfer of property [from an initial transferee] to a subsequent transferee, not the relationship of that property to a perhaps-distant debtor." App. 166a–167a (internal quotation marks omitted). The court then held that because Section 550 of the Bankruptcy Code contains no indication that Congress intended it to apply extraterritorially, to the extent the Trustee's claim sought recovery of transfers made from foreign transferors to foreign transferees, the Trustee's Section 550(a)(2) claims were impermissibly extraterritorial. App. 170a, 177a.

The district court held that international comity also precluded recovery under Section 550(a)(2) because (1) the Trustee was attempting to "reach around" foreign liquidation proceedings by seeking recovery from the foreign subsequent transferees rather than standing in line with every other creditor in the foreign liquidation proceedings, (2) investors of foreign Feeder Funds had no expectation that U. S. law would apply to their investments, (3) foreign jurisdictions have a greater interest in applying their own insolvency laws to the challenged foreign transfers than the United States, and (4) the interests of the affected forums and the "mutual interest of all nations in smoothly functioning international law" counsel against the application of U. S. law. App. 178a–179a. The district court then remanded

to the bankruptcy court for further proceedings consistent with its opinion. App. 180a.

On remand, the bankruptcy court dismissed, on comity grounds, the claims arising from transfers made by the Feeder Funds, which were themselves debtors in foreign liquidation proceedings. App. 80a–89a. The bankruptcy court carefully weighed the interests of the United States in the Madoff Securities proceedings against those of the foreign sovereigns in the foreign liquidations with respect to the transfers between the foreign Feeder Funds and their investors and/or service providers. App. 81a, 88a–89a. The court noted that the Trustee sought to recover "substantially the same transfers" from "substantially the same group of defendants" that had already been sought by the Kingate Funds' or Fairfield Funds' liquidators, App. 80a–81a, and with respect to Harley, that its liquidators made an affirmative decision not to challenge the same transfers under the laws governing Harley's liquidation. App. 87a.

The bankruptcy court echoed the district court's concern that the Trustee sought to "reach around" the foreign liquidations for recovery, noting as well that the Trustee was a creditor in certain foreign liquidation proceedings. App. 80a–81a; see also Exhibit A, Motion to Approve Settlement in *Irving H. Picard* v. *Fairfield Sentry Limited, et al.*, No. 09-1239-BRL (Bkrtcy. Ct. SDNY May 9, 2011), Dkt. No. 69 (noting the Trustee asserted claims against the Fairfield Funds). Ultimately, the bankruptcy court concluded that the foreign countries had a greater

interest in the application of their own laws to the transfers between the funds and their investors than did the United States. App. 81a, 88a.

In discussing extraterritoriality, the bankruptcy court analyzed where the transfers occurred. App. 95a. Where transfers were made between two foreign entities, the court held that application of Section 550(a)(2) was improper and dismissed those claims. App. 44a, 58a.

The Second Circuit, in reversing the lower courts, held that neither the presumption against extraterritoriality nor international comity bars recovery in these actions. App. 2a–3a. According to the Second Circuit, the focus of Section 550 for extraterritoriality purposes is found in Section 548, even though Section 550 establishes its own separate causes of action. App. 19a. The court further held that, whenever the initial transfer is voidable under Section 548(a)(1) and allegedly originates from the United States (in this case, from Madoff Securities), the Trustee may recover subsequent transfers using Section 550(a)(2) regardless of where in the world those subsequent transfers occur. App. 21a–23a.

The Second Circuit next reviewed *de novo* the bankruptcy court's complex, fact-based decision to abstain on international comity grounds. App. 28a–30a. Although the Trustee did not challenge the bankruptcy court's factual findings, Brief for Appellant in No. 17-2992 (CA2 Jan. 10, 2018), Dkt. No. 497, the court conducted its own fact-finding and balancing of the interests of the United States and those of the foreign jurisdictions without addressing

the conflict created between domestic and foreign law. App. 32a, 33a–37a. Applying non-deferential review, the court rejected abstention based on international comity because Section 550(a)(2) "allow[s] trustees to recover property from even remote subsequent transferees," which the court found suggests that Congress wanted the United States to be the forum for such claims, even when they conflict with legitimate foreign interests. App. 37a.

REASONS FOR GRANTING THE WRIT

I. The decision below conflicts with this Court's post-*Morrison* precedent regarding the presumption against extraterritoriality

A. The Second Circuit's decision that it is a "domestic" application of U. S. law to recover the proceeds of a foreign transaction between two foreign entities directly conflicts with this Court's decision in *WesternGeco*

"It is a basic premise of our legal system that, in general, 'United States law governs domestically but does not rule the world.'" *RJR Nabisco*, 136 S. Ct., at 2100 (quoting *Microsoft Corp.* v. *AT&T Corp.*, 550 U. S. 437, 454 (2007)). The presumption against extraterritoriality "rests on the perception that Congress ordinarily legislates with respect to domestic, not foreign, matters." *Morrison*, 561 U. S., at 255. "Absent clearly expressed congressional intent to the contrary, federal laws will be construed to have only domestic application." *RJR Nabisco*, *supra*, at 2100. This presumption "prevents 'unintended

clashes between our laws and those of other nations which could result in international discord.'" *WesternGeco*, 138 S. Ct., at 2136 (quoting *EEOC* v. *Arabian Am. Oil Co.*, 499 U. S. 244, 248 (1991)).

Courts apply a two-step test to determine whether the presumption is rebutted and, if not, whether applying the statute in the case is domestic or extraterritorial. 138 S. Ct., at 2136. First, they examine the statute to decide whether Congress has clearly indicated extraterritorial application, and second, they decide "whether *the case* involves a domestic application of the statute." *RJR Nabisco*, *supra*, at 2101 (emphasis added). Courts need not resolve the issues in order, and if a court determines that application of the relevant provision of the statute in a case is domestic, that ends the analysis. *WesternGeco*, *supra*, at 2136. Because the Second Circuit did not address the first step, only the second step is relevant here.

To decide whether a case involves a domestic application of the relevant statute, courts must look to the statute's "focus" and ask "whether the conduct relevant to that focus occurred in United States territory." 138 S. Ct., at 2136. Thus, "determining how the statute has actually been applied is the whole point of the focus test." *Id.*, at 2137. In *WesternGeco*, the plaintiff-patent owner sued the defendant-infringer under 35 U. S. C. § 271(f), claiming entitlement to damages under 35 U. S. C. § 284. *Id.*, at 2135. The question before the Court was whether the patent owner could recover damages incurred

abroad from a domestic defendant who infringed domestically. *Ibid.* The Court answered that the patent owner could recover foreign damages under Section 284 because *the defendant's conduct* that underlay the plaintiff's claim under Section 271(f) of the Patent Act *occurred in the United States*. *Id.*, at 2138.

The Trustee asserts that because Madoff Securities transferred funds to the Feeder Funds, the Trustee can "avoid" those initial transfers under Bankruptcy Code Section 548. But *none* of the Petitioners participated in those transactions. Rather, the Trustee here seeks to recover under Bankruptcy Code Section 550(a)(2) from Petitioners based on subsequent foreign transactions between foreign entities located abroad using foreign bank accounts. Under *WesternGeco*, the "focus" of Section 550(a)(2), and the "*conduct in this case* that is relevant to that focus," is these foreign subsequent transfers. 138 S. Ct., at 2138 (emphasis added). Thus, here, under a straightforward application of *WesternGeco*, which requires a court to look at the conduct giving rise to the claim in the case at hand, recovery under Section 550(a)(2) is extraterritorial.

The Second Circuit nevertheless determined that recovering under Section 550(a)(2) against foreign subsequent transferees here would be a "domestic" application of the law because of the "domestic debtor's allegedly fraudulent, hindersome, or delay-causing transfer of property from the United States." App. 25a. Its analysis directly conflicted with *WesternGeco* by failing to concentrate on the "conduct in

this case." 138 S. Ct., at 2138. It did not address who is suing whom and for what—the whole reason for the "focus" test. *Id.*, at 2137.

The Second Circuit attempted to justify its decision by improperly analogizing the statutory analysis in *WesternGeco* to Sections 548 and 550 of the Bankruptcy Code. It noted that, in *WesternGeco*, the object of Patent Act Section 284's "solicitude" was providing damages under Section 271(f)(2) of the Patent Act. App. 17a–18a. Since the infringement was domestic, application of Section 284 was domestic. App. 18a. The Second Circuit then treated Bankruptcy Code Section 550(a)(2) as if it were the damages provision for Section 548. App. 19a–20a. It is not—Section 550(a)(2) is its own separate cause of action with its own defenses and statute of limitations, see § I. B., *infra*, demonstrated by the Trustee's separate actions to avoid and recover the initial transfers against the initial transferee Feeder Funds.

The Second Circuit re-engineered *WesternGeco*'s "focus" analysis into a rule that a statutory reference to another part of the Code gives courts license to engage in a deductive hunt for a domestic policy goal (which exists in any statutory scheme) within the chain of statutory authorizations. Here, the Second Circuit relied on Section 548, which in this case was triggered by a domestic transfer. However, Section 548 by itself created no rights whatsoever against the Petitioners. The Second Circuit could have just as easily relied on the Madoff Securities initial bank-

ruptcy filing in the United States for its domestic focus conclusion. Under this approach, the "focus" test has lost its tether to either the plaintiff's asserted claim or the defendant's alleged conduct, contrary to *WesternGeco*'s mandate. This case vividly illustrates the problem: The Second Circuit could achieve its result only by developing a legal fiction that "recovering" the proceeds of a *foreign* transaction between *foreign* parties is a "domestic application" of the Bankruptcy Code.

Indeed, the Second Circuit's analogy directly contravenes this Court's prior ruling in *Microsoft Corp.* v. *AT&T Corp.*, relied upon in *WesternGeco*, that using Section 271(f) against a *foreign* defendant for *foreign* conduct would be an impermissible *foreign* application of U. S. law. *Microsoft Corp.*, 550 U. S., at 456. This Court in *Microsoft* previously rejected an argument similar to the "solicitude for a domestic interest" rule endorsed by the Second Circuit, explaining that it would "convert[] a single act of supply from the United States into a springboard for liability each time a copy of the software is subsequently made abroad and combined with computer hardware abroad for sale abroad." *Ibid.* (internal quotation marks omitted). The same is true here: The Second Circuit would convert a single domestic transfer from a U. S. debtor into a springboard for liability for every subsequent transfer, even between foreign parties with no connection to Madoff Securities, and even for transactions that were lawful where they occurred. *WesternGeco* prohibits that approach.

B. The Second Circuit's decision also conflicts with this Court's decision in *RJR Nabisco* by failing to evaluate independently the extraterritorial application of Section 550, which creates its own cause of action

The Second Circuit's decision also conflicts with this Court's determination in *RJR Nabisco* that the presumption against extraterritoriality must be applied independently to any statutory provision that creates a cause of action, irrespective of whether it is created to enforce a nearby statutory provision that could apply overseas. 136 S. Ct., at 2106. In *RJR Nabisco*, the Court conducted a separate extraterritoriality analysis of RICO Section 1964(c), which provides a private right of action for RICO, even though the Court had already analyzed the extent to which RICO Section 1962—the substantive provision proscribing the pattern of racketeering—reaches conduct occurring abroad. *Ibid.* The Court noted that "[t]he creation of a private right of action raises issues beyond the mere consideration whether underlying primary conduct should be allowed or not" and stated that "providing a private civil remedy for foreign conduct creates a potential for international friction beyond that presented by merely applying U. S. substantive law to that foreign conduct." *Ibid.* The Court concluded that "[i]rrespective of any extraterritorial application of § 1962 . . . § 1964(c) does not overcome the presumption against extraterritoriality" and a "private RICO plaintiff therefore must allege and prove a *domestic* injury to

its business or property." *Ibid.* The focus of Section 1964(c), as applied, was on foreign conduct.

Similarly, Section 550(a)(2) of the Bankruptcy Code creates liability for specific, enumerated conduct—a transfer of certain property between two subsequent transferees. Section 550(a)(2) is thus a separate cause of action against a different party than that provided by Section 548. See 5 Collier on Bankruptcy ¶ 550.01 (16th ed. rev. 2019) (noting Section 550 "enunciates the separation between the concepts of avoiding a transfer and recovering from the transferee"). Section 550(a)(2) also contains its own defenses, including a defense for bona fide purchasers for value in Section 550(b), and its own statute of limitations in Section 550(f), allowing a trustee to recover from subsequent transferees the "property transferred, or . . . the value of such property." See *In re Burns*, 322 F. 3d 421, 427 (CA6 2003) (recognizing that the statute and legislative history support that "avoidance and recovery are distinct concepts"). Confirming the distinction between Section 548 and Section 550, the Trustee here is not suing Petitioners under Section 548 to avoid any initial transfers from Madoff Securities, as the Trustee has done elsewhere. Nor could he: Petitioners did not engage in any transactions with Madoff Securities—the only conduct regulated by Section 548. Moreover, in this case, none of the foreign transfers caused a domestic injury—any injury had already occurred upon the initial transfers from Madoff Securities, transfers to which no Petitioner was a party.

C. Pretending clearly foreign transactions are "domestic" frustrates the principles underlying the presumption against the extraterritorial application of U. S. law

The "focus" test is a straightforward test about the basis for action under the statute and, properly applied to Section 550(a)(2), would point to the specific conduct regulated by that statute—the subsequent transfer. Any congressional policy goals are resolved by the first prong of the extraterritoriality analysis—whether there is a clear indication the statute applies extraterritorially. Yet, the Second Circuit engaged in its own policy analysis, thereby vitiating the focus test altogether.

The Second Circuit's public policy analysis failed to address the conflicts its decision creates with other countries' laws. This Court recognized in *RJR Nabisco* that "although a risk of conflict between the American statute and a foreign law is not a prerequisite for applying the presumption against extraterritoriality, where such a risk is evident, the need to enforce the presumption is at its apex." 136 S. Ct., at 2107 (internal quotation marks and citations omitted). Here, the Second Circuit's decision makes actual conflicts inevitable, since the liquidators of the Feeder Funds seek recovery for the exact same foreign transfers under different foreign laws. *Fairfield Sentry Ltd.* v. *Migani*, [2014] UKPC 9 (appeal taken from the BVI). The existence of these actual conflicts further proves that the Trustee's attempts to use Section 550(a)(2) to recover these transfers is

an extraterritorial application of the statute. *RJR Nabisco*, 136 S. Ct., at 2107.

Moreover, the Second Circuit stated—incorrectly and without support—that recognizing the extraterritorial nature of the transfers at issue here would allow a fraudster-debtor to transfer property among foreign entities and "make the property recovery-proof, even if the subsequent foreign transferee then sent the property to someone located in the United States." App. 26a–27a. Even assuming that a true creditor (rather than a shell of the debtor) transferred assets overseas to circumvent U. S. law (none of which is alleged here), this contention ignores that the Trustee could seek recovery under foreign law in foreign courts, as the Securities Investor Protection Corporation ("SIPC") acknowledged below. Reply Brief of Statutory Intervenor in No. 17-2992 (CA2 May 8, 2018), Dkt. No. 1090-1, p. 4 (Intervenor Br.) (arguing "appellees would have the Trustee stand in line in foreign proceedings"). There has never been any suggestion that relevant foreign forums would provide an inadequate mechanism to pursue recovery.

The Second Circuit's choice to imbue Section 550 with Section 548's focus, when no Petitioner here was sued under Section 548, rings of the "judicial-speculation-made-law" this Court rejected in *Morrison*, 561 U. S., at 261. Now, courts in the Second Circuit are free to take the broadest view possible of a statute and apply it to foreign conduct so long as somewhere in the larger statutory scheme, there is

a domestic policy goal to be achieved—as there always will be. The Second Circuit's erroneous decision threatens to undermine the Court's extensive extraterritoriality jurisprudence, and thus certiorari should be granted.

II. The Second Circuit's adoption of a *de novo* standard of review for abstentions based on international comity conflicts with the standard applied by all other appellate courts to address the issue

A. Other circuits recognize that deferential abuse of discretion review is necessary for fact-intensive proceedings involving principles of comity

Until this case, every court of appeals to address abstention decisions based on comity reviewed those decisions for abuse of discretion. The Second Circuit's decision to adopt *de novo* review conflicts with those decisions and with this Court's cardinal principles about when abuse of discretion review governs.

Properly following this Court's precedent, the Third, Fifth, Sixth, Seventh, Ninth, Eleventh, and D. C. Circuits all review decisions regarding whether to dismiss on international comity grounds for abuse of discretion regardless of whether the abstention decision is based on "prescriptive" comity (or "comity of nations") or "adjudicative" comity (or "comity of courts"). Those courts have emphasized the deferential nature of review, noting that district

courts have "considerable discretion in balancing the comity factors." *In re Sealed Case*, No. 19-5068, 2019 WL 3558735, at *13, *17 (CADC Aug. 6, 2019) (reviewing international prescriptive comity decision for abuse of discretion); accord *Mujica* v. *AirScan Inc.*, 771 F. 3d 580, 589, 598 (CA9 2014) (reviewing international adjudicative comity dismissal for abuse of discretion as "a doctrine of prudential abstention"); *Perforaciones Exploración Y Producción* v. *Marítimas Mexicanas, S. A. de C. V.*, 356 Fed. Appx. 675, 680–81 (CA5 2009) (reviewing prescriptive comity decision for abuse of discretion); *AAR Intern., Inc.* v. *Nimelias Enters. S. A.*, 250 F. 3d 510, 518 (CA7 2001) (same for adjudicative comity); *In re Rimsat, Ltd.*, 98 F. 3d 956, 963 (CA7 1996) (same for adjudicative comity); *Remington Rand Corp. Del.* v. *Bus. Sys., Inc.*, 830 F. 2d 1260, 1266 (CA3 1987) (same for adjudicative comity).

The Eleventh Circuit, for example, reviews lower court decisions granting or denying dismissal based on international comity for abuse of discretion in circumstances where a prescriptive comity analysis was applied. *Daewoo Motor Am., Inc.* v. *General Motors Corp.*, 459 F. 3d 1249, 1256 (CA11 2006); *GDG Acquisitions, LLC* v. *Government of Belize*, 749 F. 3d 1024, 1030 (CA11 2014). In *Daewoo*, the lower court dismissed the action because the foreign sovereign implicated in the case had a "significant interest in regulating business activity on its shores." 459 F. 3d, at 1255, 1258. The Eleventh Circuit held that abuse of discretion review applied and affirmed, noting that the district court did not abuse its discretion when it determined that foreign interests "equitably

and systematically outweighed" any prejudice to the plaintiff. *Id.*, at 1258–60.

Similarly, in *Chavez* v. *Carranza*, the Sixth Circuit reviewed the lower court's determination not to abstain on comity grounds for abuse of discretion, emphasizing its deference to the trial court's examination of the facts. 559 F. 3d 486, 495 (CA6 2009). There, a former Salvadoran military officer claimed he was entitled to amnesty pursuant to the Salvadoran Amnesty Law, but the lower court declined to defer to foreign law. *Id.*, at 494–95. The Sixth Circuit affirmed, relying on and deferring to the facts developed by the lower court. *Id.*, at 495.

The Second Circuit shattered the consensus among the circuits, holding that abstentions based on prescriptive comity—even if nominally subject to review for abuse of discretion—are reviewed *de novo* because they ostensibly involve questions of statutory interpretation. App. 28a–30a. According to the Second Circuit, prescriptive comity solely looks to divine the congressional intent in enacting a statute, but *without* applying the presumption against extraterritoriality that governs a normal exercise of statutory interpretation in this context. App. 37a. The decision thus collapses the two doctrines and effectively eliminates prescriptive comity as a safety valve against the application of U. S. law in circumstances where, as here, it would be unreasonable for such law to apply.

The Second Circuit's novel standard would allow appellate courts to make *de novo* factual determinations, including the effect of the relevant regulations

on the expectations of the parties, the connection between the regulating state and the person responsible for the activity, the interests of other states, and the likelihood of conflict with other states' regulations. App. 69a (citing Restatement (Third) of Foreign Relations § 403(1)). This inquiry is fact-based, as the Second Circuit itself implicitly recognized when it attempted to undertake factual inquiries into such issues as whether parallel proceedings existed, whether there were conflicts with foreign law, and whether the Trustee was a creditor in the related foreign proceedings. App. 34a–35a.

The Second Circuit's decision not only conflicts with every other court of appeals to have considered the question, but also conflicts with this Court's precedent. This Court has consistently held that deferential review is warranted where, as here, the relevant issue at hand depends heavily on factual determinations, not merely legal judgments, and where the lower courts may have insights not necessarily reflected in the record.[2] See *Pierce* v. *Under-*

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[2] In similar contexts requiring a weighing of evidence or balancing of factors, this Court and others have recognized that deferential review is necessary. See, *e.g.*, *Piper Aircraft Co.* v. *Reyno*, 454 U. S. 235, 237 (1981) (holding that *forum non conveniens* "may be reversed only when there has been a clear abuse of discretion"); *Aransas Project* v. *Shaw*, 775 F. 3d 641, 648 (CA5 2014) (reviewing *Burford* abstention decision for abuse of discretion); *Tribune Co.* v. *Abiola*, 66 F. 3d 12, 15 (CA2 1995) (same); *Porter* v. *Jones*, 319 F. 3d 483, 491 (CA9 2003) (reviewing *Pullman* abstention for abuse of discretion); *Nationwide Mut. Ins. Co.* v. *Unauthorized Practice of Law Comm.*, 283 F. 3d 650, 652 (CA5 2002) (same).

wood, 487 U. S. 552, 560 (1988) (noting abuse of discretion review is appropriate when questions "turn upon not merely what was the law, but what was the evidence regarding the facts"); *Cooper Industries, Inc.* v. *Leatherman Tool Group, Inc.*, 532 U. S. 424, 435 (2001) (holding that, under abuse of discretion review, factual findings made by district courts must be accepted unless "clearly erroneous"); *Cooter & Gell* v. *Hartmarx Corp.*, 496 U. S. 384, 402 (1990) (explaining that deferential review is appropriate when "the district court is better situated than the court of appeals to marshal the pertinent facts and apply the fact-dependent legal standard"). Further, this Court has recognized the particularly strong need for deferential review in insolvency proceedings, where the bankruptcy court is bound to have the "closest and deepest understanding of the record." *U. S. Bank N.A.* v. *Village at Lakeridge, LLC*, 138 S. Ct. 960, 968 (2018); 11 U. S. C. § 1501 (explaining that the purpose of Chapter 15 of the Bankruptcy Code is "to provide effective mechanisms for dealing with cases of cross-border insolvency with the objectives of," *inter alia*, "fair and efficient administration of cross-border insolvencies that protects the interests of all creditors, and other interested entities, including the debtor").[3]

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[3] Indeed, Congress has explicitly recognized the concept of comity under Chapter 15 of the Bankruptcy Code when providing additional assistance to foreign representatives under 11 U. S. C. § 1507(b). H. R. Rep. No. 109-31(I), at 1507 (2005).

B. The Second Circuit decision adds to the existing confusion among the circuits regarding a lower court's determination of a "true conflict"

The Second Circuit decision also stands alone in failing to give any weight in its comity analysis to true conflicts between U. S. and foreign laws. In particular, the court refused to give any weight in its analysis to the insolvency regimes in the BVI, Cayman Islands, and Bermuda, which are ultimately subject to review by the U. K. Privy Council. The bankruptcy court held, based on its fact-finding, that these foreign jurisdictions had a greater interest in having their laws regulate the subsequent transfers made from investment funds organized under their laws to the funds' investors who did not anticipate that U. S. law would apply to such transfers. The Second Circuit did not deny the legitimacy or strength of those interests—it simply refused to account for them. Focusing solely on the initial transfer from Madoff Securities to the Feeder Funds, it held the United States had a dominant and decisive interest in applying its own law based only on a general notion that Congress intended, through the Bankruptcy Code, to create a single centralized U. S. forum for all related avoidance claims and recovery claims. App. 37a–38a. Under this approach, however, a court must favor application of a U. S. statute regardless of any potential or true conflict with foreign law.

The courts of appeals are already divided about whether a "true" conflict or only a "potential" conflict

of laws or outcomes is required before it is appropriate for a lower court to abstain on international comity grounds. The Second Circuit's decision not only deepens that division, it stakes out the far end of the range of positions courts have taken.

This Court has recognized that in determining whether to exercise jurisdiction, courts must determine whether "there is in fact a true conflict between domestic and foreign law." *Hartford Fire Ins. Co.* v. *California*, 509 U. S. 764, 798 (1993). The courts of appeals have adopted differing positions about the showing necessary before a court should abstain. The Third, Ninth, and Eleventh Circuits do not explicitly require a true conflict to be present in order to abstain on comity grounds. See *Mujica* v. *AirScan Inc.*, 771 F. 3d 580, 599 (CA9 2014); *Gross* v. *German Foundation Indus. Initiative*, 456 F. 3d 363, 393–94 (CA3 2006); *Ungaro-Benages* v. *Dresdner Bank AG*, 379 F. 3d 1227, 1238 (CA11 2004). The Sixth, Tenth, and Federal Circuits require a true conflict, defined by these circuits as a conflict of law, to be present in order to abstain on international comity grounds. See *In re IPCom GmbH & Co., KG*, 428 Fed. Appx. 984, 985–86 (CA Fed. 2011); *Chavez* v. *Carranza*, 559 F. 3d 486, 495 (CA6 2009); *United Int'l Holdings, Inc.* v. *Wharf (Holdings) Ltd.*, 210 F. 3d 1207, 1223 (CA10 2000). The Second Circuit's position represents a new extreme; it will not accommodate even an actual or true conflict.

The D.C. Circuit, in contrast, has explicitly held that where there is a true conflict between domestic

and foreign law, there *must* be some accommodation. See *Laker Airways Ltd.* v. *Sabena, Belgian World Airlines*, 731 F. 2d 909, 948 (CADC 1984) ("The American and English courts are obligated to attempt to reconcile two contradictory laws"). This Court, too, has held that when U. S. courts apply U. S. laws in a manner that conflicts with the interests of foreign jurisdictions, U. S. courts should make some effort to accommodate those interests. See *Société Nationale Industrielle Aérospatiale* v. *United States Dist. Court for Southern Dist. of Iowa*, 482 U. S. 522, 546 (1987). By acknowledging but categorically ignoring the conflicting foreign sovereign interests in regulating foreign transactions within their borders, the Second Circuit put itself at odds with *Société Nationale*, *Laker Airways*, and every other decision to have addressed U. S. conflicts with foreign laws.

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The Second Circuit decision incorrectly reviewed a lower court's abstention determination in the international comity context *de novo*, breaking with the unanimous precedent of the other circuit courts. Abstention decisions in bankruptcy cases must be given deferential review as bankruptcy judges are in the best position to determine the best course of action, including whether and how to cooperate to achieve the best outcome for all stakeholders when insolvency proceedings implicate both domestic and foreign debtors. The Second Circuit decision also creates new uncertainty as to how courts should deal with conflicts between U. S. and foreign law. The

conflict here is very real indeed: The Trustee is seeking to claw back the very same funds being pursued in foreign bankruptcy proceedings. In substituting its own comity findings for that of the courts below and disregarding the "true conflict" at issue, the Second Circuit's decision risks conflicting commands and puts investors at risk of facing double liability for their investments. The confusion among the courts on the doctrine of comity must now be resolved.

III. This case is exceptionally important

A. The issues presented are recurring

The extraterritorial application of the Bankruptcy Code and international comity urgently warrant this Court's review because they are frequently recurring issues. There is no need for further percolation of these issues among the circuit courts. The Second Circuit plays an outsized role in extraterritoriality issues because of New York's role as the United States' principal hub of international commerce. Hence, much of this Court's prior extraterritoriality law has arisen from the Second Circuit. See, *e.g.*, *European Community* v. *RJR Nabisco, Inc.*, 764 F. 3d 129 (CA2 2014), rev'd, 136 S. Ct. 2090 (2016); *Kiobel* v. *Royal Dutch Petroleum Co.*, 621 F. 3d 111 (CA2 2010), aff'd, 569 U. S. 108 (2013); *Morrison* v. *Nat. Australia Bank Ltd.*, 547 F. 3d 167 (CA2 2008), aff'd, 561 U. S. 247 (2010). Indeed, in the last three years, there have been multiple additional decisions within the Second Circuit regarding extraterritoriality and comity with respect to the

Bankruptcy Code. See, *e.g.*, *In re Nat. Bank of Anguilla (Priv. Banking Trust) Ltd.*, 580 B. R. 64 (Bkrtcy. Ct. SDNY 2018) (addressing extraterritoriality and comity); *In re CIL Ltd.*, 582 B. R. 46 (Bkrtcy. Ct. SDNY 2018) (same); *In re Arcapita Bank B. S. C.(c)*, 575 B. R. 229 (Bkrtcy. Ct. SDNY 2017) (same); *In re Ampal-Am. Israel Corp.*, 562 B. R. 601 (Bkrtcy. Ct. SDNY 2017) (addressing extraterritoriality); *In re Lyondell Chemical Co.*, 543 B. R. 127 (Bkrtcy. Ct. SDNY 2016) (same).

B. The decision below will invalidate foreign law and judicial decisions

The decision below, which allows U. S. courts to apply U. S. law to foreign transfers that took place abroad, broadens the scope of the Bankruptcy Code to the point that it will conflict with foreign law and functionally override foreign judicial decisions. Extraterritorial overreach by U. S. courts will cause conflicts with foreign governments and invite retaliation from countries that object to U. S. interference with their own laws and judicial systems.[4]

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[4] The specter of international discord resulting from the decision below is not hypothetical; past instances of extraterritorial overreach by U. S. courts have resulted in retaliation by other countries. See J. B. Sandage, *Forum Non Conveniens and the Extraterritorial Application of United States Antitrust Law*, 94 Yale L. J. 1693, 1693–99 (1985) (explaining that, after *United States* v. *Aluminum Co. of Am.*, 148 F. 2d 416 (CA2 1945), in which the Second Circuit applied U. S. antitrust laws to foreign conduct, foreign countries enacted blocking legislation limiting U. S. discovery and preventing the enforcement of U. S. antitrust judgments).

The Second Circuit's decision fundamentally changes the territorial scope of the Bankruptcy Code. Through more than eight years of litigation on this issue, the Trustee has not identified a single case in which the Bankruptcy Code has been applied—as the Second Circuit's decision allows—to wholly foreign transfers. See generally Brief for Appellant in No. 17-2992 (CA2 Jan. 10, 2018), Dkt. No. 497; Reply Brief for Appellant in No. 17-2992 (CA2 May 9, 2018), Dkt. No. 1091. The decision eliminates the need for any extraterritoriality analysis so long as there is a domestic debtor that made the initial transfer. As a result, U. S. bankruptcy trustees are empowered to recover any subsequent transfer, regardless of where in the world the transfer was made, how many times the money has been transferred in foreign commerce, or whether the foreign law applicable to the transfer would permit the transferee to keep the transferred funds.

This new rule contravenes foreign law. Here, BVI law, which governs many of the subsequent transfers that the Trustee seeks to claw back, takes a different approach from U. S. law on certain aspects of liquidation proceedings. For example, BVI law generally presumes that a party to a transaction acted in good faith unless it was an insider. BVI Insolvency Act § 250(3). U. S. law does not carry this presumption. Additionally, while the U. S. bankruptcy court grants business judgment deference to a bankruptcy trustee, the BVI courts impose a higher standard by making liquidators seek directions from the court to pursue material activity. Further, English law, on which BVI, Cayman, and

Bermuda law is based, does not permit open-ended recovery of subsequent transfers in the same way the U. S. Bankruptcy Code does. The Second Circuit's decision creates such open-ended liability for foreign investors because the statute of limitations governing subsequent transfers is triggered not by the transfer, but by a successful avoidance claim against an initial transferee. See 11 U. S. C. § 550(f). Thus, a U. S. trustee could file suit against a subsequent transferee within one year of avoidance of the initial transfer regardless of whether a decade or more has passed since that transfer was made, as is the case here. See, *e.g.*, Proffered Second Amended Complaint in *Picard* v. *HSB Bank plc*, No. 09-01364-SMB (Bkrtcy. Ct. SDNY June 26, 2015), Dkt. No. 399 (asserting new claims against subsequent transferee defendant regarding initial transfers from 2004).

Further, with respect to some Petitioners, the courts in the BVI already have held that distributions from Fairfield Sentry Limited to those Petitioners were legitimately executed as part of the agreements between the parties to those transactions, and the distributions could not be clawed back. The U. K. Privy Council upheld these decisions. *Fairfield Sentry Ltd.* v. *Migani*, [2014] UKPC 9. If the Trustee is permitted to recover the proceeds of the very same transactions—proceeds which the BVI court held that the Petitioners were permitted to keep pursuant to BVI law—the BVI court's holding would effectively be invalidated. In countries that permit avoidance of the transfer from their local

funds, the Second Circuit's ruling could result in double liability for local investors in those funds.

As evidenced by the conflicts already present here, the Second Circuit's decision will inevitably produce just the kind of "clashes between our laws and those of other nations" that the presumption against extraterritoriality was intended to prevent. *WesternGeco*, 138 S. Ct., at 2136. In short, if the decision below is allowed to stand, U. S. law will, contrary to the holdings of *RJR Nabisco* and *Morrison*, "rule the world" in derogation of the presumption against extraterritoriality and in conflict with comity itself. *RJR Nabisco*, 136 S. Ct., at 2100.

C. The breadth of this dispute warrants review by this Court

The scale of this dispute merits this Court's review. The Trustee seeks to claw back over $4 billion in foreign subsequent transfers allegedly received by the Petitioners in these 88 consolidated appeals, without regard to whether they are net losers or net winners in the Madoff Securities scheme and despite the fact that none of them are considered customers for purposes of distribution from the Madoff Securities estate.

Additionally, the Second Circuit's decision disregards the property rights under foreign law of the recipients of the transfers at issue here. These re-

cipients of transfers from foreign Feeder Funds expected local non-U. S. law to govern their affairs.[5] Under the Second Circuit decision though, these recipients are now subject to claw back under the Bankruptcy Code, and—despite being asked to pay into the estate under U. S. law—they cannot participate as customer claimants to receive distributions in the U. S. proceedings, even after paying into the estate and even if they are net losers. See *Kruse*, 708 F. 3d, at 427 (denying SIPA customer status to fund investors).

Beyond the expectations of the transferees, courts must also consider the sovereignty of the foreign nations, whose own laws govern the transactions that took place in their jurisdictions. Here, by authorizing interference with locally-created property rights, the Second Circuit is impinging on one of the most basic rights of these foreign sovereign nations: By allowing a U. S. trustee to interfere with the legitimate interests of foreign sovereigns and the expectations of investors in foreign funds, the decision interferes with the ability of foreign jurisdictions to regulate transactions within their own jurisdictions and conduct their own insolvency proceedings. The decision allows the Trustee to do an end

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[5] See D. J. Baker et al., Am. Bankruptcy Inst. Comm'n to Study the Reform of Chapter 11, Final Report and Recommendations 155 (2014) (noting that even if Section 550 permitted extraterritorial recoveries of foreign subsequent transfers, courts should still consider "whether allowing such action to proceed is consistent with general principles of comity and is reasonably necessary to protect the interests of the estate, considering the expectations of the defendants").

run around foreign liquidation proceedings where he was a recognized creditor and to subject Petitioners to double liability.

IV. This case is an appropriate vehicle for this Court to address the issues of extraterritoriality and comity

This case is an appropriate vehicle for this Court to address two recurring and undoubtedly important questions involving the extraterritorial reach of the Bankruptcy Code and the standard of review for abstention decisions made on international comity grounds.

First, there is no dispute among the parties that, for purposes of extraterritoriality, the transfers at issue were made outside of the United States between two foreign entities. There also is no dispute that applying the Bankruptcy Code to the transfers at issue causes a conflict with foreign law. SIPC admitted as much below, Intervenor Br. at 35, and the Trustee did not disagree. The only question on extraterritoriality is whether recovery of transfers made abroad between two foreign entities is nonetheless considered a domestic application of Section 550(a)(2).

Second, with respect to comity, the only issue is the appropriate review of lower court decisions dismissing on principles of comity.

Both legal issues were exhaustively developed below, in extensive briefing in the district court; in a thorough analysis of the legal issues in the district

court's opinion; in additional briefing by the parties and another thorough decision in the bankruptcy court; in *amicus* briefs filed by BVI restructuring professionals and the Cayman Finance and Recovery and Insolvency Specialist Association, among others; and in the Second Circuit's opinion. No further development of the legal issues is necessary to sharpen the questions presented. This case presents an ideal opportunity for this Court to restore U. S. laws—and U. S. courts—to their proper territorial boundaries.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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