No. 19-277

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

BRIEF OF *AMICI CURIAE* CAYMAN FINANCE AND RECOVERY AND INSOLVENCY SPECIALISTS ASSOCIATION OF THE CAYMAN ISLANDS IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE*[1]

Cayman Finance is the association of the financial services industry of the Cayman Islands. Cayman Finance represents first-rate service providers within investment funds and asset management, banking, insurance, reinsurance, capital markets, and trusts sectors and world class fiduciary, legal, and accounting service providers. Additionally, Cayman Finance represents 15 Cayman Islands industry associations. Cayman Finance is committed to protecting, promoting, developing, and growing the Cayman Islands financial services industry through cooperation and engagement with domestic and international political leaders, regulators and organisations; to promote the integrity and transparency of the industry by legislative and regulatory enactment and to encourage the sustainable growth of the industry through excellence, innovation and balance.

The Recovery and Insolvency Specialists Association of the Cayman Islands ("RISA") is a not-for-profit membership organisation dedicated to promoting and supporting restructuring and insolvency specialists in the Cayman Islands. RISA focuses on investigating and sharing best practices amongst industry practitioners in the fields of insolvency, restructuring and litigation, through both education and networking.

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[1] This brief is filed with the written consent of all parties. No counsel for either party authored this brief in whole or in part, nor did any party or other person or entity other than *amicus curiae*, its members, or its counsel make a monetary contribution to the brief's preparation or submission. Counsel of record for all parties received notice at least 10 days prior to the due date of the intention of amici to file this brief.

Its membership (which includes both attorneys and accountants) frequently appear in, give evidence in or are otherwise the subject of proceedings conducted in the United States and elsewhere in the world.

The Cayman Islands are respected worldwide as an international financial services center with a system of law based on English common law and a stable political environment. It is the domicile of choice for approximately 70% of the world's hedge funds and a significant proportion of private equity funds, with over 10,000 regulated alternative investment entities. Accordingly, the *amici curiae* have an interest in ensuring that international insolvency principles are applied equitably, and in a manner consistent with the principle of comity and ongoing international cooperation.

The *amici curiae* offer their view because this case involves critically important issues to Cayman Islands financial services, including but not limited to Cayman insolvency proceedings. The *amici curiae* are concerned that the decision of the Second Circuit Court of Appeals may irrevocably harm the manner in which cross-border insolvency proceedings are conducted as between the United States and the Cayman Islands and, in particular, may have a negative impact on the important interplay between the available asset recovery procedures in those jurisdictions. Such impacts would, in turn, subvert the expectations of parties worldwide who invest in Cayman Islands-based alternative investment entities—including a significant number of United States investors, such as pension funds and other American investment pools.

SUMMARY OF ARGUMENT

In this case, Respondent Irving H. Picard, the Trustee for the liquidation of Bernard L. Madoff Investment Securities LLC, seeks to use 11 U.S.C. § 550(a)(2) to recover pre-bankruptcy transfers of assets that originally came from the now-bankrupt Madoff securities firm. Many of these transfers were made by foreign "feeder" funds to their foreign customers. The feeder funds are located abroad, their customers are located abroad, the transfers took place abroad, and the assets are located abroad. The Trustee seeks to apply an American statute to people, property, and events located in foreign countries—to use Section 550(a)(2) to "claw back" foreign property held by foreigners in foreign lands, regardless of what the foreign law would indicate, or how a foreign insolvency proceeding would determine the rights of the relative parties.

In the decision below (the "Decision"), the United States Court of Appeals for the Second Circuit, in relevant part, ruled that when the Trustee seeks recovery of foreign transfers from one foreign entity to another, it is a "domestic" application of U.S. law, and the presumption against extraterritoriality is not implicated, even when such recovery conflicts with the foreign law. The *amici curiae* respectfully join in the arguments advanced by Petitioners (alleged recipients of indirect overseas transfers, through foreign investment funds, from Bernard L. Madoff Investment Securities LLC) that the Decision fundamentally changes the territorial scope of the U.S. Bankruptcy Code, and contravenes this Court's precedents, those of

other circuits, and applicable foreign procedure. In the process, it contravenes the legitimate expectations of investors and financial parties—including many in the United States—and sows the international discord that the presumption against extraterritoriality seeks to avoid.

The Petitioners ably describe how the Decision conflicts with this Court's post-*Morrison* precedent regarding the presumption against extraterritoriality. The *amici curiae*, for their part, will address how the Decision, if left to stand, subjects firms and individuals in the Cayman Islands (and by extension, elsewhere) to substantial uncertainty in situations involving cross-border insolvencies. In particular, when financial institutions or investors operate in multiple jurisdictions, as many of Cayman Finance's members do, they rely on predictable choice-of-law rules that respect territorial boundaries. But if the Bankruptcy Code's avoidance provisions were applied extraterritorially, trustees in the U.S. could attack foreign transactions that are valid in the jurisdictions where the transacting parties operate and where the transactions occurred. Such attacks would frustrate the reasonable expectations of market participants in foreign countries, and would risk provoking legal conflicts with other nations' insolvency proceedings—which would have the net effect of delaying international insolvencies, where speedy, equitable resolution is often a key goal of the process.

In view of these consequences, the *amici curiae* submit that extraterritorial reaches into the Cayman Islands regime threaten to destabilize it, injecting

unpredictability into a system that is currently relatively predictable. The *amici curiae* further submit that the Decision will create uncoordinated and potentially competing avoidance claims, sowing confusion, causing delay, and increasing cost. As a result, it is likely to undermine the ability to recover fraudulent transfers.

Finally, it would be wrong to suggest that, unless Section 550(a)(2) is given extraterritorial effect, assets in the custody of foreign subsequent transferees will be lost to the U.S. bankruptcy estate. U.S. officeholders can use the courts of the Cayman Islands to recover assets for the benefit of the U.S. bankruptcy estate, and have done so in the past. Foreign subsequent transferees are not immune from avoidance claims or able to undermine the ability of bankruptcy trustees to avoid and recover fraudulent transfers through the use of entities incorporated in the Cayman Islands. Accordingly, expanding the reach of Section 550(a)(2) to include extraterritorial application is not only intrusive but also unnecessary.

ARGUMENT

I. THIS CASE IS EXCEPTIONALLY IMPORTANT BECAUSE THE DECISION WILL HAVE A DISRUPTIVE AND DETRIMENTAL EFFECT ON INSOLVENCY PROCEEDINGS IN FOREIGN COUNTRIES SUCH AS THE CAYMAN ISLANDS

The extraterritorial application of the Bankruptcy Code and international comity are recurring and important issues that warrant the Court's attention.

The Decision, 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 proceedings, and foreign judicial decisions. 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 sovereigns to regulate transactions within their own jurisdictions and conduct their own insolvency proceedings. Hence, the Decision allows the Trustee an end run around foreign liquidation proceedings, and may subject participants in those insolvency proceedings either to undeserved windfalls, or to double liability.

If permitted to stand, the Decision will have substantially deleterious effects on foreign insolvency proceedings, including those in the Cayman Islands.

First, the Decision expands U.S. bankruptcy law in a way that would disrupt longstanding investor expectations, most powerfully in the Cayman Islands financial sector. The Decision will allow U.S. bankruptcy trustees to unwind, under U.S. law, Cayman Islands financial transactions between Cayman Islands funds and their foreign investors years after the transfers were made, regardless of whether Cayman Islands law governed the transactions or whether Cayman Islands law would bar the transactions from being unwound. This outcome is directly counter to the policy of promoting the finality and certainty of completed financial transactions. As a practical matter, the Cayman Islands will be a much

less attractive venue for foreign investors—including many United States investors, such as pension funds—if transfers these investors receive can suddenly be subject to a claim in the United States years after the transfer has been completed.

Second, by effectively prioritizing the interest of U.S. bankruptcy trustees over that of Cayman Islands liquidators, the Decision introduces elements that may be at odds with the well-developed Cayman Islands insolvency regime. Permitting a U.S. debtor who has a claim against a Cayman Islands debtor to enhance its recoveries at the expense of the Cayman Islands debtor's remaining creditors undermines the considerations of equity that the Cayman Islands restructuring regime is designed to promote. Namely, in any given situation, a Cayman Islands insolvency judge may reach a decision on whether to allow the claw back of a particular transfer under applicable Cayman Islands law. There is no guarantee that a U.S. bankruptcy judge would reach the same decision, or even apply the same principles in order to reach that decision.

Third, if a U.S. debtor can circumvent a Cayman Islands liquidation and bring claims directly against a Cayman Islands debtor's creditors, it will undermine the ability of Cayman Islands liquidators to conclude liquidations in a timely and efficient matter. Cayman Islands liquidators will need to await resolution of the U.S. litigation before making distributions and winding up the estate. This not only will delay resolution of Cayman Islands liquidations—by years, in many cases—but will increase their professional costs,

reducing recoveries for the creditors of a Cayman Islands debtor.

A. The Decision Disrupts the Legitimate Expectations of Investors, Including Investors in the Financial Services Sector in the Cayman Islands

It is settled law in the Cayman Islands that investors in vehicles incorporated in the Cayman Islands have a reasonable and legitimate expectation that their investment—and the vehicle to which it relates—will be conducted in accordance with Cayman law. Investors expect that key Cayman laws, such as the Cayman insolvency regime (including the Companies Winding Up Rules), will apply.

This reasonable expectation has been widely recognized by the Grand Court of the Cayman Islands. In *In the Matter of Philadelphia Alternative Investment Fund, Ltd.*,[2] Henderson, J. stated:

> When the petitioners made the decision to invest in a company domiciled in the Cayman Islands they would have had a reasonable and legitimate expectation that, in the event a winding up was necessary, it would occur in the Cayman Islands under the applicable law here.

In *In The Matter of Lancelot Investors Fund Ltd.*,[3] Quin, J. endorsed this approach, stating:

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[2] [22 February 2006] Cause No. 440 of 2005, Grand Court (Henderson, J.).

[3] [2009] CILR 7, 20, 23, 24.

> Henderson, J. stated the law of the Cayman Islands as it was in 2005. The company in *Philadelphia* was domiciled in the Cayman Islands, and this was the jurisdiction in which it should be wound up. The petitioners had a legitimate expectation that it would be wound up in the Cayman Islands . . . .
>
> . . . I follow Henderson, J.'s judgment in *Philadelphia* . . . .
>
> . . . [I]nvestments made through the company and onwards into Lancelot USA were made in the Cayman Islands. The arrangements by which these investments were made are governed by the laws of the Cayman Islands. Any claims that the petitioners and, indeed, other investors may have against the company will have to be examined and assessed according to the law of the Cayman Islands.

Similarly, in *In the Matter of Heriot African Trade Finance Fund Limited*,[4] Jones, J. stated:

> There is no basis upon which it can be said that an *ad hoc* liquidation conducted by management is itself part of the fund's business, such that the participating shareholders should not have any reasonable expectation that the fund would be liquidated in accordance with the Companies Law and the Companies Winding Up Rules. To the contrary, investors who put their money into mutual funds incorporated in the Cayman

[4] [2011 (1)] CILR 1, 23-24.

> Islands have every reason to expect that the companies' affairs will be conducted in accordance with Cayman law, including the Companies Winding Up Rules.

In a paper presented to the INSOL Judicial Colloquium at San Francisco in March 2015, the Chief Justice of the Cayman Islands, the Honorable Anthony Smellie QC,[5] similarly stated:

> The choice of forum is important to the investors' decision to invest and reflects their expectation that Cayman law will apply to the liquidation of their investments if things go wrong. . . . .
>
> There were however, significant assets also within the Cayman Islands and the investors who petitioned the Cayman court for winding up had invested with the expectation that any disputes over their rights would be resolved in keeping with Cayman law . . . . It is not uncommon also that investors expect that any conduct or allegations of irregularity would be investigated and subsequent appropriate steps taken in keeping with Cayman law.

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[5] *Forum Shopping Is Bad; Choice Of Forum Is Good? – The Investment Fund Perspective*, Chief Justice Anthony Smellie QC, The Eleventh INSOL/UNCITRAL/World Bank Judicial Colloquium, San Francisco, March 2015, at 8, 17, available at https://www.judicial.ky/wp-content/uploads/publications/speeches/2015-04-21 ChiefJusticesPresentationatSanFranciscoINSOLJudicialColloquium.pdf.

Accordingly, consistent with offering documents and governing law provisions, investors in Cayman funds—including significant U.S. investors in such funds—have a legitimate expectation that, where a Cayman Islands company is subject to Cayman Islands insolvency proceedings, Cayman Islands law applies.

U.S. federal courts also recognize investor expectations as significant. As one example, a bankruptcy judge in the Southern District of New York very recently analyzed this point in granting recognition of a foreign main bankruptcy proceeding:

> From the Ascot Fund investors' point of view, and as a matter of fact and law, they invested in a Cayman fund and their rights were to be determined under Cayman law. Ascot Fund operated under the Amended and Restated Memorandum and Articles of Association of Ascot Fund Limited, dated Oct. 31, 2006 (the "Articles"). (Ex. 2 at ¶ 7; Ex. 19.) The Articles were governed by Cayman law and provided the rules for distributions from Ascot Fund, *including distributions in the event of a liquidation*. (Ex. 19 at ¶¶ 180-88, 200-02.) Each shareholder signed a subscription agreement (the "Subscription Agreement") (Ex. 4) which was governed by Cayman law, (*id.* at 10, § III.C), and stated that Ascot Fund was a Cayman company governed by Cayman law. (Ex. 4 at 1, 4.) Investments in Ascot Fund were solicited through a confidential offering memorandum (the "Confidential Offering Memorandum"), dated October 2006, (Ex. 22), which informed its

> investors that "Ascot Fund Limited is a Cayman Islands exempted company" "organized to operate as a private investment fund to facilitate investment by non-U.S. Persons and any investors that the Fund's board of directors deems appropriate," (*id.* at 16), and subject to the regulations of the Cayman Islands Monetary Authority. (*Id.* at iii-iv.)

In re Ascot Fund Ltd., 603 B.R. 271, 283-84 (Bkrtcy. Ct. S.D.N.Y. 2019) (emphasis in original). Indeed, in the face of the justifiable expectations of a party concerning the law governing its transaction, a court that applies a forum's law that is "totally arbitrary" or "fundamentally unfair to a litigant" invokes Constitutional due process concerns. *See generally Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 837 (1985) (Stevens, J., concurring).

When investors agree to participate in a foreign investment, they rightly make that decision, in part, in reliance on the material choice-of-law provisions in their investment contract. Investors in Cayman Islands funds—both U.S. and foreign—deliberately selected those vehicles desiring, and expecting, Cayman Islands law to govern that investment. If it stands, the Decision would subvert the expectations of those investors. And given the central import of the Cayman Islands to alternative investment vehicles around the world, the Decision's effects will reverberate in financial centers globally.

B. The Decision Introduces Elements That May Be At Odds With Foreign Insolvency Regimes

The Cayman Islands have been successful in developing as home to tens of thousands of alternative investment vehicles such as hedge funds and private equity funds, in large part because of a stable, predictable legal regime—including predictability about the process of insolvency proceedings, and about the outcome of any transfers made within the Cayman Islands in the context of those insolvency proceedings. As a major world financial center, the Cayman Islands routinely play host to cross-border insolvencies and disputes. As set forth in the brief of the *amici curiae* before the Second Circuit, the Cayman Islands insolvency regime enjoys a well-developed framework.[6]

The Second Circuit's decision introduces a wild card into this well-developed system: at any point, a U.S. bankruptcy trustee could seek to unwind transactions between two Cayman entities, which occurred in the Cayman Islands, merely because an earlier transaction

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[6] See Brief for Amici Curiae Cayman Finance, Recovery and Insolvency Specialists Association in Support of Defendants-Appellees, *In Re: Irving H. Picard, Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC*, 17-2992(L), (CA2 May 10, 2018), Dkt. No. 1102. The substantive law relating to the winding up of companies incorporated in the Cayman Islands is contained in Part V of the Cayman Islands Companies Law (2018 Revision), which is supplemented by the detailed rules governing practice and procedure set out in the Companies Winding Up Rules, 2018 (as amended) ("CWR"), the Insolvency Practitioners' Regulations 2018 (as amended) ("IPR") and the Grand Court Rules 1995 (as amended), together with a substantial body of domestic and English case law.

in the chain occurred in the United States. The Decision thus authorizes courts within the Second Circuit—contrary to other Circuits—to disturb other nations' insolvency proceedings by applying U.S. law to parties, property, and transactions wholly located abroad.

Without a straightforward Congressional grant of extraterritorial reach—absent from Sections 548 and 550 of the Bankruptcy Code—there is a presumption against extraterritoriality. *See Morrison v. National Australia Bank, Ltd.*, 561 U.S. 247, 255 (2010). And for good reason: in certain areas of law, "[t]he probability of incompatibility with the applicable laws of other countries is so obvious that if Congress intended such foreign application 'it would have addressed the subject of conflicts with foreign laws and procedures.'" *Morrison* at 269, citing *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) ("*Aramco*").

Aramco rejected overseas application of Title VII to all domestically concluded employment contracts because of the probability of incompatibility in employment law. *Morrison* rejected overseas application of securities laws because of the probability of incompatibility in foreign regulation of foreign securities exchanges and securities transactions occurring within their territorial jurisdiction. Here, too, this Court should reject extraterritorial application of U.S. bankruptcy law in foreign countries. The same logic that *Morrison* applied to securities fraud applies to allegedly fraudulent transfers: "the regulation of other countries often differs from ours as to what constitutes fraud, what disclosures must be made,

what damages are recoverable, what discovery is available in litigation, what individual actions may be joined in a single suit, what attorney's fees are recoverable, and many other matters." *Morrison* at 269, citing Brief for United Kingdom of Great Britain and Northern Ireland as *Amicus Curiae* 16–21.

The Cayman Islands insolvency regime has its own well-developed rules for handling these many different and oft-contested issues in the context of primary and secondary transfers, and clawbacks of the same to a debtor. In each case, the result might turn on different facts than a U.S. court might consider dispositive. Allowing a U.S. trustee to interfere with those well-developed rules risks introducing instability into a highly stable system.

C. The Decision Will Undermine the Ability of Foreign Liquidators to Conduct Liquidations

The Second Circuit's decision alters how any liquidator appointed by the Grand Court of the Cayman Islands can operate in a multinational set of bankruptcy proceedings. Ordinarily, a liquidator could proceed with the winding up, knowing that any parties with interests in the debtor will appear timely in the Cayman Islands winding up proceeding and make whatever claim they will make.

However, if the Decision is left to stand, such proceedings will be subject to disruption from foreign trustees, who would have the legal authority in the United States to recover secondary transfers in a U.S. proceeding from funds that are the subject of the

winding up procedure in the Cayman Islands. It would be incredibly difficult for a Cayman Islands liquidator to manage a Cayman liquidation if a U.S. debtor could pursue, in U.S. courts, creditors of Cayman Islands companies. Rather than having co-ordinated and co-operative insolvency proceedings in the U.S. and the Cayman Islands, the Decision will put those proceedings in competition with each other. The U.S. Trustee and the liquidator may both be pursuing the same parties in relation to the same transactions, but in different proceedings governed by different laws and procedures.

Further, the potential for collateral claims may impact how much the liquidator can distribute, and to whom. In any liquidation proceeding, decisions must be made about distributions, and a decision to distribute to one creditor (or not) will necessarily affect the recoveries of every other creditor in the proceeding, by reducing (or not) the overall amounts for distribution.

The only way to avoid such uncertainty is for a liquidator to wait. In the event of any pending U.S. litigation, a Cayman liquidator could wait out the end of the U.S. litigation before making any distributions, to avoid disruptive collateral attacks on his distributions. However, that is not a practical option, as this very case demonstrates. The U.S. trustee in this case was appointed on December 15, 2008—over a decade ago.[7] While most insolvency proceedings may not be as lengthy, it would be unreasonable to ask a

[7] *See* The Madoff Recovery Initiative, available at https://www.madofftrustee.com/timeline-31.html.

Cayman Islands liquidator to wait for years for a U.S. process to finish, as Cayman Islands creditors await distributions to which they are entitled to receive under Cayman law.

II. THIS CASE IS EXCEPTIONALLY IMPORTANT BECAUSE THE DECISION VIOLATES PRINCIPLES OF COMITY

The petition for certiorari seeks review on the basis that the Second Circuit adopted a *de novo* standard of review for abstentions based on international comity, whereas other circuits reviewed those decisions for abuse of discretion. The Second Circuit does, indeed, err on that basis. The *amici curiae* here would urge this Court to grant the writ not only because of the wrong standard of review (and resultant circuit split), but because the application of a *de novo* standard of review led to a decision that violates well-settled principles of international comity by allowing a U.S. trustee to reach transfers in the Cayman Islands that may not be recoverable under Cayman Islands law.

The Decision recites that "[i]nternational comity comes into play only when there is a true conflict between American law and that of a foreign jurisdiction."[8] The Decision also states (perhaps overlooking the brief of *amici* below) that the record was "unclear about whether issues litigated in the feeder funds' liquidation proceedings abroad would

[8] Decision at 31a, *citing Maxwell Commc'n Corp. PLC by Homan v. Societe Generale (In re Maxwell Commc'n Corp. plc)*, 93 F.3d 1036, 1049 (CA2 1996).

yield outcomes irreconcilable with the relief the Trustee demands in these cases."[9]

Insolvency law is rife with conflicts between American and Cayman Islands laws. To begin with, authorities in the Cayman Islands (and England) suggest that the doctrine of comity does not require that there be a conflict of laws such that compliance with the laws of both countries is impossible. It is not necessary under Cayman Islands law for the court to identify a "true conflict" before applying the doctrine of comity. Accordingly, there is a true conflict of law, simply in deciding whether a comity analysis should apply, and what type.

Further, there are conflicts in the very area of fraudulent transfers. In *Picard v. Primeo Fund*,[10] the Grand Court had recognized Mr. Picard as a foreign officeholder, and both the Grand Court and the Cayman Islands Court of Appeal recognized the jurisdiction of the Grand Court to entertain avoidance claims ancillary to foreign bankruptcy proceedings, under section 241 of the Companies Law. However, the Court of Appeal also made clear that the law governing those avoidance claims would be Cayman law, and not the law of the officeholder seeking assistance of the Grand Court. The Court of Appeal acknowledged "the apparent illogicality of applying domestic law to transaction avoidance issues when the distribution regime is governed by a foreign law," but took the view that adopting the alternative approach "would

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[9] Decision at 32a.

[10] [2014 (1)] CILR 379, 410, ¶ 54.

represent so radical a departure from the common law that, had the legislature intended that result, it could have been expected to say so in clear terms."

In that case, relief was not available on the facts. Mr. Picard was not able to use Cayman Islands avoidance provisions to recover funds paid by Bernard L. Madoff Investment Securities LLC to Primeo Fund due to a fundamental difference in interpretation between U.S. and English (and therefore Cayman Islands) law over what constitutes property of the debtor.

While the Trustee in this case has previously asserted that "property of the debtor" includes "property that would have been part of the estate had it not been transferred before the commencement of bankruptcy proceedings," the Grand Court has expressly rejected this interpretation in the Cayman Islands. In *Picard v. Primeo Fund*, the Honorable Justice Jones held, and the Court of Appeal agreed, that the appropriate interpretation of "property of the debtor" is, consistent with English jurisprudence, the property which the debtor held at the commencement of the liquidation, thereby excluding the right to avoid preferential transactions. *Id.* at 380.

Just this one example demonstrates an irreconcilable, actual conflict between the two countries' laws governing the handling of fraudulent transfers. But there does not have to be this stark an actual conflict in any given insolvency proceeding to apply the lessons of comity. Each time a U.S. trustee seeks to recover a secondary transfer in a Cayman Islands insolvency proceeding, considerations of equity,

under Cayman Islands law, command the Cayman Islands judge. U.S. law may or may not reach the same result. Given the frequency of transfer issues in insolvency proceedings, such potential conflicts may potentially arise in virtually every insolvency proceeding involving U.S. and Cayman Islands parties.

While the Decision maintains that "[t]the United States has a compelling interest in allowing domestic estates to recover fraudulently transferred property," Decision at 34a, the Cayman Islands have that exact same compelling interest—allowing Cayman estates to recover fraudulently transferred property. And where a U.S. trustee seeks to allow a U.S. party to recover fraudulently transferred property, where a Cayman liquidator (or court) would seek to have a Cayman (or other foreign) party recover that same fraudulently transferred property, there will be a conflict. Allowing a U.S. trustee to reach into the Cayman Islands thus violates the principles this Court has advocated for over a century.

III. EXPANDING SECTION 550(a)(2) TO INCLUDE EXTRATERRITORIAL APPLICATION IS UNNECESSARY

The Decision's extraterritorial application of the Bankruptcy Code is both unwarranted, because of the exceptionally well-developed and predictable state of Cayman Islands insolvency law, and also unnecessary, because the courts of the Cayman Islands are able and willing to provide assistance to U.S. bankruptcy trustees pursuing assets within that jurisdiction.

There are numerous examples in Cayman Islands case law of the Grand Court providing support and assistance to the courts and bankruptcy trustees in the United States. One of the most common scenarios in which the Grand Court provides assistance to U.S. bankruptcy courts is in the context of Chapter 11 proceedings commenced in the United States. For example, in *Fruit of the Loom*,[11] the Grand Court appointed provisional liquidators to the Cayman Islands-domiciled holding company of a large corporate group, in order to facilitate and support a restructuring proceeding under Chapter 11 in Delaware. This strategy has been implemented repeatedly in the Grand Court since *Fruit of the Loom*, including in *Trident Microsystems (Far East) Ltd.*,[12] where the restructuring was based in Delaware, and *In the Matter of CHC Group Ltd.*,[13] where the primary restructuring was being overseen in Texas.

As noted above, as an alternative to appointing its own provisional liquidators concurrent with U.S. bankruptcy trustees, the Grand Court has also provided recognition and assistance at common law to foreign officeholders for the purposes of implementing a parallel worldwide restructuring. In *In the Matter of China Agrotech Holdings Ltd.*,[14] the Honorable Justice Segal recognized Hong Kong liquidators appointed to a

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[11] [2000] CILR Note 7.

[12] [2012 (1)] CILR 424.

[13] [24 January 2017] Cause No. FSD 5 of 2017 (RMJ), Grand Court (McMillan, J.).

[14] [2017 (2)] CILR 526, 533, ¶ 4.

Cayman Islands company so that they could "apply in the name and on behalf of the Company for and promote a parallel scheme in Cayman" following receipt of a letter of request from the High Court of the Hong Kong Special Administrative Region.[15]

These examples illustrate the willingness and flexibility of the Grand Court to facilitate and support insolvency proceedings in courts of concurrent jurisdiction.

Outside of the legislative framework for recognition of foreign insolvency proceedings outlined above, the Grand Court has long been willing to deploy its "inherent common law powers to recognize and enforce the appointment of a foreign trustee in bankruptcy for the purposes of bringing into the estate the assets of a bankrupt which may exist in this jurisdiction."[16] The rationale for this approach has been referred to as the doctrine of comity as it exists between the courts of friendly states, as described in *Didisheim v. London & Westminster Bank*:[17]

> On general principles of private international law, the Courts of this country are bound to recognise the authority conferred on [the foreign appointee] by the Belgian Courts, unless

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[15] This approach was followed by another Grand Court judge recently in *In the Matter of Changgang Dunxin Enterprise Co. Ltd.*, [8 February 2018] Cause No. FSD 270 of 2017 (IMJ), Grand Court (Mangatal, J.).

[16] *In the Matter of Al Sabah*, [2002] CILR 148, 159, ¶ 31.

[17] [1900] 2 Ch. 15 at 51.

> [equivalent] proceedings in this country prevent them from doing so.

These principles have been expressly applied in the Cayman Islands in, among other decisions, *Blum v. Bruce Campbell & Co.*,[18] which dealt with recognition in the Cayman Islands of a trustee appointed to assets in the Cayman Islands by a Pennsylvania court and *Al Sabah*, in the context of an application for recognition of a Bahamian-appointed bankruptcy trustee, in order to recover assets in the Cayman Islands.

In *In the Matter of HSH Cayman I GP Ltd.*,[19] the Cayman Islands Court of Appeal had to consider whether the making of a winding up order in the Cayman Islands offended the principles of comity in circumstances where Chapter 11 proceedings were afoot in Delaware. While the Court of Appeal agreed with the judge at first instance that, on the facts of that case, comity did not require the adjournment or stay of winding up proceedings in the Cayman Islands, it acknowledged the obligation of the Grand Court to "co-operate with foreign courts and to respect foreign legislation . . . ." In doing so, the Court of Appeal distinguished the facts of *HSH Cayman* from those before the Canadian courts in *Babcock & Wilcox (Canada) Ltd.*,[20] where the Canadian courts stayed proceedings under their Companies' Creditors Arrangement Act in aid of Chapter 11 proceedings in the U.S. Bankruptcy Court in which a temporary

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[18] [1992-93] CILR 591, 603.

[19] [2010 (1)] CILR 375, 377.

[20] [2000] 5 B.L.R. (3d) 75.

restraining order had been made. In *Babcock*, Farley, J. cited "the evolving common law principles of comity which permitted the Canadian court to recognise and enforce in Canada the judicial acts of other jurisdictions." Unlike in *Babcock*, the U.S. court had not issued a temporary restraining order in relation to *HSH Cayman*.

It is thus clear from the Cayman Islands authorities that the doctrine of comity both obliges the Grand Court to recognise the authority of foreign courts, officeholders and legislation; and respectfully requests that foreign courts and officeholders respect the Cayman Islands domestic legal framework and "rights of its own citizens or of other persons who are under the protection of its laws."

In sum, the Grand Court is willing and able to assist officers of the U.S. courts in identifying and recovering assets. In Cayman Finance's and RISA's considerable experience of working together to such ends, we submit that it is not accurate to say that, absent the extraterritorial application of Section 550(a)(2), any assets transferred outside of the United States are beyond the reach of the U.S. bankruptcy trustee and so lost to U.S.-based creditors. The cases outlined above demonstrate that the Grand Court has numerous tools at its disposal, both in statute and at common law, to provide assistance and support to U.S. bankruptcy trustees (and indeed to insolvency practitioners from a host of other jurisdictions around the world).

CONCLUSION

For the reasons set forth above, and in the petition for a writ of certiorari, Cayman Finance and Recovery and Insolvency Specialists Association of the Cayman Islands urge that this Court grant the writ.

Respectfully submitted,

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