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 A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF BRITISH VIRGIN ISLANDS RESTRUCTURING PROFESSIONALS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*

Amici are financial and legal professionals whose careers have been substantially devoted to insolvencies and corporate restructurings involving companies registered in the British Virgin Islands ("BVI"). Based upon their extensive experience with the Territory's laws and regulations, *Amici* share the conviction that the Second Circuit's decision in this case will disrupt the orderly administration of BVI insolvency proceedings, both those at issue here and in the future. Because the BVI is an international financial and business hub, the disruption of its insolvency laws will adversely impact not only the BVI, but international business generally.[1]

SUMMARY OF THE ARGUMENT

The Second Circuit's decision undermines the policy of international comity imbedded in the Bankruptcy Code. The Second Circuit permitted the Trustee to assert direct claims under U.S. law against foreign investors who received transfers from foreign investment funds—currently subject to their own insolvency proceedings in the BVI and elsewhere. In doing

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[1] As required by Rule 37.2, all parties' counsel of record were provided with timely notice of the intent to file this brief and have consented to its filing. In accordance with Rule 37.6, no counsel for any party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amici* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

Capitalized terms not defined herein have the meaning prescribed in Petitioner's brief.

so, the Court failed to analyze the conflict between U.S. and foreign bankruptcy laws and significantly understated the interests of the BVI and other foreign sovereigns in the integrity of their own insolvency proceedings. As a result, the Court incorrectly determined that it is "reasonable" to apply U.S. law to transactions between foreign investors and now-insolvent foreign companies.

This was a far-reaching error. Each of the factors assessed in prescriptive-comity analysis—including the connections between the transfers at issue and the BVI and other foreign jurisdictions, the extent to which those foreign jurisdictions regulate the transfers, the foreign jurisdictions' significant interests in those regulations, the justified expectations of foreign investors, and the potential for conflict if U.S. law is applied—shows that the application of U.S. law is unreasonable. Unless reversed, the Second Circuit's decision will upend the ongoing insolvency proceedings of the BVI feeder funds and other foreign funds. What is more, it will disrupt future foreign insolvency proceedings and create substantial uncertainty in international business.

ARGUMENT

Comity has long been "part of [U.S.] law" that courts must consider. *See Hilton* v. *Guyot*, 159 U.S. 113, 163 (1895). In a "spirit of cooperation" with other sovereigns, *Societe Nationale Industrielle Aerospatiale* v. *U.S. Dist. Court for S. Dist. of Iowa*, 482 U.S. 522, 543 n.27 (1987), States ordinarily refrain

from prescribing law "with respect to a person or activity having connections with another State" when the exercise of such jurisdiction would be "unreasonable." *F. Hoffmann-La Roche Ltd.* v. *Empagran S.A.*, 542 U.S. 155, 164 (2004) (citing Restatement (Third) of Foreign Relations Law of the United States § 403(1) (1986)). Whether the application of U.S. law to foreign transactions is unreasonable turns on factors including "connections with [the] regulating nation, harm to that nation's interests, [the] extent to which other nations regulate, and potential for conflict." *Id.* at 165. Measured against each of these factors, the application of U.S. bankruptcy law to transfers between now-insolvent BVI funds and their foreign investors is manifestly unreasonable.

I. The BVI Is an Important Financial Center that Extensively Regulates Transfers Implicating Insolvent Companies.

The BVI is a British Overseas Territory and an essential international financial center. The vast majority of its financial sector activity revolves around the incorporation of companies and the subsequent provision of legal and other services to those companies, including restructuring services where necessary. The BVI thus performs a role akin to that performed by New York or Delaware within the United States.[2]

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[2] The predecessor to the BVI's current corporations statute was based upon the Delaware General Corporations Law. *See* Melanie Debono, et al., *Creating Value: The BVI's Global Contribution* (June 2017) at 69, *available at* https://bviglobalimpact.com/media–centre/creating–value–the–bvis–global–contribution (hereinafter "BVI's Global Contribution").

BVI companies are used for a number of cross-border purposes, including as holding companies, for investment businesses and joint ventures, and for corporate group structuring. BVI's Global Contribution at 77, 82–90. According to United Nations data, the BVI was the ninth largest recipient of foreign direct investment in 2015, and the world's seventh largest source of outward investment flows. *Id.* at 79. Assets held by BVI-incorporated companies are estimated at $1.5 trillion. *Id.* at 13–14.[3]

Businesspeople incorporate in the BVI for a variety of reasons. These include the Territory's highly regarded Business Companies Act, 2004 (the "Companies Act"); the availability of legal expertise grounded in English law; the effective regulatory oversight of the Financial Services Commission; comprehensive legislation governing insolvency, including the Insolvency Act, 2003 (the "Insolvency Act"); and recourse to a specialist Commercial Court with an ultimate right of appeal to the Judicial Committee of the Privy Council, where disputes are heard by Lord and Lady Justices who also sit as Justices of the Supreme Court of the United Kingdom. BVI's Global Contribution at 55–58, 73–78, 106–14, 120–21.[4]

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[3] The most recent statistics provided by the BVI Financial Services Commission indicate there were 408,838 active BVI Business Companies as of March 31, 2019. BVI Financial Services Commission, Statistical Bulletin Q1 2019 (Vol. 54, March 2019) at 2, *available at* https://www.bvifsc.vg/sites/default/files/documents/Statistical%20Bulletins/q1_2019_statistical_bulletin.pdf.

[4] The English common law and principles of equity are applied in the BVI, except where inconsistent with local statutes, *see* Common Law (Declaration of Application) Act 1705, and English cases are treated as persuasive in BVI courts, *see, e.g.*, *A, B, C & D* v. *E,* HCVAP 2011/001 ¶¶ 11–17.

The BVI's Insolvency Act and the Insolvency Rules, 2005 (the "Insolvency Rules") contain the key statutory provisions governing insolvent BVI companies. Like the U.S. Bankruptcy Code, they provide an "equitable, orderly, and systematic" mechanism for the distribution of an insolvent company's assets. *See In re Maxwell Commc'n Corp.*, 93 F.3d 1036, 1048 (CA2 1996) ("*Maxwell II*") (citation omitted). Liquidation proceedings are administered by insolvency practitioners and supervised by the Commercial Court, Insolvency Act, Part VI, Liquidation, §§ 158-236 and Part XX, Insolvency Practitioners, §§ 473-87, and an order to wind up a company divests it of the beneficial ownership of its assets and subjects them to a trust for distribution according to statutory rules, *see Ayerst (Inspector of Taxes)* v. *C&K (Construction) Ltd* [1976] AC 167; *see also* Insolvency Act § 175. Stakeholders are treated *pari passu* within their classes, irrespective of the jurisdiction in which they reside. Insolvency Act, Part VI, Liquidation, § 207; *see also* Insolvency Rules, Rule 2.2 (defining preferential claims) & Schedule 2 (addressing preferential claims discussed in Insolvency Act § 207(1)(b)). In order to ensure that creditors are treated equitably, the Insolvency Act permits the avoidance or recovery of certain transactions, including unfair preferences, undervalue transactions, and fraudulent trading. Insolvency Act Part VIII, §§ 245, 246; *id.* Part IX 255. And Section 58 of the Companies Act specifies that a company may recover certain distributions to its members if it was insolvent before, or made insolvent as a result of, those distributions. Companies Act, Part III, Division 4 - Distributions, § 58.

The BVI's insolvency laws and jurisprudence also acknowledge the international nature of modern insolvency proceedings and the importance of comity.

Rubin v. *Eurofinance SA* [2012] UKSC 46 ("*Rubin*"), ¶¶ 11–34. While a BVI court may assert dominion over local assets of an insolvent foreign company, "it does so in support of the principal [foreign] winding up . . . to ensure that creditors and members are treated equally." *Stichting Shell Pensioenfonds* v. *Krys* [2014] UKPC 41 ("Shell") ¶ 15.

Part XIX of the Insolvency Act empowers BVI courts to issue orders in aid of "foreign [insolvency] proceeding[s]," and the United States is a "relevant foreign country" whose insolvency proceedings qualify for such assistance.[5] Under Section 467 of Part XIX, a BVI court may issue orders in aid of foreign proceedings that "restrain the commencement or continuation of any proceedings . . . against a debtor in relation to any of the debtor's property," "require any person to deliver up . . . any property of the debtor or the proceeds of such property," or "grant such relief . . . that will result in a co-ordination of a Virgin Islands insolvency proceeding with a foreign proceeding." Insolvency Act, Part XIX, § 467(3). When considering whether to grant such an order, Section 468 directs BVI courts to consider factors including "the just

[5] To qualify as a "foreign proceeding" under the statute, the proceeding must be in a "relevant foreign country" and pursuant to a law relating to insolvency in which the property and affairs of the debtor are subject to the control or supervision of a court. Insolvency Act, Part XIX, § 466(1). The Financial Services Commission designated the United States as a "relevant foreign country" by order effective August 23, 2005. *See* Financial Services Commission, List of Relevant Foreign Countries for the Purposes of Part XIX of the Insolvency Act, 2003, *available at* https://www.bvifsc.vg/library/legislation/list-relevant-foreign-countries-purposes-part-xix-insolvency-act-2003.

treatment of all persons claiming in the foreign proceeding," "the prevention of preferential or fraudulent dispositions of property subject to the foreign proceeding," and "comity." *Id.* Part XIX, § 468(1).[6]

II. The Second Circuit's Decision Creates Conflict with the Laws of the BVI.

In allowing the Trustee to assert direct claims against foreign investors in insolvent BVI funds under Section 550(a) of the Bankruptcy Code, the Second Circuit "merely assume[d]" the existence of a conflict between that provision and the BVI's insolvency laws. *See* Pet. App. 32a (*In re Picard*, 917 F.3d 85, 102 (CA2 2019)). Although the Court thus accepted that it would be "impossible to distribute the debtor's assets in a manner consistent with both rules," *id.* at 31a, it failed to credit the nature or extent of the conflict in this case. That approach gave short shrift to the BVI's compelling interests.

The crux of the conflict here is that the Trustee has made direct claims under U.S. law against foreign investors (the "BVI Investors") who are already subject to claims under BVI law by the liquidators of BVI funds (the "BVI Debtors"). *See* Pet. App. 75a–79a (*Securities Investor Prot. Corp.* v. *Bernard L. Madoff Inv. Sec. LLC*, No. 08-01789-SMB, 2016 WL 6900689 (Bankrtcy Ct. SDNY Nov. 22, 2016)) (the "Bankruptcy Court Decision") (discussing efforts of

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[6] Moreover, Section 470 preserves BVI courts' longstanding common-law authority to assist foreign representatives. *In re C (A Bankrupt)*, BVIHC 0080/2013, ¶¶ 22-23 (citing *Rubin*). As noted by the U.K. Supreme Court, such assistance has included "the vesting of English assets in a foreign office-holder, or the staying of local proceedings, or orders for examination in support of the foreign proceedings, or orders for the remittal of assets to a foreign liquidation." *Rubin* ¶ 31, *see also id.* ¶¶ 32-34.

the liquidators of Fairfield Sentry Ltd. and the Kingate Funds to recover from the BVI Investors). The Trustee itself was a creditor in the BVI insolvency proceedings before it settled with the BVI liquidators. But the Trustee has nonetheless asserted U.S. law claims in the BLMIS proceedings that are premised upon the same transfers by the BVI Debtors to the BVI Investors on which the BVI liquidators' claims are premised. Indeed, those are the transfers that, the Trustee argues, make the BVI Investors "subsequent transferees" under Section 550(a).

As discussed in the decisions of the District Court and Bankruptcy Court in this case, the Privy Council—comprised of Justices of the United Kingdom's Supreme Court—has determined that the BVI Investors' entitlement to the transfers is governed by BVI contract law, and that the BVI Investors' redemptions from the BVI Debtors were *proper* under that law. *Fairfield Sentry Ltd.* v. *Migani & Ors.* [2014] UKPC 9; *see also* Pet. App. 178a (*Securities Investor Prot. Corp.* v. *Bernard L. Madoff Inv. Sec. LLC*, 513 B.R. 222 (SDNY 2014)) (the "District Court Decision") (discussing result in *Migani*); *Id.* 75a, 82a (Bankruptcy Court Decision, discussing *Migani*). The BVI liquidators argued that the redemptions were invalid because the net asset values used by the BVI Debtors to determine the BVI Investors' redemption prices were inflated by Madoff's fraud, but the Privy Council rejected that argument, ruling that the redemptions were correctly calculated. Pet. App. 75a. Thus, the BVI transfers the Trustee seeks to avoid were legitimate redemptions under BVI contract law.

To the extent the BVI liquidators have claims under BVI avoidance law, they are pursuing them in

U.S. Chapter 15 proceedings. The BVI courts have declined to enjoin the liquidators from pursuing those BVI law claims in the United States. Instead, the BVI courts have trusted that the Bankruptcy Court provides a forum in which defendants can assert defenses including "issue estoppel, res judicata, abuse of process and/or other comparable doctrines" as appropriate—for example, if the liquidators seek to re-litigate issues decided by the Privy Council in *Migani*. *UBS AG New York and others* v. *Krys*, BVIHCM 2009/0136 (the "Supreme Court Redeemer Claim Decision") ¶ 89; *see also ABN AMRO Fund Services (Isle of Man) 24 Nominees Ltd.* v. *Krys*, BVIHCMAP 11/2016 (the "Court of Appeal Redeemer Claim Decision") ¶¶ 61-62. In so ruling, the BVI courts observed that, even if the Bankruptcy Court is not as well-positioned as the BVI courts to decide the liquidators' BVI law avoidance claims—which involve burdens and defenses different from U.S. avoidance claims, *see* Pet. Br. 33–34—in the interest of comity the decision as to whether and how those claims should be permitted to proceed should be left to the Bankruptcy Court in the first instance. Supreme Court Redeemer Claim Decision ¶¶ 94-98, 111-15, 119-24; Court of Appeal Redeemer Claim Decision ¶¶ 79-81. These decisions have recently been upheld by the Privy Council. *UBS AG Bew York and others* v. *Fairfield Sentry Ltd (In Liquidation) and others*, [2019] UKPC 20.

The Second Circuit's decision to permit the Trustee to recover directly from the BVI Investors under Section 550(a) ignores all of these BVI law proceedings. It short-circuits the BVI liquidators' channel of recovery—their attempt to avoid the transfers between the BVI Debtors and BVI Investors under BVI law—potentially enabling the Trustee to recover

from the BVI Investors even if the liquidators are unable to prove the elements of their claims. And the Trustee's recovery would flow not to the BVI Debtors' estates—as it would if the liquidators recover under BVI law—but directly to the Trustee. That is why Judges Rakoff and Bernstein were correct to characterize the Trustee's Section 550(a) claims as an effort to "reach around" BVI law. Pet. App. 81a (Bankruptcy Court Decision), 178a (District Court Decision).

III. The Application of U.S. Law Here Will Unreasonably Disrupt the Interests of the BVI.

A. Permitting the Trustee to Recover Directly from BVI Investors Will Disrupt Ongoing BVI Insolvency Proceedings.

The Second Circuit erred by discounting the sovereign interests of the BVI in its comity analysis. Despite acknowledging that "Congress [has] explicitly recognized the importance of . . . international comity in transnational insolvency situations" and that "U.S. courts should ordinarily decline to adjudicate creditor claims that are the subject of a foreign bankruptcy proceeding." Pet. App. 33a, the Second Circuit refused to defer to BVI law and proceedings here. The Court justified its refusal on the ground that the BVI Debtors' insolvency proceedings are not "parallel" to the BLMIS insolvency proceedings—*i.e.*, they involve different debtors—a circumstance that purportedly rendered the interests of the BVI "not compelling." *Id.* at 35a. Indeed, the only interest the Second Circuit ascribed to the BVI and other foreign jurisdictions overseeing feeder fund liquidations was an interest in "ensur[ing] that the feeder funds' creditors can recover as much property as possible,"

which the court dismissed as "not the comity concerns our precedent discusses." *Id.* at 36a–37a.

That narrow view profoundly understates the BVI's interests. The transfers the Second Circuit would permit the Trustee to undo are fundamentally BVI transactions: redemptions of shareholdings of corporations incorporated under BVI law and governed by BVI law, to which the BVI Investors justifiably expected that BVI law would apply. Pet. App. 82a, 178a. The BVI's interest in applying its own law to those transactions is not merely a single-minded concern to ensure maximum recoveries for creditors of the BVI Debtors, as the Second Circuit seems to have presumed. Instead, the BVI's interest is reflected in the policy choices of BVI law regarding when and whether debtors should be able recover transferred assets, the availability and priority of creditor claims against debtors, and "the appropriate compromise between equality of distribution and other important commercial interests," *Maxwell II*, 93 F.3d at 1052, including finality and certainty in redemption transactions like those at issue here, *see F. Hoffman-La Roche Ltd.*, 542 U.S. at 167–68 (application of U.S. antitrust law would be unreasonable where it would unjustifiably "bypass [other nations'] less generous remedial schemes, thereby upsetting a balance of competing considerations that [those] antitrust laws embody"). The Second Circuit's decision displaces all those legislative judgments, without acknowledging the BVI's compelling interests in these BVI-centered transactions—which are at least as significant as those of the United States—or according them any weight whatsoever.

Application of Section 550(a) will disrupt the insolvency proceedings of the BVI Debtors as surely—

and as significantly—as if "parallel" liquidation proceedings involving a single debtor were involved in both jurisdictions. Not only will previous rulings of BVI and UK courts be side-stepped, *see supra* Part II, but the relief sought by the Trustee will trigger a cascade of further claims. For example, if the Trustee recovers from the BVI Investors, those investors—whom the Trustee has successfully argued are not customers of BLMIS and therefore *have no claims* in the U.S. bankruptcy proceeding, *see In re Bernard L. Madoff Investment Securities LLC*, 708 F.3d 422 (CA2 2013)—will be forced to pursue claims against the BVI Debtors in the BVI liquidation proceedings.

Any conceivable outcome of such claims will undermine the BVI's sovereign interests. If, on the one hand, the BVI Investors recover nothing from the BVI Debtors in relation to their original investments, that inequitable result will manifestly conflict with not only the Insolvency Act's and Insolvency Rules' provisions for the equitable distribution of the BVI Debtors' assets, but also the BVI and UK courts' prior decisions. If, on the other hand, the BVI Investors are permitted to pursue new claims against the BVI Debtors, such a development will add billions of dollars in new claims against the estates, likely causing them to incur millions of dollars in professional fees while the proceedings are expanded in scope, and requiring those foreign proceedings to remain open until after the resolution of the U.S. proceedings. The fact that the bankruptcy proceedings at issue here are not "parallel" proceedings involving the same debtors and claimants does not mitigate comity concerns—as the Second Circuit assumed—but rather *amplifies* that risk that foreign sovereign interests will be disrupted.

The Second Circuit's decision elides another fundamental point. Both BVI and U.S. insolvency proceedings concern the gathering of a debtor's limited assets and then distributing them among valid claimants against the estate in a prescribed priority. Except in special circumstances, assets and claims are dealt with on a debtor-by-debtor basis, rather than being pooled or consolidated between debtors (unless the proponent of such consolidation makes the required showing). *See, e.g.*, *In re Adelphia Commc'n Corp.*, 544 F.3d 420, 426 n.4 (CA2 2008); *In re Pacific Lumber Co.*, 584 F.3d 229, 249 (CA5 2009); *In re Owens Corning*, 419 F.3d 195, 208–09 (CA3, 2005). Here, the Second Circuit concluded that "[t]he Bankruptcy Code gives us no reason to think Congress would have decided that trustees looking to recover property in domestic proceedings are 'out of luck' when trustees in foreign proceedings may be interested in recovering the same property." Pet. App. 37a. Yet that conclusion ignores the matching of assets and claims to debtors that is a common feature of both the U.S. and BVI insolvency regimes.

Consider the consequences here. The Trustee would be allowed (potentially) to recover directly from the BVI Investors irrespective of the BVI Debtors' claims, and without any reciprocal right of the BVI Investors to receive distributions from the U.S. estate. This mismatch between entities, assets and claims would disregard the prioritization and adjudication of claims specified by foreign law, create the potential for double recoveries against the BVI Investors, and require insolvency proceedings in multiple foreign jurisdictions to remain open indefinitely until the U.S. proceedings are resolved. The Bankruptcy Code provides no reason to think *that* was the result Congress intended, particularly given the debtor-by-

debtor approach to assets and claims inherent in the Code's design.

The Second Circuit also reasoned that Section 550(a)(2)'s provision for recovery against subsequent transferees suggests that "Congress wanted those claims resolved in the United States, rather than in piecemeal proceedings around the world." Pet. App. 37a. But Section 550(a) does not expressly address foreign subsequent transferees, much less the subsequent transferees of foreign debtors subject to their own insolvency proceedings. That the statute *authorizes* recovery against subsequent transferees says nothing as to whether it is reasonable to exercise that authority in the circumstances present here, particular given that "international comity is a policy that Congress expressly made part of the Bankruptcy Code, and a decision consistent with comity therefore furthers the Code's policy." *Maxwell II*, 93 F.3d at 1052.

B. Application of Section 550(a) Will Disrupt Future Foreign Insolvency Proceedings and Create Substantial Uncertainty in International Business

The unreasonableness of applying Section 550(a) here becomes all the more evident when one considers the impact that the Second Circuit's ruling will have beyond this case. Similar applications of Section 550(a) in relation to future foreign insolvency proceedings will undermine those proceedings and the international business arrangements that depend on a stable legal environment. Such uncertainty is contrary to the goals of comity as applied in bankruptcy. *See* 8 Norton Bankr. L. & Prac. 3d § 154:20. And

such uncertainty will have an outsized impact on jurisdictions, like the BVI, that are hubs of international commerce.

This case well illustrates the problem. It should be common ground that transferees such as the BVI Investors should not be held liable twice for the same transaction. *See, e.g.*, *Krys* v. *Klejna*, 658 Fed. Appx. 1, 4 (CA2 2016); *Rand* v. *Anaconda-Ericsson, Inc.*, 794 F.2d 843, 848 (CA2 1986). But if double liability is to be avoided, authorizing U.S. trustees to pursue direct claims in circumstances like these will incentivize a scramble between the trustees and foreign liquidators to commence proceedings and be the first to secure a judgment. It could also incentivize investors to initiate proceedings themselves or submit to proceedings in jurisdictions where they perceive that they will gain a tactical advantage. The availability of overlapping claims for the same transfers, governed by different laws and decided in different tribunals, will promote conflict, forum shopping, and unnecessary litigation, increasing costs to both U.S. and foreign estates and reducing distributions to creditors.

Such destructive races to the courthouse are precisely what insolvency laws, domestic and foreign, aim to avoid. Thus, the Privy Council rejected an effort by a Fairfield creditor to secure a favorable distribution of assets by obtaining an attachment order in the Netherlands. It noted the "broad[] public interest in the ability of a court exercising insolvency jurisdiction in the place of the company's incorporation to conduct an orderly winding up of its affairs on a world-wide basis," since "[t]he alternative is a free-for-all in which the distribution of assets depends on the adventitious location of assets and the race to

grab them is to the swiftest, and the best informed, best resourced or best lawyered." *Shell* ¶ 24]; *see also* 8 Norton Bankr. L. & Prac. 3d § 154:20 ("Granting comity to a foreign bankruptcy proceeding enables the assets of a debtor to be dispersed in an equitable, orderly and systematic manner, rather than in a haphazard, erratic or piecemeal fashion."); *Cunard S.S. Co. Ltd.* v. *Salen Reefer Services AB*, 773 F.2d 452, 459 (CA2 1985) ("The road to equity is not a race course for the swiftest." (quoting *Israel–British Bank (London) Ltd.* v. *Fed. Dep. Ins. Corp.*, 536 F.2d 509, 513 (CA2 1976))).

Applying Section 550(a) here also incentivizes duplicative actions whereby U.S. bankruptcy trustees who are creditors in foreign bankruptcy proceedings get two bites at the apple. First, trustees will attempt to obtain a recovery under the foreign jurisdiction's bankruptcy laws. Failing that (or in parallel with the foreign proceedings), the trustee will make a run at the money in U.S. courts. One would expect the reverse to happen as well, with foreign liquidators seeking to recover from the transferees of U.S. debtors by participating in U.S. bankruptcy proceedings and then, should that fail, trying to side-step their U.S. court-losses through foreign proceedings. Such a proliferation of avoidance actions will yield a shell game of protracted proceedings that deplete debtors' estates.

As discussed above, application of 550(a) also will disrupt the ability of foreign tribunals to apply their own insolvency laws and distribution regimes. Much of the Second Circuit's analysis turns on the proposition that the only persons significantly affected by Trustee's approach are the Trustee and the BVI Investors. *See, e.g.*, Pet. App. 33a–37a. But even

if that were correct in this case, (and, as discussed *supra* in Part III.A, it is not), it ignores that future proceedings may be even more complex than this one. Permitting a U.S. trustee to pursue a foreign debtor's foreign transferees will effectively give the trustee unfair priority vis-à-vis the foreign debtor's other creditors, allowing the trustee to recover 100% of the money for which it might otherwise have to wait in line in the foreign insolvency proceeding for a distribution pursuant to the priority prescribed under foreign law. *See, e.g.*, Insolvency Act § 207. And although the Trustee here has agreed to share a portion of any recovery with the Liquidator of Fairfield Sentry, such *ad hoc* arrangements should be unnecessary, and there is no guarantee such cooperation will occur in future cases. Given the diversity of international commercial relationships and transactions organized through the BVI, Section 550(a) should not be converted into a device for trustee-creditors in BVI liquidation proceedings to reach around those proceedings, even on a case-by-case basis. *See F. Hoffman-La Roche Ltd.*, 542 U.S. at 168–69 (rejecting the argument that comity permits extraterritorial application of U.S. antitrust law on a case-by-case basis, including because such a case-by-case inquiry would "threaten interference with a foreign nation's ability to maintain the integrity of its own antitrust system").

The Second Circuit's decision will inject uncertainty into future foreign bankruptcy proceedings in other respects. Bankruptcy proceedings, in the United States and abroad, are intended to fully resolve the distribution of assets of an estate between creditors in a fair and equitable manner. *See Shell* ¶ 24. Permitting the use of U.S. law regarding subsequent transfers to undo the resolution of the rights of

creditors to a foreign estate will upend foreign proceedings. Foreign tribunals will be required not only to distribute assets equitably in light of applicable foreign law, but also to consider whether U.S. courts might subsequently upset those equities by reaching around their judgments.

Businesspeople decide whether to incorporate in a particular jurisdiction based in part on their assessment of how its laws will affect the allocation of risk. One reason the BVI is an attractive jurisdiction in which to incorporate, as described above, is because its robust legal system includes comprehensive and well-established rules governing corporate insolvency. Hundreds of billions of dollars in outward foreign direct investment is mediated through the BVI. The effect of disrupting the BVI's insolvency regime—both for businesses already operating and for future businesses considering where to incorporate—could be severe.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

Amici are the following BVI restructuring professionals.[1]

Brian Child has practiced law for over 31 years, focusing on cross-border insolvency matters, fraud litigation, restructurings and reorganizations, shareholder disputes, and related commercial litigation. He is a barrister called to the bar in the Eastern Caribbean Supreme Court (British Virgin Islands) and a barrister and solicitor admitted to practice in the Supreme Court of British Columbia (non-practicing). He was an equity partner in two leading Canadian law firms prior to locating to the BVI in 2010, where he currently practices as Senior Counsel with Campbells.

Christopher Hill is a Chartered Accountant (UK) and, until he retired in June 2017, was a licensed insolvency practitioner in both the United Kingdom and the BVI. He has specialized in insolvency and corporate restructuring for over 30 years and was admitted to the partnership of Ernst & Young in 1991. Among other formal insolvency case appointments, he acted as Joint Administrator of Railtrack Plc (the former owner of the UK's national railway network) and of Nortel's Europe, Middle East, and Africa insolvency estate, including in parallel US and Canadian proceedings to determine the allocation of $7 billion in global Nortel assets. Mr. Hill was engaged by the BVI Financial Services Commission from 2003 to 2008 as the Territory's first Director of Insolvency Services

[1] Amici are listed in alphabetical order; their affiliations are provided for identification only.

and Official Receiver. As Director of Insolvency Services (the Commission's insolvency regulatory division), his role was to ensure a smooth introduction of the then-new Insolvency Act, 2003, and to develop and operate the mechanism for licensing and regulating insolvency practitioners in the Territory. Following his tenure with the Commission, he returned to Ernst & Young in London in 2008 and subsequently led the firm's insolvency and restructuring practice in the BVI from 2012 until he retired. Since retiring, Mr. Hill has continued to retain an interest in the wellbeing of the BVI insolvency and corporate restructuring sector.

Nathan Mills is a Licensed Insolvency Practitioner in the British Virgin Islands with over 25 years specializing in corporate restructuring. In his roles in Australia and the BVI, he has had the opportunity to control the financial functions of businesses of various sizes. He has significant experience leading complex insolvency engagements in numerous jurisdictions, including the BVI, United States, United Kingdom, Hong Kong, Singapore, Cayman Islands, and Eastern Caribbean countries. These engagements involved identifying, securing, and realizing assets, involvement in multi-faceted investigations and litigation, and claim adjudication. Mr. Mills is a member of the Chartered Accountants Australia & New Zealand, serves as the Treasurer of the Recovery and Insolvency Specialists Association BVI, and is a member of the American Bankruptcy Institute.

Andrew Willins is a Partner and the Local Practice Group Head of Appleby's Dispute Resolution team in the BVI. He was called to the Bar of England & Wales in July 2000 and to the Bar of the BVI in July 2008. He regularly appears before the Commercial

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