No. 19-277

IN THE

Supreme Court of the United States

HSBC HOLDINGS PLC, 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 THE CAYMAN ISLANDS GOVERNMENT AND THE GOVERNMENT OF THE VIRGIN ISLANDS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES Page

FOREIGN CASES

TABLE OF AUTHORITIES—continued

STATUTES

FOREIGN STATUTES

SCHOLARLY AUTHORITY

TABLE OF AUTHORITIES—continued

OTHER AUTHORITIES Page

INTEREST OF *AMICI CURIAE*[1]

Amici curiae are the governments of the Cayman Islands and the Virgin Islands (also known as the British Virgin Islands, or "BVI"). Both the Cayman Islands and BVI are internally self-governing overseas territories of the United Kingdom. Each has an interest in the ongoing and effective administration of its long-established, modern, and comprehensive insolvency and commercial law regimes that protect the interests of thousands of companies, parties that have invested more than a trillion dollars through those companies, and others who rely on the legal determinations issued in *amici*'s courts. The decision of the Second Circuit at issue here threatens various of *amici*'s interests associated with the ongoing administration of those legal systems and the protections they afford to *amici*'s citizens and to others.

As described below, several of the "feeder funds" to Madoff's investment company have been subject to or are undergoing insolvency proceedings in Cayman Islands or BVI courts, and the construction of 11 U.S.C. § 550(a)(2) adopted by the court below would empower respondent to recover from foreign investors having no direct connection to the United States. The result would be to impair or nullify the operation of Cayman Islands and BVI law by, in the trial court's terms, permitting respondent to "reach around" those legal systems.

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[1] Pursuant to Supreme Court Rule 37, *amici* state that no counsel for any party authored this brief in whole or in part, and that no entity or person other than *amici* and their counsel made any monetary contribution toward the preparation and submission of this brief. The parties received timely notice and consented to the filing of this brief.

The decision below thus directly implicates *amici*'s interests in the effective operation of their legal systems and in their determinations of the proper balance among competing property and commercial interests. The decision more broadly threatens the accepted and traditional coordination and accommodations among U.S. and foreign legal systems, as well as *amici*'s well-earned reputation for providing the legal certainty and clarity that have made both central components of the modern financial world.

SUMMARY OF ARGUMENT

The petition seeks review of a Second Circuit decision that applies U.S. law to transactions undertaken abroad between foreign parties. Those parties often are domiciled in or citizens of the Cayman Islands or BVI, or are subject to insolvency proceedings conducted in the Cayman Islands or BVI under their laws. Respondent has often participated in those proceedings, and he or others similarly situated would, under the Second Circuit's construction of 11 U.S.C. § 550(a)(2), be able to use U.S. law to achieve results deemed unwarranted under the laws of the Cayman Islands and BVI.

In contrast to the careful analysis of the trial and bankruptcy courts in this case, the Second Circuit erred in finding that its decision barely implicated the interests of foreign states including, specifically, *amici*. In fact, the decision threatens the operation and stability of *amici*'s insolvency regimes. It also undermines legitimate international investor expectations and poses risks to *amici*'s long-standing, robust, and carefully constructed systems of coordinating foreign and domestic law that have made *amici*'s legal systems central components of the

world's financial and investment processes. The decision creates precisely the "international friction" and "collision" of legal regimes that this Court's decisions have sought to avoid.

Moreover, the Second Circuit created this collision of insolvency systems through reasoning that more broadly threatens to impose U.S. law abroad in circumstances and with the adverse effects that are contrary to this Court's decisions. If left unreviewed, the decision would lead to ongoing errors in determining when U.S. law has effects abroad, how interference with foreign legal systems is relevant to determining the extraterritorial effect of U.S. law, and whether to afford deference to the trial court's fact-finding needed to assess the foreign effects of U.S. law.

Amici curiae respectfully request that the Court grant the petition.

ARGUMENT

I. THE SECOND CIRCUIT APPLIED U.S. LAW EXTRATERRITORIALLY IN A MANNER THAT SIGNIFICANTLY THREATENS *AMICI*'S LEGAL SYSTEMS AND IMPAIRS COORDINATION OF U.S. AND FOREIGN LEGAL SYSTEMS.

The Second Circuit's decision permitted respondent to recover assets from foreign investors, received as a result of purely foreign transactions, in circumstances where those investors and the transferor investment funds were subject to insolvency proceedings in the BVI or the Cayman Islands. As the trial court concluded, that construction of Section 550(a)(2) permitted respondent to "reach around" the legal systems of BVI and the Cayman Islands, and

disturbed and conflicted with determinations of *amici*'s legal systems. Pet. 178a.

Even as the Second Circuit "assume[d] … that these conflicts exist," *id.* 32a, it failed to give any weight to *amici*'s extensive, legitimate interests. The court found it not "equitable and orderly" to require respondent "to litigate different claims in different countries" because the court's comity analysis determined that *amici*'s *sole* interest was in "ensur[ing] that the feeder funds' creditors can recover as much property as possible." *Id.* 36a.

This approach, however, significantly understates *amici*'s interests and indeed the U.S. interests recognized by this Court in facilitating the proper coordination among U.S. and foreign legal systems. The Second Circuit's ultimate conclusion that its construction of Section 550(a)(2) did not involve the extraterritorial application of U.S. law ignores the foreign nature of the transactions at issue and ignores the displacement of *amici*'s legal systems and *amici*'s interests in the effective administration of those legal systems, especially in relation to their citizens, their companies, and others dependent and investing in reliance on their law. As described below, see *infra* pp. 10–17, the decision also created particular conflicts between U.S. law and ongoing proceedings in *amici*'s legal systems and ignored the careful balancing of foreign and domestic interests that *amici*'s legal processes facilitate. The Second Circuit's analysis simply neglected to consider the extensive foreign interests impaired by its decision, an analysis essential to "avoid[ing] the international discord that can result when U.S. law is applied to conduct in foreign countries." *RJR Nabisco, Inc.* v. *European Cmty.*, 136 S. Ct. 2090, 2100 (2016).

A. The Second Circuit's Decision Neglected the Foreign Nature of the Transactions at Issue and the Extensive Foreign Legal Systems It Displaced.

1. The foreign nature of the fund transfers subject to Section 550(a)(2) as construed by the Second Circuit, and of the affected insolvency proceedings, is undisputed. As even the court below recognized, petitioners are "foreign subsequent transferees that invested in foreign feeder funds" organized under the foreign law. Pet. 11a. They invested in and redeemed investments from foreign investment funds called "feeder funds," including those organized under the laws of the Cayman Islands and BVI. Those feeder funds in turn invested in U.S. securities. When the value of those securities collapsed, so too did many of the feeder funds, prompting liquidation proceedings in the Cayman Islands and BVI. See *infra* pp. 10–12.

The three largest feeder funds implicated in this case, accounting for about four billion dollars of transfers sought by the Trustee, include (1) Fairfield Sentry Limited, Fairfield Sigma, and Fairfield Lambda, BVI companies that entered into liquidation in the BVI; (2) Kingate Global Fund, Ltd. and Kingate Euro Fund, Ltd., foreign companies that also entered into liquidation in both Bermuda and the BVI; and (3) Harley International (Cayman) Limited, a Cayman Islands company that entered into liquidation in the Cayman Islands. Pet. 9–10.

Fairfield Sentry Ltd. is representative of the other feeder funds. This fund was essentially closed to American investors; the majority of its directors were European citizens; and its investment manager was based in Bermuda, its administrator in Amsterdam, its custodian in Dublin, and its placement agent in the Cayman Islands. Brief for *Amici Curiae* Brian Child et

al., at 19–20, *In re Picard*, No. 17-2992(L) (2d Cir. Apr. 25, 2018). Similarly, the Kingate funds, also closed to American investors, included primarily European investors with their administrator, custodian, and consultants all located in Bermuda or Europe. *Id.* Such an international structure is not atypical for companies incorporated in the BVI or the Cayman Islands, which are especially suited for cross-border transactions. *Id.*

2. As a result, the Second Circuit's decision empowered respondent to take actions and recover funds that brought U.S. law into direct conflict and interfered with some of the world's most sophisticated and significant insolvency and property law regimes. Both the Cayman Islands and BVI are international business and financial centers performing a role for the international financial and investment system akin to that performed by Delaware within the United States, as a preferred jurisdiction for incorporation. That role arises in large measure from the certainty, fairness, and transparency provided in commercial dispute resolution by the legal systems of the Cayman Islands and BVI, including especially the clear legal standards and processes associated with their resolution of insolvency disputes. These robust legal regimes have transformed these jurisdictions into "leading centre[s] specialising in the incorporation of vehicles for cross-border business and accompanying … legal services," such as insolvency proceedings.[2]

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[2] Melanie Debono *et al.*, Capital Econ., *Creating Value: The BVI's Global Contribution* 11 (June 2017) ("*Global Contribution*"), https://bviglobalimpact.com/media-centre/creating-value-the-bvis-global-contribution.

For example, the Cayman Islands is a highly respected global financial center with a predictable legal system based on English common law and a stable political environment. As a major supplier of cross-border services, the Cayman Islands is a leading jurisdiction for international investors, with the country ranked twelfth internationally in cross-border assets ($680.7 billion) and cross-border liabilities ($652.7 billion).[3] According to the United Nations, the Cayman Islands was the ninth largest recipient of foreign direct investment and the tenth largest source of outward investment flows.[4] Recognizing the Cayman Islands as a vital global hub, the Chief Justice of the Cayman Islands recently described a principle of its legal regime as "reassuring" the "commercial necessity for international co-operation between courts in matters of cross-border insolvency."[5] For these reasons among others, the Cayman Islands is the world's largest domicile for hedge funds (51.1 percent of total net asset value)[6] and eighth largest foreign holder of U.S. treasury securities ($218.4 billion).[7] As of December 2018, the Cayman Islands

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[3] Bank for Int'l Settlements, *Cross-Border Positions* (Q1 2019), https://stats.bis.org/statx/srs/table/a2?m=S&p=20191&c=&f=pdf.

[4] United Nations Conference on Trade & Dev., *Foreign Direct Investment* (2018) ("*UN Data*"), https://unctadstat.unctad.org/wds/TableViewer/tableView.aspx?ReportId=96740.

[5] Justice Anthony Smellie, *A Cayman Islands Perspective on Transborder Insolvencies and Bankruptcies: The Case for Judicial Co-Operation*, 2 Beijing L. Rev. 145, 147 (2011).

[6] U.S. Sec. & Exch. Comm'n, *Private Funds Statistics* 13 (Nov. 13, 2018), https://www.sec.gov/divisions/investment/private-funds-statistics/private-funds-statistics-2018-q1.pdf.

[7] U.S. Dep't of the Treasury, *Major Foreign Holders of Treasury Securities* (July 2019), https://ticdata.treasury.gov/Publish/mfh.txt.

held $2.34 trillion in assets and $3.77 trillion in liabilities.[8]

Similarly, incorporating in the BVI is economically attractive for many reasons, including the jurisdiction's highly regarded BVI Business Companies Act, 2004 and Insolvency Act, 2003, the availability of legal expertise grounded in English common law, effective and respected regulatory entities, and recourse to fair and sophisticated courts. As a result, hundreds of billions of dollars in outward foreign investment is regularly directed through the BVI. According to the United Nations, the BVI was the tenth largest recipient of foreign direct investment in 2018 and the world's seventh largest source of outward investment flows.[9] Assets held by BVI-incorporated companies alone are estimated at $1.5 trillion, and investments made by these companies are believed to support roughly 2.2 million jobs worldwide.[10]

The insolvency systems of the Cayman Islands and BVI provide central components contributing to *amici*'s role in the global finance and investment system. The BVI's laws governing insolvency, for example, are a modern and comprehensive code uniquely configured to serve the BVI's policies and processes as a global financial center. The BVI's Insolvency Act, 2003, largely modeled on United Kingdom's Insolvency Act 1986, provides "a mechanism for insolvent persons to enter into arrangements with their creditors … the penalization and redress of wrongdoing associated with insolvent

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[8] Cayman Is. Ministry of Fin. Servs., *The Cayman Islands Is a Major International Financial Centre* 2 (Sept. 23, 2019).

[9] *UN Data*, *supra* note 4.

[10] *Global Contribution*, *supra* note 2, at 13–14.

persons … the avoidance of certain transactions, cross border insolvency issues and other matters connected therewith." Insolvency Act, 2003, pmbl. The Act, much like the U.S. Bankruptcy Code, divests an insolvent corporation of the beneficial ownership of its assets, and subjects those assets to a statutory trust for distribution according to statutory rules. Compare Insolvency Act, 2003, § 175, with 11 U.S.C. § 363. And if a BVI-incorporated company is liquidated, the statutory trust "applies not just to assets located within the jurisdiction of the winding up court, but all assets world-wide." *Stichting Shell Pensioenfonds* v. *Krys* [2014] UKPC 41 [14].

The Cayman Islands likewise has well-established laws concerning property rights and robust insolvency proceedings. Insolvency proceedings are governed by the Companies Law (2018 Revision), the Company Winding Up Rules 2008, the Insolvency Practitioners' Regulations of 2008, and the Foreign Bankruptcy Proceedings (International Cooperation) Rules 2008, together with a substantial body of domestic case law. The Companies Law provides for three separate mechanisms to wind up insolvent companies incorporated in the Cayman Islands. See Companies Law, pt. V, § 90. The Grand Court has responsibility for overseeing insolvency proceedings. Within this court is a Financial Services Division composed of several judges specializing in complex, cross-border insolvency proceedings.

Decisions from the Grand Court are subject to appeal to the Court of Appeal and then to the Privy Council in London. Similarly, BVI court decisions under the BVI Insolvency Act, 2003 are subject to "a final right of appeal to the Judicial Committee of the Privy Council in London," which is particularly "well-

versed in dealing with international disputes."[11] The Privy Council is made up of the same judges (formerly Law Lords, now Justices of the Supreme Court) who make up the Supreme Court of the United Kingdom. BVI Insolvency Act matters are heard in the Commercial Division of the High Court of Justice before specialist judges with particular expertise in company, insolvency, and financial services laws.

B. The Second Circuit's Decision Brings U.S. Law into Conflict with the Operation of *Amici*'s Insolvency Systems.

In addition to generally displacing robust insolvency systems that are central components of the global financial system, the Second Circuit's decision brings U.S. law into more direct conflict with the insolvency systems of the Cayman Islands and BVI. It does so both by having U.S. law supersede the overlapping and competing determinations that the trial and bankruptcy courts below recognized, and by more specific difficulties created for the operation of those foreign systems.

Judge Rakoff emphasized how the Cayman Islands' and BVI's foreign insolvency regimes overlap with U.S. bankruptcy laws in this case, stating that "many of the feeder funds are currently involved in their own liquidation proceedings in their home countries." Pet. 178a. He underscored that foreign jurisdictions such as the Cayman Islands and BVI had their own legal processes addressing the transfers, property, and parties at issue, and that the Trustee was, unjustifiably, "seeking to use [domestic law] to reach around such foreign liquidations" and thus affecting both investors with no expectation that U.S. law would

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[11] *Global Contribution*, *supra* note 2, at 58.

apply and "foreign jurisdictions [that] have a greater interest in applying their own laws than does the United States." *Id.* 178a–179a.

Bankruptcy Judge Bernstein also noted the foreign state and foreign investor interests implicated in the overlapping insolvency proceedings. He concluded that, as between the BVI (and Bermuda) and the United States with regard to their particular overlapping and competing proceedings, the BVI has "a greater interest in regulating the activity that gave rise to the common claims asserted by the [U.S.] Trustee and [BVI] liquidators." Pet. 81a. This was so because the funds at issue were "formed under foreign law" and "their liquidation, including the marshaling of assets and the payment of claims, is governed by local insolvency law." *Id.* In addition, "shareholders … should have expected BVI law to govern," *id.* 82a, and "[t]he United States has no interest in regulating the relationship between the [feeder funds] and their investors," *id.* 38a. This result was consistent, the court indicated, with the direction of Congress, which "has explicitly recognized the central concept of comity under Chapter 15 of the Bankruptcy Code." *Id.* 70a.

Contrary to the Second Circuit's analysis, Pet. 36a, the overlapping and conflicting nature of the claims is also reflected in disputes arising when a bankruptcy trustee has filed claims under U.S. law against foreign investors who themselves are subject to claims under foreign insolvency proceedings by foreign liquidators (and whose claims against the insolvent funds, in turn, increase to the extent the trustee secured funds from the investor pursuant to Section 550(a)(2)).

Cases involving Fairfield Sentry are illustrative. There, the feeder fund Fairfield Sentry had invested 95 percent of its funds with Madoff Investment Securities and went into liquidation in the BVI shortly

after the disclosure of the Ponzi scheme. Pet. 74a. A flurry of lawsuits followed under BVI law, ultimately leading to a Privy Council decision. The Privy Council held that Fairfield Sentry's right to recover against investors for unwarranted distributions "was governed by BVI law." *Id.* 75a (addressing *Fairfield Sentry Ltd.* v. *Migani*, [2014] UKPC 9). This determination, Judge Rakoff concluded, is "in conflict with what the Trustee seeks to accomplish here" by seeking recovery of the same funds from the same investors. *Id.* 178a.

Similar proceedings are occurring in the Cayman Islands. In 2010, the Grand Court recognized respondent as the trustee of the Madoff estate in the Cayman Islands. *In re Bernard L. Madoff Inv. Sec. LLC*, [2010] (1) CILR 231, [6]. When respondent then issued discovery seeking information from official liquidators relevant to potential claims involving the feeder fund, the Grand Court dismissed the application, because it was "the function of [the feeder fund's] official liquidators, not the trustee, to investigate whether or not [the feeder fund] has any cause of action against its former professional service providers." Pet. 87a (internal quotation omitted). Respondent also commenced proceedings against the Primeo Fund in the Cayman Islands to recover preferential and fraudulent transfers. *Picard* v. *Primeo Fund*, [2014] (1) CILR 379. The Court of Appeal held that respondent could pursue claims against the fund, but only under the Cayman Islands' insolvency regime and not under U.S. bankruptcy law. *Id.* [48], [55].

The Second Circuit's decision permitting the respondent to recover directly from the foreign investors under Section 550(a)(2) "reach[es] around" these proceedings, as Judge Rakoff cautioned, Pet. 178a, interfering with the decisions of Cayman Island

and BVI tribunals and impairing the feeder fund liquidators' recoveries (while increasing investors' countervailing claims).

C. The Second Circuit's Decision Is Especially Unwarranted Because *Amici*'s Insolvency Systems Appropriately Accommodate the Interests of Foreign Claimants.

The Second Circuit's disregard of the need to facilitate coordination and cooperation between U.S. and foreign legal systems is especially unwarranted because both the Cayman Islands' and BVI's legal systems effectively operate in just that coordinated and accommodating manner. Those systems appropriately take U.S. interests into account, and indeed respondent has repeatedly pursued his interests and claims there.

For example, the Cayman Islands' and BVI's insolvency laws accommodate the international nature of modern insolvency proceedings and acknowledge the fundamental importance of comity. As the BVI's reviewing court stated while discussing "insolvency proceedings" with an "international dimension," the "modern approach … is that the jurisdiction with international competence is that of the country of the centre of main interests of the debtor." *Rubin* v. *Eurofinance SA* [2012] UKSC 46, [13]; see also *Galbraith* v. *Grimshaw* [1910] AC 508 (HL), 513 ("[C]onsistent with the comity of nations [is] a rule of international law that if the court finds that there is already pending a process of universal distribution of a bankrupt's effects it should not allow steps to be taken in its territory which would interfere.").

This ordinary liquidation process is coupled with concern for international cooperation and assistance in

cross-border insolvency cases. As the Chief Justice of the Cayman Islands observed, "[j]udicial international co-operation is a well-established tradition in Cayman Islands' jurisprudence."[12] In keeping with this tradition, Order 21 of The Companies Winding Up Rules 2008 describes "international protocols" for insolvency proceedings. This Order provides for the establishment of a protocol when either the company in liquidation is subjected to a concurrent bankruptcy proceeding under foreign law or the assets of a company in liquidation located in a foreign country are subjected to a bankruptcy proceeding or receivership of the law of that country. The Grand Court is accustomed to issuing orders to facilitate international coordination under Order 21. See, *e.g.*, *In re Trident Microsystems (Far East) Ltd.* [2012] (1) CILR 424 (the "terms of the cross-border insolvency protocol stipulation" with the Delaware court under Order 21 "would be strictly followed"); *In re Lancelot Inv'rs Fund Ltd.* [2009] CIRL 7 ("[T]he Grand Court of the Cayman Islands has, on many occasions, assisted American courts and … [we] would expect the [foreign] court to help us in like circumstances." (first and second alterations in original) (internal quotation omitted)).

In particular, the insolvency processes of both *amici* are designed to facilitate and permit the consideration of the types of fraud-related and other recovery claims that the respondent seeks to use Section 550(a)(2) to accomplish unilaterally. For example, Part XVII of the Companies Law confers statutory jurisdiction on the Grand Court of the Cayman Islands to hear applications for recognition and ancillary orders brought by the "foreign representative" who has been

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[12] Smellie, *supra* note 5, at 147.

appointed in a "foreign bankruptcy proceeding," in terms similar to 11 U.S.C. § 1515 of the Bankruptcy Code. A foreign representative, in turn, has been held to include a trustee appointed to a company under Chapters 7, 11, or 15 of the U.S. Bankruptcy Code. A foreign representative may apply to the Grand Court for relief ancillary to the foreign bankruptcy proceeding under § 241 of the Companies Law, including "ordering the turnover to [the trustee] of any property belonging to a debtor." Companies Law (2018 Revision), pt. XVII, § 241(1)(e).

Likewise, and much like 11 U.S.C. § 548(a)(1)(A), the BVI Insolvency Act, 2003 permits the avoidance or recovery of certain company transactions, including fraudulent trading. The Act imposes liability for business activities carried out "at any time before the commencement of the liquidation of the company" with the intent to defraud creditors or for any other fraudulent purpose. Insolvency Act, 2003, § 255(1). The Companies Act also specifies that a company in certain circumstances may recover a distribution to its members if the company did not meet the solvency test as a result of the distribution. BVI Business Companies Act, 2004, pt. III, div. 4, § 58.

Respondent has repeatedly pursued his interests under these regimes. See *supra* pp. 10–12. Failing in these courts, or concurrently, respondent and others similarly situated in the future will, under the Second Circuit's construction of Section 550(a)(2), be able to achieve the same desired result in U.S. courts under U.S. law.

II. THE SECOND CIRCUIT'S DECISION BROADLY THREATENS THE APPROPRIATE COORDINATION OF U.S. AND FOREIGN LEGAL SYSTEMS.

The Second Circuit's dismissive approach to foreign states' interests and to coordination among international legal systems is reflected in that court's adoption of general principles whose effects are not limited to the bankruptcy context. Instead, the Second Circuit adopted and applied several legal principles and approaches to construing U.S. law that broadly threaten foreign sovereign and investor interests and risk disrupting coordination between U.S. and foreign legal systems.

The Second Circuit's analysis in each respect fails to recognize that Congress seeks generally to avoid disruptions to international legal cooperation and coordination in international finance, trade, property, and cultural systems—just as other sovereign states seek to accommodate U.S. interests. These generally harmful effects arise from the Second Circuit's approach to each of the principal issues presented by this case: (i) when statutes need to be separately considered in determining when U.S. law has a foreign effect, (ii) how interference with foreign legal systems is relevant to the determination of a foreign effect of U.S. law, and (iii) whether to afford deference to a trial court's assessment of the foreign effects of U.S. law.

1. Just as foreign states strictly limit the application of their laws to events arising in the United States and appropriately regulated by U.S. law, so does Congress generally recognize that extraterritorial application of U.S. law can harm international cooperation and conventions related to international comity that lead foreign states to limit the foreign application of their laws. That is, Congress can be presumed to recognize

that it is generally in the interests *of the United States* not to have U.S. law apply extraterritorially.

This basic principle is well-recognized in U.S. law. This Court has repeatedly stated that "[i]t 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)). As a result, "[i]t is a longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." *Morrison* v. *Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 255 (internal quotation omitted). This presumption can be overcome only by "'the affirmative intention of the Congress clearly expressed' to give a statute extraterritorial effect." *Id.*

This principle "rests on the perception that Congress ordinarily legislates with respect to domestic, not foreign, matters," *id.*, and intends to "prevent[] unintended clashes between our laws and those of other nations which could result in international discord." *WesternGeco LLC* v. *ION Geophysical Corp.*, 138 S. Ct. 2129, 2136 (2018). These considerations apply with particular force in cases like this one because "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." *RJR Nabisco*, 136 S. Ct. at 2106.

These principles and the respect accorded to foreign legal regimes are also reflected in a broad range of particular doctrines of this Court. For example, U.S. courts often decide that U.S. law must give way in circumstances where foreign legal regimes and interests are especially strong. See, *e.g.*, *Société*

Nationale Industrielle Aérospatiale v. *U.S. Dist. Court for the S. Dist. of Iowa*, 482 U.S. 522 (1987). Courts must also employ their powers to give effect to foreign judgments and to foreign legal processes, see, *e.g.*, *Hilton* v. *Guyot*, 159 U.S. 113 (1895), and they may not recognize causes of action without any relevant nexus to the United States. See *Kiobel* v. *Royal Dutch Petroleum Co.*, 569 U.S. 108, 115 (2013). Congress has carefully delineated the need for a nexus to U.S. interests that must exist before a foreign sovereign can be subjected to suit or the execution of process in U.S. courts. See 28 U.S.C. §§ 1604–1608 (immunity from suit); *id.* §§ 1609–1611 (immunity from attachment and execution of process). Indeed, specifically in the bankruptcy context, Congress has designed the bankruptcy laws to accommodate legitimate foreign interests. See 11 U.S.C. §§ 1502–1532 (Chapter 15).

2. In each of the Second Circuit's principal determinations, the court sharply departed from these decisions of this Court and the basic principles they reflect. Each departure poses a significant risk to the cooperative international legal order that Congress presumably seeks to advance and which this Court has carefully protected in *Morrison* and *RJR Nabisco*, as well as other cases reflecting related doctrines. Together, these departures clearly warrant this Court's review and reversal.

a. *First*, contrary to the teachings of *Morrison* and *RJR Nabisco*, the court below failed to identify the relevant statute for purposes of determining whether this case presents a "domestic" application of U.S. law.

In examining the "focus" of relevant U.S. law, the court ignored how Section 550(a)(2) operates as a right of action "focused" on secondary transactions—which can occur domestically or abroad and in this case clearly occurred abroad. See *supra* I.A. Instead, the

court reasoned that the only relevant statute was 11 U.S.C. § 548(a)(1)(A), which regulates primary conduct and served as a predicate for Section 550(a)(2)'s operation.

This Court has previously rejected precisely this type of reasoning as posing a significant "risk of conflict between the American statute and a foreign law," *RJR Nabisco*, 136 S. Ct. at 2107 (quoting *Morrison*, 561 U.S. at 255), and indeed reversed the Second Circuit in this respect. In *RJR Nabisco*, the Second Circuit had reasoned that it could, as it has done again here, decline to analyze Congress's intent with regard to a remedial cause of action because that remedial statute did not define the relevant regulated conduct. *Id.* 2099. This Court rejected this approach. Instead, it directed that courts pay heightened and separate attention to the creation and operation of private rights of action, such as Section 550(a)(2), because "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 [the] foreign conduct." *Id.* 2106.

When applied to a foreign secondary transaction, Section 550(a)(2) operates in just this way, as a foreign-based remedy or injury claim, which implicates all the concerns giving rise to the *Morrison* presumption. Such statutory provisions create "a risk of conflict" between U.S. and foreign law, as here, and "where such a risk is evident, the need to enforce the presumption is at [the] apex." *Id.* 2107. *WesternGeco* provides no basis for the Second Circuit's choice to analyze Section 550(a)(2), because that case involved only a calculation of damages against a party that had clearly violated U.S. law. It created no claim against third parties acting abroad and no interference with

the operation of foreign legal systems or those parties reliant upon them.

b. *Second*, the Second Circuit clearly erred in determining that Section 550(a)(2) was not being applied extraterritorially by omitting, as irrelevant to its analysis, the various effects of Section 550(a)(2) on foreign entities and legal systems.

The Second Circuit took into consideration none of the effects of its decision on investor expectations and the operation of foreign legal processes and regulations identified at length above. See *supra* I.B–C. It was equally dismissive of the careful analysis of certain of these adverse effects undertaken by both Judge Rakoff and Bankruptcy Judge Bernstein. See *supra* I.B.

Judge Rakoff emphasized the foreign nature of the relevant transfers and transferees, noting that "a mere connection to a U.S. debtor, be it tangential or remote, is insufficient on its own to make every application of the Bankruptcy Code domestic." Pet. 166a. He similarly noted that respondent would be adversely affecting both investors with no expectation that U.S. law would apply and "foreign jurisdictions [that] have a greater interest in applying their own laws than does the United States." *Id.* 179a. Judge Bernstein also noted the foreign sovereign and investor interests implicated in the dispute and the predominance of BVI interests (as well as investors' expectation that BVI law would govern). *Id.* 81a-82a.

The Second Circuit's dismissive treatment of this analysis and of the effects of its decision on foreign sovereign and investor interests rested on a basic legal error. The court incorrectly relied upon *WesternGeco*, 138 S. Ct. 2129. It reasoned that the focus of Section 548(a)(1)(A) could be attributed to Section

550(a)(2) as a remedy for a violation of Section 548(a)(1)(A), by analogy to how this Court considered the "focus" of the substantive Patent Act provision, Section 271(f)(2), should inform the assessment of the related damages calculation provision. But *WesternGeco* concerned only the calculation of damages based on actions abroad, to be paid by a party that violated the Patent Act through U.S.-based conduct. *Id.* 2138. As the Court correctly noted, "[t]hose overseas [acts]" that informed the calculation of the U.S. damages award "were merely incidental to the infringement" and were unlike the "substantive element of a cause of action" at issue in *RJR Nabisco*. *Id.* In contrast, Section 550(a)(2) does not rely on foreign acts just as a basis for calculating damages. It is, instead, an authorization to claim directly against foreign actors for events occurring abroad. Even under the *WesternGeco* framework, those foreign actions provide the essential element for pursuing the cause of action under Section 550(a)(2) and should have led to the conclusion that Section 550(a)(2) was being applied abroad, not domestically.

By misapplying *WesternGeco* and *RJR Nabisco* so dramatically, the Second Circuit authorized a general approach that will directly regulate foreign conduct, support claims against foreign investors in purely foreign transactions, and cause precisely the "potential for international friction" that *RJR Nabisco* indicated would arise from permitting any private remedy to be directed abroad in this manner. *RJR Nabisco*, 136 S. Ct. at 2106.

c. *Third*, the Second Circuit failed to recognize that an appropriate analysis of international comity rests on a series of reasonableness determinations and factual determinations regarding how U.S. law may collide with foreign law and disturb investor

expectations. Had the court not failed in this manner, it would have deferred to the District Court's assessments, which found that international comity required that U.S. law not be applied.

This Court has recognized that, in making comity determinations, "[t]he exact line between reasonableness and unreasonableness … must be drawn by the trial court, based on its knowledge of the case and of the claims and interests of the parties and the governments whose statutes and policies they invoke." *Société Nationale*, 482 U.S. at 546. Very recently, the D.C. Circuit has held that a trial court's international comity assessment must be reviewed deferentially, for abuse of discretion, because "we generally review for abuse of discretion when the district court finds itself responsible for making such a fact-bound reasonableness call." *In re Sealed Case*, 932 F.3d 915, 933–34 (D.C. Cir. 2019); see *Remington Rand Corp.-Del.* v. *Bus. Sys. Inc.*, 830 F.2d 1260, 1266–67 (3d Cir. 1987) (similar analysis). This conclusion is surely right because only careful scrutiny of evidence can support an informed assessment and balancing of the relevant factors. This conclusion is illustrated in this case by the careful, fact-based analysis and weighing of relevant factors undertaken by the trial court and bankruptcy court. See Pet. 68a–83a, 176a–179a. Indeed, all courts of appeals that have addressed the issue—other than the Second Circuit—have recognized that they must defer to the trial court's record-based application of international comity principles. See *In re Sealed Case*, 932 F.3d at 934; *Mujica* v. *AirScan Inc.*, 771 F.3d 580, 589, 599 (9th Cir. 2014); *Perforaciones Exploración y Producción* v. *Marítimas Mexicanas, S.A. de C.V.*, 356 F. App'x 675, 680–81 (5th Cir. 2009) (per curiam); *AAR Int'l, Inc.* v. *Nimelias Enters. S.A.*, 250 F.3d 510, 517–18 (7th Cir.

2001) (same for adjudicative comity); *Remington Rand Corp.-Del.*, 830 F.2d at 1266–67.

Because the Second Circuit's error in this respect was not limited to insolvency cases, and because the Second Circuit reviews a disproportionate number of cases involving foreign sovereigns or the conflicts of U.S. and foreign law, its determination would—unless reviewed and corrected by this Court—have potentially wide-ranging effects on the coordination of U.S. and foreign laws.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for certiorari.

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