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 AND SECURITIES INVESTOR PROTECTION CORPORATION,
Respondents.

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

REPLY BRIEF FOR PETITIONERS

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The Trustee's opposition brief ("Opp.") further establishes that this case presents important issues addressed by numerous academics, practitioners, industry groups, and foreign governments. Instead of addressing the issues head-on, the Trustee tries to divert this Court's focus away from them. On the petition's showing that the Second Circuit's decision contravenes this Court's extraterritoriality precedents, the Trustee addresses the wrong Bankruptcy Code provision, ignoring the distinct provision at issue, which is unambiguously extraterritorially applied here. On the petition's showing that the decision below generates a circuit split on the standard of review for comity, the Trustee mischaracterizes the decision to obscure the conflict, when the basis for the bankruptcy court's ruling would clearly be subject to abuse of discretion review in any other circuit.

On extraterritoriality, this Court held in *WesternGeco* v. *ION Geophysical Corp.*, 138 S. Ct. 2129 (2018), that courts must determine the focus of the statute at issue as applied in the case before them. This Court likewise held in *RJR Nabisco, Inc.* v. *European Community*, 136 S. Ct. 2090 (2016), that courts must analyze the statutory provision creating the cause of action or otherwise regulating the defendant's conduct. Contrary to the Trustee's opposition, the statute being applied here is *not* Bankruptcy Code Section 548, which would authorize avoidance of *initial transfers* in domestic Madoff transactions. The Trustee asserted claims against Petitioners only under Section 550(a)(2), which provides an independent cause of action—with separate

defenses and its own limitations period—to recover proceeds of *subsequent transfers*, which here occurred abroad. The Trustee makes no effort to defend the application of Section 550(a)(2) to these wholly foreign transactions. By instead focusing erroneously on Section 548, he repeats the error in the Second Circuit's decision and underscores its conflict with *WesternGeco* and *RJR*.

On comity, the Trustee engages in several attempted misdirections to obscure the obvious split that now exists between the Second Circuit's *de novo* standard and the deferential standard followed by seven other circuits for international comity abstention decisions. He pretends this is not an abstention case, even though the bankruptcy court expressly abstained based on comity, and the Second Circuit reversed by holding the bankruptcy court has no discretion to do so. He also attempts to rewrite the Second Circuit's opinion, claiming that it engaged in a thorough statutory analysis, when both the Second Circuit's and the bankruptcy court's analyses were based on applying a reasonableness test to determine whether to exercise jurisdiction. He also claims that there is no real conflict among the circuits, but no other circuit conditions its standard of review on the Second Circuit's distinction between "prescriptive" and "adjudicative" comity.

The Trustee is wrong on both questions, and given the importance of these issues and the division among the circuits, this Court's intervention is necessary.

ARGUMENT

I. The Second Circuit's decision conflicts with this Court's decisions in *WesternGeco*, *RJR Nabisco*, and others

The Trustee claims the petition does not explain where the Second Circuit went wrong, Opp. 13, but it could not have been clearer: The Second Circuit's analysis "directly conflicted with *WesternGeco* by failing to concentrate on the 'conduct in this case,'" which involves wholly foreign subsequent transfers regulated by Section 550(a)(2), not domestic initial transfers regulated only by Section 548. Pet. 16–17 ("[T]he Second Circuit relied on Section 548. . . . However, Section 548 by itself created no rights whatsoever against the Petitioners"). The Second Circuit's analysis results in the facially absurd proposition that by suing foreign persons to recover transfers they received from other foreign persons in transactions governed by foreign law, the Trustee sought a "domestic" application of the Bankruptcy Code.

"[D]etermining how the statute has actually been applied is the whole point of the focus test." *WesternGeco*, *supra*, at 2137. The Trustee does not deny that his action invokes Section 550(a)(2) to recover the proceeds of foreign transactions between foreign entities from foreign defendants. Opp. 3. Nor does he dispute that none of the Petitioners participated in the initial transfers from Madoff Securities that were separately avoided under Section 548. Opp. 5–6.

These undisputed facts are dispositive under *WesternGeco*, pursuant to which a court must focus on how the Bankruptcy Code is being applied in this case, *i.e.*, to wholly foreign transactions. Like the Second Circuit, the Trustee emphasizes that the foreign transfers bear a purported connection to initial domestic transfers because a finding of voidability of the initial transfer under Section 548 is a necessary precondition to recovery under Section 550. This analysis, however, fails to take into account that Section 550, not Section 548, provides the rules governing the conduct at issue and the separate cause of action—the only one asserted here—that creates liability for subsequent transferees. The Second Circuit's approach also identifies no limiting principle to guide courts in their search for the "focus" of a statute. The question cannot be whether there is *any* U. S. interest underlying application of a U. S. statute to foreign conduct—if that were the question, every application would qualify as "domestic." *WesternGeco* instead directs courts to identify the statute's focus as applied in the case. As the Bankruptcy Code is applied here, the focus is on foreign subsequent transfers regulated by Section 550(a)(2).

For support, the Trustee invokes *In re French*, 440 F. 3d 145 (CA4 2006), a pre-*Morrison* case, Opp. 10–11, but fails to mention *French* involved an initial transfer avoided under Section 548, so the court did not even consider the reach of Section 550 to a foreign subsequent transferee. Moreover, the transfer there involved a foreign property deed—of which the actual physical transfer occurred in Maryland, from a Maryland mother to her U. S.-

domiciled children. *French*, 440 F. 3d, at 148. The Fourth Circuit relied on the fact that "the conduct constituting the constructive fraud occurred in the United States" between parties that had "long been located in the United States." *Id.*, at 150. If anything, *French* establishes a division between the circuits because if the Second Circuit had followed the Fourth Circuit, it would have concluded the applicable statute here was applied extraterritorially, not domestically, given the foreign nature of the parties and the foreign nature of the transfers.

The Securities Investor Protection Corporation ("SIPC") provides a third theory of how to apply *WesternGeco*—it claims the courts should have analyzed the Securities Investor Protection Act ("SIPA") to determine the focus. SIPC Opp. 7. The focus, SIPC claims, should be that this case arises from a "SIPA Liquidation Proceeding," and thus, anything a trustee does in a SIPA liquidation proceeding *must* be a domestic application of U. S. law.[1] See *id.*, at 10–13. Although Respondents cannot agree on how the focus test applies here, their approaches employ the type of analysis *Morrison* cautions against: going up the statutory chain to find

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[1] A SIPA trustee's rights and powers are limited to those available to a bankruptcy trustee. See 15 U. S. C. §§ 78fff(b), 78fff-1(a). That SIPA extends to a debtor's property (including customer property) outside the United States is irrelevant because fraudulently transferred property is not the debtor's property or customer property prior to recovery. See *Picard* v. *Fairfield Greenwich*, 762 F. 3d 199, 212–13 (CA2 2014).

whatever broad domestic policy goals suit their desire to apply U. S. law and declare that to be the object of the statute's solicitude for the operative section.[2] *Morrison* v. *Nat. Australia Bank Ltd.*, 561 U. S. 247, 266 (2010).

With respect to *RJR*, the Trustee misses the point. The Trustee notes that *RJR* hinged on the first step of the extraterritoriality analysis, rather than the second step, which is at issue here. Opp. 16. But that is irrelevant because *RJR* held that an extraterritoriality analysis, as a whole, must be applied independently to the statutory provision creating the cause of action at issue. 136 S. Ct., at 2106. Applying that same approach, this Court in *WesternGeco* analyzed the liability-creating cause of action in Patent Act Section 271, rather than just the damages provision of Patent Act Section 284. 138 S. Ct., at 2137–38.

Here, the liability-creating cause of action is Section 550(a)(2), *not* Section 548, which does not apply to Petitioners' conduct. Unlike Patent Act Section 284, Section 550(a)(2) is not merely a damages-authorizing provision. It governs separate, subsequent transfers, by different parties, and includes its

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[2] The Trustee's hypothetical that a fraudster could arrange a series of fraudulent transfers to place property outside the reach of U. S. law presents a policy judgment for Congress. Opp. 8. Moreover, no such facts are alleged here, and, regardless, a court would disregard conduit entities in a fraudulent scheme to treat the property's final resting place as the domestic debtor's initial transfer. See 5 Collier on Bankruptcy ¶ 550.02 (16th ed. rev. 2019).

own limitations period and a distinct bona fide purchaser defense. Pet. 20. That defense establishes that the *defendant's* mental state, not the initial transferor's, is the basis for liability. See 11 U. S. C. § 550(b). The Trustee does not even acknowledge—let alone dispute—any of these critical distinctions demonstrating that Section 550(a)(2) constitutes a cause of action independent of Section 548. Accordingly, the object of Section 548's solicitude is irrelevant. What matters is the focus of Section 550(a)(2), and, as applied here, that focus is on transactions between foreign parties on foreign soil. Under *WesternGeco* and *RJR*, the Trustee's application of Section 550(a)(2) to those foreign transactions is not a "domestic" application of U. S. law.

II. The Second Circuit's comity decision on standard of review conflicts with all other circuits to address the issue

To obscure a material circuit split, Respondents mischaracterize the bankruptcy court's holding, the Second Circuit's prescriptive comity analysis, and other appellate courts' analyses and standards of review for international comity abstention decisions. The Trustee's confused discussion highlights the inadequacy of the "adjudicative" and "prescriptive" dichotomy the Second Circuit used to alter its standard of review. It also highlights the need for this Court to both resolve the circuit split and provide

guidance on the appropriate standard for international comity dismissals.[3]

The Trustee wrongly claims this case does not involve international comity abstention decisions. Opp. 1, 17–18. The bankruptcy court held, however, that certain "subsequent transfer claims are dismissed on grounds of international comity," App. 44a, describing it as a "form of abstention." App. 68a–69a; see also *Mujica* v. *Airscan Inc.*, 771 F. 3d 580, 598 (CA9 2014) ("International comity is a doctrine of prudential abstention"). The bankruptcy court did not engage in statutory construction; it provided an extensive fact-based determination of whether it would be "unreasonable" to avoid subsequent transfers under U. S. law in U. S. courts when the transfers are subject to pending foreign insolvency proceedings and potential avoidance under foreign laws in jurisdictions with a greater interest in regulating the transfers. App. 68a–69a.

The Second Circuit also did not engage in statutory construction—it simply second-guessed the lower courts' analyses and focused on the wrong transfer. The Second Circuit purported to apply a reasonableness analysis but relied heavily on "facts" the bankruptcy court did not find, the record did not support, and which are objectively wrong. These

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[3] Even the Trustee's *amici* below admit that "international comity is surrounded by a surprising amount of confusion," Dodge, *International Comity in American Law*, 115 Colum. L. Rev. 2071, 2072 (2015), and "tests applied by the lower courts vary not just across circuits, but within them as well," Gardner, *Abstention at the Border*, 105 Va. L. Rev. 63, 65 (2019).

"facts" include that foreign investors knew their money went to the United States, the Trustee was not a creditor in foreign proceedings, and the Trustee was seeking recovery only from "net winners," *i.e.*, investors who withdrew more than they invested. App. 35a, 36a, 39a. It thereby exhibited the dangers of breaking with other circuits and applying *de novo* review to the bankruptcy court's carefully-considered decision based on review of a 26,000-page record. See generally App. 80a–88a; see also Pet. 8 (noting certain investors were several transfers removed from Madoff Securities); Pet. 12 (noting Trustee *was a creditor* in foreign proceedings); Pet. 10 (noting Trustee sought to recover from "net losers").[4]

The Second Circuit's only discussion of a statute was to assert that, by enacting Section 550(a)(2) and "allowing trustees to recover property from even remote subsequent transferees, Congress wanted these claims resolved in the United States." App. 37a. That assertion is incorrect. Nothing in Section 550(a)(2) addresses, much less compels, its application overseas. And "[a]n act of congress ought never be construed to violate the law of nations if any other possible construction remains." *Hartford Fire Ins. Co.* v. *California*, 509 U. S. 764, 814–15 (1993) (Scalia, J., dissenting).

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[4] The Second Circuit's incorrect review of the record underscores that a court would reach a different conclusion under an abuse of discretion standard. Thus, the Trustee's contention that this case is an inappropriate vehicle because he would prevail under a deferential standard of review is wrong.

No other appellate court follows the Second Circuit's distinction between "prescriptive" and "adjudicative" comity or its *de novo* standard of review. Adjudicative comity, or comity of courts, is an abstention doctrine of limited use that applies only when there are parallel proceedings involving the same parties and claims in a domestic and a foreign court. App. 73a. As set forth in the petition, there are numerous cases where courts considered whether it is unreasonable to apply U. S. law, including out of deference to foreign insolvency proceedings, which do not fit into that narrow adjudicative comity paradigm. Pet. 24, 29–30.

The Trustee unsuccessfully attempts to distinguish Petitioners' cited cases—which all review for abuse of discretion. For example, the Trustee purports to distinguish *In re Sealed Case*, 932 F. 3d 915, 933–34 (CADC 2019), where the D.C. Circuit conducted a reasonableness analysis, by claiming it was a "fact-bound" analysis involving a "discretionary determination . . . ." Opp. 22–23. However, that is exactly how the Trustee describes the present case. Opp. 34 (describing the Second Circuit decision as "fact-bound"). He also claims Petitioners' cited cases "bear the hallmarks of adjudicative comity" as "[e]ach asked whether to 'exercise or decline jurisdiction,'" examined whether a foreign jurisdiction was an "adequate alternative," and did not purport to "[construe] a federal statute." Opp. 21–22. This, however, generally describes the approach of the bankruptcy court, which declined jurisdiction because foreign liquidation proceedings provided more

appropriate rules of decision for the potential avoidance of the transfers.[5]

III. This case raises issues of exceptional importance

These issues of international law are critically important. The Trustee notes that academics have written on this issue but is wrong that there is no disagreement. See *supra* n. 3. While those actually subject to these laws disagree with the Trustee's scholars on the merits, they agree about the importance. Numerous practitioners and organizations have joined as *amici*, including the U. S. Chamber of Commerce, the Institute of International Bankers, and SIFMA—the industry association that includes the SIPC members that fund SIPC. All object to the decision below because it creates an unprecedented expansion of U. S. bankruptcy law that severely disrupts the expectations of parties to commercial transactions, resulting in a higher risk of financial market instability. See Brief for SIFMA et al. 13–15.

Additionally, the Second Circuit's decision compelled both the Cayman Islands and the BVI—the two governments most affected by the ruling—to join as *amici* to protect their sovereignty because "the decision threatens the operation and stability of

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[5] The Trustee cites antitrust decisions, Opp. 24, that review *de novo*, but those cases, at most, support that when prescriptive comity is a tool of statutory construction, the ultimate question of the meaning of the statute remains a question of law.

[their] insolvency regimes." Brief for Cayman Islands and BVI 2. The decision also created a clear conflict with their highest court, the U. K. Privy Council, which held that these transfers to foreign investors should be governed by local law.[6] *Id.*, at 11–13. Rather than direct the Trustee to participate in the foreign liquidation proceedings as he should have done, the Second Circuit's decision subjects investors to regulation under both foreign and U. S. law for the same exact transfers, even though the subsequent transferees cannot possibly return the same property to both the Trustee and the foreign liquidators. As *amici* note, this raises the odious specter of double liability. Brief for BVI Restructuring Professionals 13–14; Brief for Cayman Finance 5–6; Brief for RISA Bermuda 12.

The Trustee claims there is no need for comity because personal jurisdiction will rescue foreign entities, Opp. 33, but personal jurisdiction covers separate issues, and a court can have personal jurisdiction over a party and still rightly abstain to avoid international discord. New York will likely continue as the forum for these cases because courts have exercised jurisdiction over parties solely based on their participation in transactions involving U. S. dollars and New York bank accounts, even where, as here, the parties are foreign. See, *e.g.*, *Official Comm. of Unsecured Creditors of Arcapita* v. *Bahrain Islamic*

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[6] *Jetivia SA* v. *Bilta (UK) Ltd. (In Liquidation)*, [2015] UKSC 23, [212]–[218] (appeal taken from Eng.), which the Trustee uses to argue that U. K. law does not conflict with this decision, involves recovery from an initial transferee and is inapposite.

Bank, 549 B. R. 56, 68 (Bkrtcy. Ct. SDNY 2016). SIPC only responds that the U. S. may place its laws in dominion over foreign jurisdictions because U. S. law offers foreign parties the opportunity to subject themselves to U. S. discovery and defend themselves here. SIPC Opp. 16. That misses the point of comity—the United States should not encroach on foreign law in this way. The Second Circuit's decision allows U. S. bankruptcy trustees to unwind foreign financial transactions, regardless of whether foreign law governed those transactions or would otherwise permit the transactions to be avoided, no matter how far removed those transactions are from the U. S. debtor. This Court should not allow that to stand unreviewed.

CONCLUSION

This Court should grant the petition.

Respectfully submitted,

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