No. 19-277

In the
Supreme Court of the United States

HSBC HOLDINGS PLC, ET AL.,
Petitioners,

v.

IRVING H. PICARD, ET AL.,
Respondents.

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

SUPPLEMENTAL BRIEF FOR PETITIONERS

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Sections 548 and 550(a)(1) of the Bankruptcy Code empower a bankruptcy or SIPC trustee to avoid certain fraudulent transfers and recover from an *initial* transferee. In contrast, §550(a)(2) authorizes trustees to recover from *subsequent* transferees. Here, the trustee invokes §550(a)(2) to target wholly foreign subsequent transfers between foreign entities on foreign soil under foreign law. Nonetheless, the Second Circuit and now the Solicitor General have deemed these "domestic applications" of §550(a)(2) on the theory that §550(a)(2) works "in tandem" with §548, which has a domestic focus. That theory is flatly wrong, and dangerously so.

Not only does that theory authorize trustees, who are duty-bound to maximize the estate's value, to target wholly foreign transactions, but it also provides a roadmap for vitiating the presumption against extraterritoriality. No matter how clearly a provision focuses on conduct or transactions that are wholly extraterritorial, like the wholly foreign subsequent transfers here, it will always be possible to find a related, "in-tandem" provision with a more domestic focus. The Solicitor General's embrace of that position is troubling, but not unprecedented, as the federal government has frequently resisted this Court's robust presumption against extraterritoriality. The Solicitor General offers little role for the presumption or for comity principles and only cold comfort to foreign sovereigns with a far more direct interest in transactions that occurred on their soil under their law. The Court should grant the petition.

I. The Court Should Review The Second Circuit's Conclusion That Applying §550(a)(2) To Wholly Foreign Subsequent Transfers Constitutes A "Domestic Application" Of §550(a)(2).

A. Both steps of this Court's two-step extraterritoriality framework focus on the statutory provision at issue, here §550(a)(2). The first step asks "whether the statute gives a clear, affirmative indication that it applies extraterritorially." *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2101 (2016). The second asks "whether the case involves a domestic application of the statute," which requires "looking to the statute's 'focus'" and assessing whether "the conduct relevant to the statute's focus" occurred domestically or abroad. *Id.* "[D]etermining how the statute has actually been applied" in the particular case "is the whole point of the focus test." *WesternGeco LLC v. ION Geophysical Corp.*, 138 S. Ct. 2129, 2137 (2018).

Given these principles, this should have been an easy case: "the statute" that "has actually been applied" is §550(a)(2). All agree §550(a)(2) is not expressly extraterritorial under step one, and the "focus" of §550(a)(2) for step-two purposes is clearly on *subsequent* transfers, all of which here concededly were wholly foreign transactions among foreign parties on foreign soil and governed by foreign law. While §550(a)(1) authorizes an action against "an initial transferee," §550(a)(2) provides a separate cause of action authorizing recovery from "any immediate or mediate transferee" of the initial transferee, subject to a distinct good-faith defense

unavailable to an initial transferee. The trustee recognized that distinction here—he separately sought recovery from initial transferees under §550(a)(1), then filed this distinct action against alleged subsequent transferees under §550(a)(2). As the contrast between the two provisions makes clear, the "focus" of §550(a)(2) is on *subsequent* transfers. The whole point—which is to say, "focus"—of §550(a)(2), as distinct from §550(a)(1), is to give the trustee additional, albeit more circumscribed, authority to go after subsequent transferees, *i.e.*, transferees with no direct dealings with the debtor. Since the §550(a)(2) actions here target *wholly foreign* subsequent transfers, this case inescapably involves an extraterritorial application of §550(a)(2).

The government resists that straightforward conclusion by largely ignoring §550(a)(2) and shifting its attention to a different provision, §548(a)(1)(A). The government goes so far as to conduct a "focus" analysis of §548(a)(1)(A), *see* US.Br.11-12, in order to conclude that the "focus" of §550(a)(2) is "the debtor's fraudulent transfer," *i.e.*, the initial transfer. US.Br.9. But that just underscores the flaws in the government's approach. Although §550(a)(1) targets *initial* transfers, and the whole point of §550(a)(2) is to provide a distinct (and narrower) authority to reach *subsequent* transfers, the government would conclude that *both* provisions focus on the initial transfer simply because that is the focus of §548(a)(1)(A).

The government justifies this misdirection by invoking *WesternGeco*'s observation that "[i]f the statutory provision at issue works in tandem with other provisions, it must be assessed in concert with

those other provisions." 138 S. Ct. at 2137; *see* US.Br.10. Likening §550(a)(2) to the damages provision in *WesternGeco*, the government contends that §550(a)(2) "works in tandem with" §548(a)(1)(A), which thus is "properly considered" when "determining [§550(a)(2)'s] focus." US.Br.11. But unlike the remedial provision at issue in *WesternGeco*, §550(a)(2) provides a standalone cause of action subject to its own unique defenses. To the extent it works "in tandem" with any other provision, it is §550(b), which provides a defense that focuses on the subsequent transferees' knowledge and actions.

Indeed, §550(a)(2) is not remotely analogous to the damages provision in *WesternGeco*. Unlike §550(a)(2)'s standalone cause of action, that damages provision could apply only "in tandem" with a liability provision—and the relevant liability provision in *WesternGeco* made defendants liable for the "*domestic act* of supplying the components" from the United States. 138 S. Ct. at 2138 (emphasis added). Here, by contrast, the defendants committed no domestic acts whatsoever, let alone any domestic acts alleged to violate §548(a)(1)(A). The government attempts to preserve a link between §548(a)(1)(A) and §550(a)(2) by suggesting they are both predicated on the same property. But what matters for the focus test is "the conduct" the statute reaches. *RJR*, 136 S. Ct. at 2101. Even the government accepts that "§548 focuses not on the property itself, but on the fraud of transferring it," *i.e.,* the *initial* transfer. US.Br.11-12 (citing *In re French*, 440 F.3d 145, 150 (4th Cir. 2006)). The focus of §550(a)(2) likewise is not on the property of the domestic bankruptcy estate, but on the conduct of re-transferring it to a *subsequent* transferee (and the

subsequent transferee's mental state). Here, all that conduct occurred abroad, rendering the application of §550(a)(2) entirely extraterritorial.

Moreover, the undisputed fact that §550(a)(2) creates a separate cause of action with its own defenses not only distinguishes *WesternGeco*, but creates an insuperable *RJR* problem. *See* Pet.19-20. The government suggests that *RJR* addressed only the "first step" of the extraterritoriality analysis, whereas this case involves the second. US.Br.14. But as petitioners have explained, *RJR* held that the *entire* extraterritoriality analysis—*i.e.*, *both* steps—applied separately to §1964(c)'s cause of action, without regard to whether other provisions applied domestically or extraterritorially. *See* Reply.6; 136 S. Ct. at 2106-08. The government attempts to distinguish *RJR* on the ground that "the Court's conclusion was based on its careful analysis of the text of Section 1964(c), not on the existence of a separate cause of action." US.Br.14. But the Court focused so carefully on §1964(c)—and not on other provisions that expressly applied extraterritorially—precisely *because* §1964(c) creates a cause of action. *See* 136 S. Ct. at 2106. Section 550(a)(2) likewise creates a cause of action, and if the focus remains on §550(a)(2), not §548(a)(1)(A), then its application here (to exclusively foreign subsequent transfers) is as obviously extraterritorial as the effort in *RJR* to redress exclusively foreign injuries. The decision below is thus in direct conflict with *RJR*.

Moreover, given that the whole point of §550(a)(2) is to reach subsequent transfers, which here are wholly foreign, if the government's in-tandem-therefore-focus-elsewhere gambit yields a "domestic

application" here, then it can produce similar "domestic applications" anywhere. It is the rare statutory provision that cannot be said to "work in tandem with other provisions," and given the domestic focus of most U.S. laws, it will be easy to identify a related provision with a domestic focus. For example, §271(f) of the Patent Act worked "in tandem" with §284 and other provisions concerning AT&T's domestically-issued patent, but this Court still found an extraterritorial application of 271(f) in *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437 (2007). Similarly, *EEOC v. Aramco*, 499 U.S. 244 (1991), involved an impermissible extraterritorial application of Title VII's anti-discrimination provision, even though that provision worked "in tandem" with definitional provisions (such as "Employer" and "Commerce") that could be said to reach the U.S.-based employer and the domestically negotiated employment contract. The government's methodology would reduce the presumption against extraterritorial application to "a craven watchdog indeed," "retreat[ing] to its kennel whenever *some* domestic activity is involved." *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 266 (2010).

The government's endorsement of the Second Circuit's misguided theory is troubling, but hardly surprising. The government, like the Second Circuit, has repeatedly advocated for giving U.S. law a far greater extraterritorial reach than this Court has accepted. *See, e.g.*, *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 117-24 (2013) (rejecting government's position and categorically rejecting relief for extraterritorial violations); *Morrison*, 561 U.S. at 261-65 (chastising Second Circuit's disregard

of presumption against extraterritoriality and rejecting government's argument for extraterritorial application); *Aramco*, 499 U.S. at 257-58 (rejecting government's effort to apply Title VII abroad).

B. In addition to being profoundly wrong, the Second Circuit's decision is profoundly consequential, as the numerous *amici*, ranging from foreign sovereigns to SIFMA and the Chamber, attest. Remarkably, however, the government says next to nothing about importance or international friction. The government acknowledges that the sheer volume of wholly foreign subsequent transfers at issue in this case alone is enormous. US.Br.17. Nor can the government deny that the decision below has drawn protests from the Cayman Islands and the British Virgin Islands and virtually the entire insolvency bars of those jurisdictions and Bermuda. Yet in the face of sovereign pleas that the decision "threatens the operation and stability of [their] insolvency regimes," Cayman/BVI.Br.2, our government offers only the conclusory reply that this case does not "pose[] a significant risk of 'unintended clashes between our laws and those of other nations.'" US.Br.16. That *ipse dixit* is unaccompanied by any evidence that Congress intended such clashes or any concrete assurance that applying U.S. law to unwind wholly foreign transfers can be harmonized with other sovereigns' more direct interest in those transfers. It instead rests exclusively on the government's erroneous and unfounded argument that §550(a)(2) "regulates the initial domestic transfer, not the subsequent foreign transfers." US.Br.16. Never mind the protests of foreign sovereigns, the hundreds of foreign defendants sued, or the thousands of wholly foreign subsequent

transfers targeted; the application of §550(a)(2) here is domestic, we are assured.

In reality, the application is extraterritorial and the international discord is concrete: The foreign sovereigns' highest court, the U.K. Privy Council, has *already held* that many of these transfers are governed by their laws and cannot be clawed-back under those laws. *See* Cayman/BVI.Br.11-13; Pet.33-35. The government does not dispute this, but argues that the "estates" in the foreign liquidation proceedings are different from the U.S. estate. US.Br.16. That is true—but only magnifies the discord. As the government admits, the decision below allows the trustee here to "seek to recover property from petitioners based on" the *very same* "transfers" that the foreign liquidators have sought or will seek to recover under foreign law. US.Br.16. The result will be that subsequent transferees may be ordered to either return the same property to both the U.S. estate and the foreign estate, or return property to the U.S. estate despite having defenses under the foreign law that directly governs the foreign transaction. In either case, the dynamic creates international tension, and exposes the fallacy of the government's principal argument that the statute's application to wholly foreign subsequent transfers is meaningfully domestic.

Furthermore, the bankruptcy context makes the prospect for international friction particularly acute. Bankruptcy trustees have a well-established "duty to maximize the value of the estate." *CFTC v. Weintraub*, 471 U.S. 343, 352 (1985); *see, e.g.*, 11 U.S.C. §704. Thus, if bankruptcy trustees have the

power to unwind wholly foreign subsequent transfers—as the decision below allows in the hub of the Nation's financial markets and related bankruptcy filings—they also have the *duty* to go literally to the ends of the earth in an effort to maximize the value of the (domestic) estate. Thus, while ordinary "private plaintiffs often are unwilling to exercise the degree of self-restraint and consideration of foreign governmental sensibilities generally exercised by the U.S. Government," *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 171 (2004), bankruptcy trustees have an affirmative duty to ignore such considerations as they pursue their statutory obligation to maximize the value of the estate. The inevitable result will be a surge in clashes between U.S. and foreign law, just as bankruptcy filings here and abroad are poised to proliferate.

The government attempts to minimize the decision below as addressing a "narrow" issue that matters "only when an initial domestic transfer is avoided under Section 548(a)(1)(A) and recovery is sought from an entity that received the funds through a subsequent foreign transfer." US.Br.17. That is a vast understatement. Subsections 550(a)(1) and (2) apply to a broad spectrum of avoidable transfers, not just §548, *see* 11 U.S.C. §550—and as the scores of §550(a)(2) suits against hundreds of defendants to unwind thousands of subsequent transfers in this proceeding alone illustrate, a fraudulent transfer by a U.S. debtor can lead to an extraordinary number of §550(a)(2) actions in a single proceeding.

Finally, the government claims that this case is a poor vehicle because the underlying dispute "arises …

through the medium of SIPA." US.Br.17. But the government's own brief belies that claim. Not only does the government admit that the Second Circuit "did not invoke any SIPA provisions to inform its extraterritoriality analysis," US.Br.17, but the government's *own* merits argument, like the Second Circuit's analysis, turns entirely on bankruptcy law and does not mention any feature of SIPA. US.Br.8-16. That is no accident. "A SIPA trustee has no greater legal interest in unadjudicated fraudulent transfers than does a trustee in bankruptcy." *Picard v. Fairfield Greenwich Ltd.*, 762 F.3d 199, 212-13 (2d Cir. 2014); *see* 15 U.S.C. §§78fff-1(d)(3), 78fff-2(c)(3). Any argument to limit the extraterritoriality ruling below to the SIPA context would be a non-starter.

II. The Court Should Also Review The Comity Question To Resolve The Circuit Split.

The bankruptcy court evaluated a number of fact-based and case-specific considerations, and concluded that comity justified dismissal of claims involving subsequent transfers from foreign feeder funds subject to foreign liquidation proceedings. The Second Circuit reversed by labeling the issue a prescriptive-comity question and subjecting it to *de novo* review. That decision is contrary to this Court's precedent and breaks from the uniform practice of other circuits, each of which reviews comity decisions under an abuse of discretion standard. The government defends the decision and minimizes the circuit split by labeling prescriptive comity a "canon of statutory interpretation" that "raises a legal question of statutory construction" properly subject to *de novo* review. US.Br.18-19. That misdescribes the decisions

below and the nature of the comity analysis required by this Court's precedents.

First, the bankruptcy court did not view its comity analysis as an exercise in statutory construction. Instead, it analyzed comity based on the particular circumstances of the parties before it—specifically, that certain subsequent transferees were simultaneously subject to clawback proceedings in the U.S. and abroad—and used its discretion to abstain. Pet.App.68a-89a. Indeed, it addressed the statutory reach of §550(a)(2) separately. Pet.App.90a-152a. The Second Circuit likewise analyzed comity separately from statutory construction, and framed the comity question as "whether the application of U.S. law would be reasonable under the circumstances, comparing the interests of the United States and the relevant foreign state." Pet.App.30a-31a.

That is not a question of statutory construction subject to *de novo* review, or a question of statutory construction at all. Courts do not have license to alter the scope or meaning of clear statutes based on what they believe is "reasonable under the circumstances." *See, e.g.*, *Clark v. Martinez*, 543 U.S. 371 (2005). Comity principles, by contrast, allow them to avoid conflicts with foreign legal systems and litigants "case by case" to achieve "reasonable" results. *Empagran*, 542 U.S. at 168; *see* Restatement (Fourth) of Foreign Relations §402 n.13 (2018) (incorporating reasonableness factors into prescriptive-comity analysis). This Court's cases make clear both that "the exact line between reasonableness and unreasonableness" when weighing comity principles "must be drawn by the trial court, based on its

knowledge of the case," *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for S. Dist. of Iowa*, 482 U.S. 522, 546 (1987), and that "the Restatement's 'factors are relevant to *any* comity analysis,'" *In re Sealed Case*, 932 F.3d 915, 933-34 (D.C. Cir. 2019) (emphasis added) (quoting *Société Nationale*, 482 U.S. at 544 n.28). The proper review of that fact-dependent reasonableness inquiry does not depend on fine distinctions between prescriptive and adjudicative comity. In every circuit but the Second, that case-by-case, fact-specific reasonableness determination is reviewed for abuse of discretion, whether the court labels its analysis "prescriptive," "adjudicative," or just plain "comity." *See* Pet.23-27.

Second, the government suggests that this is a poor vehicle because the comity question focuses on the standard of appellate review. But that is the issue upon which the circuits are now divided in light of the decision below. Moreover, correcting the standard of review would be dispositive here, given the bankruptcy judge's fact-intensive and case-specific determinations that comity considerations precluded proceeding on certain claims. Finally, the government's *de novo* review justification only heightens the stakes. Reconceiving comity as a species of statutory construction—a sort of junior-varsity presumption against extraterritoriality—strengthens the case for *de novo* review only at the expense of transforming comity from a useful safety valve for unreasonable statutory applications into a largely duplicative "canon of construction." *See* US.Br.18. Treating the Second Circuit's decision as a broad statutory holding, not a case-specific comity ruling, would also mean that the Bankruptcy Code

categorically precludes consideration of ongoing foreign insolvency proceedings. The combination of the government's misguided approaches to the presumption against extraterritoriality and comity leaves no role for ameliorating international friction and underscores the importance of granting review on both questions.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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