No. 21-1006

IN THE

Supreme Court of the United States

MARC S. KIRSCHNER,

Petitioner,

v.

DENNIS J. FITZSIMONS, ET AL.,

Respondents.

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

AMICI CURIAE BRIEF OF NINE BANKRUPTCY TRUSTEES AND INDEPENDENT FIDUCIARIES IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are individuals who have served as bankruptcy trustees and independent fiduciaries in some of the nation's most significant bankruptcy cases, including the Commonwealth of Puerto Rico, Caesar's Entertainment, SemCrude, L.P., Quebecor World (USA), Inc., Dewey LeBouef LLP, and China Fishery Group. *Amici* are Jeffrey Beck, William Brandt, Gene Davis, Richard Davis, Jonathan Flaxer, Alan M. Jacobs, Thomas Jeremiassen, Nader Tavakoli, and Bettina Whyte.

Amici write in service of their interest in the proper application of section 548(a)(1)(A) of the Bankruptcy Code ("Section 548(a)(1)(A)")—the Bankruptcy Code's "intentional" or "actual" fraudulent transfer provision—which governs a debtor's ability to avoid transfers made with an intent to hinder, delay, or defraud creditors. The only fraudulent transfer provision that is exempted from the Bankruptcy Code's safe harbors, Section 548(a)(1)(A) targets the most offensive transfers by debtors in derogation of creditors' rights, and is

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1 Pursuant to Supreme Court Rule 37.6, counsel for *amici* state that no counsel for any party authored this brief in whole or in part, and no person or entity other than amici or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. The Appellate Liaison Committee for Respondents pursuant to the September 24, 2019, Case Management Order from the U.S. Court of Appeals for the Second Circuit (ECF No. 8, Case No. 19-3049 (2d Cir., Sept. 24, 2019)) was timely notified of *amici*'s intention to file this brief more than ten days prior to its filing and consented to the filing.

essential to bankruptcy trustees' ability to fulfill their fiduciary obligation to maximize recoveries for creditors.

The Second Circuit's decision threatens to effectively gut Section 548(a)(1)(A)'s utility in the context of corporate transfers. Faced with allegations that senior management of the Tribune Company created fraudulent projections and lied to a special committee of the Board of Directors to procure approval for a leveraged buyout that would cash out shareholders (including management), the Second Circuit borrowed a "control" test from an inapposite context to hold that management's fraudulent intent did not matter for an actual fraudulent transfer claim, because the special committee had final say over the transaction. And this was the case, the Second Circuit held, even though the Special Committee relied on fraudulent materials that had been prepared by management with the requisite intent.

The Second Circuit's decision ignores centuries of sound jurisprudence dictating that the intent required for an intentional fraudulent transfer claim should be determined by reference to common law, and runs directly counter to this Court's express holding that independent review by a final decisionmaker does not cleanse a corporation of liability where other corporate agents harbored the requisite intent and were a causal factor of the prohibited conduct. The decision also provides a roadmap for corporate managers to insulate future transfers from attack, by laundering a transfer through an unwitting board of directors or special committee. And there is a serious threat that the errors of the decision will spread widely, given the Second Circuit's outsized influence on corporate bankruptcies.

Unless reversed, the decision will significantly hamper bankruptcy trustees and other fiduciaries such as *amici*—who are often charged with pursuing debtor causes of action for the benefit of victimized creditors—in discharging their fiduciary duty to maximize creditor recoveries. The Second Circuit's broad interpretation of the Bankruptcy Code's safe harbors has already materially narrowed avoidance powers. The decision's additional limitation on a trustee's ability to claw back a transfer, even where approval for the transfer was procured by fraud in an effort to harm creditors, will all but eliminate an essential component of avoidance powers that has existed for centuries, leaving creditors at the mercy of scheming corporate agents seeking to benefit themselves at creditors' expense. Because this case presents a question of exceptional importance to bankruptcy law and creditors' rights, and because the Second Circuit's error in answering it will have immediate adverse practical consequences, *amici* respectfully urge the Court to grant certiorari.

SUMMARY OF ARGUMENT

The Bankruptcy Code vests bankruptcy trustees with federal avoidance powers based upon deeply rooted principles of equity that have existed at common law for centuries and guided courts in their interpretation of statutory proscriptions against fraudulent conveyances. In interpreting modern bankruptcy statutes, courts, including this Court, have consistently adhered to the notion that current interpretation should be guided by the statutes' common law origins. *See, e.g.*, *BFP v. Resol. Tr. Corp.*, 511 U.S. 531, 543 (1994) (noting the "ancient harmony [of] foreclosure law and fraudulent conveyance law" and citing *United States v. Texas*, 507 U.S. 529, 534 (1993) for the proposition that "statutes that invade common law must be read with presumption favoring retention of long-established principles absent evident statutory purpose to the contrary").

The Second Circuit disregarded this interpretive directive in reaching its decision below, holding that the question of whether a corporate agent's intent may be imputed to a principal under Section 548(a)(1)(A) is governed not by common law, but rather by a "control" test finding no support in the precedents of any court addressing this issue.

This Court's review is warranted for three reasons.

First, the Second Circuit's decision is wrong, and departs from this Court's prior reliance on common law for determining imputation of corporate intent. In reaching its decision, the Second Circuit ignored common law rules on corporate imputation, and flouted this Court's holding that independent review by a final decisionmaker does not cleanse corporate action that is otherwise taken with the requisite statutory intent.

Second, the Second Circuit's decision will have serious consequences for bankruptcy trustees' ability to recover fraudulent transfers involving corporate transactions. In recognition of the importance of protecting creditors from intentionally harmful conduct, Section 548(a)(1)(A) is exempted from the provisions of the Bankruptcy Code that otherwise shield certain corporate transactions from avoidance. But the decision below significantly narrows Section 548(a)(1)(A)'s creditor protections by creating a clear roadmap as to how the provision may be circumvented. Under the decision below, federal courts within the Second Circuit must deem transfers directed by management with an intent to defraud creditors immune from actual fraudulent transfer challenge if the transfer was blessed by an unwitting board of directors or special committee. Management will thus be incentivized to run every transaction through a board or special committee, and bankruptcy trustees will be powerless to recover assets even where, as here, management acted with the exact intent that Section 548(a)(1)(A) is designed to target.

Third, the ramifications of the Second Circuit's error will be swift and widespread. Every year, bankruptcy courts within the Second Circuit, and the Southern District of New York in particular, hear some of the biggest bankruptcy proceedings in the country, many of which involve alleged intentional fraudulent transfers. Additionally, as both this Court and outside commentators have noted, the Second Circuit is a standard bearer in the field of financial regulation, issuing opinions that often carry weight beyond its boundaries. In the absence of action by this Court, the risk is great that the decision's impact will be felt deeply within the Second Circuit, and the Second Circuit's error may metastasize quickly to other circuits.

ARGUMENT

I. THE DECISION BELOW IS WRONG AND DEPARTS FROM THIS COURT'S PRIOR RELIANCE ON FEDERAL COMMON LAW TO RESOLVE IMPUTATION QUESTIONS

The Second Circuit based its holding—that company management's intent to fraudulently convey is irrelevant when there is a separate independent final decisionmaker—on a theory plucked from an inapposite context. The Second Circuit relied on the First Circuit's decision in *In re Roco Corp.*, 701 F.2d 978 (1st Cir. 1983), which addressed a different issue, *i.e.* when a *third-party transferee's* intent may be imputed to a transferor, to establish a novel "control" test for determining when a *corporate agent's* intent may be imputed to a corporate transferor under Section 548(a)(1)(A). Pet. App. 17a.

In adopting this inapposite "control" test, the Second Circuit panel failed to acknowledge the common law history and origins of fraudulent conveyance statutes, and failed to adhere to this Court's teachings as to common law imputation of corporate actors' intent to a corporation, which is a core tenet of agency law. Had the court of appeals applied these principles, it could not have affirmed the district court.

A. Federal Common Law Governs the Imputation Of Intent Under Section 548(a)(1)(A)

American courts have long remarked on the importance of the common law as a gap filler for fraudulent conveyance statutes. In *Coder v. Arts*, this Court, interpreting section 67(e) of the Bankruptcy Act of 1898 (a predecessor to Section 548(a)(1)(A)), stated that Congress, by "using the terms 'to hinder, delay, or defraud creditors,' intended to adopt them in their well-known meaning as being aimed at conveyances intended to defraud. … [I]n 67e, transfers fraudulent under the well-recognized principles of the common law and the statute of Elizabeth are invalidated." 213 U.S. 223, 242 (1909). *See also In re Bloch*, 142 F. 674, 676-77 (2d Cir. 1905) ("We think Congress must be presumed to have intended by the introduction of section 67e to require a surrender only of such transfers as would have been fraudulent at common law.").

This Court has made similar remarks about section 548 of the current Bankruptcy Code, noting that "absent clear[] textual guidance" from Congress, the Court will not interpret a federal statute of such ancient origin as departing from "pre-existing," common law practice. *BFP*, 511 U.S. at 543. This guidance applies with great force to the statute's "intent to hinder, delay, or defraud creditors" language, which has been part of the common law for centuries. *See* Douglas G. Baird & Thomas H. Jackson, *Fraudulent Conveyance Law and Its Proper Domain*, 38 VAND. L. REV. 829, 829 (1985) (noting that the basic prohibition against transfers made with the intent to "hinder, delay, or defraud" creditors "has survived for over four centuries").

Further, Section 548(a)(1)(A)'s common law history dictates that it be applied in a manner that prevents debtors from crafting artificial constructs designed to wrongfully evade creditors. Indeed, the Statute of 13 Elizabeth—the first modern fraudulent conveyance statute—was enacted against a backdrop of financial mischief in which debtors exploited statutory safe havens immune from enforcement of the King's writ. These debtors would convey their property to friends or family for a nominal sum, and then take sanctuary in the designated safe havens until the stymied creditors inevitably gave up on their claim, at which point the transferor-debtors would reclaim the assets. *See* GARRARD GLENN, FRAUDULENT CONVEYANCES AND PREFERENCES 84-85 (rev. ed. 1940). The Statute of 13 Elizabeth sought to remedy this misconduct, by permitting creditors to "avoid[] fraudulent … Conveyaunces" made for the "Purpose and Intent to delaye[,] hynder[,] or defraude Creditors." *See* 13 Eliz., ch. 5 (1570). Additionally, in response to the difficulty of proving the actual intent required by the statute, English courts "developed the doctrine of 'badges of fraud,'" which is applied by modern courts today, and creates a rebuttable presumption of actual fraudulent intent upon proof of certain objective facts indicative of an intent to harm creditors. *BFP*, 511 U.S. at 541. The history thus instructs that Section 548(a)(1)(A) be applied not formulaically, but in a manner designed to target deceptive conduct aimed at evading detection.

B. Under Federal Common Law, An Agent's Intent Is Imputed To A Principal If The Agent Is A Causal Factor Of The Prohibited Act

This Court's imputation analysis in *Staub v. Proctor Hospital*, 562 U.S. 411 (2011) is consistent with the historical guidance regarding interpretation of fraudulent conveyance statutes, and applies with equal force to Section 548(a)(1)(A) notwithstanding that it addresses a different type of statute. In *Staub*, this Court held expressly that in the context of federal intentional tort statutes, common law dictates that a corporation acts with the requisite intent if one of its agents harbors that intent and the agent is a causal factor of the prohibited act, even if the ultimate corporate decisionmaker lacks the requisite intent.[2] *Staub* considered whether a hospital violated a statute prohibiting adverse employment actions for which membership in a uniformed service was a "motivating factor." The employee's supervisor acted with the requisite intent, but the ultimate decisionmaker did not. *Id.* at 415-16.

In analyzing the question, the Court noted that "we start from the premise that when Congress creates a federal tort it adopts the background of general tort law," and that "general principles of law,

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[2] Courts have endorsed this approach in other contexts as well, holding, for instance, that management's knowledge of the falsity of a statement may be imputed to a corporation for purposes of establishing *scienter*. *See, e.g.*, *In re ChinaCast Educ. Corp. Sec. Litig.*, 809 F.3d 471, 473 (9th Cir. 2015).

agency law, … form the background against which federal tort laws are enacted." *Id.* at 417, 418. With these interpretive tools in mind, the Court held that the supervisor's intent was sufficient to hold the hospital liable. The Court elaborated that when an independent investigation by an ultimate decisionmaker "relies on facts provided by the biased supervisor … then the employer (either directly or through the ultimate decisionmaker) will have effectively delegated the factfinding portion of the investigation to the biased supervisor." *Id.* at 421.

The Court also observed that any other rule

> would have the improbable consequence that if an employer isolates a personnel official from an employee's supervisors, vests the decision to take adverse employment actions in that official, and asks that official to review the employee's personnel file before taking the adverse action, then the employer will be effectively shielded from discriminatory acts and recommendations of supervisors that were *designed and intended* to produce the adverse action.

Id. at 420 (emphasis in the original).

The decision below, which disregards management's intent entirely and looks *solely* to the intent of a special committee that unwittingly relied on documents provided by management in approving the challenged transfer, expressly rejected *Staub's* reasoning. The Second Circuit panel stated that they were "not persuaded that [*Staub*] carries much weight in a case requiring 'actual intent' under the Bankruptcy Code" because *Staub* "applied a 'motivating factor' standard." Pet. App. 17a. But this is a distinction without a difference. A transfer for which an intent to "hinder, delay, or defraud creditors" is a motivating factor is a transfer made with intent to hinder, delay, or defraud creditors. *See, e.g., Sher v. JPMorgan Chase Funding (In re TMST, Inc.)*, 610 BR 807, 828 (Bankr. D. Md. 2019) ("[A]n admitted intention to delay creditors is not immunized by the transferor's conviction that it is for the creditors' good."); *In re Rowe*, 234 F. Supp. 114, 116 (E.D.N.Y. 1964) ("Since there was a transfer of an interest in property within twelve months of bankruptcy, a discharge must be denied if the bankrupt *was motivated* by an 'intent to hinder, delay, or defraud his creditors.'") (emphasis added).

Adding insult to injury, in lieu of the standard established in *Staub*, the Second Circuit panel relied on two cases addressing the inapposite question of when a *third-party transferee's* intent may be imputed to a *transferor*, as opposed to the question of when a *corporate agent's* intent may be imputed to her *principal corporation*. *See* Pet App. 16a-17a. Then, observing that those decisions employed a "control" test, the Second Circuit held that "a company's intent may be established only through the 'actual intent' of the individuals 'in a position to control the disposition of [the transferor's] property.'" Pet. App. 17a. The Second Circuit held further that because Delaware corporate law required the Special Committee's approval for the leveraged buyout, *only* the Special Committee possessed such "control," and *only* the Special Committee's intent was relevant. Pet. App. 18a. Management's fraudulent intent could be disregarded, the panel held, notwithstanding that the Special Committee's review of the leveraged buyout was based on fraudulent projections that management prepared and flawed solvency and viability opinions that management fraudulently procured in order to secure the Special Committee's approval.

The court of appeals' equation of "control" with final approval ignores the practical reality—acknowledged by *Staub*—that corporate actions may be caused by more than just the final decisionmaker. *Staub*, 562 U.S. at 420-21. *Staub* teaches that where, as here, a final decisionmaker's review is predicated on information prepared by corporate agents harboring the requisite intent, the final decisionmaker's review cannot cleanse the corporation of that intent. The Second Circuit's decision to the contrary is in error. Moreover, the implications of that error are particularly dangerous because they reject fundamental and entrenched principles of agency law. Review by this Court is thus essential.

II. THE DECISION BELOW WILL HAVE ADVERSE PRACTICAL CONSEQUENCES THAT DEFEAT THE PURPOSE OF SECTION 548(a)(1)(A)

Section 548(a)(1)(A) provides bankruptcy trustees such as the *amici* with an essential tool to fulfill their fiduciary duty to maximize creditor recoveries. Indeed, Section 548(a)(1)(A) governs the Code's only avoidance power that is exempted from the safe harbors that otherwise apply to avoidable transfers. *See* 11 U.S.C. §§ 546(e), (f), (g). More specifically, sections 546(e), (f), and (g) of the Bankruptcy Code exempt certain settlement payments, and transfers made in connection with a securities contract, repurchase agreement, or swap agreement, from challenge under all of the Bankruptcy Code's fraudulent transfer provisions *except* Section 548(a)(1)(A). *Id.* Congress enacted the safe harbors to maintain stability in the financial markets by ensuring finality and certainty for certain settled transactions. *See Grede v. FCStone, LLC*, 746 F.3d 244, 252 (7th Cir. 2014) (§ 546(e)); *Matter of Bevill, Bresler & Schulman Asset Mgmt. Corp.*, 896 F.2d 54, 61 (3d Cir. 1990) (§ 546(f)); *Whyte v. Barclays Bank PLC*, 494 B.R. 196, 200 (S.D.N.Y. 2013), aff'd, 644 F. App'x 60 (2d Cir. 2016) ((§ 546(g)). In excepting actual fraudulent transfers from the safe harbors' ambit, Congress sought to reconcile the laudable goal of financial stability with the overarching need to protect creditors from intentional harm.

The Second Circuit and other courts apply the section 546 safe harbors expansively. *See In re Bernard L. Madoff Inv. Sec. LLC*, 773 F.3d 411, 418 (2d Cir. 2014); *Peterson v. Somers Dublin Ltd.*, 729 F.3d 741, 750 (7th Cir. 2013). Indeed, in other decisions involving Tribune, the Second Circuit (i) held that section 546(e) of the Bankruptcy Code "preempts fraudulent conveyance actions brought by creditors whose claims are … subject to Section 546(e)," (ii) questioned whether creditors may regain the right to pursue fraudulent transfer claims once a bankruptcy trustee is vested with the power to bring them, and (iii) granted a motion to dismiss on the basis of the safe harbor because "Tribune retained Computershare to act as 'Depositary' in connection with the LBO tender offer." *In re Tribune Fraudulent Conveyance Litigation*, 946 F.3d 66, 74, 78, 85-86 (2d Cir. 2019); *In re Tribune Fraudulent Conveyance Litigation*, 818 F.3d 98, 118, 123-34 (2d Cir. 2016). The impact of these decisions is to significantly restrict the universe of transfers that may be challenged under the Bankruptcy Code's and state law avoidance provisions, leaving only claims for intentional fraudulent transfer under Section 548(a)(1)(A) unaffected.

But the decision below significantly stymies trustees' ability to pursue claims under Section 548(a)(1)(A). As this Court held in *Staub*, a rule that enables corporations to cleanse their misdeeds by procuring the review of an isolated and unwitting final decisionmaker has the "improbable consequence" of "effectively shield[ing]" the corporation from liability for its misconduct. *Staub*, 562 U.S. at 420. The Second Circuit's decision will undoubtedly have this effect, as it provides a clear roadmap for corporate debtors to insulate their transfers from challenge by laundering a transfer through board or special committee review. In essence, the Second Circuit has created a new "safe haven" for corporate debtors.

This is especially alarming given that transactions that pose the greatest risk to creditors—such as the leveraged buyout here, where Tribune incurred billions of dollars of debt to cash out its shareholders and left its creditors holding the bag—require board approval. *See, e.g.,* DEL. CODE ANN. tit. 8 §§ 251 (requiring board approval for a merger); 170 (requiring board approval for shareholder dividends). Thus, management's intent in consummating such transfers, even if manifestly deceptive and fraudulent, will be disregarded under the Second Circuit's misguided ultimate "control test." And of course, management will undoubtedly seek board approval even for transactions that do not otherwise require it, as a means of insulating the transaction from intentional fraudulent transfer attack. Further, many states expressly permit directors to rely on information provided by corporate officers when rendering such approval. *See, e.g.,* DEL. CODE ANN. tit. 8 § 141(e). Under the Second Circuit's decision, a transfer will be immune from intentional fraudulent transfer attack even where directors approve it on the basis of fraudulent information provided by management. Indeed, this is the exact fact pattern that the Second Circuit's decision sanctions.

The negative repercussions of the Second Circuit's decision are exacerbated by the proliferation of special committees in related-party transactions. These special committees often play a "critical role" in conflict transactions in which shareholders have a vested interest, where the risk of fraudulent transfers designed to benefit shareholders at creditors' expense is heightened. *See* Andrew Brownstein et al., *Use of Special Committees in Conflict Transactions*, Harv. L. Sch. Forum on Corp. Governance (Sept. 23, 2019), https://corpgov.law.harvard.edu/2019/09/23/use-of-special-committees-in-conflict-transactions/; Scott Simpson & Katherine Brody, *The Evolving Role of Special Committees in M&A Transactions: Seeking Business Judgment Rule Protection in the Context of Controlling Shareholder Transactions and Other*

Corporate Transactions Involving Conflicts of Interest, 69 BUS. L. 1117, 1118 (2014). While there is nothing nefarious about a special committee itself, when considered in light of the Second Circuit's ruling, the practice is rife for misconduct.

III. IF LEFT UNDISTURBED, THE DECISION BELOW WILL HAVE WIDESPREAD NEGATIVE CONSEQUENCES FOR CREDITORS

Courts in the Second Circuit preside over some of the most consequential bankruptcy cases in the country, and often serve as a harbinger for courts in other circuits. Of the ten largest bankruptcies in U.S. history, seven have been filed in the Southern District of New York. These include bankruptcies that have become household names, including the 2008 collapse of Lehman Brothers, the 2002 downfall of Worldcom, and the 2001 unraveling of Enron.[3] Many of these companies have become synonymous with the type of corporate malfeasance alleged in the instance case. Further, since 1991, roughly twenty percent of all bankruptcies involving public companies with more than $100 million in assets

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[3] The other four bankruptcies are: General Motors in 2009, CIT group in 2009, MF Global in 2011 and Chrysler in 2009. The only three that did not occur in the Southern District were Washington Mutual (D. Del.); PG&E (N.D. Cal.), and Conseco (N.D. Ill.). *See Largest Bankruptcies in the United States as of June 2019*, Statista (last accessed Jan. 31, 2022), https://www.statista.com/statistics/1096794/largest-bankruptcies-usa-by-assets/#.

have been filed within the Second Circuit.[4] And given New York's centrality to large financial transactions, fraudulent transfer actions are often litigated within the Second Circuit even when the relevant bankruptcy case was filed elsewhere, as was the case here.

Further, information on historical bankruptcy filings does not encapsulate the full potential impact of the Second Circuit's decision. Large corporate debtors already tend to file their cases in a handful of jurisdictions where the court or judges on the court have a reputation for being "debtor-friendly." *See* Alex Wolf, *Purdue Pharma Bankruptcy Spotlights Venue Shopping Battle*, BLOOMBERG LAW (Aug. 2, 2021), https://news.bloomberglaw.com/us-law-week/purdue-pharma-bankruptcy-spotlights-court-venue-shopping-battle. The Second Circuit's decision will only worsen this problem, as controlling shareholders who have benefitted from corporate transfers that predate a bankruptcy filing seek haven in bankruptcy courts in the Second Circuit.

The impact of the decision is also likely to be felt in courts outside the Second Circuit. Other circuits often look to the Second Circuit for guidance in matters of financial regulation and bankruptcy. Many other circuits, and even this Court, will "often mention by name the particular judges that decided a given Second Circuit precedent to justify their reliance on that decision." Karen Patton Seymour,

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4 *See* http://lopucki.law.ucla.edu/index.htm. This data can be accessed by using the "Run-a-Study" feature and running a "One-variable study" using the "Venue (by district)" filter.

Securities and Financial Regulation in the Second Circuit, 85 FORDHAM L. REV. 225, 226 (2016). Similarly, the Southern District of New York is viewed as "one of the most sought-after bankruptcy venues." *See* James Nani, *N.Y. Mega Bankruptcies to Get Random Judges After Purdue Furor*, BLOOMBERG LAW (Nov. 22, 2021), https://news.bloomberglaw.com/bankruptcy-law/new-york-chapter-11-mega-cases-to-be-assigned-random-judge. And both this Court and outside commentators have identified the Second Circuit as a standard bearer in the field of financial regulation. Thus, the risk is great that other courts will look to the Second Circuit's decision as the authoritative rule on corporate imputation under Section 548(a)(1)(A) notwithstanding its error.

In light of the foregoing, the impact of the Second Circuit's wrongful holding is likely to be quick and widespread. This Court should not wait to address it.

CONCLUSION

Amici respectfully urge the Court to grant the petition.

Respectfully submitted,

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