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

BRIEF OF *AMICA CURIAE* DEBORAH A. DEMOTT IN SUPPORT OF PETITIONER

PETER K. STRIS
KENNETH J. HALPERN
TILLMAN BRECKENRIDGE
Counsel of Record
STRIS & MAHER LLP
777 S Figueroa St., Ste. 3850
Los Angeles, CA 90017
(213) 995-6800
tbreckenridge@stris.com

Counsel for Amica Curiae

February 14, 2022

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES—Continued

Page(s)

Statutes & Rules

Other Authorities

TABLE OF AUTHORITIES—Continued

Page(s)

BRIEF OF *AMICA CURIAE* DEBORAH A. DEMOTT IN SUPPORT OF PETITIONER

This brief is submitted on behalf of Deborah A. DeMott as *amica curiae* in support of petitioner.[1]

INTEREST OF *AMICA CURIAE*

Deborah A. DeMott is the David F. Cavers Professor of Law at Duke University where she has been a member of the law faculty since 1975. Professor DeMott served as the sole Reporter for the American Law Institute's Restatement (Third) of Agency, published in 2006. She is the author of, among other works, Fiduciary Obligation, Agency and Partnership: Duties in Ongoing Business Relationships (West, 1991). She has held appointment as the Centennial Professor in the Law Department of the London School of Economics and has served as a Fulbright Senior Scholar at Sydney and Monash Universities in Australia, and she has been the New Zealand Legal Research Foundation Visiting Fellow at the University of Auckland, in addition to teaching and lecturing at other universities in the United States and abroad. In addition to her scholarship on agency and fiduciary

---

[1] Pursuant to Rule 37.6, counsel for *amica curiae* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amica curiae* or her counsel has made a monetary contribution to the preparation or submission of this brief. This brief is filed with the consent of, and timely notice was given to, 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)).

obligation, she has written on corporate law, takeovers, and acquisitions.[2]

Amica has no stake in the outcome of this case other than her academic interest in the logically coherent development of the law. *Amica* is filing this brief because the case implicates fundamental doctrines in the common law of agency in relationship to federal statutes. *Amica* believes her unique perspective may assist the Court in determining whether to grant the petition for a writ of certiorari.

SUMMARY OF ARGUMENT

It is well settled that Congress legislates against a backdrop of common law rules that are presumed to operate unless the statute "speak[s] directly to the question addressed by the common law." *United States v. Texas*, 507 U.S. 529, 534 (1993). This principle includes the common law of agency, and courts—including this Court—often incorporate definitions and apply doctrines drawn from agency law. Agency doctrine, comprehensively articulated in the Restatement (Third) of Agency (2006), is relatively uniform in states in the United States and in federal common law. When nothing in a statutory text displaces otherwise-applicable agency principles, courts apply them unless the purpose of the statute requires otherwise. *Meyer v. Holley*, 537 U.S. 280, 285 (2003). Bankruptcy law is no exception. *See, e.g.*, *Strang v. Brudner*, 114 U.S. 555, 561 (1885) (applying agency doctrine in proceeding under Bankruptcy Act of 1867 to attribute

[2] Institutional affiliations are listed for identification purposes only.

debt incurred by partner to partnership); *Boltz-Rubinstein v. Bank of America, N.A.*, 624 B.R. 756, 762 n. 5 (E.D. Pa. 2021)("[o]rdinary state law principles apply" unless modified by the Bankruptcy Code or an order from the bankruptcy court.)

Through a novel construction of Section 548(a)(1)(A) of the Bankruptcy Code, the Second Circuit's opinion in this case destabilizes the application of well-established agency doctrine. The opinion bypasses agency law altogether in declining to impute the fraudulent actions, knowledge, and intentions of senior corporate officers to their corporate principal, the bankrupt transferor of property. The opinion does not justify its truncated treatment of imputation by reference to the text of the Bankruptcy Code, its extensive legislative history, the purposes served by Section 548(a)(1)(A), or longstanding principles (either of bankruptcy law or agency). Instead, the opinion detours into Delaware corporate law while misstating its substance and omitting the integral role of agency law within Delaware corporate jurisprudence.

Under Section 548(a)(1)(A) of the Bankruptcy Code, transfers of a debtor's property—here, Tribune's property—made within two years of filing a petition in bankruptcy are avoidable when made "with actual intent to hinder, delay, or defraud any entity" to which the debtor is indebted. Thus, if Tribune (1) shifted assets (2) within two years of its bankruptcy (3) with intent to hinder, delay, or defraud its creditors, the transaction can be avoided.

The only question is whether Tribune's leveraged buyout within two years of its bankruptcy involved intent to hinder, delay, or defraud its creditors. Senior

members of Tribune's management made misrepresentations of material fact to a Special Committee of the Tribune's board, and later, to its solvency-opinion firm to shift billions of Tribune's assets in a leveraged buyout. Management knew their statements were false and intended that both the board and the firm would rely on the misrepresentations. Under fundamental principles of agency law, a company's management speaks for it, and its misrepresentations are imputed to the corporation to establish intent.

The Second Circuit disagreed, necessitating the petition here. It held that because Tribune's board had delegated final approval over any fundamental transaction to its Special Committee—who remained unaware of management's misrepresentations—Tribune itself as the debtor was not charged with senior management's knowledge or fraudulent intent. This analysis contravenes long-established doctrines of agency law clearly implicated by the text of Section 548(a)(1)(A) and strikes at the heart of the law of agency. Moreover, the implications of the Second Circuit's unprecedented approach reach far beyond the facts of this case—troubling as they are—to widely-accepted instances in which courts apply agency doctrine. The underlying doctrines, which undergird organizational accountability, are foundational to agency law as a whole and have long historical lineages. By jettisoning core agency doctrine, the Second Circuit's approach facilitates practices that evade accountability and strategically silo information within organizations. The Second Circuit's justification for its decision was a flawed reading of Delaware corporate law to bypass the selfsame agency principles, which apply there, too. This Court should grant the

petition for a writ of certiorari to correct the Second Circuit's disregard of agency law rules long recognized by this Court as the background rules for federal statutes.

ARGUMENT

I. This Court has applied agency law to resolve issues arising under federal statutes

This Court has turned to agency law to resolve issues posed by various federal statutes, including basic agency doctrines of actual and apparent authority that delimit when a company is charged with the legal consequences of an employee's, officer's, board's, or owner's actions. *See, e.g., Kolstad v. American Dental Ass'n*, 527 U.S. 526, 542 (1999) (interpretation of Title VII with respect to vicarious liability for punitive damages "is informed by the general common law of agency") (cleaned up); *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.*, 456 U.S. 556 (1982) (apparent authority, "long … the settled rule in the federal system," creates private antitrust liability under Sherman Act for acts of agents). That makes sense. Imputation of conduct normally is a question of agency. "Agency is the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests consent or otherwise consents so to act." Restatement (Third) of Agency, § 1.01.

The Court presumes that when Congress legislates, it incorporates principles of the common law—including agency law—when it creates a federal cause

of action in tort. *See Meyer*, 537 U.S. at 285; *Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 709 (1999). In Section 548(a)(1)(A), Congress created a federal cause of action for fraud that contains no express or implied carve out of basic common law principles. On the contrary, it incorporates them. *See BFP v. Resolution Trust Corp.*, 511 U.S. 531, 540-43 (1994). It is thus inextricably linked to agency law, in particular to basic doctrines of apparent authority and imputation of an agent's knowledge and actions to the principal. *See* Restatement (Third) of Agency, §§ 2.01, 2.03 (defining actual and apparent authority), 7.08 (actions taken with apparent authority create vicarious liability for torts of misrepresentation such as fraud).

Under these doctrines, Tribune's officers acted as its agents when they materially misinformed the Special Committee and the firm that rendered Tribune's solvency opinions. Agency law imputes an officer's conduct to the company when an agent acts within the scope of actual or apparent authority, or within the scope of employment when the agent is an employee of the principal. For example, the Court has applied this principle in the context of civil liability for treble damages under the Sherman and Clayton Acts. In *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.*, a standard-setting society's officers reasonably appeared to act with authority when they interpreted a safety code in an anticompetitive manner and communicated their interpretation in a letter to an industry member, who displayed it to potential customers to thwart a competitor. This Court charged the society—the officers' principal—with the legal consequences of their conduct although the principal

itself did not ratify their conduct, benefit from it, or approve it through action of its governing body. 456 U.S. at 570-72. The conduct was imputed to the society regardless of whether others within the organization approved it or had contemporaneous knowledge of it. The society as principal had "permitted itself to be used to further the scheme which caused injury to respondent." *Id.* at 578 (Burger, C.J. concurring).

The Court's decision in *Hydrolevel* applied the long-settled doctrine of apparent authority, which imputes the fraudulent acts of an agent that appears to have authority to engage in such acts to the principal, regardless of whether the fraud benefits the principal. *Id.* at 566.[3] That is supported by a doctrine that imputes notice of material facts to the principal that are known by the agent. Restatement (Third) of Agency § 5.03. Imputation thereby creates incentives for principals to use care in choosing agents, monitoring them, and developing effective procedures for the transmission of material facts within the principal's organization. Imputation also discourages practices that deploy agents as shields to insulate the principal from notice of inconvenient facts. *Id.* cmt. b.

Separately, this Court has been alert to the risk that statutory construction may destabilize the application of broad-reaching legal doctrines when the text

---

[3] The Court noted that "[f]or instance, the principal is liable for an agent's fraud though the agent acts solely to benefit himself, if the agent acts with apparent authority.…[s]imilarly, a principal is liable for an agent's misrepresentations that cause pecuniary loss to a third person, when the agent acts within the scope of his apparent authority." *Id.*

of the statute itself is silent on the issue. These include the foundational principles of legal personality that underlie agency doctrine. In *United States v. Bestfoods*, 524 U.S. 51 (1998), the Court held that a parent corporation was not liable for its subsidiary's debts solely because it owned all the stock in the subsidiary. Thus, the parent was not subject to the subsidiary's liability under CERCLA. This Court reasoned that "nothing in CERCLA purports to reject this bedrock principle, and against this venerable common-law backdrop, the Congressional silence is audible." *Id.* at 62.

Likewise, this Court modifies or varies the application of an agency law doctrine only when it recognizes such an exception as necessary to a statute's purpose, justifying the departure. In its construction of Title VII of the Civil Rights Act of 1964 as applied to sexual harassment by supervisory employees in *Burlington Industries Inc. v. Ellerth*, this Court's opinion begins with general agency law to determine an employer's accountability for its supervisors' tangible acts of harassment. 524 U.S. 742, 754-764 (1998). Departing from general agency doctrine, the Court made affirmative defenses available to employers that take measures to prevent harassment and enable victims to report it. *Id.* at 763-65. The Court explicitly identified these departures from agency doctrines and justified them in light of the statute's prophylactic objective, finding that it dominated the statute's other objective of victim compensation. *Id.* at 764-65; *compare Field v. Mans*, 516 U.S. 59, 70-71 (1995) (where Congress silent, section 523(a)(2)(A) of Bankruptcy Act incorporated common law meaning of "actual fraud") *with NLRB v. Hearst Publications, Inc.*, 322 U.S. 111,

124–132 (1944) (rejecting agency law conception of employee where structure and context of National Labor Relations Act indicated broader definition).

Thus, far from ignoring the pervasive salience of agency doctrine in cases arising under federal statutes, this Court's opinions ground their analysis in it, as well as in statutory text. This Court acknowledges the importance of bedrock legal principles and declines to destabilize them. And it explicitly articulates justifications for departures from agency doctrines that are grounded in the relevant statute's objectives or purposes.

The opinions discussed above fit into a long and unbroken lineage for the relevant agency doctrines bypassed without justification by the Second Circuit: apparent authority and imputed knowledge. In 1839, Justice Story stressed that when an agent's action is within the scope of the agent's general authority the principal is bound by the agent's act, even if contrary to the principal's instructions. 1 Story, Commentaries on the Law of Agency, as a Branch of Commercial and Maritime Jurisprudence, with Occasional Illustrations from the Civil and Foreign Law § 126 at 115-16 (1st ed. 1839). Equally salient in Story's account is the basic principle of imputation: "notice to an agent is notice to the principal himself, where it arises from, or is at the time connected with, the subject matter of his agency." Story, Commentaries § 140 at 131.[4] Five decades later, in his comprehensive treatise Floyd

[4] Story continues, "for, upon general principles of public policy, it is presumed that the agent has communicated the facts to the principal, and if he has not, still the principal, having entrusted

Mechem stated that "[i]t is an unbroken rule, settled by an unbroken current of authority, that notice to an agent while acting within the scope of his authority and in reference to a matter over which his authority extends, is notice to the principal." Floyd R. Mechem, A Treatise on the Law of Agency, § 718 at 547 (1st ed. 1889). Mechem also articulated the basic proposition—applied by this Court in *Hydrolevel*—that an agent's fraud results in vicarious liability for the principal: "the proper inquiry is whether the act was done within the course of the agency and by virtue of the authority as agent." *Id.* § 739 at 576.[5] Under the Court's prior decisions, basic agency law is integral to the common law and is thus incorporated into federal statutes unless the text or clear purpose of the statute suggest otherwise.

II. The Second Circuit's decision substituted a roadmap for fraud in place of long-established doctrines that further accountability and compensation for defrauded creditors

The Second Circuit's opinion bypassed several well-established agency doctrines applied by this Court when construing federal statutes via an ill-conceived detour into Delaware law. In consequence, the Second Circuit's opinion crafted a roadmap for fraud on creditors with potentially broad ramifications for other well-settled applications of agency doctrine.

---

the agent with the particular business, the other party has the right to deem his acts obligatory on the principal." *Id.*

[5] *Id.* at 576, *quoting* Reynolds v. Witte, 13 S.C. 5, 7 (1880) (emphasis omitted).

A. With no justification, the Second Circuit bypassed relevant and well-settled agency doctrines

An agent who acts with apparent authority in communicating with third parties, if acting wrongfully, subjects the principal to liability. Elaborated in Restatement (Third) of Agency § 7.08 and in the Court's opinion in *Hydrolevel*, this is a well-established principle of vicarious liability applicable to agents' frauds that the Second Circuit entirely ignores. Nothing in the text of Section 548(a)(1)(A), or the Bankruptcy Code more generally, ousts its applicability to the facts of this case. Nor does the Second Circuit's opinion—unlike those of this Court discussed above—articulate a justification for so substantial a departure from agency doctrine when the relevant provision of the Bankruptcy Code is self-evidently concerned to remedy fraud committed by a debtor against its creditors.

Likewise, as discussed above, agency doctrine imputes notice of facts known to the agent to the principal, subject to exceptions inapplicable here. *See* Restatement (Third) of Agency § 5.03. Imputation doctrine does not require that the knowledgeable agent be in control of a final decision. Otherwise a principal could shield itself from inconvenient knowledge about the means used by its agents to induce third parties to transact with the principal. *Id.* § 5.03 cmt. b. When a principal is an organization, the collective knowledge of its agents is treated as its knowledge when it is material to their duties, however the organization may have configured itself. *Id.* § 5.03, cmt. c.

The Second Circuit likewise failed to justify its departure from this bedrock agency principle.

B. The Delaware Detour

Instead of applying these agency principles, the Second Circuit's decision effects a novel doctrinal bypass that rests on two misstatements of Delaware corporate law.

First, the Second Circuit wrongly concluded that "[a] corporation can only act through its directors and officers." Pet. App. 15a. Under long-settled Delaware law, a corporation also acts through its employees and other agents, with legal consequences for the corporation. For example, when managers interact with third parties on the corporation's behalf, their knowledge of material facts and illicit conduct is imputed to the corporation when innocent third parties sue the corporation. *See, e.g., In re American Int'l Group, Inc. Consol. Derivative Litig.*, 976 A.2d 872, 887 (2009), *aff'd sub nom. Teachers' Ret. Sys. of La. v. Gen. Re Corp,* 11 A.3d 228 (Del. 2010).

Second, the court focused on "the powers of corporate directors" under Delaware law and mistakenly deemed "control" a prerequisite for imputation. Pet. App. 16a. Tribune's directors had delegated final decision-making authority to a Special Committee of independent directors, who lacked "actual intent" to harm its creditors. *Id.* The Second Circuit found that only the directors had authority to act for the corporation and fraudulent transfers could be imputed only to parties who had "control" over the disposition of the transferred property. *Id.* But the Delaware statutory provisions cited by the Second Circuit do not confer

sole power on directors to approve extraordinary transactions, such as mergers and sales of substantially all assets. *See* Del. Code Ann., tit. 8, §§ 251 (merger) and 271 (sale of assets). Instead, the relevant Delaware statutory provisions require much else, in particular approval by a majority of the shares with power to vote on fundamental transactions. Each requisite step has independent significance. *See Smith v. Van Gorkom*, 488 A.2d 858, 873 (1985) (directors may not abdicate duty to act in informed manner by leaving decision to stockholders). Thus, under the Second Circuit's "control" test, *no one* could have the requisite intent absent a broad, ham-handed conspiracy. And the Second Circuit mistook Delaware's rule on imputation, drawing its "control" test from an inapposite context: when the transferee controls the transferor. Pet. App. 16a (citing *In re Roco Corp.*, 701 F.2d 978, 984 (1st Cir. 1983)). Even if—contrary to Delaware law—fundamental transactions required only approval from directors, the officers' knowledge should be imputed under the common law agency principles that Delaware corporate law incorporates, as discussed above.

C. The Roadmap for Fraud

The Second Circuit's opinion does not justify the outcomes enabled by its erroneous Delaware detour. Facilitating illicit transfers by insolvent debtors through the machinations of corrupt insiders, the Second Circuit's opinion undercuts the broad-reaching impact of long-established agency law. Likewise, the Second Circuit's opinion does not justify its departure from an "unbroken current of authority," Mechem*, su-*

pra, § 718 at 547, through construing either the Bankruptcy Code's relevant text or its policy objectives. Conditioning proof of fraudulent intent on the scienter of a committee of directors who are unaware of the fraud, the "detour" creates strong incentives to shelter those directors from knowing the truth and to populate the committee with incurious members. More generally, as discussed above, agency principles are integral to this Court's jurisprudence in many contexts involving the application of federal statutes. The Second Circuit's opinion destabilizes it. Its Delaware detour simplistically truncates Delaware law to jettison "unbroken rules" of agency law long applied by this Court in an "unbroken current of authority." Mechem, *supra*, § 718 at 547.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

PETER K. STRIS
KENNETH J. HALPERN
TILLMAN BRECKENRIDGE
Counsel of Record
STRIS & MAHER LLP
777 S Figueroa St.
Ste. 3850
Los Angeles, CA 90017
(213) 995-6800
tbreckenridge@stris.com
Counsel for Amica Curiae

February 14, 2022