No.

In the Supreme Court of the United States

CITIBANK, N.A., ET AL., PETITIONERS

v.

IRVING H. PICARD, TRUSTEE FOR THE LIQUIDATION OF BERNARD L. MADOFF INVESTMENT SECURITIES LLC, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a bankruptcy trustee seeking to recover an avoided transfer from a subsequent transferee under 11 U.S.C. 550 bears the burden of pleading and proving that the subsequent transferee did not accept the debtor's property in good faith.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Petitioners are Citibank, N.A., and Citicorp North America, Inc. Citibank, N.A., is a wholly owned subsidiary of Citigroup Inc.; Citicorp North America, Inc., is a wholly owned indirect subsidiary of Citigroup Inc. Citigroup Inc. has no parent corporation, and no publicly held company holds 10% or more of its stock.

Respondents are Irving H. Picard, Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC, and the Securities Investor Protection Corporation.

RELATED PROCEEDINGS

United States Bankruptcy Court (S.D.N.Y.):

Securities Investor Protection Corp. v. *Bernard L. Madoff Investment Securities, LLC*, No. 08-1789

Picard v. *Citibank, N.A.*, No. 10-5345 (Nov. 19, 2019) (partial final judgment)

United States District Court (S.D.N.Y.):

SEC v. *Madoff*, Civ. No. 08-10791 (Dec. 15, 2008) (order commencing liquidation proceeding)

Securities Investor Protection Corp. v. *Bernard L. Madoff Investment Securities, LLC*, Misc. No. 12-115

United States Court of Appeals (2d Cir.):

Picard v. *Citigroup Global Markets Limited*, No. 17-1431 (Sept. 27, 2017)

In re Picard, No. 17-3139 (Feb. 25, 2019)

In re Bernard L. Madoff Investment Securities LLC (*Picard* v. *Citibank, N.A.*), No. 19-4282 (Apr. 23, 2020)

In re Bernard L. Madoff Investment Securities LLC (*Picard* v. *Citibank, N.A.*), No. 20-1333 (Aug. 30, 2021)

Supreme Court of the United States:

HSBC Holdings plc v. *Picard*, No. 19-277 (June 1, 2020)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Page

Cases—continued:

Page

Cases—continued:

Statutes:

Page

Page

Miscellaneous—continued:

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PETITION FOR A WRIT OF CERTIORARI

Citibank, N.A., and Citicorp North America, Inc., respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-53a) is reported at 12 F.4th 171. The opinion of the district court (App., *infra*, 54a-64a) is reported at 516 B.R. 18. The order of the bankruptcy court entering partial final judgment for petitioners (App., *infra*, 110a-117a) is unreported. The opinion of the bankruptcy court (App., *infra*, 65a-109a) denying the trustee's motion for leave to file an amended complaint is reported at 608 B.R. 181.

JURISDICTION

The judgment of the court of appeals was entered on August 30, 2021. On November 24, 2021, Justice Sotomayor extended the time within which to file a petition for a writ of certiorari to and including January 27, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 550 of the Bankruptcy Code, 11 U.S.C. 550, provides in relevant part:

> (a) Except as otherwise provided in this section, to the extent that a transfer is avoided under section 544, 545, 547, 548, 549, 553(b), or 724(a) of this title, the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, from—
>
> > (1) the initial transferee of such transfer or the entity for whose benefit such transfer was made; or
> >
> > (2) any immediate or mediate transferee of such initial transferee.
>
> (b) The trustee may not recover under section (a)(2) of this section from—
>
> > (1) a transferee that takes for value, including satisfaction or securing of a present or antecedent debt, in good faith, and without knowledge of the voidability of the transfer avoided * * * .

STATEMENT

This case presents a recurring and important question of federal bankruptcy law that affects scores of pending lawsuits seeking billions of dollars in recovery. The Bankruptcy Code grants a trustee the power to avoid certain

pre-bankruptcy transfers of property by the debtor to third parties. Section 550 of the Code then provides a right of action for the trustee to recover for the bankruptcy estate the property underlying any avoided transfers or its equivalent value.

Of particular relevance here, Section 550 permits the trustee to recover not only from the initial transferee of the debtor's property, but also from any party who subsequently receives the property from the initial transferee. Under Section 550(b)(1), however, "[t]he trustee may not recover" from a subsequent transferee that "takes for value, * * * in good faith, and without knowledge of the voidability of the transfer avoided." The question presented is whether a trustee seeking to recover an avoided transfer from a subsequent transferee under Section 550 bears the burden of pleading and proving that the subsequent transferee did not accept the debtor's property in good faith.

This cases arises out of liquidation proceedings involving Bernard L. Madoff Investment Securities LLC (Madoff Securities). Petitioners are affiliated financial companies that loaned money to an investment fund that used the loan to invest with Madoff Securities. Respondents are the liquidation trustee of Madoff Securities and the Securities Investor Protection Corporation (which is a party in interest in all liquidation proceedings it commences under the Securities Investor Protection Act).

Using his powers under the Bankruptcy Code, the trustee commenced the underlying adversarial proceeding against petitioners pursuant to Section 550 of the Code, seeking to recover hundreds of millions of dollars that the investment fund allegedly withdrew from Madoff Securities and used to repay the loan made by petitioners. The bankruptcy court rejected respondent's claims on the ground that the complaint failed to plead that petitioners,

as subsequent transferees under Section 550, did not receive the repayment in good faith.

The court of appeals vacated and remanded. As is relevant here, the court of appeals held that good faith under Section 550 is an affirmative defense for which the subsequent transferee bears the burden of persuasion. In so holding, the court of appeals altered the course of nearly 100 pending Madoff-related lawsuits seeking nearly $4 billion in recovery.

The decision of the court of appeals should not be allowed to stand. It contravenes the text and context of the Bankruptcy Code. It ignores background common-law principles. And it has substantial practical consequences, including the imposition of significant litigation costs on innocent third parties that did not interact with the debtor. The question of who bears the burden on the issue of good faith under Section 550 is important and recurring, and this case is an ideal vehicle for resolving it. The petition for a writ of certiorari should be granted.

A. Background

The Securities Investor Protection Act of 1970 (SIPA) establishes procedures for the liquidation of securities broker-dealers that become insolvent. See *Securities Investor Protection Corp.* v. *Barbour*, 421 U.S. 412, 416 (1975). SIPA created the Securities Investor Protection Corporation and vested it with the authority to commence a liquidation proceeding against a broker-dealer in federal district court. See 15 U.S.C. 78ccc, 78eee(b).

A liquidation proceeding under SIPA proceeds "in accordance with, and as though it were being conducted under, chapters 1, 3, and 5 and subchapters I and II of chapter 7" of the Bankruptcy Code (Title 11 of the United States Code). 15 U.S.C. 78fff(b). The district court overseeing the liquidation thus appoints a trustee to liquidate

the broker-dealer and administer claims. 15 U.S.C. 78eee (b)(3). SIPA vests the liquidation trustee with the same powers with regard to the debtor and the debtor's property as a bankruptcy trustee. See 15 U.S.C. 78fff-1(a). SIPA further provides that, "[w]henever customer property is not sufficient" to pay customer claims in full, "the trustee may recover any property transferred by the debtor which, except for such transfer, would have been customer property if and to the extent that such transfer is voidable or void under the provisions of [the Bankruptcy Code]." 15 U.S.C. 78fff-2(c)(3).

The Bankruptcy Code contains several different sections that empower a bankruptcy trustee to "avoid"—that is, legally "cancel," App., *infra*, 7a—"transfers by the debtor or transfers of an interest of the debtor in property." *Merit Management Group, LP* v. *FTI Consulting, Inc.*, 138 S. Ct. 883, 887-888 (2018); see 11 U.S.C. 544, 545, 547, 548, 549, 724(a). For example, Section 548(a)(1)(A) allows a trustee to avoid transfers made during the two years before the commencement of the proceeding if the debtor made the transfer "with actual intent to hinder, delay, or defraud" a creditor. 11 U.S.C. 548(a)(1)(A).

Critically for present purposes, "[a]voidance and recovery are related but distinct concepts." App., *infra*, 7a. To the extent that a transfer is avoided, a trustee must then seek to "recover" the property (or its equivalent value) under Section 550 of the Code. Section 550(a) allows a trustee to proceed against either (1) "the initial transferee of such transfer or the entity for whose benefit such transfer was made" or (2) "any immediate or mediate transferee of such initial transferee." 11 U.S.C. 550(a)(1), (2). Section 550(b) further provides that "[t]he trustee may not recover" from a subsequent transferee that either "takes for value * * * in good faith, and without knowledge of the voidability of the transfer avoided," or is

a "good faith transferee of such transferee." 11 U.S.C. 550(b)(1), (2).

B. Facts And Procedural History

1. This case arises out of the liquidation proceedings related to Madoff Securities, the investment firm at the center of the Ponzi scheme run by Bernard Madoff. Madoff Securities purported to invest funds it received from investors in securities, but it made few, if any, trades. Instead, like all Ponzi schemes, it paid purported returns to investors from funds contributed by new investors. The fund collapsed during the 2008 financial crisis, when customers began to withdraw their investments in amounts that exceeded the inflow of new investments. App, *infra*, 3a-4a.

In December 2008, the Securities Investor Protection Corporation filed a petition in the United States District Court for the Southern District of New York to commence a SIPA liquidation proceeding against Madoff Securities. See 917 F.3d 85, 92 (2d Cir. 2019). The district court granted the petition, appointed respondent Picard as the trustee, and referred the case to the bankruptcy court. App., *infra*, 4a-5a.

The trustee proceeded to file hundreds of cases seeking to recover billions of dollars withdrawn from Madoff Securities by its customers. See, *e.g.*, Jonathan Stempel, *Madoff Trustee Files Many New Lawsuits*, Reuters (June 6, 2012) <tinyurl.com/madofflawsuits>. Many of those actions were commenced against investors in Madoff "feeder funds"—investment funds that "pooled money from investors and invested directly or indirectly" with Madoff Securities—as well as the various entities that received payments from those feeder funds. App., *infra*, 3a-5a. The trustee primarily alleged that the feeder funds withdrew money from Madoff Securities and in turn

used the money to pay various service providers, lenders, and other third parties. The trustee alleged that the feeder funds' withdrawals constituted fraudulent transfers avoidable under Section 548 of the Bankruptcy Code and that the entities that received payments from the feeder funds were liable as subsequent transferees under Section 550 of the Code. See, *e.g.*, App., *infra*, 9a.

2. In 2010, the trustee filed an adversarial complaint in the bankruptcy court against petitioners, seeking to recover $300 million in alleged avoidable transfers under the Bankruptcy Code and New York law. See App., *infra*, 5a; Bankr. Ct. Dkt. 1, at 53-75. Petitioners are not alleged to have been customers of, or investors with, Madoff Securities. Instead, the complaint sought recovery of the repayment of a loan provided by petitioners to an investment fund that invested in Madoff Securities. See App., *infra*, 9a.

To satisfy the loan, the fund allegedly withdrew money from its account at Madoff Securities and used the money to repay petitioners. The complaint does not allege that petitioners solicited the payment; the investment fund had terminated the loan agreement when it obtained replacement financing. Nor did the complaint allege that petitioners knew the repayment came from funds invested with Madoff Securities as opposed to some other source. Nevertheless, the complaint alleged that the withdrawals constituted avoidable transfers and that petitioners were liable as subsequent transferees under Section 550 of the Bankruptcy Code. See App., *infra*, 9a.

Petitioners, as well as other defendants in Madoff-related lawsuits, moved to withdraw their cases from the bankruptcy court in order to allow the district court to decide whether "SIPA and other securities laws alter the standard the [t]rustee must meet in order to show that a defendant did not receive transfers in 'good faith' under

either [Section] 548(c) or [Section] 550(b)" of the Code. App., *infra*, 56a. The motion was granted.

After deciding the standard for determining "good faith" in a SIPA liquidation, the district court proceeded to address the question of which party—the trustee or the transferee—bears the burden of pleading and proving good faith under Sections 548(c) and 550(b) of the Code. See App., *infra*, 61a-64a. The district court concluded that, "in the context of an ordinary bankruptcy proceeding," good faith is an affirmative defense for which the transferee bears the burden of proof. *Id.* at 62a. But the court concluded that SIPA "affects the burden of pleading good faith or its absence," such that "a defendant may succeed on a motion to dismiss by showing that the complaint does not plausibly allege that that defendant did not act in good faith." *Id.* at 63a-64a.

The case returned to the bankruptcy court, where the trustee moved for leave to amend his complaint. Petitioners opposed the motion on the ground that the amended complaint did not satisfy the district court's standard for pleading that petitioners lacked good faith as subsequent transferees under Section 550(b). See App., *infra*, 84a. The bankruptcy court agreed with petitioners, denied the trustee's motion, and subsequently entered partial final judgment for petitioners. See *id.* at 114a-117a; Bankr. Ct. Dkt. 176.

3. The court of appeals vacated and remanded. App., *infra*, 1a-45a. As is relevant here, the court held that Section 550(b) creates an affirmative defense against liability for which a subsequent transferee bears the burden of proof. See *id.* at 36-45a.

a. The court of appeals began by discussing the allocation of the burden of proof under Section 548(c) of the Code. That provision states that, in the context of the avoidance of a fraudulent transfer, an initial transferee

"that takes for value and in good faith has a lien on or may retain any interest transferred or obligation incurred." 11 U.S.C. 548(c). The court noted that courts had consistently held that "[t]he transferee bears the burden of establishing its good faith under [Section] 548(c)." App., *infra*, 37a. The court recognized that "[Section] 550(b) is written differently and affects a different class of transferees than [Section] 548(c)," but it nevertheless concluded that the allocation of the burden of the proof should be the same. *Id.* at 38a.

The court of appeals further reasoned that the transferee should have the burden of proof under Section 550(b) because that subsection constitutes a "proviso" that "carves an exception out of the body of a statute." App., *infra*, 39a (citation omitted). The court rejected the argument that Section 550(b) is instead an "exception, in the enacting clause of the statute, which is so incorporated with the language defining the offen[s]e" that the plaintiff must negate it in order to prevail. *Id.* at 39a-40a (citation omitted). The court also declined to give weight to the phrasing of Section 550(b), which sets forth the circumstances in which "[t]he trustee may not recover." *Id.* at 40a (quoting 11 U.S.C. 550(b)).

The court ultimately understood Section 550(b) to be "an act of legislative grace *because* subsequent transferees might be innocent third parties." App., *infra*, 41a (citation omitted). But the court cautioned that "the mere possibility of a subsequent transferee's blamelessness does not suggest that the trustee must bear the burden of pleading the transferee's lack of good faith." *Ibid.* The court added that the legislative history of the Bankruptcy Code supported its view, and it rejected the district court's conclusion that SIPA alters the normal allocation of the burden of proof. See *id.* at 41a, 45a. The court of

appeals therefore vacated the bankruptcy court's judgment in petitioners' favor and remanded for further proceedings. See *id.* at 45a.

b. Judge Menashi concurred, writing separately to express doubt regarding the validity of the unchallenged theory of avoidance on which the trustee had relied. App., *infra*, 45a-53a. In addressing that issue, Judge Menashi noted that, under "normal principles," creditors in petitioners' position "would be able to retain the [loan] repayments despite knowledge of the debtor's insolvency as long as [they did] not participate in a fraudulent scheme by holding the funds on the debtor's behalf." *Id.* at 46a.

REASONS FOR GRANTING THE PETITION

The question presented is whether a bankruptcy trustee seeking to recover an avoided transfer from a subsequent transferee under Section 550 of the Bankruptcy Code bears the burden of pleading and proving that the subsequent transferee did not accept the debtor's property in good faith. In the decision below, the court of appeals held that good faith under Section 550 is an affirmative defense that the subsequent transferee must plead and prove in order to avoid liability. That decision is deeply flawed and will have significant ramifications for the Nation's bankruptcy system in general and for the multibillion-dollar Madoff liquidation in particular. Given the exceptional legal and practical importance of the question presented, the Court's intervention is warranted.

A. The Decision Below Is Incorrect

The court of appeals concluded that the good faith of a subsequent transferee under Section 550 is an affirmative defense, relying heavily on the treatment of initial transferees elsewhere in the Bankruptcy Code. As another court of appeals has recognized, however, "the Code

treats initial transferees in a different manner than subsequent transferees," and "a substantial argument can be made in favor of placing the burden of proof on the trustee with respect to subsequent transferees." *In re Bressman*, 327 F.3d 229, 236 n.2 (3d Cir. 2003); accord *In re Nordic Village*, 915 F.2d 1049, 1063-1064 (6th Cir. 1990) (Kennedy, J., dissenting), rev'd on other grounds, 503 U.S. 30 (1992). Placing the burden on the subsequent transferee conflicts with the text and structure of the Code, departs from longstanding background principles of law, and has undesirable practical consequences.

1. The statutory text is the "touchstone" for "determining the burden of proof under a statutory cause of action." *Schaffer* v. *Weast*, 546 U.S. 49, 56 (2005). When a statute does not expressly assign the burden of proof on an issue to one party, a court applies the "ordinary default rule" that "the party seeking relief" bears the burden of persuasion "regarding the essential aspects of [its] claims." *Id.* at 56, 57, 58. While that rule "admits of exceptions"—such as where "elements can fairly be characterized as affirmative defenses or exemptions"—a court "will conclude that the burden of persuasion lies where it usually falls, upon the party seeking relief," "[a]bsent some reason to believe that Congress intended otherwise." *Id.* at 57-58.

a. Section 550 creates a right of action for a trustee to recover an avoided transfer or its equivalent value. In particular, Section 550(a) authorizes the trustee to proceed against not only the "initial transferee," 11 U.S.C. 550(a)(1), but also "any immediate or mediate transferee of such initial transferee," 11 U.S.C. 550(a)(2). Section 550(b) provides that "[t]he trustee may not recover" from a subsequent transferee that "takes for value, including satisfaction or securing of a present or antecedent debt,

in good faith, and without knowledge of the voidability of the transfer avoided." 11 U.S.C. 550(b)(1).

The text of Section 550 indicates that subsection (b) sets forth essential aspects of the trustee's cause of action that the trustee must plead and prove. To begin with, the trustee is the subject of the sentence that constitutes subsection (b). That provision thus sets forth the circumstances in which "[*t*]*he trustee* may not recover," instead of the circumstances in which the transferee may escape liability. 11 U.S.C. 550(b) (emphasis added). By contrast, statutes that create affirmative defenses often speak in terms of the defendant's conduct or liability, rather than the plaintiff's ability to recover. See, *e.g.*, 15 U.S.C. 13; 17 U.S.C. 512; 29 U.S.C. 259.

In addition, statutory exceptions that announce affirmative defenses are ordinarily "laid out apart" from the corresponding general rules. *Meacham* v. *Knolls Atomic Power Laboratory*, 554 U.S. 84, 91 (2008). But here, Section 550(b) immediately follows Section 550(a) and has a similar structure. The side-by-side placement and parallel language illustrate that the two subsections work in tandem to define the contours of a trustee's cause of action: subsection (a) sets forth the general categories of transferees amenable to suit under Section 550 (*viz.*, initial transferees and subsequent transferees), and subsection (b) sets forth the circumstances under which the trustee can recover from parties in one of those general categories.

For that reason, Section 550(b) is best understood as an "exception so incorporated with the enacting clause that the one cannot be read without the other," requiring the plaintiff to "negative[]" the "exception." *United States* v. *Cook*, 84 U.S. (17 Wall.) 168, 177 (1872); see, *e.g.*, *Schlemmer* v. *Buffalo, Rochester & Pittsburgh Railway Co.*, 205 U.S. 1, 10 (1907); *Javierre* v. *Central Altagracia*,

217 U.S. 502, 508 (1910). In this context, the "enacting clause" refers to the "principal clause" of the statute, *United States* v. *Morrow*, 266 U.S. 531, 534-535 (1925), that "defin[es]" the statute's substantive rule or regulation. See *Cook*, 84 U.S. (17 Wall.) at 176; *Mackmull* v. *Brandlein*, 137 N.Y.S. 607, 611 (App. Div. 1912); cf. 153 A.L.R. 1218 (1944) (stating that the phrase "enacting clause" has "long been applied in criminal nomenclature to the prohibitory declaration of the statute"). Here, the language and placement of the good-faith requirement demonstrates that it is fairly regarded as being "incorporated with the enacting clause." *Cook*, 84 U.S. (17 Wall.) at 176.

b. The statutory context confirms that good faith is an element of a trustee's Section 550 claim against a subsequent transferee.

Under the Code, Congress created a distinction between avoidance, on the one hand, and recovery of a transfer of the debtor's property, on the other. See, *e.g.*, App., *infra*, 7a. The avoidance power permits the trustee effectively to cancel certain "transfers by the debtor or transfers of an interest of the debtor in property." *Merit Management Group, LP* v. *FTI Consulting, Inc.*, 138 S. Ct. 883, 887-888 (2018); see 11 U.S.C. 544-549. Section 550 complements those avoiding powers by providing a right of action for the trustee to recover the value of the avoided transfer (or the transferred property itself) and by "identif[ying] the parties from whom the trustee may recover." *Merit Management Group*, 138 S. Ct. at 889. Those parties include the initial transferee of the debtor's property and any subsequent transferee that receives that property from the initial transferee. See 11 U.S.C. 550(a).

While the trustee's *recovery* powers extend to subsequent transferees, the trustee's *avoiding* powers extend only to the initial transferee. See, *e.g.*, 11 U.S.C. 547(b),

548; cf. *In re Picard*, 917 F.3d 85, 97 (2d Cir. 2019) (referring to avoidance as concerning the "initial transfer"), cert. denied, 140 S. Ct. 2824 (2020); *In re International Administrative Services, Inc.*, 408 F.3d 689, 703 (11th Cir. 2005) (same). That is, while the Code imposes liability on subsequent transferees in some circumstances, it does not treat the transfer from the initial transferee to the subsequent transferee as itself voidable.

That provides a natural reason to place the burden of pleading and proving a subsequent transferee's good faith on the trustee. Because the Code does not permit the avoidance of the subsequent transfer, that transfer remains valid even after the initial transfer is avoided. And in order to unwind the subsequent transfer, it makes sense for the trustee to carry the burden to provide some reason why *that* transfer is improper, just as the trustee had to do when avoiding the initial transfer (by, for example, demonstrating that the transfer was fraudulent, see 11 U.S.C. 548(a)(1)(A)). By contrast, Section 550 renders the initial transferee strictly liable for the avoided transfer—which makes sense, because the trustee has already carried its burden of proving that the initial transfer is invalid. The Code's avoidance provisions thus confirm what the text of Section 550 demonstrates: namely, that the trustee bears the burden of pleading and proving that a subsequent transferee did not act in good faith.

2. Beyond text and context, the common-law backdrop against which the modern Bankruptcy Code was enacted lends further support for the proposition that the burden of proof under Section 550(b) remains with the trustee, at least where the transfer of funds is concerned. See *Samantar* v. *Yousuf*, 560 U.S. 305, 320 (2010) (noting the canon of construction that "statutes should be interpreted consistently with the common law").

In particular, a subsequent transferee of funds is similarly situated to a defendant in a common-law action for recovery of stolen and resold negotiable instruments. In that situation, the defendant acquired a negotiable financial instrument from a third party in an untainted transaction; the third party acquired the instrument through wrongdoing; and the defendant's ability to retain the instrument depends on whether the defendant took the instrument for value and in good faith. See, *e.g.*, *Murray* v. *Lardner*, 69 U.S. (2 Wall.) 110, 121 (1865).

The common-law rules governing such actions were straightforward. Even where the instrument was indisputably stolen, "[t]he party who takes it before due for a valuable consideration, without knowledge of any defect of title, and in good faith, holds it by a title valid against all the world." *Murray*, 69 U.S. at 121. And "[t]he burden of proof lies on the person who assails the right claimed by the party in possession." *Ibid.* Courts applied that rule based on the presumption that the instrument was "negotiated for value in the usual course of business at the time of its execution, and without notice of any equities between the prior parties." *Collins* v. *Gilbert*, 94 U.S. 753, 754 (1877).

Indeed, even when a holder for value was the plaintiff in an action to collect on his negotiable instrument, he was "not bound to prove that he is a bonâ fide holder for a valuable consideration, without notice; for the law will presume that, in the absence of all rebutting proof." *Swift* v. *Tyson*, 41 U.S. (16 Pet.) 1, 16 (1842), overruled on other grounds by *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64, 58 (1938). Rather, it was incumbent on the party seeking to challenge the holder's title to offer "satisfactory proofs of the contrary, and thus overcome the primâ facie title of the plaintiff." *Ibid.* The rule was the same regarding the transfer of money itself. See *Holly* v. *Missionary Society*

of Protestant Episcopal Church, 180 U.S. 284, 293-294 (1901). Absent any indication that Congress sought to deviate from those common-law rules, the Court should presume that the Code comports with them, at least where the transfer of funds is concerned.

3. Placing the burden of proving good faith under Section 550(b) on the transferee is also impractical. Subsequent transferees, who are two steps removed from the debtor, are "much more likely to be innocent third parties" and often have "little ability to protect themselves by making cursory checks on their transferor." *Nordic Village*, 915 F.2d at 1063 (Kennedy, J., dissenting); accord *Bressman*, 327 F.3d at 236 n.2 (citation omitted). Because the burden of proof typically aligns with the "estimate of the probabilities," 2 Kenneth S. Broun et al., *McCormick on Evidence* § 337, at 698 (8th ed. 2020) (McCormick), the burden under Section 550 "should rest on the party seeking to recover the property, at least as to the issues of the subsequent transferee's good faith and knowledge." *Nordic Village*, 915 F.2d at 1063-1064 (Kennedy, J., dissenting).

In addition, if a lack of good faith is an affirmative defense under Section 550, then the trustee need not plead it. See *Jones* v. *Bock*, 549 U.S. 199, 215 (2007). Absent such a pleading requirement, however, the trustee would be free to pursue recovery of funds from anyone who subsequently did business with a debtor's transferees. And if those subsequent transferees—the vast majority of whom will be innocent—seek to assert their good faith, they will be subject to invasive and costly discovery. As a state-of-mind requirement, after all, good faith is a "fact-intensive inquiry." App., *infra*, 35a. And Congress should not be presumed to have licensed "fishing expeditions." *Trump* v. *Vance*, 140 S. Ct. 2412, 2428 (2020) (citation omitted).

Even after discovery, it is far from clear that the average subsequent transferee would be able to succeed at summary judgment. As the party that bears the burden of proof at trial, the transferee bears the "even greater" burden at summary judgment of "demonstrating why the record is so one-sided as to rule out the prospect of the nonmovant prevailing." 10A Charles A. Wright et al., *Federal Practice and Procedure* § 2727.1, at 492 (4th ed. 2016); cf. *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 323 (1986). And the subsequent transferee must do so while a court draws all reasonable inferences against him. See, *e.g.*, *Scott* v. *Harris*, 550 U.S. 372, 378 (2007).

Placing the burden of proof on the transferee will thus likely result in costly litigation and, in turn, create pressure to settle. That runs counter to Congress's intention to "avoid litigation and unfairness to innocent purchasers" and threatens to turn even simple bankruptcy proceedings into costly multiparty affairs. Report of Commission on Bankruptcy Law, H.R. Doc. No. 137, 93d Cong., 1st Sess., Pt. II, at 180 (1973).

4. The court of appeals offered three primary rationales in support of its holding that a subsequent transferee bears the burden of pleading and proving its good faith under Section 550(b). Each is unpersuasive.

a. The court of appeals initially invoked Section 548(c) of the Code. That provision states that, in the context of the avoidance of a fraudulent transfer, an initial transferee "that takes for value and in good faith has a lien on or may retain any interest transferred or may enforce obligation incurred." 11 U.S.C. 548(c). The initial transferee bears the burden of proving that it accepted the transfer in good faith. See 5 *Collier on Bankruptcy* ¶ 548.09[2][c], at 548-102.4 & n.32 (16th ed. 2019) (citing cases).

The court of appeals recognized that Section 550(b) is "written differently and affects a different class of transferees than [Section] 548(c)." App., *infra*, 38a. But the court nevertheless viewed Section 548(c) as a guidepost for determining the allocation of the burden of proof under Section 550(b). That was erroneous.

Section 548(c) is not a complete defense to avoidability. Instead, when an initial transferee successfully invokes Section 548(c), the transfer remains avoided, but the initial transferee receives a lien on the transferred property. See 5 *Collier on Bankruptcy* ¶ 548.09[2], at 548-102.1 to 548-102.2. Because the underlying transfer has been and remains avoided, a transferee seeking a lien under Section 548(c) is the party "seek[ing] to change the present state of affairs and who therefore naturally should be expected to bear the risk of failure of proof or persuasion." *Schaffer*, 546 U.S. at 56 (citation omitted).

Not so under Section 550(b). Section 550 permits the trustee to recover from a subsequent transferee, but the transaction in which the subsequent transferee received the debtor's property has not been avoided. See p. 14, *supra*. For that reason, it is the trustee "seek[ing] to change the present state of affairs," and it is he who should bear the burden of proof. *Schaffer*, 546 U.S. at 56 (citation omitted). By conflating the burdens of proof assigned in Section 548(c) and Section 550(b), the court of appeals ignored the important substantive distinctions between the provisions.

b. The court of appeals also heavily relied on the "overarching principle" that, "when there is an exception to the general rule, the party claiming the benefit of the exception bears the burden of pleading it." App., *infra*, 39a. In so doing, the court overlooked the traditional distinction between two different kinds of statutory excep-

tions: exceptions "out of the enacting clause," and exceptions "out of the body of the act." *Ryan* v. *Carter*, 93 U.S. 78, 83 (1876); accord *Cook*, 84 U.S. (17 Wall.) at 176; see also 1A Norman J. Singer & J.D. Shambie Singer, *Sutherland Statutes and Statutory Construction* § 21:11, at 173-174 (7th ed. 2009) (referring to the distinction as one between "exceptions" and "provisos"); 1 Joseph Chitty, *A Treatise on Pleading, and Parties to Actions* 221-223 (15th American ed. 1874) (same).

The two different kinds of exceptions are distinguished primarily by their placement within the statute. As discussed above, see p. 12, where "the exceptions themselves are stated in the enacting clause it will be necessary [for the plaintiff] to negative them." *United States* v. *Britton*, 107 U.S. 655, 670 (1883); see *Cook*, 84 U.S. (17 Wall.) at 176. But where a statute "contains provisos and exceptions in distinct clauses," "it is not necessary to [plead] that the defendant does not come within the exceptions." *Britton*, 107 U.S. at 670. Because Section 550(b) is properly construed as being part of the enacting clause, the burden is on the plaintiff to "negative" its provisions. See p. 12, *supra*.

In seeking to avoid that conclusion, the court of appeals asserted that the distinction articulated in *Cook* was "inapposite" because *Cook* was "grounded in the interpretation of a criminal statute." App., *infra*, 39a. That is incorrect. In *Cook*, this Court explained that the distinction between exceptions out of the enacting clause and exceptions out of the body of the act applies "whether speaking of a statute or private contract." 84 U.S. (17 Wall.) at 175-176. What is more, this Court has relied on the same distinction in several civil cases as a "general rule of law." *Schlemmer*, 205 U.S. at 10; *Ryan*, 93 U.S. at 83; see *Javierre*, 217 U.S at 508. The court of appeals' flawed reading of Section 550(b) was thus rooted in an erroneous

understanding of the relevant principle of statutory interpretation.

c. The court of appeals also invoked legislative history, placing significant weight on a reference in a Senate Report to a subsequent transferee being "excepted from liability" under Section 550(b). App., *infra*, 41a (quoting S. Rep. No. 989, 95th Cong., 2d Sess. 90 (1978)). That reference cannot bear the weight the court of appeals assigned it. As an initial matter, the use of the word "excepted" reveals little, given that some exceptions place the burden of proof on the plaintiff. See pp. 12-13, *supra*.

In addition, the same paragraph of the Senate Report describes the "good faith" requirement as "intended to prevent a transferee from whom the trustee could recover from transfe[r]ring the recoverable property to an innocent transferee, and receiving a retransfer from him, that is, 'washing' the transaction through an innocent third party." S. Rep. No. 989, at 90. That suggests that "good faith" refers merely to the absence of participation in a complex scheme to defraud creditors. And when allocating a burden of proof, "it is usually fairer * * * to place the burden * * * on the party claiming [the] existence" of an "exceptional situation." 2 McCormick § 337, at 700.

To the extent the Court considers legislative history, the discussion of the allocation of the burden of proof in the 1973 report of the Bankruptcy Law Commission is far more persuasive. See H.R. Doc. No. 137, Pt. II, at 164. In the report explaining its proposed draft bill, the Commission recommended removing a provision from the then-extant Bankruptcy Act that placed the burden of proof for establishing good faith on a transferee in cases of post-petition transfer of personal property. See *ibid.* The Commission characterized the revision as a policy change, explaining that "there seems no necessity to require the

transferee to carry the burden as to good faith or reasonably equivalent value." *Ibid.* The proposed change thus indicates a congressional preference to place the burden of proof regarding good faith on the trustee. Cf. H.R. Rep. No. 595, 95th Cong., 1st Sess. 308 (1977) (noting that "[t]he [Federal Rules of Bankruptcy] may not shift the burden of proof from the moving party").

* * * * *

The decision below is deeply flawed. The text and context of Section 550, background legal principles, and practical considerations all demonstrate that, in an action against a subsequent transferee, the trustee bears the burden of pleading and proving that the subsequent transferee did not receive the debtor's property in good faith. As at least one other court of appeals has noted, "[i]t is not at all clear" that Section 550 "places the burden * * * on the transferee as a defense," and "a substantial argument can be made in favor of placing the burden of proof on the trustee." *Bressman*, 327 F.3d at 236 n.2; see *Nordic Village*, 915 F.2d at 1063-1064 (Kennedy, J., dissenting). This Court should review the court of appeals' erroneous decision.

B. The Question Presented Is Exceptionally Important And Warrants Review In This Case

The question of which party bears the burden on the issue of good faith under Section 550(b) is of significant legal and practical importance for the Nation's bankruptcy system. It has a particularly outsized effect in the numerous pending actions seeking to recover billions of dollars in transfers in connection with the Madoff liquidation. This case, which cleanly and squarely presents the question, warrants the Court's review.

1. This Court has described a bankruptcy trustee's authority to avoid and recover transfers of the bankruptcy

petitioner's assets as "implement[ing] the core principles of bankruptcy." *Merit Management Group*, 138 S. Ct. at 888. Accordingly, the Court has repeatedly granted review in cases presenting questions concerning the scope of a trustee's avoidance and recovery powers. See, *e.g.*, *id.* at 892; *Central Virginia Community College* v. *Katz*, 546 U.S. 356, 359 (2006); *Fidelity Financial Services, Inc.* v. *Fink*, 522 U.S. 211, 212-213 (1998); *BFP* v. *Resolution Trust Corp.*, 511 U.S. 531, 533 (1994).

The question presented here implicates a trustee's core power to recover assets for the bankruptcy estate. And it is particularly important because it affects a vast array of third parties that may have had no interaction with the debtor but are nevertheless swept into the bankruptcy process and subject to costly litigation. See p. 16, *supra*.

The question presented is also significant given the sheer size of the Judiciary's bankruptcy docket. As of September 2021, there were over 750,000 bankruptcy cases pending in the federal courts. United States Courts, *U.S. Bankruptcy Courts – Bankruptcy Cases Commenced, Terminated and Pending*, tbl. F (Sept. 30, 2021) <tinyurl.com/bankruptcytable2021>. That figure is down from over 1 million in 2019. United States Courts, *U.S. Bankruptcy Courts – Bankruptcy Cases Commenced, Terminated and Pending*, tbl. F (Dec. 31, 2019) <tinyurl.com/bankruptcytable2019>.

Third-party transferees are often involved even in routine bankruptcy cases. See, *e.g.*, *In re Leff*, 631 B.R. 106, 124-128 (Bankr. E.D.N.Y. 2021); *In re Buffenmeyer*, 629 B.R. 372, 388-389 (Bankr. E.D. Pa. 2021); *In re Lakeland Radiologists, Ltd.*, No. 17-6009, 2020 WL 6928200, at *5-*6 (Bankr. S.D. Ill. July 14, 2020); *In re Hamadi*, 597 B.R. 67, 73-74 (Bankr. D. Conn. 2019); *In re Callas*, 557 B.R. 647, 654-659 (Bankr. N.D. Ill. 2016); *In re Great*

Gulfcan Energy Texas, Inc., 488 B.R. 898, 913-919 (Bankr. S.D. Tex. 2013); *In re Hackney*, No. 13-5056, 2013 WL 8214962, at *1 (Bankr. N.D. Ga. May 13, 2013); *In re Key Developers Group, LLC*, 449 B.R. 148, 152-155 (Bankr. M.D. Fla. 2011).

Indeed, as long as the initial transferee does not leave the transferred funds to stagnate in a bank account, subsequent transferees will necessarily be involved. The decision below would thus draw into bankruptcy proceedings any third party unlucky enough to receive a transfer: for example, a university collecting tuition payments, see *Hamadi*, 597 B.R. at 73-74; a landlord seeking rent, see *Leff*, 631 B.R. at 127; or even the Internal Revenue Service, if the funds are used to pay outstanding taxes, see *In re ATM Financial Services, LLC*, 446 B.R. 564, 566-567, 572 (Bankr. M.D. Fla. 2011).

2. The magnitude of the present dispute alone gives the question presented outsized importance. Since the collapse of the Madoff Ponzi scheme in 2008, the Madoff trustee has filed more than 1,000 lawsuits seeking to claw back tens of billions of dollars in transfers. See Jonathan Stempel, *Madoff Trustee Files Many News Lawsuits*, Reuters (June 6, 2012) <tinyurl.com/madofflawsuits>. For more than a decade, this sprawling litigation has ensnared "not only indirect investors but also individuals and entities who received fees for services provided to investment funds that were customers of Madoff Securities." App., *infra*, 60a.

The decision below revived not only the Madoff trustee's action against petitioners, but also affected approximately 90 of the trustee's other actions seeking recovery under Section 550. Collectively, those actions seek a total of $3.75 billion. See Office of Irving H. Picard, Statement Regarding Second Circuit Decision in Legacy and Citi-

bank Cases (Aug. 30, 2021) <tinyurl.com/trusteecitibank>; see D. Ct. Dkt. 20,821, at 59, *Securities Investor Protection Corp.* v. *Bernard L. Madoff Investment Securities LLC*, No. 08-1789 (S.D.N.Y. Oct. 29, 2021); see also *id.*, Ex. D (listing active subsequent-transferee cases). Many of the world's largest financial institutions are affected parties. See, *e.g.*, *Picard* v. *BNP Paribas S.A.*, No. 12-1576 (Bankr. S.D.N.Y.); *Picard* v. *Crédit Agricole (Suisse) S.A.*, No. 12-1022 (Bankr. S.D.N.Y.); *Picard* v. *Barclays Bank (Suisse) S.A.*, No. 11-2569 (Bankr. S.D.N.Y.); *Picard* v. *Royal Bank of Canada*, No. 12-1699 (Bankr. S.D.N.Y.); *Picard* v. *Lloyds TSB Bank PLC*, No. 12-1207 (Bankr. S.D.N.Y.).

If allowed to stand, the decision below would task the bankruptcy courts with conducting numerous good-faith inquiries in those actions, on a "case-by-case" basis, and would impose the cost of those inquiries on hundreds of defendants who did not receive money directly from the debtor. See App., *infra*, 35a. The trustee, meanwhile, would face no corresponding burden.

In addition, because of the court of appeals' earlier decision on the Madoff trustee's powers to recover avoided transfers from entities abroad, the decision below will have global ramifications. In that earlier decision—which applied to 88 consolidated appeals involving "hundreds" of subsequent transferees—the Second Circuit vacated a ruling preventing the trustee from recovering funds held by transferees overseas. See 917 F.3d at 105-106. The decision below now empowers the trustee to barrel ahead with his plan to drag numerous foreign transferees into American courts for discovery—including extensive document productions and depositions of relevant decisionmakers—in anticipation of summary judgment if not trial.

Nearly all of the remaining Madoff cases, foreign and domestic alike, have been sitting on the federal dockets for over a decade. There is no end in sight to the litigation in light of the decision below.

3. This case presents a rare opportunity for the Court to offer needed clarity on a common bankruptcy issue. Given the "twin concerns of delay and cost associated with prolonged litigation" in bankruptcy cases, such questions relatively infrequently make their way in fully briefed form to the appellate courts, let alone this Court. Troy A. McKenzie, *Judicial Independence, Autonomy, and the Bankruptcy Courts*, 62 Stan. L. Rev. 747, 782 (2010); see *id.* at 783-784 (finding that, between 2000 and 2007, only one bankruptcy case out of every 1,580 filed was appealed to a circuit court, compared to one out of 12 non-prisoner civil suits). As a result, "[b]asic questions of bankruptcy law remain unsolved in most circuits for lack of settled precedent, a perception shared by bankruptcy practitioners and scholars alike." *Id.* at 784 (citation omitted).

This case, which fully and cleanly presents the question of whether a bankruptcy trustee bears the burden of pleading and proving a subsequent transferee's lack of good faith under Section 550(b), is an optimal vehicle for this Court's review. Both the district court and the court of appeals thoroughly considered the question presented, and the parties fully briefed the issue. The relevant facts are undisputed. Only a recurring and important question of law remains for the Court to decide. The Court should act now to correct the court of appeals' error and settle the question for the other circuits; another case so squarely presenting the question here may not come along soon.

4. At a minimum, given the significance of the question to the federal bankruptcy system, the Court should consider calling for the views of the Solicitor General. The

Court has frequently invited the United States, as the superintendent of the nation's bankruptcy system, to weigh in on whether the Court should grant review of cases involving provisions of the Bankruptcy Code. See, *e.g.*, *Deutsche Bank Trust Company Americas* v. *Robert R. McCormick Foundation*, 141 S. Ct. 232 (2020) (No. 20-8); *Lamar, Archer & Cofrin, LLP* v. *Appling*, 137 S. Ct. 2285 (2017) (No. 16-1215); *U.S. Bank National Association* v. *Village at Lakeridge*, 137 S. Ct. 268 (2016) (No. 15-1509); *Czyzewski* v. *Jevic Holding Corp.*, 577 U.S. 1134 (2016) (No. 15-649); *Southwest Securities* v. *Segner*, 137 S. Ct. 267 (2016) (No. 15-1223); *Law* v. *Siegel*, 568 U.S. 1047 (2012) (No. 12-5196); *Countrywide Home Loans, Inc.* v. *Rodriguez*, 564 U.S. 1017 (2011) (No. 10-1285).

In fact, the Court has already called for the views of the Solicitor General in at least two cases involving the Madoff bankruptcy litigation. See *HSBC Holdings plc* v. *Picard*, 140 S. Ct. 643 (2019) (No. 19-277); *Picard* v. *JPMorgan Chase & Co.*, 571 U.S. 1122 (2014) (No. 13-448). If the Court does not grant the petition outright, it should follow that same approach here.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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