No. 23-721

In the Supreme Court of the United States

GAYLE KILLILEA,

Petitioner,

v.

RICHARD M. COAN, ET AL.,

Respondents.

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

REPLY BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

The first Question Presented is:

1. Whether expert testimony may be excluded under Rules 702 and 704 because the expert offers an opinion on the relevant question of fact.

Although Respondent attempts to reframe the first question in terms of whether the District Court "abused its discretion," it is properly framed as a question of law concerning the correct interpretation of Rules 702 and 704—*i.e.*, whether the rules permit a court to exclude expert fact testimony because the expert offers an opinion on the relevant factual issue. The courts below held "yes"; other courts of appeals have held "no." Respondent's recharacterization is immaterial because when a district court's analysis rests on a legally erroneous interpretation of the Rules, it necessarily abuses its discretion. *See Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990) ("district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law"). The first question also does not involve whether the expert was precluded from offering "legal conclusions." The expert was precluded from offering his opinion on whether the property at issue was held in trust—an undisputed question of *fact*.

The second Question Presented is:

2. Whether a trustee may avoid the transfer of property not owned by the debtor.

Although Respondent attempts to reframe the second question as involving the District Court's "sustaining of a jury verdict," Respondent does not dispute that, if the property at issue was not "an interest of the debtor" for the purposes of section 548 of the Bankruptcy Code, then Respondent was not permitted to avoid the transfer regardless of the jury's verdict. Likewise, it is irrelevant whether the trial evidence concerning other elements of avoidance was sufficient to sustain the verdict.

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SUMMARY OF REPLY

The Petition squarely presents circuit splits on two important and recurring issues: (1) whether a court may exclude the testimony of an expert fact witness under Rules 702 and 704 because the expert offers an opinion on a factual issue that is ultimately for the jury to decide; and (2) whether a trustee may avoid the transfer of property the debtor does not own as a fraudulent conveyance without first piercing the corporate veil between the debtor and the entity that does own it (or proving some other alter ego theory). The courts below held "yes" on both questions; other courts of appeals have held "no." Rather than confront these straight-forward legal issues, Respondent ("Coan") attempts to avoid them through misguided recharacterization. Along the way, however, Coan concedes (or at least does not deny) the grounds for Petitioner Killilea's argument that certiorari is warranted and, further, that this case presents a rare instance in which summary reversal is appropriate—relief Coan does not even address.

On the first Question Presented, Coan does not dispute that the issue whether Walford was held in trust is a question of fact. Nor does Coan deny that, if Walford was held in trust, the property could not be avoided as a matter of law under *Begier v. IRS*, 496 U.S. 53 (1990). Coan also concedes the District Court's reasons (adopted by the Court of Appeals) for precluding Wylie's testimony: permitting Wylie to testify whether Walford was held in trust would "usurp" the role of the jury as factfinder and "marshal the evidence" in the form of an opinion. BIO.17.

As a matter of law, however, the District Court's reasons are not legitimate grounds for precluding expert testimony—as other courts of appeals have determined, and as this Court has indicated. *Of course*, expert fact witnesses marshal and organize the evidence in rendering their opinions. And it does not usurp the role of the jury to explain complex issues of fact. That is the point of having the expert. At bottom, the District Court's reasoning, adopted by the Court of Appeals, reduces to the proposition that an expert cannot testify on questions of fact because they are questions of fact for the jury to decide. The Second Circuit's reasoning conflicts irreconcilably with the decisions of other courts of appeals.

On the second Question Presented, Coan does not dispute that if 81 North Wall Quay was not owned by the debtor, Dunne, then the property could not have been avoided as a matter of law. He also admits that Dunne did not in fact own the property—Dunne instead had an indirect interest in Page Inns, which owned 81 North Wall Quay. In near-identical cases, other courts of appeals have uniformly held that property not owned by the debtor, but instead owned by an entity that the debtor owns or has an interest in, is not "an interest of the debtor" under section 548, and is thus not avoidable unless the trustee succeeds on a veil-piercing or alter-ego theory. But it is undisputed that Coan did not seek to pierce the corporate veil between Dunne and Page Inns. The Second Circuit's holding thus conflicts with every other court to consider the issue and certiorari is warranted.

ARGUMENT

I. THE DECISIONS BELOW CREATE A SPLIT OF AUTHORITY AMONG THE COURTS OF APPEALS.

A. Coan's Reframing Efforts Fail.

Coan attempts to avoid the merits of Killilea's petition by raising irrelevant and erroneous issues.

First, Coan is wrong that a summary order cannot create a circuit split. BIO.15. A summary order "does not mean that the court considers itself free to rule differently in similar cases." *United States v. Payne*, 591 F.3d 46, 58 (2d Cir. 2010) (quotations omitted). On the contrary, summary orders *are* precedential. Further, this Court often grants certiorari to review summary orders. *See, e.g., Kumar v. Pearson Educ., Inc.*, 568 U.S. 1247 (2013).

Second, Coan contends there can be no circuit conflict here "since decisions to admit or exclude expert testimony are reviewed only for abuse of discretion." BIO.17. This is also wrong. A "district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law." *Cooter*, 496 U.S. at 405; *see also United States v. Walker*, 974 F.3d 193, 204 (2d Cir. 2020), *cert. denied*, 210 L. Ed. 2d 943 (2021). Here, the District Court precluded Wylie from offering his opinion based on its erroneous interpretation of the Rules.

Finally, Coan is wrong that Killilea waived the second Question Presented involving 81 North Wall

Quay. An issue is properly preserved for appeal if it was either "pressed or passed upon below." *United States v. Williams*, 504 U.S. 36, 41 (1992). Coan lost his waiver argument before the Second Circuit. *See* CA2 Doc. 143 at 45. That is because in her Rule 50 motion, Killilea requested that the District Court enter a directed verdict on the ground that the transfer of 81 North Wall Quay was made not by Dunne, but by Page Inns. *See* KA-274. The Second Circuit then decided the merits, rejecting Coan's waiver argument. Coan's waiver theory is entirely beside the point.

B. There is a Circuit Split Regarding the Interpretation of Rule 702.

Other courts of appeals have consistently held that expert "customs and practice" testimony is admissible under Rule 702, and particularly helpful in cases (such as this one) involving complex factual issues well beyond the ken of the average juror. *See* Pet.15-18. But the courts below held that a fact witness may be precluded from testifying as to the evidence at trial, or offering an ultimate opinion, for no other reason than that the complex factual issue is to be decided by the jury.

The resulting circuit split is significant. For example, the Sixth Circuit permits experts to offer factual opinions even when a basis for the proffered opinion rests in part on that expert's understanding of relevant law. *See United States v. Mahoney*, 949 F.2d 1397 (6th Cir. 1991). Coan is wrong that the courts below applied "the same legal principles" as in *Mahoney*. BIO.16. There, reviewing a tax fraud case,

the Sixth Circuit held that although government experts testified at trial that the tax returns at issue excluded reportable income, that did not "deprive the jury of its function" because they did not opine about whether the defendant filed false tax returns with requisite intent—the charged crime. *Id.* at 1406. Additionally, the expert's testimony was admissible because, per Rule 704, "testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." *Id.*

Here, the District Court held that Wylie was forbidden from offering his opinion on the ultimate factual issue whether Walford was held in trust, even though Wylie offered no opinion about the ultimate *legal* claim submitted to the jury: whether the transfer of Walford should be set aside as a fraudulent conveyance. His testimony thus would not "deprive the jury of its function." *Id.* at 1046. This principle is followed by the Third, Ninth, Tenth, and Eleventh Circuits, all of which permit fact experts to offer ultimate opinions and opine on the evidence at trial. *See* Pet.15-18.

Coan claims that the decision below is consistent with precluding experts from instructing the jury on applicable law. *See* BIO.17-18. This only confuses the analysis. Wylie was offered as an expert *fact* witness, and would have testified on the critically important and dispositive *factual* issue whether Walford was held in trust. The District Court determined that the relevant facts were "immensely complex" and "well beyond the ken of the average juror," and that Wylie's entire testimony would have been helpful to the jury.

DA-5543; App.34. Yet the court prevented Wylie from doing his job for reasons the Rules expressly forbid. The Second Circuit stands alone in sanctioning this outcome and reasoning.

C. There is a Circuit Split Regarding Whether an "Interest of the Debtor in Property" under § 548 Includes Property Not Owned by the Debtor.

When a bankruptcy trustee does not assert legal theories permitting him to treat corporate assets as the debtor's assets (such as veil-piercing or alter-ego theories), may the trustee set aside as a fraudulent conveyance the transfer of property held by a corporate entity under § 548? The courts below answered "yes." However, the Sixth, Seventh, and Ninth Circuits have plainly answered "no," holding instead that the trustee must prevail in asserting veil piercing or alter-ego theories, and if the trustee fails to do so, then the property is not "an interest of the debtor" under section 548. Coan has no real response to this conflict, devoting just two paragraphs to it. BIO.26.

First, Coan contends that no circuit split may be created by a summary order. That is plainly incorrect. *See* Section I.A *supra*.

Second, Coan claims that no circuit split exists because all courts, including the lower courts here, "recognize the self-evident principle that a property interest must be owned by the debtor to be the subject of a fraudulent transfer claim." BIO.27. But Coan then *concedes that Dunne did not own 81 North Wall*

Quay. BIO.26 (acknowledging that 81 North Wall Quay was "formally owned by Page Inns").

Coan suggests that, because Dunne's bankruptcy schedule listed a 100 percent holding in Page Inns, which in turn owned 81 North Wall Quay, then the property is an "interest of the debtor." BIO.22. But that is non-responsive because it identifies, rather than addresses, the problem. Coan simply observes that Dunne had an interest in Page Inns, not that 81 North Wall Quay was his property. More important, every other court of appeals has held in exactly such a circumstance that the property cannot be avoided. Pet.19-22.

The parties thus *agree* that 81 North Wall Quay was not owned by Dunne. And Coan does not deny that he made no effort to pierce the corporate veil. *See also* App.24a (District Court acknowledging that "North Wall Quay was formally owned by an entity known as Page Inns").[1] Further, Coan does not contest that in *In re Howland*, 674 F. App'x 482, 485 (6th Cir. 2017)—Killilea's leading case establishing a circuit split—the Sixth Circuit held that, when a debtor holds an interest in an LLC, which in turn owns property, the trustee cannot avoid the LLC's transfer of property under section 548 without first piercing the LLC's veil. A circuit split on the second question is thus clear.

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[1] Because Coan did not even attempt to pierce the corporate veils between Dunne, DCD, and Page Inns, his discussion of Irish veil-piercing law, BIO.24, is irrelevant.

Moreover, the Seventh Circuit follows the Sixth Circuit's approach. *See In re Wolf*, No. 23-1045, 2023 WL 6564882 (7th Cir. Oct. 10, 2023). Coan's attempt to distinguish *Wolf* as holding only that Illinois law likely recognizes reverse-veil piercing, BIO.27, is a red-herring. The court analyzed the requirements for reverse veil-piercing precisely because the debtor, Wolf, did not own the property that the trustee sought to avoid. The question was whether a business called MMQB, which was owned by a company called Zig Zag, was an interest of the debtor in property under section 548. *See In re Wolf*, 595 B.R. 735, 775 (Bankr. N.D. Ill. 2018), *aff'd*, 644 B.R. 725 (N.D. Ill. 2022). The bankruptcy court held that "because Zig Zag was, at the time of the transfer, merely the Debtor's alter ego, the property of Zig Zag was the property of the Debtor …. When it transferred the MMQB business, the transfer therefore was 'of an interest of the debtor in property.'" *In re Wolf*, 595 B.R. at 775. The Seventh Circuit affirmed, concluding that the avoidance was permissible only because the "veil-piercing was proper." *Wolf*, 2023 WL 6564882, at *3.

Coan's attempt to distinguish *In re Wardle*, No. ADV.S-03-01467, 2006 WL 6811026 (B.A.P. 9th Cir. Jan. 31, 2006), is another non-sequitur. And Coan does not even address *In re Stout*, 649 F. App'x 621 (9th Cir. 2016) ("property owned by a corporation may be considered a debtor's property where the corporation was the debtor's alter ego."). Certiorari is warranted.

II. THE DECISIONS BELOW CONFLICT WITH THIS COURT'S PRECEDENT.

A. The Second Circuit's Decision Conflicts with *Barefoot* and *Daubert*.

The Second Circuit's decision conflicts with this Court's test for the admission of expert testimony under *Barefoot* and *Daubert*.

Coan claims that the District Court "faithfully applied" *Barefoot* and *Daubert* because it found that, if Wylie were allowed to offer his opinion or speak to the evidence, he would "exceed his expertise." BIO.13 (quoting App.37a). The District Court therefore ordered that Wylie "testif[y] about background legal concepts and practices" only. App.37a.

But Wylie was Killilea's *fact* expert. Thus, the District Court's immediately-following objection that Wylie's opinion regarding the facts would permit him to "marshal[] the evidence in defendants' favor," *id.*, ignores that such marshalling is perfectly proper for a fact witness.[2] This is but part of accepted practice in which fact experts play a crucial role: "for the parties to marshal evidence supporting their claims and defenses." *Dupree v. Younger*, 598 U.S. 729, 731 (2023). There is nothing in the rules prohibiting a fact expert from offering an opinion that accords with the

[2] Killilea did not "misleadingly" state Wylie's credentials were undisputed. BIO.13. They were: "The Trustee does not challenge Wylie's expert qualifications with respect to Irish real estate law." App.34a.

position of the party that has retained him. Indeed, such convergence is the norm.

Unable to attack Wylie's qualifications, Coan describes the District Court's preclusion of Wylie's testimony as simple gatekeeping in accord with *Barefoot* and *Daubert*. Not so. In *Barefoot*, this Court did not hold, and Killilea does not claim, that "all experts, no matter the discipline or facts of a case, must always be permitted to testify to the facts of the case." BIO.14. Rather, just like the expert in *Barefoot*—who testified not only about general psychology principles but also applied those principles to the specific facts in the case—Wylie should have been permitted to discuss Irish law and customs generally, and then apply that expert understanding to the complex factual evidence in the case.

Likewise, *Daubert* instructed district courts to weigh whether proposed testimony will be helpful. Here, the District Court determined that the relevant facts were "enormously complex" and "well beyond the ken" of the average juror. App.34. If there ever was a case in which an expert fact witness was warranted on the established record, this is it. Coan simply parrots the District Court's reasoning, contending that permitting Wylie to testify would "have usurped the role of both judge and jury." BIO.19. But as the Advisory Committee Notes to Rule 704 explain, forbidding an expert from offering an ultimate opinion "generally serve[s] only to deprive the trier of fact of useful information," and the concern that such testimony would "usurp the province of the jury" is "*aptly characterized as 'empty rhetoric*.'" App.66a (quoting 7 Wigmore § 1920) (emphasis added). *See*

also United States v. Scheffer, 523 U.S. 303, 319 (1998) (Kennedy, J., concurring) ("this tired argument had long since been given its deserved repose as a categorical rule of exclusion").

To the extent Coan did not believe Wylie's testimony was correct or credible, *Barefoot* and *Daubert* make clear the appropriate mechanism: "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Daubert* at 596. The District Court's decision was instead one-sided, and highly prejudicial to Killilea—a point Coan does not contest. Coan's fact expert was permitted to testify on the factual issue whether Dunne was insolvent, whereas on the factual trust question Killilea's expert was not. *See* KA-259-457; DA-3186-3187. Notably, it was only *after* Coan's fact expert testified that the District Court made its ruling precluding the testimony of Killilea's expert.[3]

B. The Second Circuit's Decision Conflicts with This Court's Decision in *Begier*.

To determine if an asset is "an interest of the debtor in property" under § 548 of the Bankruptcy

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[3] Respondent's lone case in support, *Nimely v. City of New York*, 414 F.3d 381 (2d Cir. 2005), is inapposite. There, an expert was excluded when he was offered to evaluate the credibility of trial witnesses. *Id*. at 398. Wylie was not asked to opine on the credibility of witnesses; such is also irrelevant as Irish law looks only to the relevant documentary evidence for trust creation. DA-100.

Code, this Court has directed a straightforward test: whether the property in question would be part of the debtor's bankruptcy estate if the transfer had not been made. *Begier*, 496 U.S. at 58. Coan only briefly discusses the Second Circuit's misapplication of *Begier*. BIO.26. He claims that including 81 North Wall Quay as part of Dunne's estate was appropriate because "Dunne undisputedly had an interest in North Wall Quay, even if it was formally owned by Page Inns Limited." BIO.26 (quoting Resp. App.52a). Coan's contention that this issue "is not a question answered by *Begier*," *id*., is wrong. *Begier* held that the term "interest of the debtor" was "coextensive" with "property of the debtor." *Begier*, 496 U.S. at 59 n.3. Because Dunne did not own 81 North Wall Quay, it would not be part of his bankruptcy estate and thus did not constitute "an interest of the debtor in property" for avoidance purposes.

III. SUMMARY REVERSAL IS WARRANTED.

This is a rare case in which summary reversal is warranted. *See* Pet.4-5, 14, 27. Because Coan entirely neglects Killilea's arguments on this point, he has waived asserting grounds in opposition to it. *See Nevada Comm'n on Ethics v. Carrigan*, 564 U.S. 117, 128–29 (2011); Sup. Ct. R. 15.2 (non-jurisdictional arguments in opposition to certiorari are "deemed waived unless called to the Court's attention in the brief in opposition").

CONCLUSION

Killilea respectfully requests that the Court grant certiorari and summarily reverse.

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