No.

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

PETITION FOR A WRIT OF CERTIORARI

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January 5, 2022

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QUESTION PRESENTED

Under 11 U.S.C. § 548(a)(1)(A), a bankruptcy trustee may avoid a transfer if the debtor "made such transfer . . . with actual intent to hinder, delay, or defraud any entity." When the debtor is a corporation, which can act only through its agents, courts look to the intent of those agents to discern whether this *mens rea* element is satisfied.

In this case, involving the multi-billion-dollar failed leveraged buyout (LBO) of the Tribune Company, the trustee, suing on behalf of Tribune retirees and creditors who recovered pennies on the dollar in Tribune's inevitable bankruptcy, alleged that Tribune's chief executive officer and other high-ranking officers acted with fraudulent intent in engineering and executing the LBO. Among other things, the trustee alleged that senior management had concocted bogus projections, lied to the board of directors, and engaged in a host of other fraudulent activity. The district court, affirmed on this ground by the court of appeals, nevertheless held, as a matter of law, that senior management's fraudulent intent could not be imputed to Tribune for purposes of a Section 548(a)(1)(A) claim. In the lower courts' view, because a special committee of the board of directors, and not senior management, "controlled" the final decision to make the fraudulent transfer, only the special committee's intent was relevant for imputation purposes.

The question presented is whether a corporate agent must be "in a position to control" the challenged

transfer for her intent to be imputable to the corporation under Section 548(a)(1)(A).

PARTIES TO THE PROCEEDING

Petitioner, plaintiff-appellant below, is Marc S. Kirschner, Trustee for the Tribune Litigation Trust.

Respondents, defendants-appellees below, are former shareholders of Tribune Company, as set forth in the appendix. Pet. App. 90a-210a. Certain defendants-appellees below are not respondents here. Regarding a previous petition for certiorari in a related case, Justices Kennedy and Thomas noted "that there might not be a quorum in this Court." *Deutsche Bank Tr. Co. Ams.* v. *Robert R. McCormick Found.*, 138 S. Ct. 1162 (2018). To make more likely that there will be a quorum for this petition, petitioners abandon the case and let the judgment below stand as to the following defendants-appellees:

American Century Investment Management Inc. S&P 500 Equity Index Fund

AQR Absolute Return Master Account, L.P.

AQR Capital Management LLC

AQR Global Stock Selection HV Master Account Ltd.

AQR Global Stock Selection Master Acct LP

AQR R. C. Equity Australia Fund

BlackRock Advisors (UK) Ltd. f/k/a Barclays Global Investors. Ltd.

BlackRock Debt Strategies Fund, Inc. a/k/a DSU

BlackRock Institutional Trust Company, N.A.

BlackRock North American Equity Tracker Fund Trust Accounts, Bank of New York Europe Ltd, RBS, Trustee

BlackRock S&P 500 Index V.I. Fund (Ins-Var Ser)

BlackRock S-P 500 Index Series Master

BlackRock, Inc. (Merrill Lynch)

Boston Partners Asset Management

Capital One Bank (USA), National Association - Marshall & Ilsley Trust Co.

Caterpillar Inc.

Charles Schwab & Co, Inc.

Charles Schwab Investment Management, Inc.

College Retirement Equities Fund - Equity Index Account

College Retirement Equities Fund - Global Equities Account

College Retirement Equities Fund - Social Choice Account

College Retirement Equities Fund - Stock Account

Conservative Balanced Portfolio, a Series of Prudential Series Fund, Inc.

Credit Suisse Capital LLC

Credit Suisse Securities (USA) LLC

Credit Suisse Securities (USA) LLC f/k/a Credit Suisse First Boston LLC

Deutsche Bank Securities Inc.

Deutsche Bank Securities Inc. - DB AG Equity Swaps Offshore Consolidated Account I

DFA Investment Dimensions Group Inc. -- U.S. Core Equity 1 Portfolio

DFA Investment Dimensions Group Inc. -- U.S. Core Equity 2 Portfolio

DFA Investment Dimensions Group Inc. -- U.S. Vector Equity Portfolio

DFA Investment Dimensions Group Inc. -- VA U.S. Large Value Portfolio

DFA U.S. Core Equity Fund of Dimensional Funds

DFA US Vector Equity Fund of Dimensional Funds

DWS Equity 500 Index Portfolio, DWS Institutional Funds, DWS Investment Trust, DWS Investments VIT Funds, DWS Variable Series II

DWS Equity 500 Index VIP (DWS Investments Account Bos05-0702)

Eaton Vance Multi Cap Growth Portfolio

Eaton Vance Tax Managed Global Buy-Write Opportunities Fund, Alan R. Dynner, Trustee

Eaton Vance Tax Managed Growth Portfolio

Eaton Vance Tax Managed Multi-Cap Growth Portfolio

Federated Capital Appreciation Fund II f/k/a Federated Clover Value Fund II

Federated Capital Income Fund, Inc.

Federated Clover Value Fund f/k/a Federated American Leaders Fund

Federated Equity Income Fund, Inc.

Federated Investors Inc.

Federated Managed Volatility Fund II f/k/a Federated Capital Income Fund II

Federated Managed Volatility Fund II f/k/a Federated Capital Income Fund II f/k/a Federated Equity Income Fund II

Federated Max-Cap Index Fund

Federated MTD Stock Trust, Current Trustee

Federated Muni and Stock Advantage Fund

Fidelity Advisor Leveraged Company Stock Fund, A Series of Fidelity Advisor Series I

Fidelity Commonwealth Trust, Abigail P. Johnson, Trustee

Fidelity Concord Street Trust

Fidelity Concord Street Trust (Spartan U.S. Equity Index Fund), Current Trustee

Fidelity Leveraged Company Stock Fund, A Series of Fidelity Securities Fund

Fidelity US Equity Index Commingled Pool Fidelity

First Eagle Contrarian Value Master Fund, Ltd.

Goldman Sachs Variable Insurance Trust, Current Trustee

Invesco Equally-Weighted S&P 500 Fund f/k/a Morgan Stanley Equally-Weighted S&P 500 Fund

Invesco S&P 500 Index Fund

Invesco S&P 500 Index Fund f/k/a MS S&P 500 Index Fund

Invesco V.I. Select Dimensions Equally-Weighted S&P 500 Fund

iShares Dow Jones U.S. Consumer Services Sector Index Fund

iShares Dow Jones U.S. Total Market Index Fund

iShares Morningstar Mid Value Index Fund

iShares Russell 1000 Index Fund

iShares Russell 1000 Value Index Fund

iShares Russell 3000 Index Fund

iShares Russell 3000 Value Index Fund

iShares Russell Midcap Index Fund

iShares Russell Midcap Value Index Fund

iShares S&P 500 Index Fund

iShares S&P 500 Value Index Fund

JP Morgan Mosaic Fund, LLC

JPMorgan Trust II

MetLife Stock Index Portfolio

Neuberger Berman Inc.

Nuveen Equity Index Fund

Nuveen Equity Index Fund f/k/a First American Equity Index, Inc.

Nuveen Equity Index Fund f/k/a Firstar Equity Index Fund

Oppenheimer & Co., Inc.

Oppenheimer Main Street Select Fund f/k/a Oppenheimer Main Street Opportunity Fund

Oppenheimer Main Street Small- & Mid-Cap Fund f/k/a Oppenheimer Main Street Small Cap Fund

Oppenheimer Variable Account Funds d/b/a Oppenheimer Main Street Small- & Mid-Cap Fund/VA, f/k/a Oppenheimber Main Street Small Cap Fund/VA

OppenheimerFunds

OppenheimerFunds, Inc

Principal Funds Inc-LargeCap Blend Fund II

Principal Variable Contracts Funds Inc.-Large Cap Blend Account II

Prudential Investment Management, Inc.

Prudential Investment Portfolios 3 (Prudential Stategic Value Fund)

Prudential Investment Portfolios 8 - Prudential Stock Index Fund f/k/a Dryden Index Series Fund

Prudential Investment Portfolios 8 (Prudential Stock Index Fund)

Prudential Investments LLC

Putnam S&P 500 Fund

Putnam S&P 500 Index Fund, Putnam Fiduciary Trust Company, Trustee

SC BlackRock Small Cap Index Fund f/k/a SC Oppenheimer Main Street Cap Fund

Schwab 1000 Index Fund

Schwab Fundamental US Large Company Index Fund a/k/a Schwab Fundamental US Large Company

Schwab S&P 500 Index Fund (2M32)

Schwab S&P 500 Index Fund f/k/a Schwab Institutional Select S&P 500 Fund (2M37)

Schwab Total Stock Market Index Fund (2M40)

SPDR S&P 500 ETF

SPDR S&P Midcap 400 ETF Trust a/k/a SPDR Midcap 400 Trust, The Bank of New York Mellon, Trustee

SSGA IAM Shares Fund (State Street Global Advisors)

SSGA Japan Co Ltd (State Street Global Advisors)

SSGA S&P 500 Index Fund

SSGA S&P 500 Index Fund CTF

SSGA World Funds

State Street Global

State Street Global Advisors Fund

State Street Global Advisors Index Funds SICAV

State Street Global Advisors, Inc.

State Street Global Advisors, Inc. - Russell 1000 Value CTF

Stock Index Portfolio, a Series of the Prudential Series Fund, Inc.

T. Rowe Price

T. Rowe Price Associates a/k/a Spinningrod & Co

T. Rowe Price Associates, Inc.

T. Rowe Price Balanced Fund - Large Cap Core Fund, Inc.

T. Rowe Price Balanced Fund, Inc.

T. Rowe Price Capital Opportunity Fund, Inc.

T. Rowe Price Dividend Growth Fund, Inc. a/k/a Sherbet + Co

T. Rowe Price Equity Income Fund a/k/a Taskforce & Co

T. Rowe Price Equity Income Portfolio

T. Rowe Price Equity Income Trust

T. Rowe Price Equity Index Trust

T. Rowe Price Equity Series, Inc. a/k/a Foulard and Co

T. Rowe Price Index Trust, Inc. (T. Rowe Price Equity Index 500 Fund)

T. Rowe Price Index Trust, Inc. (T. Rowe Price Total Equity Market Index Fund)

T. Rowe Price International

T. Rowe Price Mid-Cap Value Fund, Inc.

T. Rowe Price Structured Research Trust, T Rowe Price Trust Company, Trustee

Thrivent Financial for Lutherans f/k/a Lutheran Brotherhood

Thrivent Series Fund, Inc., Thrivent Balanced Portfolio

Thrivent Series Fund, Inc., Thrivent Large Cap Index Portfolio

TIAA - Separate Account VA-1 Stock Index Account

TIAA-CREF Funds

TIAA-CREF Funds TIAA-CREF Equity Index Fund

TIAA-CREF Funds TIAA-CREF Large Cap Value Index Fund

TIAA-CREF Funds TIAA-CREF Mid-Cap Blend Index Fund

TIAA-CREF Funds TIAA-CREF Mid-Cap Value Index Fund

TIAA-CREF Funds TIAA-CREF S&P 500 Index Fund

TIAA-CREF Funds TIAA-CREF Social Choice Equity Fund

TIAA-CREF Institutional Mutual Funds

USAA Investment Management Company

USAA Mutual Fund Inc. (USAA Income Stock Fund)

USAA Mutual Fund, Inc.

USAA Mutual Funds Trust, Current Trustee

Vanguard Fenway Funds (Vanguard Equity Income Fund)

Vanguard Fiduciary Trust Company (Employee Benefit Index Fund)

Vanguard Fiduciary Trust Company (Russell 1000 Index Trust)

Vanguard Fiduciary Trust Company (Vanguard Company Stock 21)

Vanguard Fiduciary Trust Company (Vanguard Total Stock Market Index Fund)

Vanguard Fiduciary Trust Company, as Trustee of Its Sponsored and Managed Collective Investment Funds

Vanguard Index Funds (Vanguard Index 500 Fund)

Vanguard Index Funds (Vanguard Large Cap Index Fund)

Vanguard Index Funds (Vanguard Mid-Cap Index Fund)

Vanguard Index Funds (Vanguard Mid-Cap Value Index Fund)

Vanguard Index Funds (Vanguard Total Stock Market Index Fund)

Vanguard Index Funds (Vanguard Value Index Fund)

Vanguard Institutional Index Funds (Vanguard Institutional Index Fund)

Vanguard Institutional Index Funds (Vanguard Institutional Total Stock Market Index Fund)

Vanguard Malvern Funds (Vanguard Asset Allocation Fund)

Vanguard Quantitative Funds (Vanguard Growth & Income Fund)

Vanguard Quantitative Funds (Vanguard Structured Large-Cap Equity Fund)

Vanguard Scottsdale Funds (Vanguard Fiduciary Trust Company, Russell 1000 Value)

Vanguard Tax-Managed Funds (Vanguard Tax Managed Growth & Income Fund)

Vanguard Valley Forge Funds (Vanguard Balanced Index Fund)

Vanguard Variable Insurance Funds (Vanguard VVIF Equity Fund Index)

Vanguard Variable Insurance Funds (Vanguard VVIIF Midcap Index Fund)

Vanguard Variable Insurance Funds (VVIF-Equity Income VGI)

Vanguard Whitehall Funds (Vanguard High Dividend Yield Index Fund)

Vanguard Windsor Funds (Vanguard Windsor II Fund)

Vanguard World Funds (Vanguard Consumer Discretionary Index Fund)

Vanguard World Funds (Vanguard FTSE Social Index Fund)

Wells Fargo Advantage Asset Allocation Fund

Wells Fargo Advantage Diversified Stock Portfolio

Wells Fargo Advantage Index Portfolio

Wells Fargo Bank, N.A.

Wells Fargo Bank, N.A. f/k/a Wachovia Bank, N.A.

Wells Fargo Bank, N.A. f/k/a Wachovia Bank, N.A. CMC-Northeast

Wells Fargo Funds Trust (Disciplined Small-Mid Value)

Wells Fargo Funds Trust (Evergreen Market Index Fund)

Wells Fargo Funds Trust (Evergreen Market Index Value)

Wells Fargo Investments, LLC

RELATED PROCEEDINGS

Pursuant to Supreme Court Rule 14.1(b)(iii), a list of proceedings directly related to this case is set forth in the appendix. Pet. App. 211a-213a.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-52a) is reported at 10 F.4th 147. The opinion of the district court is included at Pet. App. 53a-82a.

JURISDICTION

The court of appeals' judgment was entered on August 20, 2021. The court of appeals denied rehearing on October 7, 2021. Pet. App. 83a-84a. This petition is timely under Supreme Court Rule 13(1). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 548 of Title 11 of the United States Code provides, in relevant part:

> (a)(1) The trustee may avoid any transfer (including any transfer to or for the benefit of an insider under an employment contract) of an interest of the debtor in property, or any obligation (including any obligation to or for the benefit of an insider under an employment contract) incurred by the debtor, that was made or incurred on or within 2 years before the date of the filing of the petition, if the debtor voluntarily or involuntarily—
>
> (A) made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or

> became, on or after the date that such transfer was made or such obligation was incurred, indebted . . . .

STATEMENT

The question in this case is whether the fraudulent intent of a corporation's senior executives may be imputed to the corporation under Section 548(a)(1)(A) of the Bankruptcy Code. Consistent with this Court's longstanding precedents, that question must be answered by reference to the federal common law, because Congress is presumed to incorporate common law principles any time it creates a federal tort statute. See *Meyer* v. *Holley*, 537 U.S. 280, 285 (2003). Among those principles is the precept that the acts (and intent) of a corporation's agents may be attributable to the corporation under the doctrine of *respondeat superior*. *E.g.*, *United States* v. *A&P Trucking Co*., 358 U.S. 121, 125 (1958).

The court of appeals' decision defies that bedrock principle. Rather than invoke the federal common law, the court of appeals turned to *state* law to determine which corporate agents' intent could be imputed to the company. Compounding its error, the court then invoked a confused "control" standard—akin to the one this Court rejected in *Staub* v. *Proctor Hospital*—that no un-reversed court has heretofore embraced. Nevertheless, applying that debunked standard here, the court of appeals held that the "intent" of the debtor-corporation (here, Tribune) depends on whether a special committee of Tribune's board of directors possessed the requisite intent. Thus, held the court, the fact that Tribune's senior-

most management orchestrated a fraud siphoning billions of dollars away from Tribune's creditors was of no moment. Because the *special committee* was not in on the fraud—rather, they (like the creditors and retirees) were fed bogus financial projections and lied to by management—the Trustee's fraudulent transfer claims under Section 548(a)(1)(A) were dismissed at the pleading stage.

The court of appeals' decision threatens to wreak havoc on multiple fronts. Most directly, the decision will allow bankrupt corporations to dodge billions of dollars of meritorious intentional fraudulent-transfer claims for years to come. More broadly, the court of appeals' "control" standard threatens to upend corporate criminal prosecutions, actions for securities fraud, and other areas of corporate regulation that rely on traditional (and previously noncontroversial) common law imputation standards. And all of this mischief will be let loose in the Nation's financial hub, where a vast number of bankruptcy cases are filed and where most civil and criminal actions alleging corporate fraud are brought.

The petition for writ of certiorari should be granted.

A. Statutory Framework

"Fraudulent transfer law is an elemental and ancient part of debtor-creditor relations." 5 COLLIER ON BANKRUPTCY ¶ 548.01 (16th ed.) (footnotes omitted). Beginning with the Statute of Elizabeth in 1571, Anglo-American law has for centuries

proscribed transfers made with the actual intent to hinder, delay, or defraud a debtor's creditors. *Ibid.*

This doctrine finds its modern incarnation in Section 548 of the Bankruptcy Code. Under 11 U.S.C. Section 548(a)(1)(A), a bankruptcy trustee "may avoid any transfer . . . if the debtor . . . made such transfer . . . with actual intent to hinder, delay, or defraud any entity." To prove the fraudulent intent of the debtor, a trustee may rely on direct evidence of intent or "badges of fraud"—*i.e.*, "circumstances so commonly associated with fraudulent transfers that their presence gives rise to an inference of intent." *In re Sharp Int'l Corp.*, 403 F.3d 43, 56 (2d Cir. 2005) (citation omitted).

When the debtor transferor is a corporation, courts ask whether the fraudulent intent of the corporation's agents can be imputed to the corporation itself. Consistent with the presumption that Congress incorporates "ordinary tort-related vicarious liability rules" when it "creates a tort action" like Section 548(a)(1)(A), *Meyer*, 537 U.S. at 285, most courts apply traditional vicarious liability principles to determine whether the agent's intent can be imputed to the corporation.[1]

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[1] See, *e.g.*, *In re Lyondell Chem. Co.*, 554 B.R. 635, 647 (S.D.N.Y. 2016) (applying the "general rule of imputation" that "the knowledge and actions of the corporation's officers and directors, acting within the scope of their authority, are imputed to the corporation itself"); *In re James River Coal Co.*, 360 B.R. 139, 161 (Bankr. E.D. Va. 2007) (holding that "the intent of the officers and directors may be imputed to the corporation"); *In re Blazo*

But not the Second Circuit.

B. Factual Background

In 2006, The Tribune Company was in a tight spot. The newspaper publishing industry—comprising roughly 75% of Tribune's total revenue—was in severe decline, with no end in sight. Pet. App. 5a. Prompted by Tribune's largest shareholders, Tribune's board (the "Board") brainstormed ways to increase shareholder returns. To that end, the Board formed a special committee composed of Tribune's seven independent directors. *Ibid.*

In early 2007, investor Sam Zell proposed to take Tribune private. Motivated by the anxieties of Tribune's largest shareholders that their holdings would further devalue before they were able to cash out, Zell proposed a two-step LBO. Pet. App. 6a-7a. In Step One, Tribune would borrow money—approximately $7 billion—to buy back just over half of its shares, including those held by Tribune's largest shareholders. *Id.* at 7a. After Step One closed, Tribune would borrow yet more money—another $3.7 billion—to purchase all of its remaining shares, completing Step Two. *Ibid.* Tribune would then merge with a specially created shell corporation, and management would walk away with a handsome $36 million. *Ibid.*

Corp., No. 93-62658, 1994 WL 92405, at *4 (Bankr. N.D. Ohio Feb. 25, 1994) (holding that because debtor's president was "acting within the scope of his authority," his "knowledge can be imputed to" the debtor).

There was just one problem. To obtain financing for the LBO, Tribune needed to procure an opinion stating that it would be solvent after each step of the proposed transaction. Pet. App. 7a. Because Tribune would *not* be solvent after those steps, Tribune's management got creative: to facilitate the LBO and their payday, Tribune's senior officers concocted financial projections that forecasted a post-LBO trajectory just short of miraculous. (Tribune's management had previously used these same sanguine projections to convince the Board to approve the LBO.) But even with these irrationally optimistic projections—which management knew were baseless—Tribune could not secure solvency opinions from the first two firms it approached. *Id.* at 7a-8a. So it engaged a third "virtually unknown firm," *id.* at 8a, which agreed to issue a solvency opinion using a "non-standard approach," *ibid.* Armed with its made-to-order solvency opinion, Tribune's management proceeded with the LBO.

On June 4, 2007, Step One closed. Tribune borrowed $7 billion to pay off its existing bank debt and repurchase just over half of its publicly held shares. Pet. App. 9a. Certain large shareholders sold all of their shares and their appointed Board members resigned, washing their hands of any stake in or responsibility for Tribune's post-IPO future. *Ibid.*

Concerned that Tribune would be unable to repay its recently increased debt load without refinancing its existing debt, Tribune's solvency-opinion firm got cold feet. Pet. App. 9a. So management assured the solvency-opinion firm that the special committee's financial advisor—Morgan Stanley—believed that Tribune would in fact be able to refinance its debt,

and, relying on that representation, the firm issued the requested solvency opinion. *Ibid.* In reality, however, Morgan Stanley had said no such thing. *Ibid.* Indeed, the Board's own financial advisors, Citigroup and Merrill Lynch, believed Tribune would be insolvent by more than $1.4 billion at Step One and $1.5 billion at Step Two. *Id.* at 10a. But the prospect of $12.5 million success fees kept the advisors from doing anything to discourage the transaction. Instead, Tribune borrowed an additional $3.7 billion to close Step Two in December 2007. *Ibid.*

The LBO's fallout was as swift as it was predictable. Less than a year after Step Two closed, Tribune declared bankruptcy in December 2008.

C. Procedural History

During Tribune's bankruptcy case, Tribune's unsecured creditors obtained standing to assert the claims of the company's estate on behalf of its creditors. It initiated this action in bankruptcy court in 2010. The case was eventually transferred to the Southern District of New York and, once Tribune's plan of reorganization was confirmed, the creditors' causes of action were transferred to a litigation trust, with the Trustee succeeding the creditors as plaintiff.

As discussed above, the Bankruptcy Code authorizes the Trustee to avoid and recover "intentional fraudulent transfers"—that is, transfers made by Tribune "with actual intent to hinder, delay, or defraud" its creditors. 11 U.S.C. § 548(a)(1)(A). Under this provision, the Trustee sought to recover Tribune's LBO payments to its former shareholders. The Trustee alleged that the intent of Tribune's senior

management—the ones who fabricated financial projections to dragoon the Board's approval for the LBO—should be imputed to Tribune.

In January 2017, the district court dismissed the Trustee's intentional fraudulent transfer claim. Borrowing a "control" test designed for an altogether different purpose, the court held that, in ascertaining Tribune's corporate intent, the court could consider only the intent of the individuals who had *final legal authority* over the transfer. Pet. App. 12a. Here, the district court explained, because the special committee ultimately signed off on the LBO—albeit on the strength of management's misrepresentations—the intent of Tribune's officers could not be imputed to the company. See *ibid.*

In August 2021, the court of appeals affirmed. Pet. App. 1a-52a. Observing that a Delaware statute requires a company's board to approve mergers, including LBOs, the court of appeals agreed that only the special committee of Tribune's board of directors—not management—had ultimate "control" over whether the LBO was consummated, and therefore *only* the special committee's intent could be imputed to the corporation. Thus, the Trustee's well-pleaded allegations that Tribune's senior management orchestrated the fraudulent scheme, prepared the false financial projections, engaged in conduct that the court of appeals acknowledged to be "manipulat[ive]" and "deceptive" (*id.* at 40a), and walked away with a small fortune rightfully belonging to creditors—all were beside the point. The court affirmed dismissal of the Trustee's Section 548(a)(1)(A) claim.

The Trustee petitioned for rehearing on September 7, 2021, which the court of appeals denied on October 7, 2021. Pet. App. 83a-84a.

REASONS FOR GRANTING THE PETITION

The court of appeals' holding is both unprecedented and untenable. For starters, the court of appeals' "control" test was erroneously repurposed from a First Circuit case, *In re Roco Corp.*, 701 F.2d 978 (1983), whose holding addressed a different legal question altogether. In addition to being wrong, the decision below conflicts with decades of this Court's decisions on agency law; upends the traditional analysis of "actual intent" under the Bankruptcy Code; and, devoid of any limiting principle, threatens to disrupt established rules of corporate scienter in both criminal and civil legal regimes.

This holding will have especially far-reaching effects on many of the largest Chapter 11 bankruptcies in the country. The Second Circuit has one of the nation's largest bankruptcy dockets and, in recent years alone, has adjudicated billions of dollars in fraudulent transfer claims. The court of appeals' decision will work a sea change for bankruptcy litigants in the Second Circuit, leaving unsecured creditors without recourse against bankruptcy filers that have utilized the court of appeals' new "control" standard to effectively immunize themselves from fraudulent transfer liability.

I. The Second Circuit's Novel "Control Test" For Corporate Imputation Conflicts With This Court's Teachings And More Than A Century of Federal Common Law

The Second Circuit's "control test" contravenes fundamental principles of federal agency law. As this Court has explained, "when Congress creates a tort action, it legislates against a legal background of ordinary tort-related vicarious liability rules and consequently intends its legislation to incorporate those rules." *Meyer* v. *Holley*, 537 U.S. 280, 285 (2003). One "elementary" rule of vicarious liability is that corporations "can be guilty of 'knowing' or 'willful' violations of regulatory statutes through the doctrine of respondeat superior." *United States* v. *A&P Trucking Co.*, 358 U.S. 121, 125 (1958).

The court of appeals offered no explanation why these hornbook principles should not apply to Section 548(a)(1)(A). It identified no textual language or statutory history suggesting that the Bankruptcy Code's fraudulent transfer provisions intended to exclude "ordinary tort-related vicarious liability rules." *Meyer,* 537 U.S. at 285. Instead, the court borrowed an ill-fitting rule concerning when a *transferee's* intent should be imputed to a transferor corporation. Applying that rule here, the court vitiated common law agency principles that courts have routinely invoked to construe federal tort statutes from time immemorial.

1. The Second Circuit defied this Court's consistent teaching that Congress is presumed to adopt common-law standards when it enacts a new tort statute. Pursuant to this tenet, courts have

construed countless federal statutes to incorporate traditional agency principles. See*, e.g., Meyer*, 537 U.S. at 282 (holding that the Fair Housing Act "imposes liability without fault upon the employer in accordance with traditional agency principles, *i.e.*, it normally imposes vicarious liability upon the corporation"); *Burlington Indus., Inc.* v. *Ellerth*, 524 U.S. 742, 754-755 (1998) (applying common law agency principles to Title VII); *Nationwide Mut. Ins. Co.* v. *Darden*, 503 U.S. 318, 323 (1992) (applying "traditional agency law principles" to ERISA) *Community for Creative Non-Violence* v. *Reid*, 490 U.S. 730, 741 (1989) (applying the "general common law of agency" to the Copyright Act of 1976); *Salyers* v. *Metropolitan Life Ins. Co.*, 871 F.3d 934, 939-940 (9th Cir. 2017) ("applying the federal common law of agency" to impute liability to employer under ERISA, lest the employer rely "on a compartmentalized system to escape responsibility" (citation omitted)); *1-800 Contacts, Inc.* v. *Lens.com, Inc.*, 722 F.3d 1229, 1240 (10th Cir. 2013) (joining "the Third Circuit in recognizing that the Lanham Act incorporates common-law agency principles" such that "a principal may be held vicariously liable for the infringing acts of an agent"); *Makor Issues & Rights, Ltd.* v. *Tellabs Inc.*, 513 F.3d 702, 708 (7th Cir. 2008) (holding that "the doctrines of respondeat superior and apparent authority remain applicable to suits for securities fraud").

This Court's decision in *Staub* v. *Proctor Hospital*, 562 U.S. 411 (2011), reaffirmed this interpretative framework. Starting from "the premise that when Congress creates a federal tort it adopts the background of general tort law," the Court looked to

"general principles of . . . agency law" to assess whether an employee was wrongfully discharged under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA). *Id.* at 417-418. Applying those agency principles, the Court reversed the Seventh Circuit's ruling that a supervisor's intent could be imputed to the corporation only if that supervisor "ma[de] the ultimate employment decision." *Id.* at 415. In so holding, the Court identified two lines of imputation authority in the common law: a narrower one, in which "the malicious mental state of one agent cannot generally be combined with the harmful action of another agent to hold the principal liable for a tort that requires both"; and a broader one, which permits such aggregation. *Id.* at 418. Even under the narrower standard, the Court held that a supervisor's intent could be imputed to the corporation if the supervisor acted with intent "to cause an adverse employment action" and was "a proximate cause" of the employee's discharge—even if the supervisor did *not* have ultimate "control" over the employment decision. *Id.* at 422.

Below, the court of appeals effectively revived the "control" test that this Court rejected in *Staub*. How to reconcile the two decisions? The court of appeals did so by sweeping *Staub* under the rug; because that case involved a different federal tort statute, the court reasoned, it did not carry "much weight" here. Pet. App. 17a n.4.

In truth, the decision below cannot be reconciled with *Staub*. This Court's holding in *Staub* was predicated not on USERRA-specific idiosyncrasies, but rather on the traditional, common-law agency

principles against which Congress acts when it passes *any* federal tort statute. There is no reason to believe—and the court of appeals offered none—that Congress had different common law principles in mind when it enacted Section 548(a)(1)(A).

2. After jettisoning those common law agency principles, the court of appeals invented a new "control" test for corporate imputation that lacks any grounding in federal law. Its analysis proceeded in two missteps:

First, the court of appeals improperly narrowed its inquiry to a single entity: the Tribune special committee. Ignoring decades of federal case law, the Second Circuit decided that it should "look to state law to determine who has the authority to act on behalf of a corporation," and "therefore whose actions to review to see whether there was fraudulent intent." Pet. App. 15a-16a. For this proposition, the Second Circuit cited one case: *Burks* v. *Lasker*, 441 U.S. 471 (1979). But *Lasker* addressed how "to determine the powers of corporate directors," *id.* at 478—a question naturally answered by reference to state corporate law. It had nothing to do with corporate intent, did not speak to the question of imputation, and certainly did not suggest that state law should supplant federal common law to supply the imputation standard for a federal tort statute.[2]

[2] As if that were not enough, the Second Circuit then flubbed its state-law analysis. The court of appeals cited Del. Gen. Corp. Law §§ 141(a), (c), 160(a), 251(b), for the proposition that "only the board of directors (or a committee to which the board has delegated its authority) has the power to approve an

Second, the court of appeals created a brand-new "control" test by misconstruing an unrelated case from the First Circuit. Citing *Roco*, 701 F.2d at 984—and inserting bracketed language that altered the meaning of the decision—the Second Circuit held that under Section 548(a)(1)(A), a "company's intent may be established only through the 'actual intent' of the individuals 'in a position to control the disposition of [the transferor's] property.' *Roco*, 701 F.2d at 984." Pet. App. 17a (alteration in original).[3]

That is not what *Roco* said. *Roco* addressed the entirely separate question of when, if ever, the intent of a *transferee*—not (as here) a corporate agent of the transferor—may be attributed to the transferor.

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extraordinary transaction such as a merger." Pet. App. 16a. In fact, these provisions list board approval as just one of *several* steps that must occur prior to a merger, including (i) memorialization of the transaction in a merger agreement; (ii) execution of the agreement by an authorized officer of the company; (iii) approval of the transaction by a majority of shareholders; and (iv) certification by the company's corporate secretary or assistant secretary. See Del. Gen. Corp. Law § 251(a)-(c). The Second Circuit offered no explanation for why the special committee's intent was more important than that of the members of management who prepared the merger agreement, the shareholders who voted to approve the merger, or the corporate secretary who certified the vote. The fact that the Delaware corporate law provision is so wildly inapposite confirms that relying on *state* law to provide the content for a *federal* imputation was a step off the rails at the outset.

[3] In quoting *Roco*'s holding, the Second Circuit replaced the transferee's name with "[the actor]," as if to suggest that the "control" test was designed to apply outside the transferor-qua-transferee context at issue in *Roco*. Pet. App. 16a. That elision fundamentally distorted the holding of the case.

Answering this question, the First Circuit concluded that it "may impute any fraudulent intent of Consove [the transferee] to the transferor Roco because, as the [Roco's] president, director, and sole shareholder, he was in a position to control the disposition of its property." 701 F.2d at 984.

In other words, *Roco* did not displace traditional agency principles, nor did it propound a new standard for imputing the intent of corporate agents. Rather, it identified an *additional* basis for imputation in the unusual circumstance where the transferee is in a position to "control" the relevant transfer—that is, where the transferee and the transferor are, in substance, *the same entity*. Until now, courts have uniformly understood and applied *Roco* that way. See, *e.g.*, *In re TMST, Inc.*, 610 B.R. 807, 822 (Bankr. D. Md. 2019) ("[W]hen imputing *the transferee's intent*, the control test explained in *Roco* applies; in all other contexts, traditional rules of agency apply."); accord *In re Elrod Holdings Corp.*, 421 B.R. 700, 710 (Bankr. D. Del. 2010); *In re Lyondell*, 554 B.R. at 649; *In re Lehman Bros. Holdings Inc.*, 541 B.R. 551, 575 (S.D.N.Y. 2015); *In re Adler, Coleman Clearing Corp.*, 263 B.R. 406, 445 (S.D.N.Y. 2001).

The decision below inexplicably extends this narrow exception to serve as the *sole test* for imputing intent under Section 548(a)(1)(A). The Second Circuit did not explain why the control test should displace the traditional agency principles that have routinely guided courts' imputation analysis under federal statutes. Indeed, this extension makes no sense in the context of this case: no one is alleging that the transferor (Tribune) and the transferee (Tribune's shareholders) were effectively alter egos, such that it

makes sense to look at all to the transferee's intent. Instead, the Trustee is seeking to impute to Tribune the intent of *its own corporate agents*—its CEO and other high-ranking officials—just as this Court and lower federal courts have done for at least a century.

3. In addition to contradicting generations of precedent, the rule adopted by the Second Circuit is functionally unworkable. Indeed, the court of appeals itself could not keep the "control" test straight. In rejecting the Trustee's Section 548(a)(1)(A) claim, the court of appeals *declined* to apply principles of agency law and therefore held that the intent of Tribune's officers could not be imputed to the company. Pet. App. 18a-19a. But, just a few pages later, the panel *embraced* those very principles in rejecting the Trustee's aiding-and-abetting claim. Specifically, the panel held that other Trustee claims were barred under the doctrine of *in pari delicto* because the fraudulent actions of Tribune's management, which the panel had just explained are *not* imputable to the company, were in fact "imputed to the corporation." *Id.* at 30a ("As applied to corporations, the illegal actions of a corporation's officers and directors are imputed to the corporation itself."). The Second Circuit never explained why the standard for imputation should differ across claims, or how the standard could be consistently applied going forward.

II. The Court Of Appeals' Decision, If Uncorrected, Will Have Far-Reaching Consequences

The court of appeals' "control" test will thwart fraudulent transfer claims in one of the country's most significant bankruptcy jurisdictions. Further, it

threatens to disrupt numerous areas of the law that rely upon traditional imputation principles, from criminal prosecutions to securities regulation.

1. The Second Circuit is home to a very active bankruptcy docket, including some of the nation's largest Chapter 11 filings. See Stephen J. Lubben, *Corporate Finance* 863 (3d ed. 2021) ("Very large chapter 11 cases tend to file either in the Southern District of New York or in Delaware."). Recent headline-grabbing cases include the bankruptcy of Purdue Pharma L.P.—involving 23 affiliated debtors and thousands of lawsuits brought by states and other entities affected by the opioid epidemic—and the bankruptcy of LATAM Airlines, the second largest Chapter 11 bankruptcy of 2020.

Almost invariably, trustees and creditors in these large Chapter 11 cases pursue fraudulent transfer claims against recipients of prepetition transfers. For example, in the LATAM Airlines bankruptcy, the airline's unsecured creditors committee has asserted actual fraudulent-transfer claims against Delta Air Lines and Qatar Airways, two of LATAM's largest shareholders. See Notice of Hearing on Motion of the Official Committee of Unsecured Creditors (Doc. 2531), *In re LATAM Airlines Grp. S.A.*, No. 20-11254 (Bankr. S.D.N.Y. June 16, 2021). The unsecured creditors in LATAM are hardly outliers. See*, e.g.*, *In re TransCare Corp.*, No. 20-cv-06274 (LAK), 2021 WL 4459733, at *16 (S.D.N.Y. Sept. 29, 2021) (affirming award of $39.2 million for intentional fraudulent transfer), appeal docketed, No. 21-2576 (2d Cir. Oct. 13, 2021); *In re Extended Stay, Inc.*, No. 09-13764-JLG, 2020 WL 10762310, at *27 (Bankr. S.D.N.Y.

Aug. 8, 2020) (trustee seeking to avoid LBO-related transfers under Section 548(a)(1)(A)).

Whenever a trustee brings a Section 548(a)(1)(A) claim in one of these large Chapter 11 cases, he must prove that the debtor made the illicit transfer "with actual intent to hinder, delay, or defraud" the debtor's creditors. 11 U.S.C. § 548(a)(1)(A). And, because the debtor is frequently a corporation or other legal entity, its "intent" would historically be evaluated by reference to its agents. See*, e.g.*, *In re 45 John Lofts, LLC*, 599 B.R. 730, 743 (Bankr. S.D.N.Y. 2019) ("A limited liability company, like a corporation, is not a natural person and can act 'solely through the instrumentality of their officers or other duly authorized agents.'" (citation omitted)).

But no longer. In the Second Circuit, the fraudulent intent of a company's highest-ranking officials can now safely be ignored, so long as a special committee or other subset of actors was required to sign off on the challenged transfer—even where, as here, they rubber-stamped the transaction on the strength of lies fed to them by the fraudster-officials. The corporate-fraud roadmap is now clear: So long as the fraud is laundered through a committee of siloed and uninformed actors, the company is untouchable.

This astonishing rule will be outcome-determinative in many cases. For example, in *In re Lyondell Chemical Co.*, 554 B.R. 635 (S.D.N.Y. 2016), the United States District Court for the Southern District of New York confronted facts similar to those here. To push through an ill-fated LBO, Lyondell's CEO knowingly presented false financial projections to his board. *Id.* at 639-642. When the company later

filed for bankruptcy, the trustee asserted fraudulent transfer claims against Lyondell's former shareholders for the LBO transfers, urging that the fraudulent intent of Lyondell's CEO should be imputed to the corporation. *Id.* at 643, 647.

Applying common law imputation principles, the district court held that the CEO's knowledge and intent could be imputed to Lyondell, thus reinstating the fraudulent transfer claims. *Id.* at 649-650. But, what result under the Second Circuit's new control test? We needn't speculate, because the bankruptcy court in *Lyondell*—which the district court reversed—applied the very same control test that the Second Circuit has now embraced. In *Lyondell*, the bankruptcy court (like the court below) thought it relevant that, under Delaware law, the board of directors was required to approve the LBO. And, like the court below, the bankruptcy court thus disregarded as legally irrelevant the copious allegations of fraudulent intent on the part of Lyondell's CEO. See *In re Lyondell Chem. Co.*, 503 B.R. 348, 386, 388-389 (Bankr. S.D.N.Y. 2014).

The district court averted this legal misadventure in *Lyondell*. But the impossibly crabbed notion of corporate imputation rejected by that court is now the law of the land in the Second Circuit. Henceforth, the control test will be invoked whenever a trustee or creditor of a bankrupt corporation brings an actual fraudulent transfer claim against a prepetition transferee—which is to say, virtually *any* time a trustee or creditor brings a Section 548(a)(1)(A) claim in a large Chapter 11 bankruptcy. Given the outsized importance of bankruptcy courts in the Second

Circuit, the ramifications of the court of appeals' decision cannot be overstated.

2. The damage wrought by the court of appeals' imputation standard will not be contained to Section 548(a)(1)(A). Until now, corporations have routinely been held to account for criminal acts perpetrated by their agents. If allowed to stand, the court of appeals' decision threatens to upturn fundamental principles of vicarious liability that will place serious corporate crimes beyond the reach of law enforcement.

a. The United States regularly prosecutes corporations for criminal wrongdoing. In the final twenty months of the Obama administration, for example, the federal government collected $14.15 billion in corporate penalties from seventy-one financial institutions and thirty-four public companies. Brandon L. Garrett, *Declining Corporate Prosecutions*, 57 Am. Crim. L. Rev. 109, 115 (2020). Many of those prosecutions took place in jurisdictions within the Second Circuit, especially the Southern District of New York. The United States Attorney's Office for the Southern District of New York alone has prosecuted 104 corporations in the last three decades. See Corp. Prosecution Registry, *New York – Southern District*, https://perma.cc/H6Y2-EXXN.

Because a corporation cannot itself commit a crime—any more than it could knit a sweater—corporations must be prosecuted through the acts of their agents. See*, e.g.*, *Suez Equity Invs., L.P.* v. *Toronto-Dominion Bank*, 250 F.3d 87, 101 (2d Cir. 2001) ("A corporation can only act through its employees and agents."). In the Second Circuit, as in

other circuits,[4] "[i]t is settled law that a corporation may be held criminally responsible for [criminal] violations committed by its employees or agents acting within the scope of their authority." *United States* v. *Twentieth Century Fox Film Corp.*, 882 F.2d 656, 660 (1989). The circle of corporate agents whose actions are imputable to the corporation is not limited to members of the board or management. See*, e.g.*, *United States* v. *George F. Fish, Inc.*, 154 F.2d 798, 801 (2d Cir. 1946) ("No distinctions are made in these [corporate liability] cases between officers and agents, or between persons holding positions involving varying degrees of responsibility."). Instead, *any* employee's criminal acts may be attributed to the corporation so long as the employee acts with the "intent, at least in part, to benefit the employer." *United States* v. *Ionia Mgmt. S.A.*, 526 F. Supp. 2d 319, 323 (D. Conn. 2007) (citing *J.C.B. Super Markets, Inc.* v. *United States*, 530 F.2d 1119, 1122 (2d Cir. 1976)), aff'd, 555 F.3d 303 (2d Cir. 2009).

Consistent with this settled law, the Department of Justice has promulgated broad imputation rules for

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[4] See*, e.g.*, *United States* v. *Potter*, 463 F.3d 9, 25 (1st Cir. 2006) ("[A] corporation may be held liable for 'the criminal acts of its agents' so long as those agents are acting within the scope of employment."); *In re Hellenic, Inc.*, 252 F.3d 391, 395 (5th Cir. 2001) ("An agent's knowledge is imputed to the corporation where the agent is acting within the scope of his authority and where the knowledge relates to matters within the scope of that authority."); *United States* v. *One Parcel of Land Located at 7326 Highway 45 N.*, 965 F.2d 311, 316 (7th Cir. 1992), ("[K]nowledge obtained by corporate employees acting within the scope of their employment is imputed to the corporation.").

decades.[5] So guided, federal prosecutors routinely impute to corporations the intent of their agents—even where the agents only contributed to (but did not "control") the corporate act in question. So, for example, in *United States* v. *Shortt Accountancy Corp.*, 785 F.2d 1448 (9th Cir. 1986), an accountant intentionally advised a client to take an illegal deduction. *Id.* at 1450. The accountant then passed along the deduction information to a second accountant, who unwittingly subscribed to the deduction's legality. *Id.* at 1451. Even though the first accountant did not take the final step and file the return—or in any other way "control" the culpable action—the court imputed his intent to the company. *Id.* at 1454. The Ninth Circuit rejected the argument that the first accountant's intent could not be imputed to the company as "completely meritless" and "def[ying] logic." *Ibid.*

Similarly, in *United States* v. *Bank of New England, N.A.*, 821 F.2d 844 (1st Cir. 1987), the defendant bank was convicted of 31 violations of the Currency Transaction Reporting Act for failing to

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[5] See Mem. from Larry D. Thompson, Deputy Att'y Gen. 5 (Jan. 20, 2003); Mem. from Mark Filip, Deputy Att'y Gen. 1-3 (Aug. 28, 2008); Dep't of Justice, *Civil RICO: A Manual for Federal Attorneys* 49-50 (Oct. 2007) ("Indeed, if the act is done within the course of employment and with intent to benefit the collective entity, the collective entity is liable even if the act was unlawful, or was done contrary to instructions or policies." (footnote omitted)); Dep't of Justice, *Principles of Federal Prosecution of Business Organizations* § 9-28.210 (July 2020) ("To hold a corporation liable for these actions, the government must establish that the corporate agent's actions (i) were within the scope of his duties and (ii) were intended, at least in part, to benefit the corporation.").

report numerous cash withdrawals in excess of $10,000. *Id.* at 847-848. On appeal, the bank challenged the trial judge's jury instruction on "collective knowledge"—that is, that the jury could convict the bank if the sum of its employees' knowledge amounted to the required intent under the statute. *Id.* at 855-856. The First Circuit rejected the challenge because "knowledge obtained by corporate employees acting within the scope of their employment is imputed to the corporation." *Id.* at 856.

The Second Circuit's "control" standard threatens to usher in a golden age of corporate crime. Virtually every statute under which corporations are prosecuted turns on the "actual intent" of the corporation, just like Section 548(a)(1)(A).[6] Until now, the prosecution could satisfy this element with evidence of the fraudulent intent of an employee acting within the scope of his or her employment. The court of appeals' decision, however, fundamentally changes this requirement.

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[6] See, *e.g.*, 10th Cir. Crim. Jury Instr. 2.19 (2021) (requiring that the prosecution prove that "the defendant knowingly and voluntarily participated in the conspiracy" for conviction under 18 U.S.C. § 371); 10th Cir. Crim. Jury Instr. 2.18 (2021) (requiring that the prosecution prove that "the defendant knew that the claim was false or fraudulent" for conviction under 18 U.S.C. § 287); *United States* v. *U.S. Gypsum Co.*, 438 U.S. 422, 437 (1978) ("[I]ntent generally remains a indispensable element of a criminal offense."); *Bank of New England*, 821 F.2d at 854 ("A finding of willfulness under the Reporting Act must be supported by 'proof of the defendant's knowledge of the reporting requirements and his specific intent to commit the crime.'" (citation omitted)).

It is not difficult to imagine how this will impact corporate prosecutions going forward. Imagine a public company—say, Enron—that uses off-balance-sheet partnerships to perpetrate fraud against its shareholders. Management is aware that the partnerships are fraudulent, but deliberately conceals critical information about the partnerships from the company's audit committee. Thus, to the audit committee, everything seems aboveboard. All would agree that, under traditional imputation principles, the fraudulent intent of Enron's management would be imputable to the corporation. See*, e.g.*, *Stewart* v. *Wilmington Tr. SP Servs., Inc.*, 112 A.3d 271, 303 (Del. Ch. 2015) ("[T]he practice of imputing officers' and directors' knowledge to the corporation means that, as a general rule, when those actors engage in wrongdoing, the corporation itself is a wrongdoer."), aff'd, 126 A.3d 1115 (Del. 2015). But, under the court of appeals' "control" standard, only the *audit committee's* intent is relevant because the audit committee has final say over the creation of off-balance-sheet partnerships.[7] The court of appeals' decision would thus insulate the company from criminal liability for what previously would have been a slam-dunk fraud prosecution.

b. The court of appeals' decision will dispense get-out-of-jail-free cards for still other forms of corporate malfeasance. For example, SEC Rule 10b-5 prohibits public companies from making false or misleading statements or omissions in connection with the

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[7] See*, e.g.*, Nasdaq Rule 5630 (requiring that an audit committee "or another independent body of the board of directors" oversee all related-party transactions).

purchase or sale of a security. See 17 C.F.R. § 240.10b-5(b). This cornerstone rule of federal securities regulation "protect[s] investors and instill[s] confidence in the securities markets by penalizing unfair dealings." *Sargent* v. *Genesco, Inc.*, 492 F.2d 750, 760 (5th Cir. 1974).

In the Southern District of New York—a common forum for Rule 10b-5 litigation—courts "have generally coalesced around the view that 'there is no requirement that the same individual who made an alleged misstatement on behalf of a corporation personally possessed the required scienter.'" *Rex & Roberta Ling Living Tr. u/a Dec. 6, 1990* v. *B Commc'ns Ltd.*, 346 F. Supp. 3d 389, 409 (S.D.N.Y. 2018) (citation omitted). Rather, corporate scienter has been found to exist where "high-level employees"—even those not involved in preparing their companies' offering documents—nevertheless knew facts rendering those documents misleading. *Loreley Fin. (Jersey) No. 3 Ltd.* v. *Wells Fargo Sec., LLC*, 797 F.3d 160, 178 (2d Cir. 2015). Similarly, the scienter of corporate executives who orchestrated a bribery scheme, understanding the impact those bribes could have on the company's financial statements, was imputable to the company even where those executives were not alleged to have been involved in the company's financial reporting. *In re VEON Ltd. Sec. Litig.*, No. 15-cv-08672, 2017 WL 4162342, at *10 (S.D.N.Y. Sept. 19, 2017). Simply put, "the person whose state of mind is imputed to the corporate defendant need not also be the person who made the material misstatements at issue." *Patel* v. *L-3 Commc'ns Holdings Inc.*, No. 14-CV-6038, 2016 WL 1629325, at *15 n.38 (S.D.N.Y. Apr. 21, 2016).

The court of appeals' decision gravely jeopardizes securities fraud actions under Rule 10b-5. If the Trustee is barred from recovering billions of dollars of assets fraudulently transferred by deceived directors, why should shareholders be able to recover when those same deceived directors make false statements otherwise chargeable under Rule 10b-5? Under the court of appeals' new imputation standard, a corporation can commit securities fraud but shield itself from liability so long as it insulates the statement-drafters from the statement-makers. This is no way to run a railroad, and is precisely the sort of gamesmanship that traditional imputation rules are designed to avoid.[8]

Doubtless aware of those externalities, the court of appeals volunteered that its contrived imputation rule could well be limited to "the circumstances here." Pet. App. 17a. But a judicial ruling is not "a restricted railroad ticket, good for this day and train only." *Smith* v. *Allwright*, 321 U.S. 649, 669 (1944) (Roberts, J., dissenting).[9] The basic legal question presented in this case—as in countless others—is the "actual

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[8] See*, e.g.*, *Bank of New England*, 821 F.2d at 856 ("A corporation cannot plead innocence by asserting that the information obtained by several employees was not acquired by any one individual who then would have comprehended its full import. Rather the corporation is considered to have acquired the collective knowledge of its employees and is held responsible for their failure to act accordingly." (alteration marks and citation omitted)).

[9] Indeed, the court of appeals acknowledges as much, citing this Court's interpretation of the phrase "actual knowledge" under the ERISA statute to inform the meaning of "actual intent" under Section 548(a)(1)(A). See Pet. App. 14a-15a.

intent" of the corporation. The court of appeals' decision supplies no limiting principle to prevent its misbegotten imputation standard from extending to every case in which a corporation's "actual intent" is at issue.

III. This Case Is An Ideal Vehicle To Address The Imputation Standard

The significance of the Second Circuit's decision for both agency law and corporate accountability warrants this Court's intervention. In addition to the magnitude of the issues, the posture and history of this case make it an ideal vehicle for review.

The facts of this case are undisputed at this point in the case's progression. Because the bankruptcy court dismissed the Trustee's intentional fraudulent transfer claim at the pleading stage, the universe of operative facts is set out in the complaint. Those facts, moreover, are emblematic of the decision-making processes in large corporations, which often utilize multiple financial advisors, special committees, and other complex mechanisms for approval. This case will allow the Court to assess the standard for imputation in a context that is likely to regularly recur, where numerous corporate officers, directors, and agents are involved in structuring and approving transactions.

This Court will also have the benefit of multiple rounds of briefing and judicial discussion on the central issue. The question presented was expressly decided by both the district court and the court of appeals, and was outcome dispositive. The district court first adopted the "control" standard for

imputation and, on this basis, dismissed the Trustee's intentional fraudulent transfer claim. The Trustee specifically appealed the control test. Pet. C.A. Br. 4, 28-36. The Second Circuit recognized as much in its opinion, noting (and rejecting) the Trustee's arguments (based on this Court's *Staub* decision) for "either a scope-of-employment agency standard or a 'proximate cause' standard." Pet. App. 17a. The Second Circuit then explicitly "affirm[ed] the district court's use of a 'control' test for imputation" in a published opinion. *Ibid.* In short, the legal question is cleanly presented for this Court's review.

Last, in addition to the parties' submissions, the Court will have the benefit of briefing from amici, both at the Second Circuit and before this Court, representing a range of perspectives. Amici will present additional counterpoints to the Second Circuit's opinion, as well as specific insights into the import of the Second Circuit's opinion for various sectors.

The clean procedural posture, recurring nature of the fact pattern, and far-reaching legal import of the novel and unsupported rule adopted below all support review by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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