17-2992(L)

(additional docket numbers continued on inside cover)

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

IN RE: IRVING H. PICARD, TRUSTEE FOR THE LIQUIDATION OF BERNARD L. MADOFF INVESTMENT SECURITIES LLC.

On Appeal from the United States Bankruptcy Court for the Southern District of New York

BRIEF FOR THE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS-APPELLEES AND AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Amicus Curiae the Securities Industry and Financial Markets Association has no parent corporation, and no publicly held corporation owns 10 percent or more of its stock.

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

The Securities Industry and Financial Markets Association ("SIFMA") is a securities industry trade association representing the interests of hundreds of securities firms, banks, and asset managers. SIFMA champions policies and practices that foster a strong financial industry, while promoting investor opportunity, capital formation, job creation, economic growth, and trust and confidence in the financial

[1] No counsel for a party authored this brief in whole or in part, and no one other than *amicus curiae*, its members, or its counsel contributed money to fund the preparation or submission of this brief.

markets. It regularly files *amicus curiae* briefs in cases that raise important questions of commercial law, including the territorial scope of that law—questions of direct relevance to SIFMA's mission of promoting fair and efficient markets and a strong financial services industry. *E.g.*, *Morrison* v. *Nat'l Austl. Bank Ltd.*, 561 U.S. 247 (2010); *Prime Int'l Trading, Ltd.* v. *BP plc*, No. 17–2233 (2d Cir. Feb. 7, 2018), ECF No. 173; *In re Petrobras Sec.*, 862 F.3d 250 (2d Cir. 2017); *Parkcentral Glob. Hub Ltd.* v. *Porsche Auto. Holdings SE*, 763 F.3d 198 (2d Cir. 2014).

Many of SIFMA's members operate in many countries around the world. When they enter into transactions abroad, they rely on predictable choice-of-law rules that respect territorial boundaries. As shown below, the Trustee's position here, if accepted, would subject firms and individuals to substantial legal uncertainty, and conflicting laws, in transnational situations involving insolvencies.

This brief is submitted pursuant to Fed. R. App. P. 29(a)(2), as all parties have consented to its filing.

SUMMARY OF ARGUMENT

In these cases, a bankruptcy trustee seeks to use 11 U.S.C. § 550(a)(2) to recover mediate pre-bankruptcy transfers of assets that originally came from the now-bankrupt Madoff securities firm. The problem for the Trustee is that many of these transfers were made by foreign "feeder" funds to their foreign customers. The feeder funds are located abroad, their customers are located abroad, the transfers took place abroad, and the assets are located abroad. The Trustee seeks to apply an American statute to people, property, and events located in foreign countries—to use Section 550(a)(2) to "claw back" foreign property held by foreigners in foreign lands, regardless of what foreign law commands.

The courts below correctly concluded that these proposed applications of Section 550(a)(2) were barred by the presumption against extraterritoriality, the venerable canon of construction that averts "'unintended clashes between our laws and those of other nations.'" *Kiobel* v. *Royal Dutch Petroleum Co.*, 569 U.S. 108, 115 (2013) (quoting *EEOC* v. *Arabian Am. Oil Co.*, 449 U.S. 244, 248 (1991) ("*Aramco*")). In the area of fraudulent transfer and preference law, vigorous application of the presumption is critical, because the potential for such clashes abounds. American law is more permissive than other countries' laws in allowing recovery of pre-bankruptcy transfers. Among other things, U.S. law lacks the scienter requirements found in many foreign statutes, and it permits a trustee to go back years (in New York, up to six years) to recover pre-bankruptcy transfers. It is thus no wonder that trustees will strain to invoke U.S. bankruptcy law in pursuing asset recoveries, even as to transfers from one foreign non-debtor to another.

The Trustee's position here, if accepted, would subject both firms and individuals to substantial uncertainty in situations involving cross-border insolvencies. In particular, when financial institutions or investors operate in multiple jurisdictions, as many of *amicus'* members do, they rely on predictable choice-of-law rules that respect territorial boundaries. But if the Bankruptcy Code's avoidance provisions—including Section 550(a)(2)—were applied extraterritorially, trustees in the U.S. could attack foreign transactions that are valid in the jurisdictions where the transacting parties operate and where the transactions occurred. That would frustrate the reasonable expectations of market participants in foreign countries, and would provoke legal conflicts with other nations. *See* Point I, below.

Proper application of the presumption against extraterritoriality avoids this result—and bars the recoveries sought here. As the Supreme Court has consistently emphasized, that rule of construction requires that a statute give a clear, affirmative, and unmistakable indication of extraterritorial reach before it may be applied abroad. *See* Point II.A, below. Here the Trustee does not even *attempt* to show that Section 550(a)(2) contains any such indication. He cannot, because it does not: the provision is entirely silent about its territorial scope. The best he can do is to point to the extraterritorial reach of a completely separate provision of the Bankruptcy Code, Section 541. But that argument only highlights what is *missing* from Section 550(a)(2)—a clear, affirmative and unmistakable indication of extraterritorial scope. Nor does the Trustee make any showing that SIPA, the Securities Investor Protection Act, which authorizes SIPA trustees to employ Section 550(a)(2), can somehow transform that domestic provision into one that has extraterritorial effect. *See* Point II.B, below.

The Trustee's separate effort to characterize his actions here—seeking to recover foreign assets received by foreign parties from other foreign parties in foreign transfers—as "domestic" applications of Section 550(a)(2), falls of its own weight. It does not suffice for the Trustee to point out that the transfers at issue, though made abroad, can be connected to a prior transfer from the United States. As the Supreme Court has explained, "it is a rare case of prohibited extraterritorial application that lacks *all* contact with the territory of the United States"; and "the presumption against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever *some* domestic activity is involved in the case." *Morrison* v. *Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 266 (2010). But the presumption is not "such a timid sentinel." *Id.* An indirect connection to a U.S. bankruptcy simply does not and cannot suffice to render the application of Section 550(a)(2) to foreign parties and foreign transactions somehow "domestic." *See* Point II.C, below.

ARGUMENT

POINT I

APPLICATION OF THE PRESUMPTION AGAINST EXTRATERRITORIALITY TO THE BANKRUPTCY CODE'S AVOIDANCE PROVISIONS PREVENTS CONFLICT AND ENSURES PREDICTABILITY.

These cases present important questions about the application of an important canon of statutory construction—the presumption against extraterritorial application of U.S. law—to the avoidance and recovery provisions of the Bankruptcy Code. The application of this presumption is of particular significance here, because profound conflicts could result from applying U.S. bankruptcy law to invalidate foreign transactions between foreign parties in foreign countries, which is what the Trustee seeks to do here.

Specifically, although it "applies regardless of whether there is a risk of conflict between the American statute and a foreign law," *Morrison*, 561 U.S. at 255, the presumption "serves to avoid the international discord that can result when U.S. law is applied to conduct in foreign countries," *RJR Nabisco, Inc.* v. *European Cmty.*, 136 S. Ct. 2090, 2100 (2016). The presumption "helps ensure that the Judiciary does not erroneously adopt an interpretation of U.S. law that carries foreign policy consequences not clearly intended by the political branches." *Kiobel*, 569 U.S. at 116. It averts "'unintended clashes between our laws and those of other nations,'" and—in particular—keeps the courts from having "'to run interference in [the] delicate field of international relations.'" *Id.* at 115 (quoting *Aramco*, 499 U.S. at 248).

If the Bankruptcy Code were employed to invalidate foreign transactions between foreign parties, "clashes between our laws and those of other nations," *id.*, would inevitably arise. Indeed, when it comes to the law governing the avoidance and recovery of transfers of assets traceable to a bankrupt, "[t]he probability of incompatibility with the applicable laws of other countries is so obvious that if Congress intended such foreign application 'it would have addressed the subject of conflicts with foreign laws and procedures.'" *Morrison*, 561 U.S. at 269 (quoting *Aramco*, 499 U.S. at 256). For as in *Morrison*, where the Supreme Court recognized in the securities realm that "the regulation of other countries often differs from ours," *id.* at 269, different sovereigns have enacted divergent legal rules in this area. And regardless of whether those divergent rules lead to international legal conflicts in these particular cases, any ruling from this Court permitting extraterritorial application of the Bankruptcy Code's avoidance and recovery provisions would inevitably foster such conflicts in future cases.

A. American law on avoidable transfers

Fraudulent transfers. American fraudulent transfer law comes from English law—but long ago went its own different way. Modern fraudulent transfer law dates back to the enactment by Parliament, in 1571, of the Statute of 13 Elizabeth, which prohibited a debtor from making a transfer intended to "hinder, delay, or defraud" creditors. *See* 1 GERRARD GLENN, FRAUDULENT CONVEYANCES AND PREFERENCES § 61a–e (2001) (discussing the history of the Statute of 13 Elizabeth). Recognizing that a debtor's intent is difficult to prove directly, "common law judges" in England "developed per se rules, known as 'badges of fraud,' that would allow the court to treat a transaction as a fraudulent conveyance even though no specific evidence suggested that the debtor tried to profit at his creditors' expense." Douglas G. Baird & Thomas H. Jackson, *Fraudulent Conveyance Law and Its Proper Domain*, 38 VAND. L. REV. 829, 830 (1985).

In the United States, the "badges of fraud" became codified in statutes. The Uniform Fraudulent Transfer Act, adopted by most states, identifies 11 "factors" to which "consideration may be given" in "determining actual intent." UNIF. FRAUDULENT TRANSFER ACT § 4(b) (U.L.A. 1984) ("UFTA"). These include, among others, concealment of the transfer, the pendency of a lawsuit, and retention of control by the debtor over the transferred assets. *See id.* They also include the debtor's insolvency or undercapitalization at the time of the transfer and the receipt of too little consideration in return for the transfer. *See id.*

These last two badges of fraud—the debtor's compromised financial condition and lack of adequate consideration—today have unique significance in American fraudulent transfer law. Under state statutes, insolvency and inadequate consideration, when combined, are independently sufficient grounds to avoid a transfer, regardless of the debtor's intent. Transfers that are avoided based on those objective criteria are referred to as "constructively fraudulent."

State law and the federal Bankruptcy Code each permit avoidance of constructively fraudulent transfers in addition to actual-intent fraudulent transfers. *See* UFTA § 5(a); 11 U.S.C. § 548(a)(1)(B). Most states permit avoidance of such transfers within a four-year period; New York has a six-year period.[2] Both federal and state law provide defenses to fraudulent transfer claims, including a defense available to a transferee "that takes for value and in good faith." 11 U.S.C. § 548(c); *see also* UFTA § 8(d).

Preferential transfers. A preference is a transfer, by an insolvent debtor to pay or secure an

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[2] *E.g.*, *Picard* v. *Katz*, 462 B.R. 447, 451 (S.D.N.Y. 2011) (citing N.Y. C.P.L.R. § 213(8) (McKinney 2001)).

existing debt, that has the effect of providing a greater recovery to one creditor than others similarly situated.

Despite a long history in which statutes prohibited only preferential transfers that were "intentional," "fraudulent," or received with knowledge of the debtor's insolvency,[3] U.S. preference law is now indifferent to the states of mind of the parties involved, focusing instead on the effects of the transfer. In particular, Section 547 of the Bankruptcy Code permits avoidance of a transfer made to a creditor within 90 days of a bankruptcy filing (or one year for insiders) that, *as an objective matter*, permits the creditor to receive a preferential recovery. 11 U.S.C. § 547(b). Preference claims are subject to various defenses, including one available to transferees that extend new value to the debtor. 11 U.S.C. § 547(c).

As is relevant here, Section 550(a)(2) of the Bankruptcy Code permits recovery of an avoidable transfer—whether fraudulent or preferential—not only from its "initial transferee" but also from "any immediate or mediate transferee of such initial transferee," 11 U.S.C. § 550(a)(2), although it provides a defense to such indirect transferees if they can prove that they took the transfer "for value, … in good faith, and without knowledge of the voidability of the transfer avoided," *id.* § 550(b)(1).

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[3] *See* 2 GERRARD GLENN, FRAUDULENT CONVEYANCES AND PREFERENCES §§ 378–80 (2001) (discussing history of preference law).

B. Foreign law on avoidable transfers

U.S. law governing fraudulent transfers and preferences differs markedly from the laws of various foreign jurisdictions, including the jurisdictions where the Madoff feeder funds here (and other investment funds) are located—the Cayman Islands and the British Virgin Islands.

Fraudulent transfers. The laws of many other countries do *not* recognize the types of "constructively fraudulent" transfers that American laws do. For example, the Cayman Islands requires an *actual intent* to defraud creditors. The Cayman Islands Companies Law provides that:

> Every disposition of property made at an undervalue by or on behalf of a company *with intent to defraud its creditors* shall be voidable at the insistence of its official liquidator.

Companies Law (2016 Revision) § 146(2) (Cayman Is.) (emphasis added). Cayman law thus requires *both* that the transferor receive inadequate consideration *and* have an intent to defraud.[4]

The British Virgin Islands, on the other hand, allows certain transfers to be avoided in the absence of intent to defraud—but not as easily as American law does. Under BVI law, an "undervalue transaction" may be avoided where an insolvent company transfers its property in exchange for "consideration the value of which ... is significantly less than the value"

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[4] *See* Andrew Bolton, Andrew Jackson & Victoria King, *Cayman Islands*, *in* RESTRUCTURING & INSOLVENCY 107 ¶ 46 (Catherine Balmond & Katharina Crinson contrib. eds. 2018).

of the property transferred. Insolvency Act 2003 § 246(1)(b) (Virgin Is.). But an undervalue transaction may only be avoided when the debtor is insolvent on a cash-flow basis—when it is unable to pay its debts when due. *See id.* § 246(1)(c); *id.* § 8(1) (definition of insolvency); *id.* § 244(3) (precluding use of balance sheet test of insolvency). American law, in contrast, permits avoidance of a below-fair-value transfer not only if the debtor is insolvent on a cash-flow basis, but also if it is insolvent on a balance-sheet basis *or* if the transaction left the debtor with "unreasonably small capital." 11 U.S.C. § 548(a)(1)-(B)(ii)(II). American law is thus again more expansive in permitting avoidance.

Preferential transfers. Just as American law permits avoidance of fraudulent transfers regardless of the debtor's intent, it also permits avoidance of preferential transfers based on an objective test. But some other countries do not permit avoidance of a preferential transfer unless the debtor specifically intends to prefer a particular creditor. For example, the U.K. Insolvency Act permits avoidance of a preference only if some objective requirements are met, and if "the company which gave the preference was influenced in deciding to give it *by a desire to produce in relation to* [the recipient] the [improved position]." Insolvency Act 1986 c. 45 § 239(5) (Eng. & Wales) (emphasis added). Cayman law likewise requires intent. Companies Law (2016 Revision) § 145(1) (Cayman Is.).[5] And other jurisdictions with sophisti-

[5] *See RMF Mkt. Neutral Strategies (Master) Ltd.* v. *DD Growth Premium 2X Fund*, 2014 (2) CILR 316, 318 (Grand Ct. Fin. Servs. Div. Nov. 17, 2014) ("The

cated bankruptcy systems, like Hong Kong,[6] also employ the English intent requirement.

C. The potential for conflict

These are but a few examples of how different nations around the world—including those sharing a common legal history with the United States—have made different policy choices about how, whether, and when to unwind pre-bankruptcy transfers. Still other notable contrasts between American and foreign clawback rules remain: some countries have far shorter limitations periods than the four- or six-year periods set under U.S. law,[7] other countries require the transferee to have knowledge of the debtor's insolvency to have liability,[8] and still other countries

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Cayman law of preferential payments was based on the English Bankruptcy Act 1914, which stated that a payment was preferential if a person paid a creditor with a view of giving it a preference over other creditors.").

[6] Hong Kong Bankruptcy Ordinance, No. 1, (1932) Cap. 6 § 50(4), *as amended by* Hong Kong Bankruptcy (Amendment) Ordinance, No. 18, (2005); *see* DENNIS CAMPBELL, INTERNATIONAL CORPORATE INSOLVENCY 266 (1992).

[7] *E.g.*, Konkursordnung [Bankruptcy Code] Reichsgesetzblatt [RGBl] No. 337/1914, as amended, § 43(2) (Austria) (one-year period), *translated in* AUSTRIAN INSOLVENCY CODE (Rautner Attorneys at Law trans., 2016), http://bit.ly/2JQ5ERt.

[8] *E.g.*, Legge 16 marzo 1942, n.267, in G.U. Apr. 6, 1942, n.18 (as amended Legge 17 dicembre 2012, n.221, in D.L. 179 Oct. 18, 2012, n.179), Art. 67 (It.),

require that the debtor's fraudulent intent be known to the transferee.[9]

Extraterritorial application of the Bankruptcy Code's avoidance provisions—including Section 550(a)(2)—would thus inevitably create conflicts with foreign law. Trustees could challenge transfers made abroad from one non-debtor to another, including from an offshore investment fund to its offshore investors or other foreign nationals. Those recovery efforts could succeed under U.S. law—as transfers from an "initial transferee," 11 U.S.C. § 550(a)(1), to "any immediate or mediate transferee of such initial transferee," *id.* § 550(a)(2)—even if they would plainly *fail* under applicable *foreign* law.

Extraterritorial application of Section 550(a)(2) would be especially problematic for firms and investors—including many members of SIFMA—that conduct business internationally. Multinational firms would face having the same transaction be subject to different and competing legal regimes—with the U.S. invalidating foreign transfers that are lawful in the countries in which they occurred. To the extent a connection with the U.S. is discernible *ex ante*, for-

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translated in ITALIAN BANKRUPTCY LAW (Studio Legale Ghia trans., 2013), http://bit.ly/2qVT1N2; 4 ch. 5 § Konkurslag (Svensk författningssamling [SFS] 1987:762) (Swed.).

[9] *E.g.*, Bundesgesetz über Schuldbetreibung und Konkurs [SchKG], Loi fédérale sur la poursuite pour dettes et la faillite [LP], Legge federale sulla esecuzione e sul fallimento [LEF] [Federal Debt Enforcement and Bankruptcy Law] Apr. 11, 1889, RS 281.1, art. 288, para. 1 (Switz.).

eign firms would need to seek advice under U.S. law in addition to the laws of their home countries. But in many cases, the connection to the U.S. might only be known or clear after the fact, creating litigation risk that was not contemplated. Businesses operating abroad, regardless of any American connections, are entitled to know whether U.S. law will apply to their transactions, so that they can accurately assess their risks and obligations. As is shown below, application of the presumption against extraterritoriality—by requiring a clear congressional statement that an American law applies abroad—provides the certainty that investing and other transacting parties require.

POINT II

THE TRUSTEE'S RECOVERY ACTIONS EXCEED THE TERRITORIAL SCOPE OF SECTION 550(a)(2) OF THE BANKRUPTCY CODE.

A. The presumption against extraterritoriality requires ambiguities to be resolved against construing U.S. laws to apply to persons and property abroad.

The potential clashes between U.S. and foreign law that could arise from foreign application of Section 550(a)(2) can be averted by a straightforward application of the presumption against extraterritoriality. To achieve the presumption's purpose of avoiding "'unintended clashes between our laws and those of other nations,'" *Kiobel*, 569 U.S. at 115 (quoting *Aramco*, 499 U.S. at 248), that interpretive canon requires judges to "'presum[e] that United States law governs domestically but does not rule the world,'" *id.* at 115 (quoting *Microsoft Corp.* v. *AT&T Corp.*, 550 U.S. 437, 454 (2007)); *accord*, *e.g.*, *RJR*, 136 S. Ct. at 2100. Judges must presume that "[f]oreign conduct is generally the domain of foreign law." *Microsoft*, 550 U.S. at 455 (internal quotation marks omitted). They must assume that Congress ordinarily acts accordingly—that federal "'legislators take account of the legitimate sovereign interests of other nations when they write American laws.'" *Id.* (quoting *F. Hoffmann-La Roche Ltd.* v. *Empagran S.A.*, 542 U.S. 155, 164 (2004)). After all, "'foreign law may embody different policy judgments'" than does American law, *id.*—and, as shown above, often does, *see Morrison*, 561 U.S. at 269.

The presumption is a powerful one, and requires all doubts to be resolved against interpreting a statute to apply to foreign people and property. The presumption demands "'an unmistakable congressional intent to apply extraterritorially,'" *RJR*, 136 S. Ct. at 2102—"'the *affirmative* intention of the Congress *clearly* expressed' to give a statute extraterritorial effect," *Morrison*, 561 U.S. at 255 (emphasis added) (quoting *Aramco*, 499 U.S. at 248 (quoting *Benz* v. *Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 147 (1957))). "[U]ncertain indications do not suffice," *id.* at 265, and even "possible, ... or even plausible, interpretations" don't cut it: "If we were to permit possible, or even plausible, interpretations of language ... to override the presumption against extraterritorial application, there would be little left of the presumption." *Aramco*, 499 U.S. at 253. And so "[i]f the legislative purpose is not 'unmistakably clear,' *any ambiguity* in [a] statute must be resolved in favor of refusing to apply the law to events occurring outside

U.S. territory." *Maxwell Commc'n Corp.* v. *Société Générale (In re Maxwell Commc'n Corp.)*, 186 B.R. 807, 818 (S.D.N.Y. 1995) (emphasis added) (citation omitted) (quoting *Labor Union of Pico Korea, Ltd.* v. *Pico Prods., Inc.*, 968 F.2d 191, 195 (2d Cir. 1992)), *aff'd*, 93 F.3d 1036 (2d Cir. 1996).

Even when some activities at issue in a case take place in the United States, the presumption *still* applies. Only if a domestic, "territorial event [or] relationship" is "the 'focus' of congressional concern" of a statutory provision may the application of that provision be deemed "domestic" and not extraterritorial. *Morrison*, 561 U.S. at 266 (quoting *Aramco*, 499 U.S. at 255). On the other hand, "if the conduct relevant to the focus occurred in a foreign country, then the case involves an impermissible extraterritorial application *regardless* of any other conduct that occurred in U.S. territory." *RJR*, 136 S. Ct. at 2101 (emphasis added). And if "'all the relevant conduct' ... 'took place outside the United States,'" then a court "[does] not need to determine, as ... in *Morrison*, the statute's 'focus,'" because the application would necessarily be extraterritorial, regardless of what its focus was. *Id.* (quoting *Kiobel*, 569 U.S. at 124).

Finally, in applying these principles, the courts must refrain from "resolving matters of policy." *Morrison*, 561 U.S. at 259. That was the flaw of the cases that *Morrison* criticized and abrogated. In their attempts to resolve statutory ambiguity, those decisions sought to "'divin[e] what "Congress would have wished" if it had addressed the problem.'" *Id.* at 260 (quoting *Zoelsch* v. *Arthur Andersen & Co.*, 824 F.2d 27, 32 (D.C. Cir. 1987)). But as the Supreme Court emphasized, "[i]t is [the courts'] function to give the statute the effect its language suggests, however modest that may be; not to extend it to admirable purposes it might be used to achieve." *Id.* at 270. And it is not for "the Judiciary [to] forecast[] Congress' likely disposition" of the question; judges must instead "leave in Congress' court" any question of "extraterritorial thrust." *Microsoft*, 550 U.S. at 458–59.

B. The district court correctly concluded that Section 550(a)(2) does not apply extraterritorially.

Here, the Trustee seeks to recover assets from foreign mediate transferees under Section 550(a)(2) of the Bankruptcy Code. The district court correctly concluded that Section 550(a)(2) does not contain any clear indication of extraterritorial reach. SA212–13. That is apparent from the provision's text: it contains no reference to anything outside the country, nothing that would indicate the statute would apply abroad. As relevant here, it says simply that "to the extent that a transfer is avoided under [S]ection [548 and specified other sections] of this title, the trustee may recover ... the property transferred, or … the value of such property, from ... any ... mediate transferee of [the] initial transferee." 11 U.S.C. § 550(a)(2).

Section 550(a)(2) thus says nothing—let alone anything "clear," "affirmative," and "unmistakable," as the presumption requires—about property or transferees outside the United States. Not a word refers to anything foreign. So the Court must apply the "ordinary assumption" that words in "domestically oriented statutes" refer to people, things, and events in the United States, and that these words apply "domestically, not extraterritorially." *Small* v. *United States*, 544 U.S. 385, 390–91 (2005). And the use of the word "any" before "mediate transferee" does not help the Trustee: the Supreme Court has held—repeatedly—that broad, unspecific terms such as "any" or "every" "do not rebut the presumption against extraterritoriality." *Kiobel*, 569 U.S. at 118; *accord Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 585–87 & n.4 (1992) (Stevens, J., concurring in the judgment); *Aramco*, 499 U.S. at 249.

Conceding that Section 550(a)(2) thus "lack[s] an express statement that [it] appl[ies] extraterritorially," Trustee Br. 25, the Trustee rummages around the Code and SIPA, vainly searching for "context" to support his claim, *id.* at 25–35. And *Morrison* indeed makes clear that, as with any interpretive endeavor, "context can be consulted as well" as text. 561 U.S. at 265. But the hurdle remains very high: "whatever sources of statutory meaning one consults to give the 'most faithful reading' of the text," a court must still find "clear indication of extraterritoriality," an "affirmative indication ... that [the law] applies extraterritorially." *Id.* The Trustee's "context" does not even come close clearing that bar.

The principal "context" the Trustee cites is Section 541 of the Bankruptcy Code. Trustee Br. 26–30. That section defines the "property of the estate," and states that it is comprised of various categories of the debtor's property, "wherever located and by whomever held." 11 U.S.C. § 541(a). According to the Trustee, that includes property located abroad, and, as a result, he claims, the word "property" in Section 550(a)(2)—an entirely different provision, which does *not* contain the words "wherever located"—should include extraterritorial property as well. Trustee Br. 26–29.

This argument, however, is "unclear and convoluted," *Barclay* v. *Swiss Fin. Corp. (In re Midland Euro Exch.)*, 347 B.R. 708, 719 (Bankr. C.D. Cal. 2006)—and, as Judge Rakoff found below, neither "logical nor persuasive," SA214. It flies in the face of the Trustee's necessary concession that "extraterritoriality analysis 'must be applied separately' to different statutory provisions, even within a single statute ...." Trustee Br. 32 (quoting *RJR*, 136 S. Ct. at 2108). At all events, not only does the "context" of Section 541 fail to establish extraterritorial reach in Section 550(a)(2), it also conclusively demonstrates that Section 550(a)(2) does *not* apply extraterritorially.

To begin with, the phrase "property of the estate" in Section 541 does not refer to the same thing as the word "property" in Section 550(a)(2). As Judge Rakoff recognized, this Court's decision in *FDIC* v. *Hirsch (In re Colonial Realty Co.)*, 980 F.2d 125, 131 (2d Cir. 1992), makes this abundantly clear. SA214–15. "[T]he property of a bankrupt estate" under Section 541(a)(1) generally includes "'all legal or equitable interests ... as of the commencement of the case.'" *Colonial Realty*, 980 F.2d at 131 (quoting 11 U.S.C. § 541(a)(1)). Under Section 541(a)(3), it can also include "'[a]ny interest in property that the trustee recovers' under specified Bankruptcy Code provisions, including 11 U.S.C. § 550." *Id.* (quoting 11 U.S.C. § 541(a)(3)).

So by its terms, Section 541(a)(3) refers to property a trustee does in fact "recover[]," and *not* property that it may or might recover in the future. And as

Colonial Realty holds, if Section 541(a)(1) were construed to include potentially recoverable property that a trustee has not yet recovered, "then § 541(a)(3) is rendered meaningless." *Id.* As a result, "the inclusion of property recovered by the trustee pursuant to his avoidance powers in a separate definitional subparagraph clearly reflects the congressional intent that such property is not to be considered property of the estate until it is recovered." *Id.* (citation and internal quotation marks omitted); *accord*, *e.g.*, *Picard* v. *Fairfield Greenwich Ltd.*, 762 F.3d 199, 212 (2d Cir. 2014); *Sherwood Invs. Overseas Ltd.* v. *Royal Bank of Scot., N.V. (In re Sherwood Invs. Overseas Ltd.)*, No. 6:15–cv–1469–Orl–40TBS, 2016 WL 5719450, at *11 (M.D. Fla. Sept. 30, 2016); *Midland Euro*, 347 B.R. at 719. Accordingly, because avoidable "transfers do not become property of the estate until recovered," *Maxwell*, 186 B.R. at 820, "[S]ection 541 cannot supply any extraterritorial authority that the avoidance and recovery provisions lack on their own," SA215; *accord Maxwell*, 186 B.R. at 820; *Sherwood*, 2016 WL 5719450, at *11; *Midland Euro*, 347 B.R. at 718–19.

An even more fundamental problem with the Trustee's argument, however, is that the phrase said to confer extraterritorial reach in Section 541—"wherever located"—is nowhere to be found in Section 550(a)(2) or, for that matter, in any of the Code's avoidance and recovery provisions. *Morrison*, indeed, addressed a similar situation in the Securities Exchange Act. In holding that Section 10(b) of Exchange Act had no extraterritorial reach, the Supreme Court noted that another provision of that statute, Section 30(a), *did* have such reach—it referred to transactions "'on an exchange not within or subject to the jurisdiction of the United States.'" *Morrison*, 561 U.S. at 264 (quoting 15 U.S.C. § 78dd(a)). That, the Court held, *confirmed* that Section 10(b) had no extraterritorial reach, as "Subsection 30(a) contains what § 10(b) lacks: a clear statement of extraterritorial effect." *Id.* at 265. "Even if that were not true," the Court added, "when a statute provides for some extraterritorial application, the presumption against extraterritoriality operates to limit that provision to its terms." *Id.* (citing *Microsoft*, 550 U.S. at 455–56); *accord LaMonica* v. *CEVA Grp. PLC (In re CIL Ltd.)*, 582 B.R. 46, 92 (Bankr. S.D.N.Y. 2018); *Spizz* v. *Goldfarb Seligman & Co. (In re Ampal-Am. Isr. Corp.)*, 562 B.R. 601, 612 (Bankr. S.D.N.Y. 2017) (same; rejecting argument that Section 541(a)(1) confers extraterritorial reach upon Section 547). As a result, the "wherever located" language in Section 541, and its absence in Section 550(a)(2), strongly "cut[s] *against* the Trustee's argument." SA216 (emphasis added).

But it is even worse than that for the Trustee: the "wherever located" language in Section 541, by itself, does not even suffice to confer extraterritorial reach on *Section 541*. And that is because the phrase "wherever located" is "ambiguous as to its extraterritorial effect." *Thurmond* v. *Rajapaske (In re Rajapaske)*, 346 B.R. 233, 236 (Bankr. N.D. Ga. 2005). It could mean "wherever located in the world," but it could *also* mean "wherever located in the United States," and, accordingly, as with words such as "any," "every," and "each," must be presumed to bear the domestic connotation. *See, e.g.*, *Kiobel*, 569 U.S. at 118; *Lujan*, 504 U.S. at 585–87 & n.4. As a result, the territorial ambiguity of Section 541's text can only be "resolved by referring to the legislative history" of its Bankruptcy Act predecessor. *Rajapaske*, 346 B.R. at 236. That history provides the requisite clarity for Section 541: Congress added the words "'wherever located'" "'to make clear that a trustee in bankruptcy is vested with the title of the bankrupt in property which is located without, as well as within, the United States.'" *Id.* (quoting H.R. REP. NO. 82–2320 (1952), *reprinted in* 1952 U.S.C.C.A.N. 1960, 1976).[10] Not only is there no such language in Section 550(a)(2), but there is also no such legislative history for Section 550(a)(2).

In short, the principal "context" invoked by the Trustee ultimately boils down to legislative history of Section 541's predecessor, history about the words "wherever located"—a phrase nowhere found in Section 550(a)(2). In contrast, "nothing in the statutory language or legislative history of §§ 548 or 550 indicate that Congress intended these provisions to apply to conduct outside the United States." *Sherwood*, 2016 WL 5719450, at *11; *accord Midland Euro*, 347 B.R. at 717; SA213. If anything, the absence of any such indication of extraterritorial reach establishes definitively that Congress intended no such reach: as "amply demonstrated [on] numerous occasions," Congress is fully "aware[] of the need to make a clear

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[10] *See also, e.g.*, *Nakash* v. *Zur (In re Nakash)*, 190 B.R. 763, 768 (Bankr. S.D.N.Y. 1996) (relying on legislative history); *Deak & Co.* v. *Ir. R.M.P. Soedjono (In re Deak & Co.)*, 63 B.R. 422, 427 (Bankr. S.D.N.Y. 1986) (same); *In re Filipek*, 35 B.R. 339, 341 (Bankr. D. Haw. 1983) (same).

statement that a statute applies overseas," and "knows how to ... expressly legislate[] the extraterritorial application of a statute." *Aramco*, 499 U.S. at 258 (citation and internal quotation marks omitted); *accord*, *e.g.*, *Maxwell*, 186 B.R. at 820; *CIL*, 582 B.R. at 92. "Congress has not 'clearly expressed' that sections 548 and 550 apply extraterritorially"—and therefore "they do not." *CIL*, 582 B.R. at 92–93; *see* SA212–19.

Beyond this, the Trustee argues that "specific provisions of SIPA" require that Section 550 apply extraterritorially in SIPA liquidations. Trustee Br. 30. But nothing in SIPA actually says that. And as a matter of elemental statutory construction, Section 550—which applies in all bankruptcy cases—cannot command a special extraterritorial meaning in SIPA cases, but merely a domestic meaning in every other bankruptcy case. To hold otherwise "'would establish ... the dangerous principle that judges can give the same statutory text different meanings in different cases.'" *United States* v. *Vilar*, 729 F.3d 62, 75 (2d Cir. 2013) (quoting *Clark* v. *Martinez*, 543 U.S. 371, 386 (2005)) (holding that territorial scope of Section 10(b) of Securities Exchange Act must be domestic in both criminal and civil cases). If Section 550(a)(2) applies only domestically in non-SIPA bankruptcy cases, it must apply that way in SIPA cases as well.

Beyond that, "SIPA's predominantly domestic focus suggests a lack of intent by Congress to extend its reach extraterritorially." SA217. As the district court rightly observed, moreover, the only provision of SIPA that could possibly be relevant here is Section 78fff–2(c)(3), a provision merely "empowers a SIPA trustee to utilize the Bankruptcy Code's avoidance and recovery provisions"—and thus makes clear "that whatever limitations apply to an ordinary bankruptcy likewise limit a SIPA liquidation" as well. SA216–17. SIPA simply takes Section 550 and the other Title 11 avoidance and recovery provisions just as it finds them, and accordingly adds nothing to their territorial scope.

The one case cited by the Trustee in support of extraterritorial recoveries in SIPA cases, *Hill* v. *Spencer Sav. & Loan Ass'n (In re Bevill, Bresler & Schulman, Inc.)*, 83 B.R. 880, 894 (D.N.J. 1988), only highlights the ultimate flaw of his position here. For the Trustee's citation of SIPA boils down to a plea that SIPA would work better, that investors would be better served—that, indeed, "public confidence in the U.S. securities markets" would be enhanced, Trustee Br. 34—if SIPA trustees could recover assets abroad. And that is a raw policy argument. So it should come as no surprise that the principal authority *Bevill* cites for its extraterritoriality holding happens to be a securities-law case called *SEC* v. *Kasser*, 548 F.2d 109, 114 (3d Cir. 1977)—*one of the decisions specifically disapproved by the Supreme Court in* Morrison, 561 U.S. at 259–61.

The problem with cases like *Kasser*—and thus with *Bevill*, and the Trustee's position here—is that they "appl[ied] [a] methodology of balancing interests and arriving at what seemed the best policy." *Morrison*, 561 U.S. at 259. Instead of "divining what Congress would have wanted," and "guess[ing] anew in each case" about what the best policy would be, courts must "apply the presumption in all cases." *Morrison*, 561 U.S. at 259, 261. Doing so avoids the conflicts of law described in Point I, and properly leaves policy questions for Congress to decide, as the Supreme Court has repeatedly instructed.

C. The district court correctly concluded that the Trustee's recovery actions constitute impermissible extraterritorial applications of Section 550(a)(2).

The Trustee also contends that, even if Section 550(a)(2) does not apply extraterritorially, his attempt to apply that law here—to property located in foreign countries, and transferred from one foreign party to another—is nonetheless domestic. Judge Rakoff rightly rejected this argument as well.

As Judge Rakoff recognized, *Morrison* "looked to 'the "focus" of congressional concern,' ... the 'transactions that the statute[] seeks to regulate,'" to determine whether a statute's application is domestic or extraterritorial. SA209 (quoting 561 U.S. at 266–67) (internal quotation marks omitted in part). "[I]f the conduct relevant to the [provision's] focus occurred in a foreign country, then the case involves an impermissible extraterritorial application regardless of any other conduct that occurred in U.S. territory." *RJR*, 136 S. Ct. at 2101. And here, "the regulatory focus of the Bankruptcy Code's avoidance and recovery provisions," including Section 550(a)(2), is readily apparent. SA210. As the district court held, "[o]n a straightforward reading of [S]ection 550(a), this recovery statute focuses on 'the property transferred' and the fact of its transfer, not the debtor." *Id.* Section 550(a)(2) is all about the property—getting it back from the ultimate transferee.

Here, because the property is abroad, the Trustee's proposed application of Section 550(a)(2) is unquestionably extraterritorial. Indeed, that is true *regardless* of what the statutory "focus" may be. The Trustee seeks to apply Section 550(a) to property located abroad that was transferred from one foreign party to another foreign party, and to take that foreign-located property away from the foreign transferee. All the conduct relevant to that transfer is thus foreign. That greatly simplifies the analysis: the case law teaches that if "'all the relevant conduct' ... 'took place outside the United States,'" then a court "[does] not need to determine, as ... in *Morrison*, the statute's 'focus,'" because the application of the statute in such cases *must* be extraterritorial. *RJR*, 136 S. Ct. 2101 (quoting *Kiobel*, 569 U.S. at 124).

And as Judge Rakoff held, the Trustee's assertion that the "focus" of Section 550(a)(2) is the debtor and liquidation in the United States simply "proves too much." SA209. "It cannot be that any connection to a domestic debtor, no matter how remote, automatically transforms every use [of the recovery and avoidance provisions] into purely domestic applications of those provisions." *Id.* That would enervate the presumption against extraterritoriality: American law would "rule the world," *Microsoft*, 550 U.S. at 454, and would "apply to foreign conduct," *RJR*, 136 S. Ct. at 2100, without "'the affirmative intention of the Congress clearly expressed,'" *Morrison*, 561 U.S. at 255 (quoting *Aramco*, 449 U.S. at 248).

The presumption, however, is not such a "timid sentinel." *Morrison*, 561 U.S. at 266. Indeed, the facts of case after case demonstrate how the Trustee's position—essentially, that any U.S. connection renders a statute's application domestic—vastly overreaches:

• In *Aramco*, an *American* plaintiff signed an employment contract with the *American* corporate defendant *in Houston*, then went off to work for that American company abroad, where he allegedly suffered racial and religious discrimination. The Supreme Court found an impermissibly extraterritorial attempt to apply Title VII. 499 U.S. at 247, 259.

• In *Foley Brothers* v. *Filardo*, an *American* worker similarly contracted *in the United States* with an *American* company to do construction work abroad. The Supreme Court rejected as extraterritorial his claim under the Eight Hour Law. 336 U.S. 281, 282–84 (1949); *see Filardo* v. *Foley Bros.*, 297 N.Y. 217, 219–20 (1948), *rev'd*, 336 U.S. 281 (1949).

• In *New York Central Railroad Co.* v. *Chisholm*, 268 U.S. 29, 30–32 (1925), an *American* trainman on an *American* train en route from upstate New York to Montreal was killed in an accident 30 miles north of the border. The Supreme Court threw out his estate's Federal Employers' Liability Act case as extraterritorial.

• In *Microsoft*, Microsoft induced infringement of an AT&T patent *in the United States*; it then shipped the infringing software abroad, where it was copied and installed on foreign computers. 550 U.S. at 441–42, 445–46. The Supreme Court rejected, as improperly extraterritorial, AT&T's claim for Patent Act damages for the alleged infringement abroad. *Id.* at 456.

• And in *Morrison*, the alleged misstatements of fact, the alleged false financial information, came from alleged misconduct *in the United*

States at an *American* subsidiary of the defendant. The Supreme Court rejected the plaintiff's Section 10(b) claim as extraterritorial. 561 U.S. at 266–69.

In all these cases, the American connections were at least as strong as—if not stronger than—those the Trustee cites here. Just as the transferred property here originated in the United States, so too did the employees and their contracts in *Aramco* and *Foley*, the crewman and his train in *Chisholm*, the patent infringement in *Microsoft*, and the alleged fraud in *Morrison*. But in each of those cases, the Supreme Court refused to find the proposed applications of American law to be domestic—and thus recognized that extraterritoriality's "watchdog" does not "retreat[] to its kennel whenever *some* domestic activity is involved in the case." *Morrison*, 561 U.S. at 266. Likewise here, the challenged foreign transfers do not "'touch and concern the territory of the United States … with sufficient force to displace the presumption against extraterritorial application.'" *In re Ampal-Am.*, 562 B.R. at 613–14 (quoting *Kiobel*, 569 U.S. at 124–25).

And in the end, the Trustee's effort to claim a domestic "focus" suffers from the same flaw manifest in his argument that Section 550(a)(2) applies abroad: it is ultimately, and transparently, a policy-based appeal. Instead of hewing to the text of Section 550(a)(2), the Trustee ambles about SIPA and the Code, invoking "overall purpose[s]" of "protect[ing] ... public customers of securities dealers" and "reinforc[ing] the flagging confidence in the securities market." Trustee Br. 17. But again, weighing these policy goals against the potential for international legal conflict is not the job of the courts. Until Congress unambiguously speaks, judges must "give the statute the effect its language suggests, however modest that may be; not … extend it to admirable purposes it might be used to achieve." *Morrison*, 561 U.S. at 270. This Court should decline the Trustee's plea that it step into Congress' shoes, and, applying the age-old presumption, should affirm the judgments below.

CONCLUSION

The judgments of the bankruptcy court should be affirmed.

Respectfully submitted,

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