No. 19-277

IN THE
Supreme Court of the United States

HSBC HOLDINGS PLC, CITIGROUP GLOBAL MARKETS LIMITED, TENSYR LIMITED, AND BA WORLDWIDE FUND MANAGEMENT LIMITED, ET AL.,
Petitioners,

v.

IRVING H. PICARD,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION, THE INSTITUTE OF INTERNATIONAL BANKERS, AND THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

The Securities Industry and Financial Markets Association ("SIFMA") brings together the shared interests of hundreds of securities firms, banks, and asset managers. It is the U.S. regional member of the Global Financial Markets Association, which represents the common interests of the world's leading financial and capital market participants. SIFMA's mission is to support a strong financial industry, investor opportunity, capital formation, job creation, and economic growth, while building trust and confidence in the financial markets. SIFMA has often played an advocacy role in cases concerning the extraterritorial application of U.S. law—for example, by filing an *amicus* brief with this Court in *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247 (2010), and serving as an *amicus* in the Courts of Appeals on important matters concerning the Bankruptcy Code. *See, e.g.*, *Meoli v. Huntington Nat'l Bank*, 848 F.3d 716 (6th Cir. 2017).

The Institute of International Bankers ("IIB") represents the interests of internationally-headquartered banking and financial institutions operating in the U.S. and comprises institutions from approximately 35 countries around the world. The IIB's mission is to ensure that federal and state banking laws and regulations provide international banks operating in the U.S., including their branches,

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[1] No counsel for a party authored this brief in whole or in part, and no person other than *amici curiae*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. Counsel for *amici* provided counsel for the parties timely notice of *amici*'s intent to file this brief, and all parties have consented to its filing.

agencies, and securities affiliates, with the same competitive opportunities as those available to domestic banking organizations. The IIB also seeks to ensure that the global operations of its member banks are not subject to unwarranted extraterritorial applications of U.S. law and has submitted *amicus* briefs in this Court and the Courts of Appeals addressing that issue. *See, e.g.*, *Morrison*, 561 U.S. 247; *City of Pontiac Policemen's & Firemen's Ret. Sys. v. UBS AG*, 752 F.3d 173 (2d Cir. 2014).

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members, and indirectly represents an underlying membership of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the United States. The Chamber's members transact business and make investments around the world and are regularly subject to the strictures of foreign law, including foreign insolvency and property law. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus* briefs in cases that raise issues of concern to the nation's business community, including cases concerning the U.S. Bankruptcy Code and the extraterritorial application of U.S. law. *See, e.g.*, *Morrison*, 561 U.S. 247; *Midland Funding, LLC v. Johnson*, 137 S. Ct. 1407 (2017).

SUMMARY OF ARGUMENT

The Second Circuit's decision threatens to undermine the stability and certainty that *amici*'s members and other participants in global financial markets require by effectively replacing the presumption against extraterritoriality with a rule that would permit the application of U.S. law to foreign citizens conducting foreign transactions governed entirely—and, absent the Second Circuit's decision, heretofore exclusively—by foreign law. The decision below renders illusory the well-settled presumption against extraterritoriality, upon which businesses world-wide rely, by shifting the focus of the analysis under that presumption from the foreign conduct at issue (in this case, monetary transfers between and among foreign entities on foreign soil) to domestic conduct several layers removed from foreign activity. If left to stand, the Second Circuit's decision would impose a rule of law that provides no guidance whatsoever to domestic and global financial market participants in their collective conduct of trillions of dollars in market activity.

The Second Circuit's decision does not account for the significant role that the presumption against extraterritoriality plays as a guiding principle for international actors. The operating assumption that local law governs local transactions among local residents underlies daily commerce between players in scores of jurisdictions around the globe. Against this background, a rule of law that would enable one jurisdiction—the U.S.—to impose its law in a foreign jurisdiction, at any time and without notice, serves only to upset settled expectations and undermine the certainty required for international commerce. Likewise, actors in both the U.S. and abroad conduct

their affairs based on the established and familiar presumption that, absent notice of wrongdoing or an obligation under local law, they need not expend resources conducting diligence beyond their immediate counterparties by tracing the chain of title to property or funds they acquire.

The Second Circuit's test, however, establishes a regime in which no foreign property transfer is final, even if a transferee satisfies all local legal standards. This is because there is always a risk that a U.S. bankruptcy trustee will seek to recover foreign property in reliance upon U.S. law and based upon conduct that took place entirely outside the visibility of the foreign actors who now hold that property. Indeed, due to the Bankruptcy Code's forgiving statute of limitations, such conduct may have taken place *years* before the foreign actors even acquired the property in question.[2] The lack of any discernible limit to the power of U.S. plaintiffs under the U.S. Bankruptcy Code's avoidance provisions is compelling evidence that the Second Circuit got it wrong.

Moreover, this decision will interfere with the policy decisions made by foreign jurisdictions with well-established rules regarding property transfers, avoidance, and the defenses available to transferees targeted by clawback actions. Under the Second Circuit's holding, whenever an initial property transfer takes place in the U.S., all of those varied and nuanced foreign rules are subsumed under one set of rules: those in Section 550 of the Bankruptcy Code. Thus, rather than certainty and stability, the decision below will create conflicts between the (legal) foreign

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[2] *See* n.5, *infra.*

acts of foreign entities and persons on one hand and the claims of U.S. plaintiffs that those acts run afoul of U.S. bankruptcy law on the other.

Accordingly, and for the following reasons, *amici* respectfully submit that the Petition should be granted in order to undo the global pernicious effects of the decision below.

ARGUMENT

I. The Decision Below Upsets the Settled Expectations of Domestic and Foreign Market Participants by Improperly Applying Section 550 to Foreign Conduct.

A. The Presumption Against Extraterritoriality Is a Bedrock Principle that Promotes Stability and Predictability in Financial Markets.

The presumption against extraterritoriality is grounded in the commonsense notion that "United States law governs domestically but does not rule the world" and, therefore, "[f]oreign conduct is generally the domain of foreign law. . . ." *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 455 (2007) (internal quotations omitted). In *Morrison*, this Court recognized the importance of clear rules concerning the extraterritorial application of U.S. law against the complex and varied regulatory background applicable to securities issuers and exchanges. 561 U.S. at 269–70. The presumption that local securities laws will apply to foreign securities traded on foreign exchanges provides stability to the global financial markets by allowing financial institutions and the clients they serve to transact business with settled expectations about the rules of engagement.

The need for certainty in insolvency law is no less compelling. As this Court has made clear, "predictability" is a goal the Bankruptcy Code "is designed to provide." *Schwab v. Reilly*, 560 U.S. 770, 790 (2010). Therefore, courts have an "obligation to interpret the Code clearly and predictably. . . ." *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 649 (2012). And they should prefer an interpretation of the Code that "enhances predictability for interested parties." *In re Mwangi*, 764 F.3d 1168, 1176 n.4 (9th Cir. 2014); *see also In re Elec. Metal Prods., Inc.*, 916 F.2d 1502, 1507 (10th Cir. 1990) (describing the Bankruptcy Code's liquidation and reorganization provisions as "orderly, equitable, and predictable").

The value of predictability and certainty in insolvency proceedings extends beyond U.S. borders. The United Nations Commission on International Trade Law (UNCITRAL) describes a "key objective[]" of insolvency law as the "[p]rovision of certainty in the market to promote economic stability and growth." U.N. Comm'n on Int'l Trade Law (UNCITRAL), *Legislative Guide On Insolvency Law* at 10, U.N. Sales No. E.05.V.10 (2005). Insolvency laws meet this objective when they "facilitate the provision of finance for start-up and reorganization of businesses and enable assessment of credit risk, both domestically and internationally." *Id.* When an insolvency law is "transparent and predictable," it "will enable potential lenders and creditors to understand how insolvency proceedings operate and to assess the risk associated with their position as a creditor in the event of insolvency." *Id.* at 13. When incorporating UNCITRAL's Model Law on Cross-Border Insolvency into U.S. law through Chapter 15 of the Bankruptcy

Code, Congress made clear that one of its central objectives is "greater legal certainty for trade and investment. . . ." 11 U.S.C. § 1501(a)(2) (2005). Financial institutions and other businesses operating abroad expect that, even in the case of insolvency, absent a clear indication to the contrary, U.S. law will cease to apply at the U.S. border and local law will govern the rights and obligations of foreign parties transacting business on foreign soil.

The global financial markets are built on a foundation of contractual frameworks for derivatives trading, securities lending, and other financial transactions that are, in turn, based upon a common understanding that local law determines their enforceability. For example, standard agreements designed to implement cross-border securities repurchase relationships, such as the Global Master Repurchase Agreement ("GMRA"), and derivatives-trading relationships, such as the International Swaps and Derivatives Association, Inc. ("ISDA") Master Agreement, are supported by robust opinions from counsel, in scores of jurisdictions, affirming that the agreements are enforceable under local law. *See, e.g.*, *Global Master Repurchase Agreement 1995 and 2000 versions: Legal Opinions: notes on opinions jointly obtained by ISMA and TBMA* (Apr. 7, 2004), *available at* https://www.sifma.org/wp-content/uploads/2017/08/GMRA_Notes-on-Opinions-Jointly-Obtained-by-ISMA-and-TBMA.pdf (discussing local opinions concerning GMRA); Opinions Overview, isda.org, [https://www.isda.org/opinions-overview/] (last visited Sept. 30, 2019) ("ISDA has published netting opinions covering over 73 jurisdictions and collateral opinions covering over 55 jurisdictions.").

Taken together, these international financial transactions represent trillions of dollars of outstanding credit risk. *See, e.g.*, Bank for International Settlements, *Statistical release: OTC derivatives statistics at end-December 2018 (2019)*, https://www.bis.org/publ/otc_hy1905.pdf.[3] The global legislative effort to protect such financial transactions from unwinding or clawback via insolvency proceedings, as reflected in the European Union's Financial Collateral Directive and the "safe harbors" of the Bankruptcy Code, demonstrates the need for predictability and certainty. *See* Council Directive 2002/47/EC, art. 8(1)–(3), 2002 O.J. (L 168) 43, 49; 11 U.S.C. §§ 546(e)–(g), (j) (2006).

For institutions engaged in substantial credit and trading relationships, insolvency law does not provide merely a set of exceptional measures that apply only in times of distress. Rather, insolvency law provides a set of background rules and assumptions against which credit decisions are made every day in the ordinary course. As a result, foreign legal opinions supporting enforcement of the standard agreements noted above extensively discuss the insolvency rules of local jurisdictions and the treatment of those contracts under foreign insolvency law.

The presumption in favor of local law and against the extraterritorial application of U.S. insolvency law is thus a background expectation of participants in the

[3] This is in addition to $30.5 trillion of "cross-border bank lending" outstanding as of the end of the first quarter of 2019. Bank for International Settlements, *Statistical release: BIS international banking statistics at end-March 2019 (2019)*, https://www.bis.org/statistics/rppb1907.pdf.

global financial markets. Upsetting this expectation threatens to upset those markets.

B. The Allocation of Risk Between Initial and Subsequent Transferees Promotes Stability and Predictability in Financial Markets.

The presumption against extraterritoriality aside, the Bankruptcy Code incorporates general principles of commercial law that allocate risk between initial and subsequent transferees and, consequently, provide further predictability and stability to market participants.

The Bankruptcy Code expressly separates avoidance actions from recovery actions, including those against subsequent transferees under Section 550(a)(2). *See, e.g., In re Hurtado*, 342 F.3d 528, 532 (6th Cir. 2003) (avoidance and recovery are "related conceptually" but "must be kept analytically separate"); 4 William L. Norton Jr., Norton Bankr. L. & Prac. § 70.2 (3d 2019) (the Code "generally separates the issue of whether a transfer is avoidable from the issue of the liability of a transferee."). This separation makes sense because the risks arising from avoidance are allocated differently among transferees, depending on where they sit in the chain of transfers. On the one hand, under 11 U.S.C. § 550(a)(1), "the trustee's right to recover from an initial transferee or from any entity for whose benefit a[n] avoidable transfer was made *is absolute*." *Id.* at § 70.4 (emphasis added); *see Hurtado*, 342 F.3d at 532 ("As is plain from its text, section 550(a)(1) holds initial transferees strictly liable for any fraudulent transfers they receive."). On the other hand, the right to recover from a subsequent transferee is not "absolute": no

recovery is permitted from a subsequent transferee who takes "for value," "in good faith," and "without knowledge of the voidability of the transfer. . . ." 11 U.S.C. § 550(b)(1); 4 William L. Norton Jr., Norton Bankr. L. & Prac. § 70.2 (3d 2019) ("Initial recipients of an avoidable transfer and other entities for whose benefit an initial transfer is made are subject to greater liability than certain subsequent transferees . . . .").

Subsequent transferees in a chain of transfers are subject to less rigorous liability than initial transferees "because monitoring of earlier stages is impractical, and exposing [subsequent transferees] to risk on account of earlier delicts would make commerce harder to conduct. Benefits to the commercial economy, and not to the initial transferors (who may be victims of fraud), justify this approach." *Bonded Fin. Servs., Inc. v. European Am. Bank*, 838 F.2d 890, 897 (7th Cir. 1988). This rule reflects the reality that "[t]ransferees and other purchasers generally deal only with the previous person in line," *id.* at 897, and they therefore should not be required to look past the immediate transfer absent notice of something amiss with the transfer to which they are party. *See In re Chase & Sanborn Corp.*, 848 F. 2d 1196, 1202 (11th Cir. 1988) (rejecting an interpretation of the Bankruptcy Code that would have required that "a bank must at its peril examine the source of the wired funds, determine its solvency and verify the consideration it received before the bank honors the transfer").

Indeed, the rule that a transferee need not devote time and resources to diligence beyond an immediate transferor is not specific to the Bankruptcy Code. *See, e.g.*, UCC § 3-306 (2018) (protecting a holder in due

course—who must acquire a negotiable instrument without notice of its defects per UCC § 3-302(a)(2)—from competing claims to the instrument); N.Y. Real Prop. Law § 291 (McKinney 2019) (providing that any conveyance of real property not recorded "is void as against any person who subsequently purchases . . . the same real property . . . in good faith and for a valuable consideration"); Unif. Voidable Transactions Act § 8(b)(1)(ii)(A) (2014) (providing that a "creditor may recover judgment for the value of the asset transferred . . . [and] judgment may be entered against . . . an immediate or mediate transferee of the first transferee, *other than*[] a good faith transferee that took for value") (emphasis added); Restatement (Third) of Restitution and Unjust Enrichment § 66 (2011) ("A purchaser for value and without notice acquires the legal interest that the grantor holds and purports to convey, *free of equitable interests* that a restitution claimant might have asserted against the property in the hands of the grantor.") (Emphasis added).

Thus, commercial law and the Bankruptcy Code generally reflect the unsurprising presumption that the conduct in focus in any particular transfer is the transfer itself. So long as the transferee complies with local law as it concerns the transfer—for example, by taking an instrument as a "holder in due course," UCC § 3-306—the transfer should be final and insulated from subsequent attack. *Amici*'s members rely upon this presumption in conducting trillions of dollars in transactions on this basis every year. It would unsettle the expectations of commercial actors to discover, instead, that their transfers are subject to clawback under a foreign law that focuses on *prior*

conduct by *different* actors at a distance from the transaction in issue.

Set against this background, the Second Circuit's view that *initial* transfers are the "focus" of recovery actions against subsequent transferees is plainly inconsistent with this Court's precedent. *Morrison* established that the Exchange Act's "focus" is the domestic purchase and sale of securities because those transactions are "the objects of the statute's solicitude" and the "transactions that the statute seeks to 'regulate.'" *Morrison*, 561 U.S. at 266–67. Indeed, it is the "parties or prospective parties to those transactions that the statute seeks to 'protect'. . . ." *Id.*

Here, established principles of commercial law reflect that, in an action against a subsequent transferee under Section 550(a)(2), the last transfer in the chain—not the initial transfer—is the "focus" of the statute. The Second Circuit's holding to the contrary threatens to upset those settled expectations on which *amici*'s members rely.

C. The Second Circuit's Improper Gloss on this Court's "Focus" Test Cannot Be Administered in Any Predictable Way.

Failing to abide by this Court's extraterritoriality precedent, the Second Circuit instead created a rule of law that, if applied generally to the avoidance provisions in the Bankruptcy Code, would establish no reasonable standard by which financial institutions and other businesses could regulate their conduct to avoid liability in future suits brought by debtors-in-possession, trustees, or creditors' committees. The court appears to have understood the likely repercussions of its holding regarding the "focus" of Section 550(a)(2), noting that it would

"express no opinion on the focus of § 550(a) in actions involving any avoidance provision other than § 548(a)(1)(A)." App. 22a n.7. According to the court, it sought to limit its holding because "Section 550(a) may serve different purposes depending on which of the Bankruptcy Code's avoidance provisions enables recovery." *Id.* Such reasoning is wildly impractical because it treats "focus" not as a fixed and measurable point but as an ever-changing chameleon, providing no standard by which *amici*'s members can manage their affairs.[4]

As the Second Circuit acknowledged, Section 548(a)(1)(A), concerning actual fraudulent transfers, is not the sole basis for recovery from a subsequent transferee under Section 550(a)(2). App. 22a. n.7. Rather, by its terms, Section 550(a)(2) permits recovery from the subsequent transferee of an initial transfer avoidable under Code Sections 544, 545, 547, 548, 549, 553(b), or 724(a). 11 U.S.C. § 550(a). Therefore, applying the rule that the "focus" of a recovery action against a subsequent transferee is the initial transfer, a foreign transferee receiving money

[4] Notwithstanding the Second Circuit's holding that an independent analysis of each avoidance provision in the Bankruptcy Code is appropriate, the court's logic leads to the conclusion that essentially *any* action brought under Section 550(a)(2) against a foreign subsequent transferee is "domestic." The grounds on which the court determined the "focus" of Section 548(a)(1)(A)—that an initial transfer "depletes" the estate, App. 22a—would appear to apply to any avoidance action with which Section 550(a) works "in tandem." After all, "[a] general purpose of 'the Bankruptcy Code's avoidance provisions . . . is protecting a debtor's estate from depletion to the prejudice of the unsecured creditor.'" App. 20a–21 (citing and quoting *In re Harris*, 464 F.3d 263, 273 (2d Cir. 2006)). On that basis, every avoidance provision in the Bankruptcy Code has a "focus" that is "domestic."

or property from a foreign transferor in a foreign country would have to do the following to be confident that such transferee was free of liability under the U.S. Bankruptcy Code:

Step 1: Look back through the chain of transfers to identify any conceivable nexus between the U.S. and any link in the chain.

Step 2: Decide whether one or more of the various avoidance provisions of the Bankruptcy Code could potentially apply to a transfer in the chain, on the basis that any of these provisions could eventually work "in tandem" with Section 550(a)(2) to serve as the basis for a clawback action. *See* App. 21a. An initial transfer is avoidable, for example, if it was made within the statutory preference period (11 U.S.C. § 547); or exchanged for less than reasonably equivalent value while the debtor was insolvent or near insolvent, or made to an insider (*id.* § 548(a)(1)(B)); or was made from an insolvent partnership to a general partner (*id.* § 548(b)); or was made after the commencement of bankruptcy (*id.* § 549); or was the product of a preferential pre-petition setoff transaction (*id.* § 553(b)). *See* 11 U.S.C. § 550. Indeed, under the so-called "strong-arm" provisions of the Code, this hypothetical transferee would even have to consider whether a prior transfer in the chain were avoidable under U.S. *state law*. *Id.* § 544.

Step 3: Discern the "focus" of Section 550(a)(2) in the relevant context, or contexts, given that a single subsequent transfer made the target of a recovery action under Section 550(a)(2) may arise from an initial transfer that is potentially avoidable on multiple grounds. *See*, *e.g.*, Amended Complaint in *Picard v. HSBC Bank plc, et al.*, No. 09-01364-BRL

(Bankr. S.D.N.Y. Dec. 5, 2010), Dkt. No. 170 ¶¶ 479–99 (seeking recovery of the same initial transfers allegedly avoidable under both Sections 548(a)(1)(A) and (B)).

Step 4: Determine whether there are sufficient U.S. contacts with the "focus" of Section 550(a)(2), in context, such that a subsequent transfer made and received in a foreign country can be challenged by the representative of a U.S. bankruptcy estate.

Under the Second Circuit's test, a hypothetical foreign transferee would have to undertake this analysis even if it had entirely complied with local property transfer law, or forego this analysis at the risk of being subject to a clawback action under the Bankruptcy Code years after the transfer concluded.[5] This result is precisely what the presumption against extraterritoriality is meant to avoid: the U.S. arrogating to itself the power to regulate foreign conduct otherwise governed by foreign law without an express Congressional mandate. *See Morrison*, 561 U.S. at 269 (adopting a "clear test" concerning the extraterritorial application of U.S. securities law in order to avoid "interference with foreign securities regulation"). The standard adopted by the court below

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[5] Section 550(f) provides that recovery actions, such as those at issue here, "must be brought no later than one year after the avoidance of the transfer or the closing or dismissal, whichever occurs first." 11 U.S.C. § 550(f). However, a complicated bankruptcy case can take years to reach either triggering condition. *See, e.g.*, *Pry v. Maxim Global, Inc. (In re Maxim Truck Co.)*, 415 B.R. 346, 353 (Bankr. S.D. Ind. 2009) (permitting trustee to amend the complaint to add a subsequent transferee more than seven years after the case commenced because no transfer had yet been avoided). The present case is quickly approaching the eleventh anniversary of its filing date.

is anything but a "clear test" designed to avoid "interference" with foreign law, and instead introduces uncertainty where interests of predictability are paramount.

Amici submit that any rule of commercial law must be judged on whether it provides market participants with clear guidance on how they may (or must) act to protect their interests. The Second Circuit's holding fails this test.

D. The Second Circuit's Test Will Lead to Conflicts with Foreign Law.

The Second Circuit's extraterritorial extension of the Bankruptcy Code should also be rejected because it will inevitably lead to conflicts with foreign law. Although such conflicts will arise under various factual scenarios, *amici* submit that transfers of property other than money bring the issues into stark relief. The recovery power under Section 550 is not limited to recoveries of money, and trustees have sought to avoid transfers of many other types of tangible and intangible property under the Bankruptcy Code, including, *inter alia*, real estate, *see, e.g.*, *In re Barbera*, 156 F.3d 1228 (6th Cir. 1998), personal property, *see*, *e.g.*, *Max Sugarman Funeral Home, Inc. v. A.D.B. Inv'rs*, 926 F.2d 1248, 1257 (1st Cir. 1991), security interests, *see*, *e.g.*, *In re Taylor*, 599 F.3d 880, 890 (9th Cir. 2010), regulatory permits or licenses, *see, e.g.*, *In re Select One, Inc.*, 556 B.R. 826, 852 (Bankr. E.D. Mich. 2013), and securities, *see*, *e.g.*, *In re Veluchamy*, 879 F.3d 808, 822 (7th Cir. 2018).

The decision below fails to grapple with the likelihood in future cases that specific types of property are subject to specific transfer regimes in

foreign jurisdictions—themselves concerned with finality and certainty—that may be fundamentally incompatible with Section 550. For example, under English law, a purchaser of real property "for valuable consideration" who registers the purchase, takes superior title to any prior, unregistered interest. *See* Land Registration Act 2002, c. 9 (Eng.). Thus, an English subsequent transferee who purchased real property for valuable consideration and registered his purchase would understand his interest to be secure under England's Land Registration Act. Likewise, as it concerns personal property, English law provides that "[w]hen the seller of goods has a voidable title to them, but his title has not been avoided at the time of the sale, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of the seller's defect of title." Sale of Goods Act 1979, c. 54 (UK). German law is similar, *see* BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE] § 932, *translation at* https://www.gesetze-im-internet.de/englisch_bgb/ index.html (Ger.) (protecting subsequent transferee who acts in good faith and without knowledge), while the French Civil Code protects from liability a subsequent transferee who merely *possesses* personal property, except where the personal property was lost or stolen and the original rightful owner claims it within three years. *See* CODE CIVIL [C. CIV.] [CIVIL CODE] art. 2279 (Fr.).

Meanwhile, according to the rule set out in the opinion below, once a trustee or other plaintiff invokes the U.S. Bankruptcy Code to avoid a transaction, a subsequent transferee's only defense lies under Section 550(b)(2), which protects a subsequent transferee who "accept[s] the transfer for value, in good faith, and without knowledge of the transfer's

voidability." *In re Anton Noll, Inc.*, 277 B.R. 875, 878 (B.A.P. 1st Cir. 2002). Therefore, a subsequent transferee of real property in England would have to establish in his defense not what the Land Registration Act requires (*i.e.* consideration and registration) but what U.S. bankruptcy law requires (*i.e.* value, good faith, and no prior knowledge). So too with English, German, and French personal property transfers: no matter the requirements under those local legal regimes, a subsequent transferee haled into bankruptcy court avoids liability *only* by establishing the standards set out in Section 550(b).

Finally, notwithstanding the international insolvency regimes put in place with the goal of "fair and efficient administration of cross-border insolvencies that protect[] the interests of all creditors, and other interested entities, including the debtor," 11 U.S.C. § 1501, the decision below also creates potentially irreconcilable conflicts between U.S. and foreign insolvency law. For example, under the English Insolvency Act, an "administrator" or "liquidator" may avoid a "transaction at an undervalue," *see* Insolvency Act 1986, c. 45 (UK), except where a subsequent transferee acquired property involved in the subject transaction "in good faith and for value," *see id.* But Section 550(b), again, requires a transferee to prove that he or she was "without knowledge" of the avoidability of the transfer. *See In re Anton Noll*, 277 B.R. at 878. Thus, if the decision below stands, the Second Circuit will have effectively amended U.K. insolvency law (at least with respect to chains of transfer originating in the U.S.) by requiring subsequent transferees to demonstrate a lack of knowledge *in addition to* English law's requirements of good faith and value.

The result would be even more unfair for a German subsequent transferee, who, under German law, need establish only a lack of actual knowledge, without any requirement to show "good faith" or "value." *See* INSOLVENZORDNUNG [INSOLVENCY STATUTE], Oct. 5, 1994 INSOLVENZORDNUNG [INSO] at 2854 VI, § 145 (Ger.).

That the defense available under Section 550(b) may rely on concepts—such as "notice" and "good faith"—that also appear in local law is cold comfort to foreign transferees who may be the targets of U.S. clawback actions. Sovereigns make discrete and often nuanced decisions about how transfers and other property rights are regulated, and foreign transferees rely on those rights as articulated by local statutes and courts. For example, even if two regimes allow a "good faith" transferee to retain property in the face of a recovery demand, that does not mean that those regimes agree on what constitutes "good faith." *Cf. Morrison*, 561 U.S. at 269 (enumerating differences between U.S. and foreign law, including that "the regulation of other countries often differs from ours as to what constitutes fraud"). Likewise, even a foreign law that mirrors Section 550(b) might not require the transferee to bear the burden of proof—which, regardless of local law, the transferee bears for this defense under the Bankruptcy Code. *See, e.g.*, *In re Nieves*, 648 F.3d 232, 237 (4th Cir. 2011) (holding that "a defendant claiming a defense to liability under § 550(b) bears the burden of proof"); *In re Smith*, 811 F.3d 228, 246 (7th Cir. 2016) ("Because § 550(b) offers an affirmative defense, [defendant] bore the burden of persuasion on the defense.").

If the Second Circuit's decision is upheld, it will impose significant costs on foreign behavior in that

foreign parties will have to undertake additional legal and risk analysis where there is any potential U.S. nexus to their transactions, no matter how remote. Due to these costs, and attendant risks, parties may be reluctant to engage with U.S. companies, and financial institutions specifically, out of (a not unfounded) fear that U.S. insolvency law will be applied to unwind foreign transactions that were otherwise regarded as final.

While it should be no surprise to a transferee outside the U.S. that he or she must conduct due diligence to ensure that a transaction complies with local law, it will surely surprise most foreign transferees to learn that their otherwise lawful transactions can nevertheless be undone by a faraway bankruptcy trustee or creditors' committee relying upon U.S. law to bring a claim years after the transfer in question has taken place. A rule acknowledging that the subsequent transfer (rather than the initial transfer) is the "focus" of an action under Section 550(a)(2) for purposes of extraterritoriality respects the property interests and regulatory decisions that foreign nations have made. A rule that inevitably bends the "focus" of foreign transfers back to the U.S. does not.

II. The Decision Below Creates Uncertainty by Failing to Respect International Comity Principles.

Just as the presumption against extraterritoriality protects the expectations of foreign actors *ex ante* by ensuring that U.S. law will apply abroad in expressed and predictable ways, the principles of international comity protect those expectations *ex post* by ensuring that Bankruptcy Courts and other courts faced with

international conflicts of law may forego the application of forum law, and defer instead to the interests of other sovereigns in having their laws apply.

The Second Circuit's holding, however, threatens to upset the settled expectations of global actors by making it all-but-impossible to rely on foreign law and to settle their rights and interests in foreign judicial proceedings. This is because, according to the decision below, bankruptcy courts need only extend comity to foreign nations when parallel insolvency proceedings involving the same debtor are under way. App. 34a–36a. Otherwise, foreign nations are held to have interests less important than the interest of the U.S. in recovering the proceeds of fraudulent transfers originating domestically. App. 38a–39a.

This ruling ignores the significant interest that foreign sovereigns have in regulating property transfers within their territory—an interest that exists both within and outside of insolvency. Indeed, the holding that the Bankruptcy Code superintends foreign property transfers because the interests of U.S. creditors are more important than the interests of foreign property holders—even innocent ones—ignores the "deference" and "respect" to foreign sovereigns—including their judicial processes and courts—that undergirds the comity doctrine. *See* App 27a–28a (citing *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 817 (1993) (Scalia, J., dissenting)).

Moreover, the Second Circuit is an outlier in this regard. As discussed in the Petition, while other Courts of Appeals have held that abstention on comity grounds is appropriate when there is either a "potential" or "actual" conflict between U.S. and

foreign law, the Second Circuit broke from its sister circuits in the decision below by holding that comity-based abstention is inappropriate even in the face of an actual conflict with foreign law. *See* Pet. 28a–30a. In addition to highlighting the need for resolution of this issue by this Court, the Second Circuit's departure from precedent serves to create yet more uncertainty for *amici*'s members, who benefit in the ordinary course from knowing that U.S. courts should abstain from deciding issues more appropriately left to foreign courts to decide under foreign law.

Finally, the Second Circuit's holding in this case takes on outsized importance for *amici's* members, and other participants in the global financial markets, because of the significance of the Southern District of New York in large-scale bankruptcies. For example, between 2005 and 2011, the Southern District was one of two districts accounting for over 70 percent of the 200 largest bankruptcy filings in the country (Delaware was the other), and as of 2014, the Southern District alone was handling 104 "mega cases." *See* Laura Napoli Coordes, *The Geography of Bankruptcy*, 68 Vand. L. Rev. 381, 389–90 (2015). Today there are 80 "mega cases" in the Southern District, including the bankruptcy and SIPA proceedings of Sears, General Motors, MF Global, and Lehman Brothers. *See NYSB Mega Cases*, Bankr. S.D.N.Y., http://www.nysb.uscourts.gov/megaCases (last visited Sept. 27, 2019). These large-scale proceedings with significant international contacts are precisely the ones that create the most uncertainty for foreign transferees who may find themselves in the crosshairs of a U.S. trustee or creditors' committee.

Because the Second Circuit's holding on comity grounds departs from the rules established in other circuits, fails to give appropriate respect and deference to the interests of other nations, and threatens to affect a substantial number of bankruptcy cases implicating foreign issues, *amici* respectfully submit that this Court should grant the Petition for Writ of Certiorari and correct the lower court's errors. Doing so will enhance the predictability and stability in global markets upon which *amici*'s members and other businesses rely.

CONCLUSION

For the foregoing reasons, the Petition should be granted.

Respectfully submitted,

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