No. 19-277

In the Supreme Court of the United States

HSBC HOLDINGS PLC, ET AL., PETITIONERS

v.

IRVING H. PICARD, ET AL.

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

This case involves property that is alleged to have been fraudulently transferred by a U.S. debtor from a U.S. bank account to foreign transferees, and that was subsequently transferred to other foreign entities. The questions presented are as follows:

1. Whether applying Section 550(a)(2) of the Bankruptcy Code to permit the recovery of the property from the subsequent foreign transferees, for the benefit of the U.S. debtor's bankruptcy estate, is a permissible domestic application of Section 550(a)(2).

2. Whether the court of appeals correctly determined that a *de novo* standard applied to its review of the bankruptcy court's and district court's holdings that prescriptive international comity limits the reach of Section 550(a)(2) in these circumstances.

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INTEREST OF THE UNITED STATES

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

1. This case arises out of liquidation proceedings involving Bernard L. Madoff Investment Securities LLC (Madoff Securities), the New York investment firm at the center of Bernard Madoff's Ponzi scheme. Pet. App. 7a. Madoff induced investors to buy into fake investment funds by promising substantial returns. *Ibid.* Madoff did not actually engage in any securities transactions on behalf of those investors. *Id.* at 45a. Instead, he sent them "bogus customer statements and trade confirmations showing fictitious trading activity," while he deposited all of their money in his checking account

in New York. *Ibid.*; see *id.* at 7a. When a customer requested a withdrawal, Madoff paid it from this comingled account using funds he had received from other customers. *Id.* at 7a, 45a.

Madoff Securities' direct investors included so-called "feeder funds"—entities that pool money from investors and hold it on their behalf. Pet. App. 9a, 45a, 162a. Some of the largest such funds, although operated out of New York, were organized in the British Virgin Islands, the Cayman Islands, and other foreign countries. *Id.* at 9a-10a, 45a, 162a-164a. When an investor in one of these feeder funds sought a withdrawal, Madoff Securities transferred investor money from its New York bank account to the feeder fund, which in turn transferred the money to its investor. *Id.* at 9a-10a, 45a, 162a. The collapse of Madoff's scheme in December 2008 carried with it the collapse of many feeder funds that had invested all or nearly all of their customers' funds into Madoff's enterprise. *Id.* at 7a, 162a.

Respondent Securities Investor Protection Corporation (SIPC), a nonprofit corporation acting under the Securities Investor Protection Act of 1970 (SIPA), 15 U.S.C. 78aaa *et seq.*, applied in the United States District Court for the Southern District of New York for a protective decree to place Madoff Securities in liquidation. See 654 F.3d 229, 232-233; 15 U.S.C. 78ccc (establishing the SIPC); 15 U.S.C. 78eee(a)(3)(A) (authorizing such an application). The district court issued the protective decree and appointed respondent Irving Picard as SIPA trustee. See 654 F.3d at 233; 15 U.S.C. 78eee(b)(1) and (3) (authorizing such a protective decree and appointment). Several of the feeder funds also commenced liquidation proceedings in their home jurisdictions. Pet. App. 162a.

2. SIPA establishes specialized procedures "for the expeditious and orderly liquidation of failed broker-dealers, and provides special protections to their customers." Pet. App. 7a (citation omitted). A trustee appointed under SIPA is generally "vested with the same powers and title with respect to the debtor and the property of the debtor" as a bankruptcy trustee under the Bankruptcy Code (Title 11 of the U.S. Code), and is generally "subject to the same duties" as a bankruptcy trustee in a case under Chapter 7 of the Bankruptcy Code. 15 U.S.C. 78fff-1(a)-(b). "A trustee's primary duty under SIPA is to liquidate the broker-dealer and, in so doing, satisfy the claims made by or on behalf of the broker-dealer's customers for cash balances." Pet. App. 7a-8a (citation omitted). In carrying out that duty, "[w]henever customer property is not sufficient to pay" the claims in full, "the trustee may recover any property transferred by the debtor which, except for such transfer, would have been customer property if and to the extent that such transfer is voidable or void under the provisions of Title 11." 15 U.S.C. 78fff-2(c)(3).

Under Title 11, a bankruptcy trustee "may avoid any transfer * * * of an interest of the debtor in property * * * that was made or incurred on or within 2 years" before the beginning of the liquidation proceedings, "if the debtor * * * made such transfer * * * with actual intent to hinder, delay, or defraud any entity to which the debtor was or became * * * indebted." 11 U.S.C. 548(a)(1)(A). To the extent a transfer is avoided under Section 548, the trustee generally may "recover" the transferred property from either (1) "the initial transferee of such transfer or the entity for whose benefit such transfer was made," or (2) "any immediate or mediate transferee of such initial transferee." 11 U.S.C.

550(a)(1) and (2). Section 550(a) does not authorize recovery, however, from a subsequent transferee who either "takes for value * * * in good faith, and without knowledge of the voidability of the transfer avoided," or is a "good faith transferee of such transferee." 11 U.S.C. 550(b)(1) and (2).

3. These consolidated adversarial proceedings involve alleged fraudulent transfers made by Madoff Securities to feeder funds organized under foreign countries' laws. Respondent Picard seeks to recover those transfers from subsequent foreign transferees that had invested in the feeder funds. Respondent brought suit against petitioners—hundreds of such transferees—under Section 550(a)(2) in the bankruptcy court. Pet. App. 11a.

Withdrawing the reference to the bankruptcy court, the district court held that respondent could not recover from petitioners. Pet. App. 161a-180a. The court concluded that both the presumption against extraterritoriality and international-comity principles limit the reach of Section 550(a)(2), and that respondent cannot rely on that provision to recover "subsequent transfers received abroad by a foreign transferee from a foreign transferor." *Id.* at 179a. The court dismissed respondent's claims "to the extent that they seek to recover purely foreign transfers." *Ibid.*

On remand, the bankruptcy court dismissed the claims against petitioners. Pet. App. 40a-160a. The court dismissed a majority of those claims on grounds of international comity "without reaching the issue of extraterritoriality." *Id.* at 44a; see *id.* at 43a-44a. The court described the claims dismissed on comity grounds as those that seek to recover subsequent transfers from

feeder funds that were in foreign insolvency proceedings in which the feeder funds' liquidators "ha[d] sought or could have sought to recover substantially the same transfers from the same transferees" under foreign law. *Id.* at 44a. The court invoked the presumption against extraterritoriality to dismiss the remaining claims against petitioners, describing respondent as seeking to "recover subsequent transfers between two foreign entities using foreign bank accounts." *Ibid.*

4. The court of appeals vacated the bankruptcy court's judgments and remanded for further proceedings. Pet. App. 1a-39a.

The court of appeals held that the presumption against extraterritoriality does not bar recovery because the claims against petitioners involve only domestic applications of Section 550(a). Pet. App. 15a-27a. The court explained that, to determine whether a case involves a domestic or extraterritorial application of a statute, a court must identify the "focus" of that statute. *Id.* at 16a. It observed that, under this Court's precedent, the focus of a statute is "the object of its solicitude," considered in light of the overall statutory scheme. *Id.* at 17a (quoting *WesternGeco LLC* v. *ION Geophysical Corp.*, 138 S. Ct. 2129, 2137 (2018)); see *id.* at 17a-18a. The court concluded that, because Section 550(a) applies only "'to the extent that a transfer is avoided under'" specified avoidance provisions of the Bankruptcy Code, the focus of Section 550(a)(2) depends on "the purpose of the avoidance provision that enables the recovery action." *Id.* at 19a (quoting 11 U.S.C. 550(a)).

The court of appeals observed that the suits against petitioners seek to recover fraudulent transfers avoided under Section 548(a)(1)(A) of the Bankruptcy Code. Pet. App. 20a-21a. It explained that Section 548(a)(1)(A)'s

purpose is to "allow[] a trustee, for the protection of an estate and its creditors, to avoid a *debtor's* fraudulent, hindersome, or delay-causing property transfer that depletes the estate." *Id.* at 21a (emphasis added). The court held that, "in recovery actions where a trustee alleges a debtor's transfers are avoidable as fraudulent under § 548(a)(1)(A), § 550(a) regulates the fraudulent transfer of property depleting the estate." *Id.* at 21a-22a. Because the fraudulent transfers that respondent sought to avoid in these cases were transfers by a domestic debtor from a U.S. bank account, the court concluded that these cases involve domestic applications of Section 550(a). *Id.* at 25a-26a.

The court of appeals held that international comity likewise does not bar recovery under Section 550(a)(2). Pet. App. 27a-39a. The court distinguished between two related international-comity doctrines: (1) prescriptive comity, under which courts "presume that *Congress*, out of respect for foreign sovereigns, limited the application of domestic law"; and (2) adjudicative comity, under which *courts* exercise discretion to "abstain from exercising jurisdiction" over a case, even where the statute might otherwise apply, "in deference to a foreign nation's courts that might be a more appropriate forum." *Id.* at 27a-28a (emphasis added). The court explained that prescriptive comity "poses a question of statutory interpretation," which a court of appeals reviews *de novo*, while adjudicative comity "concerns a matter of judicial discretion," which is reviewed for abuse of discretion. *Id.* at 29a-30a. The court determined that, because the issue here is "whether domestic law applies, rather than whether our courts should abstain from exercising jurisdiction," the cases present a question of prescriptive comity. *Id.* at 31a. It therefore reviewed

de novo the lower courts' dismissals on international-comity grounds. *Ibid.*

Applying such review, the court of appeals concluded that "[p]rescriptive comity poses no bar to recovery when the trustee of a domestic debtor uses § 550(a) to recover property from a foreign subsequent transferee on the theory that the debtor's initial transfer of that property from within the United States is avoidable under § 548(a)(1)(A), even if the initial transferee is in liquidation in a foreign nation." Pet. App. 37a. The court concluded that "[t]he United States has a compelling interest in allowing domestic estates to recover [such] fraudulently transferred property." *Id.* at 33a. It explained that, although U.S. courts "'should ordinarily decline to adjudicate creditor claims that are the subject of a foreign bankruptcy proceeding,'" only the feeder funds, not Madoff Securities, are "debtors in the foreign courts." *Id.* at 33a-34a (citation omitted). Respondent Picard, the court noted, "is not a creditor" of those feeder funds, and his claims against petitioners, based on fraudulent transfers by Madoff Securities to the feeder funds, "are not the subject of a foreign bankruptcy or liquidation proceeding." *Id.* at 35a.

The court of appeals recognized that respondent Picard's claims "might frustrate the efforts of [the feeder funds'] trustees to recover the same property in foreign court." Pet. App. 36a-37a. It explained, however, that any comity concerns based on such a conflict "are not the comity concerns" that it had previously recognized "in explaining when and why the Bankruptcy Code should give way to foreign law." *Id.* at 37a. The court saw "no reason to think Congress would have decided that trustees looking to recover property in domestic proceedings are out of luck when trustees in foreign

proceedings may be interested in recovering the same property." *Ibid.* The court concluded that, "[i]n fact, § 550(a)(2) suggests the opposite: that by allowing trustees to recover property from even remote subsequent transferees, Congress wanted these claims resolved in the United States, rather than through piecemeal proceedings around the world." *Ibid.*

5. The court of appeals denied petitioners' petition for rehearing en banc, without noted dissent. Pet. App. 181a-182a.

ARGUMENT

Petitioners contend (Pet. 14-23) that the court of appeals erroneously approved an impermissible extraterritorial application of Section 550(a)(2) of the Bankruptcy Code. Petitioners further contend (Pet. 23-31) that the court should have applied deferential rather than *de novo* review to the bankruptcy court's and district court's determinations regarding prescriptive international comity.

Those arguments lack merit. The court of appeals' decision is correct, and it does not conflict with any decision of this Court or another court of appeals. And even if the extraterritoriality question otherwise warranted this Court's review, the SIPA context would make this case an unsuitable vehicle for determining whether similar applications of a Bankruptcy Code provision are extraterritorial or domestic. Further review is not warranted.

1. a. The court of appeals correctly held that recovering domestic fraudulent transfers from foreign subsequent transferees is a permissible domestic application of Section 550(a)(2) of the Bankruptcy Code. "Absent clearly expressed congressional intent to the con-

trary, federal laws will be construed to have only domestic application." *RJR Nabisco, Inc.* v. *European Community*, 136 S. Ct. 2090, 2100 (2016). This presumption reflects the "commonsense notion that Congress generally legislates with domestic concerns in mind." *Ibid.* (citation omitted).

This Court has established a two-step framework for identifying impermissible extraterritorial applications of federal statutes. Generally, a court first asks "whether the presumption against extraterritoriality has been rebutted" by "a clear, affirmative indication that [the statute] applies extraterritorially." *RJR Nabisco*, 136 S. Ct. at 2101. If the presumption has not been rebutted, the court then "determine[s] whether the case involves a domestic application of the statute * * * by looking to the statute's 'focus.'" *Ibid.* "If the conduct relevant to the statute's focus occurred in the United States, then the case involves a permissible domestic application even if other conduct occurred abroad." *Ibid.* Although the inquiry will typically proceed sequentially, courts may start at step two "in appropriate cases." *Id.* at 2101 n.5.

Regardless whether Section 550(a)(2) may be applied extraterritorially in other cases, this case involves only permissible domestic applications of that provision. The "focus" of Section 550(a)(2) is the debtor's fraudulent transfer sought to be recovered, and the conduct relevant to the fraudulent transfers here occurred in the United States. The focus of a statutory provision is the "'object of its solicitude,' which can include the conduct it 'seeks to regulate' as well as the parties and interests it 'seeks to protect' or vindicate." *WesternGeco LLC* v. *ION Geophysical Corp.*, 138 S. Ct. 2129, 2137 (2018) (quoting *Morrison* v. *National Austl. Bank*

Ltd., 561 U.S. 247, 267 (2010)) (brackets omitted)). Although the focus inquiry is provision-specific, see *RJR Nabisco*, 136 S. Ct. at 2103, 2106, a court should not "analyze the provision at issue in a vacuum," *WesternGeco*, 138 S. Ct. at 2137 (citing *Morrison*, 561 U.S. at 267-269). Rather, "[i]f the statutory provision at issue works in tandem with other provisions, it must be assessed in concert with those other provisions." *Ibid.* "Otherwise, it would be impossible to accurately determine whether the application of the statute in the case is a 'domestic application.'" *Ibid.*

In *WesternGeco*, the Court considered Section 284 of the Patent Act, which authorizes "damages adequate to compensate for * * * infringement" under Section 271 of the Act. 35 U.S.C. 284; see *WesternGeco*, 138 S. Ct. at 2137. Because Sections 284 and 271 work together, the Court explained that, "[t]o determine the focus of § 284 in a given case," a court must also consider the focus of Section 271. *Ibid.* In particular, a court must "look to the type of infringement" under Section 271 that is at issue in a particular case. *Ibid.* *WesternGeco* involved a claim of infringement under Section 271(f)(2) for "suppl[ying] * * * in or from the United States any component of a patented invention * * * intending that such component will be combined outside of the United States in a manner that would infringe the patent if such combination occurred within the United States." 35 U.S.C. 271(f)(2); see *WesternGeco*, 138 S. Ct at 2135.

Examining the text of both provisions, the Court concluded that Section 284 focuses on providing a remedy for "infringement." *WesternGeco*, 138 S. Ct. at 2137 (quoting 35 U.S.C. 284). The Court further determined

that the particular infringement provision at issue, Section 271(f)(2), "focuses on domestic conduct," because it "regulates * * * the domestic act of 'suppl[ying] in or from the United States'" and "vindicates domestic interests" by "protect[ing] against 'domestic entities who export components . . . from the United States.'" *Id.* at 2137-2138 (citations omitted; first set of brackets in original). The Court accordingly held that, while some of the infringer's alleged conduct had occurred abroad, the *relevant* conduct was the "domestic act" of exporting components, which "clearly occurred within the United States." *Id.* at 2138. Awarding damages for such infringement therefore was a domestic application of Section 284.

Here, Section 550(a)(2) of the Bankruptcy Code applies only "to the extent that a transfer is avoided" under another section of the Code. 11 U.S.C. 550(a). Like Section 284 of the Patent Act, Section 550(a)(2) thus "works in tandem with other provisions," *WesternGeco*, 138 S. Ct. at 2137. As in *WesternGeco*, to determine the focus of Section 550(a)(2), a court must consider it in conjunction with the avoidance provision at issue. Because respondent Picard relied on Section 548(a)(1)(A) as a basis for avoiding the fraudulent transfers that he sought to recover from the subsequent transferees, the court of appeals properly considered Section 548(a)(1)(A) in determining the focus of Section 550(a)(2).

Where, as here, a domestic debtor fraudulently transfers property from a domestic bank account, Section 548(a)(1)(A) "focuses on domestic conduct." *WesternGeco*, 138 S. Ct at 2137. In such a case, "[t]he conduct that [Section 548(a)(1)(A)] regulates—*i.e.*, its focus—is the domestic act" of fraudulently transferring a debtor's property. *Id.* at 2138; see *In re French*,

440 F.3d 145, 150 (4th Cir.) ("§ 548 focuses not on the property itself, but on the fraud of transferring it."), cert. denied, 549 U.S. 815 (2006). The interest that Section 548(a)(1)(A) is intended to vindicate is likewise domestic, since that avoidance provision protects "a debtor's estate from depletion to the prejudice of the unsecured creditor." *In re Harris*, 464 F.3d 263, 273 (2d Cir. 2006).

In authorizing recovery of an avoided transfer from subsequent transferees, Section 550(a)(2) effectuates Section 548(a)(1)(A)'s policy of preventing depletion of the debtor's estate. As the court of appeals colorfully explained, "[r]ecovery is the business end of avoidance." Pet. App. 21a. But the object of Section 550(a)(2)'s "solicitude" remains the initial fraudulent transfer and the protection of the domestic debtor's estate.

Petitioners repeatedly describe the present suits as attempts to recover the foreign transfers between the feeder funds and their investors. See Pet. 4, 13, 21, 33, 37. But Section 550(a) is not written that way. When a domestic transfer is avoided under 548(a)(1)(A), Section 550(a) authorizes recovery of "the property transferred, or, if the court so orders, the value of such property." 11 U.S.C. 550(a). Although Section 550(a) provides for recovery from subsequent as well as initial transferees, it authorizes recovery not of the subsequent transfers themselves, but of the property (or the value of the property) that was the subject of the *initial* avoidable transfer. Thus, "[w]hen § 550(a) operates in tandem with § 548(a)(1)(A), recovery of property is 'merely the means by which the statute achieves its end of' regulating and remedying the fraudulent transfer." *Id.* at 22a (citation omitted). Because the initial fraudulent transfers in these cases were all effected by a domestic

debtor (Madoff Securities) from a New York bank account, the conduct relevant to the focus of Section 550(a)(2) was domestic.

b. Petitioners contend (Pet. 16) that the court of appeals should have based its extraterritoriality determination on "the conduct giving rise to the claim in the case[s] at hand," which petitioners describe as "subsequent foreign transactions between foreign entities located abroad using foreign bank accounts." But under *WesternGeco*, what matters is the "conduct in th[e] case that is relevant to th[e] focus" of Section 550(a)(2). 138 S. Ct. at 2138. For the reasons described above, in a case involving a fraudulent transfer that is avoided under Section 548(a)(1)(A), the focus of Section 550(a)(2) is the fraudulent *initial* transfer, not any *subsequent* transfer. Petitioners do not contest that the initial transfers here were domestic.

Petitioners argue (Pet. 20) that, unlike Section 284 of the Patent Act, Section 550(a)(2) establishes "a separate cause of action against a different party than that provided by Section 548." But in *WesternGeco*, the Court looked to Section 271(f)(2) not because it provided the cause of action in which Section 284 was invoked, but because the two provisions "work[ed] in tandem." 138 S. Ct. at 2137. Sections 548(a)(1)(A) and 550(a)(2) likewise "work[] in tandem" here. *Ibid.* Indeed, a trustee's ability to avoid a transfer under Section 548(a)(1)(A) would be largely meaningless if Section 550(a) did not authorize recovery of the fraudulently transferred property for the benefit of the estate. In that respect, Subsections 550(a)(1) and (2) provide a remedy for avoided transfers under Section 548(a)(1)(A) similar to the remedy that Section 284 of the Patent Act provides for patent infringement under Section 271.

See 5 *Collier on Bankruptcy* ¶ 548.10 (Richard Levin & Henry J. Sommers eds., 16th ed. 2020) (explaining that, "[o]nce a trustee * * * has successfully challenged a transfer * * * under section 548," Section 550(a)(2) provides him a "remed[y] against others besides the initial transferee").

RJR Nabisco is not to the contrary. Cf. Pet. 19-20. Petitioners construe (Pet. 19) *RJR Nabisco* to require a court to "conduct[] a separate extraterritoriality analysis" for a provision that creates a cause of action, distinct from any extraterritoriality analysis for a related, conduct-regulating provision. The Court in *RJR Nabisco*, however, addressed the application of the "first step" of the applicable analytic framework, under which courts consider whether Congress has expressed "a clear, affirmative indication" of extraterritorial reach. 136 S. Ct. at 2101. By contrast, the court of appeals here began and ended its analysis at step two. See Pet. App. 16a n.6. It simply heeded the *WesternGeco* Court's instruction that closely related provisions may inform the step-two analysis.

Moreover, petitioners err in relying (Pet. 19-20) on the *RJR Nabisco* Court's holding that the private cause of action in 18 U.S.C. 1964(c) provides a remedy only for domestic injuries, even though the substantive prohibitions apply abroad. The Court's conclusion was based on its careful analysis of the text of Section 1964(c), not on the existence of a separate cause of action. The Court reasoned that "by cabining RICO's private cause of action to particular kinds of injury * * * Congress signaled that the civil remedy is not coextensive with § 1962's substantive prohibitions." *RJR Nabisco*, 136 S. Ct. at 1208; see 18 U.S.C. 1964(c) (providing a cause of action to "[a]ny person injured in his business

or property"). The text of Section 550(a)(2) remains focused on recovering the initial fraudulent transfer. See pp. 12-13, *supra*.

Petitioners argue (Pet. 18) that the decision below "would convert a single domestic transfer from a U.S. debtor into a springboard for liability for every subsequent transfer, even between foreign parties with no connection to Madoff Securities, and even for transactions that were lawful where they occurred." The *WesternGeco* Court rejected strikingly similar arguments. See 138 S. Ct. at 2142 (Gorsuch, J., dissenting) (expressing concern that "supplying a single infringing product from the United States would make [the supplier] responsible for any foreseeable harm its customers cause by using the product * * * worldwide," even though the U.S. patent would not protect against such foreign uses). The Court explained that, as long as "the conduct relevant to the statute's focus occurred in the United States, then the case involves a permissible domestic application * * * even if other conduct occurred abroad." *Id.* at 2137 (majority opinion) (citation omitted).

Petitioners also overstate (Pet. 18) the extent to which Section 550(a)(2) authorizes recovery of property from subsequent foreign transferees "with no connection to Madoff Securities." As petitioners emphasize elsewhere (Pet. i, 7, 17, 20), Section 550(b) includes protections for such indirect transferees. A trustee "may not recover" under Section 550(a)(2) from (1) any transferee that "takes for value * * * without knowledge of the voidability" of the initial fraudulent transfer or (2) any subsequent "good faith transferee of such transferee." 11 U.S.C. 550(b).

Finally, petitioners assert (Pet. 21) that the court of appeals "failed to address the conflicts its decision creates with other countries' laws." But petitioners have not demonstrated that recovering from foreign subsequent transferees poses a significant risk of "unintended clashes between our laws and those of other nations." *EEOC* v. *Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991). Petitioners argue (Pet. 21) that such conflicts are "inevitable" because the liquidators of certain feeder funds "seek recovery for the exact same foreign transfers under different foreign laws." But in this context Section 550(a)(2) regulates the initial domestic transfer, not the subsequent foreign transfers. And while the liquidators of the feeder funds may also seek to recover property from petitioners based on the subsequent transfers, they are not seeking to settle the same estate. "[T]he feeder funds, not Madoff Securities, are the debtors in the foreign courts." Pet. App. 34a. "And the absence of [parallel bankruptcy] proceedings seriously diminishes the interest of any foreign state in [the] resolution" of respondent Picard's claims. *Id.* at 35a.

c. Petitioners do not contend that the court of appeals' extraterritoriality analysis implicates any conflict of authority that would warrant this Court's review. Petitioners argue (Pet. 31-37) instead that the Court's review is warranted because (1) issues concerning the extraterritorial application of the Bankruptcy Code have repeatedly arisen within the Second Circuit; (2) the court of appeals' decision "broadens the scope of the Bankruptcy Code to the point that it will conflict with foreign law"; and (3) "[t]he scale of this dispute merits this Court's review." Pet. 32, 35. Those contentions lack merit.

As explained above, petitioners overstate the potential for conflict with foreign laws. The narrow extraterritoriality question presented here arises only when an initial domestic transfer is avoided under Section 548(a)(1)(A) and recovery is sought from an entity that received the funds through a subsequent foreign transfer. See Pet. App. 22a n.7 (expressing "no opinion on the focus" of Section 550(a) outside that context). And in the absence of a legal question that warrants this Court's resolution, the large dollar amounts at issue here provide no sound basis for this Court's review. See Sup. Ct. R. 10.

Even if the narrow question presented warranted further review, this case would be an unsuitable vehicle for resolving it. The dispute here arises not directly under the Bankruptcy Code, but through the medium of SIPA. Although the court of appeals did not invoke any SIPA provisions to inform its extraterritoriality analysis, see Pet. App. 24a n.8, respondents would be free to "rely upon any matter appearing in the record in support of the judgment." *Union Pac. R.R.* v. *Brotherhood of Locomotive Eng'rs & Trainmen Gen. Comm. of Adjustment*, 558 U.S. 67, 80 (2009) (citation omitted). And both respondents have indicated their intent to rely on SIPA-specific provisions to defend the judgment here. See SIPC Br. in Opp. 7-13; Picard Br. in Opp. 15 n.5.

2. The court of appeals likewise correctly held that the district court's application of international-comity principles in interpreting Section 550(a)(2) was subject to *de novo* review. The court's determination that this issue should be considered *de novo* does not conflict with any decision of this Court or of another court of appeals. Further review is not warranted.

a. Like the presumption against extraterritoriality, prescriptive international comity is a canon of statutory interpretation. Under that "rule of construction," courts "ordinarily construe[] ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations." *F. Hoffmann-La Roche Ltd.* v. *Empagran S. A.*, 542 U.S. 155, 164 (2004). The rule "reflects principles of customary international law," which this Court has long assumed that "Congress ordinarily seeks to follow." *Ibid.* (citing, *inter alia*, *Murray* v. *Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804); *Hartford Fire Ins. Co.* v. *California*, 509 U.S. 764, 817 (1993) (Scalia, J., dissenting)). "Consistent with that presumption, this and other courts have frequently recognized that, even where the presumption against extraterritoriality does not apply, statutes should not be interpreted to regulate foreign persons or conduct if that regulation would conflict with [such] principles." *Hartford Fire Ins. Co.*, 509 U.S. at 815 (Scalia, J., dissenting); see *RJR Nabisco*, 136 S. Ct. at 2107 n.9 (recognizing that the Court in *Empagran* applied "not the presumption against extraterritoriality *per se*, but the related rule that [courts] construe statutes to avoid unreasonable interference with other nations' sovereign authority where possible").

In this case, the court of appeals correctly recognized that the bankruptcy and district courts had considered "a question of prescriptive comity," Pet. App. 31a, when those courts asked "whether the application of U.S. law would be reasonable under the circumstances, comparing the interests of the United States and the relevant foreign state," *id.* at 58a-59a (citation omitted) (bankruptcy court); *id.* at 177a (district court). Indeed, the parties agreed "with th[at] framing" below,

id. at 31a, and petitioners did not challenge it until their reply brief in this Court. See n.*, *infra*. Because prescriptive comity raises a legal question of statutory construction, the lower courts' construction of Section 550(a)(2) under those principles was subject to *de novo* review. See *Highmark Inc.* v. *Allcare Health Mgmt. Sys., Inc.*, 572 U.S. 559, 563 (2014) ("Traditionally, decisions on 'questions of law' are 'reviewable *de novo*.'") (citation omitted); *United States* v. *Nippon Paper Indus. Co.*, 109 F.3d 1, 3 (1st Cir. 1997) ("Because this question is one of statutory construction, we review de novo the [prescriptive-comity] holding."), cert. denied, 522 U.S. 1044 (1998).

In contending that the court of appeals should have applied an abuse-of-discretion standard, petitioners assert that the application of prescriptive-comity principles "depends heavily on factual determinations," Pet. 26, and that the court of appeals' decision "would allow appellate courts to make *de novo* factual determinations," Pet. 25. But the subsidiary determinations that petitioners identify—*e.g.*, whether two bodies of law conflict with each other—implicate principally legal questions, and they involve the sorts of inquiries that appellate courts regularly conduct without deferring to lower courts. See, *e.g.*, *Arizona* v. *United States*, 567 U.S. 387, 399 (2012); *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363, 372-374 (2000); *Villas at Parkside Partners* v. *City of Farmers Branch*, 726 F.3d 524, 528 (5th Cir. 2013) (en banc), cert. denied, 571 U.S. 1237 (2014); *American Trucking Ass'ns* v. *City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009).

If a court's prescriptive-comity analysis in a particular case relied on findings of "basic" or "historical" facts, "such factual findings [would be] reviewable only

for clear error." *U.S. Bank Nat'l Ass'n* v. *Village at Lakeridge, LLC*, 138 S. Ct. 960, 966 (2018). But nothing in the decision below conflicts with that "well-settled rule." *Ibid.* The fact that such subsidiary factual findings would be reviewed deferentially does not preclude *de novo* review of the ultimate legal determination concerning a statute's scope. See *ibid.* And the extraterritorial reach of a federal statute is not the sort of legal question "involving multifarious, fleeting, special, narrow facts that utterly resist generalization" for which deferential review by a court of appeals is appropriate. *Cooter & Gell* v. *Hartmarx Corp.*, 496 U.S. 384, 404 (1990) (citation and internal quotation marks omitted).

b. Petitioners contend (Pet. 23-25) that, in applying a *de novo* standard of review to a question of prescriptive comity, the court of appeals' decision conflicts with the "unanimous precedent of the other circuit courts." Pet. 30. That is incorrect.

Petitioners recognize that several of the decisions on which they rely resolved questions of adjudicative rather than prescriptive comity. See Pet. 24 (citing *Mujica* v. *AirScan Inc.*, 771 F.3d 580, 599 (9th Cir. 2014), cert. denied, 136 S. Ct. 690 (2015); *AAR Int'l, Inc.* v. *Nimelias Enters. S.A.*, 250 F.3d 510, 518 (7th Cir.), cert. denied, 534 U.S. 995 (2001); *Remington Rand Corp.-Delaware* v. *Business Sys. Inc.*, 830 F.2d 1260, 1266 (3d Cir. 1987)). Adjudicative and prescriptive comity are "distinct doctrines, albeit related ones." Pet. App. 28a. Adjudicative comity—or "comity of courts," *Hartford Fire Ins. Co.*, 509 U.S. at 818 n.9 (Scalia, J., dissenting)—concerns not the substantive scope of a federal statute, "but rather the discretion of a national court to decline to exercise jurisdiction over a case before it when that case is pending in a foreign court with

proper jurisdiction," *even if* the relevant domestic law might otherwise apply. *JP Morgan Chase Bank* v. *Altos Hornos de Mexico, S.A. de C.V.*, 412 F.3d 418, 424 (2d Cir. 2005). Adjudicative comity is thus a form of abstention and "a matter of judicial discretion." Pet. App. 30a; see *Mujica*, 771 F.3d at 599 (describing adjudicative comity as "a discretionary act of deference by a national court to decline to exercise jurisdiction in a case properly adjudicated in a foreign state") (citation omitted). The court of appeals acknowledged that "adjudicative comity dismissals" are reviewed "for abuse of discretion." Pet. App. 30a.

Although petitioners describe other lower-court decisions as applying prescriptive-comity principles, that characterization is inapt. Rather, as respondent Picard observes (and petitioners do not contest, Pet. Reply Br. 10), each of those decisions "bear[s] the hallmarks" of a form of adjudicative comity. Picard Br. in Opp. 21; see *In re Sealed Case*, 932 F.3d 915, 938 (D.C. Cir. 2019) (describing a district court's "considerable discretion" to determine whether to enforce a subpoena that would compel the subject to violate foreign law); *GDG Acquisitions, LLC* v. *Government of Belize*, 749 F.3d 1024, 1030 (11th Cir. 2014) (describing the comity doctrine at issue as "an abstention doctrine"—"'not a rule of law, but one of practice, convenience, and expediency'") (citation omitted); *Perforaciones Exploración Y Producción* v. *Marítimas Mexicanas, S.A. de C.V.*, 356 Fed. Appx. 675, 680 (5th Cir. 2009) (per curiam) (reviewing the district court's decision to "exercise * * * jurisdiction in the face of possible international comity concerns"), cert. denied, 562 U.S. 834 (2010); *Chavez* v. *Carranza*, 559 F.3d 486, 496 (6th Cir.) (describing *Empagran* as bearing "little relevance to the law at issue"),

cert. denied, 558 U.S. 822 (2009); *Daewoo Motor Am., Inc.* v. *General Motors Corp.*, 459 F.3d 1249, 1256 (11th Cir. 2006) ("The principle of international comity applied in this case is an abstention doctrine."), cert. denied, 549 U.S. 1362 (2007). In particular, in none of those decisions did the court rely on comity principles to determine the substantive reach of a federal statute.*

c. Petitioners briefly contend (Pet. 28-30) that the court of appeals erred in "failing to give any weight in its comity analysis" to the alleged conflicts "between U.S. and foreign laws," Pet. 28, and that this Court should grant certiorari to resolve confusion in the lower courts on whether "a 'true' conflict or only a 'potential' conflict of laws or outcomes is required before" international-comity concerns apply, Pet. 28-29. Those arguments provide no basis for further review.

First, contrary to petitioners' assertion (Pet. 30), the court below did not "categorically ignor[e]" foreign interests. The court considered those foreign interests at some length, Pet. App. 34a-37a, but reasonably concluded that they were not "compelling enough to limit the reach of a federal statute that would otherwise apply," *id.* at 37a. Second, this case would provide a particularly poor vehicle for clarifying the type of conflicts of law that are relevant to comity concerns, because the court of appeals merely "assume[d] without deciding" that the application of Section 550(a)(2) to the transfers here would present a "true conflict" between U.S. law and foreign law. *Id.* at 32a & n.16. Finally, the second

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* In their reply brief, petitioners belatedly contend (Pet. Reply Br. 7-11) that the court of appeals erred in considering the comity question presented here as a question of statutory construction. Even if that argument had been properly preserved, however, such a case-specific challenge would not warrant this Court's review.

question presented in the certiorari petition concerns only the standard of appellate review that the Second Circuit applied, not the substance of the comity analysis. See Pet. i ("Whether a bankruptcy court's and district court's abstentions from applying U.S. law on grounds of international comity should be reviewed for abuse of discretion * * * or *de novo*.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 2020