

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

MERIT MANAGEMENT GROUP, LP,)
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FTI CONSULTING, INC.,)
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IN THE SUPREME COURT OF THE UNITED STATES

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MERIT MANAGEMENT GROUP, LP,)
Petitioner,)

v.) No. 16-784

FTI CONSULTING, INC.,)
Respondent.)

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Washington, D.C.

Monday, November 6, 2017

The above-entitled matter came on for oral
argument before the Supreme Court of the United States
at 10:03 a.m.

APPEARANCES:

BRIAN C. WALSH, St. Louis, Missouri; on
behalf of the Petitioner.

PAUL D. CLEMENT, Washington, D.C.; on
behalf of the Respondent.

1	C O N T E N T S	
2	ORAL ARGUMENT OF:	PAGE:
3	BRIAN C. WALSH	
4	On behalf of the Petitioner	3
5	ORAL ARGUMENT OF:	
6	PAUL D. CLEMENT	
7	On behalf of the Respondent	32
8	REBUTTAL ARGUMENT OF:	
9	BRIAN C. WALSH	
10	On behalf of the Petitioner	63
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1
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P R O C E E D I N G S

(10:03 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument this morning in Case 16-784, Merit Management Group versus FTI Consulting.

Mr. Walsh.

ORAL ARGUMENT OF BRIAN C. WALSH

ON BEHALF OF THE PETITIONER

MR. WALSH: Mr. Chief Justice, and may it please the Court:

The relevant transfers in this case are the transfers by and to the financial institutions, Credit Suisse and Citizens Bank. We know that because Congress included intermediaries in the safe harbor from the very beginning, focusing on what they do rather than who they are.

We know that because Congress used the disjunctive, "by or to or for the benefit of" a financial institution or another institution, which precludes an approach that looks only at the party that has a beneficial interest in the transaction.

JUSTICE KENNEDY: I'll read them -- I'll read them with more care, but the circuits

1 that come out as -- as you would ask us to, it
2 seems to me focus on the word "settlement" and
3 that that controls everything. And they don't
4 talk about transfer. Of course, there was a
5 transfer in a lay sense, but that's not the
6 transfer here that the trustee seeks to avoid.

7 MR. WALSH: Well, Your Honor, the --
8 there was a lot of discussion of whether or not
9 something is a settlement payment in some of
10 the earlier cases. In 2006, Congress added
11 "securities contract" and "commodities
12 contract" to the statute, and those are much
13 broader concepts.

14 And so there's -- there's much less
15 discussion about whether something is or is not
16 a settlement payment because frequently it is a
17 transfer in connection with a securities
18 contract.

19 But it is true that the transfer
20 targeted by the plaintiff in this case is the
21 end-to-end transfer between the parties with
22 the beneficial interest. But that is not a
23 distinct or separable or independent transfer
24 from the transfers that made it up; the
25 transfers that the parties contemplated when

1 they entered into this contract that they're --

2 JUSTICE GINSBURG: Mr. Walsh, could
3 you explain -- I mean, here we have two
4 parties, Valley View and Merit. And you don't
5 claim that either of those is a 546(e) entity,
6 do you?

7 MR. WALSH: Neither of those is a
8 financial institution --

9 JUSTICE GINSBURG: Yes.

10 MR. WALSH: -- or one of the other
11 institutions named in the statute. That's
12 correct.

13 JUSTICE GINSBURG: So now the trustee
14 is alleging that Merit got money that otherwise
15 would have been available for distribution to
16 creditors. That's the claim.

17 MR. WALSH: That's the gist of it,
18 yes.

19 JUSTICE GINSBURG: So why should it
20 matter whether the transmission was through the
21 banks rather than handed over by Valley View to
22 Merit?

23 MR. WALSH: Because the goal of the
24 statute is to protect the securities and
25 commodities markets, not just to protect

1 particular players in the markets. We know --

2 JUSTICE GINSBURG: Well, how -- how is
3 the -- either bank at risk of anything here?

4 MR. WALSH: Neither bank is at risk of
5 liability in this particular case, but the
6 broader issue is that parties who receive
7 distributions from securities or commodities
8 transactions have a decision to make. Can we
9 safely reinvest in something else? Can we make
10 a distribution to our own investors or the
11 benefits of our pension fund or what -- what
12 have you? Or do we have to create a reserve?
13 Or do we have to anticipate that there may be
14 litigation that comes along six, eight --

15 JUSTICE SOTOMAYOR: I'm sorry, who's
16 insecure about that? The banks or the person
17 to whom the money was ultimately sent?

18 MR. WALSH: Investors in general would
19 be insecure about that, Your Honor.

20 JUSTICE SOTOMAYOR: Well, I understood
21 that the safe harbor was not intended to
22 protect people involved in financial
23 transactions. That's always a risk whenever
24 you get into a deal that's contingent on any
25 basis.

1 MR. WALSH: Well --

2 JUSTICE SOTOMAYOR: Congress wanted to
3 do that, why bother even creating the
4 fraudulent transfer provisions? Just say any
5 contract that any of these people sign in any
6 of these fields is exempt.

7 MR. WALSH: Well, Your Honor, I agree
8 that anyone engaging in any transaction has
9 some possibility that there could be a claim
10 that would come along later, but Congress has
11 focused here on the securities and commodities
12 markets --

13 JUSTICE SOTOMAYOR: Going -- going
14 back to this transfer question.

15 MR. WALSH: Yes.

16 JUSTICE SOTOMAYOR: The
17 fraudulent-transfer provision says the trustee
18 may avoid any transfer or any obligation. So
19 it's not talking just about voiding a transfer;
20 it's talking about voiding an obligation.

21 Isn't the contractual obligation an
22 obligation?

23 MR. WALSH: The contractual --

24 JUSTICE SOTOMAYOR: Or a contractual
25 rights obligation? So why can't a trustee

1 choose what it is he or she wants to avoid,
2 whether it's a transfer or an obligation?

3 MR. WALSH: Your Honor, the --

4 JUSTICE SOTOMAYOR: And that define
5 the scope of who's involved?

6 MR. WALSH: Sure. The reference to
7 obligation in the fraudulent-transfer statutes
8 is -- is generally in reference to a debt
9 incurred by the debtor to someone else. And if
10 that debt causes the debtor to become insolvent
11 or inadequately capitalized and the other --
12 the other aspects of the statute are satisfied
13 --

14 JUSTICE SOTOMAYOR: I'm sorry --

15 MR. WALSH: -- then the --

16 JUSTICE SOTOMAYOR: -- the -- here,
17 debtor sold something to someone else or was
18 obligated to send money ultimately to Merit.
19 So how does that not fit into obligation?

20 MR. WALSH: Well, that obligation has
21 been paid already. It would -- that -- that
22 application of the statute would normally be in
23 a situation --

24 JUSTICE SOTOMAYOR: You think that --

25 MR. WALSH: -- where the--

1 JUSTICE SOTOMAYOR: -- obligation
2 issue is one that's prospective and not --

3 MR. WALSH: It typically arises in
4 that context. And also the safe harbor, 546(e)
5 does not apply to obligations; it only applies
6 to transfers.

7 JUSTICE ALITO: And what you called
8 the -- the end-to-end transfer is the transfer
9 that the trustee is seeking to avoid; isn't
10 that right?

11 MR. WALSH: That is correct.

12 JUSTICE ALITO: That's the one that is
13 allegedly construction --

14 MR. WALSH: That is --

15 JUSTICE ALITO: -- constructively
16 fraudulent.

17 MR. WALSH: That is correct.

18 JUSTICE ALITO: So why does -- why
19 shouldn't the exemption provision be applied to
20 the transfer that the trustee is seeking to
21 avoid, if the -- otherwise, is your argument
22 that these intermediate transfers are -- are
23 constructively fraudulent?

24 MR. WALSH: My argument is not that
25 the intermediate transfers are constructively

1 fraudulent. My argument is that the
2 intermediate transfers can't be separated from
3 the overall end-to-end transfer, and so that by
4 avoiding the overall transfer, the trustee
5 would necessarily be avoiding the intermediate
6 transfers as well.

7 To think of it a different way --
8 JUSTICE ALITO: So why shouldn't the
9 transfer -- why shouldn't the exemption be
10 applied to the transfer that the trustee is
11 seeking to avoid, as opposed to intermediate
12 transfers that can't -- that are not
13 constructively fraudulent?

14 MR. WALSH: Well, I think a useful way
15 to think about it, Your Honor, is that there's
16 only \$55 million involved here. And we can
17 say, as a shorthand, now that we know how the
18 transfer played out -- because it was 10 years
19 ago -- we can say there was a transfer from
20 Valley View to Merit, but it's not different
21 from the transfer of the same \$55 million that
22 Valley View sent to Citizens Bank.

23 And it's not different from the subset
24 of that transfer that Citizens Bank sent to
25 Merit on two different occasions three years

1 apart. In other words, I understand the
2 trustee's point that I'm only seeking to -- to
3 avoid this broader transfer, but when we have
4 an overriding prohibition like 546(e), I don't
5 think it's sufficient simply to say, but that's
6 not what I'm doing.

7 JUSTICE GINSBURG: Well, could the
8 trustee, absent 546(e), seek to avoid the
9 transfer from Credit Suisse to Citizens Bank?

10 MR. WALSH: The trustee, absent the
11 safe harbor, could seek to avoid the transfer
12 from Credit Suisse to Citizens Bank.

13 JUSTICE KENNEDY: Why -- why was there
14 not adequate consideration for that? There --
15 there -- it was just a pass-through.

16 MR. WALSH: I'm -- I'm not agreeing on
17 --

18 JUSTICE KENNEDY: What would there be
19 to avoid?

20 MR. WALSH: I'm sorry. I'm not
21 agreeing on the -- on the merits. I'm -- I'm
22 suggesting the trustee could pursue that claim.

23 JUSTICE GINSBURG: But would you --

24 MR. WALSH: I do think there was
25 adequate consideration for it, and that claim

1 would fail, but the trustee could seek to
2 pursue it.

3 CHIEF JUSTICE ROBERTS: Your friend on
4 the other side says that your theory would
5 cover the simple use of a check to convey a
6 straightforward purchase and sale if the
7 purchaser pays with a check. Is that correct?

8 MR. WALSH: Your Honor, not
9 necessarily. And the Court doesn't need to go
10 nearly that far to rule in our favor in this
11 case.

12 The safe harbor goes at least as far
13 as what we have here, where we have an
14 intermediary, a financial institution serving
15 as an intermediary in much the same way that a
16 broker or a clearing agency would serve as an
17 intermediary --

18 CHIEF JUSTICE ROBERTS: I -- I
19 understand that, but I'm concerned about the
20 scope of the rationale that we would adopt, and
21 you say not necessarily. When would it be
22 enough that the purchaser just paid by check?

23 MR. WALSH: Well, I think -- let me
24 address the scope first. I think the scope of
25 checks or wire transfers is actually quite a

1 bit less than -- than my opponent would
2 suggest.

3 The vast majority of transfers in
4 securities and commodities, involving public
5 securities in particular, are going to clear
6 through the -- the indirect holding system.
7 They're going to clear through paper, debits,
8 and credits and not with wire transfers or
9 checks.

10 JUSTICE BREYER: I'm just curious --
11 look, I have two shares of company X in my -- I
12 have an account somewhere, okay?

13 MR. WALSH: Yes.

14 JUSTICE BREYER: So, knowing I'm about
15 to go bankrupt, I take my share, and I tell
16 them go transfer it to my wife. Right?

17 MR. WALSH: Yes.

18 JUSTICE BREYER: Now, you'll say they
19 can't attack that as a fraudulent conveyance.
20 I'm just trying to think, you know, of --

21 MR. WALSH: Well, actually --

22 JUSTICE BREYER: -- the paradigm case
23 of a fraudulent conveyance.

24 MR. WALSH: Well, actually, Your
25 Honor, that -- that very well might be a case

1 that wouldn't fall within the safe harbor.

2 JUSTICE BREYER: Why not?

3 MR. WALSH: Because if you transfer
4 your stock to your wife --

5 JUSTICE BREYER: No, no, no. I told
6 you it's being held in a -- in a bank, and I
7 tell the bank to do it.

8 MR. WALSH: It's being held in the
9 indirect system --

10 JUSTICE BREYER: Yeah.

11 MR. WALSH: -- and you -- you sell it
12 to your wife. Then in -- then in that case --

13 JUSTICE BREYER: It does.

14 MR. WALSH: -- there's safe harbor.

15 JUSTICE BREYER: So this covers --
16 that's, I think, the thrust -- this is going to
17 cover all kinds of things.

18 I have another -- another question,
19 which is -- which is, and this is just a
20 puzzle, look, when they define financial
21 institutions -- what we have here is a
22 transfer, we wanted to have a -- Valley View,
23 VVD, Valley Downs, see, wants to give \$55
24 million to a group of people that include the
25 Merit Downs or whatever, Merit? All right?

1 MR. WALSH: Yes. Yes.

2 JUSTICE BREYER: That's what they want
3 to do. Neither of them is financial
4 institutions. But the way they do it is Valley
5 Downs says its friend, Credit Suisse, which is,
6 you have the line of credit, you send it to the
7 Citizens Bank, which is the escrow.

8 MR. WALSH: Correct.

9 JUSTICE BREYER: So you say, in real
10 terms, it goes from Valley to Merit, but we do
11 it by means of the guy who gives the line of
12 credit, which is a bank, Credit Suisse, and
13 they send it to the escrow agent, which is
14 Citizens Bank, okay?

15 MR. WALSH: That's correct.

16 JUSTICE BREYER: And so the argument
17 here is, because they used these two agents,
18 now, suddenly, does it fall into the securities
19 -- the bank -- or the -- or the bank exception,
20 the Industrial Savings Bank exception, the et
21 cetera, et cetera.

22 MR. WALSH: Correct, right. And --

23 JUSTICE BREYER: Okay. So why are we
24 hearing this case? For this reason -- now,
25 this is slightly a side issue, but it's very

1 puzzling, and I think I should know the answer,
2 when I look up the definition of financial
3 institution, it says that not only is it Credit
4 Suisse and not only is it Citizens Bank, but it
5 is also the customers of each of those
6 financial institutions in an instance where the
7 bank is acting as agent or custodian for a
8 customer.

9 Now, it seems to me that Citizens Bank
10 is acting for agent or custodian of a customer,
11 namely VVD, and it seems to me that Credit
12 Suisse is acting as a -- as an agent or
13 custodian for VVD.

14 So why doesn't that cover it?

15 MR. WALSH: I think that is a fair way
16 to look at it, Your Honor.

17 JUSTICE BREYER: Well, why doesn't
18 that cover it? Why are we dealing with a case
19 which is coming out of something and deciding
20 all kinds of things about banks and my wife, if
21 I -- you know, where -- where this is
22 absolutely dealt with in a statute, under --
23 under another provision, and nobody refers us
24 to that provision, and I can't understand why
25 they didn't -- what's going on?

1 MR. WALSH: Your Honor, we did -- we
2 did refer to that provision in -- in both of
3 our briefs, if I remember correctly. So --

4 JUSTICE BREYER: You may have put it
5 in your briefs, but, I mean, why in the lower
6 courts wasn't this just said, look, point to
7 that, Judge, this involves a customer of a
8 financial institution, namely VVD, and,
9 therefore, it's in the exempt area? Point to
10 that. And -- and I want to know why that
11 didn't happen.

12 MR. WALSH: That I don't --

13 JUSTICE BREYER: It's your case. You
14 can do it in a sense the way you want, but, I
15 mean, where this is just standing out and we're
16 asked to decide a question that I think is
17 fraught with difficulty, I would like to know
18 the answer.

19 MR. WALSH: I'm afraid I don't have a
20 good answer for why that did not come up
21 earlier.

22 JUSTICE SOTOMAYOR: I'm sorry.
23 Perhaps it's simple --

24 JUSTICE ALITO: Oh, I thought you
25 conceded it. Didn't both parties -- didn't

1 both parties concede that -- that Valley View
2 is not a financial institution?

3 JUSTICE GINSBURG: You just did in
4 answer to my question.

5 MR. WALSH: No, I'm sorry.

6 JUSTICE GINSBURG: I said -- I asked
7 you that, with the question that Justice Breyer
8 raised in mind, I asked you specifically, do
9 you agree that neither Valley View nor Merit is
10 an entity enumerated under 546(e)?

11 MR. WALSH: I may have -- I may have
12 misunderstood the difference between the two
13 questions, Your Honor.

14 JUSTICE BREYER: I think it's the
15 same, but, I mean, at some point, you know, if
16 we have two cases involving the Fishing Act,
17 and it involves fishermen, and both parties
18 concede we are -- we are fishermen, but, in
19 fact, what they are is both farmers and have
20 nothing to do with fish, I would say we'd have
21 a problem in this Court about whether we should
22 hear the case.

23 MR. WALSH: And -- and, Justice
24 Ginsburg, in response to your question, neither
25 of the parties to this case is a -- is a

1 financial institution, as that term is -- is
2 generally understood.

3 In trying to --

4 JUSTICE BREYER: But not as the
5 statute understands it --

6 MR. WALSH: In -- in the --

7 JUSTICE BREYER: -- which uses it to
8 include a customer of a financial institution
9 in circumstances which are present here.

10 MR. WALSH: That -- in the rather
11 unusual definition of financial institution,
12 this is a situation in which the banks act as
13 -- acted as agents, that's -- that's an escrow
14 agent.

15 JUSTICE GINSBURG: If you -- if this
16 was such a standout issue, you must have
17 thought about it, and yet, you relegated it to
18 a footnote in your reply brief.

19 MR. WALSH: And I -- and I don't know
20 whether it's a standout issue or not, Your
21 Honor, but that is a quirk in the definition of
22 financial institution, that is true. That is
23 true.

24 I think one of the -- one of the ways
25 to think about what's going on here is whether

1 Congress is protecting particular institutions
2 or whether Congress is protecting transactions.

3 If Congress wanted to protect banks
4 and brokers and clearing agencies from
5 liability, and that was the only purpose of the
6 statute here, that could have been resolved in
7 Section 550, which is the section of the
8 Bankruptcy Code that deals with who has
9 liability if there is a transfer that's
10 avoided.

11 JUSTICE SOTOMAYOR: Well, that --
12 actually, 550, I think, works very strongly
13 against you because 550 says the trustee may
14 recover for the benefit of the state the
15 property transferred, so it seems to be talking
16 about who has control and dominion of the
17 property that the trustee is seeking to
18 recover.

19 MR. WALSH: Well, Your Honor, control
20 and dominion is a test that's been developed by
21 the lower courts. It's -- it's not a
22 rationale. It's a test to determine whether a
23 party had the beneficial interest in the
24 transaction, such that it's appropriate to
25 impose liability on that party.

1 JUSTICE SOTOMAYOR: They -- that's how
2 they've defined it under 550.

3 MR. WALSH: That is how they --

4 JUSTICE SOTOMAYOR: It makes common
5 sense, which is --

6 MR. WALSH: That is how they've
7 defined it. But what --

8 JUSTICE SOTOMAYOR: -- go to who
9 ultimately has control of the property.

10 MR. WALSH: And -- and the question
11 is, Your Honor, the reason the courts have
12 applied that definition to the term "initial
13 transferee" is because the party that initially
14 receives a transfer is not necessarily the
15 initial transferee. It's a non-literal
16 definition of the term "initial transferee."

17 JUSTICE SOTOMAYOR: Exactly.

18 MR. WALSH: And -- but the reference I
19 was making to 550 earlier, Your Honor, is to
20 550(c), which is an example of a situation in
21 which Congress perceived that there's a
22 problem, that a transfer may be avoided and
23 certain parties may be liable.

24 And Congress's response was to say,
25 avoid the transfer all you want, but here is

1 the very limited subset of parties against whom
2 you may recover.

3 That is what the opponent here would
4 like to happen here. That is what they propose
5 is the actual function of 546(e), that it only
6 protects banks and brokers and clearing
7 agencies. And Congress didn't do it in 550,
8 which would have accomplished that.

9 There -- there's also the problem here
10 that the statute protects transfers by banks
11 and brokers and clearing agencies and these
12 other parties. And that has nothing to do with
13 protecting the bottom lines of banks and
14 brokers.

15 It has everything to do with
16 protecting transactions. So, for example, if
17 Goldman Sachs were to sell me 100 shares of
18 Berkshire Hathaway stock for \$100 apiece, that
19 is a significant hit to the bottom line of
20 Goldman Sachs because the stock is worth many,
21 many times that much.

22 Nevertheless, that is not an avoidable
23 transfer because it's by a broker to me, even
24 though I am not a cog in the financial system.

25 JUSTICE KENNEDY: But they're parties

1 to the transaction. They're not acting just as
2 a pass-through agent.

3 MR. WALSH: But it would also apply,
4 Your Honor, if Goldman Sachs, on behalf of one
5 of its clients, made that transaction. I
6 probably wouldn't even know whether I was
7 dealing with Goldman Sachs' own balance sheet
8 or whether I was dealing with someone who was
9 trading through Goldman Sachs.

10 But those transfers go outside of the
11 circle of the six entities that are identified
12 in the statute. Nevertheless, a trustee can't
13 get them back. And so that is a significant
14 problem with the notion that all that is going
15 on here is we're trying to protect banks and
16 brokers from liability because if they get hit
17 with liability, there will be a cascade of
18 other banks and brokers that will -- that will
19 fail.

20 When we're talking about systemic risk
21 to the financial markets, we're not just
22 talking about banks and brokers going under.
23 If parties aren't willing to provide capital to
24 the financial system or if other parties like
25 private equity funds or pension funds collapse,

1 we have systemic risk to the financial
2 institution as well.

3 JUSTICE GORSUCH: Mr. Walsh --

4 MR. WALSH: Yes?

5 JUSTICE GORSUCH: -- can you help me
6 out with what happens to the law of preferences
7 under your interpretation?

8 As you know, trustees can avoid
9 transfers leading up to the bankruptcy that
10 meet certain conditions.

11 MR. WALSH: Yes.

12 JUSTICE GORSUCH: And a lot of that
13 would seem to go away, that power would seem to
14 go away under your interpretation, if a bank or
15 financial institution is involved. So that a
16 lot of avoidable transactions would become
17 unavoidable all of a sudden.

18 How do we reconcile your -- your
19 interpretation with that -- that apparent
20 difficulty?

21 MR. WALSH: I'm -- I'm not sure that
22 there is such a difficulty, Your Honor. A
23 typical preference claim, for example, would be
24 that the debtor repaid a vendor outside of the
25 ordinary course of business.

1 And the pursuit of that claim against
2 the manufacturer of a widget that sold it to
3 the debtor would not obviously implicate the
4 safe harbor here. There are no securities --

5 JUSTICE GORSUCH: Well, but often --

6 MR. WALSH: -- no commodities.

7 JUSTICE GORSUCH: -- often a transfer
8 that's avoidable does involve a financial
9 institution. You'd agree with that, surely?

10 MR. WALSH: It -- it may, but it --

11 JUSTICE GORSUCH: May, but --

12 MR. WALSH: -- does not very often
13 involve securities or commodities -- -

14 JUSTICE GORSUCH: Well, but it could
15 --

16 MR. WALSH: -- if that's the --

17 JUSTICE GORSUCH: Well, but it could.
18 I mean, why not? I mean, do you have any
19 empirical information on that?

20 MR. WALSH: I don't have empirical
21 information.

22 JUSTICE GORSUCH: No.

23 MR. WALSH: I -- I do have the -- the
24 overlap between securities transactions and
25 bankruptcy is very small. There are a million

1 or so bankruptcy cases filed every year. It's
2 very --

3 JUSTICE GORSUCH: So not -- a
4 triviality we don't need to worry about, even
5 though it was a central feature of the Seventh
6 Circuit's opinion?

7 MR. WALSH: I wouldn't say it's a
8 triviality, but it's not -- there's a lot of
9 talk in the briefs about the exception
10 swallowing the rule. And the rule is a good
11 bit broader, a good bit broader than the
12 exception here, Your Honor.

13 JUSTICE GORSUCH: But we don't have
14 any -- nobody has any data on that? We're
15 just -- we're just going on your -- your
16 representation versus your friend's
17 representation otherwise?

18 MR. WALSH: I -- I suppose that's
19 correct, Your Honor.

20 JUSTICE GORSUCH: All right.

21 MR. WALSH: But -- but the variety of
22 things that are untouched by the safe harbor
23 are -- are significant transactions in real
24 estate, transactions in vehicles. Trustees can
25 avoid liens because they're unperfected.

1 That's -- that's not implicated by the safe
2 harbor unless it would happen to be a lien on a
3 security, perhaps, or on a commodity.

4 And so the overlap here between
5 bankruptcy and security is a relatively
6 confined space. And what Congress has
7 determined is that if you're dealing with
8 constructive fraud, the concerns of the
9 securities and commodities markets prevail. If
10 you're dealing with --

11 JUSTICE KAGAN: Mr. Walsh?

12 MR. WALSH: Yes.

13 JUSTICE KAGAN: Could I take you back
14 to Justice Alito's question, perhaps just put a
15 little bit of a different spin on it? I mean,
16 if you look at 546(e), it's clearly an
17 exception to the avoidance power. It says
18 "notwithstanding" all these sections which deal
19 with avoidance, the trustee may not avoid the
20 following transfers.

21 So, I mean, it seems odd to read that
22 in any other way than to start with the
23 transfer that the trustee seeks to avoid. Why
24 should we not do that? Why isn't that exactly
25 what the text tell us -- tells us to do, where

1 you start with the transfer that the trustee
2 seeks to avoid and then you ask whether there's
3 a safe harbor that applies to that transfer?

4 MR. WALSH: I think the -- the first
5 -- my first response, Your Honor, is that when
6 -- when we're dealing with a prohibition of
7 that sort, we don't simply look at what the
8 party says it is doing.

9 So, if I'm called to a visit with a
10 U.S. attorney because I allegedly filled a
11 wetland, it's not a sufficient response for me
12 to say I didn't fill a wetland; I built a
13 parking lot. We have to look at, well, what
14 did I do in the process of building the parking
15 lot? Did I put a bunch of gravel in a wetland?
16 And if I did, I have a problem, notwithstanding
17 that I characterize my actions in a different
18 way.

19 But a second response is that because
20 these transfers, the way we characterize the
21 different pieces of this transaction as
22 transfers are integrally -- integrally
23 interrelated, to say that a trustee can avoid
24 the end-to-end transfer without affecting the
25 others, the intermediate transfers, in any way

1 is just inconsistent with reality.

2 JUSTICE KAGAN: I guess you're asking
3 a court to make a shift in transfers in the
4 middle of the analysis. In other words, first,
5 the court has to say whether this is the kind
6 of transfer that the trustee can avoid, and in
7 doing that, the court is looking at the -- what
8 you call the end-to-end transfer.

9 And then all of a sudden, when it
10 comes to the safe harbor, you're saying that
11 the trustee has to flip and look at another
12 transfer entirely. And that seems like a
13 strange thing for a safe harbor to do.

14 I mean, usually what we think is that,
15 you know, a safe harbor would shield from
16 avoidance a transfer that's being challenged,
17 rather than a transfer that isn't being
18 challenged.

19 MR. WALSH: I -- I think the
20 difference in -- between what you're saying and
21 what I'm saying, Your Honor, is that it's not a
22 different transfer entirely. If -- if we were
23 talking about, say, the transfer of the real
24 estate, where the plans were to build the
25 racetrack, then -- then that would be a

1 different transfer.

2 But the transfer of \$55 million from
3 Valley View to the escrow agent and the
4 subsequent transfers from the escrow agent to
5 the shareholders of Bedford Downs, they aren't
6 -- they aren't different transfers. They're
7 just different ways of looking at the same
8 transfer because they made up the long --

9 JUSTICE KENNEDY: Well, but in -- in
10 your hypothetical, if the land were held as
11 an -- in escrow for 30 days until everybody got
12 the title in, then there would be an exemption.

13 MR. WALSH: No, because it's not
14 securities or commodities. It's real estate.

15 JUSTICE BREYER: What about this, the
16 -- where -- where it says a trust fee, gee,
17 tree -- sorry, a trustee may not avoid a
18 transfer that is a settlement payment made by a
19 financial institution? Joe -- that's right,
20 isn't it? So far?

21 MR. WALSH: Yes. Yes.

22 JUSTICE BREYER: Okay. Joe Smith buys
23 a piece of property from Bill Brown for \$10
24 million. Joe Smith puts into escrow \$10
25 million. It's -- Bank of America is the escrow

1 agent. Brown puts in the deed. When both are
2 there, Bank of America gives each the other.
3 Why hasn't Bank of America given a settlement
4 payment?

5 MR. WALSH: Your Honor, I don't think
6 the term "settlement payment" has ever been
7 understood to apply outside --

8 JUSTICE BREYER: It doesn't mean that
9 --

10 MR. WALSH: -- outside securities and
11 commodities in financial transactions. So --

12 JUSTICE BREYER: I see. So -- so it
13 is not a settlement payment. It's just -- it's
14 not a settlement payment, a payment for a real
15 estate transaction.

16 MR. WALSH: It is a payment for a real
17 estate transaction. That's correct.

18 JUSTICE BREYER: It is not? It is not
19 a real estate transaction payment?

20 MR. WALSH: I'm sorry, a settlement
21 payment as defined in the code is not a real
22 estate transaction payment, yes.

23 JUSTICE BREYER: But if the same thing
24 were true and what they had bought was a -- 5
25 million acres of wheat, then it would be?

1 MR. WALSH: If -- if they bought the
2 crop and it was a forward contract under the
3 code, then that -- the -- the purchase of the
4 crop --

5 JUSTICE BREYER: Thank you, thank you.
6 I see.

7 MR. WALSH: -- could very well be
8 covered by this.

9 JUSTICE BREYER: Thank you.

10 MR. WALSH: Unless there are further
11 questions, I'd like to reserve the balance of
12 my time.

13 CHIEF JUSTICE ROBERTS: Thank you,
14 counsel.

15 Mr. Clement.

16 ORAL ARGUMENT OF PAUL D. CLEMENT

17 ON BEHALF OF THE RESPONDENT

18 MR. CLEMENT: Mr. Chief Justice, and
19 may it please the Court:

20 I think it would be helpful if I could
21 start with the elephant in the room, which is
22 Justice Breyer's question about the definition
23 of the financial institution and then address
24 the question presented.

25 So, Justice Breyer, a couple of points

1 about that.

2 First of all, I think it could not be
3 clearer that that's never been at issue in this
4 case, and even more to the point, the
5 Petitioner, when they were trying to get this
6 Court to take the case, emphasized the fact
7 that this wasn't in dispute as a sort of a
8 positive feature of this petition.

9 So, if you look at page 3 of the
10 petition, it is clear that the Petitioner --

11 JUSTICE BREYER: I have no doubt that
12 neither party wanted it resolved on that basis.
13 And so what's nagging at the back of my head is
14 that, since it seems so clear, it's like two
15 farmers who decide they have some other
16 financial interest in fishing, and they'd love
17 to have this Court decide the Fishing Act, but,
18 in fact, if you look at the Farming Act, you've
19 got the answer to the dispute between them.

20 And can two parties who would just
21 love it, if we could decide an issue that
22 really isn't at issue before them, and can they
23 stipulate away all of the actual, you know,
24 they stipulate away the basic rule that a
25 contract is valid upon signing or something, in

1 order to get us to decide a question?

2 MR. CLEMENT: So, Justice Breyer, if
3 you really had the farmer/fisher idea -- fisher
4 person idea, I think what you would do is
5 dismiss the case as improvidently granted,
6 which would serve my client's interest just
7 fine. But I think there are two very good
8 reasons why that issue was not put front and
9 center by my friends here.

10 The first is that it's completely
11 inconsistent with their overall theory of the
12 case. Their overall theory of the case is that
13 every customer of every one of the six
14 protected entities is protected ipso facto by
15 virtue of the fact that it went through one of
16 those entities.

17 So it's more than a little bit of an
18 embarrassment for them to come across a
19 definition that says that customers of one of
20 the six, in relatively narrow circumstances,
21 are also covered. It's inconsistent with their
22 overall theory. They really can't argue both
23 things. Here's the --

24 JUSTICE KAGAN: Do you think, though,
25 Mr. Clement -- I'm sorry, if you want to --

1 MR. CLEMENT: Well, I was just going
2 to say the second point why they're not making
3 it, which is it doesn't apply here anyways,
4 which is, as I read that provision, it is very
5 narrow, and it protects the customer only when
6 the bank is acting -- when the bank is acting
7 as an agent or custodian.

8 It doesn't say when the bank has acted
9 or in the past acted. It says when is -- the
10 bank is acting as the custodian or the agent.

11 So if, hypothetically, we had -- the
12 -- the trustee had tried to avoid the transfer
13 while the money was still at Citizens Bank,
14 then maybe, just maybe, we'd still probably
15 want to have a debate and actually look at, you
16 know, and talk about what agent means in this
17 context, but then maybe it applies.

18 And maybe it applies for a reason
19 then, which is, in that context, maybe Citizens
20 Bank is actually inconvenienced by this, but
21 this is why I think that I really disagree with
22 my friend when he says that the transfer the
23 trustee sought to avoid and the underlying
24 transfers are sort of indivisible.

25 Think about what happens if we prevail

1 in this case, given the transfer that the
2 trustee sought to avoid. If we prevail at the
3 end of the day, Merit owes the estate some \$16
4 million. Citizens Bank doesn't have to do a
5 thing. Credit Suisse doesn't have to do a
6 thing. If they want to wire the money, they
7 can pick one of those banks, and one of those
8 banks will actually benefit to the extent of
9 the wire transfer fee.

10 But there's no obligation to do that.
11 They can pick Bank of America instead. It is
12 not as if, if they win here, that the poor
13 folks at Citizens Bank need to go and sort of
14 unearth that escrow agreement and reverse
15 something on it.

16 They don't have to do a thing, which,
17 of course, explains why they're not here as
18 amici, why --

19 CHIEF JUSTICE ROBERTS: Well, it's not
20 that simple. I mean, this is not simply -- I
21 think you try to portray it, it's simply a
22 matter of conduits that -- that don't have
23 anything to do with it, but as I understand it,
24 the intermediaries had a lot to do -- this --
25 this -- they were there functioning as

1 intermediaries -- intermediaries for several
2 years. They had certain compliance obligations
3 to check.

4 There were going to be payments in
5 this event, but no payments in that event.
6 They were seriously involved. They weren't
7 just, you know, stamping the papers and moving
8 the money.

9 MR. CLEMENT: You're right, Mr. Chief
10 Justice, to a degree, but for whatever the sort
11 of exertion they did, they were compensated.
12 And the trustee's not trying to get that
13 compensation back.

14 I mean, if you can imagine this case,
15 when the wire transfer went from Credit Suisse,
16 the money went to Citizens and then eventually
17 to Merit. I assume Credit Suisse got paid, I
18 don't know, \$1,000 to do that transfer.

19 Now, if the trustee here thought, you
20 know, this whole thing is such a bunch of
21 baloney, that we should get the money back from
22 Merit and we shouldn't have had to pay that
23 \$1,000 to Credit Suisse, so I have a theory, as
24 the trustee, as to why I can avoid the transfer
25 to Credit Suisse, well, of course, that's

1 covered by 546(e) through the straightforward
2 way we think the statute should be read, which
3 is this affirmative defense, this exception,
4 this safe harbor talks about a transfer that
5 the trustee may not avoid.

6 It then cross-references five sections
7 of the statute, each one of which uses the term
8 "may avoid." It describes a transfer that the
9 trustee may avoid. It just seems like these
10 provisions -- there are all these textual
11 interrelationships between the two provisions,
12 such that it seems perfectly natural to say
13 that, when you're applying 546(e), you look at
14 the transfer that the trustee is seeking to
15 avoid.

16 CHIEF JUSTICE ROBERTS: Could -- what
17 if the trustee -- would there be situations in
18 which it would make sense for the trustee to
19 want to avoid one of the intermediary transfers
20 rather than simply the ultimate one?

21 MR. CLEMENT: It might, but they
22 probably run into 546(e), I mean, which is to
23 say you can imagine a situation where you
24 really thought that, you know, the money
25 stopped at one of those banks, and so the --

1 the ultimate transferee, the right person to
2 bring the action against was the bank.

3 Or if the bank's trading on its own
4 account or something, I think, in that
5 situation, and you know, you -- you'd have a
6 transfer where the transfer that the trustee
7 was bringing under 544, 545, all those various
8 provisions, the transfer you're seeking to
9 avoid was a transfer to a bank.

10 CHIEF JUSTICE ROBERTS: Well, would it
11 be in a situation where there's no money with
12 the ultimate seller to recover? They also
13 become bankrupt.

14 MR. CLEMENT: I suppose --

15 CHIEF JUSTICE ROBERTS: Credit Suisse
16 is not bankrupt?

17 MR. CLEMENT: Right, no -- look, in
18 that situation, an aggressive trustee might
19 seek to avoid a transfer to the bank, but in
20 that situation, 546(e) stops that in its
21 tracks.

22 And I think it's also important to
23 remember that 546(e) is added at a point where
24 you already have limitations as to which
25 transferee you can recover from. And part of

1 what Congress is worried about is the idea
2 that, in some situations, and maybe the ones
3 that we were talking about in this kind of
4 hypothetical, it would actually be tough to
5 figure out whether or not the financial
6 intermediary really was just a conduit, in
7 which case they'd be protected under
8 preexisting law, or whether they sort of ended
9 up with the money when the music stopped.

10 And what Congress tried to do in
11 546(e) was to provide a nice bright-line rule
12 that protects these intermediaries, and it
13 seems like it is consistent with both the
14 general interest and the bright-line nature of
15 the rule to say this is relatively
16 straightforward, let's look at the transfer the
17 trustee is seeking to avoid. If the trustee is
18 seeking to avoid a transfer that is by, to, or
19 for the benefit of one of these six entities,
20 that's it, motion to dismiss --

21 JUSTICE KAGAN: Well, does that
22 mean -- does that mean, Mr. Clement, that we --
23 all we do is we look at the trustee's
24 complaint, we leave it to him to decide the
25 question?

1 MR. CLEMENT: Yes, Justice Kagan, but
2 I think the reason that that doesn't create
3 some sort of mischief here is that, in making
4 that -- the complaint, the affirmative part of
5 the complaint, the trustee isn't just sort of
6 free to pick transfers at random that he or she
7 seeks to invalidate.

8 They have to come up with a transfer
9 that fits the terms and the requirements of one
10 of those provisions of the code in Chapter 5.

11 JUSTICE KAGAN: So that -- that might
12 be right.

13 I was trying to think of cases in
14 which there could be mischief by relying
15 entirely on the trustee's power to define the
16 transfer.

17 And here is what I came up with, is
18 that there truly is a transfer from a debtor to
19 a bank, if the bank's not serving as an
20 intermediary, it is a real transfer of stock,
21 right?

22 And now, 546 -- 546(e) is going to
23 prevent the trustee from avoiding that. But
24 then the trustee says: So, in order to get
25 around 546(e), I'm going to define the transfer

1 differently, I'm going to ask where the bank
2 then transferred the stock and -- and -- and
3 say that the transfer that I want to avoid is
4 from the original debtor to whoever it was that
5 the bank transferred the stock to, even though
6 those really were two separate transactions.

7 Could the trustee play games like
8 that?

9 MR. CLEMENT: I don't think they -- I
10 mean, they could try, but I don't think they
11 would get away with it. And I think that, you
12 know, in any case where the trustee brings an
13 action against somebody, they're going to have
14 essentially two kinds of defenses to raise.

15 One is going to be an affirmative
16 defense based on 546(e). Now, it may be in
17 your hypothetical the trustee's kind of pled
18 around that, but you still have to -- the
19 trustee still has to essentially satisfy the
20 terms of the original avoidance provision, and
21 I don't think, for purposes of that
22 hypothetical, though it might depend on some
23 details of it, that the trustee would be able
24 to do that.

25 And then, of course, there's a second

1 piece of this, which is to make this in a -- in
2 a transfer situation, to really get any juice
3 for the effort, you have to not only avoid the
4 transfer, but you also have to get recovery
5 under 550.

6 And in the hypothetical that you're
7 talking about, the third-party subsequent
8 transferee would not be the immediate -- the
9 initial transferee under 550. And so, as long
10 as they took it in good faith and paid value
11 for it, they'd be completely protected.

12 So I just don't think it would work.
13 And I think it is important to recognize that,
14 you know, this is not a situation where the
15 trustee can just sort of, you know, pick the --
16 well, today, I feel like the Credit Suisse to
17 Citizens Bank transfer is the one I'm going
18 after.

19 That would satisfy --

20 JUSTICE KENNEDY: Well, if we're -- if
21 we're writing the -- the opinion to accept your
22 proposition, how do we -- how do we qualify it?
23 Do we -- do we say that this does not apply to
24 transfers where the settlement institution does
25 not have an equity participation?

1 I mean, what -- what --

2 MR. CLEMENT: See, I wouldn't do that,
3 Justice Kennedy. I think that's -- that is the
4 way some of the courts had -- have written it,
5 but I think the simpler way to write the
6 opinion is to say, to apply 546(e), just look
7 to the transfer that the trustee seeks to
8 avoid, and it's as simple as that.

9 If the transfer that the trustee seeks
10 to avoid --

11 JUSTICE KENNEDY: But that -- that --
12 that then involves Justice Kagan's concern that
13 you're giving the -- the trustee a chance -- a
14 chance to define the transfer in a particular
15 way. Now, if the -- if the Bankruptcy Code
16 defines a transfer so it's abundantly clear the
17 -- what transfer is -- is involved, then that's
18 one thing.

19 MR. CLEMENT: Well, but I tried to be
20 responsive to Justice Kagan's question, and I
21 think that the code puts all sorts of limits on
22 the trustee when they're picking the transfer
23 that they're seeking to avoid.

24 So, for example, for certain
25 provisions of the code, you can only avoid a

1 transfer at a certain time period if it's a
2 transfer to an insider. Now, that seems to me
3 to buttress the idea that that provision of the
4 code doesn't really care much about the
5 intermediaries because otherwise you could say,
6 well, there's never a transfer to an insider
7 because it always goes through a bank first.

8 So I think the trustee is disciplined
9 not just by 546(e) but by the various things
10 that the trustee has to show to qualify the
11 particular transfer for being avoidable under
12 one of the affirmative avoidance powers.

13 JUSTICE KAGAN: What do you think is
14 wrong, Mr. Clement, with the alternative
15 approach? If I understand the alternative
16 approach, which Justice Kennedy was referring
17 to, it's more of a functional analysis; you ask
18 who has dominion and control of a particular
19 piece of property at a particular point. And
20 -- and that seems more what the Seventh Circuit
21 was doing than -- than what your brief
22 suggests.

23 So why do you think that that's a
24 worse alternative than the one you're
25 suggesting?

1 MR. CLEMENT: Well, Justice Kagan, let
2 me start by saying it's a lot better
3 alternative than my client losing this case.
4 So, if you find that attractive, I mean, that's
5 fine.

6 Here's the reason, though, that,
7 honestly, I don't think it's right. Because I
8 think one point my -- my friend and I agree on
9 is that when Congress was passing the
10 predecessor to 546(e) back in the day, there
11 was already substantial protection for the
12 intermediaries under the recovery provision,
13 550, if they were truly conduits and weren't
14 the beneficial owners.

15 And so I think what Congress was
16 trying to do with 546(e) was to provide an
17 alternative, more bright-line way for the
18 financial intermediaries to get out of the case
19 early at the motion to dismiss stage.

20 And the problem with this looking for
21 the beneficial ownership is it's really the
22 same inquiry, and it could be fact-specific in
23 a particular case, that Congress was trying to
24 supplement with this bright-line rule.

25 And we think our rule gives a nice

1 bright-line rule that courts can apply at the
2 motion to dismiss stage, literally just look at
3 the complaint, look at the transfer the
4 trustee's seeking to avoid, and then, if it
5 satisfies 546(e), you know, you're done,
6 trustee loses. If it doesn't, we move forward.

7 Of course, when you move forward, you
8 can still get into this beneficial interest
9 inquiry. That's part of the 550 inquiry
10 because here -- -

11 JUSTICE GINSBURG: Well, how --

12 MR. CLEMENT: -- as in almost every
13 case -- sorry.

14 JUSTICE GINSBURG: How do you -- how
15 do you answer what your colleague stressed;
16 that is, it doesn't say for the -- only for the
17 benefit of a financial institution. It says
18 "by." If a transfer is by a financial, that's
19 enough.

20 MR. CLEMENT: You're right, Justice
21 Ginsburg, and we think that's right, but we
22 think what Congress was addressing in that
23 situation was the precise situation that the
24 Southern District of New York dealt with in a
25 case called Seligson, which I think both

1 parties agree is the case that Congress was
2 trying to address with the predecessor to
3 546(e).

4 And that was a situation where the
5 financial intermediary -- there I believe it
6 was a commodity broker -- is the bankrupt. And
7 so --

8 JUSTICE BREYER: So for this --

9 MR. CLEMENT: And so, in that
10 situation, you do want to protect and shield
11 the transfers by the bankrupt because the one
12 thing Congress was clearly concerned with is
13 you'd have a bankruptcy by one of the hub
14 players in the financial industry and that
15 would create this sort of ripple effect to
16 everybody who dealt with them.

17 JUSTICE BREYER: So, for this
18 provision, do I have this right? A, look to
19 the -- the transaction that the trustee is
20 trying to set aside as a preference or
21 fraudulent conveyance. B, ask the question:
22 Who is the person who directed that that
23 transfer be made? All right.

24 If it's a financial institution, et
25 cetera, stop right there, good-bye, you're out.

1 If not, continue to question 3. And question 3
2 is: Who is the initial transferee and not a
3 conduit of that transfer? And if the answer is
4 a financial institution, you're out. And
5 otherwise we go on to ask the other questions.

6 And that means that a -- that the
7 transferee, the initial transferee, if he's
8 receiving money that he is to hold for the
9 benefit of the other, he still is the initial
10 transferee. And you will look to such matters
11 as to who this money is to benefit later on in
12 your -- your efforts. Is that right?

13 MR. CLEMENT: Well, Justice Breyer, I
14 think you've aptly captured the Seventh
15 Circuit's reasoning.

16 JUSTICE BREYER: Uh-huh.

17 MR. CLEMENT: I'm actually asking you
18 to make this case even simpler.

19 JUSTICE BREYER: Uh-huh.

20 MR. CLEMENT: I'm asking you to look
21 at the transfer that the trustee seeks to
22 avoid.

23 JUSTICE BREYER: Yeah.

24 MR. CLEMENT: That has to be by
25 somebody and to somebody --

1 JUSTICE BREYER: Yeah.

2 MR. CLEMENT: -- in order for it to
3 satisfy 544, 545, 547, or the two provisions of
4 548 that 546(e) cross-references.

5 JUSTICE BREYER: All Right.

6 MR. CLEMENT: So there you have, right
7 on the face of the complaint, a transfer by
8 someone, to someone, or for the benefit of
9 someone, because as we explained in the brief
10 --

11 JUSTICE BREYER: Do you have what it
12 says?

13 MR. CLEMENT: -- the reason that
14 language is there is because the avoidance
15 power is not limited to transfers to somebody
16 who is like an insider or a creditor --

17 JUSTICE BREYER: That's right.

18 MR. CLEMENT: -- but also to somebody
19 who is for the benefit of a creditor or an
20 insider. So just look at the face of the
21 complaint, apply 546(e) to the transfer that
22 the trustee has put at issue, and if the terms
23 are satisfied, then the trustee loses.

24 And if the terms are not satisfied,
25 then you move forward and you probably analyze

1 all of those transferee questions before the
2 case is all over, but I do think it's more
3 faithful to what Congress was trying to
4 accomplish when it enacted the predecessor to
5 546(e) to have a nice, bright-line protection
6 that's there for the financial intermediaries.

7 It doesn't protect all of their
8 customers. It doesn't protect Merit. They
9 have other arguments they can eventually make,
10 but what they wanted was a nice bright-line
11 rule so clearing agencies, commodity brokers,
12 and then eventually stockbrokers and financial
13 institutions and financial participants would
14 all have a nice, clean motion to dismiss
15 argument to win their case.

16 JUSTICE SOTOMAYOR: May I address a
17 question that confused me in your briefing?

18 JUSTICE BREYER: Yeah.

19 JUSTICE SOTOMAYOR: You kept saying
20 that the initial transfer had to be by the
21 debtor.

22 But the code permits the trustee to
23 void a non-debtor's transfer if the property
24 that that non-debtor is transferring is of an
25 interest of the debtor in property.

1 So it's not so clean to say that the
2 transfer has to be by the debtor. It can also
3 be by the debtor's agent, a non-debtor.

4 MR. CLEMENT: Justice Sotomayor, I
5 think you're right that it's certainly not
6 clean. Now, I think, at the end of the day,
7 we're actually right, and I get some solace
8 from the fact that our position is supported by
9 Professor Brubaker, who's spent a lot more time
10 looking at the code than I have.

11 So I think we're actually right that
12 even when it's a transfer by a third-party of
13 an interest of the debtor, it actually ends up,
14 for purposes of the code, being a transfer
15 "made by," which I think is the relevant term,
16 "made by" the debtor.

17 JUSTICE SOTOMAYOR: So that's how
18 you're reading that then.

19 MR. CLEMENT: That's how we're reading
20 it, but I want to make as clear as I can that
21 nothing turns on that. Our position -- I think
22 it makes -- if you -- if you accept that, it
23 makes our position that much clearer.

24 But nothing turns on it. And I think
25 what that just helps to show is that, either in

1 100 percent of the cases or the vast majority
2 of the cases, that when you get to transfer by,
3 either for purposes of the avoidance power or
4 for purposes of the exception of 546(e), it's
5 going to be a transfer by the bankrupt. And
6 whether it's 99 or 100 percent, nothing
7 ultimately turns on it.

8 JUSTICE SOTOMAYOR: So why -- but why
9 then did you argue that the transfer from
10 Credit Suisse to Citizens Bank -- both involved
11 property of the debtor, why did you argue that
12 that wouldn't qualify because it wasn't a
13 transfer by the debtor?

14 MR. CLEMENT: Because the way we read
15 Chapter 5 of the code is it essentially ignores
16 conduits for purposes of identifying who's the
17 transferor and who's the transferee. And we do
18 think that's consistent throughout Chapter 5.
19 That's why for its --

20 JUSTICE SOTOMAYOR: You don't think
21 Credit Suisse or -- or Citizens Bank fell under
22 the safe harbor automatically? They're both
23 financial --

24 MR. CLEMENT: I think -- I think if
25 the trustee had tried to avoid that transfer,

1 it would automatically satisfy 546(e).

2 What I'm making, though, is the point
3 that I don't think, properly understood, that
4 is even a transfer by Credit Suisse. And I
5 think maybe the way to try to at least
6 understand the point I'm making, but nothing
7 turns on it --

8 JUSTICE SOTOMAYOR: Oh, okay. That's
9 what I'm --

10 MR. CLEMENT: -- is -- is think about
11 the charitable giving exception. Now, it
12 allows -- it exempts certain transfers by the
13 debtor to a qualifying charitable institution.

14 Now, I would think the vast majority
15 of those are made by telling your bank I want
16 to give \$2,000 to this charity. Now, if you
17 accept their view that you subdivide
18 everything, well, then that's not a transfer by
19 the debtor to the charity. It's a transfer by
20 the debtor to Credit Suisse, which is not a
21 charity, and then a transfer by Credit Suisse
22 to the charity.

23 And that doesn't come within the
24 exception to the power, which is nonsense.
25 That's clearly not what Congress was trying --

1 JUSTICE GORSUCH: So -- but, Mr.
2 Clement, on that, I assume your friend will get
3 up and say, well, a lot of those charitable
4 contributions are by check, and those aren't
5 covered.

6 And just as -- just as we heard when I
7 asked the question about avoidable transfers,
8 that it became an empirical debate about how
9 many of those would be covered.

10 So how -- how clean a line is this
11 really? I mean, what -- what you're
12 suggesting?

13 MR. CLEMENT: Well, two things,
14 Justice Gorsuch. First of all, my friend would
15 want to tell you that the checks aren't
16 covered.

17 JUSTICE GORSUCH: Yeah.

18 MR. CLEMENT: But, with all due
19 respect, I don't think he has a theory as to
20 why. And I think that's -- that's what's
21 critical. I mean, you know, if there's no word
22 in that statute that allows you to draw that
23 distinction, as the colloquy with Justice
24 Breyer showed, there might be a theory based on
25 the definition of financial institution --

1 JUSTICE GORSUCH: Customer.

2 MR. CLEMENT: -- why the escrow
3 situation is different from the check
4 situation.

5 But if he's right, and all you have to
6 do is have a -- any kind of transfer and we
7 don't ignore any transfers by or to a financial
8 institution, I don't think he's offered you a
9 theory for why checks don't count. So that
10 would be the first point.

11 The second point would be, yeah,
12 there's some empirical debates here we don't
13 know the answers to.

14 JUSTICE GORSUCH: Right.

15 MR. CLEMENT: But if we're looking for
16 a clean answer, I mean, I think both sides are
17 giving you a clean answer. They're basically
18 giving you an answer that says, if it's a
19 settlement payment or a margin payment or a
20 payment in connection with a securities
21 contract, unless there's like the one person
22 out there that's doing these things with bags
23 of cash, it's covered.

24 JUSTICE GORSUCH: Yeah.

25 MR. CLEMENT: We're giving you the

1 clean position that --

2 JUSTICE GORSUCH: The amici -- the
3 amici give us a very clean position, right,
4 that we need a transferee under the statute and
5 a debtor under the statute. I read the red
6 brief as being a little more equivocal on that.
7 Maybe I misread it.

8 Did you endorse the amici's clean
9 position without qualification?

10 MR. CLEMENT: Well, we think our
11 position is even cleaner, I mean, so -- so --
12 but we think -- if you're referring to
13 Professor Brubaker's --

14 JUSTICE GORSUCH: Yeah.

15 MR. CLEMENT: We think we get to the
16 exact same place. I think, maybe since I'm
17 coming at this more like a lawyer instead of a
18 bankruptcy professor, I think about it in
19 really simple terms, and it maps on to the
20 procedural history of this case.

21 The trustee here brought a complaint.
22 It was a complaint that identified a transfer
23 for avoidance. The -- Merit filed an answer
24 with an affirmative defense. The affirmative
25 defense was based on 546(e).

1 It just seems logical, as -- as
2 Justice Kagan suggested, albeit in a question,
3 so she might not have meant it, but --

4 (Laughter.)

5 MR. CLEMENT: -- but as Justice Kagan
6 suggested, like what world do you look at
7 different transfers for purposes of the
8 exception to the affirmative defense than the
9 transfer that you're looking at for the prima
10 facie case of avoidance in the first instance?

11 It seems like the statutes work
12 together very well, hand in glove.

13 And we haven't talked a lot about the
14 policy implications of their clean position,
15 which is that, sort of, as long as there is a
16 bank anywhere involved in a securities
17 transaction, it's exempted.

18 And the consequences of that are, I
19 mean, really quite simple and quite striking,
20 which is, in a case like this, where otherwise
21 the unsecured creditors are going to get 15
22 cents on the dollar, which is already enough to
23 ruin your whole day --

24 JUSTICE GORSUCH: All right. All
25 right. But the Second Circuit is very

1 concerned about the effect that this would have
2 on the leveraged buyout industry and -- and,
3 therefore, the economy more broadly.

4 I can understand an argument that
5 Congress in 1978 wasn't much concerned about
6 the leveraged buyout industry because it didn't
7 exist, as we now know it, but what -- what else
8 do you say in response to that, the parade of
9 horrors that we've heard?

10 MR. CLEMENT: Well, I mean, I don't
11 actually think it's much of a parade of
12 horrors, Your Honor, but let me try to be as
13 responsive as I can, which is to say, I think
14 if Congress were really concerned about the
15 leveraged buyout situation, it would have
16 written a very different exemption than the one
17 that it wrote here. It might have defined
18 something like leveraged buyout. It might have
19 exempted certain smaller ones or larger ones.

20 You know, when you have this provision
21 applied in the context of a very large
22 transaction on the public markets, there are
23 lots of the trustees' prima facie case,
24 including that there wasn't sufficient value
25 provided and the like, those are going to be

1 relatively difficult to prove, I mean, at least
2 if you believe in sort of the efficiencies of
3 markets.

4 But when you have leveraged buyouts
5 for small companies, I mean, that is a fertile
6 ground for essentially getting money out of the
7 company and away from unsecured creditors and
8 to some favored party.

9 So as -- as the trustee's amicus brief
10 said, to sort of carve out, you know, leveraged
11 buyouts from the fraudulent avoidance laws,
12 that's carving out a lot because these are
13 transactions where there is a risk that's quite
14 considerable to mulcting the interest of the
15 unsecured creditors.

16 The last thing I'll say before I sit
17 down is just, in addition to all the other
18 textual arguments we make in the brief, I do
19 think it's worth emphasizing that, under their
20 view of the statute, Congress's effort in 2005
21 to add financial participants as the sixth on
22 the list of protected entities was completely
23 superfluous and just a fool's errand, because I
24 can't imagine that financial participants who
25 are defined as entities with \$100 million or a

1 billion dollars in transactions were doing
2 those transactions with cash.

3 So those financial participants were
4 already customers of these five entities, so if
5 that's enough to bring you into the statute,
6 Congress was utterly wasting its time in 2005.

7 JUSTICE KAGAN: May I ask,
8 Mr. Clement, you might have no insight on this
9 and you might not be able to say anything about
10 it, so if so, just say so, but it is curious to
11 me, I've never seen a bankruptcy case, maybe
12 ever, but certainly a bankruptcy case like this
13 one, in which we do not have a Solicitor
14 General brief.

15 Do you have any thoughts about why the
16 SG didn't file here?

17 MR. CLEMENT: No, I don't have any
18 particular thoughts, other than I do think
19 that, if what we were urging on you was really
20 a catastrophe for the markets or something
21 else, boy, I sure think the SG would be here,
22 wave -- you know, waving at least a yellow
23 flag.

24 To me, the amici that aren't here that
25 speak even louder, though, are, frankly, the

1 lack of financial institutions, stockbroker,
2 clearing agency amici.

3 I mean, look, normally, I don't think
4 you really draw any inference through -- from
5 the amici that aren't here, but, you know, if
6 you told me that, wow, there's this provision
7 that's in the code that's specifically designed
8 to protect your interests, and the Seventh
9 Circuit adopted a narrow construction of it,
10 and it's going up to the Supreme Court of the
11 United States, and they will decide the scope
12 of this exemption that protects your industry,
13 I mean, if -- if you had any thought that you
14 were not fully protected by the Respondent's
15 view as much as the Petitioner's view, I would
16 think it would be worth your while to file an
17 amicus brief.

18 And the fact that they're not here, I
19 think, underscores that the entities that
20 Congress was trying to protect are fully
21 protected by our view, and they're fully
22 protected by the Petitioner's view. It's just
23 so is the rest of the world.

24 And I just don't think there's any
25 view that Congress actually intended to not

1 just protect those six financial entities, but
2 to protect everybody else who essentially
3 transacted in them, in connection with the
4 securities contract.

5 So we think the decision below should
6 be affirmed.

7 Thank you.

8 CHIEF JUSTICE ROBERTS: Thank you,
9 counsel.

10 Four minutes, Mr. Walsh.

11 REBUTTAL ARGUMENT OF BRIAN C. WALSH

12 ON BEHALF OF THE PETITIONER

13 MR. WALSH: Thank you.

14 I'd like to return to Justice Kagan's
15 question a little bit earlier about whether we
16 can focus solely on the transfer as the trustee
17 identifies and characterizes it.

18 And I think it's useful to think about
19 what happens if that end-to-end transfer in
20 this case is avoided and -- and some amount of
21 that would have to be refunded by Merit. I
22 think the question we have to ask is then: So
23 what of the transfers from Citizens Bank out of
24 escrow to Merit?

25 Can we say that those transfers are

1 still valid and in effect and have been
2 consummated and have been paid, and Citizens
3 has satisfied its obligations because Merit has
4 the 16 and a half million dollars?

5 And I think the answer to all those
6 questions is no because, once the broader
7 transfer is avoided and a recovery is made,
8 everything else falls with it as well.

9 So when we say the --

10 JUSTICE SOTOMAYOR: Sorry. I thought
11 that 550 said that post -- that transferees
12 from Bedford could be protected by other safe
13 havens, if they paid consideration in -- in
14 good faith, et cetera, they would be okay?

15 MR. WALSH: No, that -- that's right.
16 If -- if -- well, Bedford didn't receive the
17 transfer, Your Honor, the shareholders of
18 Bedford, including my client, received the
19 transfer.

20 JUSTICE SOTOMAYOR: Right.

21 MR. WALSH: If they had transferred it
22 on --

23 JUSTICE SOTOMAYOR: Right.

24 MR. WALSH: And that's what we were
25 talking about, the good faith defense would

1 come into play.

2 But what I'm talking about is the
3 transfers from Citizens out of escrow to the
4 shareholders. If the -- if the broader
5 transfer is avoided and recovery is had against
6 Merit, then those transfers into and out of
7 escrow involving financial institutions are not
8 in full force and effect.

9 JUSTICE BREYER: So what?

10 MR. WALSH: So --

11 JUSTICE BREYER: I mean, if I write a
12 check, and it goes to the postman, and the
13 postman delivers it to Smith, and I get my
14 money back from Smith, then I guess you could
15 say, well, the postman -- that putting it in
16 the mailbox didn't have any financial effect.

17 So what?

18 MR. WALSH: So the -- the so what,
19 Your Honor, is that, when the trustee says, I'm
20 only seeking to avoid the one transfer and the
21 rest can --

22 JUSTICE BREYER: Well, that is all
23 that he's trying to avoid.

24 MR. WALSH: -- and the rest can be
25 disregarded --

1 JUSTICE BREYER: Well, I know, but I
2 mean it has no effect. If FedEx, you know,
3 delivered the check. I mean, there are many
4 ways of delivering the check. If they're just
5 a conduit, the bank, it's quite true in a sense
6 that transfer from the bank didn't have any
7 effect because the people who got the money had
8 to give it back to the people who deposited the
9 money.

10 But my question was, so what?

11 MR. WALSH: The so what is that the
12 statute says the trustee may not avoid the
13 transfer by a financial institution. And so by
14 -- by avoiding the transfer, the broader
15 transfer --

16 JUSTICE BREYER: And there's no --
17 there's no consequence to Citizens Bank, is
18 there?

19 MR. WALSH: It would not hit Citizens'
20 bottom line, that's correct.

21 JUSTICE BREYER: No -- no -- no
22 consequence?

23 MR. WALSH: That's correct.

24 JUSTICE BREYER: Okay.

25 MR. WALSH: I -- I do want to talk

1 about consequences, though, because this is a
2 case involving 16 and a half million dollars.
3 As the Court is aware, both sides in the
4 Tribune case have filed amicus briefs. That
5 case is, let's call it 100 times larger than
6 ours, it's more than that.

7 And the issue there, and Justice
8 Gorsuch mentioned the Second Circuit's opinion,
9 which is justifiably concerned about what
10 happens, there are thousands of defendants in
11 that case.

12 Of course, if Goldman Sachs or Merrill
13 Lynch received a distribution in that case for
14 its own account, they don't have liability,
15 that transfer can't be avoided. I think
16 everybody would agree about that. But there
17 are employees who held company stock, there are
18 pension funds that held stock in Tribune. All
19 these other entities remain exposed.

20 Over the past 30 years, Congress has
21 expanded and expanded and expanded the safe
22 harbor to bolt on different concepts, including
23 financial institutions. At the same time, the
24 courts, with a few exceptions, have been
25 interpreting the statute broadly.

1 And if Congress thought that the
2 courts were out of line, it could very well
3 have cut the statute back. It didn't do that.
4 The statute has continued to expand. And it's
5 important.

6 And one -- one last point, Mr. Clement
7 mentioned the Seligson case. And what Congress
8 was -- I'm sorry.

9 CHIEF JUSTICE ROBERTS: You can finish
10 your point.

11 MR. WALSH: The -- the notion that
12 transfers by an institution are protected by
13 the safe harbor covers a good bit more than
14 transfers by an institution into the clearing
15 system.

16 The example I gave before where
17 Goldman Sachs transferred me a bunch of
18 Berkshire Hathaway stock for a nominal amount
19 of money is covered as well, so it's broader
20 than Seligson.

21 CHIEF JUSTICE ROBERTS: Thank you,
22 counsel. The case is submitted.

23 (Whereupon, 11:02 a.m., the case was
24 submitted.)

25

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\$			
\$1,000 [2] 37:18,23	acted [3] 19:13 35:8,9	APPEARANCES [1] 1:17	11,12
\$10 [2] 30:23,24	acting [7] 16:7,10,12 23:1 35:6,6,10	application [1] 8:22	banks [14] 5:21 6:16 16:20 19:12 20:3 22:6,10,13 23:15,18,22 36:7,8 38:25
\$100 [2] 22:18 60:25	action [2] 39:2 42:13	applied [4] 9:19 10:10 21:12 59:21	based [3] 42:16 55:24 57:25
\$16 [1] 36:3	actions [1] 28:17	applies [4] 9:5 28:3 35:17,18	basic [1] 33:24
\$2,000 [1] 54:16	actual [2] 22:5 33:23	apply [8] 9:5 23:3 31:7 35:3 43:23 44:6 47:1 50:21	basically [1] 56:17
\$55 [4] 10:16,21 14:23 30:2	actually [14] 12:25 13:21,24 20:12 35:15,20 36:8 40:4 49:17 52:7,11,13 59:11 62:25	applying [1] 38:13	basis [2] 6:25 33:12
1	add [1] 60:21	approach [3] 3:21 45:15,16	became [1] 55:8
10 [1] 10:18	added [2] 4:10 39:23	appropriate [1] 20:24	become [3] 8:10 24:16 39:13
10:03 [2] 1:15 3:2	addition [1] 60:17	aptly [1] 49:14	Bedford [4] 30:5 64:12,16,18
100 [4] 22:17 53:1,6 67:5	address [4] 12:24 32:23 48:2 51:16	area [1] 17:9	beginning [1] 3:16
11:02 [1] 68:23	addressing [1] 47:22	aren't [7] 23:23 30:5,6 55:4,15 61:24 62:5	behalf [9] 1:19,21 2:4,7,10 3:8 23:4 32:17 63:12
15 [1] 58:21	adequate [2] 11:14,25	argue [3] 34:22 53:9,11	believe [2] 48:5 60:2
16 [2] 64:4 67:2	adopt [1] 12:20	argument [14] 1:14 2:2,5,8 3:4,7 9:21,24 10:1 15:16 32:16 51:15 59:4 63:11	below [1] 63:5
16-784 [1] 3:4	adopted [1] 62:9	arguments [2] 51:9 60:18	beneficial [6] 3:22 4:22 20:23 46:14,21 47:8
1978 [1] 59:5	affecting [1] 28:24	arises [1] 9:3	benefit [9] 3:19 20:14 36:8 40:19 47:17 49:9,11 50:8,19
2	affirmative [7] 38:3 41:4 42:15 45:12 57:24,24 58:8	around [2] 41:25 42:18	benefits [1] 6:11
2005 [2] 60:20 61:6	affirmed [1] 63:6	aside [1] 48:20	Berkshire [2] 22:18 68:18
2006 [1] 4:10	afraid [1] 17:19	aspects [1] 8:12	better [1] 46:2
2017 [1] 1:11	agencies [4] 20:4 22:7,11 51:11	assume [2] 37:17 55:2	between [7] 4:21 18:12 25:24 27:4 29:20 33:19 38:11
3	agency [2] 12:16 62:2	attack [1] 13:19	Bill [1] 30:23
3 [4] 2:4 33:9 49:1,1	agent [13] 15:13 16:7,10,12 19:14 23:2 30:3,4 31:1 35:7,10,16 52:3	attorney [1] 28:10	billion [1] 61:1
30 [2] 30:11 67:20	agents [2] 15:17 19:13	attractive [1] 46:4	bit [7] 13:1 26:11,11 27:15 34:17 63:15 68:13
32 [1] 2:7	aggressive [1] 39:18	automatically [2] 53:22 54:1	bolt [1] 67:22
5	ago [1] 10:19	available [1] 5:15	both [13] 17:2,25 18:1,17,19 31:1 34:22 40:13 47:25 53:10,22 56:16 67:3
5 [4] 31:24 41:10 53:15,18	agree [6] 7:7 18:9 25:9 46:8 48:1 67:16	avoid [44] 4:6 7:18 8:1 9:9,21 10:11 11:3,8,11,19 21:25 24:8 26:25 27:19,23 28:2,23 29:6 30:17 35:12,23 36:2 37:24 38:5,8,9,15,19 39:9,19 40:17,18 42:3 43:3 44:8,10,23,25 47:4 49:22 53:25 65:20,23 66:12	bother [1] 7:3
544 [2] 39:7 50:3	agreeing [2] 11:16,21	avoidable [5] 22:22 24:16 25:8 45:11 55:7	bottom [3] 22:13,19 66:20
545 [2] 39:7 50:3	agreement [1] 36:14	avoidance [10] 27:17,19 29:16 42:20 45:12 50:14 53:3 57:23 58:10 60:11	bought [2] 31:24 32:1
546 [1] 41:22	albeit [1] 58:2	avoided [6] 20:10 21:22 63:20 64:7 65:5 67:15	boy [1] 61:21
546(e) [28] 5:5 9:4 11:4,8 18:10 22:5 27:16 38:1,13,22 39:20,23 40:11 41:22,25 42:16 44:6 45:9 46:10,16 47:5 48:3 50:4,21 51:5 53:4 54:1 57:25	ALITO [6] 9:7,12,15,18 10:8 17:24	avoiding [4] 10:4,5 41:23 66:14	BREYER [50] 13:10,14,18,22 14:2,5,10,13,15 15:2,9,16,23 16:17 17:4,13 18:7,14 19:4,7 30:15,22 31:8,12,18,23 32:5,9,25 33:11 34:2 48:8,17 49:13,16,19,23 50:1,5,11,17 51:18 55:24 65:9,11,22 66:1,16,21,24
547 [1] 50:3	Alito's [1] 27:14	aware [1] 67:3	Breyer's [1] 32:22
548 [1] 50:4	allegedly [2] 9:13 28:10	away [6] 24:13,14 33:23,24 42:11 60:7	BRIAN [5] 1:18 2:3,9 3:7 63:11
550 [11] 20:7,12,13 21:2,19 22:7 43:5,9 46:13 47:9 64:11	alleging [1] 5:14	B	brief [8] 19:18 45:21 50:9 57:6 60:9,18 61:14 62:17
550(c) [1] 21:20	allows [2] 54:12 55:22	back [10] 7:14 23:13 27:13 33:13 37:13,21 46:10 65:14 66:8 68:3	briefing [1] 51:17
6	almost [1] 47:12	bags [1] 56:22	briefs [4] 17:3,5 26:9 67:4
6 [1] 1:11	already [5] 8:21 39:24 46:11 58:22 61:4	balance [2] 23:7 32:11	bright-line [7] 40:11,14 46:17,24 47:1 51:5,10
63 [1] 2:10	alternative [5] 45:14,15,24 46:3,17	baloney [1] 37:21	bring [2] 39:2 61:5
9	America [4] 30:25 31:2,3 36:11	Bank [47] 3:13 6:3,4 10:22,24 11:9,12 14:6,7 15:7,12,14,19,19,20 16:4,7,9 24:14 30:25 31:2,3 35:6,6,8,10,13,20 36:4,11,13 39:2,9,19 41:19 42:1,5 43:17 45:7 53:10,21 54:15 58:16 63:23 66:5,6,17	bringing [1] 39:7
A	amici [6] 36:18 57:2,3 61:24 62:2,5	bank's [2] 39:3 41:19	brings [1] 42:12
a.m [3] 1:15 3:2 68:23	amici's [1] 57:8	bankrupt [6] 13:15 39:13,16 48:6,11 53:5	broader [9] 4:13 6:6 11:3 26:11,11 64:6 65:4 66:14 68:19
able [2] 42:23 61:9	amicus [3] 60:9 62:17 67:4	Bankruptcy [10] 20:8 24:9 25:25 26:1 27:5 44:15 48:13 57:18 61:26,1,27 54:15 48:13 57:18 61:26	broadly [2] 59:3 67:25
above-entitled [1] 1:13	amount [2] 63:20 68:18		broker [3] 12:16 22:23 48:6
absent [2] 11:8,10	analysis [2] 29:4 45:17		brokers [8] 20:4 22:6,11,14 23:16,18,22 51:11
absolutely [1] 16:22	analyze [1] 50:25		brought [1] 57:21
abundantly [1] 44:16	another [5] 3:20 14:18,18 16:23 29:11		Brown [2] 30:23 31:1
accept [3] 43:21 52:22 54:17	answer [12] 16:1 17:18,20 18:4 33:19 47:15 49:3 56:16,17,18 57:23 64:5		Brubaker [1] 52:9
accomplish [1] 51:4	answers [1] 56:13		
accomplished [1] 22:8	anticipate [1] 6:13		
account [3] 13:12 39:4 67:14	anyways [1] 35:3		
acres [1] 31:25	apart [1] 11:1		
across [1] 34:18	apiece [1] 22:18		
Act [4] 18:16 19:12 33:17,18	apparent [1] 24:19		

Official

<p>Brubaker's ^[1] 57:13 build ^[1] 29:24 building ^[1] 28:14 built ^[1] 28:12 bunch ^[3] 28:15 37:20 68:17 business ^[1] 24:25 butress ^[1] 45:3 buyout ^[4] 59:2,6,15,18 buyouts ^[2] 60:4,11 buys ^[1] 30:22</p>	<p>Citizens' ^[1] 66:19 claim ^[7] 5:5,16 7:9 11:22,25 24:23 25:1 clean ^[10] 51:14 52:1,6 55:10 56:16,17 57:1,3,8 58:14 cleaner ^[1] 57:11 clear ^[6] 13:5,7 33:10,14 44:16 52:20 clearer ^[2] 33:3 52:23 clearing ^[7] 12:16 20:4 22:6,11 51:11 62:2 68:14 clearly ^[3] 27:16 48:12 54:25 CLEMENT ^[48] 1:20 2:6 32:15,16,18 34:2,25 35:1 37:9 38:21 39:14,17 40:22 41:1 42:9 44:2,19 45:14 46:1 47:12,20 48:9 49:13,17,20,24 50:2,6,13,18 52:4,19 53:14,24 54:10 55:2,13,18 56:2,15,25 57:10,15 58:5 59:10 61:8,17 68:6 client ^[2] 46:3 64:18 client's ^[1] 34:6 clients ^[1] 23:5 Code ^[13] 20:8 31:21 32:3 41:10 44:15,21,25 45:4 51:22 52:10,14 53:15 62:7 cog ^[1] 22:24 collapse ^[1] 23:25 colleague ^[1] 47:15 colloquy ^[1] 55:23 come ^[7] 4:1 7:10 17:20 34:18 41:8 54:23 65:1 comes ^[2] 6:14 29:10 coming ^[2] 16:19 57:17 commodities ^[10] 4:11 5:25 6:7 7:11 13:4 25:6,13 27:9 30:14 31:11 commodity ^[3] 27:3 48:6 51:11 common ^[1] 21:4 companies ^[1] 60:5 company ^[3] 13:11 60:7 67:17 compensated ^[1] 37:11 compensation ^[1] 37:13 complaint ^[8] 40:24 41:4,5 47:3 50:7,21 57:21,22 completely ^[3] 34:10 43:11 60:22 compliance ^[1] 37:2 concede ^[2] 18:1,18 conceded ^[1] 17:25 concepts ^[2] 4:13 67:22 concern ^[1] 44:12 concerned ^[6] 12:19 48:12 59:1,5,14 67:9 concerns ^[1] 27:8 conditions ^[1] 24:10 conduit ^[3] 40:6 49:3 66:5 conduits ^[3] 36:22 46:13 53:16 confined ^[1] 27:6 confused ^[1] 51:17 Congress ^[29] 3:14,18 4:10 7:2,10 20:1,2,3 21:21 22:7 27:6 40:1,10 46:9,15,23 47:22 48:1,12 51:3 54:25 59:5,14 61:6 62:20,25 67:20 68:1,7 Congress's ^[2] 21:24 60:20 connection ^[3] 4:17 56:20 63:3</p>	<p>consequence ^[2] 66:17,22 consequences ^[2] 58:18 67:1 considerable ^[1] 60:14 consideration ^[3] 11:14,25 64:13 consistent ^[2] 40:13 53:18 construction ^[2] 9:13 62:9 constructive ^[1] 27:8 constructively ^[4] 9:15,23,25 10:13 CONSULTING ^[2] 1:6 3:5 consummated ^[1] 64:2 contemplated ^[1] 4:25 context ^[4] 9:4 35:17,19 59:21 contingent ^[1] 6:24 continue ^[1] 49:1 continued ^[1] 68:4 contract ^[9] 4:11,12,18 5:1 7:5 32:2 33:25 56:21 63:4 contractual ^[3] 7:21,23,24 contributions ^[1] 55:4 control ^[4] 20:16,19 21:9 45:18 controls ^[1] 4:3 convey ^[1] 12:5 conveyance ^[3] 13:19,23 48:21 correct ^[11] 5:12 9:11,17 12:7 15:8,15,22 26:19 31:17 66:20,23 correctly ^[1] 17:3 counsel ^[3] 32:14 63:9 68:22 count ^[1] 56:9 couple ^[1] 32:25 course ^[7] 4:4 24:25 36:17 37:25 42:25 47:7 67:12 COURT ^[13] 1:1,14 3:10 12:9 18:21 29:3,5,7 32:19 33:6,17 62:10 67:3 courts ^[7] 17:6 20:21 21:11 44:4 47:1 67:24 68:2 cover ^[4] 12:5 14:17 16:14,18 covered ^[8] 32:8 34:21 38:1 55:5,9,16 56:23 68:19 covers ^[2] 14:15 68:13 create ^[3] 6:12 41:2 48:15 creating ^[1] 7:3 Credit ^[21] 3:13 11:9,12 15:5,6,12,12 16:3,11 36:5 37:15,17,23,25 39:15 43:16 53:10,21 54:4,20,21 creditor ^[2] 50:16,19 creditors ^[4] 5:16 58:21 60:7,15 credits ^[1] 13:8 critical ^[1] 55:21 crop ^[2] 32:2,4 cross-references ^[2] 38:6 50:4 curious ^[2] 13:10 61:10 custodian ^[5] 16:7,10,13 35:7,10 customer ^[7] 16:8,10 17:7 19:8 34:13 35:5 56:1 customers ^[4] 16:5 34:19 51:8 61:4 cut ^[1] 68:3</p>	<p>days ^[1] 30:11 deal ^[2] 6:24 27:18 dealing ^[6] 16:18 23:7,8 27:7,10 28:6 deals ^[1] 20:8 dealt ^[3] 16:22 47:24 48:16 debate ^[2] 35:15 55:8 debates ^[1] 56:12 debts ^[1] 13:7 debt ^[2] 8:8,10 debtor ^[18] 8:9,10,17 24:24 25:3 41:18 42:4 51:21,25 52:2,13,16 53:11,13 54:13,19,20 57:5 debtor's ^[1] 52:3 decide ^[7] 17:16 33:15,17,21 34:1 40:24 62:11 deciding ^[1] 16:19 decision ^[2] 6:8 63:5 deed ^[1] 31:1 defendants ^[1] 67:10 defense ^[6] 38:3 42:16 57:24,25 58:8 64:25 defenses ^[1] 42:14 define ^[5] 8:4 14:20 41:15,25 44:14 defined ^[5] 21:2,7 31:21 59:17 60:25 defines ^[1] 44:16 definition ^[8] 16:2 19:11,21 21:12,16 32:22 34:19 55:25 degree ^[1] 37:10 delivered ^[1] 66:3 delivering ^[1] 66:4 delivers ^[1] 65:13 depend ^[1] 42:22 deposited ^[1] 66:8 describes ^[1] 38:8 designed ^[1] 62:7 details ^[1] 42:23 determine ^[1] 20:22 determined ^[1] 27:7 developed ^[1] 20:20 difference ^[2] 18:12 29:20 different ^[15] 10:7,20,23,25 27:15 28:17,21 29:22 30:1,6,7 56:3 58:7 59:16 67:22 differently ^[1] 42:1 difficult ^[1] 60:1 difficulty ^[3] 17:17 24:20,22 directed ^[1] 48:22 disagree ^[1] 35:21 disciplined ^[1] 45:8 discussion ^[2] 4:8,15 disjunctive ^[1] 3:19 dismiss ^[5] 34:5 40:20 46:19 47:2 51:14 dispute ^[2] 33:7,19 disregarded ^[1] 65:25 distinct ^[1] 4:23 distinction ^[1] 55:23 distribution ^[3] 5:15 6:10 67:13 distributions ^[1] 6:7 District ^[1] 47:24 doing ^[6] 11:6 28:8 29:7 45:21 56:</p>
C			
<p>call ^[2] 29:8 67:5 called ^[3] 9:7 28:9 47:25 came ^[2] 1:13 41:17 capital ^[1] 23:23 capitalized ^[1] 8:11 captured ^[1] 49:14 care ^[2] 3:25 45:4 carve ^[1] 60:10 carving ^[1] 60:12 cascade ^[1] 23:17 Case ^[46] 3:4,11 4:20 6:5 12:11 13:22,25 14:12 15:24 16:18 17:13 18:22,25 33:4,6 34:5,12,12 36:1 37:14 40:7 42:12 46:3,18,23 47:13,25 48:1 49:18 51:2,15 57:20 58:10,20 59:23 61:11,12 63:20 67:2,4,5,11,13 68:7,22,23 cases ^[6] 4:10 18:16 26:1 41:13 53:1,2 cash ^[2] 56:23 61:2 catastrophe ^[1] 61:20 causes ^[1] 8:10 center ^[1] 34:9 central ^[1] 26:5 cents ^[1] 58:22 certain ^[7] 21:23 24:10 37:2 44:24 45:1 54:12 59:19 certainly ^[2] 52:5 61:12 cetera ^[4] 15:21,21 48:25 64:14 challenged ^[2] 29:16,18 chance ^[2] 44:13,14 Chapter ^[3] 41:10 53:15,18 characterize ^[2] 28:17,20 characterizes ^[1] 63:17 charitable ^[3] 54:11,13 55:3 charity ^[4] 54:16,19,21,22 check ^[9] 12:5,7,22 37:3 55:4 56:3 65:12 66:3,4 checks ^[4] 12:25 13:9 55:15 56:9 CHIEF ^[14] 3:3,9 12:3,18 32:13,18 36:19 37:9 38:16 39:10,15 63:8 68:9,21 choose ^[1] 8:1 circle ^[1] 23:11 Circuit ^[3] 45:20 58:25 62:9 Circuit's ^[3] 26:6 49:15 67:8 circuits ^[1] 3:25 circumstances ^[2] 19:9 34:20 Citizens ^[21] 3:13 10:22,24 11:9,12 15:7,14 16:4,9 35:13,19 36:4,13 37:16 43:17 53:10,21 63:23 64:2 65:3 66:17</p>	<p>consequence ^[2] 66:17,22 consequences ^[2] 58:18 67:1 considerable ^[1] 60:14 consideration ^[3] 11:14,25 64:13 consistent ^[2] 40:13 53:18 construction ^[2] 9:13 62:9 constructive ^[1] 27:8 constructively ^[4] 9:15,23,25 10:13 CONSULTING ^[2] 1:6 3:5 consummated ^[1] 64:2 contemplated ^[1] 4:25 context ^[4] 9:4 35:17,19 59:21 contingent ^[1] 6:24 continue ^[1] 49:1 continued ^[1] 68:4 contract ^[9] 4:11,12,18 5:1 7:5 32:2 33:25 56:21 63:4 contractual ^[3] 7:21,23,24 contributions ^[1] 55:4 control ^[4] 20:16,19 21:9 45:18 controls ^[1] 4:3 convey ^[1] 12:5 conveyance ^[3] 13:19,23 48:21 correct ^[11] 5:12 9:11,17 12:7 15:8,15,22 26:19 31:17 66:20,23 correctly ^[1] 17:3 counsel ^[3] 32:14 63:9 68:22 count ^[1] 56:9 couple ^[1] 32:25 course ^[7] 4:4 24:25 36:17 37:25 42:25 47:7 67:12 COURT ^[13] 1:1,14 3:10 12:9 18:21 29:3,5,7 32:19 33:6,17 62:10 67:3 courts ^[7] 17:6 20:21 21:11 44:4 47:1 67:24 68:2 cover ^[4] 12:5 14:17 16:14,18 covered ^[8] 32:8 34:21 38:1 55:5,9,16 56:23 68:19 covers ^[2] 14:15 68:13 create ^[3] 6:12 41:2 48:15 creating ^[1] 7:3 Credit ^[21] 3:13 11:9,12 15:5,6,12,12 16:3,11 36:5 37:15,17,23,25 39:15 43:16 53:10,21 54:4,20,21 creditor ^[2] 50:16,19 creditors ^[4] 5:16 58:21 60:7,15 credits ^[1] 13:8 critical ^[1] 55:21 crop ^[2] 32:2,4 cross-references ^[2] 38:6 50:4 curious ^[2] 13:10 61:10 custodian ^[5] 16:7,10,13 35:7,10 customer ^[7] 16:8,10 17:7 19:8 34:13 35:5 56:1 customers ^[4] 16:5 34:19 51:8 61:4 cut ^[1] 68:3</p>	<p>days ^[1] 30:11 deal ^[2] 6:24 27:18 dealing ^[6] 16:18 23:7,8 27:7,10 28:6 deals ^[1] 20:8 dealt ^[3] 16:22 47:24 48:16 debate ^[2] 35:15 55:8 debates ^[1] 56:12 debts ^[1] 13:7 debt ^[2] 8:8,10 debtor ^[18] 8:9,10,17 24:24 25:3 41:18 42:4 51:21,25 52:2,13,16 53:11,13 54:13,19,20 57:5 debtor's ^[1] 52:3 decide ^[7] 17:16 33:15,17,21 34:1 40:24 62:11 deciding ^[1] 16:19 decision ^[2] 6:8 63:5 deed ^[1] 31:1 defendants ^[1] 67:10 defense ^[6] 38:3 42:16 57:24,25 58:8 64:25 defenses ^[1] 42:14 define ^[5] 8:4 14:20 41:15,25 44:14 defined ^[5] 21:2,7 31:21 59:17 60:25 defines ^[1] 44:16 definition ^[8] 16:2 19:11,21 21:12,16 32:22 34:19 55:25 degree ^[1] 37:10 delivered ^[1] 66:3 delivering ^[1] 66:4 delivers ^[1] 65:13 depend ^[1] 42:22 deposited ^[1] 66:8 describes ^[1] 38:8 designed ^[1] 62:7 details ^[1] 42:23 determine ^[1] 20:22 determined ^[1] 27:7 developed ^[1] 20:20 difference ^[2] 18:12 29:20 different ^[15] 10:7,20,23,25 27:15 28:17,21 29:22 30:1,6,7 56:3 58:7 59:16 67:22 differently ^[1] 42:1 difficult ^[1] 60:1 difficulty ^[3] 17:17 24:20,22 directed ^[1] 48:22 disagree ^[1] 35:21 disciplined ^[1] 45:8 discussion ^[2] 4:8,15 disjunctive ^[1] 3:19 dismiss ^[5] 34:5 40:20 46:19 47:2 51:14 dispute ^[2] 33:7,19 disregarded ^[1] 65:25 distinct ^[1] 4:23 distinction ^[1] 55:23 distribution ^[3] 5:15 6:10 67:13 distributions ^[1] 6:7 District ^[1] 47:24 doing ^[6] 11:6 28:8 29:7 45:21 56:</p>	
D			
<p>D.C ^[2] 1:10,20 data ^[1] 26:14 day ^[4] 36:3 46:10 52:6 58:23</p>	<p>D.C ^[2] 1:10,20 data ^[1] 26:14 day ^[4] 36:3 46:10 52:6 58:23</p>	<p>D.C ^[2] 1:10,20 data ^[1] 26:14 day ^[4] 36:3 46:10 52:6 58:23</p>	

Official

<p>22 61:1 dollar ^[1] 58:22 dollars ^[3] 61:1 64:4 67:2 dominion ^[3] 20:16,20 45:18 done ^[1] 47:5 doubt ^[1] 33:11 down ^[1] 60:17 Downs ^[4] 14:23,25 15:5 30:5 draw ^[2] 55:22 62:4 due ^[1] 55:18</p>	<p>exact ^[1] 57:16 Exactly ^[2] 21:17 27:24 example ^[5] 21:20 22:16 24:23 44:24 68:16 exception ^[10] 15:19,20 26:9,12 27:17 38:3 53:4 54:11,24 58:8 exceptions ^[1] 67:24 exempt ^[2] 7:6 17:9 exempted ^[2] 58:17 59:19 exemption ^[5] 9:19 10:9 30:12 59:16 62:12 exempts ^[1] 54:12 exertion ^[1] 37:11 exist ^[1] 59:7 expand ^[1] 68:4 expanded ^[3] 67:21,21,21 explain ^[1] 5:3 explained ^[1] 50:9 explains ^[1] 36:17 exposed ^[1] 67:19 extent ^[1] 36:8</p>	<p>finish ^[1] 68:9 first ^[10] 12:24 28:4,5 29:4 33:2 34:10 45:7 55:14 56:10 58:10 fish ^[1] 18:20 fisher ^[1] 34:3 fishermen ^[2] 18:17,18 Fishing ^[3] 18:16 33:16,17 fit ^[1] 8:19 fits ^[1] 41:9 five ^[2] 38:6 61:4 flag ^[1] 61:23 flip ^[1] 29:11 focus ^[2] 4:2 63:16 focused ^[1] 7:11 focusing ^[1] 3:16 folks ^[1] 36:13 following ^[1] 27:20 fool's ^[1] 60:23 footnote ^[1] 19:18 force ^[1] 65:8 forward ^[4] 32:2 47:6,7 50:25 Four ^[1] 63:10 frankly ^[1] 61:25 fraud ^[1] 27:8 fraudulent ^[9] 7:4 9:16,23 10:1,13 13:19,23 48:21 60:11 fraudulent-transfer ^[2] 7:17 8:7 fraught ^[1] 17:17 free ^[1] 41:6 frequently ^[1] 4:16 friend ^[6] 12:3 15:5 35:22 46:8 55:2,14 friend's ^[1] 26:16 friends ^[1] 34:9 front ^[1] 34:8 FTI ^[2] 1:6 3:5 full ^[1] 65:8 fully ^[3] 62:14,20,21 function ^[1] 22:5 functional ^[1] 45:17 functioning ^[1] 36:25 fund ^[1] 6:11 funds ^[3] 23:25,25 67:18 further ^[1] 32:10</p>	<p>good-bye ^[1] 48:25 GORSUCH ^[22] 24:3,5,12 25:5,7,11,14,17,22 26:3,13,20 55:1,14,17 56:1,14,24 57:2,14 58:24 67:8 got ^[5] 5:14 30:11 33:19 37:17 66:7 granted ^[1] 34:5 gravel ^[1] 28:15 ground ^[1] 60:6 GROUP ^[3] 1:3 3:5 14:24 guess ^[2] 29:2 65:14 guy ^[1] 15:11</p>
<p style="text-align: center;">E</p> <p>each ^[3] 16:5 31:2 38:7 earlier ^[4] 4:10 17:21 21:19 63:15 early ^[1] 46:19 economy ^[1] 59:3 effect ^[7] 48:15 59:1 64:1 65:8,16 66:2,7 efficiencies ^[1] 60:2 effort ^[2] 43:3 60:20 efforts ^[1] 49:12 eight ^[1] 6:14 either ^[4] 5:5 6:3 52:25 53:3 elephant ^[1] 32:21 embarrassment ^[1] 34:18 emphasized ^[1] 33:6 emphasizing ^[1] 60:19 empirical ^[4] 25:19,20 55:8 56:12 employees ^[1] 67:17 enacted ^[1] 51:4 end ^[2] 36:3 52:6 end-to-end ^[6] 4:21 9:8 10:3 28:24 29:8 63:19 ended ^[1] 40:8 endorse ^[1] 57:8 ends ^[1] 52:13 engaging ^[1] 7:8 enough ^[4] 12:22 47:19 58:22 61:5 entered ^[1] 5:1 entirely ^[3] 29:12,22 41:15 entities ^[10] 23:11 34:14,16 40:19 60:22,25 61:4 62:19 63:1 67:19 entity ^[2] 5:5 18:10 enumerated ^[1] 18:10 equity ^[2] 23:25 43:25 equivocal ^[1] 57:6 errand ^[1] 60:23 escrow ^[13] 15:7,13 19:13 30:3,4,11,24,25 36:14 56:2 63:24 65:3,7 essentially ^[5] 42:14,19 53:15 60:6 63:2 estate ^[8] 26:24 29:24 30:14 31:15,17,19,22 36:3 et ^[4] 15:20,21 48:24 64:14 even ^[11] 7:3 22:23 23:6 26:4 33:4 42:5 49:18 52:12 54:4 57:11 61:25 event ^[2] 37:5,5 eventually ^[3] 37:16 51:9,12 everybody ^[4] 30:11 48:16 63:2 67:16 everything ^[4] 4:3 22:15 54:18 64:8</p>	<p style="text-align: center;">F</p> <p>face ^[2] 50:7,20 facie ^[2] 58:10 59:23 fact ^[6] 18:19 33:6,18 34:15 52:8 62:18 fact-specific ^[1] 46:22 facto ^[1] 34:14 fail ^[2] 12:1 23:19 fair ^[1] 16:15 faith ^[3] 43:10 64:14,25 faithful ^[1] 51:3 fall ^[2] 14:1 15:18 falls ^[1] 64:8 far ^[3] 12:10,12 30:20 farmer/fisher ^[1] 34:3 farmers ^[2] 18:19 33:15 Farming ^[1] 33:18 favor ^[1] 12:10 avored ^[1] 60:8 feature ^[2] 26:5 33:8 FedEx ^[1] 66:2 fee ^[2] 30:16 36:9 feel ^[1] 43:16 fell ^[1] 53:21 fertile ^[1] 60:5 few ^[1] 67:24 fields ^[1] 7:6 figure ^[1] 40:5 file ^[2] 61:16 62:16 filed ^[3] 26:1 57:23 67:4 fill ^[1] 28:12 filled ^[1] 28:10 financial ^[48] 3:12,20 5:8 6:22 12:14 14:20 15:3 16:2,6 17:8 18:2 19:1,8,11,22 22:24 23:21,24 24:1,15 25:8 30:19 31:11 32:23 33:16 40:5 46:18 47:17,18 48:5,14,24 49:4 51:6,12,13 53:23 55:25 56:7 60:21,24 61:3 62:1 63:1 65:7,16 66:13 67:23 find ^[1] 46:4 fine ^[2] 34:7 46:5</p>	<p style="text-align: center;">G</p> <p>games ^[1] 42:7 gave ^[1] 68:16 gee ^[1] 30:16 general ^[3] 6:18 40:14 61:14 generally ^[2] 8:8 19:2 getting ^[1] 60:6 GINSBURG ^[14] 5:2,9,13,19 6:2 11:7,23 18:3,6,24 19:15 47:11,14,21 gist ^[1] 5:17 give ^[4] 14:23 54:16 57:3 66:8 given ^[2] 31:3 36:1 gives ^[3] 15:11 31:2 46:25 giving ^[5] 44:13 54:11 56:17,18,25 glove ^[1] 58:12 goal ^[1] 5:23 Goldman ^[7] 22:17,20 23:4,7,9 67:12 68:17</p>	<p style="text-align: center;">H</p> <p>half ^[2] 64:4 67:2 hand ^[1] 58:12 handed ^[1] 5:21 happen ^[3] 17:11 22:4 27:2 happens ^[4] 24:6 35:25 63:19 67:10 harbor ^[18] 3:15 6:21 9:4 11:11 12:12 14:1,14 25:4 26:22 27:2 28:3 29:10,13,15 38:4 53:22 67:22 68:13 Hathaway ^[2] 22:18 68:18 havens ^[1] 64:13 head ^[1] 33:13 hear ^[2] 3:3 18:22 heard ^[2] 55:6 59:9 hearing ^[1] 15:24 held ^[5] 14:6,8 30:10 67:17,18 help ^[1] 24:5 helpful ^[1] 32:20 helps ^[1] 52:25 history ^[1] 57:20 hit ^[3] 22:19 23:16 66:19 hold ^[1] 49:8 holding ^[1] 13:6 honestly ^[1] 46:7 Honor ^[24] 4:7 6:19 7:7 8:3 10:15 12:8 13:25 16:16 17:1 18:13 19:21 20:19 21:11,19 23:4 24:22 26:12,19 28:5 29:21 31:5 59:12 64:17 65:19 horribles ^[2] 59:9,12 hub ^[1] 48:13 hypothetical ^[5] 30:10 40:4 42:17,22 43:6 hypothetically ^[1] 35:11</p> <p style="text-align: center;">I</p> <p>idea ^[4] 34:3,4 40:1 45:3 identified ^[2] 23:11 57:22 identifies ^[1] 63:17 identifying ^[1] 53:16 ignore ^[1] 56:7 ignores ^[1] 53:15 imagine ^[3] 37:14 38:23 60:24 immediate ^[1] 43:8 implicate ^[1] 25:3 implicated ^[1] 27:1 implications ^[1] 58:14 important ^[3] 39:22 43:13 68:5 impose ^[1] 20:25</p>

<p>improvidently ^[1] 34:5 inadequately ^[1] 8:11 INC ^[1] 1:6 include ^[2] 14:24 19:8 included ^[1] 3:14 including ^[3] 59:24 64:18 67:22 inconsistent ^[3] 29:1 34:11,21 inconvenienced ^[1] 35:20 incurred ^[1] 8:9 independent ^[1] 4:23 indirect ^[2] 13:6 14:9 indivisible ^[1] 35:24 Industrial ^[1] 15:20 industry ^[4] 48:14 59:2,6 62:12 inference ^[1] 62:4 information ^[2] 25:19,21 initial ^[8] 21:12,15,16 43:9 49:2,7, 9 51:20 initially ^[1] 21:13 inquiry ^[3] 46:22 47:9,9 insecure ^[2] 6:16,19 insider ^[4] 45:2,6 50:16,20 insight ^[1] 61:8 insolvent ^[1] 8:10 instance ^[2] 16:6 58:10 instead ^[2] 36:11 57:17 institution ^[26] 3:20,20 5:8 12:14 16:3 17:8 18:2 19:1,8,11,22 24:2, 15 25:9 30:19 32:23 43:24 47:17 48:24 49:4 54:13 55:25 56:8 66: 13 68:12,14 institutions ^[10] 3:13 5:11 14:21 15:4 16:6 20:1 51:13 62:1 65:7 67: 23 integrally ^[2] 28:22,22 intended ^[2] 6:21 62:25 interest ^[10] 3:22 4:22 20:23 33:16 34:6 40:14 47:8 51:25 52:13 60: 14 interests ^[1] 62:8 intermediaries ^[9] 3:15 36:24 37: 1,1 40:12 45:5 46:12,18 51:6 intermediary ^[7] 12:14,15,17 38: 19 40:6 41:20 48:5 intermediate ^[6] 9:22,25 10:2,5, 11 28:25 interpretation ^[3] 24:7,14,19 interpreting ^[1] 67:25 interrelated ^[1] 28:23 interrelationships ^[1] 38:11 invalidate ^[1] 41:7 investors ^[2] 6:10,18 involve ^[2] 25:8,13 involved ^[8] 6:22 8:5 10:16 24:15 37:6 44:17 53:10 58:16 involves ^[3] 17:7 18:17 44:12 involving ^[4] 13:4 18:16 65:7 67:2 ipso ^[1] 34:14 Isn't ^[7] 7:21 9:9 27:24 29:17 30: 20 33:22 41:5 issue ^[11] 6:6 9:2 15:25 19:16,20 33:3,21,22 34:8 50:22 67:7</p> <hr/> <p style="text-align: center;">J</p>	<p>Joe ^[3] 30:19,22,24 Judge ^[1] 17:7 juice ^[1] 43:2 JUSTICE ^[159] 3:3,9,24 5:2,9,13, 19 6:2,15,20 7:2,13,16,24 8:4,14, 16,24 9:1,7,12,15,18 10:8 11:7,13, 18,23 12:3,18 13:10,14,18,22 14:2, 5,10,13,15 15:2,9,16,23 16:17 17: 4,13,22,24 18:3,6,7,14,23 19:4,7, 15 20:11 21:1,4,8,17 22:25 24:3,5, 12 25:5,7,11,14,17,22 26:3,13,20 27:11,13,14 29:2 30:9,15,22 31:8, 12,18,23 32:5,9,13,18,22,25 33:11 34:2,24 36:19 37:10 38:16 39:10, 15 40:21 41:1,11 43:20 44:3,11, 12,20 45:13,16 46:1 47:11,14,20 48:8,17 49:13,16,19,23 50:1,5,11, 17 51:16,18,19 52:4,17 53:8,20 54:8 55:1,14,17,23 56:1,14,24 57: 2,14 58:2,5,24 61:7 63:8,14 64:10, 20,23 65:9,11,22 66:1,16,21,24 67: 7 68:9,21 justifiably ^[1] 67:9</p> <hr/> <p style="text-align: center;">K</p> <p>KAGAN ^[12] 27:11,13 29:2 34:24 40:21 41:1,11 45:13 46:1 58:2,5 61:7 Kagan's ^[3] 44:12,20 63:14 KENNEDY ^[9] 3:24 11:13,18 22: 25 30:9 43:20 44:3,11 45:16 kept ^[1] 51:19 kind ^[4] 29:5 40:3 42:17 56:6 kinds ^[3] 14:17 16:20 42:14 knowing ^[1] 13:14</p> <hr/> <p style="text-align: center;">L</p> <p>lack ^[1] 62:1 land ^[1] 30:10 language ^[1] 50:14 large ^[1] 59:21 larger ^[2] 59:19 67:5 last ^[2] 60:16 68:6 later ^[2] 7:10 49:11 Laughter ^[1] 58:4 law ^[2] 24:6 40:8 laws ^[1] 60:11 lawyer ^[1] 57:17 lay ^[1] 4:5 leading ^[1] 24:9 least ^[4] 12:12 54:5 60:1 61:22 leave ^[1] 40:24 less ^[2] 4:14 13:1 leveraged ^[6] 59:2,6,15,18 60:4, 10 liability ^[7] 6:5 20:5,9,25 23:16,17 67:14 liable ^[1] 21:23 lien ^[1] 27:2 liens ^[1] 26:25 limitations ^[1] 39:24 limited ^[2] 22:1 50:15 limits ^[1] 44:21 line ^[6] 15:6,11 22:19 55:10 66:20</p>	<p>68:2 lines ^[1] 22:13 list ^[1] 60:22 literally ^[1] 47:2 litigation ^[1] 6:14 little ^[4] 27:15 34:17 57:6 63:15 logical ^[1] 58:1 long ^[3] 30:8 43:9 58:15 look ^[25] 13:11 14:20 16:2,16 17:6 27:16 28:7,13 29:11 33:9,18 35: 15 38:13 39:17 40:16,23 44:6 47: 2,3 48:18 49:10,20 50:20 58:6 62: 3 looking ^[6] 29:7 30:7 46:20 52:10 56:15 58:9 looks ^[1] 3:21 loses ^[2] 47:6 50:23 losing ^[1] 46:3 lot ^[12] 4:8 24:12,16 26:8 28:13,15 36:24 46:2 52:9 55:3 58:13 60:12 lots ^[1] 59:23 louder ^[1] 61:25 Louis ^[1] 1:18 love ^[2] 33:16,21 lower ^[2] 17:5 20:21 LP ^[1] 1:3 Lynch ^[1] 67:13</p> <hr/> <p style="text-align: center;">M</p> <p>made ^[9] 4:24 23:5 30:8,18 48:23 52:15,16 54:15 64:7 mailbox ^[1] 65:16 majority ^[3] 13:3 53:1 54:14 MANAGEMENT ^[2] 1:3 3:5 manufacturer ^[1] 25:2 many ^[4] 22:20,21 55:9 66:3 maps ^[1] 57:19 margin ^[1] 56:19 markets ^[8] 5:25 6:1 7:12 23:21 27:9 59:22 60:3 61:20 matter ^[3] 1:13 5:20 36:22 matters ^[1] 49:10 mean ^[31] 5:3 17:5,15 18:15 25:18, 18 27:15,21 29:14 31:8 36:20 37: 14 38:22 40:22,22 42:10 44:1 46: 4 55:11,21 56:16 57:11 58:19 59: 10 60:1,5 62:3,13 65:11 66:2,3 means ^[3] 15:11 35:16 49:6 meant ^[1] 58:3 meet ^[1] 24:10 mentioned ^[2] 67:8 68:7 MERIT ^[21] 1:3 3:4 5:4,14,22 8:18 10:20,25 14:25,25 15:10 18:9 36: 3 37:17,22 51:8 57:23 63:21,24 64:3 65:6 merits ^[1] 11:21 Merrill ^[1] 67:12 middle ^[1] 29:4 might ^[11] 13:25 38:21 39:18 41: 11 42:22 55:24 58:3 59:17,18 61: 8,9 million ^[12] 10:16,21 14:24 25:25 30:2,24,25 31:25 36:4 60:25 64:4 67:2</p>	<p>mind ^[1] 18:8 minutes ^[1] 63:10 mischievous ^[2] 41:3,14 misread ^[1] 57:7 Missouri ^[1] 1:18 misunderstood ^[1] 18:12 Monday ^[1] 1:11 money ^[18] 5:14 6:17 8:18 35:13 36:6 37:8,16,21 38:24 39:11 40:9 49:8,11 60:6 65:14 66:7,9 68:19 morning ^[1] 3:4 motion ^[4] 40:20 46:19 47:2 51:14 move ^[3] 47:6,7 50:25 moving ^[1] 37:7 much ^[9] 4:12,14 12:15 22:21 45:4 52:23 59:5,11 62:15 mulcting ^[1] 60:14 music ^[1] 40:9 must ^[1] 19:16</p> <hr/> <p style="text-align: center;">N</p> <p>nagging ^[1] 33:13 named ^[1] 5:11 namely ^[2] 16:11 17:8 narrow ^[3] 34:20 35:5 62:9 natural ^[1] 38:12 nature ^[1] 40:14 nearly ^[1] 12:10 necessarily ^[4] 10:5 12:9,21 21: 14 need ^[4] 12:9 26:4 36:13 57:4 Neither ^[6] 5:7 6:4 15:3 18:9,24 33: 12 never ^[3] 33:3 45:6 61:11 Nevertheless ^[2] 22:22 23:12 New ^[1] 47:24 nice ^[5] 40:11 46:25 51:5,10,14 nobody ^[2] 16:23 26:14 nominal ^[1] 68:18 non-debtor ^[2] 51:24 52:3 non-debtor's ^[1] 51:23 non-literal ^[1] 21:15 nonsense ^[1] 54:24 nor ^[1] 18:9 normally ^[2] 8:22 62:3 nothing ^[6] 18:20 22:12 52:21,24 53:6 54:6 notion ^[2] 23:14 68:11 notwithstanding ^[2] 27:18 28:16 November ^[1] 1:11</p> <hr/> <p style="text-align: center;">O</p> <p>obligated ^[1] 8:18 obligation ^[11] 7:18,20,21,22,25 8: 2,7,19,20 9:1 36:10 obligations ^[3] 9:5 37:2 64:3 obviously ^[1] 25:3 occasions ^[1] 10:25 odd ^[1] 27:21 offered ^[1] 56:8 often ^[3] 25:5,7,12 okay ^[7] 13:12 15:14,23 30:22 54:8 64:14 66:24 once ^[1] 64:6</p>
---	--	---	--

<p>one ^[3] 5:10 9:2,12 19:24,24 23:4 34:13,15,19 36:7,7 38:7,19,20,25 40:19 41:9 42:15 43:17 44:18 45:12,24 46:8 48:11,13 56:21 59:16 61:13 65:20 68:6,6</p> <p>ones ^[3] 40:2 59:19,19</p> <p>only ^[13] 3:21 9:5 10:16 11:2 16:3,4 20:5 22:5 35:5 43:3 44:25 47:16 65:20</p> <p>opinion ^[4] 26:6 43:21 44:6 67:8</p> <p>opponent ^[2] 13:1 22:3</p> <p>opposed ^[1] 10:11</p> <p>oral ^[5] 1:13 2:2,5 3:7 32:16</p> <p>order ^[3] 34:1 41:24 50:2</p> <p>ordinary ^[1] 24:25</p> <p>original ^[2] 42:4,20</p> <p>other ^[19] 5:10 8:11,12 11:1 12:4 22:12 23:18,24 27:22 29:4 31:2 33:15 49:5,9 51:9 60:17 61:18 64:12 67:19</p> <p>others ^[1] 28:25</p> <p>otherwise ^[6] 5:14 9:21 26:17 45:5 49:5 58:20</p> <p>out ^[17] 4:1 10:18 16:19 17:15 24:6 40:5 46:18 48:25 49:4 56:22 60:6,10,12 63:23 65:3,6 68:2</p> <p>outside ^[4] 23:10 24:24 31:7,10</p> <p>over ^[3] 5:21 51:2 67:20</p> <p>overall ^[5] 10:3,4 34:11,12,22</p> <p>overlap ^[2] 25:24 27:4</p> <p>overriding ^[1] 11:4</p> <p>owes ^[1] 36:3</p> <p>own ^[4] 6:10 23:7 39:3 67:14</p> <p>owners ^[1] 46:14</p> <p>ownership ^[1] 46:21</p>	<p>pays ^[1] 12:7</p> <p>pension ^[3] 6:11 23:25 67:18</p> <p>people ^[5] 6:22 7:5 14:24 66:7,8</p> <p>perceived ^[1] 21:21</p> <p>percent ^[2] 53:1,6</p> <p>perfectly ^[1] 38:12</p> <p>Perhaps ^[3] 17:23 27:3,14</p> <p>period ^[1] 45:1</p> <p>permits ^[1] 51:22</p> <p>person ^[5] 6:16 34:4 39:1 48:22 56:21</p> <p>petition ^[2] 33:8,10</p> <p>Petitioner ^[8] 1:4,19 2:4,10 3:8 33:5,10 63:12</p> <p>Petitioner's ^[2] 62:15,22</p> <p>pick ^[4] 36:7,11 41:6 43:15</p> <p>picking ^[1] 44:22</p> <p>piece ^[3] 30:23 43:1 45:19</p> <p>pieces ^[1] 28:21</p> <p>place ^[1] 57:16</p> <p>plaintiff ^[1] 4:20</p> <p>plans ^[1] 29:24</p> <p>play ^[2] 42:7 65:1</p> <p>played ^[1] 10:18</p> <p>players ^[2] 6:1 48:14</p> <p>please ^[2] 3:10 32:19</p> <p>pled ^[1] 42:17</p> <p>point ^[15] 11:2 17:6,9 18:15 33:4 35:2 39:23 45:19 46:8 54:2,6 56:10,11 68:6,10</p> <p>points ^[1] 32:25</p> <p>policy ^[1] 58:14</p> <p>poor ^[1] 36:12</p> <p>portray ^[1] 36:21</p> <p>position ^[8] 52:8,21,23 57:1,3,9,11 58:14</p> <p>positive ^[1] 33:8</p> <p>possibility ^[1] 7:9</p> <p>post ^[1] 64:11</p> <p>postman ^[3] 65:12,13,15</p> <p>power ^[6] 24:13 27:17 41:15 50:15 53:3 54:24</p> <p>powers ^[1] 45:12</p> <p>precise ^[1] 47:23</p> <p>precludes ^[1] 3:21</p> <p>predecessor ^[3] 46:10 48:2 51:4</p> <p>preexisting ^[1] 40:8</p> <p>preference ^[2] 24:23 48:20</p> <p>preferences ^[1] 24:6</p> <p>present ^[1] 19:9</p> <p>presented ^[1] 32:24</p> <p>prevail ^[3] 27:9 35:25 36:2</p> <p>prevent ^[1] 41:23</p> <p>prima ^[2] 58:9 59:23</p> <p>private ^[1] 23:25</p> <p>probably ^[4] 23:6 35:14 38:22 50:25</p> <p>problem ^[6] 18:21 21:22 22:9 23:14 28:16 46:20</p> <p>procedural ^[1] 57:20</p> <p>process ^[1] 28:14</p> <p>Professor ^[3] 52:9 57:13,18</p> <p>prohibition ^[2] 11:4 28:6</p> <p>properly ^[1] 54:3</p>	<p>property ^[8] 20:15,17 21:9 30:23 45:19 51:23,25 53:11</p> <p>propose ^[1] 22:4</p> <p>proposition ^[1] 43:22</p> <p>prospective ^[1] 9:2</p> <p>protect ^[12] 5:24,25 6:22 20:3 23:15 48:10 51:7,8 62:8,20 63:1,2</p> <p>protected ^[10] 34:14,14 40:7 43:11 60:22 62:14,21,22 64:12 68:12</p> <p>protecting ^[4] 20:1,2 22:13,16</p> <p>protection ^[2] 46:11 51:5</p> <p>protects ^[5] 22:6,10 35:5 40:12 62:12</p> <p>prove ^[1] 60:1</p> <p>provide ^[3] 23:23 40:11 46:16</p> <p>provided ^[1] 59:25</p> <p>provision ^[12] 7:17 9:19 16:23,24 17:2 35:4 42:20 45:3 46:12 48:18 59:20 62:6</p> <p>provisions ^[7] 7:4 38:10,11 39:8 41:10 44:25 50:3</p> <p>public ^[2] 13:4 59:22</p> <p>purchase ^[2] 12:6 32:3</p> <p>purchaser ^[2] 12:7,22</p> <p>purpose ^[1] 20:5</p> <p>purposes ^[6] 42:21 52:14 53:3,4,16 58:7</p> <p>pursue ^[2] 11:22 12:2</p> <p>pursuit ^[1] 25:1</p> <p>put ^[5] 17:4 27:14 28:15 34:8 50:22</p> <p>puts ^[3] 30:24 31:1 44:21</p> <p>putting ^[1] 65:15</p> <p>puzzle ^[1] 14:20</p> <p>puzzling ^[1] 16:1</p>	<p>really ^[16] 33:22 34:3,22 35:21 38:24 40:6 42:6 43:2 45:4 46:21 55:11 57:19 58:19 59:14 61:19 62:4</p> <p>reason ^[6] 15:24 21:11 35:18 41:2 46:6 50:13</p> <p>reasoning ^[1] 49:15</p> <p>reasons ^[1] 34:8</p> <p>REBUTTAL ^[2] 2:8 63:11</p> <p>receive ^[2] 6:6 64:16</p> <p>received ^[2] 64:18 67:13</p> <p>receives ^[1] 21:14</p> <p>receiving ^[1] 49:8</p> <p>recognize ^[1] 43:13</p> <p>reconcile ^[1] 24:18</p> <p>recover ^[5] 20:14,18 22:2 39:12,25</p> <p>recovery ^[4] 43:4 46:12 64:7 65:5</p> <p>red ^[1] 57:5</p> <p>refer ^[1] 17:2</p> <p>reference ^[3] 8:6,8 21:18</p> <p>referring ^[2] 45:16 57:12</p> <p>refers ^[1] 16:23</p> <p>refunded ^[1] 63:21</p> <p>reinvest ^[1] 6:9</p> <p>relatively ^[4] 27:5 34:20 40:15 60:1</p> <p>relegated ^[1] 19:17</p> <p>relevant ^[2] 3:11 52:15</p> <p>relying ^[1] 41:14</p> <p>remain ^[1] 67:19</p> <p>remember ^[2] 17:3 39:23</p> <p>repaid ^[1] 24:24</p> <p>reply ^[1] 19:18</p> <p>representation ^[2] 26:16,17</p> <p>requirements ^[1] 41:9</p> <p>reserve ^[2] 6:12 32:11</p> <p>resolved ^[2] 20:6 33:12</p> <p>respect ^[1] 55:19</p> <p>Respondent ^[4] 1:7,21 2:7 32:17</p> <p>Respondent's ^[1] 62:14</p> <p>response ^[6] 18:24 21:24 28:5,11,19 59:8</p> <p>responsive ^[2] 44:20 59:13</p> <p>rest ^[3] 62:23 65:21,24</p> <p>return ^[1] 63:14</p> <p>reverse ^[1] 36:14</p> <p>rights ^[1] 7:25</p> <p>ripple ^[1] 48:15</p> <p>risk ^[6] 6:3,4,23 23:20 24:1 60:13</p> <p>ROBERTS ^[11] 3:3 12:3,18 32:13 36:19 38:16 39:10,15 63:8 68:9,21</p> <p>room ^[1] 32:21</p> <p>ruin ^[1] 58:23</p> <p>rule ^[10] 12:10 26:10,10 33:24 40:11,15 46:24,25 47:1 51:11</p> <p>run ^[1] 38:22</p>
P		Q	
<p>PAGE ^[2] 2:2 33:9</p> <p>paid ^[6] 8:21 12:22 37:17 43:10 64:2,13</p> <p>paper ^[1] 13:7</p> <p>papers ^[1] 37:7</p> <p>parade ^[2] 59:8,11</p> <p>paradigm ^[1] 13:22</p> <p>parking ^[2] 28:13,14</p> <p>part ^[3] 39:25 41:4 47:9</p> <p>participants ^[4] 51:13 60:21,24 61:3</p> <p>participation ^[1] 43:25</p> <p>particular ^[10] 6:1,5 13:5 20:1 44:14 45:11,18,19 46:23 61:18</p> <p>parties ^[16] 4:21,25 5:4 6:6 17:25 18:1,17,25 21:23 22:1,12,25 23:23,24 33:20 48:1</p> <p>party ^[7] 3:22 20:23,25 21:13 28:8 33:12 60:8</p> <p>pass-through ^[2] 11:15 23:2</p> <p>passing ^[1] 46:9</p> <p>past ^[2] 35:9 67:20</p> <p>PAUL ^[3] 1:20 2:6 32:16</p> <p>pay ^[1] 37:22</p> <p>payment ^[15] 4:9,16 30:18 31:4,6,13,14,14,16,19,21,22 56:19,19,20</p> <p>payments ^[2] 37:4,5</p>	<p>positive ^[1] 33:8</p> <p>possibility ^[1] 7:9</p> <p>post ^[1] 64:11</p> <p>postman ^[3] 65:12,13,15</p> <p>power ^[6] 24:13 27:17 41:15 50:15 53:3 54:24</p> <p>powers ^[1] 45:12</p> <p>precise ^[1] 47:23</p> <p>precludes ^[1] 3:21</p> <p>predecessor ^[3] 46:10 48:2 51:4</p> <p>preexisting ^[1] 40:8</p> <p>preference ^[2] 24:23 48:20</p> <p>preferences ^[1] 24:6</p> <p>present ^[1] 19:9</p> <p>presented ^[1] 32:24</p> <p>prevail ^[3] 27:9 35:25 36:2</p> <p>prevent ^[1] 41:23</p> <p>prima ^[2] 58:9 59:23</p> <p>private ^[1] 23:25</p> <p>probably ^[4] 23:6 35:14 38:22 50:25</p> <p>problem ^[6] 18:21 21:22 22:9 23:14 28:16 46:20</p> <p>procedural ^[1] 57:20</p> <p>process ^[1] 28:14</p> <p>Professor ^[3] 52:9 57:13,18</p> <p>prohibition ^[2] 11:4 28:6</p> <p>properly ^[1] 54:3</p>	<p>qualification ^[1] 57:9</p> <p>qualify ^[3] 43:22 45:10 53:12</p> <p>qualifying ^[1] 54:13</p> <p>question ^[22] 7:14 14:18 17:16 18:4,7,24 21:10 27:14 32:22,24 34:1 40:25 44:20 48:21 49:1,1 51:17 55:7 58:2 63:15,22 66:10</p> <p>questions ^[5] 18:13 32:11 49:5 51:1 64:6</p> <p>quirk ^[1] 19:21</p> <p>quite ^[5] 12:25 58:19,19 60:13 66:5</p>	<p>R</p> <p>racetrack ^[1] 29:25</p> <p>raise ^[1] 42:14</p> <p>raised ^[1] 18:8</p> <p>random ^[1] 41:6</p> <p>rather ^[5] 3:16 5:21 19:10 29:17 38:20</p> <p>rationale ^[2] 12:20 20:22</p> <p>read ^[7] 3:24,25 27:21 35:4 38:2 53:14 57:5</p> <p>reading ^[2] 52:18,19</p> <p>real ^[9] 15:9 26:23 29:23 30:14 31:14,16,19,21 41:20</p> <p>reality ^[1] 29:1</p>
P		R	
P		R	
P		R	
P		R	
P		R	
P		R	
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Official

10,13,15 38:4 53:22 64:12 67:21 68:13 safely [1] 6:9 sale [1] 12:6 same [8] 10:21 12:15 18:15 30:7 31:23 46:22 57:16 67:23 satisfied [4] 8:12 50:23,24 64:3 satisfies [1] 47:5 satisfy [4] 42:19 43:19 50:3 54:1 Savings [1] 15:20 saying [5] 29:10,20,21 46:2 51:19 says [17] 7:17 12:4 15:5 16:3 20: 13 27:17 28:8 30:16 34:19 35:9, 22 41:24 47:17 50:12 56:18 65:19 66:12 scope [5] 8:5 12:20,24,24 62:11 second [6] 28:19 35:2 42:25 56:11 58:25 67:8 Section [2] 20:7,7 sections [2] 27:18 38:6 securities [17] 4:11,17 5:24 6:7 7: 11 13:4,5 15:18 25:4,13,24 27:9 30:14 31:10 56:20 58:16 63:4 security [2] 27:3,5 see [4] 14:23 31:12 32:6 44:2 seek [4] 11:8,11 12:1 39:19 seeking [12] 9:9,20 10:11 11:2 20: 17 38:14 39:8 40:17,18 44:23 47: 4 65:20 seeks [7] 4:6 27:23 28:2 41:7 44:7, 9 49:21 seem [2] 24:13,13 seems [14] 4:2 16:9,11 20:15 27: 21 29:12 33:14 38:9,12 40:13 45: 2,20 58:1,11 seen [1] 61:11 Seligson [3] 47:25 68:7,20 sell [2] 14:11 22:17 seller [1] 39:12 send [3] 8:18 15:6,13 sense [5] 4:5 17:14 21:5 38:18 66: 5 sent [3] 6:17 10:22,24 separable [1] 4:23 separate [1] 42:6 separated [1] 10:2 seriously [1] 37:6 serve [2] 12:16 34:6 serving [2] 12:14 41:19 set [1] 48:20 settlement [11] 4:2,9,16 30:18 31: 3,6,13,14,20 43:24 56:19 Seventh [4] 26:5 45:20 49:14 62:8 several [1] 37:1 SG [2] 61:16,21 share [1] 13:15 shareholders [3] 30:5 64:17 65:4 shares [2] 13:11 22:17 sheet [1] 23:7 shield [2] 29:15 48:10 shift [1] 29:3 shorthand [1] 10:17 shouldn't [4] 9:19 10:8,9 37:22 show [2] 45:10 52:25	showed [1] 55:24 side [2] 12:4 15:25 sides [2] 56:16 67:3 sign [1] 7:5 significant [3] 22:19 23:13 26:23 signing [1] 33:25 simple [6] 12:5 17:23 36:20 44:8 57:19 58:19 simpler [2] 44:5 49:18 simply [5] 11:5 28:7 36:20,21 38: 20 since [2] 33:14 57:16 sit [1] 60:16 situation [17] 8:23 19:12 21:20 38: 23 39:5,11,18,20 43:2,14 47:23,23 48:4,10 56:3,4 59:15 situations [2] 38:17 40:2 six [6] 6:14 23:11 34:13,20 40:19 63:1 sixth [1] 60:21 slightly [1] 15:25 small [2] 25:25 60:5 smaller [1] 59:19 Smith [4] 30:22,24 65:13,14 solace [1] 52:7 sold [2] 8:17 25:2 solely [1] 63:16 Solicitor [1] 61:13 somebody [5] 42:13 49:25,25 50: 15,18 someone [6] 8:9,17 23:8 50:8,8,9 somewhere [1] 13:12 sorry [11] 6:15 8:14 11:20 17:22 18:5 30:17 31:20 34:25 47:13 64: 10 68:8 sort [13] 28:7 33:7 35:24 36:13 37: 10 40:8 41:3,5 43:15 48:15 58:15 60:2,10 sorts [1] 44:21 SOTOMAYOR [27] 6:15,20 7:2,13, 16,24 8:4,14,16,24 9:1 17:22 20: 11 21:1,4,8,17 51:16,19 52:4,17 53:8,20 54:8 64:10,20,23 sought [2] 35:23 36:2 Southern [1] 47:24 space [1] 27:6 specifically [2] 18:8 62:7 spent [1] 52:9 spin [1] 27:15 St [1] 1:18 stage [2] 46:19 47:2 stamping [1] 37:7 standing [1] 17:15 standout [2] 19:16,20 start [4] 27:22 28:1 32:21 46:2 state [1] 20:14 STATES [3] 1:1,14 62:11 statute [21] 4:12 5:11,24 8:12,22 16:22 19:5 20:6 22:10 23:12 38:2, 7 55:22 57:4,5 60:20 61:5 66:12 67:25 68:3,4 statutes [2] 8:7 58:11 still [7] 35:13,14 42:18,19 47:8 49: 9 64:1	stipulate [2] 33:23,24 stock [9] 14:4 22:18,20 41:20 42:2, 5 67:17,18 68:18 stockbroker [1] 62:1 stockbrokers [1] 51:12 stop [1] 48:25 stopped [2] 38:25 40:9 stops [1] 39:20 straightforward [3] 12:6 38:1 40: 16 strange [1] 29:13 stressed [1] 47:15 striking [1] 58:19 strongly [1] 20:12 subdivide [1] 54:17 submitted [2] 68:22,24 subsequent [2] 30:4 43:7 subset [2] 10:23 22:1 substantial [1] 46:11 sudden [2] 24:17 29:9 suddenly [1] 15:18 sufficient [3] 11:5 28:11 59:24 suggest [1] 13:2 suggested [2] 58:2,6 suggesting [3] 11:22 45:25 55:12 suggests [1] 45:22 Suisse [19] 3:13 11:9,12 15:5,12 16:4,12 36:5 37:15,17,23,25 39: 15 43:16 53:10,21 54:4,20,21 superfluous [1] 60:23 supplement [1] 46:24 supported [1] 52:8 suppose [2] 26:18 39:14 SUPREME [3] 1:1,14 62:10 surely [1] 25:9 swallowing [1] 26:10 system [5] 13:6 14:9 22:24 23:24 68:15 systemic [2] 23:20 24:1	thousands [1] 67:10 three [1] 10:25 throughout [1] 53:18 thrust [1] 14:16 title [1] 30:12 today [1] 43:16 together [1] 58:12 took [1] 43:10 tough [1] 40:4 tracks [1] 39:21 trading [2] 23:9 39:3 transacted [1] 63:3 transaction [13] 3:23 7:8 20:24 23:1,5 28:21 31:15,17,19,22 48: 19 58:17 59:22 transactions [13] 6:8,23 20:2 22: 16 24:16 25:24 26:23,24 31:11 42: 6 60:13 61:1,2 transfer [122] 4:4,5,6,17,19,21,23 7:4,14,18,19 8:2 9:8,8,20 10:3,4,9, 10,18,19,21,24 11:3,9,11 13:16 14: 3,22 20:9 21:14,22,25 22:23 25:7 27:23 28:1,3,24 29:6,8,12,16,17, 22,23 30:1,2,8,18 35:12,22 36:1,9 37:15,18,24 38:4,8,14 39:6,6,8,9, 19 40:16,18 41:8,16,18,20,25 42:3 43:2,4,17 44:7,9,14,16,17,22 45:1, 2,6,11 47:3,18 48:23 49:3,21 50:7, 21 51:20,23 52:2,12,14 53:2,5,9, 13,25 54:4,18,19,21 56:6 57:22 58:9 63:16,19 64:7,17,19 65:5,20 66:6,13,14,15 67:15 transferee [14] 21:13,15,16 39:1, 25 43:8,9 49:2,7,7,10 51:1 53:17 57:4 transferees [1] 64:11 transferor [1] 53:17 transferred [5] 20:15 42:2,5 64:21 68:17 transferring [1] 51:24 transfers [39] 3:11,12 4:24,25 9:6, 22,25 10:2,6,12 12:25 13:3,8 22: 10 23:10 24:9 27:20 28:20,22,25 29:3 30:4,6 35:24 38:19 41:6 43: 24 48:11 50:15 54:12 55:7 56:7 58:7 63:23,25 65:3,6 68:12,14 transmission [1] 5:20 tree [1] 30:17 Tribune [2] 67:4,18 tried [4] 35:12 40:10 44:19 53:25 triviality [2] 26:4,8 true [5] 4:19 19:22,23 31:24 66:5 truly [2] 41:18 46:13 trust [1] 30:16 trustee [61] 4:6 5:13 7:17,25 9:9, 20 10:4,10 11:8,10,22 12:1 20:13, 17 23:12 27:19,23 28:1,23 29:6, 11 30:17 35:12,23 36:2 37:19,24 38:5,9,14,17,18 39:6,18 40:17,17 41:5,23,24 42:7,12,19,23 43:15 44:7,9,13,22 45:8,10 47:6 48:19 49:21 50:22,23 51:22 53:25 57:21 63:16 65:19 66:12 trustee's [7] 11:2 37:12 40:23 41:
---	--	---	---

T

talked [1] 58:13
talks [1] 38:4
targeted [1] 4:20
tells [1] 27:25
term [6] 19:1 21:12,16 31:6 38:7
52:15
terms [6] 15:10 41:9 42:20 50:22,
24 57:19
test [2] 20:20,22
text [1] 27:25
textual [2] 38:10 60:18
theory [8] 12:4 34:11,12,22 37:23
55:19,24 56:9
there's [19] 4:14,14 10:15 14:14
21:21 22:9 26:8 28:2 36:10 39:11
42:25 45:6 55:21 56:12,21 62:6,
24 66:16,17
therefore [2] 17:9 59:3
they've [2] 21:2,6
third-party [2] 43:7 52:12
though [9] 22:24 26:5 34:24 42:5,
22 46:6 54:2 61:25 67:1
thoughts [2] 61:15,18

15 42:17 47:4 60:9 trustees ^[2] 24:8 26:24 trustees' ^[1] 59:23 try ^[4] 36:21 42:10 54:5 59:12 trying ^[14] 13:20 19:3 23:15 33:5 37:12 41:13 46:16,23 48:2,20 51: 3 54:25 62:20 65:23 turns ^[4] 52:21,24 53:7 54:7 two ^[14] 5:3 10:25 13:11 15:17 18: 12,16 33:14,20 34:7 38:11 42:6, 14 50:3 55:13 typical ^[1] 24:23 typically ^[1] 9:3	WALSH ^[103] 1:18 2:3,9 3:6,7,9 4: 7 5:2,7,10,17,23 6:4,18 7:1,7,15, 23 8:3,6,15,20,25 9:3,11,14,17,24 10:14 11:10,16,20,24 12:8,23 13: 13,17,21,24 14:3,8,11,14 15:1,8, 15,22 16:15 17:1,12,19 18:5,11,23 19:6,10,19 20:19 21:3,6,10,18 23: 3 24:3,4,11,21 25:6,10,12,16,20, 23 26:7,18,21 27:11,12 28:4 29: 19 30:13,21 31:5,10,16,20 32:1,7, 10 63:10,11,13 64:15,21,24 65:10, 18,24 66:11,19,23,25 68:11 wanted ^[5] 7:2 14:22 20:3 33:12 51:10 wants ^[2] 8:1 14:23 Washington ^[2] 1:10,20 wasting ^[1] 61:6 wave ^[1] 61:22 waving ^[1] 61:22 way ^[17] 10:7,14 12:15 15:4 16:15 17:14 27:22 28:18,20,25 38:2 44: 4,5,15 46:17 53:14 54:5 ways ^[3] 19:24 30:7 66:4 wetland ^[3] 28:11,12,15 whatever ^[2] 14:25 37:10 wheat ^[1] 31:25 whenever ^[1] 6:23 Whereupon ^[1] 68:23 whether ^[17] 4:8,15 5:20 8:2 18:21 19:20,25 20:2,22 23:6,8 28:2 29:5 40:5,8 53:6 63:15 who's ^[5] 6:15 8:5 52:9 53:16,17 whoever ^[1] 42:4 whole ^[2] 37:20 58:23 whom ^[2] 6:17 22:1 widget ^[1] 25:2 wife ^[4] 13:16 14:4,12 16:20 will ^[7] 23:17,18,18 36:8 49:10 55: 2 62:11 willing ^[1] 23:23 win ^[2] 36:12 51:15 wire ^[5] 12:25 13:8 36:6,9 37:15 within ^[2] 14:1 54:23 without ^[2] 28:24 57:9 word ^[2] 4:2 55:21 words ^[2] 11:1 29:4 work ^[2] 43:12 58:11 works ^[1] 20:12 world ^[2] 58:6 62:23 worried ^[1] 40:1 worry ^[1] 26:4 worse ^[1] 45:24 worth ^[3] 22:20 60:19 62:16 wow ^[1] 62:6 write ^[2] 44:5 65:11 writing ^[1] 43:21 written ^[2] 44:4 59:16 wrote ^[1] 59:17
U	Y
U.S ^[1] 28:10 ultimate ^[3] 38:20 39:1,12 ultimately ^[4] 6:17 8:18 21:9 53:7 unavoidable ^[1] 24:17 under ^[18] 16:22,23 18:10 21:2 23: 22 24:7,14 32:2 39:7 40:7 43:5,9 45:11 46:12 53:21 57:4,5 60:19 underlying ^[1] 35:23 underscores ^[1] 62:19 understand ^[7] 11:1 12:19 16:24 36:23 45:15 54:6 59:4 understands ^[1] 19:5 understood ^[4] 6:20 19:2 31:7 54: 3 unearth ^[1] 36:14 UNITED ^[3] 1:1,14 62:11 unless ^[3] 27:2 32:10 56:21 unperfected ^[1] 26:25 unsecured ^[3] 58:21 60:7,15 until ^[1] 30:11 untouched ^[1] 26:22 unusual ^[1] 19:11 up ^[11] 4:24 16:2 17:20 24:9 30:8 40:9 41:8,17 52:13 55:3 62:10 urging ^[1] 61:19 useful ^[2] 10:14 63:18 uses ^[2] 19:7 38:7 utterly ^[1] 61:6	year ^[1] 26:1 years ^[4] 10:18,25 37:2 67:20 yellow ^[1] 61:22 York ^[1] 47:24
V	
valid ^[2] 33:25 64:1 Valley ^[11] 5:4,21 10:20,22 14:22, 23 15:4,10 18:1,9 30:3 value ^[2] 43:10 59:24 variety ^[1] 26:21 various ^[2] 39:7 45:9 vast ^[3] 13:3 53:1 54:14 vehicles ^[1] 26:24 vendor ^[1] 24:24 versus ^[2] 3:5 26:16 View ^[15] 5:4,21 10:20,22 14:22 18: 1,9 30:3 54:17 60:20 62:15,15,21, 22,25 virtue ^[1] 34:15 visit ^[1] 28:9 void ^[1] 51:23 voiding ^[2] 7:19,20 VVD ^[4] 14:23 16:11,13 17:8	
W	