

No. 25-1089

In the
Supreme Court of the United States

FAIRFIELD SENTRY LTD. (IN LIQUIDATION);
FAIRFIELD SIGMA LTD. (IN LIQUIDATION);
FAIRFIELD LAMBDA LTD. (IN LIQUIDATION);
KENNETH M. KRYS; AND GREIG MITCHELL,

Petitioners,

v.

CITIBANK NA LONDON, et al.,

Respondents.

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

REPLY BRIEF

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June 9, 2026

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	ii
REPLY BRIEF.....	1
I. The Decision Below Defies Plain Text And This Court’s Teachings, Opening Clear Circuit Splits.....	3
A. The Second Circuit Badly Erred and Split With the Fifth Circuit in Holding That the Bankruptcy Code’s Safe Harbor Applies Extraterritorially	3
B. The Second Circuit Further Erred and Split With Multiple Circuits in Holding That the Safe Harbor Directly Blocks Common-Law Claims	7
II. The Question Presented Is Important, And This Case Is An Ideal Vehicle	11
CONCLUSION	13

TABLE OF AUTHORITIES

Cases

<i>Abitron Austria GmbH v. Hetronic Int’l, Inc.</i> , 600 U.S. 412 (2023).....	1, 3, 4
<i>Contemp. Indus. Corp. v. Frost</i> , 564 F.3d 981, 984 (8th Cir. 2009).....	10
<i>Grede v. FCStone, LLC</i> , 746 F.3d 244 (7th Cir. 2014).....	10
<i>In re Condor Ins. Ltd.</i> , 601 F.3d 319 (2010)	6, 7
<i>In re Hellas Telecomms.</i> <i>(Luxembourg) II SCA</i> , 526 B.R. 499 (Bankr. S.D.N.Y. 2015).....	11
<i>In re Lehman Bros. Holdings Inc.</i> , 469 B.R. 415 (Bankr. S.D.N.Y. 2012).....	10
<i>In re Park S. Secs.</i> , 326 B.R. 505 (Bankr. S.D.N.Y. 2005).....	9
<i>In re Quorum Health Corp.</i> , 2023 WL 2552399 (Bankr. D. Del. Mar. 16, 2023).....	11
<i>In re Worldcom, Inc.</i> , 401 B.R. 637 (Bankr. S.D.N.Y. 2009).....	8
<i>Merit Mgmt. Grp., LP v. FTI Consulting, Inc.</i> , 583 U.S. 366 (2018).....	2, 4, 8
<i>Morrison v. Nat’l Australia Bank Ltd.</i> , 561 U.S. 247 (2010).....	6
<i>Stern v. Marshall</i> , 564 U.S. 462 (2011).....	8
Statutes	
11 U.S.C. §544(b)(1).....	9

11 U.S.C. §546(e)	3
11 U.S.C. §561(d)	5
11 U.S.C. §1501(a)	3
11 U.S.C. §1508	3

REPLY BRIEF

The decision below turns Chapter 15 of the Bankruptcy Code on its head. The *raison d'être* of Chapter 15 is to facilitate—not frustrate—foreign bankruptcies in general and the efforts of foreign liquidators in particular. But the decision below holds that a U.S.-law defense—the safe harbor of 11 U.S.C. §546(e)—applies extraterritorially in Chapter 15 proceedings to extinguish approximately \$6 billion in foreign-law claims regarding foreign conduct. Making matters worse, the decision creates a circuit split by atextually expanding §546(e) to foreclose even common-law claims. This Court should intervene and reverse.

Respondents are understandably reluctant to defend the Second Circuit's holding that §546(e) applies extraterritorially, as the statute contains no express statement to that effect. They instead begin by asserting that this case involves only *domestic* applications of U.S. law. That is a nonstarter. The Second Circuit applied §546(e) to protect transfers of funds between British Virgin Islands (“BVI”) entities and investors located overseas. If that is not an extraterritorial application of the safe harbor, it is hard to imagine what would be. And when respondents finally try to justify the Second Circuit's actual holding, their discussion of statutory “context” and “structure” falls well short of any “affirmative[] and unmistakabl[e]” directive that §546(e) “appl[ies] to foreign conduct,” *Abitron Austria GmbH v. Hetronic Int'l, Inc.*, 600 U.S. 412, 417-18 (2023). Nor can respondents justify the Second Circuit's novel and atextual expansion of §546(e) beyond Chapter 5

avoidance powers to foreign statutory avoidance powers and even foreign common-law claims. That expansion flouts plain text and this Court's unanimous decision in *Merit Management Group, LP v. FTI Consulting, Inc.*, 583 U.S. 366 (2018).

Not content to rewrite the decision below, respondents proceed to rewrite the question presented to try to explain away the circuit splits the Second Circuit created. That divide-and-conquer effort goes nowhere. The Second Circuit expressly held that §546(e) "directly bars" both foreign and "domestic common-law claims irrespective of implied-preemption principles." Pet.App.193, 208. The Second Circuit had to reach that conclusion because nothing in the Supremacy Clause or implied-preemption principles could plausibly preempt foreign-law claims.

Respondents do not dispute that this case has crucial implications for international comity, domestic bankruptcy law, and the many innocent foreign-based investors trying to recoup some portion of the devastating losses they sustained in the infamous Madoff Ponzi scheme. Nor can respondents identify any vehicle problem, as the question presented was thoroughly ventilated below and is cleanly presented here. Any Chapter 15 case will have some complexity, and the fact that this is the largest Chapter 15 case in history underscores the stakes and the need for this Court's review. The Court should grant certiorari and restore Chapter 15 as a means to facilitate the efforts of foreign liquidators, not frustrate them with atextual constructions and extraterritorial applications of domestic defenses.

I. The Decision Below Defies Plain Text And This Court’s Teachings, Opening Clear Circuit Splits.

A. The Second Circuit Badly Erred and Split With the Fifth Circuit in Holding That the Bankruptcy Code’s Safe Harbor Applies Extraterritorially.

1. It is black-letter law that federal statutes do not “apply to foreign conduct” absent an “affirmative[] and unmistakabl[e]” directive from Congress. *Abitron*, 600 U.S. at 417-18. It is equally obvious that the Bankruptcy Code’s safe harbor, 11 U.S.C. §546(e), contains no such directive; it limits a domestic bankruptcy trustee’s use of U.S.-law avoidance powers to target domestic transfers. *See* Pet.17-18. Section 561(d) is no different. By “limit[ing] avoidance powers” in Chapter 15 proceedings “to *the same extent* as in a proceeding under chapter 7 or 11,” §561(d) does not somehow expand those powers to override foreign statutes or vitiate foreign transactions. It simply restricts a foreign liquidator’s ability to wield U.S.-law avoidance powers to target U.S. transfers. Section 561(d) contains no indication—let alone an “unmistakable” command, *Abitron*, 600 U.S. at 418-19—that Congress intended to curtail foreign liquidators’ ability to use *foreign* law to target *foreign* transfers under the auspices of Chapter 15. Nor would that make sense, as assisting foreign liquidators is the whole point of Chapter 15. *See* 11 U.S.C. §§1501(a), 1508.

Instead of defending the Second Circuit’s extraterritoriality holding, respondents deny there is a foreign application at all, a theory the Second Circuit

did not embrace. Respondents' felt-need to change the subject is telling. It is also unavailing. In determining whether a suit involves a foreign application of a statute, "courts must start by identifying the 'focus' of congressional concern underlying the provision at issue." *Abitron*, 600 U.S. at 418. "[I]f the conduct relevant to the focus occurred in a foreign country, then the case involves an impermissible extraterritorial application regardless of any other conduct that occurred in U.S. territory." *Id.* at 424.

As one would expect from a foreign liquidator's effort to use foreign law (both foreign statutes and foreign common law) to reclaim assets for a foreign liquidation, this case plainly involves extraterritorial conduct. Indeed, this Court has squarely held that "the focus of the §546(e) safe-harbor inquiry [is] on the transfer." *Merit Mgmt.*, 583 U.S. at 383. And, here, it is undeniable that the bulk of the transfers were "purely foreign transactions," Pet.App.251—typically from a BVI entity to an overseas investor, *see, e.g.*, Bankr.SDNY.No.10-03630, Dkt.34-1 at ¶30 & Ex.A. Applying §546(e) to block a foreign liquidator's foreign-law actions to vitiate such transfers and reclaim funds for a foreign main proceeding is clearly an extraterritorial application of U.S. law implicating the very comity and international-friction concerns that Chapter 15—the culmination of a multi-decade coordination effort involving dozens of nations—was designed to assuage.

Seeking to avoid this straightforward conclusion, respondents suggest that this case involves an application of §561(d), rather than §546(e). That would be news to the Second Circuit, which held that

“*the safe harbor of §546(e) applies extraterritorially*” and that “*the safe harbor bars the liquidators’ claims.*” Pet.App.192 (emphasis added). It is also plainly wrong. Section 561 states that *other* provisions of the Code—including §546(e)’s safe harbor—“*shall apply*” in Chapter 15 cases. 11 U.S.C. §561(d) (emphasis added). This case thus involves an “application of the safe harbor,” Pet.App.178, to conduct that occurred overseas.

Respondents’ defense of the Second Circuit’s actual holding is weaker still. Respondents concede that neither §546(e) nor §561(d) contains any express statement of extraterritoriality, and their invocation of “structure” and “context,” BIO.20, adds nothing meaningful to the Second Circuit’s misguided canon-against-superfluity analysis. Like the decision below, respondents’ argument boils down to the proposition that if §561(d) is to have any effect, it must extend the safe harbor to “avoidance claim[s] ... based on foreign law.” BIO.20. That argument fails twice over. First, 11 U.S.C. §1523(a) empowers foreign liquidators recognized under Chapter 15 to bring actual *U.S.-law* avoidance claims, and §561(d) makes clear that the safe harbor covers such claims. *See* Pet.20-21. That alone gives §561(d) domestic work to do and thus should eliminate any temptation to extend the statute extraterritorially to avoid superfluity. Second, even assuming §561(d) extends the safe harbor to block some foreign-law avoidance claims, that would not justify extending it to block wholly foreign *transfers*. For example, *contra* Pet.App.187, the statute could be construed to limit foreign liquidators’ power to avoid transfers from foreign entities to domestic entities without extending it to the foreign-to-foreign transfers

at issue in the bulk of petitioners' claims. See *In re Condor Ins. Ltd.*, 601 F.3d 319, 320, 329 (2010) (holding that Chapter 15 authorizes courts to apply foreign law to foreign-to-domestic transfers).

Ultimately, the presumption against extraterritoriality would be “a craven watchdog indeed” if it could be defeated by the relatively weak interpretive force of the canon against superfluity. *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247, 266 (2010); see Pet.20. But there is no superfluity at all here, and thus no defense for the Second Circuit's extraterritoriality holding.

2. The decision below not only is wrong, but conflicts with the Fifth Circuit's *Condor* decision. As *Condor* explains, Chapter 15 is designed to promote international comity by *facilitating* foreign liquidators' efforts to recover assets from defendants (like respondents) who can be sued in the United States. 601 F.3d at 321-25. Chapter 15 thus contemplates that U.S. courts will grant relief to foreign liquidators “when foreign law applie[s] and would provide for such relief.” *Id.* at 329. The decision below subverts this principle by creating a unique, U.S.-law defense to foreign-law claims regarding foreign transactions that would proceed free from that U.S.-law defense in their home courts. This transforms Chapter 15 from a tool for assisting foreign liquidators into a means of preventing them from recovering assets they could recover in their home jurisdictions. And respondents' assertion that petitioners “lost in their home courts” and “are hoping

for better luck in American ones,” BIO.4, is pure sophistry, hoping to prejudice petitioners.¹

Respondents can deny the split only by mischaracterizing *Condor*. The Fifth Circuit did not “hold[] that avoidance powers are available in Chapter 15 proceedings,” BIO.13; it held that “foreign avoidance law” applies, *Condor*, 601 F.3d at 329 (emphasis added). That distinction makes all the difference, as foreign avoidance powers are not subject to §546(e)’s safe harbor. *Condor* certainly does *not* support the proposition that Chapter 15 imposes “limitations” on foreign liquidators’ assertion of “foreign law claims,” BIO.13. It held that “Congress did not intend to restrict the powers of the U.S. court to apply [foreign] law” in Chapter 15 proceedings. 601 F.3d at 327. The decision below does just that. *Contra* BIO.13, “[t]he decision below and *Condor*” could not be *less* “aligned.”

B. The Second Circuit Further Erred and Split With Multiple Circuits in Holding That the Safe Harbor Directly Blocks Common-Law Claims.

1. The distinction between statutory avoidance claims and common-law claims is well established. The former “belong[] to the trustee, not to the [debtor],” and “only arise upon the filing of a [bankruptcy] petition.” *In re Worldcom, Inc.*, 401 B.R.

¹ Petitioners filed most claims in New York, per negotiated forum-selection clauses, long before the preliminary-issues determination in BVI litigation (which presents no obstacle to these claims). *See* Pet.App.295-96, 353-63. Respondents’ efforts in the BVI court to enjoin petitioners’ U.S. litigation were completely unsuccessful. *See* Pet.App.422-23.

637, 645-46 (Bankr. S.D.N.Y. 2009). The latter “exist[] without regard to any bankruptcy proceeding” and could be pursued by the debtor even outside bankruptcy. *Stern v. Marshall*, 564 U.S. 462, 499 (2011). That distinction is critical, because as this Court has explained, §546(e)’s safe harbor “limits ... *the avoidance powers* set forth elsewhere” in the Bankruptcy Code. *Merit Mgmt.*, 583 U.S. at 381 (emphasis added). That makes sense, as §546(e) is a creature of the Code and expressly limits the avoidance powers that are creatures of the Code, without indicating any intent to block pre-existing non-Code claims. Confirming as much, §561(d) provides that the safe harbor “shall apply in a case under chapter 15 ... to limit *avoidance powers* to the same extent as in a proceeding under chapter 7 or 11.” (Emphasis added.) So, even assuming §561(d) extends the safe harbor extraterritorially to restrict foreign-law “avoidance powers,” *but see* Pet.17-22, the furthest it could possibly reach is foreign statutory avoidance claims that arise distinctly in liquidation—not foreign common-law claims that exist outside of liquidation, Pet.22-27.

Respondents’ counterarguments fall flat. No one disputes that “avoid” means “annul” or “undo.” BIO.22. But common-law claims do not seek to “undo” transactions; they seek to hold defendants liable for alleged misconduct—e.g., knowingly profiting from fraud. *See* Pet.4, 22-23, 26. That is why respondents cannot identify *a single case* adopting the Second Circuit’s aberrant view that common-law claims are “avoidance” claims for purposes of the safe harbor. To the extent courts have “*deem[ed]* common-law claims ... barred *in light of* Section 546(e),” BIO.22 (emphasis

added), they have done so under implied-preemption principles. Whether or not that analysis is correct for state common-law claims, it is plainly inapplicable to foreign common-law claims. In short, the Second Circuit's holding that §546(e) "directly appl[ies] to common-law claims," Pet.App.208, is both atextual and unprecedented.

Perhaps recognizing as much, respondents seek a textual hook in 11 U.S.C. §544, which empowers trustees to assert certain state-law claims belonging to "an unsecured creditor." *See* BIO.24. That does not work. The common-law claims here were not—and could not have been—asserted under §544 because they belong to *the debtor* (not "a creditor") and do not involve interests or obligations that are "*voidable* under applicable law." 11 U.S.C. §544(b)(1) (emphasis added); *see* Pet.23, 26. Like the Second Circuit, respondents fail to engage with this statutory text; they instead rely on unreasoned dicta from a bankruptcy-court case. *See* BIO.24 (citing *In re Park S. Secs.*, 326 B.R. 505, 514 (Bankr. S.D.N.Y. 2005)); Pet.App.209 (same). That is no match for the text that underwent bicameralism and presentment. And §544's text makes clear that it cannot transform common-law claims raised entirely independently of that provision into avoidance claims.

2. The Second Circuit's unprecedented expansion of §546(e)'s safe harbor to common-law claims conflicts with decisions of the Seventh and Eighth Circuits and numerous district and bankruptcy courts. Pet.27-29. Every other court to consider the issue has concluded that the safe harbor's limitation on "avoiding powers" directly covers only Chapter 5 avoidance claims. And

while some of those decisions have found common-law claims barred by implied-preemption principles, the Second Circuit's novel interpretation of §546(e) would extinguish all domestic and foreign common-law claims regardless of the scope of any implied preemption. Pet.29-30.

Respondents try to deny this division of authority by rewriting the question presented. Petitioners challenge the Second Circuit's holding that §546(e) "directly bars" both foreign and "domestic common-law claims irrespective of implied-preemption principles." Pet.App.193, 208; *see also* Pet.App.203-11. On *that* issue, the decision below squarely conflicts with Seventh and Eighth Circuit cases concluding that §546(e) bars state common-law claims only (if at all) when they "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Contemp. Indus. Corp. v. Frost*, 564 F.3d 981, 984, 988 (8th Cir. 2009), *abrogated in part on other grounds by Merit Mgmt.*, 583 U.S. 366; *accord Grede v. FCStone, LLC*, 746 F.3d 244, 259 (7th Cir. 2014).

Respondents likewise cannot reconcile the decision below with the many bankruptcy-court decisions addressing this issue. *See* Pet.28-29. Their contention that both approaches reach the same "bottom line," BIO.15-16, is flat wrong. For example, *In re Lehman Brothers Holdings Inc.*, 469 B.R. 415 (Bankr. S.D.N.Y. 2012), held that over a dozen common-law claims were *not* "preempted by federal bankruptcy law" because they were "unlike classic avoidance claims." *Id.* at 449-51; *accord In re Hellas Telecomms. (Luxembourg) II SCA*, 526 B.R. 499, 508-

13 (Bankr. S.D.N.Y. 2015) (unjust enrichment claim not preempted); *In re Quorum Health Corp.*, 2023 WL 2552399 (Bankr. D. Del. Mar. 16, 2023) (same as to “illegal dividend” and “unjust enrichment” claims). The petition repeatedly cites these cases, *see* Pet.26, 28-29, yet respondents ignore them—effectively conceding that the division of authority matters.

II. The Question Presented Is Important, And This Case Is An Ideal Vehicle.

A. Unless this Court intervenes, the decision below will have major negative ramifications in the bankruptcy context and beyond. The Second Circuit’s twin errors transform Chapter 15 from a comity-enhancing means of assisting foreign liquidators into a comity-destroying mechanism for preventing them from recovering assets they could recover in their home jurisdictions. *See* Clark.Amicus.Br.3-5. And the outsized importance of the Second Circuit in transnational bankruptcies, as evidenced by the numerous agreements selecting New York for choice-of-law and venue purposes, magnifies the negative effects on international comity.

Unable to dispute the importance of these issues, respondents suggest that the petition improperly “mashes together two entirely distinct questions.” BIO.12; *see* BIO.3. That is wrong and beside the point. Whether §546(e) applies extraterritorially and what types of claims §546(e) bars are two closely related questions—both of which implicate circuit splits. Having incorrectly extended §546(e) extraterritorially, the Second Circuit erroneously and atextually extended it to wipe out even foreign common-law claims that are not “avoidance powers” at

all. The net effect is to leave innocent foreign Madoff investors holding the bag, while domestic victims recover from some of the same defendants. *Accord* Lloyd.Amicus.Br.3. That turns Chapter 15 on its head. There is no sound reason for this Court to bifurcate the question presented or correct just one of those errors.²

B. This case is also an ideal vehicle for addressing the intersection of §546(e) and Chapter 15. All relevant issues were thoroughly litigated below and are cleanly presented for this Court’s review. While respondents do their best to make the dispute sound complex, all Chapter 15 cases will have a degree of complexity. And respondents cannot deny that “this is the most significant litigation ever instituted under that Chapter,” covering approximately \$6 billion of claims. Pet.1.

Respondents’ attempts to identify vehicle problems strain credulity. Their submission that “this case is not about Section 546(e),” BIO.25, is risible; the Second Circuit expressly “h[e]ld that all of [petitioners’] claims should have been dismissed pursuant to ... §546(e),” Pet.App.160. And respondents’ assertion that bringing this litigation in

² To be clear, petitioners invoked two different bodies of foreign law (BVI statutory avoidance provision and BVI common law) to target two different sets of transactions (some foreign-to-domestic, but most foreign-to-foreign). Only by combining its two misguided holdings could the Second Circuit extend §546(e), which by its terms addresses only domestic statutory avoidance powers, to deny foreign liquidators the ability to bring any of these claims—including foreign common-law claims, which are not avoidance powers at all, even as to wholly foreign transactions.

New York “has a strong whiff of forum shopping,” BIO.26, is unbecomingly false: These suits are in U.S. courts pursuant to a forum-selection clause, *see* Pet.App.169-78, and petitioners seek to have BVI law applied exactly as it would be in BVI courts. The Second Circuit denied them that opportunity by projecting a U.S.-law defense extraterritorially and atextually extending it to common-law claims. The Court should grant certiorari and reverse.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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