

SUPREME COURT OF THE UNITED STATES

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.)
- - - - -

Pages: 1 through 68

Place: Washington, D.C.

Date: November 6, 2017

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 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.

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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 -- I'll read them -- I'll read them with more care, but the

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

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

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

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

1 transfers that the parties contemplated when
2 they entered into this contract that they're --

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

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

10 JUSTICE GINSBURG: Yes.

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

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

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

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

24 MR. WALSH: Because the goal of the
25 statute is to protect the securities and

1 commodities markets, not just to protect
2 particular players in the markets. We know --

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

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

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

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

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

1 basis.

2 MR. WALSH: Well --

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

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

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

16 MR. WALSH: Yes.

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

22 Isn't the contractual obligation an
23 obligation?

24 MR. WALSH: The contractual --

25 JUSTICE SOTOMAYOR: Or a contractual

1 rights obligations? So why can't a trustee
2 choose what it is he or she wants to avoid,
3 whether it's a transfer or an obligation?

4 MR. WALSH: Your Honor, the --

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

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

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

24 JUSTICE SOTOMAYOR: You think that
25 obligation issue is one that's prospective and

1 not --

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

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

10 MR. WALSH: That is correct.

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

13 MR. WALSH: That is --

14 JUSTICE ALITO: -- constructively
15 fraudulent.

16 MR. WALSH: That is correct.

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

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

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

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

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

22 And it's not different from the subset
23 of that transfer that Citizens Bank sent to
24 Merit on two different occasions three years
25 apart. In other words, I understand the

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

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

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

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

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

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

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

22 JUSTICE GINSBURG: But would you --

23 MR. WALSH: I do think there was
24 adequate consideration for it, and that claim
25 would fail, but the trustee could seek to

1 pursue it.

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

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

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

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

22 MR. WALSH: Well, I think -- let me
23 address the scope first. I think the scope of
24 checks or wire transfers is actually quite a
25 bit less than -- than my opponent would

1 suggest.

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

9 JUSTICE BREYER: I'm just curious,
10 though, it says look, I have two shares of
11 company X in my -- I have an account somewhere,
12 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, and you -- you sell it to your
10 wife. Then in -- then in that case, there's
11 safe harbor.

12 JUSTICE BREYER: It does. So this
13 covers -- that's, I think, the thrust of this
14 is going to cover all kinds of things.

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

23 MR. WALSH: Yes. Yes.

24 JUSTICE BREYER: That's what they want
25 to do. Neither of them is financial

1 institutions. But the way they do it is Valley
2 Downs says its friend, Credit Suisse, which is,
3 you have the line of credit, you send it to the
4 Citizens Bank, which is the escrow.

5 MR. WALSH: Correct.

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

12 MR. WALSH: That's correct.

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

19 MR. WALSH: Correct, right.

20 JUSTICE BREYER: Okay. And so why are
21 we hearing this case? For this reason -- now,
22 this is slightly a side issue, but it's very
23 puzzling, and I think I should know the answer,
24 when I look up the definition of financial
25 institution, it says that not only is it Credit

1 Suisse and not only is it Citizens Bank, but it
2 is also the customers of each of those
3 financial institutions in an instance where the
4 bank is acting as agent or custodian for a
5 customer.

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

11 So why doesn't that cover it?

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

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

23 MR. WALSH: Your Honor, we did -- we
24 did refer to that provision in -- in both of
25 our briefs, if I remember correctly.

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

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

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

16 MR. WALSH: I'm afraid I don't have a
17 good answer for why that did not come up
18 earlier.

19 JUSTICE SOTOMAYOR: I'm sorry.
20 Perhaps it's simple.

21 JUSTICE ALITO: Oh, I thought you
22 conceded it. Didn't both parties -- didn't
23 both parties concede that -- that Valley View
24 is not a financial institution?

25 JUSTICE GINSBURG: You just did in

1 answer to my question.

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

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

8 MR. WALSH: I may have -- I may have
9 misunderstood the difference between the two
10 questions, Your Honor.

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

20 MR. WALSH: And -- and, Justice
21 Ginsburg, in response to your question, neither
22 of the parties to this case is a -- is a
23 financial institution, as that term is -- is
24 generally understood.

25 In trying to --

1 JUSTICE BREYER: But not as the
2 statute understands it, which uses it to
3 include a customer of a financial institution
4 in circumstances which are present here.

5 MR. WALSH: That -- in the rather
6 unusual definition of financial institution,
7 this is a situation in which the banks act as
8 -- acted as agents, that's -- that's an escrow
9 agent.

10 JUSTICE GINSBURG: If you -- if this
11 was such a standout issue, you must have
12 thought about it, and yet, you relegated it to
13 a footnote in your reply brief.

14 MR. WALSH: And I -- and I don't know
15 whether it's a standout issue or not, Your
16 Honor, but that is a quirk in the definition of
17 financial institution, that is true. That is
18 true.

19 I think one of the -- one of the ways
20 to think about what's going on here is whether
21 Congress is protecting particular institutions
22 or whether Congress is protecting transactions.

23 If Congress wanted to protect banks
24 and brokers and clearing agencies from
25 liability, and that was the only purpose of the

1 statute here, that could have been resolved in
2 Section 550, which is the section of the
3 Bankruptcy Code that deals with who has
4 liability if there is a transfer that's
5 avoided.

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

14 MR. WALSH: Well, Your Honor, control
15 and dominion is a test that's been leveled by
16 the lower courts. It's -- it's not a
17 rationale. It's a test to determine whether a
18 party had the beneficial interest in the
19 transaction, such that it's appropriate to
20 impose liability on that party.

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

23 MR. WALSH: That is how they --

24 JUSTICE SOTOMAYOR: It makes common
25 sense, which is --

1 MR. WALSH: That is how they've
2 defined it. But what --

3 JUSTICE SOTOMAYOR: -- go to who
4 ultimately has control of the property.

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

12 JUSTICE SOTOMAYOR: Exactly.

13 MR. WALSH: And -- but the reference I
14 was making to 550 earlier, Your Honor, is to
15 550(c), which is an example of a situation in
16 which Congress perceived that there's a
17 problem, that a transfer may be avoided and
18 certain parties may be liable.

19 And Congress's response would say,
20 avoid the transfer all you want, but here is
21 the very limited subset of parties against whom
22 you may recover.

23 That is what the opponent here would
24 like to happen here. That is what they propose
25 is the actual function of 546(e), that it only

1 protects banks and brokers and clearing
2 agencies. And Congress didn't do it in 550,
3 which would have accomplished that.

4 There -- there's also the problem here
5 that the statute protects transfers by banks
6 and brokers and clearing agencies and these
7 other parties. And that has nothing to do with
8 protecting the bottom lines of banks and
9 brokers.

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

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

20 JUSTICE KENNEDY: But they're parties
21 to the transaction. They're not acting just as
22 a pass-through agent.

23 MR. WALSH: But it would also apply,
24 Your Honor, if Goldman Sachs, on behalf of one
25 of its clients, made that transaction. I

1 probably wouldn't even know whether I was
2 dealing with Goldman Sachs' own balance sheet
3 or whether I was dealing with someone who was
4 trading through Goldman Sachs.

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

15 When we're talking about systemic risk
16 to the financial markets, we're not just
17 talking about banks and brokers going under.
18 If parties aren't willing to provide capital to
19 the financial system or if other parties like
20 private equity funds or pension funds collapse,
21 we have systemic risk to the financial
22 institution as well.

23 JUSTICE GORSUCH: Mr. Walsh --

24 MR. WALSH: Yes?

25 JUSTICE GORSUCH: -- can you help me

1 out with what happens to the law of preferences
2 under your interpretation?

3 As you know, trustees can avoid
4 transfers leading up to the bankruptcy that
5 meet certain conditions.

6 MR. WALSH: Yes.

7 JUSTICE GORSUCH: And a lot of that
8 would seem to go away, that power would seem to
9 go away under your interpretation, if a bank or
10 financial institution is involved. So that a
11 lot of avoidable transactions would become
12 unavoidable all of a sudden.

13 How do we reconcile your -- your
14 interpretation with that -- that apparent
15 difficulty?

16 MR. WALSH: I'm -- I'm not sure that
17 there is such a difficulty, Your Honor. A
18 typical preference claim, for example, would be
19 that the debtor repaid a vendor outside of the
20 ordinary course of business.

21 And the pursuit of that claim against
22 the manufacturer of a widget that sold it to
23 the debtor would not obviously implicate the
24 safe harbor here. There are no securities --

25 JUSTICE GORSUCH: Well, but often --

1 MR. WALSH: -- no commodities.

2 JUSTICE GORSUCH: -- often a transfer
3 that's avoidable does involve a financial
4 institution. You'd agree with that, surely?

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

6 JUSTICE GORSUCH: May, but --

7 MR. WALSH: -- does not very often
8 involve securities or commodities -- -

9 JUSTICE GORSUCH: Well, but it could
10 --

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

12 JUSTICE GORSUCH: Well, but it could.
13 I mean, why not? I mean, do you have any
14 empirical information on that?

15 MR. WALSH: I don't have empirical
16 information.

17 JUSTICE GORSUCH: No.

18 MR. WALSH: I -- I do have the -- the
19 overlap between securities transactions and
20 bankruptcy is very small. There are a million
21 or so bankruptcy cases filed every year. It's
22 very --

23 JUSTICE GORSUCH: So not -- a
24 triviality we don't need to worry about, even
25 though it was a central feature of the Seventh

1 Circuit's opinion?

2 MR. WALSH: I wouldn't say it's a
3 triviality, but it's not -- there's a lot of
4 talk in the briefs about the exception
5 swallowing the rule. And the rule is a good
6 bit broader, a good bit broader than the
7 exception here, Your Honor.

8 JUSTICE GORSUCH: But we don't have
9 any -- nobody has any data on that? We're
10 just -- we're just going on your -- your
11 representation versus your friend's
12 representation otherwise?

13 MR. WALSH: I -- I suppose that's
14 correct, Your Honor.

15 JUSTICE GORSUCH: All right.

16 MR. WALSH: But -- but the variety of
17 things that are untouched by the safe harbor
18 are -- are significant transactions in real
19 estate, transactions in vehicles. Trustees can
20 avoid liens because they're unperfected.
21 That's -- that's not implicated by the safe
22 harbor unless it would happen to be a lien on a
23 security, perhaps, or on a commodity.

24 And so the overlap here between
25 bankruptcy and security is a relatively

1 confined space. And what Congress has
2 determined is that if you're dealing with
3 constructive fraud, the concerns of the
4 securities and commodities markets prevail. If
5 you're dealing with --

6 JUSTICE KAGAN: Mr. Walsh?

7 MR. WALSH: Yes.

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

16 So, I mean, it seems odd to read that
17 in any other way than to start with the
18 transfer that the trustee seeks to avoid. Why
19 should we not do that? Why isn't that exactly
20 what the text tell us -- tells us to do, where
21 you start with the transfer that the trustee
22 seeks to avoid and then you ask whether there's
23 a safe harbor that applies to that transfer?

24 MR. WALSH: I think the -- the first
25 -- my first response, Your Honor, is that when

1 we're dealing with a prohibition of that sort,
2 we don't simply look at what the party says it
3 is doing.

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

14 But a second response is that because
15 these transfers, the way we characterize the
16 different pieces of this transaction as
17 transfers are integrally -- integrally
18 interrelated, to say that a trustee can avoid
19 the end-to-end transfer without affecting the
20 others, the intermediate transfers, in any way
21 is just inconsistent with reality.

22 JUSTICE KAGAN: I guess you're asking
23 a court to make a shift in transfers in the
24 middle of the analysis. In other words, first,
25 the court has to say whether this is the kind

1 of transfer that the trustee can avoid, and in
2 doing that, the court is looking at the -- what
3 you call the end-to-end transfer.

4 And then all of a sudden, when it
5 comes to the safe harbor, you're saying that
6 the trustee has to flip and look at another
7 transfer entirely. And that seems like a
8 strange thing for a safe harbor to do.

9 I mean, usually what we think is that,
10 you know, a safe harbor would shield from
11 avoidance a transfer that's being challenged,
12 rather than a transfer that isn't being
13 challenged.

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

22 But the transfer of \$55 million from
23 Valley View to the escrow agent and the
24 subsequent transfers from the escrow agent to
25 the shareholders of Bedford Downs, they aren't

1 -- they aren't different transfers. They're
2 just different ways of looking at the same
3 transfer because they made up the long --

4 JUSTICE KENNEDY: Well, but in -- in
5 your hypothetical, if the land were held as
6 an -- in escrow for 30 days until everybody got
7 the title in, then there would be an exemption.

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

10 JUSTICE BREYER: What about this,
11 where it says a trust fee, gee, tree -- sorry,
12 a trustee may not avoid a transfer that is a
13 settlement payment made by a financial
14 institution? Joe -- that's right, isn't it?
15 So far?

16 MR. WALSH: Yes.

17 JUSTICE BREYER: Yes. Right? Joe
18 Smith buys a piece of property from Bill Brown
19 for \$10 million. Joe Smith puts into escrow
20 \$10 million. It's -- Bank of America is the
21 escrow agent. Brown puts in the deed. When
22 both are there, Bank of America gives each the
23 other. Why hasn't Bank of America given a
24 settlement payment?

25 MR. WALSH: Your Honor, I don't think

1 the term "settlement payment" has ever been
2 understood to apply outside --

3 JUSTICE BREYER: It doesn't mean that
4 --

5 MR. WALSH: -- outside securities and
6 commodities in financial transactions. So --

7 JUSTICE BREYER: I see. So -- so it
8 is not a settlement payment. It's just -- it's
9 not a settlement payment, a payment for a real
10 estate transaction.

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

13 JUSTICE BREYER: It is not? It is not
14 a real estate transaction payment?

15 MR. WALSH: I'm sorry, a settlement
16 payment as defined in the code is not a real
17 estate transaction payment, yes.

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

21 MR. WALSH: If -- if they bought the
22 crop and it was a forward contract under the
23 code, then that -- the -- the purchase of the
24 crop --

25 JUSTICE BREYER: Thank you, thank you.

1 I see.

2 MR. WALSH: -- could very well be
3 covered by this.

4 JUSTICE BREYER: Thank you.

5 MR. WALSH: Unless there are further
6 questions, I'd like to reserve the balance of
7 my time.

8 CHIEF JUSTICE ROBERTS: Thank you,
9 counsel.

10 Mr. Clement.

11 ORAL ARGUMENT OF PAUL D. CLEMENT

12 ON BEHALF OF THE RESPONDENT

13 MR. CLEMENT: Mr. Chief Justice, and
14 may it please the Court:

15 I think it would be helpful if I could
16 start with the elephant in the room, which is
17 Justice Breyer's question about the definition
18 of financial institution and then address the
19 question presented.

20 So, Justice Breyer, a couple of points
21 about that.

22 First of all, I think it could not be
23 clearer that that's never been at issue in this
24 case, and even more to the point, the
25 Petitioner, when they were trying to get this

1 Court to take the case, emphasized the fact
2 that this wasn't in dispute as a sort of a
3 positive feature of this petition.

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

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

15 And can two parties who would just
16 love it, if we could decide an issue that
17 really isn't at issue before them, and can they
18 stipulate away all of the actual, you know,
19 they stipulate away the basic rule that a
20 contract is valid upon signing or something, in
21 order to get us to decide a question?

22 MR. CLEMENT: So, Justice Breyer, if
23 you really had the farmer/fisher idea -- fisher
24 person idea, I think what you would do is
25 dismiss the case as improvidently granted,

1 which would serve my client's interest just
2 fine. But I think there are two very good
3 reasons why that issue was not put front and
4 center by my friends here.

5 The first is that it's completely
6 inconsistent with their overall theory of the
7 case. Their overall theory of the case is that
8 every customer of every one of the six
9 protected entities is protected ipso facto by
10 virtue of the fact that it went through one of
11 those entities.

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

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

21 MR. CLEMENT: Well, I was just going
22 to say the second point why they're not making
23 it, which is it doesn't apply here anyways,
24 which is, as I read that provision, it is very
25 narrow, and it protects the customer only when

1 the bank is acting -- when the bank is acting
2 as an agent or custodian.

3 It doesn't say when the bank has acted
4 or in the past acted. It says when the -- the
5 bank is acting as the custodian or the agent.

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

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

20 Think about what happens if we prevail
21 in this case, given the transfer that the
22 trustee sought to avoid. If we prevail at the
23 end of the day, Merit owes the estate some \$16
24 million. Citizens Bank doesn't have to do a
25 thing. Credit Suisse doesn't have to do a

1 thing. If they want to wire the money, they
2 can pick one of those banks, and one of those
3 banks will actually benefit to the extent of
4 the wire transfer fee.

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

11 They don't have to do a thing, which,
12 of course, explains why they're not here as
13 amici, why --

14 CHIEF JUSTICE ROBERTS: Well, it's not
15 that simple. I mean, this is not simply -- I
16 think you try to portray it, it's simply a
17 matter of conduits that -- that don't have
18 anything to do with it, but as I understand it,
19 the intermediaries had a lot to do -- this --
20 this -- they were there functioning as
21 intermediaries -- intermediaries for several
22 years. They had certain compliance obligations
23 to check.

24 There were going to be payments in
25 this event, but no payments in that event.

1 They were seriously involved. They weren't
2 just, you know, stamping the papers and moving
3 the money.

4 MR. CLEMENT: You're right, Mr. Chief
5 Justice, to a degree, but for whatever the sort
6 of exertion they did, they were compensated.
7 And the trustee's not trying to get that
8 compensation back.

9 I mean, if you can imagine this case,
10 when the wire transfer went from Credit Suisse,
11 the money went to Citizens and then eventually
12 to Merit. I assume Credit Suisse got paid, I
13 don't know, \$1,000 to do that transfer.

14 Now, if the trustee here thought, you
15 know, this whole thing is such a bunch of
16 baloney, that we should get the money back from
17 Merit and we shouldn't have had to pay that
18 \$1,000 to Credit Suisse, so I have a theory, as
19 the trustee, as to why I can avoid the transfer
20 to Credit Suisse, well, of course, that's
21 covered by 546(e) through the straight-forward
22 way we think the statute should be read, which
23 is this affirmative defense, this exception,
24 this safe harbor talks about a transfer that
25 the trustee may not avoid.

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

11 CHIEF JUSTICE ROBERTS: Could -- what
12 if the trustee -- would there be situations in
13 which it would make sense for the trustee to
14 want to avoid one of the intermediary transfers
15 rather than simply the ultimate one?

16 MR. CLEMENT: It might, but they
17 probably run into 546(e), I mean, which is to
18 say you can imagine a situation where you
19 really thought that, you know, the money
20 stopped at one of those banks, and so the --
21 the ultimate transferee, the right person to
22 bring the action against was the bank.

23 Or if the bank's trading on its own
24 account or something, I think, in that
25 situation, and, you know, you'd have a transfer

1 where the transfer that the trustee was
2 bringing under 544, 545, all those various
3 provisions, the transfer you're seeking to
4 avoid was a transfer to a bank.

5 CHIEF JUSTICE ROBERTS: Well, would it
6 be in a situation where there's no money with
7 the ultimate seller to recover? They also
8 become bankrupt. Credit Suisse is not
9 bankrupt?

10 MR. CLEMENT: I suppose -- right,
11 no -- look, in that situation, an aggressive
12 trustee might seek to avoid a transfer to the
13 bank, but in that situation, 546(e) stops that
14 in its tracks.

15 And I think it's also important to
16 remember that 546(e) is added at a point where
17 you already have limitations as to which
18 transferee you can recover from. And part of
19 what Congress is worried about is the idea
20 that, in some situations, and maybe the ones
21 that we were talking about in this kind of
22 hypothetical, it would actually be tough to
23 figure out whether or not the financial
24 intermediary really was just a conduit, in
25 which case they'd be protected under

1 preexisting law, or whether they sort of ended
2 up with the money when the music stopped.

3 And what Congress tried to do in
4 546(e) was to provide a nice brightline rule
5 that protects these intermediaries, and it
6 seems like it is consistent with both the
7 general interest and the brightline nature of
8 the rule to say this is relatively
9 straightforward, let's look at the transfer the
10 trustee is seeking to avoid. If the trustee is
11 seeking to avoid a transfer that is by, to, or
12 for the benefit of one of these six entities,
13 that's it, motion to dismiss --

14 JUSTICE KAGAN: Well, does that
15 mean -- does that mean, Mr. Clement, that we --
16 all we do is we look at the trustee's
17 complaint, we leave it to him to decide the
18 question?

19 MR. CLEMENT: Yes, Justice Kagan, but
20 I think the reason that that doesn't create
21 some sort of mischief here is that, in making
22 that -- the complaint, the affirmative part of
23 the complaint, the trustee isn't just sort of
24 free to pick transfers at random that he or she
25 seeks to invalidate.

1 They have to come up with a transfer
2 that fits the terms and the requirements of one
3 of those provisions of the code in Chapter 5.

4 JUSTICE KAGAN: So that -- that might
5 be right.

6 I was trying to think of cases in
7 which there could be mischief by relying
8 entirely on the trustee's power to define the
9 transfer.

10 And here is what I came up with, is
11 that there truly is a transfer from a debtor to
12 a bank, if the bank's not serving as an
13 intermediary, it is a real transfer of stock,
14 right?

15 And now, 546 -- 546(e) is going to
16 prevent the trustee from avoiding that. But
17 then the trustee says: So, in order to get
18 around 546(e), I'm going to define the transfer
19 differently, I'm going to ask where the bank
20 then transferred the stock and -- and -- and
21 say that the transfer that I want to avoid is
22 from the original debtor to whoever it was that
23 the bank transferred the stock to, even though
24 those really were two separate transactions.

25 Could the trustee play games like

1 that?

2 MR. CLEMENT: I don't think they -- I
3 mean, they could try, but I don't think they
4 would get away with it. And I think that, you
5 know, in any case where the trustee brings an
6 action against somebody, they're going to have
7 essentially two kinds of defenses to raise.

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

18 And then, of course, there's a second
19 piece of this, which is to make this in a -- in
20 a transfer situation, to really get any juice
21 for the effort, you have to not only avoid the
22 transfer, but you also have to get recovery
23 under 550.

24 And in the hypothetical that you're
25 talking about, the third-party subsequent

1 transferee would not be the immediate -- the
2 initial transferee under 550. And so, as long
3 as they took it in good faith and paid value
4 for it, they'd be completely protected.

5 So I just don't think it would work.
6 And I think it is important to recognize that,
7 you know, this is not a situation where the
8 trustee can just sort of, you know, pick the --
9 well, today, I feel like the Credit Suisse to
10 Citizens Bank transfer is the one I'm going
11 after.

12 That would satisfy --

13 JUSTICE KENNEDY: Well, if we're -- if
14 we're writing the -- the opinion to accept your
15 proposition, how do we -- how do we qualify it?
16 Do we -- do we say that this does not apply to
17 transfers where the settlement institution does
18 not have an equity participation?

19 I mean, what -- what --

20 MR. CLEMENT: See, I wouldn't do that,
21 Justice Kennedy. I think that's -- that is the
22 way some of the courts had -- have written it,
23 but I think the simpler way to write the
24 opinion is to say, to apply 546(e), just look
25 to the transfer that the trustee seeks to

1 avoid, and it's as simple as that.

2 If the transfer that the trustee seeks
3 to avoid --

4 JUSTICE KENNEDY: But that -- that --
5 that then involves Justice Kagan's concern that
6 you're giving the -- the trustee a chance -- a
7 chance to define the transfer in a particular
8 way. Now, if the -- if the Bankruptcy Code
9 defines a transfer so it's abundantly clear
10 what transfer is involved, then that's one
11 thing.

12 MR. CLEMENT: Well, but I tried to be
13 responsive to Justice Kagan's question, and I
14 think that the code puts all sorts of limits on
15 the trustee when they're picking the transfer
16 that they're seeking to avoid.

17 So, for example, for certain
18 provisions of the code, you can only avoid a
19 transfer at a certain time period if it's a
20 transfer to an insider. Now, that seems to me
21 to buttress the idea that that provision of the
22 code doesn't really care much about the
23 intermediaries because otherwise you could say,
24 well, there's never a transfer to an insider
25 because it always goes through a bank first.

1 So I think the trustee is disciplined
2 not just by 546(e) but by the various things
3 that the trustee has to show to qualify the
4 particular transfer for being avoidable under
5 one of the affirmative avoidance powers.

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

16 So why do you think that that's a
17 worse alternative than the one you're
18 suggesting?

19 MR. CLEMENT: Well, Justice Kagan, let
20 me start by saying it's a lot better
21 alternative than my client losing this case.
22 So, if you find that attractive, I mean, that's
23 fine.

24 Here's the reason, though, that,
25 honestly, I don't think it's right. Because I

1 think one point my -- my friend and I agree on
2 is that when Congress was passing the
3 predecessor to 546(e) back in the day, there
4 was already substantial protection for the
5 intermediaries under the recovery provision,
6 550, if they were truly conduits and weren't
7 the beneficial owners.

8 And so I think what Congress was
9 trying to do with 546(e) was to provide an
10 alternative, more brightline way for the
11 financial intermediaries to get out of the case
12 early at the motion to dismiss stage.

13 And the problem with this looking for
14 the beneficial ownership is it's really the
15 same inquiry, and it could be fact-specific in
16 a particular case, that Congress was trying to
17 supplement with this brightline rule.

18 And we think our rule gives a nice
19 brightline rule that courts can apply at the
20 motion to dismiss stage, literally just look at
21 the complaint, look at the transfer the
22 trustee's seeking to avoid, and then, if it
23 satisfies 546(e), you know, you're done,
24 trustee loses. If it doesn't, we move forward.

25 Of course, when you move forward, you

1 can still get into this beneficial interest
2 inquiry. That's part of the 550 inquiry
3 because here, as in almost every case --

4 JUSTICE GINSBURG: How -- how do you
5 -- how do you answer what your colleague
6 stressed; that is, it doesn't say for the --
7 only for the benefit of a financial
8 institution. It says "by." If a transfer is
9 by a financial, that's enough.

10 MR. CLEMENT: You're right, Justice
11 Ginsburg, and we think that's right, but we
12 think what Congress was addressing in that
13 situation was the precise situation that the
14 Southern District of New York dealt with in a
15 case called Seligson, which I think both
16 parties agree is the case that Congress was
17 trying to address with the predecessor to
18 546(e).

19 And that was a situation where the
20 financial intermediary -- there I believe it
21 was a commodity broker -- is the bankrupt. And
22 so --

23 JUSTICE BREYER: So for this --

24 MR. CLEMENT: And so, in that
25 situation, you do want to protect and shield

1 the transfers by the bankrupt because the one
2 thing Congress was clearly concerned with is
3 you'd have a bankruptcy by one of the hub
4 players in the financial industry and that
5 would create this sort of ripple effect to
6 everybody who dealt with them.

7 JUSTICE BREYER: So, for this
8 provision, do I have this right? A, look to
9 the -- the transaction that the trustee is
10 trying to set aside as a preference or
11 fraudulent conveyance. B, ask the question:
12 Who is the person who directed that that
13 transfer be made? All right.

14 If it's a financial institution, et
15 cetera, stop right there, good-bye, you're out.
16 If not, continue to question 3. And question 3
17 is: Who is the initial transferee and not a
18 conduit of that transfer? And if the answer is
19 a financial institution, you're out. And
20 otherwise we go on to ask the other questions.

21 And that means that a -- that the
22 transferee, the initial transferee, if he's
23 receiving money that he is to hold for the
24 benefit of the other, he still is the initial
25 transferee. And you will look to such matters

1 as to who this money is to benefit later on in
2 your -- your efforts. Is that right?

3 MR. CLEMENT: Well, Justice Breyer, I
4 think you've aptly captured the Seventh
5 Circuit's reasoning.

6 JUSTICE BREYER: Uh-huh.

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

9 JUSTICE BREYER: Uh-huh.

10 MR. CLEMENT: I'm asking you to look
11 at the transfer that the trustee seeks to
12 avoid.

13 JUSTICE BREYER: Yeah.

14 MR. CLEMENT: That has to be by
15 somebody and to somebody --

16 JUSTICE BREYER: Yeah.

17 MR. CLEMENT: -- in order for it to
18 satisfy 544, 545, 547, or the two provisions of
19 548 that 546(e) cross-references.

20 JUSTICE BREYER: Right.

21 MR. CLEMENT: So there you have, right
22 on the face of the complaint, a transfer by
23 someone, to someone, or for the benefit of
24 someone, because as we explained in the brief
25 --

1 JUSTICE BREYER: Do you have what it
2 says?

3 MR. CLEMENT: -- the reason that
4 language is there is because the avoidance
5 power is not limited to transfers to somebody
6 who is like an insider or a creditor but also
7 to somebody who is for the benefit of a
8 creditor or an insider. So just look at the
9 face of the complaint, apply 546(e) to the
10 transfer that the trustee has put at issue, and
11 if the terms are satisfied, then the trustee
12 loses.

13 And if the terms are not satisfied,
14 then you move forward and you probably analyze
15 all of those transferee questions before the
16 case is all over, but I do think it's more
17 faithful to what Congress was trying to
18 accomplish when it enacted the predecessor to
19 546(e) to have a nice, brightline protection
20 that's there for the financial intermediaries.

21 It doesn't protect all of their
22 customers. It doesn't protect Merit. They
23 have other arguments they can eventually make,
24 but what they wanted was a nice brightline rule
25 so clearing agencies, commodity brokers, and

1 then eventually stockbrokers and financial
2 institutions and financial participants would
3 all have a nice, clean motion to dismiss
4 argument to win their case.

5 JUSTICE SOTOMAYOR: May I address a
6 question that confused me in your briefing?

7 JUSTICE BREYER: Yeah.

8 JUSTICE SOTOMAYOR: You kept saying
9 that the initial transfer had to be by the
10 debtor.

11 But the code permits the trustee to
12 void a non-debtor's transfer if the property
13 that the non-debtor is transferring is of an
14 interest of the debtor in property.

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

18 MR. CLEMENT: Justice Sotomayor, I
19 think you're right that it's certainly not
20 clean. Now, I think, at the end of the day,
21 we're actually right, and I get some solace
22 from the fact that our position is supported by
23 Professor Brubaker, who's spent a lot more time
24 looking at the code than I have.

25 So I think we're actually right that

1 even when it's a transfer by a third-party of
2 an interest of the debtor, it actually ends up,
3 for purposes of the code, being a transfer
4 "made by," which I think is the relevant term,
5 "made by" the debtor.

6 JUSTICE SOTOMAYOR: So that's how
7 you're reading that then.

8 MR. CLEMENT: That's how we're reading
9 it, but I want to make as clear as I can that
10 nothing turns on that. Our position -- I think
11 it makes -- if you -- if you accept that, it
12 makes our position that much clearer.

13 But nothing turns on it. And I think
14 what that just helps to show is that, either in
15 100 percent of the cases or the vast majority
16 of the cases, that when you get to transfer by,
17 either for purposes of the avoidance power or
18 for purposes of the exception of 546(e), it's
19 going to be a transfer by the bankrupt. And
20 whether it's 99 or 100 percent, nothing
21 ultimately turns on it.

22 JUSTICE SOTOMAYOR: So why -- but why
23 then did you argue that the transfer from
24 Credit Suisse to Citizens Bank -- both involved
25 property of the debtor, why did you argue that

1 that wouldn't qualify because it wasn't a
2 transfer by the debtor?

3 MR. CLEMENT: Because the way we read
4 Chapter 5 of the code is it essentially ignores
5 conduits for purposes of identifying who's the
6 transferor and who's the transferee. And we do
7 think that's consistent throughout Chapter 5.
8 That's why for its --

9 JUSTICE SOTOMAYOR: You don't think
10 Credit Suisse or -- or Citizens Bank fell under
11 the safe harbor automatically? They're both
12 financial --

13 MR. CLEMENT: I think -- I think if
14 the trustee had tried to avoid that transfer,
15 it would automatically satisfy 546(e).

16 What I'm making, though, is the point
17 that I don't think, properly understood, that
18 is even a transfer by Credit Suisse. And I
19 think maybe the way to try to at least
20 understand the point I'm making, but nothing
21 turns on it --

22 JUSTICE SOTOMAYOR: Oh, okay. That's
23 what I'm --

24 MR. CLEMENT: -- is -- is think about
25 the charitable giving exception. Now, it

1 allows -- it exempts certain transfers by the
2 debtor to a qualifying charitable institution.

3 Now, I would think the vast majority
4 of those are made by telling your bank I want
5 to give \$2,000 to this charity. Now, if you
6 accept their view that you subdivide
7 everything, well, then that's not a transfer by
8 the debtor to the charity. It's a transfer by
9 the debtor to Credit Suisse, which is not a
10 charity, and then a transfer by Credit Suisse
11 to the charity.

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

15 JUSTICE GORSUCH: So -- but, Mr.
16 Clement, on that, I assume your friend will get
17 up and say, well, a lot of those charitable
18 contributions are by check, and those aren't
19 covered.

20 And just as -- just as we heard when I
21 asked the question about avoidable transfers,
22 it became an empirical debate about how many of
23 those would be covered.

24 So how -- how clean a line is this
25 really? I mean, what you're suggesting?

1 MR. CLEMENT: Well, two things,
2 Justice Gorsuch. First of all, my friend would
3 want to tell you that the checks aren't
4 covered.

5 JUSTICE GORSUCH: Yeah.

6 MR. CLEMENT: But, with all due
7 respect, I don't think he has a theory as to
8 why. And I think that's -- that's what's
9 critical. I mean, you know, if there's no word
10 in that statute that allows you to draw that
11 distinction, as the colloquy with Justice
12 Breyer showed, there might be a theory based on
13 the definition of financial institution --

14 JUSTICE GORSUCH: Customer.

15 MR. CLEMENT: -- why the escrow
16 situation is different from the check
17 situation.

18 But if he's right, and all you have to
19 do is have a -- any kind of transfer and we
20 don't ignore any transfers by or to a financial
21 institution, I don't think he's offered you a
22 theory for why checks don't count. So that
23 would be the first point.

24 The second point would be, yeah,
25 there's some empirical debates here we don't

1 know the answers to.

2 JUSTICE GORSUCH: Right.

3 MR. CLEMENT: But if we're looking for
4 a clean answer, I mean, I think both sides are
5 giving you a clean answer. They're basically
6 giving you an answer that says, if it's a
7 settlement payment or a margin payment or a
8 payment in connection with a securities
9 contract, unless there's like the one person
10 out there that's doing these things with bags
11 of cash, it's covered.

12 JUSTICE GORSUCH: Yeah.

13 MR. CLEMENT: We're giving you the
14 clean position that --

15 JUSTICE GORSUCH: The amici -- the
16 amici give us a very clean position, right,
17 that we need a transferee under the statute and
18 a debtor under the statute. I read the red
19 brief as being a little more equivocal on that.
20 Maybe I misread it.

21 Do you endorse the amici's clean
22 position without qualification?

23 MR. CLEMENT: Well, we think our
24 position is even cleaner, I mean, so -- so --
25 but we think -- if you're referring to

1 Professor Brubaker's --

2 JUSTICE GORSUCH: Yeah.

3 MR. CLEMENT: We think we get to the
4 exact same place. I think, maybe since I'm
5 coming at this more like a lawyer instead of a
6 bankruptcy professor, I think about it in
7 really simple terms, and it maps on to the
8 procedural history of this case.

9 The trustee here brought a complaint.
10 It was a complaint that identified a transfer
11 for avoidance. The -- Merit filed an answer
12 with an affirmative defense. The affirmative
13 defense was based on 546(e).

14 It just seems logical, as -- as
15 Justice Kagan suggested, albeit in a question,
16 so she might not have meant it, but -- but as
17 Justice Kagan suggested, like what world do you
18 look at different transfers for purposes of the
19 exception to the affirmative defense than the
20 transfer that you're looking at for the prima
21 facie case of avoidance in the first instance?

22 It seems like the statutes work
23 together very well, hand in glove.

24 And we haven't talked a lot about the
25 policy implications of their clean position,

1 which is that, sort of, as long as there is a
2 bank anywhere involved in a securities
3 transaction, it's exempted.

4 And the consequences of that are, I
5 mean, really quite simple and quite striking,
6 which is, in a case like this, where otherwise
7 the unsecured creditors are going to get 15
8 cents on the dollar, which is already enough to
9 ruin your whole day --

10 JUSTICE GORSUCH: All right. All
11 right. But the Second Circuit is very
12 concerned about the effect that this would have
13 on the leveraged buyout industry and -- and,
14 therefore, the economy more broadly.

15 I can understand an argument that
16 Congress in 1978 wasn't much concerned about
17 the leverage buyout industry because it didn't
18 exist, as we now know it, but what -- what else
19 do you say in response to that, the parade of
20 horribles that we've heard?

21 MR. CLEMENT: Well, I mean, I don't
22 actually think it's much of a parade of
23 horribles, Your Honor, but let me try to be as
24 responsive as I can, which is to say, I think
25 if Congress were really concerned about the

1 leverage buyout situation, it would have
2 written a very different exemption than the one
3 that it wrote here. It might have defined
4 something like leverage buyout. It might have
5 exempted certain smaller ones or larger ones.

6 You know, when you have this provision
7 applied in the context of a very large
8 transaction on the public markets, there are
9 lots of the trustees' prima facie case,
10 including that there wasn't sufficient value
11 provided and the like, those are going to be
12 relatively difficult to prove, I mean, at least
13 if you believe in sort of the efficiencies of
14 markets.

15 But when you have leverage buyouts for
16 small companies, I mean, that is a fertile
17 ground for essentially getting money out of the
18 company and away from unsecured creditors and
19 to some favored party.

20 So as -- as the trustee's amicus brief
21 said, to sort of carve out, you know, leverages
22 buyouts from the fraudulent avoidance laws,
23 that's carving out a lot because these are
24 transactions where there is a risk that's quite
25 considerable to molting the interest of the

1 unsecured creditors.

2 The last thing I'll say before I sit
3 down is just, in addition to all the other
4 textual arguments we make in the brief, I do
5 think it's worth emphasizing that, under their
6 view of the statute, Congress's effort in 2005
7 to add financial participants as the sixth on
8 the list of protected entities was completely
9 superfluous and just a fool's errand, because I
10 can't imagine that financial participants who
11 are defined as entities with \$100 million or a
12 billion dollars in transactions were doing
13 those transactions with cash.

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

18 JUSTICE KAGAN: May I ask,
19 Mr. Clement, you might have no insight on this
20 and you might not be able to say anything about
21 it, so if so, just say so, but it is curious to
22 me, I've never seen a bankruptcy case, maybe
23 ever, but certainly a bankruptcy case like this
24 one, in which we do not have a Solicitor
25 General brief.

1 Do you have any thoughts about why the
2 SG didn't file here?

3 MR. CLEMENT: No, I don't have any
4 particular thoughts, other than I do think
5 that, if what we were urging on you was really
6 a catastrophe for the markets or something
7 else, boy, I sure think the SG would be here,
8 you know, waving at least a yellow flag.

9 To me, the amici that aren't here that
10 speak even louder, though, are frankly, the
11 lack of financial institutions, stockbroker,
12 clearing agency amici.

13 I mean, look, normally, I don't think
14 you really draw any inference through -- from
15 the amici that aren't here, but, you know, if
16 you told me that, wow, there's this provision
17 that's in the code that is specifically
18 designed to protect your interests, and the
19 Seventh Circuit adopted a narrow construction
20 of it, and it's going up to the Supreme Court
21 of the United States, and they will decide the
22 scope of this exemption that protects your
23 industry, I mean, if -- if you had any thought
24 that you were not fully protected by the
25 Respondent's view as much as the Petitioner's

1 view, I would think it would be worth your
2 while to file an amicus brief.

3 And the fact that they're not here, I
4 think, underscores that the entities that
5 Congress was trying to protect are fully
6 protected by our view, and they're fully
7 protected by the Petitioner's view. It's just
8 so is the rest of the world.

9 And I just don't think there's any
10 view that Congress actually intended to not
11 just protect those six financial entities, but
12 to protect everybody else who essentially
13 transacted in them, in connection with the
14 securities contract.

15 So we think the decision below should
16 be affirmed.

17 Thank you.

18 CHIEF JUSTICE ROBERTS: Thank you,
19 counsel.

20 Four minutes, Mr. Walsh.

21 REBUTTAL ARGUMENT OF BRIAN C. WALSH
22 ON BEHALF OF THE PETITIONER

23 MR. WALSH: Thank you.

24 I'd like to return to Justice Kagan's
25 question a little bit earlier about whether we

1 can focus solely on the transfer as the trustee
2 identifies and characterizes it.

3 And I think it's useful to think about
4 what happens if that end-to-end transfer in
5 this case is avoided and some amount of that
6 would have to be refunded by Merit. I think
7 the question we have to ask is then, So what of
8 the transfers from Citizens Bank out of escrow
9 to Merit?

10 Can we say that those transfers are
11 still valid and in effect and have been
12 consummated and have been paid, and Citizens
13 has satisfied its obligations because Merit has
14 the 16 and a half million dollars?

15 And I think the answer to all those
16 questions is no because, once the broader
17 transfer is avoided and a recovery is made,
18 everything else falls with it as well.

19 So when we say the --

20 JUSTICE SOTOMAYOR: Sorry. I thought
21 that 550 said that post -- that transferees
22 from Bedford could be protected by other safe
23 havens, if they paid consideration in -- in
24 good faith, et cetera, they would be okay?

25 MR. WALSH: No, that -- that's right.

1 If -- if -- well, Bedford didn't receive the
2 transfer, Your Honor, the shareholders of
3 Bedford, including my client, received the
4 transfer.

5 JUSTICE SOTOMAYOR: Right.

6 MR. WALSH: If they had transferred it
7 on --

8 JUSTICE SOTOMAYOR: Right.

9 MR. WALSH: And that's what we were
10 talking about, the good faith defense would
11 come into play.

12 But what I'm talking about is the
13 transfers from Citizens out of escrow to the
14 shareholders. If the -- if the broader
15 transfer is avoided and recovery is had against
16 Merit, then those transfers into and out of
17 escrow involving financial institutions are not
18 in full force and effect.

19 JUSTICE BREYER: So what?

20 MR. WALSH: So --

21 JUSTICE BREYER: I mean, if I write a
22 check, and it goes to the postman, and the
23 postman delivers it to Smith, and I get my
24 money back from Smith, then I guess you could
25 say, well, the postman -- that putting it in

1 the mailbox didn't have any financial effect.

2 So what?

3 MR. WALSH: So the -- the so what,
4 Your Honor, is that, when the trustee says, I'm
5 only seeking to avoid the one transfer and the
6 rest can --

7 JUSTICE BREYER: Well, it is all he's
8 trying to avoid.

9 MR. WALSH: -- and the rest can be
10 disregarded --

11 JUSTICE BREYER: Well, no, but I mean
12 it has no effect. If FedEx, you know,
13 delivered the check. I mean, there are many
14 ways of delivering the check. If they're just
15 a conduit, the bank, it's quite true in a sense
16 that transfer from the bank didn't have any
17 effect because the people who got the money had
18 to give it back to the people who deposited the
19 money.

20 But my question was, so what?

21 MR. WALSH: The so what is that the
22 statute says the trustee may not avoid the
23 transfer by a financial institution. And so by
24 -- by avoiding the transfer, the broader
25 transfer --

1 JUSTICE BREYER: And there's no --
2 there's no consequence to Citizens Bank, is
3 there?

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

6 JUSTICE BREYER: No -- no -- no
7 consequence?

8 MR. WALSH: That's correct.

9 JUSTICE BREYER: Okay.

10 MR. WALSH: I do want to talk about
11 consequences, though, because this is a case
12 involving 16 and a half million dollars. As
13 the Court is aware, both sides in the Tribune
14 case have filed amicus briefs. That case is,
15 let's call it 100 times larger than ours, it's
16 more than that.

17 And the issue there, and Justice
18 Gorsuch mentioned the Second Circuit's opinion,
19 which is justifiably concerned about what
20 happens, there are thousands of defendants in
21 that case.

22 Of course, if Goldman Sachs or Merrill
23 Lynch received a distribution in that case for
24 its own account, they don't have liability,
25 that transfer can't be avoided. I think

1 everybody would agree about that. But there
2 are employees who held company stock, there are
3 pension funds that held stock in Tribune. All
4 these other entities remain exposed.

5 Over the past 30 years, Congress has
6 expanded and expanded and expanded the safe
7 harbor to bolt on different concepts, including
8 financial institutions. At the same time, the
9 courts, with a few exceptions, have been
10 interpreting the statute broadly.

11 And if Congress thought that the
12 courts were out of line, it could very well
13 have cut the statute back. It didn't do that.
14 The statute has continued to expand. And it's
15 important.

16 And one -- one last point, Mr. Clement
17 mentioned the Seligson case. And what Congress
18 was -- I'm sorry.

19 CHIEF JUSTICE ROBERTS: You can finish
20 your point.

21 MR. WALSH: The -- the notion that
22 transfers by an institution are protected by
23 the safe harbor covers a good bit more than
24 transfers by an institution into the clearing
25 system.

1 The example I gave before where
2 Goldman Sachs transferred me a bunch of
3 Berkshire Hathaway stock for a nominal amount
4 of money is covered as well, so it's broader
5 than Seligson.

6 CHIEF JUSTICE ROBERTS: Thank you,
7 counsel. The case is submitted.

8 (Whereupon, 11:02 a.m., the case was
9 submitted.)

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