SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES MERIT MANAGEMENT GROUP, LP,) Petitioner,) v.) No. 16-784 FTI CONSULTING, INC.,) Respondent.)

Pages: 1 through 68

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1 IN THE SUPREME COURT OF THE UNITED STATES 2 _ _ _ _ _ _ _ _ _ _ _ _ _ _ _ _ _ _ _ MERIT MANAGEMENT GROUP, LP,) 3 Petitioner, 4) 5 v.) No. 16-784 FTI CONSULTING, INC., 6) 7 Respondent.) _ _ _ _ _ _ _ _ _ _ 8 - - - - - - - -9 Washington, D.C. 10 Monday, November 6, 2017 11 12 The above-entitled matter came on for oral 13 argument before the Supreme Court of the United States 14 15 at 10:03 a.m. 16 17 APPEARANCES: 18 BRIAN C. WALSH, St. Louis, Missouri; on behalf of the Petitioner. 19 PAUL D. CLEMENT, Washington, D.C.; on 20 behalf of the Respondent. 21 22 23 24 25

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PROCEEDINGS 1 2 (10:03 a.m.) CHIEF JUSTICE ROBERTS: 3 We'll hear argument this morning in Case 16-784, Merit 4 Management Group versus FTI Consulting. 5 Mr. Walsh. 6 7 ORAL ARGUMENT OF BRIAN C. WALSH ON BEHALF OF THE PETITIONER 8 9 MR. WALSH: Mr. Chief Justice, and may it please the Court: 10 The relevant transfers in this case 11 12 are the transfers by and to the financial institutions, Credit Suisse and Citizens Bank. 13 14 We know that because Congress included 15 intermediaries in the safe harbor from the very beginning, focusing on what they do rather than 16 17 who they are. 18 We know that because Congress used the disjunctive, "by or to or for the benefit of" a 19 financial institution or another institution, 20 which precludes an approach that looks only at 21 2.2 the party that has a beneficial interest in the 23 transaction. JUSTICE KENNEDY: I'll read them --24 25 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 that that controls everything. And they don't 3 talk about transfer. Of course, there was a 4 transfer in a lay sense, but that's not the 5 transfer here that the trustee seeks to avoid. 6 MR. WALSH: Well, Your Honor, the --7 there was a lot of discussion of whether or not 8 9 something is a settlement payment in some of the earlier cases. In 2006, Congress added 10 "securities contract" and "commodities 11 12 contract" to the statute, and those are much 13 broader concepts.

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

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

1 they entered into this contract that they're --2 JUSTICE GINSBURG: Mr. Walsh, could you explain -- I mean, here we have two 3 parties, Valley View and Merit. And you don't 4 claim that either of those is a 546(e) entity, 5 6 do you? 7 MR. WALSH: Neither of those is a financial institution --8 9 JUSTICE GINSBURG: Yes. MR. WALSH: -- or one of the other 10 institutions named in the statute. That's 11 12 correct. JUSTICE GINSBURG: So now the trustee 13 14 is alleging that Merit got money that otherwise 15 would have been available for distribution to creditors. That's the claim. 16 17 MR. WALSH: That's the gist of it, 18 yes. JUSTICE GINSBURG: So why should it 19 20 matter whether the transmission was through the banks rather than handed over by Valley View to 21 2.2 Merit? 23 MR. WALSH: Because the goal of the 24 statute is to protect the securities and commodities markets, not just to protect 25

1 particular players in the markets. We know --JUSTICE GINSBURG: Well, how -- how is 2 the -- either bank at risk of anything here? 3 MR. WALSH: Neither bank is at risk of 4 liability in this particular case, but the 5 broader issue is that parties who receive 6 7 distributions from securities or commodities transactions have a decision to make. Can we 8 9 safely reinvest in something else? Can we make a distribution to our own investors or the 10 benefits of our pension fund or what -- what 11 12 have you? Or do we have to create a reserve? Or do we have to anticipate that there may be 13 14 litigation that comes along six, eight --15 JUSTICE SOTOMAYOR: I'm sorry, who's insecure about that? The banks or the person 16 17 to whom the money was ultimately sent? MR. WALSH: Investors in general would 18 be insecure about that, Your Honor. 19 JUSTICE SOTOMAYOR: Well, I understood 20 that the safe harbor was not intended to 21 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.

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1 MR. WALSH: Well --2 JUSTICE SOTOMAYOR: Congress wanted to 3 do that, why bother even creating the fraudulent transfer provisions? Just say any 4 contract that any of these people sign in any 5 of these fields is exempt. 6 7 MR. WALSH: Well, Your Honor, I agree that anyone engaging in any transaction has 8 9 some possibility that there could be a claim that would come along later, but Congress has 10 focused here on the securities and commodities 11 12 markets --JUSTICE SOTOMAYOR: Going -- going 13 14 back to this transfer question. 15 MR. WALSH: Yes. 16 JUSTICE SOTOMAYOR: The 17 fraudulent-transfer provision says the trustee may avoid any transfer or any obligation. So 18 it's not talking just about voiding a transfer; 19 it's talking about voiding an obligation. 20 Isn't the contractual obligation an 21 22 obligation? 23 MR. WALSH: The contractual --JUSTICE SOTOMAYOR: Or a contractual 24 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 --JUSTICE SOTOMAYOR: And that define 4 the scope of who's involved? 5 6 MR. WALSH: Sure. The reference to 7 obligation in the fraudulent-transfer statutes is -- is generally in reference to a debt 8 9 incurred by the debtor to someone else. And if that debt causes the debtor to become insolvent 10 or inadequately capitalized and the other --11 12 the other aspects of the statute are satisfied 13 _ _ 14 JUSTICE SOTOMAYOR: I'm sorry --15 MR. WALSH: -- then the --JUSTICE SOTOMAYOR: -- the -- here, 16 17 debtor sold something to someone else or was obligated to send money ultimately to Merit. 18 So how does that not fit into obligation? 19 MR. WALSH: Well, that obligation has 20 been paid already. It would -- that -- that 21 22 application of the statute would normally be in a situation --23 JUSTICE SOTOMAYOR: You think that --24 25 MR. WALSH: -- where the--

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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

10

1 fraudulent. My argument is that the 2 intermediate transfers can't be separated from 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 7 To think of it a different way --JUSTICE ALITO: So why shouldn't the 8

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 to think about it, Your Honor, is that there's 15 only \$55 million involved here. And we can 16 17 say, as a shorthand, now that we know how the transfer played out -- because it was 10 years 18 19 ago -- we can say there was a transfer from Valley View to Merit, but it's not different 20 from the transfer of the same \$55 million that 21 2.2 Valley View sent to Citizens Bank.

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

11

apart. In other words, I understand the 1 2 trustee's point that I'm only seeking to -- to 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 6 not what I'm doing. 7 JUSTICE GINSBURG: Well, could the 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 12 from Credit Suisse to Citizens Bank. JUSTICE KENNEDY: Why -- why was there 13 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 JUSTICE KENNEDY: What would there be 18 to avoid? 19 20 MR. WALSH: I'm sorry. I'm not agreeing on the -- on the merits. I'm -- I'm 21 2.2 suggesting the trustee could pursue that claim. 23 JUSTICE GINSBURG: But would you --MR. WALSH: I do think there was 24 adequate consideration for it, and that claim 25

would fail, but the trustee could seek to

12

2 pursue it. 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 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

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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 --

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 2.2 enough that the purchaser just paid by check? MR. WALSH: Well, I think -- let me 23 24 address the scope first. I think the scope of checks or wire transfers is actually quite a 25

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1 bit less than -- than my opponent would 2 suggest. 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 7 They're going to clear through paper, debits, and credits and not with wire transfers or 8 checks. 9 JUSTICE BREYER: I'm just curious --10 look, I have two shares of company X in my -- I 11 12 have an account somewhere, okay? 13 MR. WALSH: Yes. 14 JUSTICE BREYER: So, knowing I'm about to go bankrupt, I take my share, and I tell 15 them go transfer it to my wife. Right? 16 17 MR. WALSH: Yes. JUSTICE BREYER: Now, you'll say they 18 can't attack that as a fraudulent conveyance. 19 I'm just trying to think, you know, of --20 MR. WALSH: Well, actually --21 2.2 JUSTICE BREYER: -- the paradigm case 23 of a fraudulent conveyance. MR. WALSH: Well, actually, Your 24 25 Honor, that -- that very well might be a case

14

1 that wouldn't fall within the safe harbor. 2 JUSTICE BREYER: Why not? MR. WALSH: Because if you transfer 3 your stock to your wife --4 JUSTICE BREYER: No, no, no. I told 5 you it's being held in a -- in a bank, and I 6 7 tell the bank to do it. MR. WALSH: It's being held in the 8 9 indirect system --10 JUSTICE BREYER: Yeah. MR. WALSH: -- and you -- you sell it 11 12 to your wife. Then in -- then in that case --JUSTICE BREYER: It does. 13 MR. WALSH: -- there's safe harbor. 14 15 JUSTICE BREYER: So this covers -that's, I think, the thrust -- this is going to 16 17 cover all kinds of things. I have another -- another question, 18 which is -- which is, and this is just a 19 puzzle, look, when they define financial 20 institutions -- what we have here is a 21 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 Merit Downs or whatever, Merit? All right? 25

15

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

16

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?

17

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

18

1 both parties concede that -- that Valley View 2 is not a financial institution? JUSTICE GINSBURG: You just did in 3 answer to my question. 4 5 MR. WALSH: No, I'm sorry. JUSTICE GINSBURG: I said -- I asked 6 7 you that, with the question that Justice Breyer raised in mind, I asked you specifically, do 8 9 you agree that neither Valley View nor Merit is an entity enumerated under 546(e)? 10 MR. WALSH: I may have -- I may have 11 12 misunderstood the difference between the two questions, Your Honor. 13 14 JUSTICE BREYER: I think it's the same, but, I mean, at some point, you know, if 15 we have two cases involving the Fishing Act, 16 17 and it involves fishermen, and both parties concede we are -- we are fishermen, but, in 18 fact, what they are is both farmers and have 19 nothing to do with fish, I would say we'd have 20 a problem in this Court about whether we should 21 2.2 hear the case. 23 MR. WALSH: And -- and, Justice 24 Ginsburg, in response to your question, neither of the parties to this case is a -- is a 25

19

1 financial institution, as that term is -- is 2 generally understood. 3 In trying to --JUSTICE BREYER: But not as the 4 statute understands it --5 MR. WALSH: In -- in the --6 7 JUSTICE BREYER: -- which uses it to include a customer of a financial institution 8 9 in circumstances which are present here. MR. WALSH: That -- in the rather 10 unusual definition of financial institution, 11 12 this is a situation in which the banks act as -- acted as agents, that's -- that's an escrow 13 14 agent. 15 JUSTICE GINSBURG: If you -- if this was such a standout issue, you must have 16 17 thought about it, and yet, you relegated it to a footnote in your reply brief. 18 MR. WALSH: And I -- and I don't know 19 20 whether it's a standout issue or not, Your Honor, but that is a quirk in the definition of 21 2.2 financial institution, that is true. That is 23 true. I think one of the -- one of the ways 24 to think about what's going on here is whether 25

20

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.

21

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

22

1 the very limited subset of parties against whom 2 you may recover. 3 That is what the opponent here would like to happen here. That is what they propose 4 is the actual function of 546(e), that it only 5 6 protects banks and brokers and clearing 7 agencies. And Congress didn't do it in 550, which would have accomplished that. 8 There -- there's also the problem here 9 10 that the statute protects transfers by banks and brokers and clearing agencies and these 11 12 other parties. And that has nothing to do with protecting the bottom lines of banks and 13 14 brokers. 15 It has everything to do with protecting transactions. So, for example, if 16 17 Goldman Sachs were to sell me 100 shares of Berkshire Hathaway stock for \$100 apiece, that 18 is a significant hit to the bottom line of 19 20 Goldman Sachs because the stock is worth many, many times that much. 21 2.2 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

23

1 to the transaction. They're not acting just as 2 a pass-through agent. 3 MR. WALSH: But it would also apply, Your Honor, if Goldman Sachs, on behalf of one 4 of its clients, made that transaction. 5 Ι probably wouldn't even know whether I was 6 7 dealing with Goldman Sachs' own balance sheet or whether I was dealing with someone who was 8 9 trading through Goldman Sachs. But those transfers go outside of the 10 circle of the six entities that are identified 11 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 on here is we're trying to protect banks and 15 brokers from liability because if they get hit 16 17 with liability, there will be a cascade of other banks and brokers that will -- that will 18 fail. 19 20 When we're talking about systemic risk to the financial markets, we're not just 21 talking about banks and brokers going under. 2.2 23 If parties aren't willing to provide capital to 24 the financial system or if other parties like

private equity funds or pension funds collapse,

24

1 we have systemic risk to the financial institution as well. 2 JUSTICE GORSUCH: Mr. Walsh --3 MR. WALSH: Yes? 4 JUSTICE GORSUCH: -- can you help me 5 6 out with what happens to the law of preferences 7 under your interpretation? As you know, trustees can avoid 8 9 transfers leading up to the bankruptcy that meet certain conditions. 10 11 MR. WALSH: Yes. 12 JUSTICE GORSUCH: And a lot of that 13 would seem to go away, that power would seem to go away under your interpretation, if a bank or 14 15 financial institution is involved. So that a lot of avoidable transactions would become 16 17 unavoidable all of a sudden. How do we reconcile your -- your 18 19 interpretation with that -- that apparent difficulty? 20 MR. WALSH: I'm -- I'm not sure that 21 there is such a difficulty, Your Honor. A 22 23 typical preference claim, for example, would be that the debtor repaid a vendor outside of the 24 ordinary course of business. 25

25

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

26

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.

27

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 a safe harbor that applies to that transfer? 3 MR. WALSH: I think the -- the first 4 -- my first response, Your Honor, is that when 5 -- when we're dealing with a prohibition of 6 7 that sort, we don't simply look at what the party says it is doing. 8 9 So, if I'm called to a visit with a U.S. attorney because I allegedly filled a 10 wetland, it's not a sufficient response for me 11 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? And if I did, I have a problem, notwithstanding 16 17 that I characterize my actions in a different 18 way. But a second response is that because 19 these transfers, the way we characterize the 20 different pieces of this transaction as 21 2.2 transfers are integrally -- integrally 23 interrelated, to say that a trustee can avoid the end-to-end transfer without affecting the 24

25 others, the intermediate transfers, in any way

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1 is just inconsistent with reality. 2 JUSTICE KAGAN: I quess you're asking a court to make a shift in transfers in the 3 middle of the analysis. In other words, first, 4 the court has to say whether this is the kind 5 of transfer that the trustee can avoid, and in 6 7 doing that, the court is looking at the -- what you call the end-to-end transfer. 8 And then all of a sudden, when it 9 comes to the safe harbor, you're saying that 10 the trustee has to flip and look at another 11 12 transfer entirely. And that seems like a strange thing for a safe harbor to do. 13 14 I mean, usually what we think is that, you know, a safe harbor would shield from 15 avoidance a transfer that's being challenged, 16 17 rather than a transfer that isn't being challenged. 18 MR. WALSH: I -- I think the 19 difference in -- between what you're saying and 20 what I'm saying, Your Honor, is that it's not a 21 2.2 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 racetrack, then -- then that would be a 25

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1 different transfer. 2 But the transfer of \$55 million from 3 Valley View to the escrow agent and the subsequent transfers from the escrow agent to 4 the shareholders of Bedford Downs, they aren't 5 6 -- they aren't different transfers. They're 7 just different ways of looking at the same transfer because they made up the long --8 9 JUSTICE KENNEDY: Well, but in -- in your hypothetical, if the land were held as 10 an -- in escrow for 30 days until everybody got 11 12 the title in, then there would be an exemption. MR. WALSH: No, because it's not 13 14 securities or commodities. It's real estate. 15 JUSTICE BREYER: What about this, the -- where -- where it says a trust fee, gee, 16 17 tree -- sorry, a trustee may not avoid a transfer that is a settlement payment made by a 18 financial institution? Joe -- that's right, 19 isn't it? So far? 20 21 MR. WALSH: Yes. Yes. 2.2 JUSTICE BREYER: Okay. Joe Smith buys 23 a piece of property from Bill Brown for \$10 24 million. Joe Smith puts into escrow \$10 million. It's -- Bank of America is the escrow 25

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1 agent. Brown puts in the deed. When both are 2 there, Bank of America gives each the other. Why hasn't Bank of America given a settlement 3 4 payment? MR. WALSH: Your Honor, I don't think 5 the term "settlement payment" has ever been 6 7 understood to apply outside --JUSTICE BREYER: It doesn't mean that 8 9 MR. WALSH: -- outside securities and 10 commodities in financial transactions. So --11 12 JUSTICE BREYER: I see. So -- so it is not a settlement payment. It's just -- it's 13 not a settlement payment, a payment for a real 14 15 estate transaction. MR. WALSH: It is a payment for a real 16 17 estate transaction. That's correct. JUSTICE BREYER: It is not? It is not 18 19 a real estate transaction payment? 20 I'm sorry, a settlement MR. WALSH: payment as defined in the code is not a real 21 22 estate transaction payment, yes. 23 JUSTICE BREYER: But if the same thing 24 were true and what they had bought was a -- 5 million acres of wheat, then it would be? 25

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               MR. WALSH: If -- if they bought the
 2
      crop and it was a forward contract under the
      code, then that -- the -- the purchase of the
 3
      crop --
 4
               JUSTICE BREYER: Thank you, thank you.
 5
 6
      I see.
 7
               MR. WALSH: -- could very well be
      covered by this.
 8
 9
               JUSTICE BREYER: Thank you.
               MR. WALSH: Unless there are further
10
      questions, I'd like to reserve the balance of
11
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
               MR. CLEMENT: Mr. Chief Justice, and
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19
      may it please the Court:
20
               I think it would be helpful if I could
      start with the elephant in the room, which is
21
22
      Justice Brever's question about the definition
      of the financial institution and then address
23
24
      the question presented.
               So, Justice Breyer, a couple of points
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1 about that. First of all, I think it could not be 2 clearer that that's never been at issue in this 3 case, and even more to the point, the 4 Petitioner, when they were trying to get this 5 Court to take the case, emphasized the fact 6 7 that this wasn't in dispute as a sort of a positive feature of this petition. 8 9 So, if you look at page 3 of the petition, it is clear that the Petitioner --10 JUSTICE BREYER: I have no doubt that 11 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 financial interest in fishing, and they'd love 16 17 to have this Court decide the Fishing Act, but, in fact, if you look at the Farming Act, you've 18 got the answer to the dispute between them. 19 20 And can two parties who would just love it, if we could decide an issue that 21 2.2 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 contract is valid upon signing or something, in 25

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1 order to get us to decide a question? 2 MR. CLEMENT: So, Justice Brever, if you really had the farmer/fisher idea -- fisher 3 person idea, I think what you would do is 4 dismiss the case as improvidently granted, 5 6 which would serve my client's interest just 7 fine. But I think there are two very good reasons why that issue was not put front and 8 9 center by my friends here. The first is that it's completely 10 inconsistent with their overall theory of the 11 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 those entities. 16 17 So it's more than a little bit of an embarrassment for them to come across a 18 definition that says that customers of one of 19 the six, in relatively narrow circumstances, 20 are also covered. It's inconsistent with their 21 2.2 overall theory. They really can't argue both 23 things. Here's the --24 JUSTICE KAGAN: Do you think, though, Mr. Clement -- I'm sorry, if you want to --25

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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
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1 in this case, given the transfer that the 2 trustee sought to avoid. If we prevail at the end of the day, Merit owes the estate some \$16 3 million. Citizens Bank doesn't have to do a 4 thing. Credit Suisse doesn't have to do a 5 6 thing. If they want to wire the money, they 7 can pick one of those banks, and one of those banks will actually benefit to the extent of 8 the wire transfer fee. 9 But there's no obligation to do that. 10 They can pick Bank of America instead. It is 11 12 not as if, if they win here, that the poor folks at Citizens Bank need to go and sort of 13 14 unearth that escrow agreement and reverse 15 something on it. They don't have to do a thing, which, 16 17 of course, explains why they're not here as amici, why --18 CHIEF JUSTICE ROBERTS: Well, it's not 19 that simple. I mean, this is not simply -- I 20 think you try to portray it, it's simply a 21 2.2 matter of conduits that -- that don't have 23 anything to do with it, but as I understand it, the intermediaries had a lot to do -- this --24 this -- they were there functioning as 25

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

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

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

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

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

It then cross-references five sections 6 7 of the statute, each one of which uses the term "may avoid." It describes a transfer that the 8 9 trustee may avoid. It just seems like these provisions -- there are all these textual 10 interrelationships between the two provisions, 11 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 --

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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

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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?

MR. CLEMENT: Yes, Justice Kagan, but 1 2 I think the reason that that doesn't create some sort of mischief here is that, in making 3 that -- the complaint, the affirmative part of 4 the complaint, the trustee isn't just sort of 5 free to pick transfers at random that he or she 6 7 seeks to invalidate. They have to come up with a transfer 8 that fits the terms and the requirements of one 9 of those provisions of the code in Chapter 5. 10 JUSTICE KAGAN: So that -- that might 11 12 be right. I was trying to think of cases in 13 which there could be mischief by relying 14 15 entirely on the trustee's power to define the transfer. 16 17 And here is what I came up with, is that there truly is a transfer from a debtor to 18 a bank, if the bank's not serving as an 19 intermediary, it is a real transfer of stock, 20 right? 21 And now, 546 -- 546(e) is going to 2.2 23 prevent the trustee from avoiding that. But 24 then the trustee says: So, in order to get around 546(e), I'm going to define the transfer 25

1 differently, I'm going to ask where the bank 2 then transferred the stock and -- and -- and say that the transfer that I want to avoid is 3 from the original debtor to whoever it was that 4 the bank transferred the stock to, even though 5 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 mean, they could try, but I don't think they 10 would get away with it. And I think that, you 11 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 defense based on 546(e). Now, it may be in 16 17 your hypothetical the trustee's kind of pled around that, but you still have to -- the 18 trustee still has to essentially satisfy the 19 terms of the original avoidance provision, and 20 I don't think, for purposes of that 21 22 hypothetical, though it might depend on some 23 details of it, that the trustee would be able to do that. 24

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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 for the effort, you have to not only avoid the 3 transfer, but you also have to get recovery 4 under 550. 5 And in the hypothetical that you're 6 7 talking about, the third-party subsequent transferee would not be the immediate -- the 8 initial transferee under 550. And so, as long 9 as they took it in good faith and paid value 10 for it, they'd be completely protected. 11 12 So I just don't think it would work. 13 And I think it is important to recognize that, you know, this is not a situation where the 14 trustee can just sort of, you know, pick the --15 well, today, I feel like the Credit Suisse to 16 17 Citizens Bank transfer is the one I'm going after. 18 That would satisfy --19 JUSTICE KENNEDY: Well, if we're -- if 20 we're writing the -- the opinion to accept your 21 proposition, how do we -- how do we qualify it? 22 23 Do we -- do we say that this does not apply to transfers where the settlement institution does 24

25 not have an equity participation?

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I mean, what -- what --1 2 MR. CLEMENT: See, I wouldn't do that, Justice Kennedy. I think that's -- that is the 3 way some of the courts had -- have written it, 4 but I think the simpler way to write the 5 opinion is to say, to apply 546(e), just look 6 7 to the transfer that the trustee seeks to avoid, and it's as simple as that. 8 9 If the transfer that the trustee seeks to avoid --10 JUSTICE KENNEDY: But that -- that --11 12 that then involves Justice Kagan's concern that 13 you're giving the -- the trustee a chance -- a chance to define the transfer in a particular 14 15 way. Now, if the -- if the Bankruptcy Code defines a transfer so it's abundantly clear the 16 17 -- what transfer is -- is involved, then that's 18 one thing. MR. CLEMENT: Well, but I tried to be 19 responsive to Justice Kagan's question, and I 20 think that the code puts all sorts of limits on 21 2.2 the trustee when they're picking the transfer 23 that they're seeking to avoid. So, for example, for certain 24 provisions of the code, you can only avoid a 25

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1 transfer at a certain time period if it's a 2 transfer to an insider. Now, that seems to me to buttress the idea that that provision of the 3 code doesn't really care much about the 4 intermediaries because otherwise you could say, 5 6 well, there's never a transfer to an insider 7 because it always goes through a bank first. So I think the trustee is disciplined 8 9 not just by 546(e) but by the various things that the trustee has to show to qualify the 10 particular transfer for being avoidable under 11 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 approach, which Justice Kennedy was referring 16 17 to, it's more of a functional analysis; you ask who has dominion and control of a particular 18 piece of property at a particular point. And 19 -- and that seems more what the Seventh Circuit 20 was doing than -- than what your brief 21 2.2 suggests. 23 So why do you think that that's a 24 worse alternative than the one you're suggesting? 25

MR. CLEMENT: Well, Justice Kagan, let 1 2 me start by saying it's a lot better alternative than my client losing this case. 3 So, if you find that attractive, I mean, that's 4 fine. 5 Here's the reason, though, that, 6 7 honestly, I don't think it's right. Because I think one point my -- my friend and I agree on 8 is that when Congress was passing the 9 predecessor to 546(e) back in the day, there 10 was already substantial protection for the 11 12 intermediaries under the recovery provision, 550, if they were truly conduits and weren't 13 the beneficial owners. 14 15 And so I think what Congress was trying to do with 546(e) was to provide an 16 17 alternative, more bright-line way for the financial intermediaries to get out of the case 18 early at the motion to dismiss stage. 19 20 And the problem with this looking for the beneficial ownership is it's really the 21 2.2 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

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1 bright-line rule that courts can apply at the 2 motion to dismiss stage, literally just look at the complaint, look at the transfer the 3 trustee's seeking to avoid, and then, if it 4 satisfies 546(e), you know, you're done, 5 trustee loses. If it doesn't, we move forward. 6 7 Of course, when you move forward, you can still get into this beneficial interest 8 9 inquiry. That's part of the 550 inquiry because here -- -10 JUSTICE GINSBURG: Well, how --11 12 MR. CLEMENT: -- as in almost every 13 case -- sorry. 14 JUSTICE GINSBURG: How do you -- how do you answer what your colleague stressed; 15 that is, it doesn't say for the -- only for the 16 17 benefit of a financial institution. It says "by." If a transfer is by a financial, that's 18 19 enough. 20 MR. CLEMENT: You're right, Justice Ginsburg, and we think that's right, but we 21 2.2 think what Congress was addressing in that situation was the precise situation that the 23 Southern District of New York dealt with in a 24 case called Seligson, which I think both 25

1 parties agree is the case that Congress was 2 trying to address with the predecessor to 546(e). 3 And that was a situation where the 4 financial intermediary -- there I believe it 5 6 was a commodity broker -- is the bankrupt. And 7 so --JUSTICE BREYER: So for this --8 9 MR. CLEMENT: And so, in that situation, you do want to protect and shield 10 the transfers by the bankrupt because the one 11 12 thing Congress was clearly concerned with is you'd have a bankruptcy by one of the hub 13 14 players in the financial industry and that 15 would create this sort of ripple effect to everybody who dealt with them. 16 17 JUSTICE BREYER: So, for this provision, do I have this right? A, look to 18 the -- the transaction that the trustee is 19 20 trying to set aside as a preference or fraudulent conveyance. B, ask the question: 21 2.2 Who is the person who directed that that 23 transfer be made? All right. If it's a financial institution, et 24 cetera, stop right there, good-bye, you're out. 25

If not, continue to question 3. And question 3 1 2 is: Who is the initial transferee and not a conduit of that transfer? And if the answer is 3 a financial institution, you're out. And 4 otherwise we go on to ask the other questions. 5 And that means that a -- that the 6 7 transferee, the initial transferee, if he's receiving money that he is to hold for the 8 benefit of the other, he still is the initial 9 transferee. And you will look to such matters 10 as to who this money is to benefit later on in 11 12 your -- your efforts. Is that right? Well, Justice Breyer, I 13 MR. CLEMENT: 14 think you've aptly captured the Seventh 15 Circuit's reasoning. JUSTICE BREYER: Uh-huh. 16 17 MR. CLEMENT: I'm actually asking you to make this case even simpler. 18 JUSTICE BREYER: Uh-huh. 19 20 MR. CLEMENT: I'm asking you to look at the transfer that the trustee seeks to 21 2.2 avoid. 23 JUSTICE BREYER: Yeah. 24 MR. CLEMENT: That has to be by somebody and to somebody --25

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1 JUSTICE BREYER: Yeah. MR. CLEMENT: -- in order for it to 2 satisfy 544, 545, 547, or the two provisions of 3 548 that 546(e) cross-references. 4 JUSTICE BREYER: All Right. 5 6 MR. CLEMENT: So there you have, right 7 on the face of the complaint, a transfer by someone, to someone, or for the benefit of 8 9 someone, because as we explained in the brief 10 JUSTICE BREYER: Do you have what it 11 12 says? MR. CLEMENT: -- the reason that 13 language is there is because the avoidance 14 15 power is not limited to transfers to somebody who is like an insider or a creditor --16 17 JUSTICE BREYER: That's right. MR. CLEMENT: -- but also to somebody 18 who is for the benefit of a creditor or an 19 insider. So just look at the face of the 20 complaint, apply 546(e) to the transfer that 21 2.2 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 faithful to what Congress was trying to 3 accomplish when it enacted the predecessor to 4 546(e) to have a nice, bright-line protection 5 that's there for the financial intermediaries. 6 7 It doesn't protect all of their It doesn't protect Merit. Thev 8 customers. 9 have other arguments they can eventually make, but what they wanted was a nice bright-line 10 rule so clearing agencies, commodity brokers, 11 12 and then eventually stockbrokers and financial institutions and financial participants would 13 14 all have a nice, clean motion to dismiss argument to win their case. 15 JUSTICE SOTOMAYOR: May I address a 16 17 question that confused me in your briefing? JUSTICE BREYER: Yeah. 18 19 JUSTICE SOTOMAYOR: You kept saying 20 that the initial transfer had to be by the debtor. 21 2.2 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 interest of the debtor in property. 25

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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 of the cases, that when you get to transfer by, 2 either for purposes of the avoidance power or 3 for purposes of the exception of 546(e), it's 4 going to be a transfer by the bankrupt. And 5 whether it's 99 or 100 percent, nothing 6 7 ultimately turns on it. JUSTICE SOTOMAYOR: So why -- but why 8 9 then did you argue that the transfer from Credit Suisse to Citizens Bank -- both involved 10 property of the debtor, why did you argue that 11 12 that wouldn't qualify because it wasn't a transfer by the debtor? 13 14 MR. CLEMENT: Because the way we read 15 Chapter 5 of the code is it essentially ignores conduits for purposes of identifying who's the 16 17 transferor and who's the transferee. And we do think that's consistent throughout Chapter 5. 18 That's why for its --19 JUSTICE SOTOMAYOR: You don't think 20 Credit Suisse or -- or Citizens Bank fell under 21 2.2 the safe harbor automatically? They're both financial --23 MR. CLEMENT: I think -- I think if 24 25 the trustee had tried to avoid that transfer,

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1 it would automatically satisfy 546(e). 2 What I'm making, though, is the point that I don't think, properly understood, that 3 is even a transfer by Credit Suisse. And I 4 think maybe the way to try to at least 5 understand the point I'm making, but nothing 6 7 turns on it --JUSTICE SOTOMAYOR: Oh, okay. That's 8 9 what I'm --MR. CLEMENT: -- is -- is think about 10 the charitable giving exception. Now, it 11 12 allows -- it exempts certain transfers by the debtor to a qualifying charitable institution. 13 14 Now, I would think the vast majority of those are made by telling your bank I want 15 to give \$2,000 to this charity. Now, if you 16 17 accept their view that you subdivide everything, well, then that's not a transfer by 18 the debtor to the charity. It's a transfer by 19 the debtor to Credit Suisse, which is not a 20 charity, and then a transfer by Credit Suisse 21 2.2 to the charity. And that doesn't come within the 23 24 exception to the power, which is nonsense. That's clearly not what Congress was trying --25

1 JUSTICE GORSUCH: So -- but, Mr. 2 Clement, on that, I assume your friend will get up and say, well, a lot of those charitable 3 contributions are by check, and those aren't 4 5 covered. 6 And just as -- just as we heard when I 7 asked the question about avoidable transfers, that it became an empirical debate about how 8 9 many of those would be covered. So how -- how clean a line is this 10 really? I mean, what -- what you're 11 12 suggesting? MR. CLEMENT: Well, two things, 13 Justice Gorsuch. First of all, my friend would 14 15 want to tell you that the checks aren't covered. 16 17 JUSTICE GORSUCH: Yeah. MR. CLEMENT: But, with all due 18 19 respect, I don't think he has a theory as to why. And I think that's -- that's what's 20 critical. I mean, you know, if there's no word 21 2.2 in that statute that allows you to draw that 23 distinction, as the colloquy with Justice 24 Brever showed, there might be a theory based on the definition of financial institution --25

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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

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1 clean position that --JUSTICE GORSUCH: The amici -- the 2 amici give us a very clean position, right, 3 that we need a transferee under the statute and 4 a debtor under the statute. I read the red 5 brief as being a little more equivocal on that. 6 7 Maybe I misread it. Did you endorse the amici's clean 8 9 position without qualification? MR. CLEMENT: Well, we think our 10 position is even cleaner, I mean, so -- so --11 12 but we think -- if you're referring to Professor Brubaker's --13 14 JUSTICE GORSUCH: Yeah. 15 MR. CLEMENT: We think we get to the exact same place. I think, maybe since I'm 16 17 coming at this more like a lawyer instead of a bankruptcy professor, I think about it in 18 really simple terms, and it maps on to the 19 20 procedural history of this case. The trustee here brought a complaint. 21 It was a complaint that identified a transfer 2.2 for avoidance. The -- Merit filed an answer 23 with an affirmative defense. The affirmative 24 defense was based on 546(e). 25

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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

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1 concerned about the effect that this would have 2 on the leveraged buyout industry and -- and, therefore, the economy more broadly. 3 I can understand an argument that 4 Congress in 1978 wasn't much concerned about 5 6 the leveraged buyout industry because it didn't 7 exist, as we now know it, but what -- what else do you say in response to that, the parade of 8 horribles that we've heard? 9 MR. CLEMENT: Well, I mean, I don't 10 actually think it's much of a parade of 11 12 horribles, Your Honor, but let me try to be as responsive as I can, which is to say, I think 13 14 if Congress were really concerned about the 15 leveraged buyout situation, it would have written a very different exemption than the one 16 17 that it wrote here. It might have defined something like leveraged buyout. It might have 18 exempted certain smaller ones or larger ones. 19 20 You know, when you have this provision applied in the context of a very large 21 2.2 transaction on the public markets, there are 23 lots of the trustees' prima facie case, including that there wasn't sufficient value 24 provided and the like, those are going to be 25

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

But when you have leveraged buyouts for small companies, I mean, that is a fertile ground for essentially getting money out of the company and away from unsecured creditors and 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.

The last thing I'll say before I sit 16 17 down is just, in addition to all the other textual arguments we make in the brief, I do 18 think it's worth emphasizing that, under their 19 view of the statute, Congress's effort in 2005 20 to add financial participants as the sixth on 21 2.2 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 are defined as entities with \$100 million or a 25

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1 billion dollars in transactions were doing 2 those transactions with cash. So those financial participants were 3 already customers of these five entities, so if 4 that's enough to bring you into the statute, 5 Congress was utterly wasting its time in 2005. 6 7 JUSTICE KAGAN: May I ask, Mr. Clement, you might have no insight on this 8 9 and you might not be able to say anything about it, so if so, just say so, but it is curious to 10 me, I've never seen a bankruptcy case, maybe 11 12 ever, but certainly a bankruptcy case like this one, in which we do not have a Solicitor 13 14 General brief. 15 Do you have any thoughts about why the SG didn't file here? 16 17 MR. CLEMENT: No, I don't have any particular thoughts, other than I do think 18 that, if what we were urging on you was really 19 a catastrophe for the markets or something 20 else, boy, I sure think the SG would be here, 21 2.2 wave -- you know, waving at least a yellow 23 flaq. To me, the amici that aren't here that 24 speak even louder, though, are, frankly, the 25

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lack of financial institutions, stockbroker,
 clearing agency amici.

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

And the fact that they're not here, I think, underscores that the entities that Congress was trying to protect are fully protected by our view, and they're fully protected by the Petitioner's view. It's just so is the rest of the world. And I just don't think there's any

25 view that Congress actually intended to not

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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

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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			

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1 come into play. But what I'm talking about is the 2 transfers from Citizens out of escrow to the 3 shareholders. If the -- if the broader 4 transfer is avoided and recovery is had against 5 Merit, then those transfers into and out of 6 7 escrow involving financial institutions are not in full force and effect. 8 JUSTICE BREYER: So what? 9 MR. WALSH: So --10 JUSTICE BREYER: I mean, if I write a 11 12 check, and it goes to the postman, and the postman delivers it to Smith, and I get my 13 14 money back from Smith, then I guess you could 15 say, well, the postman -- that putting it in the mailbox didn't have any financial effect. 16 17 So what? MR. WALSH: So the -- the so what, 18 Your Honor, is that, when the trustee says, I'm 19 20 only seeking to avoid the one transfer and the 21 rest can --2.2 JUSTICE BREYER: Well, that is all 23 that he's trying to avoid. MR. WALSH: -- and the rest can be 24 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. As the Court is aware, both sides in the 3 Tribune case have filed amicus briefs. That 4 case is, let's call it 100 times larger than 5 6 ours, it's more than that. 7 And the issue there, and Justice Gorsuch mentioned the Second Circuit's opinion, 8 9 which is justifiably concerned about what happens, there are thousands of defendants in 10 11 that case. Of course, if Goldman Sachs or Merrill 12 Lynch received a distribution in that case for 13 14 its own account, they don't have liability, 15 that transfer can't be avoided. T think everybody would agree about that. But there 16 17 are employees who held company stock, there are pension funds that held stock in Tribune. All 18 these other entities remain exposed. 19 20 Over the past 30 years, Congress has expanded and expanded and expanded the safe 21 2.2 harbor to bolt on different concepts, including 23 financial institutions. At the same time, the 24 courts, with a few exceptions, have been interpreting the statute broadly. 25

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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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