

CASE NO. 14-90024

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT**

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**JEFFERSON COUNTY, ALABAMA,**  
*Petitioner,*

v.

**ANDREW BENNETT, ET AL.,**  
*Respondents.*

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On Petition for Permission for Interlocutory Appeal from the United States District  
Court for the Northern District of Alabama, Southern Division  
Case No. 2:14-CV-00213-SLB

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**MOTION FOR LEAVE TO FILE BRIEF FOR AMICUS CURIAE  
SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION  
IN SUPPORT OF PETITIONER JEFFERSON COUNTY, ALABAMA**

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*Attorneys for Amicus Curiae Securities Industry & Financial Markets Association*

**CERTIFICATE OF INTERESTED PERSONS AND  
CORPORATE DISCLOSURE STATEMENT**

Pursuant to Fed. R. App. P. 26.1, 11th Cir. R. 26.1-1, 11th Cir. R. 26.1-2, and 11th Cir. R. 26.1-3, the undersigned attorney for Securities Industry and Financial Markets Association certifies that, in addition to those entities identified in the Petition for Permission for Interlocutory Appeal, filed December 11, 2014, the following persons or entities may have an interest in the outcome of this case:

1. Carroll, Kevin M.
2. Hammerman, Ira D.
3. Lamar, Jayna P.
4. Maynard, Cooper & Gale, P.C.
5. Miller, Kasdin E.
6. Norwood, Leslie M.
7. Securities Industry and Financial Markets Association

Pursuant to Fed. R. App. P. 26.1, the undersigned attorney states that Securities Industry and Financial Markets Association has no parent corporation and does not issue stock.

*/s/ Kasdin E. Miller*

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Counsel for Amicus Curiae Securities  
Industry and Financial Markets Association

Amicus Curiae Securities Industry and Financial Markets Association (“SIFMA”) respectfully moves this Court for leave to file a brief in support of Petitioner Jefferson County, Alabama. Pursuant to Rule 29 of the Federal Rules of Appellate Procedure, SIFMA conditionally files its brief with this motion. As grounds for the motion, SIFMA states as follows:

1. Jefferson County, Alabama (the “County”) has petitioned this Court for permission to file an interlocutory appeal of an order by the District Court for the Northern District of Alabama that denied the County’s motion to dismiss an appeal of a bankruptcy court order confirming the County’s Chapter 9 Plan of Adjustment.
2. SIFMA, which brings together the shared interests of hundreds of securities firms, banks, and asset managers, has a strong interest in the outcome of the County’s petition and brings a unique perspective that will likely benefit the Court in its consideration of the petition.
3. SIFMA’s mission is to support a strong financial industry, investor opportunity, capital formation, job creation, and economic growth, while building trust and confidence in the financial markets. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA).

4. SIFMA and its members seek to foster a stable and robust municipal bond market to assist local governments in financing necessary infrastructure and in providing vital services to their residents.
5. Because of their involvement in the municipal bond market, most SIFMA members have been or will be affected by a proceeding brought by an insolvent municipality seeking to adjust its obligations under Chapter 9 of the Bankruptcy Code. Therefore, the legal interpretation of the statutory framework surrounding such proceedings is of paramount importance to SIFMA members. The District Court's Order is inconsistent with the statutory framework, accepted practices, and established case law around which Chapter 9 has developed and on which participants in the municipal financing arena rely.
6. SIFMA's proposed amicus brief details the far-reaching effects on the municipal bond market, investors, and SIFMA members that will result from the District Court's Order. As discussed in SIFMA's proposed amicus brief, the District Court's Order creates market uncertainty that threatens not only the cost and feasibility of future bond offerings, but also the rights of existing bondholders.
7. SIFMA believes that the proposed amicus brief will aid the Court's consideration of the County's petition by providing an important market

perspective and by explaining the broader ramifications of the District Court's Order.

Therefore, SIFMA respectfully requests leave to file the attached Brief for Amicus Curiae Securities Industry and Financial Markets Association in support of the Petition for Permission for Interlocutory Appeal Pursuant to 28 U.S.C. § 1292(b) filed by Petitioner Jefferson County, Alabama.

Respectfully submitted,

/s/ Kasdin E. Miller

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*Counsel for Amicus Curiae Securities  
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**CERTIFICATE OF SERVICE**

I hereby certify that on this 18th day of December, 2014, a true and correct copy of the foregoing Motion for Leave to File Brief for Amicus Curiae Securities Industry and Financial Markets Association in Support of Petitioner Jefferson County, Alabama was filed in accordance with the Court's CM/ECF Guidelines and served via the Court's CM/ECF system on all counsel of record.

*/s/ Kasdin E. Miller* \_\_\_\_\_

Kasdin E. Miller

Jayna P. Lamar

*Counsel for Amicus Curiae Securities*

*Industry and Financial Markets Association*

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FINANCIAL MARKETS ASSOCIATION IN SUPPORT OF  
PETITIONER JEFFERSON COUNTY, ALABAMA**

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1. Carroll, Kevin M.
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Pursuant to Fed. R. App. P. 26.1, the undersigned attorney states that Securities Industry and Financial Markets Association has no parent corporation and does not issue stock.

*/s/ Jayna P. Lamar*

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## TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT.....	C-1
TABLE OF CITATIONS .....	ii
STATEMENT OF AMICUS CURIAE INTERESTS .....	1
CERTIFIED QUESTION OF LAW .....	2
PROCEEDINGS BELOW.....	2
SUMMARY OF THE ARGUMENT .....	3
ARGUMENT .....	4
I.    The Municipal Bond Market Fills a Unique Economic Need. ....	4
II.   Chapter 9 Allows Insolvent Municipalities to Adjust Debt Obligations. ....	5
III.  The District Court’s Ruling Threatens the Interests of All Participants in the Municipal Market.....	7
CONCLUSION .....	10
CERTIFICATE OF COMPLIANCE.....	12
CERTIFICATE OF SERVICE .....	13

## TABLE OF CITATIONS

### Statutes

11 U.S.C. § 101(40) .....	6
11 U.S.C. § 552 .....	10
11 U.S.C. § 904 .....	3, 6
11 U.S.C. § 945(a) .....	7
11 U.S.C. §§ 901, et seq .....	1
28 U.S.C. § 1292(b) .....	3
Bankruptcy Code § 109(c) .....	6

### Rules

Fed. R. App. P. 26.1 .....	C-1
Fed. R. App. P. 29(b) .....	2
Fed. R. App. P. 32(a)(5) .....	12
Fed. R. App. P. 32(a)(6) .....	12
Fed. R. App. P. 5(c) .....	12
Fed. R. Bankr. P. 3020(e) .....	7
Fed. R. Civ. P. 29(d) .....	12

### Other Authorities

Adam Smith, <i>The Wealth Of Nations</i> , Bk. I. Ch. IX (Edwin Cannan Ed., Bantam Dell 2003) (1776) .....	9
<i>General Obligation Bond</i> , Mun. Sec. Rulemaking Bd., <a href="http://www.msrb.org/glossary/definition/general-obligation-bond-or-go-bond.aspx">http://www.msrb.org/glossary/definition/general-obligation-bond-or-go-bond.aspx</a> .....	5

H.R. REP. NO. 100-1011 (1988),  
*reprinted in 1988 U.S.C.C.A.N. 4115* .....10

John Gramlich, *Municipal Bankruptcy Explained: What It Means to File For Chapter 9* (Nov. 22, 2011),  
<http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2011/11/22/municipal-bankruptcy-explained-what-it-means-to-file-for-chapter-9> .....8

Mary Jo White, *Focusing on Fundamentals: the Path to Address Equity Market Structure*,  
Sec. Traders Ass’n 80th Annual Market Structure Conf. (Oct. 2, 2013).....9

*Municipal Bonds*, SEC,  
<http://www.sec.gov/answers/bondmun.htm> .....4, 5

*Municipality Bankruptcy*, U.S. Courts,  
<http://www.uscourts.gov/federalcourts/bankruptcy/bankruptcybasics/chapter9.aspx> .....6

*SEC, Report on the Municipal Securities Market* (July 31, 2012),  
[www.sec.gov/news/studies/2012/munireport073112.pdf](http://www.sec.gov/news/studies/2012/munireport073112.pdf) .....4

*U.S. Bond Market Issuance & Outstanding*, SIFMA,  
<http://www.sifma.org/research/statistics.aspx> .....5

## STATEMENT OF AMICUS CURIAE INTERESTS

The Securities Industry and Financial Markets Association (“SIFMA”) brings together the shared interests of hundreds of securities firms, banks, and asset managers. SIFMA’s mission is to support a strong financial industry, investor opportunity, capital formation, job creation, and economic growth, while building trust and confidence in the financial markets. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (“GFMA”). Most SIFMA members have been or will be affected by a proceeding brought by an insolvent municipality seeking to adjust its obligations pursuant to the provisions of 11 U.S.C. §§ 901, et seq. (“Chapter 9”). Because SIFMA believes the District Court’s ruling is inconsistent with the statutory framework, accepted practices and established case law around which Chapter 9 has developed and on which participants in the municipal financing arena rely, SIFMA respectfully urges this Court to accept the petition of Jefferson County, Alabama (“County”). Prompt review of the decision below is imperative to the continued stability and accessibility of the municipal bond market. Accepting the petition will resolve the uncertainty caused by the challenged order about the finality and integrity of confirmed, non-stayed plans of adjustment that contemplate an emerging debtor’s issuance of new bonds or warrants to finance governmental projects and operations, thereby enhancing market acceptance.

By accompanying motion, SIFMA seeks leave of the Court to file this brief pursuant to Fed. R. App. P. 29(b).<sup>1</sup>

### **CERTIFIED QUESTION OF LAW**

“Whether the Ratepayers’ appeal of the Confirmation Order is moot—either constitutionally, statutorily, and/or equitably—based on consummation [of the Plan] and/or the Ratepayers’ failure to obtain a stay pending appeal?” Doc. 48, p. 6.<sup>2</sup>

### **PROCEEDINGS BELOW<sup>3</sup>**

Petitioner Jefferson County (“County”) seeks leave to appeal the District Court’s order (“Order”), Doc. 36, and memorandum opinion, (“Opinion”), Doc. 35, denying its motion to dismiss an appeal of a bankruptcy court order (“Confirmation Order”), Bankr. Doc. 2248,<sup>4</sup> confirming the County’s Chapter 9

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<sup>1</sup> No counsel for any party in this case authored this brief in whole or in part, and no party, party’s counsel, or any other person, other than SIFMA, its members, or its counsel, contributed money intended to fund preparing or submitting this brief.

<sup>2</sup> Record citations to “Doc.” are to the entries on the docket of Case No. 2:14-cv-00213-SLB (“Ratepayer Appeal”), an appeal brought in the United States District Court for the Northern District of Alabama, Southern Division (“District Court”) by a group of users of the Jefferson County sewer system (“Ratepayers”).

<sup>3</sup> For a full recital of the background and proceedings below, SIFMA relies on the statement contained in the County’s Petition.

<sup>4</sup> Record citations to “Bankr. Doc.” are to the entries on the docket of Case No. 11-05736-TBB9 (“Bankruptcy Case”) in the United States Bankruptcy Court for the Northern District of Alabama, Southern Division (“Bankruptcy Court”). Although the Ratepayers timely appealed, they never sought a stay of the Confirmation Order in any court, and the County substantially consummated the Plan on December 3, 2013, by issuing some \$1.8 billion in new sewer revenue warrants.

Plan of Adjustment (“Plan”), Bankr. Doc. 2182. The District Court certified its Order and Opinion for immediate appeal under 28 U.S.C. § 1292(b). Doc. 48.

### **SUMMARY OF THE ARGUMENT**

SIFMA seeks to foster stability in, and the continued availability of, a robust municipal bond market to assist local governments in financing necessary infrastructure and providing vital services. Even municipalities in financial distress need financing to maintain critical day-to-day functions. A municipality’s ability to adjust its obligations pursuant to known, tested provisions of, and final proceedings under, Chapter 9 is critical to restoring investor confidence and allowing its re-entry into the municipal market for funding pursuant to a confirmed Plan.

The District Court’s Order threatens accepted constructs under which Chapter 9 debtors can successfully emerge with new or restructured financing. By questioning the efficacy and constitutionality of the Plan’s agreed retention of jurisdiction in the Bankruptcy Court and otherwise suggesting that a reviewing court may revise isolated provisions of a confirmed, consummated plan, the District Court challenged prevailing assumptions regarding mootness and the finality of non-stayed orders, as well as a municipal debtor’s ability to consent to the bankruptcy court’s exercise of certain powers without violating the Tenth Amendment’s protection of sovereign state rights. *See* 11 U.S.C. § 904. The uncertainty created by the Order broadly implicates not only the theoretical cost

and feasibility of future bond offerings, but also the rights of existing holders who are vulnerable to resulting fluctuations in the value and marketability of their bonds. The disruption created by the Order for all issuers must be resolved now. The market cost of awaiting full District Court proceedings is simply too high.

## ARGUMENT

### I. The Municipal Bond Market Fills a Unique Economic Need.

Appreciation of the economic threat posed by the ruling below requires an understanding of the breadth of interests potentially affected by it. The issues raised in the County's petition impact all participants in the municipal bond market, including not only issuers such as the County, but also investors who purchase municipal bonds and residents of municipalities who effectively utilize bond proceeds daily in their consumption of vital public services.

“Municipal bonds are debt securities issued by states, cities, counties and other governmental entities to finance capital projects, such as building schools, highways or sewer systems, and to fund day-to-day obligations.” *Municipal Bonds*, SEC, <http://www.sec.gov/answers/bondmun.htm><sup>5</sup>; see also SEC, *Report on the Municipal Securities Market*, at i (July 31, 2012), [www.sec.gov/news/studies/2012/munireport073112.pdf](http://www.sec.gov/news/studies/2012/munireport073112.pdf). Municipal bond buyers

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<sup>5</sup> Unless otherwise noted, any reference to material located on the internet refers to such sources as they existed on December 12, 2014.

effectively extend credit or make loans to the issuing municipality in consideration for regular interest payments and an eventual return of principal, typically over a multi-year term.<sup>6</sup> Bond proceeds are then used for a variety of public purposes. Bonds may be tax-exempt or taxable, and may be secured by specified taxes or revenues from a financed project or issued as “general obligations” backed by the issuer’s “full faith and credit,”<sup>7</sup> but the ultimate beneficiaries of all such bonds are users of the funded governmental services. Bond investors “typically are seeking a steady stream of income payments, and compared to stock investors, they may be more risk-averse and more focused on preserving rather than accumulating wealth.” *Municipal Bonds, supra*.

## **II. Chapter 9 Allows Insolvent Municipalities to Adjust Debt Obligations.**

Local governments are not immune to financial distress. Among other factors, diminished tax revenues due to declining property values or loss of industry, the increased cost of providing, and greater demand for, public services, and the high cost of existing credit facilities have squeezed limited governmental

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<sup>6</sup> As of September 2014, more than a million different municipal bonds were outstanding, with an aggregate principal exceeding \$3.3 trillion. *U.S. Bond Market Issuance & Outstanding*, SIFMA, <http://www.sifma.org/research/statistics.aspx>. Individual investors currently directly or indirectly hold about two-thirds. *Municipal Bonds, supra*.

<sup>7</sup> See *General Obligation Bond*, Mun. Sec. Rulemaking Bd., <http://www.msrb.org/Glossary/Definition/general-obligation-bond-or-go-bond.aspx>.



resources. Like private borrowers, such governments may need to restructure their debt obligations to facilitate repayment under terms that are feasible.

Congress recognized the unique needs of such borrowers in enacting Chapter 9 and its predecessor statutory schemes addressing municipal insolvency. Chapter 9 provides a financially-distressed, eligible municipality<sup>8</sup> protection from its creditors while it negotiates a plan for adjusting its debts. Those creditors include the municipality's bondholders. Although Chapter 9 draws from, and has marked similarity to, the more commonly-invoked chapters available to other debtors, it has a unique constitutional overlay. That is,

due to the severe limitations placed upon the power of the bankruptcy court in chapter 9 cases (required by the Tenth Amendment and the Supreme Court's decisions in cases upholding municipal bankruptcy legislation), the bankruptcy court generally is not as active in managing a municipal bankruptcy case as it is in corporate reorganizations under chapter 11. The functions of the bankruptcy court in chapter 9 cases are generally limited to approving the petition (if the debtor is eligible), confirming a plan of debt adjustment, and ensuring implementation of the plan.

*Municipality Bankruptcy*, U.S. Courts, [http:// www.uscourts.gov/FederalCourts/Bankruptcy/BankruptcyBasics/Chapter9.aspx](http://www.uscourts.gov/FederalCourts/Bankruptcy/BankruptcyBasics/Chapter9.aspx). However, “to obtain the protection of court orders and eliminate the need for multiple forums to decide issues,” *id.*, a municipal debtor may expand the powers of the bankruptcy court by consent. 11

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<sup>8</sup> The Bankruptcy Code defines a “municipality” as a “political subdivision or public agency or instrumentality of a State.” 11 U.S.C. § 101(40). Eligibility to file Chapter 9 is governed by Bankruptcy Code Section 109(c).

U.S.C. § 904. Significantly, the bankruptcy court “may retain jurisdiction over the case for such period of time as is necessary for the successful implementation of the plan.” 11 U.S.C. § 945(a). Both the confirmed Plan and the Confirmation Order reflect the County’s consent to the Bankruptcy Court’s retention of jurisdiction to enforce the terms of, and resolve any disputes arising under, the Plan if needed. Bankr. Doc. 2182, pp. 91-92 (sec. 6.4(f),(l)); Bankr. Doc. 2248, pp. 67, 77 (¶¶ 25, 38).

In direct reliance upon the Bankruptcy Court’s waiver of the otherwise applicable 14-day stay of effectiveness of the Confirmation Order, Fed. R. Bankr. P. 3020(e), the County issued approximately \$1.8 billion in new sewer warrants, paying off approximately \$3.2 billion of then-outstanding warrants at an agreed discount, thereby substantially consummating the Plan. Investors purchased the new warrants against the backdrop of a confirmed Plan setting forth key terms and conditions under which the warrants were to be issued, including an “Approved Rate Structure” expressly subject to continued enforcement by the Bankruptcy Court. *See, e.g.*, Bankr. Doc. 2182, pp. 64, 84, 90 (sec. 4.3, 5.11(c), 6.4(l)).

### **III. The District Court’s Ruling Threatens the Interests of All Participants in the Municipal Market.**

The District Court’s Order threatens the stability of the municipal market in its departure from accepted Chapter 9 jurisprudence and traditional interpretations of mootness doctrines in appellate proceedings, potentially resulting in higher costs

for all borrowers and casting doubt on the usefulness of Chapter 9 generally. The act of filing a Chapter 9 petition alone has severe market consequences:

A Chapter 9 filing immediately raises the likelihood of a credit rating downgrade and, as a result, higher future borrowing costs for the government. The damage to a municipality's image may result in an exodus of residents or less business investment, which can hit government tax collections and make the underlying budget crisis worse. Public workers worry about slashed salaries or benefits, and all residents could see higher taxes, loss of services or deferred maintenance on necessities such as schools, roads and bridges — although those consequences can precede bankruptcy, too.

John Gramlich, *Municipal Bankruptcy Explained: What it Means to File for Chapter 9* (Nov. 22, 2011), available at <http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2011/11/22/municipal-bankruptcy-explained-what-it-means-to-file-for-chapter-9>. How much more severe the consequences, then, if after substantial consummation of a confirmed, non-stayed plan, and the issuance and purchase of \$1.8 billion in new warrants in reliance thereon, a reviewing federal court can revise the terms of that plan to excise selectively a critical portion of the underlying creditor compromise on which it was based? The Order necessarily diminishes the attractiveness of Chapter 9 proceedings as a means of adjusting debt through compromise and stifles the willingness of investors to trust an emerging debtor and buy newly-issued bonds at a rate that is feasible for the debtor post-confirmation, for fear of change in the negotiated terms by a reviewing court.

“[M]arket structure should inspire confidence in investors and companies that they will be treated fairly and that the system will work efficiently. Without this confidence, [the] market structure can act as a headwind that will impede capital formation.” Mary Jo White, *Focusing on Fundamentals: The Path to Address Equity Market Structure*, Sec. Traders Ass’n 80th Annual Market Structure Conf. (Oct. 2, 2013). For the more risk-averse bond investors, market disruption caused by the Order, which questions the sanctity of a confirmed, substantially-consummated plan and threatens to rewrite its consensual structure, has the potential for even stronger adverse consequences.<sup>9</sup>

Market sensitivity to judicial action is not theoretical or hypothetical. The markets require sufficient confidence in a municipality’s willingness and ability to perform its obligations before access to financing will be allowed at a feasible rate. Congress has sought to ensure that the structure and provisions of Chapter 9 itself do not hamper or impede a municipality’s ability to adjust its debts. Indeed, the Municipal Bankruptcy Amendments of 1988 specifically addressed the market paralysis resulting from the Bankruptcy Reform Act of 1978’s failure to address

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<sup>9</sup> Certainty of contract has long been recognized as essential to economic development, and doubts about enforcement of a contract can make a venture too risky. See Adam Smith, *The Wealth of Nations*, bk.I. ch. IX, at 133 (Edwin Cannan ed., Bantam Dell 2003) (1776) (“When the law does not enforce the performance of contracts, it puts all borrowers nearly upon the same footing with bankrupts . . . .”).

the effect of 11 U.S.C. § 552 on special revenue financing, which deterred investors who feared the loss of secured status if a municipality filed Chapter 9.<sup>10</sup>

The uncertainty created by the Order and the potential for a federal court to strike retroactively select portions of a substantially-consummated, non-stayed plan unnecessarily re-inserts into the municipal debt-adjustment process the very “structural risk” that Congress sought to avoid. One of two results will emerge from allowing the Order to stand: (1) the market will not purchase new bond issues from a municipality leaving Chapter 9, or (2) the risk premium imposed by the market on such new issues will be prohibitively high; that is, the rate demanded by the market to purchase such bonds will be too high for the municipality to meet the feasibility requirements of the confirmation process.

### CONCLUSION

For the foregoing reasons, SIFMA respectfully requests that this Court accept the County’s interlocutory appeal of the District Court’s Order.

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<sup>10</sup> H.R. REP. NO. 100-1011 (1988), *reprinted in* 1988 U.S.C.C.A.N. 4115, 4119 (“Proponents of the legislation argue that in the absence of the changes contained therein, municipalities—particularly the small to medium-sized cities—may have trouble raising money through special revenue bonds, disrupting the municipal finance market and harming the municipalities. Lenders may be reluctant to advance funds for projects, particularly in municipalities that are having some financial difficulties, when the possibility exists that the lien securing repayment could be avoided if the municipality files bankruptcy. Proponents argue that bond rating agencies may downgrade the creditworthiness of certain special revenue bonds because of what could happen in a bankruptcy.”).

Respectfully submitted,

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*Counsel for Amicus Curiae Securities  
Industry and Financial Markets Association*

### **CERTIFICATE OF COMPLIANCE**

Pursuant to Fed. R. Civ. P. 29(d) and Fed. R. App. P. 5(c), the undersigned certifies that this amicus brief complies with the type-volume limitation by the word count of the word-processing system used to prepare the brief. According to the word-count function of Microsoft Word, this brief contains 2,420 words, or 10 pages, from the Statement of Amicus Curiae Interests through the Conclusion.

I further certify that this brief complies with the typeface requirements set forth in Fed. R. App. P. 32(a)(5) and the type-style requirements set forth in Fed. R. App. P. 32(a)(6). The brief was prepared in Microsoft Word 14-point Times New Roman type.

*/s/ Jayna P. Lamar*

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Kasdin E. Miller

*Counsel for Amicus Curiae Securities*

*Industry and Financial Markets Association*

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*/s/ Jayna P. Lamar* \_\_\_\_\_

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