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(*Docket Nos. continued on inside cover*)

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

IN RE: FAIRFIELD SENTRY LIMITED,

Debtor.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR AMICUS CURIAE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION IN SUPPORT OF APPELLEES

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CORPORATE DISCLOSURE STATEMENT

The Securities Industry and Financial Markets Association is a non-profit corporation. It has no parent corporation, and no publicly held corporation owns more than 10% of its stock.

STATEMENT OF INTEREST

The Securities Industry and Financial Markets Association ("SIFMA") is a securities industry trade association representing the interests of hundreds of securities firms, banks, and asset managers.[1] SIFMA champions policies and practices that foster a strong financial industry while promoting investor opportunity, capital formation, job creation, economic growth, and trust and confidence in financial markets. SIFMA regularly files amicus curiae briefs in cases that raise important questions of commercial and securities law.

As a representative of the leading participants in the global securities and financial markets, SIFMA has an abiding interest in promoting the safety and stability of the financial markets in which its members operate and the certainty of completed securities transactions. These goals advanced by the safe harbors codified in §§ 546(e) and 561(d) of the Bankruptcy Code will be put at risk by the Liquidators' claims here. The foreign-law avoidance claims that the Liquidators advance seek to unwind billions of dollars' worth of securities transactions completed as long as fifteen years ago, and threaten the very wide-scale

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than amicus, its members, or its counsel made any contribution toward preparation or submission of this brief. The parties have consented to the filing of this brief.

disruption and instability of the securities markets that the Bankruptcy Code's safe harbors were designed to avoid. From the perspective of financial-market participants—including SIFMA's members—it matters little whether long-settled securities transactions are attacked in a proceeding brought under Chapter 11 or Chapter 15 of the Bankruptcy Code. In either case, the result is the same. Permitting settled securities transactions to be undone undermines the certainty and finality that is key to the orderly functioning of the financial markets, and results in increased borrowing costs and general market instability. Worse still, allowing substantial long-settled securities transactions to be unwound creates a risk that a securities firm will fail and heightens the possibility that the insolvency of one firm could lead to the insolvency of others. This is exactly what the Bankruptcy Code's safe harbors were designed to prevent.

SIFMA has long worked to promote the stability of the financial markets. Consistent with that long-term effort, it now asks this Court to apply the Bankruptcy Code's safe harbors according to their plain langue and consistent with their intent.

INTRODUCTION AND SUMMARY OF ARGUMENT

SIFMA has long advocated for policies that ensure that bankruptcy proceedings related to one market participant do not undermine the stability of the entire financial system by creating dangerous ripple effects. Congress wisely addressed these concerns when it codified the safe harbor for settled securities transactions in 11 U.S.C. § 546(e) and again when it explicitly made that safe harbor applicable in Chapter 15 proceedings by enacting 11 U.S.C. § 561(d). Together, these statues ensure that litigants cannot use U.S. courts to unwind long-settled securities transactions—whether under U.S. or non-U.S. bankruptcy laws.

By trying to claw back funds from Defendants here under British Virgin Islands ("BVI") law, the liquidators ("Liquidators") of several BVI-registered Fairfield funds defy the express congressional intent reflected in the § 546(e) and § 561(d) safe harbors under the Bankruptcy Code. The Court should reject that effort.

To start, endorsing the Liquidators' position introduces into the securities markets uncertainty and instability that Congress has long sought to avoid. Market participants expect that when they settle securities transactions involving financial institutions, those transactions will not be unwound. Relying on that expectation, market

intermediaries make payments to their counterparties (who themselves are often market intermediaries). Left without the protections of transactional certainty, financial intermediaries—such as Defendants here—will be forced either to bear the risk that they will be obligated to pay judgments on account of transfers made literally decades ago or to reduce the velocity of transactions by requiring collateral. Either outcome threatens the stability and utility of the financial markets and, Congress concluded, is to be avoided. But that is exactly the outcome that the Liquidators seek to impose.

In fact, even the threat of litigation aimed at unwinding transactions would upset the safe-harbor regime. As this Court has recognized, litigating avoidance claims is a costly endeavor. And that is not to mention the monitoring costs that market participants would be forced to incur if their foreign transactions were suddenly subject to claw-back claims in bankruptcy.

Putting these weighty policy considerations aside, the Liquidators' claims should fail for a more basic reason: The statutory text requires that result. Section 561(d) bars avoidance claims under Chapter 15 "to the same extent" that they are barred under the Bankruptcy Code's other chapters. And § 546(e) bars avoidance claims under the Bankruptcy Code's other chapters if those claims are based on payments "made by or

to (or for the benefit of) a . . . financial institution . . . in connection with a securities contract"—precisely the sorts of claims that the Liquidators bring. It does not matter that the Liquidators bring their claims under non-U.S. law in a Chapter 15 proceeding. Those are the only types of avoidance claims that they could bring under Chapter 15, which forbids foreign representatives (like the Liquidators) from bringing avoidance claims under U.S. law. Thus, for § 561(d) to have any meaning, it *must* bar the foreign-law avoidance claims that the Liquidators seek to bring here.

The legislative history bolsters this conclusion. It shows that, time and again, Congress has fortified the Bankruptcy Code's safe harbors to offer broader protection to market participants in response to recent financial crises. Section 561(d) was no exception. Congress enacted that provision to quell industry-group fears—after the collapse of a large, Cayman-headquartered fund—that locking investors into their positions in insolvent offshore entities could topple the U.S. financial markets. That is what the Liquidators try to do here, and it is precisely what Congress intended to forbid.

Contrary to explicit congressional intent to extend the safe harbor to foreign avoidance claims, the Liquidators' theory creates the absurd result that a foreign representative barred from brining an avoidance

claim under U.S. law can bring *the same claim* in a U.S. court under non-U.S. law. The Liquidators acknowledge that, were they acting under Chapter 7 or 11, their claims would be barred the safe harbor. Still, they argue that their foreign-law claims are permitted. But that outcome directly contradicts both the text of the safe harbor and Congress's goal of preventing ripple effects from foreign bankruptcies.

Finally, § 561(d)'s legislative history puts the lie to the Liquidators' claim that Defendants are using § 561(d) to regulate foreign markets. Quite the contrary, applying § 561(d) would protect *U.S.* markets by giving U.S. market participants comfort that their settled securities transactions are final—precisely the sort of certainty and predictability that this Court has said is crucial for securities markets to work.

ARGUMENT

I. Allowing the Liquidators' claims to succeed would increase uncertainty and decrease finality and liquidity.

The Liquidators seek to avoid transfers made to financial institutions from insolvent BVI funds. If the Liquidators succeed, large banks and other investment funds that received redemption payments from the BVI funds many years ago would have to return that capital. But returning those funds would disrupt the settled expectation of securities-market participants. That result clashes with the Bankruptcy

Code's safe harbors. This Court should therefore reject the Liquidators' theory.

A. Threatening to unwind settled securities transactions with foreign counterparties could upend the U.S. securities market.

1. In creating safe harbors under the Code, Congress recognized the harm that could befall "the nation's financial markets" if the bankruptcy process could be used to unwind "settled securities transactions." *Kaiser Steel Corp. v. Charles Schwab & Co.*, 913 F.2d 846, 848 (10th Cir. 1990) (quotation marks omitted). Indeed, the prospect of "[u]nwinding settled securities transactions" would "seriously undermine" the "certainty, speed, finality, and stability" that make the securities markets function. *In re Tribune Co. Fraudulent Conv. Litig.*, 946 F.3d 66, 90 (2d Cir. 2019); *see Enron Creditors Recovery Corp. v. Alfa, S.A.B. de C.V.*, 651 F.3d 329, 336 (2d Cir. 2011) (recognizing that, for participants in securities markets, "certainty and predictability are at a premium"). Safe harbors thus "promote finality and certainty for investors, by limiting the circumstances . . . under which securities transactions could be unwound." *Tribune*, 946 F.2d at 92 (quotation marks omitted). That finality and certainty are "necessary to attract capital" to the securities markets. *Id.* at 90.

The Liquidators' theory—which would unwind foreign securities

transactions years after they settled—thus deprives investors of the certainty and finality that are vital to functioning markets. Such a theory would flout the safe harbors. As this Court has repeatedly recognized, Congress intended for courts to interpret the safe harbors broadly so that investors know they will be protected: forcing them to have to guess how their settled transactions will be treated "in every case" undermines the clarity on which securities markets thrive. *Enron*, 651 F.3d at 336; *see Tribune*, 946 F.3d at 92 (observing that courts should avoid "narrow literalness" when interpreting safe harbor); *see also infra* Point II.B (discussing legislative history). Interpreting the safe harbors' "broad language" broadly furthers Congress's "purpose of enhancing the efficiency of securities markets in order to reduce the cost of capital to the American economy." *Tribune*, 946 F.3d at 92. The Liquidators' theory undermines that purpose. Endorsing it would require U.S. investors in foreign securities to labor under the continual threat that their transactions will be undone. Faced with such a risk, they may well choose to invest their money elsewhere.

2. The threat of litigation only adds to the uncertainty and further harms the market. Even frivolous lawsuits are "a substantial deterrent to investing in securities." *Tribune*, 946 F.3d at 93. "Given the costliness of defending such legal actions and the long delay in learning of their

outcome, exposing investors to even very weak lawsuits involving millions of dollars would be a substantial deterrent to investing in securities." *Id.* "The need to set aside reserves to meet the costs of litigation—not to mention the costs of losing—would suck money from the capital markets." *Id.* at 93–94. So too would the "costly and constant monitoring" that securities-market participants would have to undertake in order to ensure that they are not subjected to claw-back claims. *Id.* at 93.

Again, the Liquidators' theory would impose those costs. This case proves the point. The Chapter 15 proceeding here, which followed proceedings in the BVI, was filed in 2010. JA5116 (*In re Fairfield Sentry Ltd.*, 440 B.R. 60 (S.D.N.Y. 2010)). So were the adversary proceedings that are the subject of this appeal—which seek to unwind transactions dating back twenty years, to 2003. *See Fairfield Sentry Ltd. v. Theodoor GCC Amsterdam (In re Fairfield Sentry Ltd.)*, 2018 WL 3756343, at *2 (Bankr. S.D.N.Y. Aug. 6, 2018); JA213–14. These adversarial proceedings are now in their third court, having been litigated extensively in the Bankruptcy Court, the District Court, and now this Court. If the Liquidators prevail, then future cases may impose even greater costs, since investors will have already incurred the costly pre-litigation monitoring—based on a decision that approves the Liquidators' theory—

that this Court worried about in *Tribune*. The upshot is that "the copious imaginations of able lawyers" will "substantial[ly] deter[] . . . investing in the securities markets." *Tribune*, 946 F.3d at 93. That is the opposite of what Congress intended.

B. Allowing securities transactions with foreign counterparties to be unwound undermines the stability of the U.S. securities market.

Congress also viewed the safe harbors as curbing contagion risk. In enacting the securities safe harbor in § 546(e), for instance, Congress understood that "the insolvency of one . . . security firm" could "spread[] to other firms and possibly threaten[] the collapse of the [securities] market." *Tribune*, 946 F.3d at 91 (quoting H.R. Rep. No. 97-420, at 1 (1982)); *accord, e.g.*, *Bevill, Bresler & Schulman Asset Mgmt. Corp. v. Spencer Sav. & Loan Ass'n*, 878 F.2d 742, 747 (3d Cir. 1989). The securities safe harbor guards against such "a ripple effect," *Kaiser Steel*, 913 F.2d at 849 (quotation marks omitted), by preventing securities firms that transact with a market participant that undergoes "a major bankruptcy" from having their transactions unwound and then being left with "insufficient capital or liquidity to meet [their] current trading obligations, placing other market participants and the securities markets themselves at risk," *Enron,* 651 F.3d at 334 (quotation marks omitted).

The Bankruptcy Code's safe harbors worked to that effect when

Lehman Brothers failed. Although Lehman Brothers' bankruptcy helped spur the 2008 financial crisis, the impact could have been even deeper but for the safe harbors. As commentators have observed, the safe harbors staved off "some form of domino effect" that would have "exacerbat[ed] the crisis." Mark D. Sherrill, *In Defense of the Bankruptcy Code's Safe Harbors*, 70 Bus. L. 1007, 1029–30 (2015) (citing Kimberly Summe, *Misconceptions About Lehman Brothers' Bankruptcy and the Role Derivatives Played*, 64 Stan. L. Rev. Online 16, 18 (2011)); *see also Lehman Bros. Holdings v. JPMorgan Chase Bank, N.A. (In re Lehman Bros. Holdings)*, 469 B.R. 415, 451 (S.D.N.Y. 2012) (applying safe harbor as a "blanket exemption" for any transfer "made by or to a financial institution in connection with a securities contract").[2]

While Congress was focused on domestic bankruptcies when it passed § 546(e), the risk it addressed is just as pronounced for transactions with foreign companies. The near collapse of Long-Term Capital Management (LTCM) underscores this point. LTCM was a hedge fund that operated a fund in the Cayman Islands. *See* JA3519

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[2] Understandings of contagion risk were on display again recently, when Silicon Valley Bank lost capital and could not raise funds for deposit withdrawals. The U.S. government stepped into to secure investments and prevent widespread illiquidity. Andrew Metrick, *Is the Collapse of SVB the Start of a Banking Panic*, Yale Insights, Mar. 11, 2023.

(President's Working Group on Financial Markets, *Hedge Funds, Leverage, and the Lessons of Long-Term Capital Management* ("*Lessons of LTCM*")). In the summer of 1998, after the Russian ruble devalued, LTCM suffered significant losses and would have failed if not for emergency investments from other firms exposed to an LTCM default. JA3540–42 (*Lessons of LTCM*). Because LTCM operated in the Cayman Islands, it could have filed for bankruptcy there. JA3556 (*Lessons of LTCM*). Under the predecessor to Chapter 15, the foreign representative could have then sought an injunction in the United States barring U.S. creditors from liquidating their LTCM investments until the Cayman bankruptcy proceeding concluded. *Id.*

The results would have been disastrous for U.S. markets. "Even a temporary delay in the liquidation of collateral could have had detrimental financial consequences"—at first for the financial institutions whose investments would have been trapped in LTCM while the Cayman bankruptcy played out, and then to the U.S. economy as a whole. *Id.* Indeed, LTCM's counterparties would have rushed to rein in their other credit risks, resulting in a broad decline in market liquidity. JA3548 (*Lessons of LTCM*). LTCM's foreign bankruptcy, in other words, would have set off the same domestic ripple effect Congress sought to address through § 546(e).

Congress soon recognized the potential fallout from a single foreign bankruptcy on the market. The President's Working Group assigned to study the LTCM collapse informed Congress of the possible ripple effect, *id.*, and Congress later passed § 561—which includes the safe harbor at issue here—in response to "fears of a domino effect and systemic collapse if the Bankruptcy Code and the Safe Harbor Provisions were not amended," Sherrill, *supra*, at 1018 (quotation marks omitted); *see* Pub. L. 109-8, tit. IX, § 907, 119 Stat. 23, 180 (2005) (codified at 11 U.S.C. § 561); *infra* Point II.B.3.

These risks are even graver today than they were when LTCM failed. That is because the U.S. securities market is more exposed to non-U.S. asset managers than ever, with holdings in foreign markets consistently rising over the last decade. *See* U.S. Dep't of the Treasury, U.S. Holdings of Foreign Securities at Market Value (Oct. 22, 2022), https://shorturl.at/eCLN2. The BVI is no exception. U.S. holdings in BVI increased from $1.1 billion in 1997 to $85 billion in 2021. *Id.*

Meanwhile, more and more foreign debtors are finding their way into U.S. Bankruptcy Court. Chapter 15 is becoming "a more widely used tool in the restructuring arsenal of international debtors," opening the market to more litigation like the Liquidators'. Peter M. Gilhuly, Kimberly A. Posin & Adam E. Malatesta, *Bankruptcy Without Borders:*

A Comprehensive Guide to the First Decade of Chapter 15, 24 Am. Bankr. Inst. L. Rev. 47, 48 (2016). The numbers bear out this point: in the past decade-and-a-half, Chapter 15 filings have increased nearly fivefold, from 48 filings in 2008 and a high of 240 filings in 2020. U.S. Courts, Bankruptcy Statistics Data Visualizations, http://tiny.cc/f1x6vz (last visited May 12, 2023).

Against this backdrop, the Liquidators' theory poses a real risk of destabilization. If the Liquidators are right, then a major foreign bankruptcy could spawn a host of avoidance claims in U.S. court, which in turn could dry up liquidity in the securities market. That is the precise result that the safe harbors aim to prevent. It cannot be that Congress, legislating in the wake of the LTCM collapse, intended to hobble investors by leaving them exposed to the risk of avoidance litigation brought by the bankruptcy estates of failed foreign companies, especially when the Bankruptcy Code bars domestic trustees from bringing the exact claims. Or put another way, it cannot be that Congress intended to let foreign debtors use U.S. courts to bring market-destabilizing avoidance claims after expressly forbidding U.S. debtors to do so.

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In short, the Liquidators' theory undermines the entire purpose of the Bankruptcy Code's safe harbors. They seek to take capital—from

long-settled transfers—of domestic financial institutions and return it to insolvent funds in the BVI, eradicating the finality and stability that the securities markets need to function.

II. Sections 561(d) and 546(e) preclude the Liquidators' claims.

When interpreted correctly, § 561(d) of the Bankruptcy Code, 11 U.S.C. § 561(d), prevents the uncertainty and instability that, as discussed in Point I, would occur if foreign representatives could assert foreign-law avoidance claims for securities transactions in Chapter 15 proceedings. Both the text and drafting history support that result.

Start with the text. The proper understanding of § 561(d) begins with § 546(e), which establishes a safe harbor from avoidance claims in a domestic bankruptcy proceeding for transfers made to financial institutions. Section 561(d), in turn, applies that protection "to the same extent" in Chapter 15. Because the Liquidators' claims under Chapter 15 seek to avoid securities transactions, § 561(d) bars them.

The legislative history of bankruptcy safe harbors reinforces this point. When Congress enacted § 546(e), it sought to protect domestic markets from the fallout of insolvency of one market participant. And it has consistently broadened the safe harbor as necessary to forestall market-wide problems that it did not initially contemplate. Section 561(d) is just the latest stop along that road. Chapter 15 did not exist

when Congress enacted § 546(e). But as soon as Congress enacted Chapter 15, it passed § 561(d) to ensure that foreign debtors invoking Chapter 15 would be subject to the same limitations as domestic ones—driven in no small part by industrywide fears that a foreign bankruptcy could affect securities markets unless market participants were free to withdraw their assets without fear of avoidance claims. *See infra* Point II.B.3.

This text and history powerfully support Defendants' reading of § 561(d). The Court should adopt that reading.

A. The plain language of § 561(d) incorporates § 546(e) to bar the Liquidators' claims.

By its plain terms, § 561(d) bars the Liquidators' avoidance claims. It states that "[a]ny provisions of [the Bankruptcy Code] relating to securities contracts . . . shall apply in a case under chapter 15" and will "limit avoidance powers to the same extent as in a proceeding under chapter 7 or 11 of [the Code]." That language incorporates the safe harbor of § 546(e) into Chapter 15. Section 546(e), in turn, is a provision that relates to securities contracts and limits avoidance powers in Chapter 7 and 11 proceedings. Among other things, it bars "the trustee," with limited exceptions, from "avoid[ing] a transfer" that was "made by or to (or for the benefit of) a . . . financial institution . . . in connection with a securities contract." So § 561(d) bars Chapter 15 foreign representatives,

like the Liquidators, from avoiding securities-contract-related transfers made by or to or for the benefit a financial institution.[3]

For that limitation to have any meaning, it must apply to foreign-law avoidance claims. Under Chapter 15, a foreign representative may bring an ancillary bankruptcy proceeding in a U.S. court. 11 U.S.C. § 1504. This means that once a foreign proceeding is recognized by a U.S. court under Chapter 15, the representative can seek to recover assets in the United States through avoidance claims. *See id.* § 1521(a)(7); *Fogerty v. Petroquest Res., Inc. (In re Condor Ins. Ltd.)*, 601 F.3d 319, 329 (5th Cir. 2010) ("[A] court has authority to permit relief under foreign avoidance law under [§ 1521(a)(7)]."); *Hosking v. TPG Cap. Mgmt., L.P. (In re Hellas Telecomms. (Luxembourg) II SCA)*, 535 B.R. 543, 586 (Bankr. S.D.N.Y. 2015) (same). But those avoidance claims cannot be grounded in U.S. law. Chapter 15 expressly forbids a foreign representative to bring avoidance claims under the Bankruptcy Code by barring "relief available under sections . . . 544, . . . 547 [and] 548"—sections that grant domestic avoidance power. 11 U.S.C. § 1521(a)(7); *see Fogerty*, 601 F.3d at 323 ("The sections explicitly excepted from (a)(7) are

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[3] It does not matter that the claims here are brought by a foreign representative and not a "trustee." As this Court has recognized, § 546(e) bars not just the trustee, but also other parties, from bringing claims "seeking the very relief barred to the trustee." *Tribune*, 946 F.3d at 84.

often referred to as 'avoidance powers . . . .'"). And the Supremacy Clause bars foreign representatives from bringing avoidance claims grounded in the law of any U.S. State. *See, e.g.*, *Tribune*, 946 F.3d at 72. The only claims to which § 561(d) could apply, then, are foreign-law avoidance claims, like those the Liquidators assert here. Declining to apply § 561(d) to such claims would "render [the statute] superfluous," thereby transgressing "[t]he canon against surplusage." *Garcia v. Garland*, 64 F.4th 62, 74 (2d Cir. 2023).

The Liquidators resist this conclusion by misreading § 561(d). Rather than follow the text to its logical conclusion that § 546(e) applies to foreign-law avoidance claims, the Liquidators assert (Br. 30–31) that § 1523 grants foreign representatives "domestic avoidance powers." But § 1523 is beside the point. It "grants no substantive right of avoidance" to foreign representatives under Chapter 15. *Fogerty*, 601 F.3d at 323–24; *see Charles Russell, LLP v. HSBC Bank USA, N.A. (In re Awal Bank, BSC)*, 455 BR. 73, 87–88 (Bankr. S.D.N.Y. 2011) ("This limited grant of standing in section 1523 does not create or establish any legal right of avoidance . . . ." (quoting H.R. Rep. 109-31(I), at 116 (2005)). Instead, it merely grants foreign representatives "standing in a case concerning the debtor pending under another chapter of [the Bankruptcy Code]." 11 U.S.C. § 1523(a). So while § 1523 may give foreign representatives

standing to bring avoidance claims in cases under Chapters 7 and 11, it would not implicate § 561(d), which bars avoidance claims "in a case under chapter 15." Put differently, § 561(d) applies only to avoidance claims in cases *under Chapter 15*, not to the avoidance claims that § 1523 grants foreign representatives standing to bring "under another chapter."[4]

In sum, the Liquidators' attempt to dodge the safe harbor is at odds with the statute's plain language. Section 561(d) makes sense only if it bars foreign representatives from asserting in Chapter 15 foreign-law avoidance claims involving financial institutions in connection with securities contracts.

B. Applying § 561(d) to bar the Liquidators' claims furthers Congress's intent.

The conclusion that § 561(d) bars the Liquidators' claims is only buttressed by the history of the Bankruptcy Code's safe harbors. That history shows that Congress has consistently amended the safe harbors to respond to the financial issues of the day and that, in passing § 561(d),

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[4] At any rate, if a foreign representative brought an avoidance claim like the ones Liquidators bring here in a Chapter 7 or 11 proceeding, it would have to be under Bankruptcy Code § 544, 547, or 548. *See generally Fogerty*, 601 F.3d at 323 (describing avoidance actions powers the Bankruptcy Code). Any such action would then be barred by § 546(e), which would apply directly. *See supra* pp. 4–5.

it was responding to fears that efforts to avoid securities transactions using foreign bankruptcy proceedings could undermine U.S. securities markets.

1. The history of the safe harbors starts in 1978. That year, Congress enacted sections that exempted commodity-related contracts from the automatic stay and avoidance claims. Pub. L. 95-598, tit. I, § 101, 92 Stat. 2549, 2619 (1978). In doing so, "Congress sought to 'promote customer confidence in commodity markets generally' via 'the protection of commodity market stability.'" *Kaiser Steel*, 913 F.2d at 849 (quoting S. Rep. No. 989, 95th Cong., 2d Sess. 8 (1978)).

But a problem soon emerged. Congress quickly realized that the safe harbor did not reach securities markets—an oversight, given Congress's "concern[] about the volatile nature of" *both* "the commodities and securities markets." *Bevill, Bresler*, 878 F.2d at 747; *see Bankruptcy of Commodity and Securities Brokers: Hearings Before the Subcomm. on Monopolies & Com. L. of the H. Comm. on the Judiciary*, 97th Cong. 239 (1981) (testimony of Bevis Longstreth, Comm'r, SEC) (explaining that the disparity between securities and commodities contracts was likely inadvertent). Congress addressed the issue broadening the safe harbor to include transfers "made by or to a . . . stockbroker[] or securities clearing agency," Pub. L. 97-222, § 4, 96 Stat. 235, 236 (1982), in an effort to stave

off instability in the securities markets, *see supra* Point I (discussing congressional intent).[5]

Two years later, in 1984, Congress expanded the list of covered entities under § 546(e) whose transfers could not be avoided. The list included "financial institutions," and the amendments defined that term to include banks, trust companies, and their customers or agents so that the safe harbor would extend broadly to those institutions. *See* Pub. L. 98-353, tit. III, § 461(d), 98 Stat. 333, 377 (1984).

In 1990, when the International Swaps and Derivatives Association ("ISDA") drew attention to the Code's disparate treatment of swap agreements, Congress again extended the safe harbors. *See* 11 U.S.C. § 560; *Bankruptcy Treatment of Swap Agreements and Forward Contracts: Hearing on H.R. 2057 and H.R. 1754 Before the Subcomm. on Econ. & Com. L. of the H. Comm. on the Judiciary*, 101st Cong. 14 (1990) (statement of Mark C. Brickell, Chairman, ISDA).

Finally, in 2006, to "help reduce systemic risk in the financial markets," H.R. Rep. 109-648, at 1 (2006), Congress expanded the safe harbor to protect transfers made "in connection with a securities

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[5] Other provisions of the 1982 amendments also showed preference for liquidity in the event of insolvency—for instance, § 555, which allowed stockbrokers to liquidate securities agreements if the contract allowed. 11 U.S.C. § 555 (1982) (amended 1984).

contract," except for those made with actual fraudulent intent. *See* Pub. L. 109-390, § 5(b)(1)(B), 120 Stat. 2692, 2697 (2006).

These amendments reflect a consistent broadening of safe-harbor protection. Since 1972, Congress has over and over expanded the safe harbors to cover more entities and agreements. *See* Charles W. Mooney Jr., *The Bankruptcy Code's Safe Harbors for Settlement Payments and Securities Contracts: When Is Safe Too Safe?*, 49 Tex. Int'l L.J. 243, 245–48 (2014). At bottom, seeing the divergent needs of the bankruptcy and securities-law regimes, Congress drew a balance prioritizing the stability of the U.S. financial markets by ensuring that a debtor's bankruptcy powers cannot be used to claw back completed securities transactions. *See Picard v. Ida Fishman Revocable Tr. (In re Bernard L. Madoff Inv. Sec. LLC)*, 773 F.3d 411, 423 (2d Cir. 2014) ("[I]n enacting the Bankruptcy Code, Congress struck careful balances between the need for an equitable result for the debtor and its creditors, and the need for finality.").

2. Consistent with that intent, this Court has also broadly interpreted § 546(e).

The Court's recent decision in *Tribune* is a prime example. There, the Court determined that Tribune qualified as a covered entity under § 546(e)'s safe harbor for payments made by or to a "financial institution"

in connection with a securities contract, even though Tribune was not a financial institution in its own right. 946 F.3d at 80. This Court so held because Tribune had retained a trust company and bank—themselves qualifying institutions—as "depositar[ies]" in a tender offer. *Id.* at 78. The Court also broadly interpreted the safe harbor to preempt state-law fraudulent conveyance laws brought by creditors, even though the safe harbor was worded as barring avoidance claims brought by the "trustee," not creditors. *Id.* at 82. Such an interpretation was warranted, the Court explained, because Congress "intended to protect the process or market from the entire genre of harms" that allowing securities-related avoidance claims would engender. *Id.* at 92; *see also Enron*, 651 F.3d at 336 (declining to construe safe harbor in a way that would "result in commercial uncertainty and unpredictability" by making its application "in every case depend on a factual determination"). *Tribune* thus underscores Congress's sweeping intent in providing a safe harbor for securities-related transactions.

3. Section 561(d) broadens the safe harbor's scope even further. It applies the safe harbor to proceedings under Chapter 15. Once again, Congress was concerned that the safe harbor, as drafted, was under-protective. So it expanded the safe harbor to fit the circumstances.

Like § 546(e), § 561(d) grew out of concerns of systemic risk. *See*

supra pp. 11–12. Those concerns were first voiced in 1996, when ISDA and the Public Securities Association ("PSA") proposed a precursor to § 561(d). *See* JA2941 (ISDA & PSA, *Financial Transactions in Insolvency: Reducing Legal Risk Through Legislative Reform* 1 (1996) ("*ISDA–PSA Proposal*")). In their proposal, ISDA and PSA suggested a provision extending the Code's safe harbor to foreign proceedings, recognizing that the "failure of one large participant in financial markets or a disruption in one market could lead to widespread difficulties" or "systemic disruptions." JA2944 (*ISDA–PSA Proposal*); *see also* JA4960–61 (*In re Fairfield Sentry Ltd.*, 596 B.R. 275 (S.D.N.Y. 2018) (discussing the legislative history of § 561(d))). They explained that although "Congress ha[d] amended the Bankruptcy Code to keep pace in promoting speed and certainty in resolving complex financial transactions," there "remain[ed] a number of related financial transactions in which" the key provisions of the Code "m[ight] not be enforceable in a bankruptcy proceeding." JA2947 (*ISDA–PSA Proposal*). In particular, the Code did not apply the same provisions to a foreign proceeding under 11 U.S.C. § 304 (Chapter 15's predecessor) as it did to a domestic proceeding. JA2961 (*ISDA–PSA Proposal*).

In response to that gap, ISDA and PSA asked Congress to pass legislation forbidding "a bankruptcy court or trustee" to "exercise its

discretion in a Section 304 proceeding to reach a result that would be at odds with the result that would be required in a non-Section 304 proceeding." *Id.* The language that ISDA and PSA proposed to achieve this effect closely mirrors the language Congress later used in § 561(d):

ISDA–PSA Proposal	Section 561(d)
"Any provisions of this title relating to securities contracts . . . shall apply in a case ancillary to a foreign proceeding under this section . . . and to limit avoidance powers to the same extent as a proceeding under Chapters 7 or 11." JA2984 (*ISDA–PSA Proposal*).	"Any provisions of this title relating to securities contracts . . . shall apply in a case under Chapter 15 . . . and to limit avoidance powers to the same extent as a proceeding under chapter 7 or 11 . . . ." 11 U.S.C. § 561(d).

Congress looked to the ISDA–PSA proposal two years later, in 1998, when the U.S. faced what was then the "worst financial crisis in 50 years"—the collapse of LTCM. Paul L. Lee, *A Retrospective on the Demise of Long-Term Capital Management*, CLS Blue Sky Blog (Sept. 10, 2018), http://tiny.cc/5ko6vz. That near-failure prompted the President's Working Group commissioned to study LTCM's failure to acknowledge that the Bankruptcy Code left U.S. market participants vulnerable to a foreign bankruptcy, which could cause a ripple effect in the domestic market. *See supra* Point I. The disparate treatment of foreign and domestic proceedings created a paradoxical outcome in which the U.S.

market was exposed to greater risk from a foreign bankruptcy proceeding than from a domestic one.

Congress responded by including the ISDA–PSA language on foreign proceedings in two legislative proposals. *See* S. 1914, 105th Cong. § 210 (1998); H.R. 4393, 105th Cong. § 4 (1998). Congress considered similar proposals each legislative session[6] before ultimately codifying the ISDA–PSA proposal, as § 561(d), in 2005. *See* Pub. L. 109-8, tit. IX, § 907, 119 Stat. at 180. In passing § 561(d), Congress noted that the provision stemmed from extensive debate and discussion—with nearly 30 hearings between 1998 and 2005—and that many provisions in the bill were "derived from recommendations issued by the President's Working Group." H.R. Rep. 109-31 (2005). As this history shows, Congress passed § 561(d) to address the risk identified by the President's Working Group: that a foreign bankruptcy proceeding could devastate U.S. financial markets if Congress did not expand the safe harbor.

Section 561(d) also complements Chapter 15, which was enacted at the same time, and harmonizes it with the rest of the Code. Pub. L. 109-8, tit. IX, § 907, 119 Stat. at 180; *id.* tit. VIII, § 801, 119 Stat. at 138. In enacting § 561(d) at the same time as Chapter 15, Congress ensured,

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6 *See* H.R. 833, 106th Cong. § 1604 (2000); S. 420, 107th Cong. § 903 (2001); H.R. 2120, 108th Cong. § 4 (2003).

contrary to what the Liquidators suggest, that foreign representatives would not have greater avoidance powers in the United States than domestic trustees. Chapter 15 was modeled after the United Nations Commission on International Trade Law ("UNCITRAL") Model Law on Cross-Border Insolvency, which recognized that the "increasing incidence of cross-border insolvencies reflect[ed] the continuing global expansion of trade and investment" but that "national insolvency laws by and large [had] not kept pace with the trend." UNCITRAL Model Law and Guide to Enactment, Part II, ¶ 5. Chapter 15 addressed the issue of cross-border insolvency, and § 561(d) ensured that U.S. securities-market participants would enjoy the same finality and stability that § 546(e) strived to protect, even as Congress provided a new mechanism for foreign debtors to avail themselves of U.S. courts.

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The decades of legislative history on the Bankruptcy Code's safe harbors reflect Congress's long-running concern that the bankruptcy process not undermine the U.S. financial markets. *See Merit Mgmt. Grp., LP v. FTI Consulting, Inc.*, 138 S. Ct. 883, 890 (2018) ("Congress amended the securities safe harbor exception over the years, each time expanding the categories of covered transfers or entities."). It also shows that Congress enacts each safe harbor to target a particular problem—

and that § 561(d) was no exception. With § 561(d), Congress ensured that foreign bankruptcies would not become a tool to claw back funds from U.S. market participants. The Liquidators' claims—which seek to avoid securities-related payments to U.S. counterparties—fall within the heartland of that safe harbor. The Court should therefore apply § 561(d) as Congress intended.

4. Congress's focus on protecting U.S. market participants points up another fundamental flaw in the Liquidators' argument. The Liquidators try to sidestep § 561(d) by arguing (Br. 51–74) that Defendants seek to apply it extraterritorially. But Defendants seek to do no such thing. On the contrary, Defendants invoke § 561(d) to bar claims brought in U.S. courts under a statutory framework enacted by a U.S. legislature to govern proceedings brought by a foreign debtor and designed to preserve the stability of U.S. markets by ensuring that U.S. market participants can transact with finality, certainty, and predictability.

Nor does it matter that the Liquidators' claims arose outside the United States. *See* Liquidators' Br. 62. While statutes *creating* claims apply only when the underlying conduct occurs in the United States, courts have found that there is no "authority which holds that a federal statute *barring* enforcement of claims in courts of the United States bars

only claims arising within the United States." *Alter v. Bell Helicopter Textron, Inc.*, 944 F. Supp. 531, 541 (S.D. Tex. 1996) (emphasis added); *see Blazevska v. Raytheon Aircraft Co.*, 522 F.3d 948, 954 (9th Cir. 2008) (applying *Alter*); *Force v. Facebook, Inc.*, 934 F.3d 53, 74 (2d Cir. 2019) ("[E]xtraterritoriality is simply not implicated by statutes that merely limit civil liability." (quoting *Blazevska*, 522 F.3d at 953)).

At bottom, Defendants rely on § 561(d) to target domestic conduct: the Liquidators' use of U.S. courts to claw back funds from market participants. That is precisely the sort of conduct that Congress targeted in passing § 561(d). Because this is a "permissible domestic application" of § 561(d), the presumption against extraterritoriality does not stand in the way of applying the statute here. *RJR Nabisco, Inc. v. European Cmty.*, 579 U.S. 325, 337 (2016); *accord Morrison v. National Austl. Bank Ltd.*, 561 U.S. 247, 266 (2010).

CONCLUSION

For these reasons, SIFMA urges the Court to affirm the District Court's judgment.

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CERTIFICATE OF COMPLIANCE

I hereby certify that:

1. This brief complies with Second Circuit Rule 32.1(a)(4)(A), because it contains 6,320 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook font.

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