No. 16-317

IN THE

Supreme Court of the United States

DEUTSCHE BANK TRUST COMPANY AMERICAS, *et al.*,
Petitioners,

v.

ROBERT R. MCCORMICK FOUNDATION, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

DAVID M. LEHN
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006

ERIC F. FLETCHER
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109

PHILIP D. ANKER
Counsel of Record
ALAN E. SCHOENFELD
PABLO G. KAPUSTA
WILMER CUTLER PICKERING
HALE AND DORR LLP
7 World Trade Center
New York, NY 10007
(212) 230-8890
philip.anker@wilmerhale.com

Counsel for Respondents Susquehanna Capital Group, et al.

COMPLETE LIST OF PARTIES REPRESENTED BY COUNSEL IN APPENDIX

CORPORATE DISCLOSURE STATEMENT

Each of the following Respondents states that it has no parent corporation and no publicly held corporation owns 10% or more of its stock: 1199SEIU Health Care Employees Pension Fund; 1199SEIU Home Care Employees Fund; 1199SEIU Greater New York Pension Fund; Adage Capital Advisors Long; Adage Capital Partners LP; Aegon/Transamerica Series Trust T Rowe Price Equity Income; Aetna, Inc.; The Alfred W. Merkel Marlowe G. Merkel Trust UA 11 Sept 85; Amalgamated Bank; Bank of America Corporation; The Bank of New York Mellon Corporation Retirement Plans Master Trust; The Bank of Nova Scotia; BMO Nesbitt Burns Employee Co-Investment Fund I (U.S.), L.P.; Board of Trustees of the Colleges of Applied Arts and Technology Pension Plan, as Administrator of Colleges of Applied Arts and Technology Pension Plan; Brown Brothers Harriman & Co.; The Church Pension Fund, in its individual and trustee capacities; Clearwater Growth Fund; Cougar Trading, LLC; Darell F. Kuenzler IRA; Del Mar Master Fund, Ltd.; Denise Palmer Revocable Trust U/A/D 10-28-1991, Denise E. Palmer, Trustee; The Depository Trust & Clearing Corporation; D. E. Shaw Valence Portfolios, L.L.C.; Deutsche Bank AG; DiMaio Ahmad Capital LLC; Emanuel E. Geduld 2005 Family Trust; Equity League Pension Trust Fund; Evelyn A. Freed Trust U/A/D 03/26/90 Brandes-All Cap Value; Goldman Sachs Variable Insurance Trust; GPC LX LLC; Gryphon Hidden Values VIII Ltd.; Guggenheim Portfolio Company XXXI, LLC; Guggenheim Portfolio LIX, LLC; Halcyon Asset Management LLC; Halcyon Diversified Fund LP; Halcyon Fund, LP; Halcyon Master Fund LP; Harbor Capital Group Trust for Defined Benefit Plans (incorrectly named as "Harbor Capital Group Trust");

Harbor Mid Cap Value Fund; Harvest AA Capital LP; Harvest Capital LP; Hussman Econometrics Advisors, Inc.; Hussman Investment Trust; Hussman Strategic Growth Fund; Iolaire Investors LLP; Harvard University; J. Goldman & Co., L.P. (incorrectly named as "Jay Goldman & Co., LP"); Jay Goldman Master Limited Partnership (incorrectly named as "Jay Goldman Master LP"); Jeanette Day Family Trust U/A DTD 10/04/1994; Jennifer Merkel, Successor Trustee of The Alfred W. Merkel Marlowe G. Merkel Trust UA 11 Sept 85; Jim Hicks as trustee of The Jim Hicks & Co. Employee Profit-Sharing Plan; John Hancock Funds II; John Hancock Funds II Equity Income Fund (incorrectly named as "John Hancock Funds II (Equity-Income Fund)" and "JHF II Equity-Income Fund"); John Hancock Funds II Spectrum Income Fund (incorrectly named as "John Hancock Funds II (Spectrum Income Fund)" and "JHF II Spectrum Income Fund"); John Hancock Variable Insurance Trust New Income Trust (incorrectly named as "John Hancock Variable Insurance Trust (F/K/A John Hancock Trust (New Income Trust))," "John Hancock Variable Insurance Trust," and "JHT New Income Trust"); The Kraft Group; Lispenard Street Credit Fund LLP; Lispenard Street Credit Master Fund; Lispenard Street Credit Master Fund Ltd.; Loomis Sayles Credit Alpha Fund; Lyxor/Canyon Value Realization Fund Ltd.; The MainStay Funds; Manulife U.S. Equity Fund; MassMutual Premier Enhanced Index Value Fund (currently known as MassMutual Premier Disciplined Value Fund); MassMutual Premier Funds; MassMutual Premier Small Company Opportunities Fund (currently known as MassMutual Premier Small Cap Opportunities Fund); MassMutual Select Diversified Value Fund; MassMutual Select Funds; MassMutual Select Indexed

Equity Fund (currently known as MM S&P 500 Index Fund); MML Blend Fund; MML Equity Income Fund; MML Series Investment Fund; MML Series Investment Fund II; Monserrate Ramirez JTWROS; New Americans LLC; New Eagle Holdings LLC; New York Life Insurance Company; NorthShore University HealthSystem, as owner of the NorthShore University HealthSystem Second Century Fund; Northwestern Mutual Life Insurance Company; Ohio National Fund, Inc.; OMA OPA LLC; Oppenheimer Main Street Select Fund (formerly known as Oppenheimer Main Street Opportunity Fund); Oppenheimer Main Street Mid Cap Fund (formerly known as Oppenheimer Main Street Small Cap Fund); Oppenheimer Variable Account Funds doing business as Oppenheimer Main Street Small & Mid-Cap Fund/VA (formerly known as Oppenheimer Main Street Small Cap Fund/VA); Paper Products, Miscellaneous Chauffeurs, Warehousemen, Helpers, Messengers, Production and Office Workers Local 27 Pension Fund; The Peter J. Fernald Trust U/A 1/13/92; Peter J. Fernald, Trustee of The Peter J. Fernald Trust U/A 1/13/92; Pond View Credit (Master) LP; Posen Family Limited Partnership; President and Fellows of Harvard College; Principal Variable Contracts Funds, Inc.; Producers-Writers Guild of America Pension Plan; The Public Employees' Retirement Association of Colorado; QVT Fund LP; Raymond M. Luthy Trust; Reed Elsevier U.S. Retirement Plan (now known as RELX Inc. U.S. Retirement Plan); Russell Investment Company; Robert N. Mohr, Successor Trustee to Joseph B. Mohr, as Trustee of the J&M Trust UA Dated 07/23/1992; Russell U.S. Core Equity Fund (incorrectly named as "Russell US Core Equity Fund," and f/k/a "Russell Equity I Fund" and Russell Investment Company Diversified Equity Funds); Roy-

al Bank of Canada; Rydex ETF Trust (Guggenheim S&P 500 Pure Value ETF) (incorrectly named as "Rydex ETF Trust (Rydex S&P 500 Pure Value ETF)"); Rydex ETF Trust (Guggenheim S&P 500 Equal Weight Consumer Discretionary ETF) (incorrectly named as "Rydex ETF Trust (Rydex S&P Equal Weight Consumer Discretionary ETF)"); Rydex ETF Trust (Guggenheim S&P 500 Equal Weight ETF) (incorrectly named as "Rydex ETF Trust (Rydex S&P Equal Weight ETF)"); Rydex Series Funds; Rydex Series Funds Multi-Hedge Strategies Fund; Rydex Series Funds S&P 500 Pure Value Fund; Rydex Variable S&P 500 Pure Value Fund; Rydex Variable Trust; Rydex Variable Trust Multi-Hedge Strategies Fund; SBL Fund Series O; Schultze Asset Management, LLC; Sowood Alpha Fund LP; Stark Investments; Stichting Pensioenfonds ABP; Stichting Pensioenfonds Van De ABN Amro Bank N.V.; Stichting Pensioenfonds Zorg En Welzijn; Stichting Shell Pensioenfonds; Susquehanna Capital Group; Susquehanna Investment Group; Susquehanna Investment Group as custodian of the SIG-SS CBOE Joint Account; Terrill F Cox & Lorraine M Cox Trust U/A DTD 3/31/98; Times Mirror Savings Plan; Towerview LLC; Transamerica Blackrock Large Cap Value VP (F/K/A Transamerica T. Rowe Price Equity Income VP); Transamerica Partners Mid Cap Value; Transamerica Partners Mid Cap Value F/K/A Diversified Investors Portfolios; Transamerica Partners Mid Value Portfolio (f/k/a Transamerica Partners Mid-Cap Value Portfolio f/k/a/ Diversified Investors Mid-Cap Value Portfolio); Transamerica Partners Portfolios (F/K/A Diversified Investors Portfolios); Transamerica Series Trust (F/K/A Aegon/Transamerica Series Trust); Tribune Company 401(k) Savings Plan; Tribune Company Master Retire-

ment Savings Trust; Tribune Employee Stock Ownership Plan; T. Rowe Price Balanced Fund, Inc., also named incorrectly as T. Rowe Price Balanced Fund – Large Cap Core Fund, Inc.; T. Rowe Price Equity Income Fund; T. Rowe Price Equity Series, Inc.; T. Rowe Price Group, Inc.; T. Rowe Price Index Trust, Inc.; T. Rowe Price Mid-Cap Value Fund, Inc.; Trustees of Boston College; Trustees of the Walters Art Gallery, Inc., d/b/a the Walters Art Museum; Twin Securities, Inc.; Vanguard 500 Index Fund (incorrectly named as "Vanguard Index 500 Fund" and also f/k/a "Vanguard Tax-Managed Growth & Income Fund"); Vanguard Balanced Index Fund (incorrectly named as "Vanguard Balanced Index Fund (a/k/a Vanguard Balanced Index Equity Fund)"); Vanguard Consumer Discretionary Index Fund; Vanguard Equity Income Fund; Vanguard Fenway Funds; Vanguard FTSE Social Index Fund; The Vanguard Group, Inc.; Vanguard Growth and Income Fund; Vanguard High Dividend Yield Index Fund; Vanguard Index Funds; Vanguard Institutional Index Fund; Vanguard Institutional Total Stock Market Index Fund; Vanguard Large Cap Index Fund; Vanguard Malvern Funds; Vanguard Mid-Cap Index Fund; Vanguard Mid-Cap Value Index Fund; Vanguard Quantitative Funds; Vanguard Scottsdale Funds; Vanguard Structured Large-Cap Equity Fund; Vanguard Total Stock Market Index Fund; Vanguard Valley Forge Funds; Vanguard Value Index Fund; Vanguard Variable Insurance Fund; Vanguard Whitehall Funds; Vanguard Windsor Funds; Vanguard Windsor II Fund; Vanguard World Fund (f/k/a Vanguard World Funds); Wabash/Harvest Partners LP; Woodmont Investments Ltd.; and Workers Compensation Board.

Each of the following Respondents, to the extent they exist, either are (or were merged into) wholly

owned direct or indirect subsidiaries of Wells Fargo & Company (a publicly held corporation that has no parent corporation and of which Berkshire Hathaway Inc., together with its affiliates, beneficially owns over 10% of its common stock): A.G. Edwards & Sons, LLC; A.G. Edwards Private Equity Partners III, L.P.; A.G. Edwards, Inc.; AG Edwards & Sons, Inc.; Evergreen Asset Management Corp.; First Clearing, LLC; Wachovia Bank, N.A.; Wells Fargo Bank, N.A.; Wells Fargo Investments, LLC.

Each of the following Respondents, to the extent they exist, either are (or were merged into) wholly owned direct or indirect subsidiaries of respondent The Bank of New York Mellon Corporation (a publicly held corporation that has no parent corporation and no public corporation owns 10% or more of its stock): BNY Mellon Investment Servicing (US) Inc. (f/k/a PFPC, Inc.); BNY Mellon Trust of Delaware; BNY Mellon, N.A., as successor-in-interest to Mellon Trust of New England, N.A.; Mellon Capital Management Corporation; Pershing LLC; The Bank of New York Mellon (on its own behalf and in its capacity as trustee of various trusts); The Dreyfus Corporation.

Each of the following Respondents, to the extent they exist, either are (or were merged into) wholly owned direct or indirect subsidiaries of Bank of America Corporation, are unincorporated divisions of Bank of America Corporation, or otherwise not publicly owned corporations: Bank of America; Bank of America, N.A.; Bank of America, N.A. / LaSalle Bank, N.A.; Bank of America Structured Research; Banc of America Securities LLC; Bank of America N.A./GWIM Trust Operations; Columbia Management Group; Forrestal Funding Master Trust; LaSalle Bank, N.A.; Merrill Lynch, Pierce, Fenner & Smith Incorporated; Merrill Lynch,

Pierce, Fenner & Smith as successor to Banc of America Securities LLC, Securities Lending Services; Merrill Lynch; Merrill Lynch & Co., Inc.; Merrill Lynch Capital Corp.; Merrill Lynch Financial Markets, Inc.; Merrill Lynch Trust Co.; Merrill Lynch, Pierce, Fenner & Smith, Inc. – Safekeeping; Merrill Lynch, Pierce, Fenner & Smith, Inc. – Securities Lending; 1IA SPX1; US Trust Co. N.A.; and U.S. Trust Company of Delaware.

"Aegon/Transamerica Series Fund – TRP" does not exist, to the best of counsel's knowledge.

APG Asset Management US Inc. F/K/A ABP Investments US, Inc. (incorrectly named as ABP) states that no publicly held corporation owns 10% or more of its stock and that its parent corporation is APG Asset Management, whose parent is Stichting Pensioenfonds ABP.

Baldwin Enterprises, Inc. states that its ultimate parent company is Leucadia National Corporation, a publicly held corporation.

Bank of Montreal Holding Inc. (as successor in interest to BMO Nesbitt Burns Trading Corp. S.A.) states that it is wholly owned by the Bank of Montreal.

Barclays Bank PLC states that it is a wholly owned subsidiary of Barclays PLC, a publicly held company whose shares are traded on the London and New York stock exchanges. Barclays PLC has no parent company, and no publicly held company owns more than 10% of its stock.

Barclays Capital, Inc. states that the following parent corporations or publicly held corporations own 10% or more of any class of its equity interests: Barclays PLC; Barclays Bank PLC; and Barclays Group US Inc.

Barclays Capital Securities Ltd. States that it is an indirectly held wholly owned subsidiary of Barclays PLC, a publicly held company whose shares are traded on the London and New York stock exchanges. Barclays PLC has no parent company, and no publicly held company owns more than 10% of its stock.

Bear Stearns Asset Management, Inc. states that it is a wholly owned subsidiary of The Bear Stearns Companies LLC, which is a wholly owned subsidiary of JPMorgan Chase & Co., a publicly held corporation.

Bear Stearns & Co., Inc. (n/k/a J.P. Morgan Securities LLC) states that it is a wholly owned subsidiary of J.P. Morgan Broker-Dealer Holdings Inc., which is a wholly owned subsidiary of JPMorgan Chase & Co., a publicly held corporation.

Bear Stearns Equity Strategies RT LLC states that it is a wholly owned subsidiary of Bear Stearns Equity Holdings Inc., which is a wholly owned subsidiary of The Bear Stearns Companies LLC, which is a wholly owned subsidiary of JPMorgan Chase & Co., a publicly held corporation.

Bear Stearns Securities Corp. (which changed its name to J.P. Morgan Clearing Corp.) states that it was a wholly owned subsidiary of J.P. Morgan Securities LLC, which is a wholly owned subsidiary of J.P. Morgan Broker-Dealer Holdings Inc., which is a wholly owned subsidiary of JPMorgan Chase & Co., a publicly held corporation. J.P. Morgan Clearing Corp. was merged into J.P. Morgan Securities LLC on October 1, 2016.

Bessemer Trust Company states that it is a wholly owned subsidiary of The Bessemer Group, Inc., which has no parent corporation. No publicly held corporation

owns 10% or more of the stock of the Bessemer Group, Inc.

BHF-Bank Aktiengesellschaft states that it is a wholly owned subsidiary of BHF Group S.A., Brussels and BHF Group Ltd., London, which are each directly or indirectly wholly owned by Oddo & Cie, SCA, which is a partnership organized under French law. Upon information and belief, no publicly traded company owns 10% or more of the partnership interests in Oddo & Cie, SCA.

BMO Nesbitt Burns Employee Co-Investment Fund I Management (U.S.), Inc. states that it is indirectly wholly owned subsidiary of Bank of Montreal. No publicly held corporation owns 10% or more of the stock of Bank of Montreal.

BMO Nesbitt Burns Inc. states that it is a wholly owned subsidiary of BMO Nesbitt Burns Holding Corporation, which in turn is wholly owned by Bank of Montreal Holding Inc., which is wholly owned by the Bank of Montreal. Bank of Montreal is a publicly traded bank, incorporated under the Bank Act. No publicly held corporation owns 10% or more of the stock of the Bank of Montreal.

BMO Nesbitt Burns U.S. Blocker Inc. states that it is a wholly owned subsidiary of BMO Nesbitt Burns Employee Co-Investment Fund I (U.S.) L.P.

BNP Paribas Prime Brokerage Inc. states that it is a wholly owned indirect subsidiary of BNP Paribas, which is a publicly owned company organized under the laws of France. No publicly held entity owns 10% or more of the stock of BNP Paribas.

BNP Paribas Securities Corp. states that it is a wholly owned indirect subsidiary of BNP Paribas,

which is a publicly owned company organized under the laws of France. No publicly held entity owns 10% or more of the stock of BNP Paribas.

Canadian Imperial Holdings, Inc. states that it is an indirect wholly owned subsidiary of Canadian Imperial Bank of Commerce, which is a publicly traded company and has no parent. No publicly held corporation owns 10% or more of Canadian Imperial Bank of Commerce's stock.

Cantigny Foundation states that it is organized under the General Not For Profit Corporation Act of Illinois and, accordingly, issues no stock.

Cede & Co. states that it is a New York partnership with no parent corporation and no publicly held corporation owns 10% or more of Cede & Co.

Chandler Trust No. 1 is a trust established under the laws of the State of California and, accordingly, issues no stock. No publicly traded company holds 10% or more of the beneficial interests in Chandler Trust No. 1.

Chandler Trust No. 2 is a trust established under the laws of the State of California and, accordingly, issues no stock. No publicly traded company holds 10% or more of the beneficial interests in Chandler Trust No. 2.

Charles Schwab & Co., Inc. states that it is 100% owned by Schwab Holdings, Inc., which is 100% owned by The Charles Schwab Corporation, a publicly traded company.

Charles Schwab & Co., Inc., as Custodian for Brent V. Woods IRA Rollover, states that it is 100% owned by Schwab Holdings, Inc., which is 100% owned by The

Charles Schwab Corporation, a publicly traded company.

Charles Schwab & Co., Inc., as Custodian of the George William Buck SEP-IRA DTD 04/08/93, states that it is 100% owned by Schwab Holdings, Inc., which is 100% owned by The Charles Schwab Corporation, a publicly traded company.

Charles Schwab & Co., Inc., as Custodian of the Peter Marino IRA Rollover, states that it is 100% owned by Schwab Holdings, Inc., which is 100% owned by The Charles Schwab Corporation, a publicly traded company.

Charles Schwab Investment Management, Inc. (incorrectly named as "Charles Schwab Inv Mgt Co") states that it is 100% owned by The Charles Schwab Corporation, a publicly traded company.

CIBC World Markets Corp. states that it is a wholly owned subsidiary of Canadian Imperial Bank of Commerce, which is a publicly traded company and has no parent. No publicly held corporation owns 10% or more of Canadian Imperial Bank of Commerce's stock.

CIBC World Markets, Inc. states that it is a wholly owned subsidiary of Canadian Imperial Bank of Commerce, which is a publicly traded company and has no parent. No publicly held corporation owns 10% or more of Canadian Imperial Bank of Commerce's stock.

College Retirement Equities Fund states that it is a private membership corporation with no parent company and no publicly held corporation owns 10% or more of the membership interests in College Retirement Equities Fund.

Commerzbank AG states that it is publicly traded on the German market. Upon information and belief,

no publicly traded entity owns 10% or more of Commerzbank AG.

Commerz Markets LLC states that it is wholly owned by Commerzbank AG. Upon information and belief, no publicly traded entity owns 10% or more of Commerzbank AG.

Cooper Neff Advisors, Inc., now known as Harewood Asset Management (US) Inc., states that it is a wholly owned, indirect subsidiary of BNP Paribas, which is a publicly owned company organized under the laws of France. No publicly held entity owns 10% or more of the stock of BNP Paribas.

Credit Suisse Securities (Europe) Ltd. states that it is a wholly owned subsidiary of Credit Suisse Investment Holdings (UK), which in turn is a wholly owned subsidiary of Credit Suisse Investments (UK), which in turn is a wholly owned subsidiary of Credit Suisse AG, which in turn is a wholly owned subsidiary of Credit Suisse Group AG. Credit Suisse Group AG is a corporation organized under the laws of Switzerland and whose shares are listed on the Swiss Stock Exchange and are also listed on the New York Stock Exchange in the form of American Depositary Shares.

Credit Suisse Securities (USA) LLC states that it is a wholly owned subsidiary of Credit Suisse (USA) Inc., which in turn is a wholly owned subsidiary of Credit Suisse Holdings (USA) Inc., which in turn is a jointly owned subsidiary of: (1) Credit Suisse Group AG Guernsey Branch, which is a branch of Credit Suisse Group AG, which is a corporation organized under the laws of Switzerland and whose shares are listed on the Swiss Stock Exchange and are also listed on the New York Stock Exchange in the form of American Depositary Shares, and (2) Credit Suisse AG, which itself is a

wholly owned subsidiary of Credit Suisse Group AG and which has listed debt securities and warrants in the United States and elsewhere. No publicly held company owns 10% or more of Credit Suisse Group AG.

Credit Suisse (USA), Inc. states that it is a wholly owned subsidiary of Credit Suisse Holdings (USA) Inc., which in turn is a jointly owned subsidiary of: (1) Credit Suisse Group AG Guernsey Branch, which is a branch of Credit Suisse Group AG, which is a corporation organized under the laws of Switzerland and whose shares are listed on the Swiss Stock Exchange and are also listed on the New York Stock Exchange in the form of American Depositary Shares, and (2) Credit Suisse AG, which itself is a wholly owned subsidiary of Credit Suisse Group AG and which has listed debt securities and warrants in the United States and elsewhere. No publicly held company owns 10% or more of Credit Suisse Group AG.

The Depository Trust Company states that it is a wholly owned subsidiary of The Depository Trust & Clearing Corporation, which does not have a parent company. No publicly held company owns 10% or more of The Depository Trust & Clearing Corporation.

Deutsche Bank AG, Filiale Amsterdam states that it is a branch of Deutsche Bank AG. No publicly traded corporation holds 10% or more of the stock of Deutsche Bank AG.

Deutsche Bank Securities Inc. states that it is a wholly owned subsidiary of DB U.S. Financial Markets Holding Corporation, which is a wholly owned subsidiary of Taunus Corporation, which in turn is a wholly owned subsidiary of Deutsche Bank AG.

Deutsche Investment Management Americas Inc. states that it is a wholly owned subsidiary of Deutsche Bank Americas Holding Corp., which is a wholly owned subsidiary of Taunus Corporation, which is a wholly owned subsidiary of Deutsche Bank AG. No publicly traded corporation holds 10% or more of the stock of Deutsche Investment Management Americas Inc.

"DIA MID CAP Value Portfolio" does not exist, to the best of counsel's knowledge.

Dreyfus Index Funds, Inc. states that Charles Schwab & Company, Inc. (a subsidiary of The Charles Schwab Corporation, a publicly traded company), Fidelity Investments Institutional Operations Company, Inc. and VALIC Retirement Services, Co. (a subsidiary of American International Group, Inc., a publicly traded company) own at least 10% of its "Dreyfus S&P 500 Index Fund" portfolio.

Dreyfus Stock Index Fund, Inc. states that Nationwide Life Insurance Company, Annuity Investors Life Insurance Company (a subsidiary of American Financial Group, Inc., a publicly traded company) and Symetra Life Insurance Company (a subsidiary of Symetra Financial Corporation, a publicly traded company) each own at least 10% of a certain class of its stock.

Eaton Vance Multi Cap Growth Portfolio states that it is a Massachusetts business trust and no publicly held corporation owns 10% or more of Eaton Vance Multi Cap Growth Portfolio.

Eaton Vance Tax Managed Global Buy Write Opportunities Fund states that it is a Massachusetts business trust and no publicly held corporation owns 10% or

more of Eaton Vance Tax Managed Global Buy Write Opportunities Fund.

Eaton Vance Tax Managed Growth Portfolio states that it is a Massachusetts business trust and no publicly held corporation owns 10% or more of Eaton Vance Tax Managed Growth Portfolio.

Eaton Vance Tax Managed Multi-Cap Growth Portfolio states that it is a Massachusetts business trust and no publicly held corporation owns 10% or more of Eaton Vance Tax Managed Multi-Cap Growth Portfolio.

Edward D. Jones & Co., L.P. states that it is a Missouri Limited Partnership in which EDJ Holding Company, Inc. is the general partner, and The Jones Financial Companies, L.L.L.P is the sole limited partner.

Employee Retirement System of Texas ("ERST") states that it is a public employee pension fund that does not have a parent corporation. No publicly held corporation owns 10% of more of the ERST's stock.

Fidelity Advisor Series I states that it is an open-end management investment company created under initial declarations of trust. It has no parent corporation. Upon information and belief, no publicly traded company owns 10% or more of Fidelity Advisor Series I.

Fidelity Commonwealth Trust states that it is an open-end management investment company created under initial declarations of trust. It has no parent corporation. Upon information and belief, no publicly traded company owns 10% or more of Fidelity Commonwealth Trust.

Fidelity Concord Street Trust states that it is an open-end management investment company created

under initial declarations of trust. It has no parent corporation. Upon information and belief, no publicly traded company owns 10% or more of Fidelity Concord Street Trust.

Fidelity Securities Fund – Leveraged Company Stock Fund states that it is a fund of Fidelity Securities Fund, an open-end management investment company created under a declaration of trust. It has no parent corporation. Upon information and belief, no publicly traded company owns 10% or more of Fidelity Securities Fund – Leveraged Company Stock Fund.

Fidelity US Equity Index Commingled Pool states that it is a commingled pool of the Fidelity Group Trust for Employee Benefit Plans. It has no parent company. Upon information and belief, no publicly traded company owns 10% or more of Fidelity US Equity Index Commingled Pool.

Frank Russell does not exist, to the best of counsel's knowledge.

Frank Russell Company states that it is a wholly owned subsidiary of the London Stock Exchange Group, LLC.

Frank Russell Investments does not exist, to the best of counsel's knowledge.

Frank Russell Trust does not exist, to the best of counsel's knowledge.

GAMCO Asset Management Inc. states that it is a wholly owned subsidiary of GAMCO Investors, Inc., a publicly held corporation.

Goldman, Sachs & Co. states that it is an indirect wholly owned subsidiary of The Goldman Sachs Group,

Inc., which indirectly owns 100% of Goldman, Sachs & Co.

Goldman Sachs Execution & Clearing, L.P. states that it is an indirect subsidiary of The Goldman Sachs Group, Inc. To the best of its knowledge, no other publicly held corporation owns 10% or more of Goldman Sachs Execution & Clearing, L.P.

Goldman Sachs International Holdings LLC states that it is more than 10% owned by each of GSEM (Del) Inc. and Goldman Sachs Global Holdings L.L.C.

Great-West Life & Annuity Insurance Company is a wholly owned subsidiary of GWL&A Financial Inc., which is not publicly traded. No publicly held corporation owns 10% or more of Great-West Life & Annuity Insurance Company's stock. GWL&A Financial, Inc. is indirectly owned by Great-West Lifeco Inc. Great-West Lifeco Inc.'s shares are traded publicly in Canada on the Toronto Stock Exchange

GS Investment Strategies LLC states that it is owned by The Goldman Sachs Group, Inc.

Guggenheim Advisors, LLC states that it is a wholly owned subsidiary of Guggenheim Alternative Asset Management, LLC. No publicly held corporation owns 10% or more of its stock.

Harbor Capital Advisors, Inc. states that it is wholly owned by Robeco US Holding, Inc., which is wholly owned by Robeco International Holding B.V., which is wholly owned by Robeco Groep N.V. ORIX Corporation, a publicly traded company, owns 100% of the outstanding shares of Robeco Groep N.V.

The Hartford Financial Services Group, Inc., incorrectly named as "The Hartford Financial Services Group, Inc. d/b/a The Hartford," states that it is a pub-

licly traded corporation that has no parent corporation and that no publicly held corporation with a 10% or more ownership interest in its common stock. Allianz SE, a publicly held corporation that has no parent corporation, holds contingent rights to purchase more than 10% of the common stock of Hartford Financial.

Hartford Investment Management Company states that it is wholly owned by The Hartford Financial Services Group, Inc. ("Hartford Financial"), a publicly traded corporation that has no parent corporation and which has no publicly held corporation with a 10% or more ownership interest in its common stock. Allianz SE, a publicly held corporation that has no parent corporation, holds contingent rights to purchase more than 10% of the common stock of Hartford Financial.

Hartford Life Insurance Company states that it is wholly owned by Hartford Life and Accident Insurance Company, which is wholly owned by Hartford Life, Inc., which is wholly owned by Hartford Holdings, Inc., which is wholly owned by The Hartford Financial Services Group, Inc., a publicly traded corporation that has no parent corporation and which has no publicly held corporation with a 10% or more ownership interest in its common stock. Allianz SE, a publicly held corporation that has no parent corporation, holds contingent rights to purchase more than 10% of the common stock of Hartford Financial.

Harvard Management Co. states that its parent corporation is the President and Fellows of Harvard College. No publicly held corporation owns 10% or more of its stock.

Hudson Bay Fund LP states that its general partner is Hudson Bay Capital Associates LLC. No publicly held corporation owns 10% or more of its stock.

Hudson Bay Master Fund Ltd. states that it is a wholly owned subsidiary of Hudson Bay Fund LP and Hudson Bay Intermediate Fund Ltd. No publicly held corporation owns 10% or more of its stock.

Illinois Municipal Retirement Fund ("Fund") states that it is a public employee pension fund that does not have a parent corporation. No publicly held corporation owns 10% of more of the Fund's stock.

ING Investment Trust Co. (n/k/a Voya Investment Trust Co.) states that it is a wholly owned subsidiary of ING Investment Management Co. (n/k/a Voya Investment Management Co. LLC), which is a wholly owned subsidiary of ING Investment Management LLC (n/k/a Voya Investment Management LLC), which is a wholly owned subsidiary of Lion Connecticut Holdings Inc. (n/k/a Voya Holdings, Inc.), which is a wholly owned subsidiary of Voya Financial, Inc., a U.S. domiciled publicly traded stock corporation.

Jefferies LLC (formerly known as Jefferies & Company, Inc. and the successor to Jefferies Bache Securities, LLC) states that it is wholly owned by Jefferies Group LLC, which in turn is wholly owned by Limestone Merger Sub, LLC, which in turn is wholly owned by Leucadia National Corporation. Leucadia National Corporation is a publicly held corporation.

John Hancock Life Insurance Company (U.S.A.) as successor-in-interest to John Hancock Financial Services, Inc. states that it is a wholly owned subsidiary of Manulife Financial Corporation, a publicly traded company.

JPMorgan Chase 401(k) Savings Plan states that it is an "employee pension benefit plan" as defined by the Employee Retirement Security Act, its income is ex-

empt from federal income tax under Section 501(a) of the Internal Revenue Code, and that it is sponsored by JPMorgan Chase Bank, N.A., a wholly owned subsidiary of JPMorgan Chase & Co., a publicly held corporation.

JPMorgan Chase Bank, N.A. (which was also improperly referred to in the Amended Complaint as "Custodial Trust Company") states that it is a wholly owned subsidiary of JPMorgan Chase & Co., a publicly held corporation.

J.P. Morgan Clearing Corp. was merged into J.P. Morgan Securities LLC on October 1, 2016.

J.P. Morgan Securities LLC (formerly J.P. Morgan Securities Inc.) states that it is a wholly owned subsidiary of J.P. Morgan Broker-Dealer Holdings Inc., which is a wholly owned subsidiary of JPMorgan Chase & Co., a publicly held corporation.

J.P. Morgan Securities plc (formerly J.P. Morgan Securities Ltd.) states that it is an indirect wholly owned subsidiary of JPMorgan Chase Bank, N.A., which is a wholly owned subsidiary of JPMorgan Chase & Co., a publicly held corporation.

JPMSI LLC (formerly J.P. Morgan Services Inc.) states that it is a wholly owned subsidiary of Bear, Stearns International Holdings Inc., which is a wholly owned subsidiary of The Bear Stearns Companies LLC, which is a wholly owned subsidiary of JPMorgan Chase & Co., a publicly held corporation.

JPMorgan Trust II states that it is an open-end, management investment company organized as a Delaware statutory trust. JPMorgan Trust II issues shares of beneficial interest in series, with each series corresponding to a separate fund. JPMorgan Trust II

has no parent corporation and, as of October 3, 2016, no publicly held corporation owns, of record, ten percent or more of the shares of any series for its own benefit.

J.P. Morgan Whitefriars, Inc. states that it is a wholly owned subsidiary of J.P. Morgan Overseas Capital Corporation, which is a wholly owned subsidiary of J.P. Morgan International Finance Limited, which is an indirect wholly owned subsidiary of JPMorgan Chase & Co., a publicly held corporation.

Lockheed Martin Corporation states that it has no parent corporation and that State Street Corporation, a publicly held corporation, beneficially owns 10% or more of its stock.

Lockheed Martin Corporation Master Retirement Trust states that is was established by Lockheed Martin Corporation as a master pension trust for the corporation's U.S. employee pension plans and for the exclusive benefit of the participants and beneficiaries of such plans.

LPL Financial LLC states that it is an indirect, wholly owned subsidiary of LPL Financial Holdings Inc., a publicly traded corporation.

Manulife Asset Management (US) LLC states that it is an indirect subsidiary of the John Hancock Financial Corporation, which is itself an indirect subsidiary of The Manufacturers Life Insurance Company, which is wholly owned by Manulife Financial Corporation, a publicly traded company.

Manulife Investments (f/k/a “Manulife Mutual Funds”) states that it is a division of Manulife Asset Management Limited, which is a wholly owned subsidiary of Manulife Asset Management Holdings (Canada) Inc. (f/k/a/ “FNA Financial Inc.”), which is itself a whol-

ly owned subsidiary of The Manufacturers Life Insurance Company, which is wholly owned by Manulife Financial Corporation, a publicly traded company.

Manulife Invst Ex FDS Corp.-MIX states that it is a wholly owned subsidiary of Manulife Investment Exchange Funds Trust.

MassMutual Premier Main Street Small/Mid Cap Fund (f/k/a "MassMutual Premier Main Street Small Cap Fund") no longer exists, to the best of counsel's knowledge.

Maxim Series Fund, Inc. (n/k/a Great-West Funds, Inc.) states that Great-West Life & Annuity Insurance Company owns a percentage of Maximum Series Fund, Inc. (n/k/a Great-West Funds, Inc.) through its insurance company's separate accounts. Great-West Life & Annuity Insurance Company is a wholly owned subsidiary of GWL&A Financial, Inc., which is not publicly traded. No publicly held company holds 10% or more of Great-West Life & Annuity Insurance Company's stock. GWL&A Financial, Inc. is indirectly owned by Great-West Lifeco Inc. Great-West Lifeco Inc.'s shares are traded publicly in Canada on the Toronto Stock Exchange.

Mutual of America Investment Corp. states that no publicly held corporation own 10% or more of its stock and that its parent corporation is Mutual of America Life Insurance Company.

National Financial Services LLC states that it is a wholly owned subsidiary of FMR LLC. No publicly held entity owns 10% or more of FMR LLC.

Neuberger Berman LLC states that it is a wholly owned subsidiary of Neuberger Berman Holdings LLC.

SG Americas Securities, LLC (as successor to respondent Newedge USA, LLC) states that it is wholly owned by SG Americas Securities Holdings, LLC, which is a wholly owned subsidiary of Société Générale, which is a publicly traded company. Upon information and belief, no other publicly held corporation owns 10% or more of the shares of Société Générale.

Northwestern Mutual Series Fund, Inc. states that it is a wholly owned subsidiary of the Northwestern Mutual Life Insurance Company, which does not have a parent corporation. No publicly held corporation owns 10% or more of the stock of Northwestern Mutual Life Insurance Company.

OFI Private Investments, Inc. states that it is a wholly owned subsidiary of OppenheimerFunds, Inc., itself a wholly owned subsidiary of Oppenheimer Acquisition Corp., which is primarily owned by MM Asset Management Holding LLC, which is owned by MassMutual Holding LLC, which is in turn owned by Massachusetts Mutual Life Insurance Company. No publicly held corporation owns 10% or more of Massachusetts Mutual Life Insurance Company.

Ohio Public Employees Retirement System ("OPERS") states that it is a public employee pension fund that does not have a parent corporation. No publicly held corporation owns 10% of more of the OPERS' stock.

Oppenheimer & Co., Inc. states that it is a subsidiary of Oppenheimer Holdings, Inc., a publicly held company.

OppenheimerFunds, Inc. states that it is a wholly owned subsidiary of Oppenheimer Acquisition Corp., which is primarily owned by MM Asset Management

Holding LLC, which is owned by MassMutual Holding LLC, which is in turn owned by Massachusetts Mutual Life Insurance Company. No publicly held corporation owns 10% or more of Massachusetts Mutual Life Insurance Company.

optionsXpress, Inc. states that it is 100% owned by optionsXpress Holdings, Inc., which is in turn 100% owned by The Charles Schwab Corporation, a publicly traded company.

Pacific Select does not exist, to the best of counsel's knowledge.

Pacific Select Fund states that it is a wholly owned subsidiary of Pacific Mutual Holding Company.

Pacific Select Fund Equity Index Portfolio is not a corporate entity, but an investment fund operating under the Pacific Select Fund, which itself is a wholly owned subsidiary of Pacific Mutual Holding Company.

Pensions Reserve Investment Management Board of Massachusetts ("PRIM") states that it is a public employee pension fund that does not have a parent corporation. No publicly held corporation owns 10% of more of the PRIM's stock.

PNC Bank, National Association states that it is wholly owned by PNC Bancorp, Inc., which in turn is wholly owned by The PNC Financial Services Group, Inc.

ProShares Ultra S&P500 states that it is a publicly sold, exchange-traded fund and a series of ProShares Trust, a Delaware statutory trust. ProShares Trust has no parent corporation, and, to its knowledge, no publicly held corporation beneficially owns 10% or more of the stock of ProShares Trust.

Prudential Insurance Company of America states that it is a wholly owned subsidiary of Prudential Financial, Inc., who is its sole member. No publicly held corporation owns 10% or more of the party's stock.

Prudential Investment Management Inc. (n/k/a PGIM, Inc.) states that it is a wholly owned subsidiary of the Prudential Asset Management Holding Company, LLC (n/k/a PGIM Holding Company LLC), which is a wholly owned subsidiary of Prudential Financial, Inc. No publicly held corporation owns 10% or more of the party's stock. No publicly held corporation has a financial interest in the outcome of the matter.

Prudential Retirement Insurance and Annuity Company states that it is a wholly owned subsidiary of The Prudential Insurance Company of America, which is a wholly owned subsidiary of Prudential Financial, Inc., who is its sole member. No publicly held corporation owns 10% or more of the party's stock.

Putnam Fiduciary Trust Company is a wholly owned subsidiary of Putnam U.S. Holdings, LLC, which is a wholly owned subsidiary of Putnam Acquisition Financing LLC, which is a wholly owned subsidiary of Putnam Acquisition Financing Inc., which is a wholly owned subsidiary of Putnam Investments, LLC, which is a wholly owned subsidiary of Great-West Lifeco U.S. Inc., which is a wholly owned subsidiary of Great-West Financial (Nova Scotia) Co., which is a wholly owned subsidiary of Great-West Financial (Canada) Inc., which is a wholly owned subsidiary of Great-West Lifeco Inc.

RBC Capital Markets Arbitrage, LLC states that it is an indirect, wholly owned subsidiary of Royal Bank of Canada, which is publicly traded on the New York Stock Exchange and the Toronto Stock Exchange.

RBC Capital Markets, LLC states that it is an indirect, wholly owned subsidiary of Royal Bank of Canada, which is publicly traded on the New York Stock Exchange and the Toronto Stock Exchange.

RBC Global Asset Management, Inc. states that it is an indirect wholly owned subsidiary of Royal Bank of Canada, which is publicly traded on the New York Stock Exchange and the Toronto Stock Exchange.

RBC O'Shaughnessy U.S. Value Fund states that it is a trust for which RBC Global Asset Management Inc. is trustee. RBC Global Asset Management Inc. is an indirect wholly owned subsidiary of Royal Bank of Canada, which is publicly traded on the New York Stock Exchange and the Toronto Stock Exchange.

Reed Elsevier Inc. (now known as RELX, Inc.) states that its ultimate parent companies are RELX PLC and RELX NV, which are publicly traded companies.

Reichhold, Inc. states that it is a wholly owned subsidiary of Kestrel I Acquisition Corporation, which has no parent corporation. No publicly held corporation owns 10% or more of the Kestrel I Acquisition Corporation.

Reliance Trust Company states that its ultimate parent company is Fidelity National Information Services, Inc., a publicly traded company.

Robert R. McCormick Foundation states that it is organized under the General Not For Profit Corporation Act of Illinois and, accordingly, issues no stock.

Royal Trust Corporation of Canada states that it is an indirect, wholly owned subsidiary of Royal Bank of Canada, which is publicly traded on the New York Stock Exchange and the Toronto Stock Exchange.

RS S&P 500 Index VIP Series (incorrectly named as Guardian Investors Services LLC and Guardian VC 500 Index Fund, John Doe as Owner of) states that it has no parent corporation and that, upon information and belief, there is no publicly held corporation that owns 10% or more of RS S&P 500 Index VIP Series' stock.

Russell Investment Group (also named as "Russell Investments") states that it is a registered trade name of investment management business affiliates under the common control of Russell Investments Group, Ltd.

Russell Investments Trust Company (f/k/a Frank Russell Trust Company) states that it is a wholly owned subsidiary of Russell Investments US Institutional Holdco, Inc.

Rydex Investments states that it is the former doing-business-as name of Security Investors LLC, a wholly owned subsidiary Rydex Holdings, LLC, and that no publicly held corporation owns 10% or more of its stock.

SBL Fund no longer exists, to the best of counsel's knowledge.

SBL Fund Series H no longer exists, to the best of counsel's knowledge. Therefore, it has no parent corporation and no publicly held corporation owns 10% or more of its stock.

School Employees Retirement System of Ohio ("SERS") states that it is a public employee pension fund that does not have a parent corporation. No publicly held corporation owns 10% of more of the SERS' stock.

Schwab 1000 Index Fund states that it has no parent corporation and, to the best of counsel's knowledge,

no publicly held corporation owns 10% or more of its shares.

Schwab Capital Trust states that it has no parent corporation and, to the best of counsel's knowledge, no publicly held corporation owns 10% or more of its shares.

Schwab Fundamental US Large Company Index Fund states that it has no parent corporation and, to the best of counsel's knowledge, no publicly held corporation owns 10% or more of its shares.

Schwab Investments states that it has no parent corporation and, to the best of counsel's knowledge, no publicly held corporation owns 10% or more of its shares.

Schwab S&P 500 Index Fund (F/K/A Schwab Institutional Select S&P 500 Fund) states that it has no parent corporation and, to the best of counsel's knowledge, no publicly held corporation owns 10% or more of its shares.

Schwab Total Stock Market Index Fund states that it has no parent corporation and, to the best of counsel's knowledge, no publicly held corporation owns 10% or more of its shares.

Scotia Capital Inc. states that it is owned entirely by The Bank of Nova Scotia, a publicly held foreign bank headquartered in Halifax, Nova Scotia, Canada. No publicly held corporation owns 10% or more of The Bank of Nova Scotia's equity interests.

Scotia Capital (USA) Inc. states that it is a wholly owned subsidiary of Scotia Capital Inc. Scotia Capital Inc. is wholly owned by The Bank of Nova Scotia, a publicly held foreign bank headquartered in Halifax, Nova Scotia, Canada. No publicly held corporation

owns 10% or more of The Bank of Nova Scotia's equity interests.

Security Global Investors-Rydex/SGI states that it is the former doing-business-as name for Security Global Investors, LLC, which is Kansas limited liability company that was merged with and into Security Investors LLC, and no publicly held corporation owns 10% or more of its stock.

Securities Investors, LLC states that it is a subsidiary of Rydex Holdings, LLC, and that no publicly held corporation owns 10% or more of its stock.

SG Americas Securities, LLC states that it is a limited liability company wholly owned by SG Americas Securities Holdings, LLC. SG Americas Securities Holdings, LLC, is a wholly owned subsidiary of Société Générale, which is a publicly traded company. Upon information and belief, no other publicly held corporation owns 10% or more of the shares of Société Générale.

Stark Global Opportunities Master Fund Ltd. states that its indirect parent entities are Stark Global Opportunities Fund LP and Stark Global Opportunities Fund Ltd., none of which are publicly held corporations. No publicly held corporation owns 10% or more of its stock.

Stark Master Fund Ltd. states that its indirect parent entities are Stark Investments Limited Partnership, Shepherd Investments International, Ltd., and Shepherd Guardian Fund Ltd., none of which are publicly held corporations. No publicly held corporation owns 10% or more of its stock.

State Street Bank and Trust Company states that it is a trust company chartered and existing under the

laws of the Commonwealth of Massachusetts and headquartered in the Commonwealth of Massachusetts. State Street Bank and Trust Company is a wholly owned subsidiary of State Street Corporation, a publicly traded corporation.

State Street Bank Luxembourg, S.A. states that it is an indirect wholly owned subsidiary of State Street Bank and Trust Company.

State Street Global Advisors, Inc. states that it is a direct wholly owned subsidiary of State Street Corporation.

State Street Global Advisors (Japan) Co., Ltd. states that it is an indirect wholly owned subsidiary of State Street Global Advisors, Inc., which is a wholly owned subsidiary of State Street Corporation.

State Street Trust and Banking Company, Limited states that it is an indirect wholly owned subsidiary of State Street Bank and Trust Company, which is a wholly owned subsidiary of State Street Corporation.

Stichting Pensioenfonds Hoogovens states that its parent corporation is Tata Steel Ijmuiden B.V., whose parent company is Corus Group Limited. Corus Group Limited's parent company is Tata Steel Europe Limited, whose parent company is Tata Steel Global Holding Pte. Ltd. Tata Steel Global Holding Pte. Ltd.'s parent company is Tata Steel Limited. Tata Steel Limited is a public company. Upon information and belief, there is no publicly held corporation that owns 10% or more of Stichting Pensioenfonds Hoogovens's stock.

Strategic Funds, Inc. states that Morgan Stanley & Co. (a subsidiary of Morgan Stanley, a publicly traded company), First Clearing, LLC (a subsidiary of Wells Fargo & Co., a publicly traded company), American

Enterprise Investment Services Inc. (a subsidiary of Ameriprise Financial Inc., a publicly traded company), UBS WM USA (a subsidiary of UBS Group AG, a publicly traded company), Merrill Lynch, Pierce, Fenner & Smith Incorporated (a subsidiary of Bank of America Corporation, a publicly traded company), Pershing LLC and MBC Investments Corporation (both subsidiaries of The Bank of New York Mellon Corporation, a publicly traded company) each own at least 10% of certain classes of its "Dreyfus Active Midcap Fund" portfolio.

SunTrust Bank states that it is a wholly owned subsidiary of SunTrust Banks, Inc. SunTrust Banks, Inc. is a publicly traded company, with no public corporation holding 10% or more of its stock.

Swiss American Corporation states that it is a wholly owned subsidiary of Credit Suisse Holdings (USA), Inc., which in turn is a jointly owned subsidiary of: (1) Credit Suisse Group AG Guernsey Branch, which is a branch of Credit Suisse Group AG, which is a corporation organized under the laws of Switzerland and whose shares are listed on the Swiss Stock Exchange and are also listed on the New York Stock Exchange in the form of American Depositary Shares, and (2) Credit Suisse AG, which itself is a wholly owned subsidiary of Credit Suisse Group AG and which has listed debt securities and warrants in the United States and elsewhere. No publicly held company owns 10% or more of Credit Suisse Group AG.

Swiss American Securities, Inc. was dissolved as of June 7, 2010, and thus has no parent corporation, nor does any publicly held corporation own 10% or more of its stock.

Swiss Re Financial Products Corp. states that it is a subsidiary of Swiss Re America Holding Corp. No publicly held corporation owns 10% or more of its stock.

TD Ameritrade Clearing, Inc. states that it is a wholly owned subsidiary of TD Ameritrade Online Holdings, Corp. TD Ameritrade Holding Corporation is a publicly traded corporation and holder 94% of the issued and outstanding common stock of TD Ameritrade Online Holdings, Corp.

TD Equity Options LLC, f/k/a TD Options LLC, states that it is an indirect subsidiary of The Toronto-Dominion Bank.

Teachers Insurance and Annuity Association of America states that it is a private stock life insurance company wholly owned by the TIAA Board of Overseers and no publicly held corporation owns 10% or more of the stock of Teachers Insurance and Annuity Association of America.

The Dreyfus/Laurel Funds, Inc. states that SEI Private Trust Company (a subsidiary of SEI Investments Company, a publicly traded company), and Fidelity Investments each own at least 10% of its "Dreyfus Institutional S&P 500 Stock Index Fund" portfolio, which was formerly known as the "Dreyfus BASIC S&P 500 Stock Index Fund."

Texas Education Agency ("TEA") states that it is a public employee pension fund that does not have a parent corporation. No publicly held corporation owns 10% of more of the TEA's stock.

TIAA Board of Overseers states that it is a private entity with no parent corporation, and no publicly held corporation owns 10% or more of TIAA Board of Overseers.

TIAA-CREF Funds states that it is a private entity with no parent corporation, and no publicly held corporation owns 10% or more of TIAA-CREF Funds.

TIAA-CREF Funds (formerly known as TIAA-CREF Institutional Mutual Funds) states that it is a private entity with no parent corporation, and no publicly held corporation owns 10% or more of TIAA-CREF Funds.

TIAA-CREF Investment Management, LLC states that it is a private entity wholly owned by Teachers Insurance and Annuity Association of America and no publicly held corporation owns 10% or more of TIAA-CREF Investment Management, LLC.

TIAA-CREF Life Funds states that it is a private entity with no parent corporation, and no publicly held corporation owns 10% or more of TIAA-CREF Life Funds.

TOA Reinsurance Company of America states that it is a wholly owned subsidiary of The TOA Reinsurance Company, Ltd. No publicly held corporation owns 10% or more of its stock.

Transamerica Asset Management, as owner of the DIA Mid Cap Value Portfolio, states that it is directly owned by Transamerica Premier Life Insurance Company ("TPLIC") (77%) and AUSA Holding Company (23%) ("AUSA"), both of which are indirect, wholly owned subsidiaries of AEGON N.V. TPLIC is owned by Commonwealth General Corporation ("Commonwealth"). Commonwealth and AUSA are wholly owned by Transamerica Corporation, a financial services holding company. Transamerica Corporation is owned by The Aegon Trust, which is owned by Aegon International B.V., which is owned by Aegon N.V., a Nether-

lands corporation, and a publicly traded international insurance group.

Transamerica Premier Life Insurance Company (f/k/a "Monumental Life Insurance Company") states that it is a wholly owned subsidiary of Commonwealth General Corporation. Commonwealth General Corporation is a direct wholly owned subsidiary of Transamerica Corporation, which is a wholly owned subsidiary of the AEGON Trust. The AEGON Trust is a wholly owned subsidiary of AEGON International B.V., which is wholly owned by AEGON N.V. AEGON N.V. is a publicly traded holding company with its headquarters in The Hague, the Netherlands, and more than 10% of its stock is owned by Vereniging Aegon.

T. Rowe Price Associates, Inc. states that it is a direct, wholly owned subsidiary of T. Rowe Price Group, Inc., a publicly traded corporation.

T. Rowe Price Retirement Plan Services, Inc. states that it is a subsidiary of T. Rowe Price Associates, Inc.. T. Rowe Price Associates, Inc. is a direct, wholly owned subsidiary of T. Rowe Price Group, Inc., a publicly traded corporation.

T. Rowe Price Trust Company states that it is a direct, wholly owned subsidiary of T. Rowe Price Associates, Inc. T. Rowe price Associates, Inc. is a direct, wholly owned subsidiary of T. Rowe Price Group, Inc., a publicly traded corporation.

UBS AG states that it is wholly owned by UBS Group AG, a publicly traded company. No publicly held corporation owns 10% or more of UBS Group AG stock.

UBS Financial Services, Inc. states that it is a wholly owned subsidiary of UBS Americas Inc., which is wholly owned by UBS Americas Holding LLC. UBS

Americas Holding LLC is a wholly owned subsidiary of UBS AG, which is wholly owned by UBS Group AG. No publicly held corporation owns 10% or more of UBS Group AG stock.

UBS Global Asset Management (Americas) Inc. states that it is a wholly owned subsidiary of UBS AG, which is wholly owned by UBS Group AG, a publicly traded corporation. No publicly held corporation owns 10% or more of UBS Group AG stock.

UBS Asset Management (US) Inc. states that it is a wholly owned subsidiary of UBS Americas Inc., which is wholly owned by UBS Americas Holding LLC. UBS Americas Holding LLC is a wholly owned subsidiary of UBS AG, which is wholly owned by UBS Group AG, a publicly traded corporation. No publicly held corporation holds 10% or more of UBS Group AG stock.

UBS O'Connor LLC states that it is a wholly owned subsidiary of UBS Group AG, a publicly traded company with no parent corporation and no publicly held company owning 10% or more of its stock.

UBS Securities LLC states that its corporate parents are UBS Americas Holding LLC (68%) and UBS Americas Inc. (32%), the latter of which is wholly owned by UBS Americas Holding LLC. UBS Americas Holding LLC is wholly owned by UBS AG, which is wholly owned by UBS Group AG, a publicly traded corporation. No publicly held corporation holds 10% or more of UBS Group AG stock..

Union Bank, N.A., formerly known as Union Bank of California, N.A., states that it is a wholly owned subsidiary of UnionBanCal Corporation, which is a wholly owned subsidiary of The Bank of Tokyo-Mitsubishi

UFJ, Ltd., which in turn is a wholly owned subsidiary of Mitsubishi UFJ Financial Group, Inc.

U.S. Bancorp Investments, Inc. states that it is wholly owned by U.S. Bancorp, a publicly held corporation. No publicly held corporations owns 10% or more of U.S. Bancorp's stock.

U.S. Bank N.A. states that it is wholly owned by U.S. Bancorp, a publicly held corporation. No publicly held corporation owns 10% or more of U.S. Bancorp's stock.

"Vanguard Asset Allocation Fund" no longer exists, to the best of counsel's knowledge.

Vanguard Fiduciary Trust Company states that its parent company is The Vanguard Group, Inc.

"Vanguard Institutional Index Funds" does not exist, to the best of counsel's knowledge.

"Vanguard Tax-Managed Funds" does not exist, to the best of counsel's knowledge.

"Vanguard Variable Insurance Funds" does not exist, to the best of counsel's knowledge.

"Vanguard VVIF Equity Fund Index" does not exist, to the best of counsel's knowledge.

"Vanguard VVIF Equity Income VGI" does not exist, to the best of counsel's knowledge.

"Vanguard VVIF Midcap Index Fund" does not exist, to the best of counsel's knowledge.

Variable Insurance Products Fund II – Index 500 Portfolio states that it is a fund of the Variable Insurance Products Fund II, an open-end management investment company created under a declaration of trust. It has no parent company. Upon information and belief,

no publicly traded company owns 10% or more of the Index 500 Portfolio.

"VFTC - Vanguard Company Stock Account 21" does not exist, to the best of counsel's knowledge.

Welch & Forbes LLC states that its parent company is Affiliated Managers Group Inc. and that Affiliated Managers Group Inc. is a public company that owns more than 10% of Welch & Forbes LLC's stock.

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STATEMENT

A. Statutory Framework

Outside bankruptcy, a debtor's creditors may avail themselves of state law to unwind fraudulent transfers that hinder payment of their claims against the debtor. *See Husky Int'l Elecs., Inc.* v. *Ritz*, 136 S. Ct. 1581, 1587 (2016). Once a debtor files for bankruptcy protection, however, state-law creditor remedies give way to "the great and comprehensive remedy" of federal bankruptcy law, *Glenny* v. *Langdon*, 98 U.S. 20, 28 (1878), which provides for the orderly management of debtors' affairs and determination of creditors' rights.

Under the Bankruptcy Code, a trustee (or debtor-in-possession, 11 U.S.C. § 1107(a)) is vested with creditors' state-law rights outside bankruptcy to "avoid," or undo, pre-bankruptcy transactions involving the debtor. For example, § 544(b)(1) gives "the federally appointed trustee" the right to step into the shoes of any unsecured creditor and avoid any fraudulent transfer the creditor could have avoided under state law. Pet. App. ("App.") 23a, 27a-28a; 28 U.S.C. § 1409(c) ("trustee" serves "as statutory successor to the … creditors under section … 544(b)"); 11 U.S.C. § 544(b)(1) (trustee may "avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable law by a creditor holding an unsecured claim"). The Code also provides the trustee with "independent federal" powers to avoid intentional, § 548(a)(1)(A), and constructive, § 548(a)(1)(B), fraudulent transfers. As a result, the trustee obtains the exclusive "power … to resolve potential fraudulent transfer claims" through litigation, settlement, or extinguishment of the claims in a plan of reorganization. *In re PWS Holding Corp.*, 303 F.3d 308, 315 (3d Cir.

2002). The trustee must bring any of these claims within the applicable two-year limitation period provided by the Code. § 546(a). Any resulting recovery redounds to the bankruptcy estate and is distributed according to the Bankruptcy Code's rules governing the distribution of estate property. *See* § 507.

Section 546(e), however, provides a "safe harbor" from avoidance under § 544 and § 548 (among others) for certain transactions affecting the financial markets. Specifically, "the trustee may not avoid a transfer … made by or to (or for the benefit of)" defined qualifying entities—"a commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities clearing agency"—if the transfer was a "settlement payment … [or] in connection with a securities contract." § 546(e). The only "except[ion]" to this safe harbor is for a claim by the trustee for intentional fraudulent conveyance "under § 548(a)(1)(A)." *Id.*

The point of this safe harbor, the courts of appeals agree, is to "minimiz[e] the displacement caused in the commodities and securities markets in the event of a major bankruptcy affecting those industries." *In re Quebecor World (USA) Inc.*, 719 F.3d 94, 100 (2d Cir. 2013). Congress sought to promote "'stability,'" "finality[,] … 'speed and certainty in resolving complex financial transactions'" by limiting the circumstances under which securities transactions could be unwound in bankruptcy to those involving intentional fraudulent transfer under federal law. *In re Kaiser Steel Corp.*, 952 F.2d 1230, 1240 n.10 (10th Cir. 1991) (quoting H.R. Rep. No. 101-484, 2 (1990), *reprinted in* 1990 U.S.C.C.A.N. 223, 224)); S. Rep. No. 95-989, 8 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5794.

B. Tribune's Bankruptcy Proceedings

Tribune Company ("Tribune") was a publicly traded media company. In 2007, certain investors initiated a leveraged buyout ("LBO") of the company, paying its stockholders (respondents here) about $8 billion for all outstanding shares. App. 10a. As is typical in securities transactions, the LBO was facilitated by intermediaries: a "securities clearing agency" received the payments from the buyers, and cleared and settled the transaction, C.A. App. 0464; 11 U.S.C. § 101(48), and the stockholders delivered their stock certificates and other required documents to a "financial institution," which also received the payments on their behalf, C.A. App. 0903; § 101(22).

In December 2008, Tribune filed for bankruptcy protection under Chapter 11. App. 11a. No trustee was appointed; Tribune operated as a debtor in possession. *Id.* In November 2010, shortly before the Code's two-year limitations period was to run, the Official Committee of Unsecured Creditors ("Committee"), granted standing by the bankruptcy court to act in the debtor's stead, brought an action to avoid various transfers relating to the LBO, including intentional fraudulent-conveyance claims under § 548(a)(1)(A) and § 544(b) against the cashed-out shareholders to avoid the payments they received for their stock—the transfers at issue here. App. 11a; C.A. App. 0122-0126, 0128-0130, 0133-0134. In light of the safe harbor, the Committee did not seek to avoid those shareholder payments based on a constructive fraudulent-conveyance theory. App. 58a.[1]

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[1] The petition incorrectly states that the Committee's "suit did not allege any constructive fraudulent-conveyance claims." Pet. 6; *see also* Pet. 36. Although the Committee did not seek to

While the Committee's avoidance action was pending, a group of unsecured creditors led by various hedge funds—petitioners here—sought relief from the automatic bankruptcy stay in order to commence, in non-bankruptcy courts, actions arising under state law. The Committee supported petitioners' motion, insisting that the "Committee deliberately did not initiate any [state-law constructive fraudulent-conveyance claims] against the Former Shareholders," and "[i]nstead … inten[ded] … that individual creditors have the ability to pursue [such claims] on their own behalf."[2] The purpose of that choreography, the Committee explained, was to make an "end run" around the safe harbor.[3] In the creditors' view, whereas the Committee was barred from seeking to avoid the safe-harbored payments to shareholders under a constructive fraudulent-conveyance theory, this "Work-Around" would allow the creditors to assert those same claims, "unburdened by section 546(e)."[4]

The bankruptcy court lifted the automatic stay under § 362(a) to permit petitioners to file their complaints. App. 13a. The court made clear, however, that it was not determining whether petitioners had valid claims to assert, noting merely that the stay would be

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unwind the shareholder payments on the basis of constructive fraudulent conveyance, it did assert constructive fraudulent-conveyance claims under § 548(a)(1)(B) and § 544(b) to avoid other LBO-related transactions. C.A. App. 0122-0126, 0128-0130, 0133-0134.

[2] Committee Statement 4, *In re Tribune Co.*, No. 08-13141 (Bankr. D. Del. Mar. 17, 2011), ECF No. 8396.

[3] Tr. 53:12-14, *In re Tribune Co.*, No. 08-13141 (Bankr. D. Del. Mar. 23, 2011), ECF No. 8485-3.

[4] 2 Report of Examiner 254-255, *In re Tribune Co.*, No. 08-13141 (Bankr. D. Del. July 26, 2010), ECF Nos. 5130-5134.

lifted for petitioners to pursue their "right, if any, to prosecute" such claims. *Id.*

Once the reorganization plan took effect, the Committee was succeeded by the Litigation Trustee, who continued to pursue the Committee's avoidance claims, including the claim to avoid the shareholder payments pursuant to the only theory available under the safe harbor: intentional fraudulent conveyance (invoking § 548(a)(1)(A), but no longer invoking § 544(b)). App. 11a; C.A. App. 1119-1120, 1123-1124, 1228 n.13. That separate action remains pending in the district court.

C. Proceedings Below

1. Petitioners filed forty-five suits against more than 2,500 named former Tribune shareholders (as well as a putative defendant class) in twenty-one courts around the country alleging that the same shareholder payments being challenged by the Litigation Trustee under the Bankruptcy Code's intentional fraudulent-conveyance provision were also avoidable by creditors under state constructive fraudulent-conveyance laws. App. 14a; App. 58a-59a; *In re Tribune Co. Fraudulent Conveyance Litig.*, 831 F. Supp. 2d 1371, 1371 (J.P.M.L. 2011). These actions were consolidated in the Southern District of New York. App. 14a.

The district court dismissed petitioners' actions. App. 14a. The court rejected respondents' argument that § 546(e) barred petitioners' claims. App. 15a. But, notwithstanding the bankruptcy court's lifting of the automatic stay and respondents' assertion of a standing argument unrelated to the automatic stay (*infra* p.19), the district court determined that the stay "deprived [petitioners] of statutory standing to pursue their claims so long as the Litigation Trustee [the Commit-

tee's successor] was pursuing the avoidance of the same transfers, albeit under a different legal theory"—intentional fraudulent conveyance under federal law. App. 14a; *see* App. 13a.

2. The court of appeals affirmed the dismissal on different grounds. The court first concluded that, because the automatic stay had been lifted, it did not bar petitioners' claims. App. 17a-18a. But the court concluded that the text, structure, and purpose of § 546(e) and related provisions of the Bankruptcy Code demonstrated Congress' intent to preempt these state-law claims.

On this latter issue, the court first addressed petitioners' argument that the presumption against preemption applied. App. 19a-20a. The court recognized that this presumption is "strongest" in "an area recognized as traditionally one of state law alone" and has less force when the area subject to federal legislation "has 'a history of significant federal presence.'" App. 21a (quoting *United States* v. *Locke*, 529 U.S. 89, 90 (2000)). The court observed that "detailed, preemptive federal regulation of creditors' rights," including federal law governing the avoidance of transfers by debtors who avail themselves of bankruptcy protection, has "existed for over two centuries." App. 22a. The court explained that the Code's safe-harbor provisions, as well as provisions setting standards and limitations for avoidance claims, had "everything to do with" the "balancing of debtors' and creditors' rights" and the longstanding federal regulation of securities markets, not with "the vindication of state police powers." App. 23a-24a. Thus, the court concluded that "the issue before [it] is one of inferring congressional intent from the Code, without significant countervailing pressures of state law concerns." App. 24a.

Looking then to the text and structure of the Code, the court noted several difficulties with the threshold premise of petitioners' theory. Petitioners contended that state-law constructive fraudulent-conveyance claims to avoid the shareholder payments—claims that vested in the bankruptcy trustee (or the Committee acting in his stead) under § 544(b)(1) upon Tribune's bankruptcy filing—later "reverted" to individual creditors after the Code's limitations period had expired for the Committee to assert fraudulent-conveyance claims against the shareholders. App. 12a, 28a-29a. The court observed that this "critical step" in petitioners' argument had "no support in the language of the Code" and was "hardly consistent" with the purposes behind the safe-harbor provisions and the Code's limitations period for avoidance actions: to provide finality to potential defendants, simplify proceedings, reduce costs, and assure equitable distribution among all creditors. App. 29a-31a; *see also* App. 23a-24a, 36a. And even if petitioners' state-law claims could theoretically revert to them, the notion that they would do so "in undiminished form" would create "a glaring anomaly" in the statute, since those claims were "diminished" by the Code's safe harbor while vested exclusively in the trustee. App. 31a-35a.

"[T]he lack of a statutory basis" supporting petitioners "might well have suggested … that Section 544[] … cut off" creditors of a bankrupt debtor from pursuing any state-law avoidance claims, even those not subject to the safe harbor, but the court declined to "resolve these issues." App. 39a. Instead, the court concluded that petitioners' state-law constructive fraudulent-conveyance claims were preempted by § 546(e) because they would be barred expressly by that provision if brought by the trustee and "conflict

with" "[e]very congressional purpose reflected in [that] Section." App. 40a.

Again looking to the text, structure, and purpose of the Code, the court explained that the payments made to shareholders in the $8 billion Tribune LBO—"by commercial firms to financial intermediaries to purchase shares from the firm's shareholders"—implicated Congress' abiding concern in enacting the safe harbor. App. 48a; *see also* App. 25a-26a, 44a. Congress recognized that intermediaries bring "essential" "certainty, speed, finality, and stability" to "financial markets." App. 40a. Because "[u]nwinding settled securities transactions … would seriously undermine" those essential features, Congress intended § 546(e) to bar state-law claims for avoidance of the billions of dollars in transfers at issue. App. 40a; *see also* App. 44a-47a.

Moreover, the court said, allowing individual creditors to avoid safe-harbored transfers after the Code's limitations period for actions by the trustee had run would only "increase the disruptive effect of an unwinding by lengthening the period of uncertainty for intermediaries and investors." App. 41a; *see also* App. 47a. "Indeed," the court added, "the idea of preventing a trustee from unwinding specified transactions while allowing creditors to do so, but only later, is a policy in a fruitless search of a logical rationale." App. 41a.

Consequently, the court concluded that petitioners' state-law constructive fraudulent-conveyance claims were preempted. Put simply, they "'st[oo]d as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress'" as reflected in § 546(e). App. 20a (quoting *Hillman* v. *Maretta*, 133 S. Ct. 1943, 1949-1950 (2013)).

Petitioners sought rehearing en banc. C.A. ECF No. 365 at 1. The court denied the petition without calling for a response. C.A. ECF No. 373.

REASONS FOR DENYING THE WRIT

I. THE COURT OF APPEALS' HOLDING THAT § 546(e) PREEMPTS CREDITOR CONSTRUCTIVE FRAUDULENT-CONVEYANCE ACTIONS DOES NOT MERIT REVIEW

The court of appeals' conclusion that § 546(e) preempts individual creditors' state-law constructive fraudulent-conveyance claims does not conflict with any decision of this Court or any other court of appeals—and petitioners do not contend otherwise.[5] Petitioners also concede that "individual creditors have brought cases like this only a handful of times." Pet. C.A. Reply Br. 72. In other words, petitioners' challenge is manifestly unworthy of this Court's attention.

Petitioners are therefore left to mischaracterize the court of appeals' analysis in their first and third Questions Presented. They contend that the panel discarded the presumption against preemption and usurped Congress' power to balance policy interests in derogation of the Bankruptcy Code's text. That is wrong. The panel

[5] The only contrary decisions petitioners have identified (at 35) are a Delaware district-court decision, *PHP Liquidating, LLC* v. *Robbins*, 291 B.R. 603 (D. Del 2003), a Delaware bankruptcy-court decision, *In re Physiotherapy Holdings, Inc.*, 2016 WL 3611831 (Bankr. D. Del. June 20, 2016), and a New York bankruptcy-court decision overturned by the decision below, *In re Lyondell Chem. Co.*, 503 B.R. 348, 378 (Bankr. S.D.N.Y. 2014). That hardly constitutes a split worthy of this Court's consideration. Further, in *PHP*, the district court did not even consider the question of implied preemption; it simply observed that that the claims were brought by the "assignee of the unsecured creditors," not the trustee. 291 B.R. at 607.

adhered to this Court's preemption and statutory-interpretation jurisprudence, and reached the correct conclusion.

But even if petitioners' arguments were sound, review would still be unwarranted because they would not alter the outcome of this case. Petitioners' asserted state-law rights do not exist, and if they did, they would not have reverted to the creditors. Moreover, the clear conflict between the Code and petitioners' state-law claims requires preemption regardless of any general presumption otherwise.

A. The Court Of Appeals' Application Of The Presumption Against Preemption Is Not Worthy Of Review

Petitioners' first Question Presented contends that the court of appeals erroneously "held … that the presumption against federal preemption of state law does not apply in the bankruptcy context." Pet. i.; *see also* Pet. 12-13 (similar). The court never said that, nor does its reasoning reflect such a view. Instead, consistent with this Court's precedent, the court concluded that the presumption was relatively weak in this case concerning multiple subjects with long histories of federal regulation. That conclusion does not conflict with any decision of another court of appeals (or of this Court), and the Question does not warrant review.

1. Far from holding that the presumption against preemption never applies in bankruptcy cases, the court noted the "recognized presumption against preemption," which, it explained, "usually goes to the weight to be given to the lack of an express statement overriding state law." App. 20a-21a. Applying this Court's jurisprudence, the court explained, "The presumption is strongest when Congress is legislating in

an area recognized as traditionally one of state law alone," *id.* 21a (citing *Hillman* v. *Maretta*, 133 S. Ct. 1943, 1950 (2013)), and is weaker "when the State regulates in an area where there has been a history of significant federal presence," *United States* v. *Locke*, 529 U.S. 89, 90, 108 (2000). Faithfully applying this Court's precedent, the court observed, "Preemption is always a matter of congressional intent, even where that intent must be inferred." App. 21a (citing *Cipollone* v. *Liggett Grp., Inc.*, 505 U.S. 504, 516 (1992)).

2. Consistent with this well-established legal framework, the court turned to the federal interests served by the Bankruptcy Code. Section 546(e) "stands 'at the intersection of two important national legislative policies on a collision course—the policies of bankruptcy and securities law.'" *In re Enron Creditors Recovery Corp.*, 651 F.3d 329, 334 (2d Cir. 2011) (quoting *In re Resorts Int'l, Inc.*, 181 F.3d 505, 515 (3d Cir. 1999)). Thus, the court considered the Constitution's explicit grant of power to Congress to "establish … uniform Laws on the subject of Bankruptcies throughout the United States," U.S. Const. art. I, § 8, cl. 4, and the attendant "detailed, preemptive federal regulation of creditors' rights [that] has … existed for over two centuries," App. 22a. The court likewise took account of Congress' tradition of regulating the securities markets. App. 24a; *see Merrill Lynch, Pierce, Fenner & Smith Inc.* v. *Dabit*, 547 U.S. 71, 78 (2006) ("The magnitude of the federal interest in protecting the integrity and efficient operation of the market for nationally traded securities cannot be overstated.").

In furtherance of these twin federal areas of interest, the Bankruptcy Code, as petitioners acknowledged, Pet. C.A. Br. 44-45, and the court of appeals explained, App. 23a, expressly vests creditors' state-law fraudu-

lent-transfer claims exclusively in the federally appointed trustee, § 544(b)(1); *supra* p.1, and subjects those claims to various federal-law modifications, including a limitations period, § 546(a), constraints on remedies, § 550, and the safe harbor of § 546(e). Moreover, creditors are bound by the outcome of the trustee's actions asserting their state-law rights. *St. Paul Fire & Marine Ins. Co.* v. *PepsiCo, Inc.*, 884 F.2d 688, 701 (2d Cir. 1989); *see also In re PWS Holding Corp.*, 303 F.3d 308, 314-315 (3d Cir. 2002).

In contrast, this case does not implicate an area in which States have traditionally regulated. *Cf. Wyeth* v. *Levine*, 555 U.S. 555, 567 (2009); *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 485 (1996). Petitioners' contention (at 18) that there is a long history of state regulation of fraudulent conveyances misses the point: the issue is not whether § 546(e) preempts all state fraudulent-conveyance law, but whether it preempts state-law fraudulent-conveyance claims to unwind a transaction that occurred in the national securities markets involving a debtor in federal bankruptcy proceedings.

As petitioners admit, where the debtor is in bankruptcy, "individual creditors have brought cases like this only a handful of times," all the result of the recent efforts to evade § 546(e). Pet. C.A. Reply Br. 72. And even where the debtor is not in bankruptcy, petitioners have not cited a single state-court case in which creditors have brought a successful fraudulent transfer claim unwinding a major securities transaction. That is hardly surprising given the long history in which state legislatures and courts have crafted their commercial laws to avoid conflicts with federal bankruptcy law. *See, e.g.*, *Chemical Bank* v. *First Trust, N.A.*, 93 N.Y.2d 178, 184-186 (1999). The "spirit of comity" exhibited by the States in this area, *id.* at 186, and the re-

sulting nonexistence of the state-law claims petitioners assert undercut the presumption against preemption—and, indeed, would provide an adequate and independent state ground for affirmance. *See* C.A. Dkt. 144.

In any event, the idea behind petitioners' suit is not that they currently have freestanding state-law claims. It is that they *previously had* such claims, which were effectively federalized and placed in the hands of the trustee when Tribune filed for bankruptcy, but then, petitioners argue, those claims *reverted* to them, *intact* and *unencumbered* by the safe harbor or any other provision of the Bankruptcy Code, as if Tribune had never filed for bankruptcy. *See* App. 28a-33a. As discussed below, the best reading of the Code, supported by its text and this Court's precedent, is that a creditor's state-law fraudulent-conveyance claims cannot revert *at all*. *Infra* pp.17-19.

That too provides an alternative ground for affirmance. For present purposes, however, it suffices to say that the court of appeals was on firm ground in concluding that the presumption against preemption is at a low ebb—and thus that the court must "infer congressional intent from the Code, without significant countervailing pressures of state law concerns," App. 24a—where, as here, creditors of a bankrupt debtor seek to assert claims that § 546(e) bars their statutory representative from bringing.

3. The idiosyncratic nature of petitioners' claims means that petitioners have no basis to conjure a circuit split or departure from this Court's precedent. Petitioners purport to contrast (at 14-17) the Third and Ninth Circuits' recognition of the presumption against preemption in bankruptcy cases with the analysis below, but in fact the various courts' approaches do not

differ in substance. As noted, the Second Circuit—like the Third and Ninth Circuits—recognized the presumption against preemption. The different outcomes simply reflect the different federal and state interests implicated by the statutory provisions at issue in each case. Unlike here, the Third and Ninth Circuit cases did not involve § 546(e) or another provision of the Code that, on its face, barred state-law claims in order to serve longstanding federal interests in regulating *both* the bankruptcy proceedings *and* the securities markets, or the absence of any demonstrated state interest in allowing individual creditors to pursue those claims after they had vested in the bankruptcy trustee. Petitioners thus do not identify a relevant circuit split.[6]

Nor does the court of appeals' decision conflict with this Court's decision in *BFP* v. *Resolution Trust Corp.* That case concerned whether the price paid for a debtor's real estate in a foreclosure sale that complied with state law was "reasonably equivalent value," as that term is used in § 548 of the Bankruptcy Code. The Court held that it was, noting that there was no history of federal regulation of foreclosure, and the Bankruptcy Code was

[6] *See Integrated Sols., Inc.* v. *Service Support Specialties, Inc.*, 124 F.3d 487, 490, 492-493 (3d Cir. 1997) (applying "strong" presumption against preemption of state-law restrictions on assigning tort claims given state courts' "consistent[]" position that claims were not assignable and longstanding federal jurisprudence that bankruptcy "trustee does not have greater rights in the property of the estate than the debtor had before filing for bankruptcy"); *In re Fed.-Mogul Glob. Inc.*, 684 F.3d 355, 365 (3d Cir. 2012) ("presumption operates most forcefully" in field "States have traditionally occupied, particularly regulation of matters of health and safety" (quotation marks omitted)); *PG&E* v. *California ex rel. Cal. Dep't of Toxic Substances Control*, 350 F.3d 932, 943 (9th Cir. 2003) (presuming "Congress does not undertake lightly to preempt state law, particularly in areas of traditional state regulation").

"entirely compatible with pre-existing [state-law] practice." 511 U.S. 531, 539-540, 545 (1994). The Second Circuit's approach here accords with *BFP*. The court just reached a different result because the federal and state interests at issue here are manifestly different.[7]

4. In any event, even if the court of appeals had stated that the presumption against preemption does not apply at all in any bankruptcy context, this case would present a poor vehicle for review of that question because it does not determine the outcome of the case. Presumption or not, federal law impliedly preempts state law—even in areas of traditional state interest—when the state law "interferes with Congress' objective." *Hillman*, 133 S. Ct. at 1950, 1955; *see also In re Fed.-Mogul Glob.*, 684 F.3d at 365 (notwithstanding presumption against preemption, "[t]he purpose of Congress is the ultimate touchstone"), *cited in* Pet. 14. As explained below, petitioners' state-law claims plainly conflict with the objectives behind § 546(e), and therefore are preempted even if the presumption against preemption were at its strongest.

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[7] Insofar as petitioners try to fabricate a departure from this Court's decision in *United States* v. *Locke*, 529 U.S. 89 (2000), they also err. Petitioners say the court of appeals cited *Locke* for the proposition that "the presumption against preemption applies *only* 'when Congress is legislating in an area recognized as traditionally one of state law alone.'" Pet. 15 (quoting App. 21a) (emphasis added). The court of appeals never said that. It said (correctly) that "[t]he presumption is *strongest* when Congress is legislating in an area recognized as traditionally one of state law alone." App. 21a (citing *Hillman*, 133 S. Ct. at 1950; emphasis added). The court cited *Locke* for the unimpeachable proposition that "the regulation of creditors' rights has 'a history of significant federal presence.'" *Id.* (quoting *Locke*, 529 U.S. at 90).

B. Whether § 546(e) Impliedly Preempts Petitioners' Claim Does Not Merit Review

1. Under their third Question Presented, petitioners contend (at 30) that the court of appeals impermissibly undertook a freewheeling rebalancing of policy interests, in derogation of the Bankruptcy Code's text. The court did no such thing. Rather, it analyzed the text, structure, and purpose behind the safe harbor, and only then concluded (correctly) that petitioners' constructive fraudulent-conveyance claims (if actually cognizable under state law, *supra* pp.12-13) would do violence to Congress' carefully balanced statutory scheme and were therefore preempted. Moreover, no other court of appeals has considered the question, and petitioners themselves have signaled that it is unlikely to recur. This question does not warrant review.

The core of petitioners' position is that § 546(e) does not preempt creditors' state-law constructive fraudulent-conveyance claims because that provision refers only to actions by "the trustee." *See* Pet. 30. But Congress expressly made the trustee the representative of the creditors in bankruptcy, giving the trustee exclusive authority to bring state-law fraudulent-conveyance claims that outside bankruptcy creditors could bring. *See supra* p.1. In view of the identity in bankruptcy between creditors and their representative, the textual cue on which Petitioners base their entire argument hardly bears the weight they ascribe to it.[8]

[8] *Hartford Underwriters Insurance Co.* v. *Union Planters Bank, N.A.*, 530 U.S. 1 (2000), is not to the contrary; rather, it reinforces that the trustee's avoidance power is exclusive—or at least subjects creditors to the same statutory safe harbor. There, the Court reasoned that the affirmative grant of power to the "trus-

In any event, as this Court has made clear, statutes must be interpreted as a whole. "[W]hile the meaning of [a] phrase … may seem plain when viewed in isolation, such a reading [may] turn[] out to be untenable in light of the statute as a whole." *King* v. *Burwell*, 135 S. Ct. 2480, 2495 (2015) (quotation marks and alterations omitted). Indeed, "the context and structure of the Act [can] compel [a court] to depart from what would otherwise be the most natural reading of the pertinent statutory phrase." *Id.*

That is precisely how the court of appeals approached this case. *See, e.g.*, App. 29a ("The Supreme Court has thus explained … 'we must not be guided by a single sentence or part of a sentence of the Code, but look to the provisions of the whole law.'" (quoting *Kelly* v. *Robinson*, 479 U.S. 36, 43 (1986)) (alterations omitted)). And that analysis revealed that petitioners' supposedly plain-meaning interpretation actually creates serious inconsistencies with the wording and structure of the Code.

For example, as the court of appeals pointed out, petitioners' theory assumes that their state-law claims revert to creditors after being vested in the trustee. There is "no support in the language of the Code" for

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tee" in § 506(c) to surcharge a secured creditor's collateral meant that no other party, including creditors, could exercise that power. *Id.* at 6. The Court explained, "Where a statute … names the parties granted the right to invoke its provisions … such parties *only* may act." *Id.* at 6-7 (emphasis added) (quotation marks omitted); *see also id.* at 6 (A "situation in which a statute authorizes specific action and designates a particular party empowered to take it is surely among the least appropriate in which to presume nonexclusivity."). Indeed, *Hartford* underscores why Congress would have referred exclusively to the "trustee" in § 546(e): Having given only the trustee the power to avoid, Congress had only to limit the avoidance power of "the trustee" in the safe harbor.

such an assumption, App. 29a-30a, and it runs headlong into this Court's long-settled precedents. No "creditor can have any greater right under the Bankrupt Act than the act itself confers." *Glenny* v. *Langdon*, 98 U.S. 20, 29 (1878). A fundamental principle of bankruptcy law, recognized by this Court nearly 140 years ago, is that creditors' "remedies," including avoidance of fraudulent conveyances, "are absorbed in the great and comprehensive remedy" given the trustee "to collect and distribute among [creditors] the property of their debtor." *Id.* at 28; *Trimble* v. *Woodhead*, 102 U.S. 647, 649-650 (1880) (claims do not revert from representative of bankruptcy estate to creditors). Consequently, except where bankruptcy law specifies otherwise, nothing "divest[s]" the trustee of any remedies and restores them to creditors, even after the time in which the trustee may assert the claim has expired. *Trimble*, 102 U.S. at 650.

Congress has revised the bankruptcy statute several times since *Glenny* and *Trimble*, but has never disparaged those decisions or altered the fundamental principle they articulated. In the current version of the statute, Congress again specified that creditors' claims are vested in the trustee, § 544(b)(1); 28 U.S.C. § 1409(c), and provided for reversion—but only if the bankruptcy case is *dismissed*. 11 U.S.C. § 349(b). That narrow statutory allowance for reversion reaffirms the longstanding rule that, absent the dismissal of the bankruptcy case, creditors' claims, vested in the trustee, do not revert to creditors. *Dewsnup* v. *Timm*, 502 U.S. 410, 419 (1992) ("[T]his Court has been reluctant to accept arguments that would interpret the Code, however vague the particular language under consideration might be, to effect a major change in pre-Code practice that is not the subject of at least some discussion in the legislative history."); *In re MortgageAmerica Corp.*, 714

F.2d 1266, 1275 (5th Cir. 1983) ("We do not think that the 1978 Congress meant to change [the] result" prescribed by *Glenny*). And certainly § 546(e) does not vary that rule; it reflects Congress' intent to protect securities settlement payments from avoidance altogether as constructive fraudulent transfers, not to allocate such avoidance powers between trustee and creditor.

Moreover, nothing in the statute suggests that if the creditors' state-law claims do revert, they revert "undiminished" by the various federal modifications that applied to them while "lodged in the trustee." App. 31a-32a. The court of appeals rightly deemed it "a glaring anomaly" to suppose that the creditors would have (or the trustee could pass on to them) *greater* powers to avoid the debtors' transfers than Congress chose to give the trustee himself. App. 32a, 39a.

2. Given those threshold defects in petitioners' claims, the court could have stopped there and held that *all* creditor fraudulent-conveyance claims are foreclosed once the debtor files for bankruptcy. Or at a minimum, the court could have held that creditors' state-law claims are foreclosed once the trustee commences an action to avoid the same transactions, as occurred here, a rule of law that provides yet another independent basis for affirmance. *See* C.A. Dkt. 145, at 18-36.

But the court declined to dismiss on those bases, instead merely concluding that, at a minimum, those difficulties in reconciling petitioners' claims with the Bankruptcy Code's text and structure rendered "the meaning of Section 546(e) with regard to appellants' rights to bring the[se] actions … ambiguous." App. 40a. Consequently, the court turned to the question of whether permitting petitioners to bring *the particular* state-law constructive fraudulent-conveyance claims that they

were advancing—claims to avoid settlement payments that § 546(e) would plainly bar the trustee from avoiding—would conflict with the purposes underlying that statutory safe harbor. The court did so, not because the court wished to advance its policy preferences or usurp Congress' power to balance competing interests, but because the statute's underlying purpose must guide the analysis where the text does not resolve the interpretive question. *See King*, 135 S. Ct. at 2492-2493. "'The purpose of Congress is the ultimate touchstone' in every pre-emption case," including "the way in which Congress intended the statute … to affect business, consumers, and the law." *Medtronic*, 518 U.S. at 485-486.

The court of appeals reached the commonsense conclusion that allowing creditors to bring state-law claims that the creditors' statutory representative is prohibited from bringing would undermine the purposes of the safe harbor. As the court explained, the careful balance Congress struck in establishing the safe harbor would be rendered meaningless if creditors could "end run" § 546(e) and pursue the identical claims that the trustee is barred from pursuing.

Rather than focusing on a "sole purpose," as petitioners allege (at 33), the court of appeals explained that "[*e*]*very congressional purpose* reflected in Section 546(e), however narrow or broad, is in conflict with appellants' legal theory." App. 40a (emphasis added). First, the court explained that "[t]he narrowest purpose of Section 546(e) was to protect other [financial] intermediaries from avoidance claims seeking to unwind a bankrupt intermediary's transactions that consummated transfers between customers." App. 41a. The court noted that petitioners' "legal theory would clearly allow such claims to be brought (later) by creditors of the bankrupt intermediary." *Id.* That is, under

petitioners' theory, the scope of § 546(e) (discussed further in Part II, *infra*) is irrelevant because it applies only to trustees. In petitioners' view, a creditor may bring a fraudulent conveyance claim directly against a bank or clearing agency or other financial institution (if permitted by state law), putting "[e]ven the narrowest purpose of Section 546(e) … at risk." *Id.*

The court also recognized Congress' "larger purpose … to 'promot[e] finality … and certainty' for investors." App. 44a; *see supra* p.2; Securities & Exchange Commission C.A. Amicus Br. 1-2 (Section 546(e) "protects the securities clearance and settlement system from disruption" and "assures the finality of settled security transactions. … Congress enacted Section 546(e) to protect the securities markets from the disruptions that would result if settled securities transactions could be undone when one of the parties subsequently files for bankruptcy."). The court explained that, by its terms, § 546(e) "protects transactions rather than firms, reflecting a purpose of enhancing the efficiency of securities markets." App. 45a. As with Congress' narrower purpose, accepting petitioners' argument would undermine Congress' overriding objective—"all investors in public companies would face new and substantial risks …. At the very least, each would have to confront a higher degree of uncertainty even as to the consummation of securities transactions." App. 46a. As this case illustrates, "[p]ension plans, mutual funds, and similar institutional investors" would be "exposed to substantial liabilities derived from investments in securities sold long ago." *Id.*

Petitioners contend (at 31) that the Second Circuit neglected to give appropriate consideration to the Bankruptcy Code's goal of maximizing assets available to creditors. That is a caricature of both the Code's

purposes and the court's analysis. The court explained that, by safe-harboring transfers that could otherwise be avoided for creditors' benefit, § 546(e) "is in full conflict with the goal of maximizing the assets available to creditors. Its purpose is to protect a national, heavily regulated market by limiting creditors' rights." App. 49a. If Congress' overriding goal had been to maximize returns to creditors, it would not have limited the ability of the trustee (the creditors' successor) to bring claims for constructive fraudulent-conveyance in the first place.

Finally, petitioners ignore that Congress "vest[ed] trustees with a *federal claim* to avoid the very transfers attacked by appellants' state law claims—but only on an intentional fraud theory." App. 32a (emphasis added); *see* §§ 546(e), 548(a)(1)(A). The existence of this remedy for the trustee reflects the balance Congress chose between protecting securities markets and protecting creditors. H.R. Rep. No. 97-420, 2 (1982), *reprinted in* 1982 U.S.C.C.A.N. 583-584 ("[T]he avoiding powers of a trustee are not construed to permit … settlement payments to be set aside *except in cases of fraud*." (emphasis added)). Petitioners ultimately posit an illogical world in which Congress decided to limit the trustee to avoiding intentional fraud when seeking to maximize the value returned to creditors, but elected to impose no such limit, or any other, on the creditors themselves. The court below rightly rejected petitioners' position.[9]

[9] Petitioners contend (at 32-33) that because Congress included an express preemption provision in another subsection of § 544(b), without amending § 546(e) to be so explicit, it follows that Congress did not intend for § 546(e) to have preemptive force. The court below rejected that argument (App. 49a-53a); petitioners simply repeat them here.

II. THE QUESTION WHETHER § 546(e) APPLIES WHERE THE QUALIFYING ENTITY IS A CONDUIT DOES NOT MERIT REVIEW

Petitioners contend that there is a "deep[]" division among the circuit courts on a question of "extraordinary importance": whether the safe harbor of § 546(e) applies where the qualifying entity (e.g., a "stockbroker," "financial institution," or "securities clearing agency") served as an intermediary without obtaining a beneficial interest in the transferred payment. Pet. 3, 19-20, 24. In fact, this question has arisen rarely in the thirty-five years since the safe harbor was enacted; when it has, the courts of appeals—including the Second Circuit—have generally agreed that § 546(e) applies. Until just a few months ago, it seemed clear that Congress had laid the issue to rest when it amended § 546(e) a decade ago. It is too soon to determine whether the Seventh Circuit's recent departure from the unanimous post-amendment view is a harbinger of a wider split or an aberration. Review by this Court, therefore, would be premature. Moreover, the majority view, reflected in the decision below, is correct.

A. The Split On This Issue Is Lopsided And Too Recent, And The Issue Too Infrequently Recurring, To Merit The Court's Review

Between its enactment in 1982 and its revision in 2006, § 546(e) exempted from avoidance any "settlement payment" "made by or to" a qualifying entity. During that quarter century, only three courts of appeals had occasion to address whether the safe harbor applies only if the qualifying entity had a beneficial interest in the payment. First, the Tenth Circuit held that payments made to a "conduit" (a stockbroker) in connection with an LBO were exempt from avoidance

under § 546(e). *Kaiser Steel Corp.* v. *Charles Schwab & Co.*, 913 F.2d 846, 848, 850 (10th Cir. 1990); *see also In re Kaiser Steel Corp.*, 952 F.2d 1230, 1236 (10th Cir. 1991) (holding that § 546(e) also applies to "payments made to the beneficial shareholders"). The Eleventh Circuit then reached the opposite conclusion, finding that § 546(e) did not apply to LBO payments made to and by a "financial institution" if that entity "was nothing more than an intermediary or conduit" and "never acquired a beneficial interest in either the funds or the shares." *Matter of Munford, Inc.*, 98 F.3d 604, 610 (11th Cir. 1996). Three years later, the Third Circuit rejected the Eleventh Circuit's analysis and held that, by its "plain language," § 546(e) applied to LBO payments made by financial institutions serving as conduits. *In re Resorts Int'l*, 181 F.3d at 515-516.[10]

In 2006, with the circuits split 2-1 in favor of applying § 546(e) to transfers involving qualifying entities acting as conduits, Congress amended § 546(e) to apply to transfers "made by or to (*or for the benefit of*)" a qualifying entity. Financial Netting Improvements Act of 2006, Pub. L. No. 109-390, § 5(b)(1), 120 Stat. 2692, 2697 (emphasis added); *see also id.* (also expanding § 546(e) to cover any "transfer … in connection with a securities contract"). The legislative history is silent on this particular change, but the amendment is naturally understood as a correction of the Eleventh Circuit's decision in *Munford*. Whereas the Eleventh Circuit had read the prior version of § 546(e) to require that the transfer be "made by or to" *and* for the benefit of a

[10] The Court denied certiorari petitions in the Third, Tenth, and Eleventh Circuit cases. *See Sun Int'l N. Am., Inc.* v. *Lowenschuss*, 528 U.S. 1021 (1999); *Kaiser Steel Res., Inc.* v. *Pearl Brewing Co.*, 505 U.S. 1213 (1992); *Munford* v. *Munford, Inc.*, 522 U.S. 1068 (1998).

qualifying entity, *Resorts Int'l*, 181 F.3d at 516 ("The majority in *Munford* seems to have read into section 546(e) the requirement that the [qualifying entity] obtain a 'beneficial interest' in the funds"), Congress now specified that the transfer need only be made by, to, *or* for the benefit of the qualified entity.

In the decade since the amendment, three more courts of appeals—the Second, Sixth, and Eighth Circuits—have concluded, predictably, that § 546(e) applies to transfers involving qualifying entities acting as conduits, and the Third Circuit has reaffirmed its position to the same effect. *In re Quebecor World (USA) Inc.*, 719 F.3d 94, 98-100 (2d Cir. 2013); *In re Plassein Int'l Corp.*, 590 F.3d 252, 256-259 (3d Cir. 2009); *In re QSI Holdings, Inc.*, 571 F.3d 545, 550-551 (6th Cir. 2009); *Contemporary Indus. Corp.* v. *Frost*, 564 F.3d 981, 986-987 (8th Cir. 2009).[11]

Three months ago, however, the Seventh Circuit became the first circuit in twenty years, and the only one since Congress amended § 546(e) ten years ago, to conclude that the safe harbor does not apply "where a named entity acts as a conduit," but rather applies only where the qualifying entity is "the first and the final party possessing the thing transferred." *FTI Consulting, Inc.* v. *Merit Mgmt. Grp., LP*, 830 F.3d 690, 693, 697 (7th Cir.), *reh'g en banc denied*, Order, ECF 32 (7th Cir. Aug. 30, 2016).

[11] The Court denied certiorari petitions in the Second, Third, and Sixth Circuit cases. *Official Comm. of Unsecured Creditors of Quebecor World (USA) Inc.* v. *American United Life Ins. Co.*, 134 S. Ct. 1278 (2014); *Brandt* v. *B.A. Capital Co.*, 559 U.S. 1093 (2010); *QSI Holdings, Inc.* v. *Alford*, 558 U.S. 1148 (2010). No petition was filed in the Eighth Circuit case.

The split recently created by the Seventh Circuit after a decade of circuit court decisions uniformly reaching the contrary conclusion does not justify this Court's review. Unlike this case, which involves $8 billion in settlement payments made by a public company to thousands of shareholders through a securities clearing agency, *see* App. 101a-250a, the transaction at issue in *FTI Consulting* involved unusual facts barely implicating the securities markets: it was relatively small ($16.5 million) and entailed a transfer to one shareholder in a private stock sale. *See* 830 F.3d at 693, 697. While the Seventh Circuit nominally addressed Congress' intent in enacting the safe harbor to "protect[] the market from systemic risk and allow[] parties in the securities industry to enter into transactions with greater confidence," *id.* at 696, it had no occasion to consider the actual systemic risk occasioned by its decision. In contrast, where courts of appeals have addressed this question in the context of large stock transactions affecting numerous market participants, they have uniformly held that transfers using a qualifying entity as a conduit are safe-harbored. *E.g.*, *Kaiser Steel Corp.*, 952 F.2d at 1236; *QSI Holdings, Inc.*, 571 F.3d at 550-551.

More time is needed to allow the circuit courts to examine the issue in light of the Seventh Circuit's brand new ruling and outside the atypical factual context presented in that case. Indeed, as noted above, this Court has repeatedly declined to hear the very question now presented—whether § 546(e) applies where the qualifying entity lacks a beneficial interest in the transfer—even after the Eleventh Circuit had split from the Tenth Circuit under the prior version of the statute. *See supra* nn.10 & 11.

Moreover, this is not an important recurring issue. In the nearly thirty-five years since § 546(e) was enact-

ed, lower courts have addressed the issue in barely twenty reported cases. In contrast, about 400,000 bankruptcies were filed under Chapter 11 during that period.[12] Thus, the issue has little chance of arising with regularity in the future.

B. The Second Circuit's Decision Was Correct

The Second Circuit and the overwhelming weight of circuit authority are right: § 546(e) applies even when the qualifying entity serves as a conduit for the covered transfer, without a beneficial interest therein. That conclusion is compelled by the text, structure, and purpose of the statute.

1. As multiple circuit courts have observed both before and after Congress amended § 546(e), "the text [of § 546(e)] plainly and unambiguously encompasses … payments" for which the qualifying entity served as a conduit. *Contemporary Indus.*, 564 F.3d at 986-987; *accord Quebecor*, 719 F.3d at 98-100; *Enron*, 651 F.3d at 339; *QSI Holdings*, 571 F.3d at 551; *Resorts Int'l*, 181 F.3d at 516. By its terms, § 546(e) requires only that the transfer be made by, to, or for the benefit of a financial institution. It does "not expressly require" that the qualifying entity have a beneficial interest in the transferred property. *Contemporary Indus.*, 564 F.3d at 986-987; *accord QSI Holdings*, 571 F.3d at 551. To the contrary, Congress' addition of the phrase "or for the benefit of" makes clear that the statute expressly safe-harbors a payment "to" a qualifying entity even when the payment was *not* "for the benefit" of it. *See Quebecor*, 719 F.3d at 99-100. A requirement that the qualifying entity have or obtain a beneficial interest in

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[12] U.S. Dep't of Justice, *Chapter 11 Filing Trends*, https://www.justice.gov/sites/default/files/ust/legacy/2011/07/13/abi_200905.pdf.

the transferred property would have to be "read into" the statute. *Resorts Int'l*, 181 F.3d at 516. Courts may not do that; "[i]t is well established that, when the statutory language is plain," as it is here, courts "must enforce it according to its terms." *Jimenez* v. *Quarterman*, 555 U.S. 113, 118 (2009).

The Seventh Circuit justified its departure from the majority view by finding the phrase "made by or to" ambiguous, because "a transfer through a financial institution as intermediary could reasonably be interpreted as being 'made by or to' the financial institution or 'made by or to' the entity ultimately receiving the money." *FTI Consulting*, 830 F.3d at 692. But only the first of those two alternatives, which the Seventh Circuit acknowledged would encompass conduits, actually tracks the statute's text. The second reading would require the text to say, "made by or to a qualifying entity *if that entity is the beneficial holder of the transferred property*."

Similarly, the Seventh Circuit found the phrase "for the benefit of" ambiguous because it "could refer to a transaction made *on behalf of*" a qualifying entity. *FTI Consulting*, 830 F.3d at 693. That is hardly a straightforward reading of the statutory text. Rather, by providing that the safe harbor applies whether the payment is made "to" or "for the benefit of" a qualifying entity, the statute extends the safe harbor to the precise situation at issue—where the payment was made to a conduit that was a qualifying entity and hence was made "to," but not "for the benefit of," that party.

2. The Bankruptcy Code as a whole also precludes interpreting § 546(e) to require that the qualifying entity have a beneficial interest in the transfer. By defini-

tion, "the enumerated intermediaries are typically facilitators of, rather than participants with a beneficial interest in, the underlying transfers." *Quebecor*, 719 F.3d at 100. The Code defines "securities clearing agency" as an entity responsible for "facilitat[ing] the prompt and accurate clearance and settlement of securities transactions." 15 U.S.C. § 78q-1(b)(3)(A); *see* 11 U.S.C. § 101(48) (incorporating Securities Exchange Act of 1934 definition); *see also* § 101(6) ("commodity broker" includes "clearing organization"); § 101(22A)(B) ("financial participant" includes "clearing organization"). It likewise defines "stockbroker" as a person who has a "customer" and who "effect[s] transactions in securities … for the account of others." § 101(53A); *see* 11 U.S.C. § 741(2) (defining "customer"). Congress tethered § 546(e) to these definitions, evidencing its intent to safe harbor transfers that flowed through conduits.

Tracking an argument accepted by the Seventh Circuit, petitioners argue (at 27) that § 546(e) must be coextensive with § 550(a), which, petitioners say, permits a trustee to "avoid a transfer only to a 'transferee.'" Because some lower courts have held that an entity is a "transferee" only if it gains "dominion" over the transferred property, petitioners contend, § 546(e) should similarly apply only if the qualifying entity acquires a beneficial interest in the property transferred. *FTI Consulting*, 830 F.3d at 695; *accord Munford*, 98 F.3d at 610. However, petitioners' interpretation of § 546(e) "does [not] logically follow from the application of section 550." *Resorts Int'l*, 181 F.3d at 516.

That is so because even if petitioners are right about the meaning of "transferee" in § 550(a), § 546(e) nowhere uses that term. Moreover, petitioners' argument rests on a mischaracterization of § 550(a). That subsection specifies not which transfers are avoidable,

but rather the persons from whom the trustee may recover transferred property that is avoided under other sections of the Code. 11 U.S.C. § 550(a) ("to the extent that a transfer is avoided under [various other sections], the trustee may recover … the property transferred … from … the initial transferee" or certain others). Indeed, as Congress has explained, "Section 550 prescribes the liability of a transferee of an avoided transfer, and *enunciates the separation between the concepts of avoiding a transfer and recovering from the transferee*." H.R. Rep. No. 95-595, 375 (1977) (emphasis added), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6331; *see also In re Burns*, 322 F.3d 421, 428 (6th Cir. 2003) ("avoidance and recovery are distinct, and the permissive language of § 550 suggests that recovery is an optional remedy"); *In re Viola*, 469 B.R. 1, 9 (B.A.P. 9th Cir. 2012) (same). It makes perfect sense that Congress created a categorical exception to avoidance for transactions involving a qualifying entity—as discussed below, that furthers Congress' intent of promoting market stability—while limiting the scope of entities from whom an avoided transfer may be recovered to those who actually received a beneficial interest in the transferred property.

Petitioners further contend (at 27) that because § 555 "gives certain rights" to the same qualifying entities as § 546(e) "where those entities are *counterparties* to a securities contract with the debtor," those entities "must also be counterparties to, and not mere conduits for, the challenged transfer" under § 546(e). Again, that argument lacks textual support. Section 555 states that the entity's "exercise of a contractual right … shall not be stayed, avoided, or otherwise limited"; in contrast, § 546(e) does not mention the entities' contractual rights and is not focused on protecting such rights.

Moreover, § 555 is not limited to circumstances in which the qualifying entity will be the ultimate recipient of the property. There is thus no basis to limit § 546(e)'s safe harbor to such situations.

3. Finally, construing § 546(e) to cover transactions in which the qualifying entity served as conduit furthers the purpose of the safe harbor. Congress established the safe harbor to promote stability, finality, speed, and certainty in the financial markets by minimizing disruption to settled financial transactions. *E.g.*, *Quebecor*, 719 F.3d at 100; *supra* p.2; *accord* App. 40a, 44a. "Unwinding settled securities transactions … would seriously undermine" these values. App. 40a. And contrary to petitioners' assertion (at 27), that risk *is* "implicated where financial institutions serve as mere conduits to a transaction."

As the Second Circuit (which has considerable experience with securities markets) observed in this case, it is *as intermediaries* rather than as financially interested parties that clearing agencies, brokers, financial institutions, and other qualifying entities provide the essential stability, finality, speed, and certainty to the financial markets. App. 40a; *accord Quebecor*, 719 F.3d at 100 ("transaction involving one of these financial intermediaries, even as a conduit, necessarily touches upon these at-risk markets"). Consequently, a "clear safe harbor for transactions made through these financial intermediaries promotes stability in their respective markets and ensures that otherwise avoidable transfers are made out in the open, reducing the risk that they were made to defraud creditors." *Quebecor*, 719 F.3d at 100; *accord, e.g.*, App. 45a-47a; *Contemporary Indus.*, 564 F.3d at 987.

Congress' unqualified statement that the safe harbor "expressly extend[s] … protections to the securities market," H.R. Rep. No. 97-420, 375 (1982), *reprinted in* 1982 U.S.C.C.A.N. 583, 583, ought not be whittled away. Congress' purpose was not to restrict the safe harbor to transactions in which financial intermediaries have a proprietary interest, but rather to identify broad categories of protected transactions: those occurring in the commodities and securities *markets*, in which qualifying entities often participate as conduits without a proprietary interest. Or as the court below put it, the "broad language used in Section 546(e) protects transactions rather than firms, reflecting a purpose of enhancing the efficiency of securities markets." App. 45a; *see also* App. 43a-44a.[13]

Petitioners' insistence that the qualifying entity have a beneficial interest in the transfer would stand § 546(e) on its head. Where the transfer involved a financial institution transacting on its own account (or another entity transacting on the financial institution's behalf), the transfer would be protected from avoidance. But the sorts of transfers that occur daily in the securities markets—for example, purchases and sales of stock through brokers by small retail and institutional investors (*e.g.*, pension funds)—would not be protected. Petitioners nowhere explain how this disparate treatment would further Congress' aims of enhancing the markets' stability, finality, speed, and certainty.

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[13] Petitioners assert (at 28) that the costs of "undoing a deal like this do not outweigh" the need to protect creditors. But as they correctly concede elsewhere, that "it is not for courts to alter the balance struck by the statute." Pet. 12.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted.

MARK A. NEUBAUER
CARLTON FIELDS JORDEN
BURT, LLP
2000 Avenue of the Stars
Suite 530N
Los Angeles, CA 90067

Counsel for The Alfred W. Merkel Marlowe G. Merkel Trust UA 11 Sept 85, et al.

ELLIOT MOSKOWITZ
DAVIS POLK &
WARDWELL LLP
450 Lexington Avenue
New York, NY 10017

Counsel for Bear Stearns Asset Management, Inc.

MICHAEL S. DOLUISIO
STUART T. STEINBERG
ELLEN L. MOSSMAN
DECHERT LLP
Cira Centre
2929 Arch Street
Philadelphia, PA 19104-2808

Counsel for Aegon/ Transamerica Series Fund – TRP, et al.

PHILIP D. ANKER
Counsel of Record
ALAN E. SCHOENFELD
PABLO G. KAPUSTA
WILMER CUTLER PICKERING
HALE AND DORR LLP
7 World Trade Center
New York, NY 10007
(212) 230-8890
philip.anker@wilmerhale.com

DAVID M. LEHN
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006

ERIC F. FLETCHER
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109

Counsel for Respondents Susquehanna Capital Group, et al.

STEVEN R. SCHOENFELD
DELBELLO DONNELLAN
WEINGARTEN WISE &
WIEDERKEHR LLP
One North Lexington Avenue
White Plains, NY 10601

Counsel for College Retirement Equities Fund, et al.

ANDREW J. ENTWISTLE
ENTWISTLE
& CAPPUCCI LLP
299 Park Avenue
20th Floor
New York, NY 10171

Counsel for GAMCO Asset Management, Inc. & The Public Employees' Retirement Association of Colorado

MATTHEW D. MCGILL
OSCAR GARZA
DOUGLAS LEVIN
GIBSON, DUNN &
CRUTCHER LLP
1050 Connecticut Ave., NW
Washington, DC 20036

Counsel for Chandler Trust No. 1 & Chandler Trust No. 2

MATTHEW L. FORNSHELL
ICE MILLER LLP
250 West Street
Columbus, OH 43215

Counsel for Illinois Municipal Retirement Fund, et al.

SABIN WILLETT
MICHAEL C. D'AGOSTINO
MORGAN LEWIS
& BOCKIUS LLP
One Federal Street
Boston, MA 02110

Counsel for Aetna, Inc., et al.

DANIEL L. CANTOR
DANIEL S. SHAMAH
O'MELVENY & MYERS LLP
Times Square Tower
7 Times Square
New York, NY 10036

Counsel for Bank of America, N.A., et al.

DAVID N. DUNN
PHILLIPS, DUNN, SHRIVER
& CARROLL, P.C.
147 Western Avenue
Brattleboro, VT 05301

Counsel for Ciri Gillespie, et al.

GREGG M. MASHBERG
STEPHEN L. RATNER
PROSKAUER ROSE LLP
11 Times Square
New York, NY 10036

Counsel for 1199SEIU Health Care Employees Pension Fund, et al.

DAVID C. BOHAN
JOHN P. SIEGER
KATTEN MUCHIN
ROSENMAN LLP
525 West Monroe Street
Chicago, IL 60661

Counsel for Cantigny Foundation & The Robert R. McCormick Foundation

DOUGLAS HALLWARD-
DRIEMEIER
D. ROSS MARTIN
ROPES & GRAY LLP
1211 Avenue of the Americas
New York, NY 10036-8704

Counsel for APG Asset Management US Inc. F/K/A ABP Investments US, Inc. (incorrectly named as ABP), et al.

ALAN J. STONE
ANDREW M. LEBLANC
MILBANK, TWEED, HADLEY
& MCCLOY LLP
1 Chase Manhattan Plaza
New York, NY 10005

Counsel for Amalgamated Bank, et al.

GARY STEIN
DAVID K. MOMBORQUETTE
WILLIAM H. GUSSMAN, JR.
SCHULTE ROTH
& ZABEL LLP
919 Third Avenue
New York, NY 10022

Counsel for Adage Capital Advisors Long, et al.

COMPLETE LIST OF PARTIES REPRESENTED
BY COUNSEL IN APPENDIX

OCTOBER 2016

APPENDIX

COMPLETE LIST OF PARTIES REPRESENTED BY COUNSEL

PHILIP D. ANKER
Counsel of Record
ALAN E. SCHOENFELD
PABLO G. KAPUSTA
WILMER CUTLER PICKERING
HALE AND DORR LLP
7 World Trade Center
New York, NY 10007
(212) 230-8890
philip.anker@wilmerhale.com

DAVID M. LEHN
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006

ERIC F. FLETCHER
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109

Counsel for Respondents Susquehanna Capital Group, Susquehanna Investment Group, and Susquehanna Investment Group as custodian of the SIG-SS CBOE Joint Account

MARK A. NEUBAUER
CARLTON FIELDS JORDEN
BURT, LLP
2000 Avenue of the Stars
Suite 530N
Los Angeles, CA 90067

Counsel for The Alfred W. Merkel Marlowe G. Merkel Trust UA 11 Sept 85; Chase L. Leavitt; Darell F. Kuenzler; Darell F. Kuenzler IRA; Debra A. Gastler; Denise Palmer Revoca-

ble Trust U/A/D 10-28-1991, Denise E. Palmer, Trustee; Durham J. Monsma; Emil Kratochvil; Evelyn A. Freed Trust U/A/D 03/26/90 Brandes-All Cap Value; Javad Rassouli; Jeanette Day Family Trust U/A DTD 10/04/1994; Jennifer Merkel, Successor Trustee of The Alfred W. Merkel Marlowe G. Merkel Trust UA 11 Sept 85; Jim Hicks as Trustee of the Jim Hicks & Co. Employee Profit-Sharing Plan; John Patinella; Leonidia Gonsalves; Mark Allen Itkin; Mary E. Day; Miles Adrian Collet Murray; Monserrate Ramirez JTWROS; Muriel S. Harris; Myrna Ramirez; Nancy Lobdell; OMA OPA LLC; The Peter J. Fernald Trust U/A 1/13/92; Peter J. Fernald, Trustee of The Peter J. Fernald Trust U/A 1/13/92; Posen Family Limited Partnership; Raymond M. Luthy Trust; Renee H. Miller; Reichhold, Inc.; Richard L. Goldstein; Robbie E. Monsma; Robert N. Mohr, Successor Trustee to Joseph B. Mohr, as Trustee of the J&M Trust UA Dated 07/23/1992; Terrill F Cox & Lorraine M Cox Trust U/A DTD 3/31/98; and William F. Thomas

ELLIOT MOSKOWITZ
DAVIS POLK &
WARDWELL LLP
450 Lexington Avenue
New York, NY 10017

Counsel for Bear Stearns Asset Management, Inc.; Bear Stearns & Co., Inc. (n/k/a J.P. Morgan Securities LLC); Bear Stearns Equity Strategies RT LLC; Bear Stearns Securities Corp. (n/k/a J.P. Morgan Clearing Corp.); Custodial Trust Company; JPMorgan 401(k) Savings Plan; JPMorgan Chase Bank, N.A. (which was also improperly referred to in the Amended Complaint as "Custodial Trust Company"); J.P. Morgan Clearing Corp.; J.P. Morgan; J.P. Morgan Securities LLC (formerly J.P. Morgan Securities Inc.); J.P. Morgan Securities plc (formerly J.P. Morgan Securities Ltd.); JPMSI LLC (formerly J.P. Morgan Services Inc.); JPMorgan Trust II; and J.P. Morgan Whitefriars, Inc.

MICHAEL S. DOLUISIO
STUART T. STEINBERG
ELLEN L. MOSSMAN
DECHERT LLP
Cira Centre
2929 Arch Street
Philadelphia, PA 19104-2808

Counsel for Aegon/Transamerica Series Fund – TRP; Aegon/Transamerica Series Trust T Rowe Price Equity Income; Board of Trustees of the Colleges of Applied Arts and Technology Pension Plan, As Administrator of Colleges of Applied Arts and Technology Pension Plan; Charles Schwab & Co. Inc; Charles Schwab & Co., Inc, as Custodian for Brent V. Woods IRA Rollover; Charles Schwab & Co., Inc, as Custodian of the George William Buck SEP-IRA DTD 04/08/93; Charles Schwab & Co., Inc, as Custodian of the Peter Marino IRA Rollover; Charles Schwab Investment Management, Inc. (incorrectly named as "Charles Schwab Inv Mgt Co"); Clearwater Growth Fund; DIA MID CAP Value Portfolio; Harbor Capital Advisors, Inc.; Harbor Capital Group Trust for Defined Benefit Plans (incorrectly named as "Harbor Capital Group Trust"); Harbor Mid Cap Value Fund; J. Goldman & Co., L.P. (incorrectly named as "Jay Goldman & Co., LP"); Jay Goldman Master Limited Partnership (incorrectly named as "Jay Goldman Master LP"); John Hancock Life Insurance Company (USA) as successor-in-interest to John Hancock Financial Services, Inc.; John Hancock Funds II; John Hancock Funds II Equity Income Fund (incorrectly named as "John Jancock Funds II (Equity-Income Fund)"and "JHF II Equity-Income Fund"); John Hancock Funds II Spectrum Income Fund (incorrectly named as "John Hancock Funds II (Spectrum Income Fund)" and "JHF II Spectrum Income Fund"); John Hancock Variable Insurance Trust New Income Trust (incorrectly named as "John Hancock Variable Insurance Trust (F/K/A John Hancock Trust (New Income Trust)," "John Hancock Variable Insurance Trust," and "JHT New Income Trust"); Linda Molenda; Manulife Asset Management (US) LLC; Manulife Invst Ex FDS Corp.-

MIX; Manulife Investments (f/k/a "Manulife Mutual Funds"); Manulife U.S. Equity Fund; MassMutual Premier Enhanced Index Value Fund (currently known as MassMutual Premier Disciplined Value Fund); MassMutual Premier Funds; MassMutual Premier Main Street Small/Mid Cap Fund (f/k/a "MassMutual Premier Main Street Small Cap Fund"); MassMutual Premier Small Company Opportunities Fund (currently known as MassMutual Premier Small Cap Opportunities Fund); MassMutual Select Diversified Value Fund; MassMutual Select Funds; MassMutual Select Indexed Equity Fund (currently known as MM S&P 500 Index Fund); MML Blend Fund; MML Equity Income Fund; MML Series Investment Fund; MML Series Investment Fund II; Monumental Life Insurance Company; Monumental Life Insurance Co. F/K/A Peoples Benefit Life Insurance Company; Monumental Life Insurance Co., as Owner of Teamsters Separate Account (Monumental Life Insurance Company, on Behalf of Separate Account L-32) (incorrectly named as "Monumental Life Insurance Co., as Owner of Teamsters Separate Account (Monumental Life Insurance Company, on Behalf of Separate Account L-23)"); OFI Private Investments, Inc.; Oppenheimer Main Street Select Fund (formerly known as Oppenheimer Main Street Opportunity Fund); Oppenheimer Main Street Mid Cap Fund (formerly known as Oppenheimer Main Street Small Cap Fund); Oppenheimer Variable Account Funds doing business as Oppenheimer Main Street Small & Mid-Cap Fund/VA (formerly known as Oppenheimer Main Street Small Cap Fund/VA); OppenheimerFunds, Inc.; optionsXpress, Inc.; Pacific Select Fund; ProShares Ultra S&P500 (incorrectly named as "Pro Shares Ultra S&P 500"); Russell Investment Company; Russell Investment Group; Russell Investments Trust Company (f/k/a "Frank Russell Trust Company"); Russell U.S. Core Equity Fund (incorrectly named as "Russell US Core Equity Fund," and f/k/a "Russell Equity I Fund" and "Russell Investment Company Diversified Equity Funds"); Rydex ETF Trust (Guggenheim S&P 500 Pure Value ETF) (incorrectly named as "Rydex ETF Trust (Rydex S&P 500

Pure Value ETF)"); Rydex ETF Trust (Guggenheim S&P 500 Equal Weight Consumer Discretionary ETF) (incorrectly named as "Rydex ETF Trust (Rydex S&P Equal Weight Consumer Discretionary ETF)"); Rydex ETF Trust (Guggenheim S&P 500 Equal Weight ETF) (incorrectly named as "Rydex ETF Trust (Rydex S&P Equal Weight ETF)"); Rydex Investments; Rydex Series Funds; Rydex Series Funds Multi-Hedge Strategies Fund; Rydex Series Funds S&P 500 Pure Value Fund; Rydex Variable S&P 500 Pure Value Fund; Rydex Variable Trust; Rydex Variable Trust Multi-Hedge Strategies Fund; SBL Fund Series H; SBL Fund Series O; Schwab 1000 Index Fund; Schwab Capital Trust; Schwab Fundamental US Large Company Index Fund; Schwab Investments; Schwab S&P 500 Index Fund; Schwab S&P 500 Index Fund (F/K/A Schwab Institutional Select S&P 500 Fund); Schwab Total Stock Market Index Fund; Security Global Investors-Rydex/SGI; Security Investors, LLC; Transamerica Asset Management, as owner of the DIA Mid Cap Value Portfolio; Transamerica Blackrock Large Cap Value VP (F/K/A Transamerica T. Rowe Price Equity Income VP); Transamerica Partners Mid Cap Value; Transamerica Partners Mid Cap Value F/K/A Diversified Investors Portfolios; Transamerica Partners Mid Value Portfolio (f/k/a Transamerica Partners Mid-Cap Value Portfolio f/k/a/ Diversified Investors Mid-Cap Value Portfolio); Transamerica Partners Portfolios (F/K/A Diversified Investors Portfolios); Transamerica Series Trust (F/K/A Aegon/Transamerica Series Trust); The Vanguard Group, Inc.; Vanguard 500 Index Fund (incorrectly named as "Vanguard Index 500 Fund" and f/k/a "Vanguard Tax-Managed Growtn & Income Fund"); Vanguard Asset Allocation Fund; Vanguard Balanced Index Fund (incorrectly named as "Vanguard Balanced Index Fund (a/k/a Vanguard Balanced Index Equity Fund)"); Vanguard Consumer Discretionary Index Fund; Vanguard Equity Income Fund; Vanguard Fenway Funds; Vanguard Fiduciary Trust Company; Vanguard FTSE Social Index Fund; Vanguard Growth and Income Fund; Vanguard High Dividend Yield Index Fund; Vanguard Index Funds; Vanguard Insti-

tutional Index Fund (incorrectly named as "Vanguard Institutional Index Funds"); Vanguard Institutional Total Stock Market Index Fund; Vanguard Large Cap Index Fund; Vanguard Malvern Funds; Vanguard Mid-Cap Index Fund; Vanguard Mid-Cap Value Index Fund; Vanguard Quantitative Funds; Vanguard Scottsdale Funds; Vanguard Structured Large-Cap Equity Fund; Vanguard Tax-Managed Funds; Vanguard Total Stock Market Index Fund; Vanguard Valley Forge Funds; Vanguard Value Index Fund; Vanguard Variable Insurance Fund; Vanguard Variable Insurance Funds; Vanguard VVIF Equity Fund Index; Vanguard VVIF Equity Income VGI; Vanguard VVIF Midcap Index Fund; Vanguard Whitehall Funds; Vanguard Windsor Funds; Vanguard Windsor II Fund; Vanguard World Fund (f/k/a Vanguard World Funds); VFTC - Vanguard Company Stock Account 21; and Woodmont Investments Ltd.

STEVEN R. SCHOENFELD
DELBELLO DONNELLAN
WEINGARTEN WISE &
WIEDERKEHR LLP
One North Lexington Avenue
White Plains, NY 10601

Counsel for College Retirement Equities Fund; Teachers Insurance and Annuity Association of America; TIAA Board of Overseers; TIAA-CREF Funds (formerly known as TIAA-CREF Institutional Mutual Funds); TIAA-CREF Investment Management, LLC; and TIAA-CREF Life Funds

ANDREW J. ENTWISTLE
ENTWISTLE
& CAPPUCCI LLP
299 Park Avenue
20th Floor
New York, NY 10171

Counsel for GAMCO Asset Management, Inc. and The Public Employees' Retirement Association of Colorado

MATTHEW D. MCGILL
OSCAR GARZA
DOUGLAS LEVIN
GIBSON, DUNN &
CRUTCHER LLP
1050 Connecticut Ave., NW
Washington, DC 20036

Counsel for Chandler Trust No. 1 and Chandler Trust No. 2

MATTHEW L. FORNSHELL
ICE MILLER LLP
250 West Street
Columbus, OH 43215

Counsel for Illinois Municipal Retirement Fund, School Employees Retirement System of Ohio, Ohio Public Employees Retirement System, Pensions Reserve Investment Management Board of Massachusetts, Texas Education Agency, and Employee Retirement System of Texas

DAVID C. BOHAN
JOHN P. SIEGER
KATTEN MUCHIN
ROSENMAN LLP
525 West Monroe Street
Chicago, IL 60661

Counsel for Cantigny Foundation and The Robert R. McCormick Foundation

ALAN J. STONE
ANDREW M. LEBLANC
MILBANK, TWEED, HADLEY
& MCCLOY LLP
1 Chase Manhattan Plaza
New York, NY 10005

Counsel for Amalgamated Bank; Barclays Bank PLC; Barclays Capital Inc.; Barclays Capital Securities Ltd.; Bessemer Trust Company; BHF-Bank Aktiengesellschaft; BMO Nesbitt Burns Employee Co-Investment Fund I (U.S.), L.P.; BMO Nesbitt Burns Employee Co-Investment Fund I Management (U.S.), Inc.; BMO Nesbitt Burns Inc.; Bank of Montreal Holding Inc. (as successor in interest to BMO Nesbitt Burns Trading Corp. S.A.); BMO Nesbitt Burns U.S. Blocker Inc.; BNP Paribas Securities Corp.; Brown Brothers Harriman & Co.; Canadian Imperial Holdings, Inc.; CIBC World Markets Corp.; CIBC World Markets, Inc.; Commerz Markets LLC; Commerzbank AG; Cooper Neff Advisors, Inc. now known as Harewood Asset Management (US) Inc.; Credit Suisse (USA), Inc.; Credit Suisse Securities (Europe) Ltd.; Credit Suisse Securities (USA) LLC; D.E. Shaw Valence Portfolios, L.L.C.; Deutsche Bank AG; Deutsche Bank AG, Filiale Amsterdam; Deutsche Bank Securities Inc.; Deutsche Investment Management Americas Inc.; Eaton Vance Multi Cap Growth Portfolio; Eaton Vance Tax Managed Global Buy Write Opportunities Fund; Eaton Vance Tax Managed Growth Portfolio; Eaton Vance Tax Managed Multi-Cap Growth Portfolio; Edward D. Jones & Co., L.P.; Fidelity Advisor Series I; Fidelity Commonwealth Trust; Fidelity Concord Street Trust; Fidelity Securities Fund – Leveraged Company Stock Fund; Fidelity U.S. Equity Index Commingled Pool; Goldman Sachs Execution & Clearing, L.P.; Goldman Sachs International Holdings LLC; Goldman Sachs Variable Insurance Trust; Goldman, Sachs & Co.; GS Investment Strategies LLC; Liberty Harbor Master Fund I, L.P.; Lyxor/Canyon Value Realization Fund Ltd.; National Financial Services LLC; Neuberger Berman LLC; PNC Bank, National Association; RBC Capital Markets Arbitrage, LLC; RBC Capital Markets, LLC; RBC Global Asset Management, Inc.; RBC O'Shaughnessy U.S. Value Fund; Royal Bank of Canada; Royal Trust Corporation of Canada; Schultze Asset Management LLC; Scotia Capital (USA) Inc.; Scotia Capital Inc.; SG Americas Securities, LLC; State Street Bank and Trust Company; State Street Bank Luxembourg, S.A.; State

Street Global Advisors (Japan) Co., Ltd.; State Street Global Advisors, Inc.; State Street Trust and Banking Company, Limited; SunTrust Bank; Swiss American Corporation; Swiss American Securities, Inc.; TD Ameritrade Clearing, Inc.; TD Equity Options LLC, f/k/a TD Options LLC; The Bank of Nova Scotia; U.S. Bancorp Investments, Inc.; U.S. Bank N.A.; UBS AG; UBS Financial Services, Inc.; UBS Global Asset Management (Americas) Inc.; UBS Global Asset Management (US) Inc.; UBS O'Connor LLC; UBS Securities LLC; Union Bank, N.A., formerly known as Union Bank of California, N.A.; Variable Insurance Products Fund II – Index 500 Portfolio; and Workers Compensation Board

SABIN WILLETT
MICHAEL C. D'AGOSTINO
MORGAN LEWIS
& BOCKIUS LLP
One Federal Street
Boston, MA 02110

Counsel for Aetna, Inc.; BNA Employees' Retirement Plan, incorrectly named as "Bureau of Natl Affairs Ret"; Sharon Christhilf; The Church Pension Fund, in its individual and trustee capacities; Los Angeles City Employees' Retirement System; Los Angeles Fire and Police Pension System; DL Partners, LP; Great-West Life & Annuity Insurance Company; Maxim T. Rowe Price Equity/Income Portfolio; Maxim Foreign Equity Portfolio; Maxim Series Fund, Inc.(n/k/a Great-West Funds, Inc.); Harris Corporation Master Trust, incorrectly named as "Harris Corp. Retirement Trust"; Teachers Retirement System of the State of Illinois; ING Capital LLC; ING Investment Trust Co.(n/k/a Voya Investment Trust Co.); ING T. Rowe Price Equity Income Portfolio (n/k/a VY T. Rowe Price Equity Income Portfolio), a series of ING Investors Trust (n/k/a Voya Investors Trust); The Kraft Group; Laborers' District Council & Contractors Pension Fund of Ohio; Legg Mason Batterymarch Financial Management S&P 500 Index Fund, a series of the Legg Mason Partners Equity Trust, incorrectly

named as "Legg Mason Partners"; Madison Square Investors Large-Cap Enhanced Index Fund LP (f/k/a NYLIM-QS Large Cap Enhanced Fund LP), incorrectly named as "NYLIM-QS Large Cap Enhanced Fund LP" and also incorrectly named as "Madison Square Investors Large-Cap Enhanced Index Collective Index Fund f/k/a NYLIM Large-Cap Enhanced Index Collective Fund"; New York Life Insurance Company; The MainStay Funds; MainStay Funds Trust, incorrectly named as "The MainStay Funds Trust"; MainStay VP Funds Trust (f/k/a MainStay VP Series Fund, Inc.); Maryland State Retirement and Pension System; The Milliken Retirement Plan, incorrectly named as "Miliken Stock Fund (7R)" and also incorrectly named as "Miliken Stock Fund (7R) T. Rowe Price Trust Co."; National Railroad Retirement Investment Trust; NorthShore University HealthSystem Second Century Fund; NorthShore University HealthSystem, as Owner of the NorthShore University HealthSystem Second Century Fund; Northwestern Mutual Series Fund, Inc.; Northwestern Mutual Life Insurance Company; Ohio National Fund, Inc., incorrectly named as "Ohio Natl Fund, Inc. Strategic Value Portfolio" and as "John Doe, as Owner of Ohio Natl Fund, Inc. Strategic Value Portfolio Ohio National Financial Services"; Dorothy D. Park; Principal Variable Contracts Funds, Inc.; Advanced Series Trust - AST T. Rowe Price Asset Allocation Portfolio, incorrectly named as "Advance Series Trust" and as "AST T. Rowe Price Asset Allocation Portfolio"; Advanced Series Trust - AST QMA US Equity Alpha Portfolio; Prudential Insurance Company of America, incorrectly named as "Prudential Insurance Co. of America (PMFIM), a/k/a PICA- Prudential Insurance Company Separate Account" and as "Prudential Inusrance Co. of America (PMFIM)" and also as "Prudential Insurance Co. of America (PDI)"; Prudential Investment Management, Inc.(n/k/a PGIM, Inc.); Prudential Retirement Insurance and Annuity Company; Stock Index Portfolio, a Series of the Prudential Series Fund, Inc.; Conservative Balanced Portfolio, a Series of the Prudential Series Fund, Inc.; Prudential Investment Portfolios 3 – Prudential QMA

Strategic Value Fund (f/k/a "Strategic Partners Opportunity Funds"); Prudential Investment Portfolios 8 – Prudential QMA Strategic Value Fund; Putnam S&P 500 Index Fund; Putnam Fiduciary Trust Company; Redwood Master Fund, Ltd.; T. Rowe Price Associates, Inc.; T. Rowe Price Mid-Cap Value Fund, Inc.; T. Rowe Price Group, Inc.; T. Rowe Price Retirement Plan Services, Inc.; Alaska Large-Cap Trust, incorrectly named as "Alaska CTF Large Cap Trust"; T. Rowe Price Index Trust, Inc.; T. Rowe Price Structured Research Common Trust Fund; T. Rowe Price Balanced Fund, Inc., also named incorrectly as "T. Rowe Price Balanced Fund – Large Cap Core Fund, Inc."; T. Rowe Price Equity Income Fund; T. Rowe Price Equity Index Trust, incorrectly named as "T. Rowe Price Institutional Com Trust Fund Equity Index Trust"; T. Rowe Price Equity Index 500 Fund; T. Rowe Price Total Equity Market Index Fund; T. Rowe Price Equity Series, Inc.; T. Rowe Price Equity Index Trust; T. Rowe Price Trust Company; Hanna Jonas Miller; Ruth McCormick Tankersley Revocable Trust, Dated October 6, 1992, incorrectly named as Ruth McCormick Tankersley, as Trustee of the 10/06/92 Ruth McCormick Tankersely Revocable Trust, and also incorrectly named as The 10/06/92 Ruth McCormick Tankersley Revocable Trust," also incorrectly named as "Ruth McCormick Tankersley Trust Dated 12/03/1990," and also incorrectly named as "The 10/06/92 Ruth McCormick Tankersley Revocable Trust"; Ruth McCormick Tankersley; Ellen Johnson Twaddell; William Sanderson Twaddell; Tiffany Tankersley; Trustees of the Walters Art Gallery, Inc., d/b/a the Walters Art Museum, incorrectly named as "Walters Trustees Consolidated Fund – Fixed Income"; Vermont State Employees Retirement System; Board of Administration of the Water and Power Employees' Retirement Plan of the City of Los Angeles; and Weiss Multi-Strategy Partners LLC

DANIEL L. CANTOR
DANIEL S. SHAMAH
O'MELVENY & MYERS LLP

Times Square Tower
7 Times Square
New York, NY 10036

Counsel for Bank of America, N.A; Bank of America, N.A. / LaSalle Bank, N.A.; Bank of America Corporation; Bank of America; Bank of America Structured Research; Banc of America Securities LLC; Bank of America N.A./ GWIM Trust Operations; BNP Paribas Prime Brokerage Inc.; Columbia Management Group; Forrestal Funding Master Trust; LaSalle Bank, N.A.; Merrill Lynch, Pierce, Fenner & Smith Incorporated; Merrill Lynch, Pierce, Fenner & Smith as successor to Banc of America Securities LLC, Securities Lending Services; Merrill Lynch; Merrill Lynch & Co., Inc.; Merrill Lynch Capital Corp.; Merrill Lynch Financial Markets, Inc.; Merrill Lynch Trust Co.; Merrill Lynch, Pierce, Fenner & Smith, Inc. – Safekeeping; Merrill Lynch, Pierce, Fenner & Smith, Inc. – Securities Lending; 1IA SPX1; US Trust Co. N.A.; and U.S. Trust Company of Delaware

DAVID N. DUNN
PHILLIPS, DUNN, SHRIVER
& CARROLL, P.C.
147 Western Avenue
Brattleboro, VT 05301

Counsel for Ciri Gillespie, Cara-Leigh Gillespie-Wilson, John and Carol Jansson, Kirsten & John Gibbs, Walter Lang, Joel Marks, Steven and Susan Miller, Richard DeFoe, Kevin Domkowski, Richard & Lynda Freedman, Paul Gerken, Susan Gail Harwood Trust, Peter & Janice Howe, William H. Johnson, KWK Management, McConnell Foundation, Lili Charlotte Sarnoff, Spindle Limited Partnership, Maud P. Barton Revocable Trust, Cornelia Tobey, Richard Triest, Jerold Jay Wichtel, James & Eileen Wirth, Eileen S. Buckley, Willowlake Development, and Lu Ann Sodano

GREGG M. MASHBERG
STEPHEN L. RATNER
PROSKAUER ROSE LLP

11 Times Square
New York, NY 10036

Counsel for 1199SEIU Health Care Employees Pension Fund; 1199SEIU Home Care Employees Fund; 1199SEIU Greater New York Pension Fund; A.G. Edwards & Sons, LLC; A.G. Edwards Private Equity Partners III, L.P.; A.G. Edwards, Inc.; AG Edwards & Sons, Inc.; Baldwin Enterprises, Inc.; The Bank of New York Mellon Corporation Retirement Plans Master Trust; BNY Mellon Investment Servicing (US) Inc. (f/k/a PFPC, Inc.); BNY Mellon Trust of Delaware; BNY Mellon, N.A., as Successor-In-Interest to Mellon Trust of New England, N.A.; Cede & Co.; Dreyfus Index Fund, Inc.; Dreyfus Stock Index Fund, Inc.; Equity League Pension Trust Fund; Evergreen Asset Management Corp.; First Clearing, LLC; Iolaire Investors LLP; Jefferies Bache Securities, LLC (formerly Prudential Bache Securities, LLC); Jefferies LLC (formerly Jefferies & Company, Inc.); Mellon Bank N.A. Employees Benefit Collective Investment Plan; Mellon Bank, N.A. Employee Benefit Plan; Mellon Capital Management Corporation; New Eagle Holdings LLC; Newedge USA, LLC; Oppenheimer & Co., Inc.; Paper Products, Miscellaneous Chauffeurs, Warehousemen, Helpers, Messengers, Production and Office Workers Local 27 Pension Fund; Pershing LLC; Producers-Writers Guild of America Pension Plan; Reed Elsevier Inc.; Reed Elsevier U.S. Retirement Plan; Reliance Trust Company; Strategic Funds, Inc.; The Bank of New York Mellon; The Bank of New York Mellon as trustee of The Bank of New York Mellon Employee Benefit Collective Investment Fund Plan f/k/a Mellon Bank, N.A. Employee Benefit Collective Investment Fund Plan; The Bank of New York Mellon as trustee of The Collective Trust of The Bank of New York; The Bank of New York Mellon as trustee of the PG&E Nuclear Facilities Qualified CPUC Decommissioning Master Trust; The Bank of New York Mellon as trustee of the PG&E Postretirment Medical Plan Trust; The Bank of New York Mellon as trustee of the R.E. Ginna Nuclear Power Plant LLC Master Decommissioning Trust; The Bank of New York Mellon Corporation; The Depository Trust &

Clearing Corporation; The Depository Trust Company; The Dreyfus Corporation; The Dreyfus/Laurel Funds, Inc.; Wachovia Bank, N.A.; Wells Fargo Bank, N.A.; and Wells Fargo Investments, LLC

DOUGLAS HALLWARD-DRIEMEIER
D. ROSS MARTIN
ROPES & GRAY LLP
1211 Avenue of the Americas
New York, NY 10036-8704

Counsel for APG Asset Management US Inc. F/K/A ABP Investments US, Inc. (incorrectly named as ABP); Francis L. Coolidge, Guardian Investors Services LLC; Guardian VC 500 Index Fund, John Doe as Owner of; Harvard University; Harvard Management Co.; President and Fellows of Harvard College; Loomis Sayles Credit Alpha Fund; LPL Financial LLC; Marcia Tingley; Mutual of America Investment Corp.; Nora Morgenstern; Stichting Pensioenfonds van de ABN AMRO N.V.; Stichting Pensioenfonds ABP; Stichting Pensioenfonds Hoogovens; Stichting Pensioenfonds Zorg En Welzijn; Stichting Shell Pensioenfonds; Tribune Company Master Retirement Savings Trust; Tribune Employee Stock Ownership Plan; Times Mirror Savings Plan; Tribune Company 401(k) Savings Plan; Trustees of Boston College; and Welch & Forbes LLC

GARY STEIN
DAVID K. MOMBORQUETTE
WILLIAM H. GUSSMAN, JR.
SCHULTE ROTH
& ZABEL LLP
919 Third Avenue
New York, NY 10022

Counsel for Adage Capital Advisors Long, Adage Capital Partners LP, Cougar Trading, LLC, Del Mar Master Fund, Ltd., DiMaio Ahmad Capital LLC, Emanuel E. Geduld 2005 Family Trust, GPC LX LLC, Gryphon Hidden Values VIII Ltd., Guggenheim Advisors, LLC, Guggenheim Portfo-

lio Company XXXI, LLC, Guggenheim Portfolio LIX, LLC, Halcyon Asset Management LLC, Halcyon Diversified Fund LP, Halcyon Fund, LP, Halcyon Master Fund LP, Harvest AA Capital LP, Harvest Capital LP, Howard Berkowitz, Hudson Bay Fund LP, Hudson Bay Master Fund Ltd., Hussman Econometrics Advisors, Inc., Hussman Investment Trust, Hussman Strategic Growth Fund, John Splain, as Trustee of the Hussman Investment Trust, Lispenard Street Credit Fund LLP, Lispenard Street Credit Master Fund, Lispenard Street Credit Master Fund Ltd., Lockheed Martin Corporation, Lockheed Martin Corporation Master Retirement Trust, New Americans LLC, Pond View Credit (Master) LP, QVT Fund LP, Sowood Alpha Fund LP, Stark Global Opportunities Master Fund Ltd., Stark Investments, Stark Master Fund Ltd., Swiss Re Financial Products Corp., TOA Reinsurance Company of America, Towerview LLC, Twin Securities, Inc., and Wabash/Harvest Partners LP