Nos. 19-1402 and 19-1411

IN THE

Supreme Court of the United States

ANTONIO JUBIS ZACARIAS, *et al.*,

Petitioners,

v.

RALPH S. JANVEY, *et al.*,

Respondents.

BARRY L. RUPERT, *et al.*,

Petitioners,

v.

RALPH S. JANVEY, AS RECEIVER FOR STANFORD RECEIVERSHIP ESTATE, *et al.*,

Respondents.

ON PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF AMICUS CURIAE PUBLIC INVESTORS ADVOCATE BAR ASSOCIATION IN SUPPORT OF PETITIONERS

ROYAL B. LEA, III
Counsel of Record
BINGHAM & LEA, P.C.
319 Maverick Street
San Antonio, Texas 78212
(210) 224-1819
royal@binghamandlea.com

Counsel for Amicus Curiae Public Investors Advocate Bar Association

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IDENTITY OF AMICUS CURIAE AND ITS INTERESTS IN THE CASE

Public Investors Advocate Bar Association ("PIABA") is a not-for-profit corporation, and has no parent entities. No publicly held company owns any part of PIABA.[1]

PIABA respectfully submits this Brief as an Amicus in support of the Petitioners. PIABA supports reversal of the opinion and judgment of the Court of Appeals. The resolution of this case will have a significant impact on the integrity of the securities markets and the remediation of fraud in those markets. The remediation of fraud is of particular concern to PIABA.

PIABA is an international bar association established in 1990 to promote the interests of public investors in the various forums where investors resolve their disputes. PIABA members include current and former state and federal securities regulators, securities law professors, and experienced securities practitioners.

PIABA also publishes books and reports on securities arbitration and litigation, conducts regular CLE programs for its members, and communicates directly with governmental and quasi-governmental

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1. Counsel signing this Brief for PIABA authored this Brief together with assistance from other members of PIABA. No counsel for any party in this case participated in any way in authoring this Brief. No person or entity other than PIABA made any monetary contribution to the authorship or cost of filing of this Brief. Petitioners and Respondents have consented to the filing of this Amicus Brief, and received more than 10 days notice of PIABA's intention of filing this Amicus Brief.

securities regulators, such as the Securities and Exchange Commission, the North American Securities Administrators Association, and the Financial Industry Regulatory Authority, on issues of interest to PIABA members and public investors. This Court, federal Circuit Courts of Appeal, and state supreme courts have permitted PIABA to appear as an amicus curiae in cases involving issues important to public investors regarding claims against stockbrokers, financial advisors, and securities issuers.[2]

SUMMARY OF ARGUMENT

Claims by purchasers of securities to recover their losses from intermediaries who fraudulently induced purchases are direct claims or owned by the purchasers. Those claims are not derivative of any claims owned by the issuer of the securities. The issuer of the fraudulent securities does not own the rights of the purchasers to sue to recover their lost purchase money from intermediaries. Nor does an equitable receiver appointed over the estate of the failed issuer own those claims.

When the purchasers choose to assert their direct claims in a state court, a federal court appointing the receiver lacks jurisdiction to interfere with the state court proceeding, assert or settle the claims on behalf of the purchasers in the federal proceeding, or otherwise bar the purchasers from pursuing their claims in that state court.

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2. PIABA joined in an amicus brief with others in this Court's previous consideration of the Stanford Ponzi scheme in *Chadbourne & Parke LLP v. Troice*, 571 U.S. 377 (2014).

ARGUMENT

The Court should grant review in this case to answer this question: when injured investors lose money because they are deceived by a third-party intermediary's fraud into purchasing an issuer's securities, who owns the rights to sue for the investors' losses of their purchase money—the investors themselves, or a court-appointed receiver of the failed issuer of the securities?

Ownership of the right to sue for the money an investor loses when the investor is deceived into purchasing a worthless security is an important property right that belongs to the investor, not the issuer of the security. The Fifth Circuit's opinion clouds ownership of that right, and as demonstrated below, conflicts with opinions of other courts of appeal.

A receiver gets its name because through a court order the receiver "receives" the assets of a failed entity to administer the assets for a prescribed purpose under the court's supervision. In the context of a receiver appointed under the federal securities laws, the failed entity is often the issuer of worthless securities promoted and sold through fraudulent means.

The Receiver over the assets of the failed Stanford entities that operated the Stanford Ponzi scheme is presiding over assets used in just this type of fraudulent scheme. The district court appointed the Receiver over the estate of the Stanford entities, which issued and sold worthless certificates of deposit ("CD's") to investors, including the objecting investors in this case. *See Zacarias v. Stanford Int'l Bank, Ltd.*, 945 F.3d 883, 889-90 (5th Cir. 2019).

As is true in any transfer of property, a receiver receives only what the transferor—here, the failed issuer—has to deliver, and nothing more. *See Hills v. Parker*, 111 Mass. 508, 511 (Mass 1873) (Gray, J.) (decree appointing receivers could not "authorize [the receivers] to take … property of any other person" other than that of railroad company in receivership). The Fifth Circuit correctly recognized that because a receiver only receives assets of the failed entity, a "receivership court cannot reach claims that are independent and non-derivative" of the claims of the failed issuer. *Zacarias*, 945 F.3d at 897 & n. 43; *see also Janvey v. Democratic Senatorial Campaign Comm., Inc.*, 712 F.3d 185, 190 (5th Cir. 2013) ("federal equity receiver has standing to assert only the claims of the entities in receivership").

For a right to sue to belong to the Receiver, it must have passed into the receivership estate from the Stanford entities. The Fifth Circuit says the right to sue to recover investor losses did pass into the receivership estate, asserting that the losses the objecting investors suffered are "*additional* liability Stanford incurred to its investors." *Id*. (emphasis added).[3] While Stanford may have an "additional liability" to these investors in the

3. The Fifth Circuit's assertion that the losses of the purchasers of the Stanford CD's are an "*additional*" liability of the Stanford Bank is dubious. The Fifth Circuit did not explain what it meant by "additional" liability. Purchasers of CD's are depositors in the selling bank. Like any bank selling a CD, Stanford had the liability to repay the principal amount of the CD purchasers' money with interest. That liability to return the purchasers' money is ordinary and unremarkable; it is the obligation of a bank selling a CD to return the money of the purchaser/depositer on the due date with the accrued interest.

amount of the CD's, this additional liability is distinct from the liability a third party may have to the objecting investors for the third party's fraudulent behavior.

Importantly, an investor's right to bring claims against an intermediary between the investor and the issuer of a security for fraudulently inducing the investor's purchase exists independently of claims against the issuer. Such claims exist regardless of whether the issuer collapsed after running a Ponzi scheme or continued its affairs in the ordinary course. Consider, for example, an intermediary who makes a fraudulent misrepresentation by claiming that an issuer's securities would be suitable for an investor despite knowing that the securities were not suitable for the investor's needs. If the investor purchased the securities and experienced losses, the investor has a claim against the intermediary—regardless of whether the issuer culpably participated in the wrongdoing. *See O'Connor v. R.F. Lafferty & Co.*, 965 F.2d 893, 898 (10th Cir. 1992) (laying out "elements of an unsuitability claim based on fraud"). An intermediary who misrepresents other facts about the issuer—including its financial condition—directly harms an investor in the same way. When an intermediary harms an investor through such a misrepresentation, the harm happens regardless of whether the issuer fails and a receiver is appointed.

In other words, the investors' claims are property rights distinct from the Receiver's claims, and as the dissenting opinion in the Court of Appeals in this case says, are "beyond the district court's power." *Zacarias*, 945 F.3d at 905. The fact that the claims both originated from the same Ponzi scheme is a red herring.

Indeed, recently, the Eleventh Circuit Court of Appeals commented that "[a]lthough a receivership is typically created to protect the rights of creditors, the receiver is not the class representative for creditors and cannot pursue claims owned directly by the creditors …. Rather, he is limited to bringing only those actions previously owned by the party in receivership." *Isaiah v. JPMorgan Chase Bank, N.A.*, 960 F.3d 1296, 1306 (11th Cir. 2020). The *Isaiah* court further recognized that "[t]he corporation—and the receiver who stands in the shoes of the corporation—lacks standing to pursue such tort claims because the corporation, 'whose primary existence was as a perpetrator of the Ponzi scheme, cannot be said to have suffered injury from the scheme it perpetrated.'" *Id.* at 1306 (quoting *O'Halloran v. First Union Nat'l Bank of Fla.*, 350 F.3d 1197, 1203 (11th Cir. 2003)). The *Isaiah* court found that

> [i]n the absence of any allegation in the complaint that the Receivership Entities had at least one innocent officer or director and were thus honest corporations injured by the actions of a few corrupt employees, the Receivership Entities—and in turn, Isaiah—lack standing to pursue claims against JPMC for aiding and abetting the Ponzi scheme.

Isaiah, 960 F.3d at 1308.

The Fifth Circuit thus erred in concluding that the rights of investors to sue to recover their lost money spent on their purchases of the worthless CD's derive from the rights of the receiver of the assets of the failed issuer of the securities. *Zacarias*, 945 F.3d at 900 ("Plaintiffs-

Objectors' suits are derivative of and dependent on the receiver's claims"). From that error, the Fifth Circuit erroneously concluded the claims of the objecting investors were subject to the district court's jurisdiction so that the district court could bar the objecting investors from independently pursuing their claims. *See id*.

By stating that an investor's right to sue for losses in connection with the purchase of securities is a derivative claim rather than a direct claim, the court is stating that the issuer of the securities owns the right to sue the intermediary who solicited the sale and the investor who purchased the securities, and lost the investment purchase money, does not own the right to sue to recover the loss.

The Fifth Circuit, thus, got backwards whose losses and whose rights to sue are derivative of whose. Stanford would not have had any "additional liability" if the investors had not *first* been misled into investing and suffered their losses. If the Receiver has a right to sue third parties to recover the "additional liability"—which is doubtful,[4] but even if there were such a right—it would be derivative of the *investors'* rights to sue to recover their own losses, not the other way around.

Logically, this makes sense. If the issuer of fraudulent securities owned the right to sue to recover investors' losses from their purchases of the issuer's worthless securities, the issuer, of course, would never exercise the

4. The issuer of fraudulent securities loses nothing when it issues the securities and receives purchase money. *See, e.g., Rochelle v. Marine Midland Grace Trust Co.*, 535 F.2d 523, 528 (9th Cir. 1976) ("Sunset could not successfully sue because it lost nothing … on the issuance of its debentures").

right to sue. The unintended consequence of the Fifth Circuit's opinion is that it could extinguish all investor claims as they would all be derivative and the issuer would never have any financial incentive to bring those claims. This cannot possibly be the law or a result this Court can endorse.

Rather, this Court has said twice that the right to sue for fraudulent misrepresentations in connection with the purchase of a security is not derivative of the right of the issuer of the security; the right is a direct right of the investor/purchaser of the security. *See Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 735-36 (1975) (purchasers of securities have "express nonderivative private civil remedies" under the '33 and '34 Acts) and *Central Bank, N.A. v. First Interstate Bank, N.A.*, 511 U.S. 164, 178 (1994) (same). The right belongs to the defrauded investors who parted with their money to purchase the worthless security and who own the security.

In *Blue Chips Stamps* and *Central Bank,* this Court referred to the express rights afforded investors under the federal securities laws. The objecting investors here, of course, seek their relief under state law. But it is not the text of the federal securities statutes that make an investor's right to sue under those laws direct and not derivative. It is that the loss of their purchase money is a direct economic loss of money or property borne by an investor when that investor is deceived into purchasing a worthless security. In this case, if Stanford had any "additional liability" from its fraudulent scheme, that liability was a consequence (or derivative) of the investors' losses.

Other Courts of Appeal have correctly held that investors own and have the right to sue for their losses resulting from being fraudulently induced to invest. In *Medsker v. Feingold*, for example, the Eleventh Circuit said that when third-party promoters "made intentional misrepresentations to" the purchasers of securities and "thereby fraudulently induced them to invest their money into" the securities, the injury from the loss of the purchase money was "not an injury to the [issuing] corporation," but rather was "an injury to [the] investors." 307 F. Appx. 262, 265 (11th Cir. 2008); s*ee also Hirsch v. Arthur Andersen & Co*., 72 F.3d 1085, 1094 (2d Cir. 1995) ("claims predicated upon the distribution of misleading PPMs to investors … are the property of those investors, and may be asserted only by them"); *see also Rochelle*, 535 F.2d at 529 (issuer suffers no loss).[5]

Since an investor owns their own right to sue for fraud when the investor is deceived into purchasing a worthless security, the investor should decide the court in which to sue. No receiver has standing to assert the investor's claim for the investor; no court should have jurisdiction to decide the investor's claim through a bar order, certainly not without the investor's consent.

5. The courts in Delaware recognize the quintessentially direct right of a purchaser of a worthless security to sue for fraud when the investor is deceived into purchasing the investment. *In re El Paso Pipeline Partners, L.P.*, 132 A.3d 67, 88 (Del. Ch. 2015) ("'[q]intessential examples of personal claims" belonging to investor "would include^S.^S.^S.ort claim for fraud in … purchase … of shares"')(quoting *In re Activision Blizzard, Inc. S'holder Litig.*, 124 A.3d 1025, 1056 (Del. Ch. 2015)). The Supreme Court of Delaware quoted *El Paso Pipeline* and *Activision* approvingly in *Citigroup, Inc. v. AHW Inv. P'ship*, 140 A.3d 1125, 1140 n.76 (Del. 2016).

Even if a court certifies an investor class action for a class of claims arising out of a common fraudulent scheme, an investor has the right to opt out of the class and assert the investor's claim to recover the investor's own loss. Fed. R. Civ. P. 23(c)(2)(v) (right to be excluded from class). Allowing one court and receiver the plenary jurisdiction to settle and bar claims for investors who do not consent, and who wish to assert their claim in another forum through counsel of their own choosing, robs investors of their valuable right to choose when and how to assert their own claims for themselves.

The Fifth Circuit concludes that the rights of the objecting investors to sue to recover what they lost when they were deceived into purchasing worthless securities is *derivative of a receiver's right* to sue to recover what the objecting investors lost. That conflicts with what other courts have said and creates confusion on an important issue. That confusion hurts the investing public.

Bar orders, like the one here subjecting investors to the jurisdiction of a court which they did not themselves choose, and to a settlement to which they did not agree, are not the only harm to investors. Promoters of bogus investments will take what the Fifth Circuit said about derivative status and use it as a perpetual defense to purchasers' fraudulent inducement claims broadly outside receiverships. If what the Fifth Circuit said about the derivative nature of an investor's right to sue to recover their own losses is allowed to stand, promoters of bogus securities will challenge investor claims at the threshold, arguing that the claims belong to the issuer. That argument obviously should fail. But the Fifth Circuit's opinion casts a dark cloud on what should be a bright-line

rule: aggrieved investors own their own rights to bring claims against third-parties involved in the unlawful sales of illicit securities, whether the violations are of the federal securities laws or state securities laws, and whether or not a receiver has been appointed for the failed issuer.

CONCLUSION

The Court should grant review in this case, and should say that when investors lose money because they are deceived into the purchase of a worthless investment by fraud, the right to sue third parties other than the issuer to recover their losses belong to the investors, not to the court-appointed receiver of the failed issuer of the investment. Therefore, the court-appointed receiver lacks standing to assert or settle the investor's claims against the third parties. When the investor has chosen to assert their claims in a state court, the federal court appointing the receiver lacks jurisdiction over the investor's claims.

Respectfully Submitted,

Royal B. Lea, III
Counsel of Record
Bingham & Lea, P.C.
319 Maverick Street
San Antonio, Texas 78212
(210) 224-1819
royal@binghamandlea.com

Counsel for Amicus Curiae Public Investors Advocate Bar Association

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