No. 19-1402

IN THE

Supreme Court of the United States

ANTONIO JUBIS ZACARIAS,
ROBERTO BARBAR, *et al.*

Petitioners,

v.

RALPH S. JANVEY, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF

Janvey stakes his Brief in Opposition on three false premises.[1] One is that the decision below represents a resolution of supposed factual disputes, purportedly unique to this case, rather than a deep split among several circuits over the limits of Article III jurisdiction in federal receiverships. The issue, according to Janvey, is the degree of purported relatedness between the Zacarias Parties' claims for misrepresentation against Willis, and Janvey's claims of mismanagement and fraudulent conveyances. But this attempt to reframe the issue as a battle over *relatedness* only highlights the circuit split. In the D.C. and First Circuits, even the mismanagement claims Janvey brought against Willis would belong to investors and not receivers. No circuit, other than the Fifth, believes investor misrepresentation claims, such as the Zacarias Parties asserted, could ever be so related to receiver mismanagement theories as to confer jurisdiction. This is not a factual dispute but a question of fundamental Article III principles.

Second, Janvey claims that because courts have approved bar orders in federal court receiverships there must be uniformity among the circuits in deciding whether district courts have Article III jurisdiction to issue them in all cases. But Janvey's attempts to distinguish standing cases from bar order cases betrays the reality that they are all talking about the same thing—the constitutional power to control third-party investor claims. Janvey doubles down on the Fifth Circuit's departure from other circuits, claiming a receiver's lack of standing to bring

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[1] Janvey directs his brief to both the petitions in this case and in the related *Rupert et al. v. Janvey, et al.*, No. 19-1411.

investor claims can be severed from a district court's Article III jurisdiction to bar them. Janvey has no case to support this assertion, except the decision below. That other circuits specifically *reject* this contention underscores the need for this Court's intervention.

Third, Janvey tries to manufacture a vehicle defect in the form of a jurisdictional challenge to the Zacarias and Rupert petitions.[2] This argument depends on a novel reimagining of Supreme Court Rule 13.3, which unambiguously runs the time to file a certiorari petition from the date of a denial of a timely petition for rehearing, *without regard* for the date of the mandate. That straightforward formula inarguably makes the petitions timely. There is no jurisdictional impediment to this Court granting review.

I. The question presented is purely legal.

The supposed factual "entangle[ments]" Janvey refers to are nothing more than typical claims in Ponzi scheme litigation. BOI.4. As the Seventh Circuit observed, they fall into familiar categories of misrepresentation claims, almost always brought by investors who were lied to, and mismanagement claims, which may be brought by investors or receivers (depending on the circuit). *See Knauer v. Jonathon Roberts Fin. Group, Inc.,* 348 F.3d 230, 233–34 (7th Cir. 2003); *see also Liberte Capital Group, LLC v. Capwill*, 248 Fed. Appx. 650, 659 (6th Cir. 2007)

[2] The other Respondents make the same argument. Willis's brief adds an extended discussion of the supposed benefits of the settlement, and of Willis's alleged defenses to the false and misleading statements it made about Stanford's business. Since these are merits arguments, the Zacarias Parties do not address them here.

(recognizing "the difference between the investors' pre-purchase claims of fraudulent inducement to invest and the receiver's post-purchase claims of dissipation of the commodities pool's assets"). Where other circuits put stops on receiver poaching of third-party investor claims, respecting Article III jurisdiction boundaries, *see id.*, the Fifth Circuit affirmed Janvey's audacious take-over of the Zacarias Party claims. The circuits are split on the question. Spinning the issue as a debate over how related an investor misrepresentation claim is to a receiver mismanagement claim ignores the Article III issue—not because it is not there, but because Janvey refuses to acknowledge it. These are not true factual disputes but conflicting legal tests circuits have adopted for resolving standing and jurisdictional questions.

Janvey highlights Judge Willett's description, in his dissent below, of a "narrow issue" that he believed should decide the case. BIO.21-22. But the "narrow issue" Judge Willett identified was not a factual dispute based on some unique or case-specific allegations. It was a question of whether *any* distinctions should be drawn between prototypical Ponzi scheme claims—or, in Judge Willett's words, "whether the Objectors' claims were the same as the Receiver's *just because they both have origins in the same Ponzi scheme*." Pet. App. 38a (emphasis added). The majority decision below eliminates distinctions altogether, relegating standing limitations to a nonissue since any claim flowing from a Ponzi scheme belongs to the receiver. *Id*. 28a-29a. Judge Willett in dissent cited differences between investor misrepresentation claims and receiver mismanagement claims, not to highlight factual disputes but to disagree about the legal test for deciding Article III jurisdiction. His conclusion leaves

no doubt the decision was based not on factual disagreements but on a legal question of jurisdiction—"the Objectors' claims are distinct from the Receiver's, *meaning the district court lacked jurisdiction* to adjudicate them, or to enjoin them." Pet. App. 39a (emphasis added).

Judge Willett agreed with the Tenth Circuit's approach in *SEC v. DeYoung*, 850 F.3d 1172 (10th Cir. 2017), that "substantially identical" claims can be taken over by the receiver. Pet. App. 38a. "Substantially identical" is a legal standard, not a factual one. The courts below took the standard many steps further, watering it down (in the district court ruling) to "sufficiently *similar*," *Id*. 86a (emphasis added), and then (in the majority opinion) to an "injured by the Ponzi scheme" test, a standard so amorphous that any claim investors could possibly bring are necessarily "derivative of and dependent on the receiver's claims." *Id*. 28a-29a.

Judge Willett may agree with *DeYoung*, but the circuits are more fractured. The First Circuit rejected a similarity-based test, such as "substantially identical," for deciding receiver standing to bring claims that investors may also bring. The court in *Goodman v. F.C.C.,* 182 F.3d 987 (D.C. Cir. 1999) found a mere "congruence of interests" between the receivership and defrauded investors was insufficient to give the receiver standing to challenge a FCC decision not to extend licenses the receiver could then sell, with substantial benefit to the estate. *See id*. at 992. The court held, "Goodman does not suggest any reason for thinking the receivership licensees are unable to sue the Commission themselves," *id*.—a straight rejection of the "substantially identical" test later adopted by *DeYoung*. The First Circuit similarly

rejected receiver standing to sue a third party for mismanaging investor funds, citing the longstanding equity principle that "the receiver can only make a claim which the corporation could have made." *Fleming v. Lind-Waldock & Co.*, 922 F.2d 20, 25 (1st Cir. 1990).

The split involves not factual disputes but an entrenched disagreement about controlling legal standards for deciding standing and Article III jurisdiction. In the Tenth and Fifth Circuits, negligence or beaches of duties that harm investors and the receivership estate equally create actions the receiver may bring, to the exclusion of any investor claim. Not so in the D.C. and First Circuits, where investors can pursue mismanagement causes of action without intrusion by the receiver. With hundreds of millions of dollars at stake in this case alone, there is an urgent need for this Court to resolve the split.

II. Janvey's case distinctions are meritless.

Janvey dismisses the conflicting decisions as mere standing cases. He claims the Fifth Circuit supposedly agrees that the receiver lacks standing. BIO.25. (In fact, the decision below reduces the standing question to a vague footnote, Pet. App. 25a n.61). It is the presence of the bar orders, Janvey contends, that sets the decision below and *DeYoung* apart from other circuit decisions. BIO.28-29. But the mere fact of the bar orders is a meaningless distinction, representing nothing more than the receiver's power to exert control over investor claims. Janvey identifies nothing unique about bar orders that exempts them from the normal requirements of Article III standing. *DeYoung* itself properly viewed issues of standing and Article III jurisdiction as *the* threshold question for deciding the district court's "Authority to Enter the Claims Bar

Order." *DeYoung*, 850 F.3d at 1180. The *DeYoung* court separately considered the propriety of the bar orders themselves. *Id.* at 1182 ("We next turn to Intervenors' contention that the district court erred by entering the Claims Bar Order").

Liberte II may not involve bar orders, but the receiver's claim to have the district court channel arbitration proceeds to the receivership estate is substantively no different than routing settlement proceeds to the estate, contingent on a bar order. *See Liberte II*, 248 Fed. Appx. at 656. The threshold Article III standing analysis was no different. The Sixth Circuit held "[t]he mere fact that the Appellee *would like* to pull the arbitration proceeds into the receivership pool does not establish a 'personal stake' for the receivership entities." *Id.* The decision below holds exactly the opposite: "[T]he costs of undermining this settlement are potentially large. The receivership—and thus qualifying investor claimants—would be deprived of $132 million in settlement proceeds." Pet. App. 29a. This potential loss of a valuable settlement was enough, in the Fifth Circuit's view, to activate "the broad jurisdiction of the district court to protect the receivership res." *Id.* 32a. That this result comes in the context of a settlement and bar order, rather than as part of an order channeling settlement proceeds to the estate (*Liberte II*), or an order enabling the receiver to sell valuable licenses (*Goodman*), or a simple order dismissing receiver mismanagement claims for lack of standing (*Fleming*), does not alter the Article III standing issue at the root of every one of these cases.

III. The decision below is still wrong.

Despite efforts to redefine the question presented as a supposed factual dispute, Janvey cannot avoid

the real issue—"Whether a district court in a receivership action has Article III jurisdiction to bar investor claims for individual injuries when the receiver lacks standing to bring those claims himself." Pet. i. Delving into the merits, Janvey argues that the district court indeed has such powers. BIO.26. Bar orders, Janvey contends, find wide justification as part of the district court's equity powers. BIO.27. But that is true of any federal receivership. Other circuits have not attempted to expand Article III jurisdiction to enrich the receivership estate, solely in the name of "equitable considerations." The Sixth Circuit explicitly rejected that argument. *Liberte II*, 248 Fed. Appx. at 665 ("we have uncovered no case in which a court held, or even suggested, that equitable considerations could trump a district court's exceeding its Article III powers by permitting a receiver to raise claims of investors"). The decision below splits from that authority by separating standing to bring investor claims, from a free-ranging, judicially created Article III jurisdiction that reaches any claim derived from the Ponzi scheme.

Janvey argues this is perfectly fine, and his admitted lack of standing to bring investor claims supposedly poses no obstacle to a district court bar order channeling settlement proceeds to the estate. Article III jurisdiction, he contends, exists independent of standing. BIO.26. But that argument tilts at windmills. Standing is "rooted in the traditional understanding of a case or controversy," embodied by Article III, "ensur[ing] that federal courts *do not exceed their authority* as it has been traditionally understood." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (emphasis added). And "Article III standing requires a concrete injury." *Thole v. U. S. Bank N.A*, 140 S. Ct. 1615, 1620–21 (2020).

Janvey's admission that he lacks standing to bring the Zacarias and Rupert claims necessarily admits a lack of Article III jurisdiction to adjudicate those claims.

The main case Janvey cites for his argument does not support it. *Eberhard v. Marcu*, 530 F.3d 122, 128–29 (2d Cir. 2008) rejected an argument that subject matter jurisdiction necessarily is lacking if the receiver lacks standing, as it "confuses two entirely separate issues." *Id.* at 128. But the *Eberhard* court explicitly was not talking about Article III standing limitations to adjudicate third-party claims. It was talking about a district court's subject matter jurisdiction to hear "an action commenced by a court appointed receiver [that] seeks to accomplish the ends sought and directed by the suit in which the appointment was made." *Id.* The court made the unremarkable observation that the "Receiver may pursue in the district court all possible grounds for relief related to the ownership of [the estate]." Separately, the court considered "the merits of each claim (and the Receiver's standing to assert it)." *Id.* at 128–29. *Eberhard* ultimately found that the receiver lacked standing to bring fraudulent conveyance claims belonging to creditors. *Id.* at 135.

Nothing in *Eberhard* suggests the receiver could have nonetheless settled the fraudulent transfer claims, rather than plead them, and then have the district court channel the proceeds to the receivership estate within its Article III powers. The "separate issues" of standing and subject matter jurisdiction *Eberhard* mentions are irrelevant here. No one disputes the district court's subject matter jurisdiction to hear the merits of Janvey's claims against Willis, or to decide the standing questions and the motion to approve settlement. The argument is that the district

court lacked jurisdiction to enter bar orders terminating investor claims against Willis that *did not belong to the receivership estate* and were not before the court. *Eberhard*'s holding on standing supports that argument.

Judge Willett is correct: "Federal courts cannot decide a claim's fate outside the 'honest and actual antagonistic assertion of rights.'" Pet. App. 39a (citing *United States v. Johnson*, 319 U.S. 302, 305 (1943)). Standing is not a triviality to be banished to a footnote. And jumping straight to a settlement is not the cure for the lack of standing by the receiver. That the Fifth Circuit reasoned it is underscores the circuit split, and the urgent need for this Court's intervention.

IV. The jurisdictional argument is meritless.

The timeliness of the petition is a matter of record. The Fifth Circuit issued judgment December 19, 2019; the Zacarias Parties' *timely* petitioned for panel rehearing and rehearing en banc, and moved to recall the mandate, 14 days later on January 2, 2020*, see* Fed. R. App. P. 35(c) and 40(a)(1); the Fifth Circuit denied the petition for rehearing on January 21, 2020; on March 19, 2020, this Court extended the deadline to file petitions in all cases to 150 days from the date of the lower court judgment or order denying a timely petition for rehearing; the Zacarias parties filed their petition June 19, 2020, within 150 days of the January 21 order. Pet. at 1. Janvey disputes none of these facts, and he concedes the Fifth Circuit's order denied en banc review under its normal procedures. BIO.13.

Any question about timeliness is answered by the unambiguous terms of Supreme Court Rule 13.3: "if a petition for rehearing is *timely filed* in the lower court by any party … the time to file the petition for a writ

of certiorari for all parties … *runs from the date of the denial of rehearing*." *Id.* (emphasis added). Since Janvey cannot dispute the timeliness of the Zacarias Parties' January 2 rehearing petition, he cannot dispute the timeliness of the petition in this Court, or this Court's jurisdiction under 28 U.S.C. § 1254(1). Instead he asks this Court to make substantial revisions to Rule 13.3.

First Janvey argues the issuance of the mandate by the Fifth Circuit simultaneously with the judgment altered Rule 13.3's terms, nullifying the "timely filed" petition for rehearing and subsequent order.[3] But Rule 13.3 makes clear the date of the mandate is irrelevant. The time to file a petition "runs from the date of entry of the judgment or order sought to be reviewed, and *not from the issuance date of the mandate*…." S. Ct. R. 13.3 (emphasis added). Janvey would have this Court make "the date of the mandate" a key factor in calculating timeliness.

Next Janvey suggests the premature issuance of the mandate casts doubt on whether the rehearing petition could be "appropriately entertain[ed]." BIO.14. But Rule 13.3 does not discriminate among timely filed petitions for rehearing: "if a petition for rehearing is timely filed in the lower court by any party, or if the lower court *appropriately entertains an untimely petition for rehearing* … the time to file the petition for a writ of certiorari … runs from the date

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[3] A court can "shorten" the time to issue the mandate "*by order*." Fed. R. App. P. 41(b) (emphasis added). Contrary to Janvey's suggestion, BIO.12, the docket contains no such order. The Fifth Circuit clerk simply issued the mandate immediately. BIO App. 2a. That was an abuse of discretion. *Cf. Bell v. Thompson*, 545 U.S. 794, 805 (2005) (finding the lower court abused discretion by staying the mandate "[w]ithout a formal docket entry").

of the denial of rehearing…." *Id*. (emphasis added). The "appropriately entertains" condition applies only to "an untimely petition." Here the petition was timely.

Janvey finally resorts to cryptic language, that "[h]olds on the mandate were lifted," from a Fifth Circuit order denying the Zacarias Parties' motion to extend the time to seek rehearing en banc. BIO.12. But that order did not shorten the time to seek rehearing. Nor did it bar a petition outright. It simply denied an extension. The Zacarias Parties consequently timely filed their petition on the due date, January 2, and the Fifth Circuit denied the petition in the usual course, on January 21.

This Court has repeatedly stated it will not rewrite unambiguous laws. *E.g., Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731, 1749 (2020) ("The people are entitled to rely on the law as written"). Arguing that this Court should rewrite Rule 13.3 here to block review of a vitally important jurisdictional issue dividing the circuits is baseless.

CONCLUSION

This Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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