No. 19-1411

In The
Supreme Court of the United States

BARRY L. RUPERT, CAROL RUPERT, MICHAEL RISHMAGUE, LIONEL ALESSIO, DAN AULI PANOS, EDNA ABLE, et al.,

Petitioners,

v.

RALPH S. JANVEY, in his Capacity as Court-Appointed Receiver for Stanford Receivership Estate, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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SUMMARY

Respondents' timeliness argument is meritless. The Fifth Circuit issued its opinion on December 19, 2019, after a panel rehearing. Petitioners timely sought en banc review of that panel decision ("En Banc Petition"), which the Fifth Circuit appropriately entertained and denied on January 21, 2020. Under Supreme Court Rule 13.3, the Petition was timely.

Respondents' argument that there is no circuit split frames the issue as to whether district courts have *authority* in equity to enter *any* bar orders, or as one involving a fact-bound inquiry. Both ignore the real issue presented.

This case presents a legal question of constitutional magnitude—i.e., if a receiver lacks Article III standing to assert claims belonging to defrauded investors against third parties for harms the receivership entity did not suffer, does the receivership court have jurisdiction to permanently bar those defrauded investors' claims?

ARGUMENT

Respondents accurately frame the relevant facts:

> All involved have consistently accepted, and the Fifth Circuit expressly noted, that the claims asserted by the Receiver belong to the Receivership entities and the claims being barred belong to [Petitioners].

Rec.Resp. at 24.[1] The Receiver in effect settled, and the district court barred, claims that indisputably do not belong to the Receivership entities—state-law fraud claims for injuries inflicted by Willis/BMB on Stanford's investors, not on Stanford itself.[2]

Under the law of the First, Second, Sixth, Seventh, D.C., and now Eleventh Circuits,[3] the bar orders affirmed by the Fifth Circuit would not be permissible due to the Receiver's lack of standing to bring the claims and thus the district court's lack of subject-matter jurisdiction to bar the claims. Those circuits have all held that receivers may not bring non-receivership claims, and notions of "equitable authority" will not confer standing and jurisdiction. The Fifth Circuit disagreed by holding that the Receiver's appointment swept essentially all claims, however tangential and jurisdictionally deficient, into the sole possession of the Receiver for purposes of resolution.[4] Respondents'

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[1] Actually, Petitioners dispute the Receiver's standing to bring the claim he pled for aiding and abetting breach of fiduciary duty. *See Isaiah v. JPMorgan Chase Bank*, 960 F.3d 1296, 1306–08 (11th Cir. 2020) (holding that a receiver for "a sham corporation created as the centerpiece of a Ponzi scheme" lacks standing to sue for aiding and abetting that Ponzi scheme).

[2] Respondents' position that those claims were not settled [Rec.Resp. at 9] places form over substance. As part of a settlement, the Receiver obtained money in exchange for obtaining a court order permanently barring the claims.

[3] *Isaiah*, 960 F.3d at 1306.

[4] Respondents' claim that the Fifth Circuit did not address standing [Rec.Resp. at 15] is incorrect. The Fifth Circuit expressly held that the Receiver had standing to settle and bar Petitioners' claims because those claims "are derivative of and dependent on"

position seemingly would confer on district courts boundless authority, even in the absence of jurisdiction, to permit receivers to seize and resolve a universe of claims they deem necessary to obtain a favorable settlement. *See* Rec.Resp. at 21 n.8. Certiorari is appropriate to allow this Court to resolve the circuit split and define the proper analysis of receivership bar orders.

A. "Broad equitable authority" does not confer jurisdiction

Respondents' discussion of receivership courts' general *authority* to issue bar orders [Rec.Resp. at 15–25] is irrelevant to the issue presented, which concerns whether the district court had the *jurisdiction* to bar claims neither belonging to the parties before it nor seeking the receivership entities' property. *See*, *e.g.*, Pet. at i.

A court's exercise of any "power" without jurisdiction is "gratuitous and thus inconsistent with the Art. III limitation." *Simon v. E. Kentucky Welfare Rights Org.*, 426 U.S. 26, 38 (1976). As the Ninth Circuit has explained regarding the analogous relationship

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the Receiver's claims, meaning that "[t]he district court had subject matter jurisdiction over these claims." *See* Pet.App.29–32. The dissent pointed out that Petitioners' "claims are distinct from the Receiver's, meaning the district court lacked jurisdiction to adjudicate them, or to enjoin them." Pet.App.45 (Willett, J., dissenting).

between a court's jurisdiction and its power under bankruptcy laws:

> Subject matter jurisdiction and power are separate prerequisites to the court's capacity to act. Subject matter jurisdiction is the court's authority to entertain an action between the parties before it. Power under section 105 is the scope and forms of relief the court may order in an action in which it has jurisdiction.

In re Am. Hardwoods, Inc., 885 F.2d 621, 624 (9th Cir. 1989). Just as a bankruptcy court lacks power where it lacks jurisdiction, "broad equitable authority" [Rec.Resp. at 17] does not create otherwise nonexistent receivership jurisdiction. Respondents' argument and the Fifth Circuit's holding that a court may unmoor its authority from its jurisdiction is simply incorrect and merits this Court's review.

Petitioners acknowledge that under appropriate circumstances, a receiver may seek orders barring claims by or against receivership entities and property. The question here is whether bar orders may reach beyond the Receivership estate to seize claims belonging to third parties against third parties. Outside of the Fifth and Tenth Circuits, the law is clear that a receiver may not "su[e] a third party on behalf of [investors] to enforce a personal right of theirs." *Troelstrup v. Index Futures Group, Inc.*, 130 F.3d 1274, 1277 (7th Cir. 1997). A receiver—comparable to a bankruptcy trustee—may not settle, release, and seek to bar those

same claims.[5] *Cf. DSQ Prop. Co., Ltd. v. DeLorean*, 891 F.2d 128, 131 (6th Cir. 1989).

1. The existence of bar orders in other cases does not answer the question presented.

None of the cases cited by Respondents [Rec.Resp. at 16–20] support the proposition that a district court has authority to bar claims over which it lacks subject-matter jurisdiction.

Other than *SEC v. DeYoung*, 850 F.3d 1172 (10th Cir. 2017), and *SEC v. Quiros*, 966 F.3d 1195 (11th Cir. 2020), Respondents' cited cases involve courts temporarily enjoining claims against *the actual receivership entities*. *See SEC v. Wencke*, 622 F.2d 1363, 1369 (9th Cir. 1980) (addressing stay of "all proceedings against the receivership entities"); *Liberte Capital Group, LLC v. Capwill*, 462 F.3d 543, 553 (6th Cir. 2006) (same); *SEC v. Byers*, 609 F.3d 87, 90 (2d Cir. 2010) (staying involuntary bankruptcy petitions involving receivership entities); *Schauss v. Metals Depository Corp.*, 757 F.2d 649, 651 (5th Cir. 1985) (discussing the effect of a temporary bar order issued by another court).

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[5] Respondents' suggestion that bar orders must be permitted to cover third parties' claims because otherwise "the parties would simply release them via settlement" [Rec.Resp. at 27] misperceives Respondents' own argument about the proper scope of bar orders. Under current jurisprudence, bar orders may cover future claims by third parties (1) seeking receivership assets or (2) seeking to bring claims belonging to the receiver. Neither type of claim is at issue here.

The bar orders at issue are distinguishable. First, these bar orders are permanent, meaning the claims were finally adjudicated. Second, these bar orders enjoined non-Receivership plaintiffs from recovery for investors' personal harms caused by non-Receivership wrongdoers. *See*, *e.g.*, Pet.App.97–99.

In *SEC v. Quiros*, a receiver did seek to permanently enjoin claims brought by former lawyers of the individual in receivership, Quiros, against Quiros's insurance carrier. 966 F.3d at 1198. The carrier agreed to conditionally pay the lawyers, but those payments became tied up in the receivership asset-freeze. *Id.* Quiros later fired the lawyers, who obtained leave from the asset-freeze to file suit against the insurer in state court. *Id.* An approved receiver settlement deal barred the lawyers' claims but was reversed as not necessary to the settlement. *Id.* at 1198, 1202. The *Quiros* court did not discuss that receiver's standing because it was undisputed. The lawyers' claims sought Quiros's insurance policy proceeds, and so the lawyers' claims truly were derivative of Quiros's. The claims there, unlike here, fell within the ambit of the receivership *res*, which is why the *Quiros* lawyers needed the court's permission to bring the state-court action. Had the lawyers' claims not been derivative of Quiros's or unrelated to the receivership *res*, the Eleventh Circuit likely would have applied its recent holding that a receiver lacks standing to bring claims belonging to non-receivership entities. *See Isaiah*, 960 F.3d at 1308.

Insofar as *Lloyds* upheld a bar order in part, that case was consistent with *Quiros*. *See SEC v. Stanford*

Int'l Bank, Ltd., 927 F.3d 830, 850 (5th Cir. 2019) (*Lloyds*).[6] The portion of the bar order affirmed in *Lloyds* enjoined a direct action for proceeds of the receivership entity's insurance policy. *Id.* Thus, "the Receiver had standing to pursue [and settle] *its own* claims as coinsured," and the district court had jurisdiction and authority to protect the receivership *res* by barring third parties from bringing the same claims. *Id.* (emphasis in original).

If bar orders are issued as often as Respondents contend, review by this Court of the proper limits of receivership courts' jurisdiction to issue them is warranted. One of Congress's earliest acts aimed to promote comity by curbing abuse of federal litigation bars. *See* 28 U.S.C. § 2283. Improper issuance of bar orders in receivership cases could undermine this Court's policy of "preserv[ing] the ability for investors to obtain relief under state laws." *See Chadbourne & Parke LLP v. Troice*, 571 U.S. 377, 394 (2014).

2. Bar orders' "propriety" is a red herring

The question presented is whether a court lacking Article III standing to hear claims may nevertheless bar those claims as part of a receiver's settlement. Respondents' arguments regarding the "factbound" inquiry of the propriety of any given bar order [Rec.Resp. at 21–22] are immaterial. Standing determinations and jurisdictional inquiries present a predominantly

[6] This Court denied review of *Lloyds*. *Becker v. Janvey*, 140 S. Ct. 2567 (2020).

legal question. *See Pederson v. Louisiana State Univ.*, 213 F.3d 858, 869 (5th Cir. 2000). Petitioners are requesting that the Court describe the proper test for the scope of bar orders in receivership cases. It will be the lower courts' job on remand to apply that test.[7]

B. The split is clear

Respondents admit, and the Fifth Circuit acknowledged, that the claims being barred do not belong to the Receiver. Rec.Resp. at 24; Pet.App.28–29. Respondents argued, and the Fifth Circuit apparently agreed, that ownership of the claims makes no difference because a receiver may resolve, and thus a district court may bar, claims that do not belong to a receiver or seek receivership property. Rec.Resp. at 24; Pet.App.28–29.

But the panel majority here went further, holding that, upon the appointment of a receiver, a receivership entity's "investors will have hypothetical claims that they could independently bring *but for the receivership*." Pet.App.30. The Fifth Circuit explained that a receivership "exists precisely to *gather such interests* in the service of equity and aggregate recovery." *Id*. The Fifth Circuit was clear: Petitioners' state-law claims against Willis/BMB became the exclusive property of

[7] For the same reason, the arguments raised by the Willis parties in their response are irrelevant. The Willis parties argue that without the bar order they would not have settled and the investors may receive less or nothing at all if the claims are litigated. Willis.Resp. at 1–12. That may well be. But jurisdiction is not determined by outcome.

the Receiver, who "gathers" them immediately upon his appointment. Thus, despite the panel majority's purported agreement that the Receiver did not own (but could nonetheless settle) investors' claims, the Fifth Circuit in fact held that investors' claims *belong* to the Receiver. This Fifth Circuit holding conflicts with other circuits' rejection of a receiver's standing to bring (let alone *seize*), settle, and release third-party claims. *See* Pet. at 8–15.

The *intra*-circuit split [Rec.Resp. at 25–26] between this case and *Lloyd's* further reflects the confusion requiring this Court's resolution. Contrary to Respondents' suggestion that the Fifth Circuit will resolve its own split, *this case* should have been an opportune vehicle for the Fifth Circuit to review en banc given the shared factual background with *Lloyds*, but the court declined. *See* Rec.Resp.App.17a. More importantly, even a hypothetical future resolution of the intra-circuit split at the Fifth Circuit in favor of the majority view by other circuits would still leave a split between the majority and the Tenth Circuit.

Respondents' argument that a receiver's standing to bring a claim is distinct from a court's jurisdiction to bar a claim relies on a single case holding that receivership courts have jurisdiction to decide cases brought by receivers, even if that eventual decision is that the receiver lacked standing to bring the claim at issue. Rec.Resp. at 27–28 (citing *Eberhard v. Marcu*, 530 F.3d 122 (2d Cir. 2008)). But the issue here is not whether the district court had jurisdiction over the receiver's complaint. The issue is whether a district court has

jurisdiction to settle and bar claims over which the district court lacked jurisdiction.

In short, this Court should not be distracted by Respondents' attempt to downplay the significance of the growing split amongst the circuit courts. The standing issue presents a largely legal question of jurisdiction, not "equitable authority." Only this Court can provide resolution.

C. Respondents' timeliness argument is a red herring

The Court need look no further than the Fifth Circuit's January 21, 2020, order denying en banc rehearing and this Court's rules to reject any contention that the Petition was untimely. *See* Pet.App.118; *see also* Sup. Ct. R. 13.3.[8]

This Court's rules expressly provide that any "appropriately entertain[ed]" petition for rehearing tolls the start of the 90-day period to file in this Court. Sup. Ct. R. 13.3. Respondents attempt to avoid the permissive breadth of this rule by arguing that the En Banc Petition was not "appropriately entertain[ed]" because

[8] Because the jurisdictional/timeliness argument lacks merit, it presents no "complication" precluding review [Rec.Resp. at 12]. Nor did Petitioners "omit" background. Rec.Resp. at 13. Petitioners' jurisdictional statement explains that "[t]he Fifth Circuit rendered its decision on December 19, 2019, and issued its mandate that same day." Pet. at 1. Petitioners did not include reference to the Fifth Circuit order denying a briefing extension because that ministerial order has no bearing.

the mandate's issuance purportedly affected jurisdiction. *Id.* That argument fails for at least two reasons.

First, a mandate is a procedural creature that relates to finality, not jurisdiction. *Cf. Thomsen v. Cayser*, 243 U.S. 66, 83 (1917) (holding appellate court "possessed" jurisdiction when it "received and granted a petition for rehearing" and "ordered a recall of the mandate previously issued"). Appellate courts' "power to recall and reform a mandate even after issuance is . . . well established." *Sparks v. Duval County Ranch Co., Inc.*, 604 F.2d 976, 979 (5th Cir. 1979), *aff'd on other grounds sub nom. Dennis v. Sparks*, 449 U.S. 24 (1980); 5th Cir. R. 41.2; *see also Hawaii Hous. Auth. v. Midkiff*, 463 U.S. 1323, 1324 (1983) (holding that mandates may be recalled at the courts' discretion). Here, the Fifth Circuit's issuance of the mandate, which Petitioners moved to recall, did not terminate jurisdiction.

Second, the Fifth Circuit may entertain a second rehearing petition. *Cf. United States v. Jobe*, 101 F.3d 1046 (5th Cir. 1996) (issuing new opinion on second motion for rehearing); *Sun Oil Co. v. Burford*, 130 F.2d 10, 13 (5th Cir. 1942) ("[W]e have ordered the mandate recalled, and shall proceed to a consideration of the second petition for a rehearing on its merits."), *rev'd on other grounds*, 319 U.S. 315 (1943). The plain language of the January 2020 order unmistakably shows that the Fifth Circuit entertained the En Banc Petition, and that three judges "did not *participate in the consideration* of the rehearing en banc." *See* Pet.App.118. That order states that the Fifth Circuit was "*treating* the

Petition for Rehearing En Banc as a Petition for Panel Rehearing." *Id*. Respondents' position that the Fifth Circuit refused to consider the En Banc Petition defies the record.[9]

Rule 13.3 states that any rehearing petition considered by the Fifth Circuit tolls the 90-day period for filing a petition in this Court. *See* Sup. Ct. R. 13.3. The order denying rehearing states clearly that the Fifth Circuit accepted the En Banc Petition and, properly exercising its jurisdiction on January 21, 2020, declined to grant rehearing. *See*, *e.g.*, Pet.App.118. That date triggered the 150-day period within which to seek review.

Ninety days from January 21 is April 20. Approximately one month before that deadline, the Court globally extended the petitioning period by an additional 60 days, which in this case pushed the deadline to June 19. The Petition was timely.

[9] Respondents rely on *Allegrucci v. United States*, 372 U.S. 954 (1963), for the proposition that a lower court cannot extend the time to seek review in this Court. *See* Rec.Resp. at 13 n.6. Respondents' secondary authority explains that in *Allegrucci* the Third Circuit *inappropriately* entertained "an out-of-time petition for rehearing filed after the petition for certiorari had been filed and expressly designed to cure the timeliness defect of the petition for certiorari." *See* Stephen M. Shapiro et al., Supreme Court Practice 6–20 (11th ed. 2019). Here, in contrast, the En Banc Petition was timely filed prior to the Petition, and had nothing to do with curing any timeliness defect in this Court.

CONCLUSION

The Rupert Parties and Able Parties pray that the Court grant their Petition, review this case on the merits, and resolve the question of whether a receiver can settle and bar claims over which the district court lacks jurisdiction.

Respectfully submitted,

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