No. _____

In the
Supreme Court of the United States

GMAG, LLC; MAGNESS SECURITIES LLC; GARY D. MAGNESS; and MANGO FIVE FAMILY, INC., in its Capacity as Trustee of the Gary D. Magness Irrevocable Trust,
Petitioners,

v.

RALPH S. JANVEY, in his Capacity as Court-Appointed Receiver for the Stanford International Bank Limited, et al.,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioners ("Magness") invested tens of millions of dollars in a bank that turned out to be one of the largest and best-concealed Ponzi schemes in American history. Respondent, the receiver appointed after the bank's collapse, sued Magness to recover loans that Magness had received from the bank in amounts substantially less than his lost investments. The jury returned a verdict for Magness on its good-faith defense, finding any investigation into the bank would have been futile.

On appeal, the Fifth Circuit not only overturned the jury's verdict but entered judgment against Magness based on a factual question that was never put to the jury. The Fifth Circuit first asked the Texas Supreme Court to decide whether a transferee can assert good faith on the ground that a diligent investigation would have been futile. Resolving that question of first impression, the Texas Supreme Court held that a transferee must conduct a diligent investigation to assert good faith. Based on that intervening legal ruling, Magness' good-faith defense turned on a factual question that the jury never decided and was expressly told was not dispositive. But instead of remanding for the jury to resolve that disputed factual issue, the Fifth Circuit resolved the factual dispute itself. Based on its own skewed reading of a trial record aimed at different issues, the court reversed the jury's verdict and rendered judgment against Magness.

The question presented is:

Whether the Seventh Amendment and due process permit a court of appeals to reverse a jury verdict based on the court's own independent examination of a trial record to answer disputed factual questions that were never presented to or resolved by the jury.

PARTIES TO THE PROCEEDING

GMAG, LLC; Magness Securities, LLC; Gary D. Magness; and Mango Five Family, Inc., in its capacity as trustee of the Gary D. Magness Irrevocable Trust are petitioners here and were defendants-appellees below.

Ralph S. Janvey, in his capacity as court-appointed receiver for the Stanford International Bank Limited, et al., is respondent here and was plaintiff-appellant below.

CORPORATE DISCLOSURE STATEMENT

GMAG, LLC; Magness Securities, LLC; and Mango Five Family, Inc., Trustee of the Gary D. Magness Irrevocable Trust have no parent corporations, and no publicly held company owns 10 percent or more of their stock.

STATEMENT OF RELATED PROCEEDINGS

Janvey v. GMAG, L.L.C., No. 17-11526 (5th Cir.) (opinion issued and judgment entered Jan. 9, 2019; order granting rehearing, vacating opinion, and certifying question to Supreme Court of Texas issued May 24, 2019; opinion reversing district court's judgment and entering judgment in favor of receiver issued Oct. 8, 2020; order denying rehearing issued Feb. 23, 2021; mandate issued Mar. 3, 2021; order denying motion to recall mandate issued Apr. 9, 2021).

Janvey v. GMAG, L.L.C., No. 19-0452 (Tex.) (opinion answering certified question of state law issued Dec. 20, 2019).

Janvey v. GMAG LLC, No. 3:15-CV-00401-N (N.D. Tex.) (judgment entered Sept. 14, 2017; amended judgment entered Dec. 14, 2017; judgment on remand entered April 9, 2021).

Janvey v. GMAG, L.L.C., No. 21-10483 (5th Cir.) (pending post-judgment appeal on discrete issue of permissible costs and prejudgment interest docketed May 10, 2021).

There are no additional proceedings in any court that are directly related to this case.

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PETITION FOR WRIT OF CERTIORARI

The Fifth Circuit's extraordinary decision in this case deviates radically from settled precedent and cannot be reconciled with the most basic Seventh Amendment guarantee that a jury shall resolve disputed questions and the equally fundamental due process right to present every available defense. The panel reversed a jury verdict for petitioners and rendered judgment for respondent based on its own independent answer to a factual question that the jury was never asked and was instructed it need not resolve, and that only became relevant due to an intervening change of the law on appeal. By resolving that factual issue itself rather than remanding for a new trial before a properly instructed jury, the panel violated petitioners' constitutional rights and broke with decades of consistent precedent from this Court and others. This Court should not permit that ruling to stand without further review.

Petitioners are GMAG, LLC; Magness Securities, LLC; Gary D. Magness; and Mango Five Family, Inc., in its capacity as trustee of the Gary D. Magness Irrevocable Trust (collectively, "Magness"). Magness was among the largest depositors in Stanford International Bank ("SIB"), which turned out to be a massive Ponzi scheme—one of the largest and most effectively concealed schemes in U.S. history. After the scheme was exposed and the bank collapsed, respondent Ralph S. Janvey ("the Receiver") was appointed to recover and redistribute SIB's assets, and brought fraudulent-transfer claims against Magness seeking to claw back loans that Magness had received from SIB and that had been secured by Magness' own

substantially larger (and now-evaporated) investments in the bank. At trial, the jury rejected the Receiver's fraudulent-transfer claims, finding, based on the instructions it was given, that Magness had no actual knowledge of SIB's Ponzi scheme and that no reasonable person could have discovered it. The jury was not asked to determine whether Magness in fact conducted a diligent (but futile) investigation to determine whether SIB was fraudulent; on the contrary, based on its understanding of Texas law, the district court specifically instructed the jury that Magness was "not required to prove that [it] actually conducted a diligent inquiry." ROA.11675.[1]

On appeal, the Receiver argued that as a matter of Texas law, no good-faith defense is available under the Texas Uniform Fraudulent Transfer Act ("TUFTA") for a transferee on inquiry notice. A panel of the Fifth Circuit initially agreed, but then vacated its opinion and asked the Texas Supreme Court to clarify the contours of the TUFTA good-faith defense. In answering that question of first impression, the Texas Supreme Court rejected the Receiver's argument and held that a good-faith defense is available to a transferee on inquiry notice, but only if the transferee conducted a diligent investigation. Thus, the availability of the defense now turned on the answer to the very factual issue that the district court instructed the jury not to consider.

While the need for a remand for a new trial to allow the jury to answer that factual question in the first instance would seem inescapable, the Fifth

[1] "ROA" citations refer to the Fifth Circuit record on appeal.

Circuit panel took matters into its own hands. Despite a jury-trial record addressed to different questions and on which Magness had prevailed—and the presence of a specific instruction that the jury need not decide the question—the Fifth Circuit evaluated the facts for itself and found that no diligent investigation had occurred. On that basis, the panel reversed the existing jury verdict, precluded any jury from considering the newly relevant factual issue raised by the Texas Supreme Court's intervening decision, and rendered judgment for the Receiver for tens of millions of dollars.

That remarkable ruling contravened established law and violated Magness' constitutional rights twice over. By improperly wresting from the jury the disputed factual question of whether Magness conducted a diligent investigation—a question that only became relevant in light of an intervening change in law on appeal, and that the jury was expressly told not to decide—the panel decision squarely conflicts with decades of this Court's Seventh Amendment precedents and lower court cases faithfully applying them. And by denying Magness a retrial to litigate that newly relevant factual issue, the panel's decision also deprives Magness of its long-recognized due process right to present every available defense, an independent right that applies regardless of the factfinder at trial. A decision undermining just one of those fundamental constitutional protections would be a strong candidate for certiorari; the decision below undermines both at once, and throws what was previously established law into serious confusion. This Court should grant review and reverse.

OPINIONS BELOW

The Fifth Circuit's opinion is reported at 977 F.3d 422 and reproduced at App.1-15. Its order denying rehearing is unreported and reproduced at App.16-17. The Fifth Circuit's initial (now vacated) opinion is reported at 913 F.3d 452 and reproduced at App.18-29. Its order granting panel rehearing, withdrawing its initial opinion, and certifying the relevant state-law question to the Supreme Court of Texas is reported at 925 F.3d 229 and reproduced at App.30-42.

The Supreme Court of Texas's opinion answering the certified question is reported at 592 S.W.3d 125 and reproduced at App.43-59.

The district court's decisions denying the Receiver's motions for judgment as a matter of law and for a new trial are unreported but available at 2017 WL 8780882 and 2017 WL 8780883, and reproduced at App.60-64 and App.65-75.

JURISDICTION

The Fifth Circuit issued its decision on October 8, 2020 and denied rehearing on February 23, 2021. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment's Due Process Clause provides: "No person shall … be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V.

The Seventh Amendment provides: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be

otherwise re-examined in any Court of the United States, than according to the rules of the common law." U.S. Const. amend. VII.

STATEMENT OF THE CASE

A. Factual Background

1. SIB was one of the largest and most effectively concealed Ponzi schemes in U.S. history. For nearly two decades, SIB sold fraudulent certificates of deposit ("CDs") that purported to pay fixed interest rates higher than those offered by U.S. commercial banks, and claimed to derive its returns from a well-diversified portfolio of marketable securities. App.2. In fact, those purported returns came from money procured from new investors. *Id.* SIB deceived more than 18,000 investors before the U.S. Securities and Exchange Commission ("SEC") uncovered the scheme in 2009. *Id.* The scheme left its investors with some $7 billion in losses.

Magness was one of SIB's largest investors, eventually purchasing over $79 million in SIB CDs. *Id.* Magness first invested with SIB in 1999, purchasing a six-month CD that paid interest at a rate higher than U.S. banks. ROA.17788-89, 19530, 20085. SIB timely paid Magness the principal and accrued interest on that CD at the end of its six-month term. ROA.17788, 18347.

After that initial positive experience, which appeared to confirm SIB's legitimacy, Magness made further investments beginning in 2004. Before making those additional investments, Gary Magness personally visited SIB's offices in Antigua, where he learned about SIB's tax structure and regulatory oversight, and was told that the SEC had previously

investigated SIB on multiple occasions and found no issues. ROA.17791-94. Gary Magness considered the SEC results particularly salient because they meant that "somebody else was doing the due diligence besides us" with the advantage of being "inside of the bank." ROA.17794. Gary Magness considered the risk profile of his investments with SIB to be "low," because (he believed) the investments were bank CDs and the interest rate was favorable but in line with similar investment products. ROA.17810-13; *see* ROA.18096.

In 2006, Magness formed a family trust company whose investment committee undertook a quarterly review of Magness' entire investment portfolio, including the SIB CDs. ROA.17822. The committee paid special attention to the SIB CDs and other non-publicly traded assets, because the value of those assets was harder to assess. ROA.17841-42, 17851, 18124-25, 19835-38, 18091-92. Because some of the committee members were unfamiliar with SIB, they sought additional information regarding that investment. ROA.17822, 17933, 18124-25, 18270, 18706-07, 20172. The committee was told that SIB CDs were backed by a worldwide investment portfolio (not by bank loans, as was more typical for other CDs in the United States). ROA.19890. While the committee understood that SIB CDs presented more risk than other CDs, they did not perceive them as a "risky" investment. ROA.17822, 18350-51, 18429-31.

In October 2007, the committee sought more information about the SIB CDs to determine whether and how the mortgage crisis affected SIB's portfolio. ROA.17843. The committee asked Chuck Wilk, an independent advisor and third-party consultant

familiar with nontraditional investments, to further investigate the SIB investment. ROA.17843-44. Wilk provided a positive report on the SIB CDs, observing that "lots and lots of banks" were "offering [a] similar product," including Credit Suisse and UBS. ROA.18376-85.

As the mortgage crisis deepened, the committee arranged to hear from SIB's president, Juan Rodriguez-Tolentino, in March 2008 to address SIB's exposure to the mortgage markets. ROA.19890. Rodriguez-Tolentino reported that mortgages were not a substantial portion of SIB's investments, and provided additional information that left the committee with a positive view of SIB. ROA.17853-56, 18816-17, 18163, 18247, 18292-95, 18345-46. Overall, despite conducting a number of due diligence investigations, Magness (like thousands of other SIB investors) had not found anything improper or illegal about SIB as of October 2008.[2]

2. In October 2008, in the midst of the Great Recession and the accompanying stock-market meltdown, Magness found itself in need of immediate funds to respond to margin calls from its principal margin lenders. ROA.17859-62, 18165-66, 18249-50, 18295-96, 18445-46, 18913-14, 19908. In order to

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[2] The panel opinion notes a July 2008 Bloomberg article repeating unconfirmed rumors that the SEC was investigating SIB. App.3. There was no evidence at trial that Magness ever saw this article, that the market responded negatively to it, or that any other reports or articles confirmed it. Likewise, nothing in the investment committee meetings in October and December 2008 or subsequent follow-up emails shows any suspicion of fraud. *See* ROA.19908, 20023, 20300.

respond to the margin calls, Magness sought to obtain the necessary funds from SIB. As the evidence at trial showed, that effort was motivated by the critical need for Magness to obtain immediate funds to meet its margin calls, not by any new information suggesting that there might be any problem with SIB. *See, e.g.*, ROA.17787-88, 17875-78, 17888-89, 18284-85, 18295, 18314, 18687, 20021.

The terms of the SIB CDs gave SIB discretion to allow early withdrawals, but did not require SIB to permit them. *See* ROA.17878-79, 17962-65, 19587 (explaining that SIB CDs were an "illiquid investment"). Consistent with those terms, SIB told Magness that rather than terminate the CDs at that time, it would loan Magness up to 80% of their value. *See* ROA.19553, 19928-34. That response accorded with the terms of the CDs and did not cause Magness concern; instead, Magness was reassured when despite the crisis, SIB was able within days to loan Magness $25 million, and then another $63.2 million (after Magness repaid the first loan with accrued interest from its SIB CDs and over $700,000 in additional Magness funds). ROA.17870-71, 17879-80, 17963-64, 18165-66, 19928-38. Even after those transactions, Magness continued to evaluate SIB (where it still had tens of millions of dollars invested even net of the loans), arranging a further meeting with SIB executives in January 2009 to discuss SIB's financial health. ROA.18029-31, 18179-80; *see* App.9.

B. Procedural History

1. In February 2009, the SEC announced that SIB was a massive Ponzi scheme and charged several of its officers with fraud. The district court appointed the

Receiver to recover SIB's assets and distribute them among the investors. App.2.

In February 2015, despite Magness' status as a substantial net victim of the scheme, the Receiver sued Magness to claw back the loans that Magness received in October 2008. The Receiver claimed that those loans—which were secured by Magness' larger investments in SIB CDs that were wiped out by SIB's collapse—constituted fraudulent transfers under the Texas Uniform Fraudulent Transfer Act ("TUFTA"). *See* Tex. Bus. & Com. Code §24.005.[3] Magness defended against the Receiver's claims on the ground that it had received the loan transfers in good faith, *id.* §24.009(a), explaining that it sought those loans to meet massive and urgent margin calls resulting from the stock market meltdown in the Great Recession of 2008, not because of any knowledge or concern that SIB was a Ponzi scheme.

The case proceeded to a seven-day jury trial. At trial, the Receiver squarely conceded—contrary to the Fifth Circuit's ruling here—that Magness had conducted an investigation into his investments with SIB, admitting that "the undisputed facts in this case show that [Magness] *did* investigate the facts that

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[3] The Receiver claimed that the entire $88.2 million that Magness received in loans from SIB in October 2008 constituted fraudulent transfers, even though Magness had already repaid the initial $25 million loan before receiving the second $63.2 million loan and thus never had an outstanding loan amount greater than $63.2 million, despite substantially greater investments in the CDs. *See supra* p.8; ROA.17876, 18631, 19925-27. Magness subsequently paid the Receiver approximately $8.5 million, leaving a disputed amount of approximately $79.7 million. *See* ROA.9996.

[according to the Receiver] put them on notice of SIB's fraud or insolvency." ROA.9575 (emphasis in original); *see also* ROA.17777-78 (admitting that Magness "got to talk to [SIB's] president himself" to determine "what exactly is this bank invested in? What strategies is this bank involved in that backs up these certificates of deposit?"). That concession was prudent, given the extensive evidence showing that Magness had thoroughly investigated SIB throughout the period at issue—which was hardly surprising, given that Magness had invested tens of millions of dollars in SIB CDs over that period. *See supra* pp.5-9.

After the presentation of evidence, the Receiver moved for judgment as a matter of law under Federal Rule of Civil Procedure 50(a). The Receiver did *not* contend that he was entitled to judgment because Magness failed to conduct any reasonable investigation into SIB; instead, he argued only that the evidence showed Magness was on inquiry notice, and that the existence of inquiry notice alone obviated Magness' good-faith defense as a matter of Texas law. ROA.11563-78. The district court reserved decision on the Receiver's motion and sent the case to the jury.

The jury found for Magness. It determined that Magness did not have any actual knowledge that SIB was a Ponzi scheme. App.60-61; *see* ROA.11673. The jury found Magness was on "inquiry notice" of the fraud, meaning Magness knew facts that "would have excited the suspicions of a reasonable person and led that person to investigate"; but it did not determine when Magness was first put on inquiry notice, or assess the sufficiency of Magness' investigation, because it found that any investigation would have

been futile as "diligent inquiry would not have revealed to a reasonable person that Stanford was running a Ponzi scheme." ROA.11673, 11675. Those findings were consistent with the district court's instructions, which instructed the jury that it need not address the sufficiency of Magness' investigation and that a futility finding was sufficient to demonstrate that Magness should prevail on its good-faith defense. In particular, the district court instructed that Magness was "not required to prove that [it] actually conducted a diligent inquiry" in order to prove its good-faith defense. ROA.11675.

The Receiver filed a renewed motion for judgment as a matter of law under Federal Rule of Civil Procedure 50(b), ROA.11651, and a motion for entry of judgment under Federal Rule of Civil Procedure 58, ROA.11685. Neither motion contended that the Receiver was entitled to judgment because Magness failed to show that he conducted a diligent investigation; instead, both argued only that Magness was on inquiry notice and so could not show good faith as a matter of law. The district court denied both motions and entered judgment for Magness in accordance with the jury's verdict. App.61 (explaining that Magness "prevailed at trial on [its] good-faith defense under the [TUFTA]"). The district court also denied the Receiver's subsequent motion for a new trial and second renewed motion for judgment as a matter of law. App.66.

2. On appeal, a panel of the Fifth Circuit initially accepted the Receiver's argument that the existence of inquiry notice alone was sufficient to negate Magness' good-faith defense under TUFTA, and so reversed the

jury's verdict and rendered judgment for the Receiver. App.28-29. On rehearing, however, the panel vacated that opinion. App.30-31. Recognizing Magness' contention that the application of the TUFTA good-faith defense to this case presented "a significant issue of first impression," App.31, the panel certified to the Texas Supreme Court the state-law question of whether the TUFTA good-faith defense is available to a transferee who had inquiry notice of fraudulent activity but "would not have been reasonably able to discover that fraudulent activity through diligent inquiry," App.42; *see* App.5 (recognizing that "the Texas courts to consider TUFTA good faith had not considered whether it includes a diligent investigation requirement").

3. The Texas Supreme Court accepted the certified question as a "determinative question[] of Texas law having no controlling Supreme Court precedent," framing the question as "whether a transferee on inquiry notice of fraudulent intent can achieve good faith without investigating its suspicions." App.44, 48. In answering that question, the court rejected the categorical view that a transferee on inquiry notice cannot assert the TUFTA good-faith defense. App.54-59. Instead, the court held that to assert good faith, a transferee on inquiry notice "must show at minimum that it investigated its suspicions diligently," by investigating "the suspicious circumstances initially raising concern." App.44, 48, 59. The Texas Supreme Court expressly reserved decision on what level of investigation is sufficiently diligent to establish good faith or whether Magness had in fact conducted a diligent investigation. App.48 n.1, 56-58.

4. In light of the Texas Supreme Court's decision, Magness' good-faith defense under TUFTA now turned on factual questions the jury had never decided (and indeed, was expressly told not to decide). The only proper course at that juncture was for the panel to remand this case for a new trial at which a properly instructed jury could consider and resolve those factual questions as the Seventh Amendment requires. Instead, the Fifth Circuit panel took a different (and unconstitutional) approach: It chose to decide the factual questions raised by the Texas Supreme Court's decision itself, despite a trial record aimed at different ultimate issues and a jury expressly instructed not to address the now-dispositive factual issue. The panel proceeded to reverse the jury's verdict for Magness and render judgment for the Receiver, based on its own finding that Magness did not specifically conduct a diligent inquiry at what the panel considered the critical moment: the month of October 2008, when (according to the panel) "the jury found [Magness] to be on inquiry notice." App.8.

The panel recognized Magness had in fact "investigated [its] investments prior to and after October 2008," but dismissed those investigations because they did not coincide with the disputed transfer, and because (according to the panel) they were not "investigations into suspected fraud" but "were merely inquiries by [Magness'] investment committee to inform itself of the nature and health of Magness's investments." App.9. The panel likewise dismissed the Receiver's concession that Magness conducted an investigation. *See* App.8-10.

The panel was equally dismissive of the obvious Seventh Amendment and due process concerns raised by its decision to reverse the jury verdict below by unilaterally resolving a newly relevant factual question that the jury was never asked to consider and was affirmatively told not to resolve. As to the Seventh Amendment, the panel accepted that "actions to recover fraudulent transfers are entitled to be tried before a jury." App.13; *see Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 64 (1989). But the panel held that its decision to reverse the jury's verdict and render judgment for the Receiver did not implicate that constitutional guarantee, because in the panel's view—despite the Receiver's admissions, the evidence described above showing that Magness did investigate SIB, and an evidentiary record assembled under a different understanding of the critical factual issues—"no reasonable jury could find" that Magness "diligently investigated [its] initial suspicions of SIB's Ponzi scheme while on inquiry notice." App.13.

As to due process, the panel acknowledged that the Constitution guarantees every defendant "an opportunity to present every available defense." App.14 (quoting *Philip Morris USA v. Williams*, 549 U.S. 346, 353 (2007)); *see Lindsey v. Normet*, 405 U.S. 56, 66 (1972). But it found that principle adequately satisfied because Magness "had an opportunity to establish the affirmative defense" of "good faith" in the first trial—where the jury agreed Magness *had* established that defense based on the understanding of the law reflected in the instructions. App.14. The panel did not dispute that Magness had no opportunity in that first trial to litigate the factual question of whether Magness diligently investigated

its initial suspicions, a question that only became critical after the Texas Supreme Court rendered its decision. But instead of recognizing Magness' due process right to present that "available defense" to the jury in a new trial, the panel held that it could simply rule on that factual question itself, based on its own reexamination of a cold record from a trial that had no occasion to address the specific timing or diligence of Magness' investigations. *Id.* On that basis, the panel once again reversed the jury's verdict for Magness and rendered judgment for the Receiver. App.15.

REASONS FOR GRANTING THE PETITION

The decision below violates the Constitution twice over, betraying both the Seventh Amendment right to a jury trial in civil cases and the due process right to present every available defense. It contravenes decades of this Court's precedents and countless lower-court decisions faithfully applying them, and sows confusion into what was until now clear and established doctrine. Further review is plainly warranted.

The Seventh Amendment preserves the historically treasured right to a jury trial in civil cases, a "basic and fundamental feature of our system of federal jurisprudence." *Jacob v. City of New York*, 315 U.S. 752, 752 (1942). Given that constitutional command, it has been settled law for more than a century that a court cannot "substitute[] itself for the jury" by "find[ing] the facts involved in the issue, and render[ing] judgment thereon." *Baylis v. Travelers' Ins. Co.*, 113 U.S. 316, 320-21 (1885). That, however, is precisely what the Fifth Circuit did here. The jury below was never asked to decide the intensely factual

question whether Magness diligently investigated any initial suspicions it may have had regarding SIB; instead, the jury was told not to address that issue, and ruled for Magness on the ground that any investigation would have been futile, which established good faith under the district court's instructions. On appeal, however, the Texas Supreme Court took a different view of the law, holding that good faith requires a diligent investigation. That intervening change in the law raised a new factual issue—whether Magness had conducted a diligent investigation—that the jury below never resolved and on which the Receiver never sought judgment at trial.

Given that new factual issue, whose resolution the Seventh Amendment squarely preserves for the jury, the only constitutional course available to the Fifth Circuit was to remand for a new jury trial. Instead of taking that course, however, the panel took matters into its own hands, relying on its own independent evaluation of the cold paper record from a trial directed at different issues to reverse the jury's verdict and render judgment for the Receiver because (according to the panel) Magness had not produced adequate evidence at trial of a diligent investigation. That approach was plainly unconstitutional, and squarely conflicts with numerous decisions from this Court and from lower courts faithfully following this Court's precedent and the core command of the Seventh Amendment. The panel's sole justification for its disregard of Magness' Seventh Amendment rights—its assertion that no reasonable jury could find that Magness had conducted a diligent investigation—is a complete non-starter. It ignores that no jury was ever asked that question, that the

jury that actually heard the evidence was told not to answer the question, and that the jury-trial record was assembled under a different understanding of the law (under which the timing and thoroughness of Magness' investigation were irrelevant). To add insult to injury, the panel's misguided factual determination ignores extensive evidence (and the Receiver's own concession) that Magness did in fact investigate SIB, which made it into the record despite jury's focus on different issues.

The panel's refusal to remand for a new trial violated not only the Seventh Amendment, but the Fifth Amendment's guarantee of due process. As this Court has long held, due process guarantees defendants "an opportunity to present every available defense" before judgment can be rendered against them. *Philip Morris*, 549 U.S. at 353. By rendering judgment against Magness on a factual issue that only became relevant after an intervening change of the law on appeal, and that the jury was specifically instructed not to decide, the panel denied Magness that basic right and deprived it of any opportunity to present a full defense on the newly critical issue. That approach was fundamentally unfair, and cannot be reconciled with due process even independent of Magness' Seventh Amendment right to a jury trial. Regardless of whether the factfinder at trial is a judge or a jury, due process simply does not allow an appellate court to reverse a verdict for one party and render judgment for the other party on a factual issue that was not even relevant under the law at the time of trial.

The decision below is not only manifestly wrong, but exceptionally important. It misconstrues not one but two fundamental constitutional rights, eviscerating both the Seventh Amendment and due process. In asserting the power to wipe out a favorable jury verdict and render judgment on a factual issue that was never tried to the jury, it improperly aggrandizes the authority of appellate courts while simultaneously diminishing the protections available for civil defendants and the essential role of the factfinder at trial. And its reasoning and result create conflict and disharmony in what was until now settled law. Those pernicious effects and the substantial injustice of the decision below must not be permitted to stand without further review. This Court should grant certiorari.

I. The Fifth Circuit's Decision Contravenes Established Law And Eviscerates Fundamental Seventh Amendment And Due Process Protections.

A. The Decision Below Conflicts With Settled Precedent and Violates the Seventh Amendment by Depriving Magness of Its Right to a Jury Trial.

1. The Seventh Amendment commands that in civil cases at common law, "the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." U.S. Const. amend. VII. That Seventh Amendment right to a jury trial in civil cases "is a basic and fundamental feature of our system of federal jurisprudence." *Jacob*, 315 U.S. at 752. Indeed, it is

an "essential characteristic" of our federal judicial system that "in civil common-law actions, it distributes trial functions between judge and jury" by "assign[ing] the decisions of disputed questions of fact to the jury." *Byrd v. Blue Ridge Rural Elec. Co-op., Inc.*, 356 U.S. 525, 537 (1958); *see, e.g.*, *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 432 (1996).

Under the Seventh Amendment, "it is the province of the jury to hear the evidence and by their verdict to settle the issues of fact, no matter what the state of the evidence." *Slocum v. N.Y. Life Ins. Co.*, 228 U.S. 364, 387 (1913). "[W]hile it is the province of the court to aid the jury in the right discharge of their duty, even to the extent of directing their verdict where the insufficiency or conclusive character of the evidence warrants such a direction, the court cannot dispense with a verdict, or disregard one when given, and itself pass on the issues of fact." *Id.* at 387-88; *see, e.g.*, *Balt. & Carolina Line v. Redman*, 295 U.S. 654, 658-61 (1935). It has thus been settled law for well over a century that "the court errs if it substitutes itself for the jury, and, passing upon the effect of the evidence, finds the facts involved in the issue, and renders judgment thereon." *Baylis*, 113 U.S. at 320-21. That instruction applies with particular force to appellate courts, as appellate factfinding risks violating both the Seventh Amendment's core guarantee and its injunction against re-examining questions tried before the jury. *See, e.g.*, *Google LLC v. Oracle Am., Inc.*, 141 S.Ct. 1183, 1200 (2021) (recognizing that the Seventh Amendment "both requires that 'the right of trial by jury … be preserved' and forbids courts to 're-examin[e]' any 'fact tried by a jury'" (quoting U.S. Const. amend. VII)).

The constitutional right to have the jury rather than the court hear and determine all the dispositive facts cannot be lightly brushed aside. Quite the contrary: this Court "has always guarded with jealousy" the Seventh Amendment right to a jury trial in civil cases. *Slocum*, 228 U.S. at 387 (quoting *Baylis*, 113 U.S. at 321); *see also Jacob*, 315 U.S. at 752-53 ("A right so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the courts."). This Court has accordingly often (and recently) confirmed that the "constitutional guaranty" of the Seventh Amendment "operates to require that [factual] issues be settled by the verdict of a jury," as the Framers intended. *Slocum*, 228 U.S. at 388; *see Google*, 141 S.Ct. at 1200.

2. The decision below cannot be squared with those settled principles. After a seven-day trial, the jury below returned a verdict *for Magness*, finding that it was entitled to prevail on its good-faith defense based on a factual determination made dispositive under the trial court's instructions—namely, that any further investigation of SIB would have been futile. App.60-62. The jury was not asked to decide whether Magness in fact conducted a diligent investigation, *see* ROA.11667-75; on the contrary, the district court explicitly instructed the jury that Magness was "*not required to prove that* [it] *actually conducted a diligent inquiry*," ROA.11675 (emphasis added).

On appeal, however, that unasked and unanswered factual question became dispositive under the intervening decision of the Texas Supreme Court. In response to the Fifth Circuit's certified

question, the Texas Supreme Court held for the first time that in order to assert the TUFTA good-faith defense, a transferee on inquiry notice "must show at minimum that it investigated its suspicions diligently" by investigating "the suspicious circumstances initially raising concern." App.44, 48. Recognizing the unresolved factual issues that its decision raised, the Texas Supreme Court properly reserved decision on whether Magness had in fact conducted the necessary diligent investigation, *see* App.48 n.1, leaving that issue open for retrial before a properly instructed jury.

The Fifth Circuit, however, showed no such restraint. Rather than following the prudent and constitutionally required course of sending the case back for a jury to resolve the newly dispositive factual questions concerning the timing and sufficiency of Magness' investigation, the panel chose instead to resolve those disputed factual questions itself in the first instance, based on the paper record of a trial that was aimed at different issues and conducted on a legal understanding that rendered the disputed factual questions irrelevant (as the jury was instructed). *See* App.7-12. And despite all that and the substantial evidence in that record showing that Magness *did* investigate SIB, *see supra* pp.5-9—not to mention the Receiver's own explicit concession that Magness "*did* investigate the facts that [according to the Receiver] put them on notice of SIB's fraud or insolvency," ROA.9575 (emphasis in original)—the panel relied on its own assessment of the record to find that Magness had "not shown that they diligently investigated their suspicions (initial or otherwise) of SIB's Ponzi scheme while on inquiry notice." App.14-15. Based on that wholly inappropriate appellate factfinding, the panel

reversed the jury's verdict and rendered judgment for the Receiver, depriving Magness of any opportunity for a jury determination of whether he had conducted a diligent investigation.

That ruling runs squarely contrary to the Seventh Amendment and this Court's decisions applying it. Rather than "preserv[ing]" the "right of trial by jury," U.S. Const. amend. VII, the Fifth Circuit arrogated to itself the power to decide disputed factual questions that became relevant for the first time on appeal due to an intervening change in the law, and that the jury below had never considered (and indeed was instructed not to consider). The result was precisely what "the Seventh Amendment does not permit," namely, "the entry of judgment on a trial at law before a jury upon an issue of fact, without the verdict of the jury" on that issue. *Gasoline Prods. Co. v. Champlin Refin. Co.*, 283 U.S. 494, 499 (1931); *see, e.g.*, *Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394, 402 n.4 (2006) (appellate court cannot "itself determine the issues of fact and direct a judgment for the defendant, for this would cut off the plaintiff's unwaived right to have the issues of fact determined by a jury" (quoting *Redman*, 295 U.S. at 658)).

The panel's decision likewise conflicts with the decisions of other federal courts of appeals that have faithfully applied the constitutional text and this Court's precedents. *See, e.g.*, *Whelan v. Abell*, 48 F.3d 1247, 1252 (D.C. Cir. 1995) (recognizing that "for the court to enter judgment against the [jury's] verdict would improperly encroach on the verdict winner's constitutional right"); *Millers' Mut. Fire Ins. Ass'n of Ill. v. Bell*, 99 F.2d 289, 291 (8th Cir. 1938)

(recognizing that "because of the Seventh Amendment," an appellate court "may not itself determine the issues of fact"); *Dextone Co. v. Bldg. Trades Council of Westchester Cnty.*, 60 F.2d 47, 49 (2d Cir. 1932) (recognizing that "the Seventh Amendment does not permit the entry of judgment on a trial at law before a jury upon an issue of fact without the verdict of a jury"). In fact, with or without explicitly invoking the commands of the Seventh Amendment, numerous courts faced with similar circumstances have correctly concluded that where an intervening change in the law presents new factual questions, the jury must address those issues in the first instance and thus the proper course is to remand for the jury to consider the newly relevant factual questions. *See, e.g.*, *Zierke v. Agri-Systems*, 992 F.2d 276, 278-79 (10th Cir. 1993) (remanding for new trial in products liability case in light of intervening change in governing Wyoming law); *Saunders v. State of Rhode Island*, 731 F.2d 81, 82-83 (1st Cir. 1984) (remanding for new trial in light of responses to questions certified to Rhode Island Supreme Court).[4] The panel's decision to reverse the jury's verdict and render judgment for the Receiver here, based on its own resolution of factual questions

[4] Indeed, even many state courts—which are not bound by the Seventh Amendment—have taken the same approach. *See, e.g.*, *City of Mia. v. Harris*, 490 So.2d 69, 74 (Fla. Dist. Ct. App. 1985) (where "the law has changed between trial and appeal," the proper remedy is a new trial, to provide "the adversely affected party [with] an opportunity to supply the missing proof"); *Am. Reciprocal Insurers v. Bessonette*, 405 P.2d 529, 531 (Or. 1965) (en banc) (recognizing that "a change in the law upon appeal requires a new trial" where "the wrong law may have been used by the triers in finding the facts").

that only became relevant through an intervening change in the law, thus stands as a remarkable (and remarkably incorrect) outlier that warrants this Court's correction.

3. The panel did not contest that remand for a new trial is the normal course when an intervening change in the law raises new factual issues that the jury was not previously asked to consider or decide. But the panel nevertheless asserted that its refusal to remand this case was proper because, in its view, no reasonable jury could have found that Magness "diligently investigated [its] initial suspicions of SIB's Ponzi scheme during the time period—October 2008—the jury found [Magness] to be on inquiry notice." App.8; *see* App.8-15. That is wrong both on the law and on the facts, and cannot justify depriving Magness of its Seventh Amendment rights.

As a matter of law, the appellate court's decision to make factual findings based on a jury-trial record developed on a different understanding of what Texas law required cannot be justified. To the extent the trial record did not reflect sufficient evidence about the timing and thoroughness of Magness' investigation, that reflects the reality that the jury was directed to focus on other issues and expressly told that the thoroughness of the investigation was not dispositive. To deprive Magness of any ability to present a case to the jury directed to those newly relevant issues deprives Magness of its Seventh Amendment rights. Pointing to purportedly insufficient evidence in a record *addressed to different issues* just reinforces the problem—namely, that Magness never had its constitutionally guaranteed

opportunity to make its case to a properly instructed jury on the legally salient factual questions. If a plaintiff put forward its case to a jury instructed that the plaintiff need not prove recklessness, and an appellate court later clarified that recklessness must be shown, it would be fundamentally incompatible with the Seventh Amendment to deny the plaintiff any opportunity to demonstrate recklessness. Suggesting that the existing jury-trial record did not reflect sufficient evidence of recklessness would only underscore that the jury was improperly instructed. So too here. The purported absence of evidence in a jury-trial record addressed to different issues does not remotely justify depriving the party that won the first jury trial of any opportunity to prove its case to a properly instructed jury. *See Weisgram v. Marley Co.*, 528 U.S. 440, 444 (2000) (appellate court may not direct entry of judgment against a party that has not had "a full and fair opportunity to present the case").

That is particularly true when the existing trial record already underscores that Magness conducted substantial diligence. Even though the trial record below was directed to different issues, the evidence presented to the jury showed that Magness did in fact conduct a diligent investigation into SIB throughout the period of his investment with the bank. *See supra* pp.5-9. Indeed, even the Receiver conceded that Magness had investigated SIB, acknowledging that "the undisputed facts in this case show that [Magness] … *did* investigate the facts that [according to the Receiver] put them on notice." ROA.9575 (emphasis in original). Thus, even a record assembled under different legal instructions underscores that a reasonable jury that was properly instructed and had

the benefit of jury presentations directed to the relevant questions could readily find that Magness carried out a diligent investigation.

The panel evaded that commonsense conclusion by focusing on the record evidence concerning Magness' efforts during the specific month of October 2008, when Magness received the transfers at issue and when (according to the jury) Magness was on inquiry notice. App.8, 14-15. But not only was that a factual question for the jury, there was no legal basis for limiting the relevant evidence to that specific period. Under the Texas Supreme Court's decision, the key question for resolving Magness' good-faith defense is whether Magness "diligently investigat[ed] its initial suspicions" that placed it on inquiry notice. App.59. But nothing in the record or the jury's verdict below definitively suggests that Magness' "initial suspicions" arose in October 2008, and in any event nothing in law or logic requires a party to investigate its "initial suspicions" from scratch at the precise moment when it receives the disputed transfer. To the contrary, a thorough investigation before or after the "initial suspicions" would certainly inform what additional inquiries were reasonable. The substantial evidence that Magness conducted extensive inquiries into SIB both before and after receiving the disputed transfers, *see supra* pp.5-9, thus speaks directly to the factual question of diligent investigation that the Texas Supreme Court's decision makes dispositive and that the Fifth Circuit nevertheless refused to permit the jury to decide.

Nor does anything in law or logic support the panel's conclusion that Magness' prior inquiries

should be disregarded as "merely inquiries [into] the nature and health of Magness's investments." App.9. On the contrary, a properly instructed jury could readily conclude those inquiries into SIB's financial health were highly relevant to the critical factual question newly identified by the Texas Supreme Court of whether Magness diligently investigated. The panel offered no explanation for its apparent distinction between a diligent investigation for TUFTA purposes and the due diligence investigations Magness actually conducted. The reassuring facts that Magness uncovered during those investigations—just like the purportedly suspicious facts on which the Receiver relied at trial—necessarily inform the factual question of whether the inquiries that Magness actually conducted were sufficient to show a diligent investigation. The jury is the only entity authorized to decide that factual question.

In the end, the decision below cannot be squared with the Seventh Amendment, with this Court's precedents, or with other decisions faithfully applying those precedents. Put simply, a federal appellate court "may not order judgment" on appeal if "the record reveals a new trial issue which has not been resolved." *Neely v. Martin K. Eby Constr. Co.*, 386 U.S. 317, 325 (1967); *see also, e.g.*, *Fountain v. Filson*, 336 U.S. 681, 683 (1949); *Weade v. Dichmann, Wright & Pugh*, 337 U.S. 801, 808-09 (1949). Once the Texas Supreme Court rendered its intervening decision holding for the first time that the TUFTA good-faith defense turns on whether the transferee conducted a diligent inquiry—an issue that the jury here was never asked to consider and was expressly told was not dispositive—the Fifth Circuit had no constitutional

option but to remand the case for a new trial. Instead, defying the Seventh Amendment and this Court's decisions interpreting it, the Fifth Circuit deprived Magness of its constitutional right to have a jury decide whether Magness had diligently investigated, and arrogated the power to decide that factual issue for itself. It then proceeded to reverse the jury's verdict for Magness and render judgment for the Receiver based on its own review of a trial record developed before the Texas Supreme Court clarified the governing legal standard and so focused on different issues entirely. That outcome cannot be squared with the Seventh Amendment's jury-trial guarantee, and cannot be permitted to stand.

B. The Decision Below Conflicts With Settled Precedent and Violates Due Process by Depriving Magness of Its Right to Present Every Available Defense.

The Fifth Circuit's extraordinary decision below violated not only the Seventh Amendment but also settled principles of due process. For nearly a century, this Court has made crystal clear that due process guarantees defendants "an opportunity to present every available defense." *Philip Morris*, 549 U.S. at 353; *see, e.g.*, *Lindsey*, 405 U.S. at 66; *Am. Sur. Co. v. Baldwin*, 287 U.S. 156, 168 (1932); *see also Philip Morris USA Inc. v. Scott*, 561 U.S. 1301, 1303 (2010) (Scalia, J., in chambers); *California v. Trombetta*, 467 U.S. 479, 485 (1984) (due process requires defendants "be afforded a meaningful opportunity to present a complete defense"); *Nickey v. State of Mississippi*, 292 U.S. 393, 396 (1934) (due process guarantees "all

available defenses may be presented to a competent tribunal"). The lower federal courts have consistently recognized and applied this fundamental premise of due process. *See, e.g.*, *Mullins v. Direct Digit., LLC*, 795 F.3d 654, 669 (7th Cir. 2015); *Merrick v. Paul Revere Life Ins. Co.*, 500 F.3d 1007, 1016 (9th Cir. 2007); *Kansas ex rel. Beck v. Occidental Life Ins. Co.*, 95 F.2d 935, 937 (10th Cir. 1938); *see also* 16B Barbara J. Van Arsdale, Am. Jur. 2d *Constitutional Law* §1000 (2d ed. 2021) (due process "requires that there be an opportunity to present every available defense").

The Fifth Circuit's decision below squarely conflicts with that established principle. As the panel recognized, when this case went to trial, "the Texas courts to consider TUFTA good faith had not considered whether it includes a diligent investigation requirement," App.5; instead, the district court specifically instructed the jury that Magness was "not required to prove that [it] actually conducted a diligent inquiry," ROA.11675. The Texas Supreme Court's opinion on certification, however, adopted the opposite approach, holding that a transferee on inquiry notice *must* show that it conducted a diligent investigation in order to invoke the TUFTA good-faith defense—a fact that Magness had never before been directed to prove. App.44. In light of that intervening change in the law, the only constitutional course was to remand for a new trial to give Magness the opportunity to litigate that new diligent-investigation defense before the relevant factfinder (here, the jury). Even in a bench trial, a defendant still has a constitutional right to raise an available defense. By depriving Magness of that opportunity here, and instead *reversing* the jury's verdict and rendering

judgment *for the Receiver* based on the panel's own view of a trial record directed at different issues, the panel violated the basic commands of both the Seventh and Fifth Amendments.

This Court's decision in *Fountain* is instructive. In that case, the district court construed the plaintiffs' complaint as seeking a resulting trust under New Jersey law, and granted summary judgment for the defendant. 336 U.S. at 682. The D.C. Circuit agreed that no resulting trust could arise, but found that the plaintiffs' complaint adequately alleged a separate claim for personal liability—and then, based on its own review of the summary judgment record, ordered judgment for the plaintiffs on that claim. *Id.* This Court reversed, explaining that a federal court of appeals cannot grant judgment "on a new issue as to which the opposite party had no opportunity to present a defense." *Id.* at 683. Because the trial court never considered any claim for personal liability, there was "no occasion in the trial court for [the defendant] to dispute the facts material to a claim that a personal obligation existed." *Id.* As such, "it was error for [the D.C. Circuit] to deprive [the defendant] of an opportunity to dispute the facts material to that claim by ordering summary judgment against her." *Id.*

The same analysis applies here. Like the defendant in *Fountain*, Magness had "no occasion in the trial court" to dispute whether it had conducted a diligent investigation, *id.*, an issue that the district court specifically instructed the jury Magness was not required to prove in order to demonstrate good faith, ROA.11675. Once the Texas Supreme Court rendered its intervening decision making that issue central to

the case, the panel had no authority to "deprive [Magness] of an opportunity to dispute the facts material to that [defense]" by rendering judgment for the Receiver on the existing record. *Fountain*, 336 U.S. at 683; *see, e.g.*, *Byrd*, 356 U.S. at 533 (holding that a party that prevailed at trial, and "was fully justified [under the district court's rulings] in not coming forward with proof of his own" on a particular issue, "cannot be penalized by the denial of his day in court to try the issue" and must be afforded a retrial).

The panel below acknowledged that due process requires giving a defendant an opportunity to present every available defense. App.14. But it then narrowed that right out of existence, asserting that Magness had received all the process to which it was due because Magness already "had an opportunity to establish the affirmative defense available to it"—namely, "good faith"—at the trial below. *Id.* As a result, the panel concluded, it "would not violate [Magness'] due-process rights" to "forgo[] a second jury trial" on this issue. *Id.*

That reasoning ignores the specific instructions given to the first jury and the actual holding of the Texas Supreme Court, and would eviscerate the fundamental due process right in the process. Magness did indeed have an opportunity to present its good-faith defense to the jury at trial, under the law as it stood at the time—and *prevailed* on that defense, winning a verdict that left it with no further liability. But the intervening decision on appeal from the Texas Supreme Court substantially altered the contours of that defense; it rejected the Receiver's dogmatic approach that inquiry notice always defeats good faith

as a matter of law, but held that Magness was required to show diligent investigation (which the district court had never required) in order to maintain its good-faith defense. The fact that Magness had an opportunity to present (and *successfully* presented) the good-faith defense as it existed *before* that intervening ruling cannot deprive Magness of his due process right to present that defense as it existed *after* that ruling, including his right to present evidence on the new factual issue that he had "no occasion" to litigate in the previous trial. *Fountain*, 336 U.S. at 683; *see Byrd*, 356 U.S. at 531. The Fifth Circuit's contrary view—that a defendant who has prevailed on a defense at trial can be stripped of its verdict by a later appellate decision adding another element to that defense, without giving the defendant any opportunity to prove that new element—would render the due process right to present every available defense a dead letter.

II. The Issues Raised In This Case Are Critically Important.

The decision below is not only profoundly wrong, but exceptionally important. It implicates not only tens of millions of dollars of asserted liability in this case, but opens the door for appellate courts to undermine defendants' fundamental constitutional rights and the central role of the jury. Allowing that decision to stand will sow needless confusion and severely erode defendants' critical Seventh Amendment and due process rights. Moreover, this case presents an excellent vehicle to vindicate the Seventh Amendment and reinforce the centrality of the jury's factfinding role.

First and foremost, the decision below devastates the protections of the Seventh Amendment, a provision this Court has long viewed as a "fundamental guarantee of the rights and liberties of the people." *Parsons v. Bedford, Breedlove & Robeson*, 28 U.S. (3 Pet.) 433, 446 (1830) (Story, J.); *see Jacob*, 315 U.S. at 752 (recognizing the civil jury trial as "a basic and fundamental feature of our system of federal jurisprudence"). Indeed, "the want of an express provision securing the right of trial by jury in civil cases" was "[o]ne of the strongest objections originally taken against the constitution of the United States"; and from the earliest days of the Republic, the jury-trial right guaranteed by the Seventh Amendment "has always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy." *Parsons*, 28 U.S. (3 Pet.) at 446; *see Chauffeurs, Teamsters & Helpers, Loc. No. 391 v. Terry*, 494 U.S. 558, 580-81 (1990) (Brennan, J., concurring); *Slocum*, 228 U.S. at 387; *Baylis*, 113 U.S. at 321; *cf.* Order, *Google LLC v. Oracle Am. Inc.*, No. 18-956 (U.S. filed May 4, 2020) (requesting briefing on Seventh Amendment issues). This Court should not allow the decision below to undermine that "fundamental and sacred" right without further review. *Jacob*, 315 U.S. at 752-53.

The case simultaneously allows the Court to vindicate the due process right to present every available defense. Even if the trial court had been the factfinder, it would have still violated the Constitution to deprive Magness of a full and fair opportunity to present its defense. Despite this Court's repeated acknowledgment of that basic right, *see, e.g.*, *Philip Morris*, 549 U.S. at 353; *Lindsey*, 405 U.S. at 66; *Am.*

Sur., 287 U.S. at 168, the decision below drastically limits its scope, empowering courts to bar defendants from litigating any new defense that arises for the first time on appeal—even where the defendant *prevailed* on an earlier version of that defense at trial. That approach would significantly expand the authority of appellate courts to deny a remand when new factual issues become relevant based in a change in the law on appeal. That potential sea change in the law plainly warrants this Court's attention.

The case also presents an ideal vehicle for review; the issues presented were squarely preserved below, and the effect of the panel's errors is particularly stark given the prior jury verdict for Magness and the instruction that the jury need not address the sufficiency of Magness' investigation. After all, it is not just that the jury never decided the critical factual issue. The jury was expressly told not to decide the issue. For an appellate court to decide the issue itself anyways cuts to the heart of the Seventh Amendment. Allowing such a decision to stand would send exactly the wrong signal about the Seventh Amendment, and the specific instruction that the jury need not consider the factual issues resolved by the Fifth Circuit presents the issues cleanly. Whether by plenary consideration or summary reversal, this Court should grant review and correct the Fifth Circuit's remarkable departure from what was previously settled law.

In sum, the decision below implicates two fundamental constitutional rights and eviscerates both of them. If the decision below had only disregarded the Seventh Amendment or had only

disregarded due process, either of those errors alone would independently warrant further review; in combination, the panel's disregard for both of those constitutional protections plainly compels this Court's attention.

CONCLUSION

This Court should grant the petition.

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