No. 21-110

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

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF

The Receiver's opposition cannot disguise the obvious and pressing need for this Court's review. The Fifth Circuit's extraordinary decision departs sharply from established law, and eviscerates both the fundamental Seventh Amendment right to a jury trial on all disputed factual issues and the equally fundamental due process right to present every available defense. By reversing a jury verdict for Magness and rendering judgment for the Receiver based on its own resolution of a factual question that the jury was never asked—and was specifically instructed it need not resolve—the panel contravened settled precedent and trampled on Magness' constitutional rights. This Court should grant certiorari and reverse.

The Receiver has remarkably little to say in response to the serious Seventh Amendment and due process issues raised by the decision below. Instead, the Receiver attempts to mischaracterize and muddle the record, disputing everything from whether the Texas Supreme Court's decision altered the governing law (it plainly did), to whether Magness conducted any investigation (the Receiver *explicitly conceded* as much below), and whether the jury actually sided with Magness at trial (there is a reason the Receiver was the appellant). But despite the Receiver's efforts at obfuscation, he does not and cannot contest the central facts that establish the clear constitutional flaws in the Fifth Circuit's decision. It is undisputed that in light of the district court's understanding of Texas law, the jury at trial was never asked to decide whether Magness conducted a diligent investigation, and was

specifically instructed that Magness was "not required to prove that [it] actually conducted a diligent inquiry." ROA.11675. It is undisputed that the Texas Supreme Court has now rejected the district court's understanding of Texas law, and held that the factual question of whether the transferee conducted a diligent investigation is critical to a good-faith defense. And it is undisputed that instead of remanding for a jury to resolve that fact-intensive issue, the Fifth Circuit instead "substitute[d] 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 appellate factfinding, rendering judgment against a party that won at trial by resolving a factual issue that the jury was never asked to decide and that only became outcome-dispositive after an intervening appellate ruling, is fundamentally inconsistent with the Seventh Amendment and due process.

In the end, the Receiver's attempts to dispute the record and make this case appear "factbound," BIO.15, only underscore that the Fifth Circuit had no business deciding these factbound and still-disputed issues for itself. Under our system, that is the role for a properly instructed jury, not an appellate court reviewing the verdict of a jury that was never asked the now-dispositive question and came down in petitioner's favor as instructed. Seventh Amendment and due process guarantees are critical, and this case involves a stark disregard for the jury's proper role. This Court should grant certiorari and make clear that those constitutional guarantees cannot be so easily ignored.

I. The Receiver's Mischaracterizations Of The Record Cannot Obscure The Serious Constitutional Flaws In The Decision Below.

The Receiver's opposition rests on numerous mischaracterizations of the record below, but three—which form the primary grounds for the Receiver's defense of the decision below, BIO.23-31—demand correction.

1. First, the Receiver asserts that the Texas Supreme Court's decision "was not an 'intervening change in the law.'" BIO.24-28. That blinks reality. Whether or not the Texas Supreme Court's decision constitutes a break with the thrust of prior decisions, it plainly was a change from the law as understood by the district court and reflected in its jury instructions, which is all that matters. Under Texas law as the district court understood and applied it at trial, Magness was "not required to prove that [it] actually conducted a diligent inquiry." ROA.11675. Under the Texas Supreme Court's decision, by contrast, a transferee *is* required to "show at minimum that it investigated its suspicions diligently," Pet.App.44—precisely the opposite of the district court's view at trial. The Receiver's suggestion that the law was already clear on this issue and so Magness should have been aware of the need to prove a diligent investigation, BIO.25-26, ignores not only the experienced district court judge's contrary view, but also the Fifth Circuit's and the Texas Supreme Court's explicit recognition that the question was open. *See* Pet.App.5 ("[T]he Texas courts to consider TUFTA good faith had not considered whether it includes a diligent investigation requirement[.]"); Pet.App.26

(the Texas Supreme Court "has not addressed whether TUFTA good faith requires a diligent investigation"); Pet.App.42 (Texas courts "have not discussed the applicability of … the diligent inquiry requirement"); Pet.App.48 (recognizing a "determinative question[] of Texas law having no controlling Supreme Court precedent").[1]

The Receiver's *post hoc* view that Texas law always required a diligent investigation cannot even be reconciled with his own actions at trial. As the Receiver grudgingly recognizes, he *conceded* in the district court that Magness *had* investigated SIB, admitting that "the undisputed facts in this case show that [Magness] *did* investigate the facts that put [it] on notice of SIB's fraud or insolvency." ROA.9575 (emphasis in original); *see* BIO.29 n.16. That concession made sense in a world where the Receiver had to show Magness was on inquiry notice, and where the quality of Magness' investigation was not dispositive. But in a world where the critical issue was the quality of Magness' investigation, it is hard to believe the Receiver would have conceded that Magness did investigate. Likewise, at the close of evidence and again after the jury returned its verdict, the Receiver moved for judgment as a matter of law, arguing that the evidence showed Magness was on inquiry notice and that was sufficient to defeat any TUFTA good-faith defense. ROA.11573-77,

[1] The Receiver's citations to Magness' proposed jury instructions only confirm the point. Those instructions make clear that Magness was *not* required to prove a diligent investigation—the opposite of what the Receiver suggests. ROA.9130.

ROA.11651-54, ROA.11687-89. But the Receiver *never* argued in *either* motion that Magness needed to show a diligent investigation and failed to present sufficient evidence at trial to show a diligent investigation. Pet.10-11. To be sure, such an argument would have been directly contrary to the district court's jury instructions, but the Receiver did not make the argument even for preservation purposes. That decision would be inexplicable (and lead to forfeiture problems) if Texas law had been settled that proof of a diligent investigation is necessary for a good-faith defense.

In short, the record makes inescapably clear that the interpretation of TUFTA that prevailed at trial was radically different from the interpretation that the Texas Supreme Court subsequently adopted—as indisputably captured by the jury being instructed that it need not consider the now-critical diligent-investigation question. Once the Texas Supreme Court's decision made that question outcome-determinative, the only proper course was to remand for a jury to address that unresolved factual question. The Fifth Circuit's decision to instead decide that newly critical factual issue for itself and to fault Magness for not presenting sufficient evidence of a fact that both Magness and the jury were told was not dispositive cannot be squared with the Seventh and Fifth Amendments.[2]

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[2] Notably, the Receiver *concedes* that remand is constitutionally required when a "true and unforeseeable shift in the law" raises a new factual question. BIO.27. That is precisely what happened here, *see* Pet.12-13—and in any event, nothing in the Constitution limits a party's right to a jury trial or to present

2. Second, the Receiver makes the remarkable assertions that Magness cannot present "*any* evidence that [it] conducted a diligent investigation in October 2008," and that Magness explicitly "*denied* that [it] had any suspicions or conducted any investigation at this time." BIO.28-30 (emphasis in original). Those assertions seriously mischaracterize the record. While the trial focused on other issues, and the jury was expressly instructed that it need not consider the thoroughness of Magness' investigation, the evidence at trial nonetheless indicated that Magness *did* investigate SIB—which helps explain why the Receiver explicitly admitted below that "the undisputed facts in this case show that [Magness] *did* investigate the facts that put [them] on notice of SIB's fraud," ROA.9575 (emphasis in original), and why the Receiver never asserted any purported absence of a diligent investigation as a basis for judgment as a matter of law in the district court, *see* ROA.11563-78, ROA.11651-54, ROA.11685-91.

The Receiver has no answer to any of that. *See* Pet.5-8 (recounting Magness' extensive investigations into SIB from 1999 on). Indeed, the Receiver *concedes* that Magness' investment committee *did* conduct regular "[i]nquiries … to inform itself of the nature and health of Magness's investments," but claims the Fifth Circuit properly concluded those inquiries were

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all available defenses to only "unforeseeable" new issues. What matters is how the district court instructed the jury; regardless of whether the error in an instruction telling the jury it need not consider an issue was foreseeable, it is a glaring Seventh Amendment violation for an appellate court to decide for itself an issue that the jury was told it need not decide. *Contra* BIO.27-28.

insufficient to show a diligent investigation "into suspected fraud." BIO.29 (brackets omitted) (quoting Pet.App.9). Like the Fifth Circuit, the Receiver offers no explanation for his apparent distinction between the due diligence inquiries that he admits Magness conducted concerning his investments and the diligent investigation TUFTA requires "into suspected fraud." And while the Receiver emphasizes that many of those inquiries pre-dated the transfers here, *see* BIO.29, the reassuring facts that Magness learned from those prior inquiries necessarily inform the factual question of how much further diligence was due—especially when the Receiver does not dispute that Magness continued to investigate SIB all the way through January 2009, *see* Pet.7-8. The Constitution reserves resolution of this factual dispute for a properly instructed jury, not for independent factfinding by the Fifth Circuit based on a record assembled before a jury expressly told they did not need to resolve the issue.

Grasping at straws, the Receiver takes snippets of testimony out of context to claim that Magness "repeatedly and uniformly *denied* that [it] had any suspicions or conducted any investigation" into SIB in October 2008. BIO.28. That is half right, but not the half that the Receiver wants. It is true that Magness "had no suspicions" of SIB in October 2008, BIO.7 (emphasis omitted), as the jury confirmed by finding that Magness had no actual knowledge of the Ponzi scheme, *see* Pet.App.60-61. But the *reason* that Magness had no suspicion of SIB in October 2008 was that Magness *did* conduct repeated diligent investigations into SIB throughout the relevant period, and found nothing untoward—consistent with the jury's finding that even a diligent investigation

would not have uncovered the fraud, *see* ROA.11675. In short, Magness had "no reason to ask any more questions *than they already asked*" by October 2008, BIO.8-9 (emphasis altered) (quoting ROA.17772), and "didn't have any concerns" or "any suspicion that there might be some sort of fraudulent scheme going on," and did not need to ask for any "additional information," precisely *because* Magness had been diligently investigating SIB all along. *Id.* (quoting ROA.17881, ROA.18201-02, ROA.18314). *Contra* BIO.3, 13-14, 28-29.

The Receiver's attempt to paint that testimony as a concession that Magness never investigated is deeply flawed. In fact, that testimony simply underscores that whether Magness' investigation was sufficiently diligent is a hotly disputed factual question whose resolution must be left to a properly instructed jury. The Fifth Circuit plainly erred by resolving that fact-intensive issue for itself and reversing the judgment for Magness based on its own evaluation of a trial record directed at different questions.

3. Third, and most remarkable, the Receiver insists that "Magness did not 'prevail at trial'" and the Fifth Circuit did not "'reverse' the jury's verdict." BIO.30-31. Again, that is demonstrably incorrect. The jury entered a verdict for Magness, finding that based on the district court's instructions Magness had proven its good-faith defense under TUFTA. ROA.11673-75. The district court recognized that Magness "prevailed at trial on their good-faith defense," Pet.App.61, and proceeded to "render[] judgment on the verdict for the Magness Defendants,"

Pet.App.64. Unsurprisingly, it was the Receiver (not Magness) who chose to appeal that judgment, because it was the Receiver (not Magness) who lost at trial. Pet.App.5. The Receiver's continued insistence that he actually prevailed before the jury, and that the Fifth Circuit's decision to reverse and render judgment for the Receiver actually respected the jury's verdict, is nothing short of astonishing.

Contrary to the Receiver's incorrect assertion, the jury did *not* "disbelieve[] Magness's repeated testimony that [it] did not suspect … that SIB was a Ponzi scheme." BIO.30. On the contrary, the jury plainly credited that testimony, explicitly finding that Magness did *not* have actual knowledge of the scheme, ROA.11673, and (based on the district court's instructions) that Magness was not liable because any investigation would have been futile. ROA.11673-75. That is a defense verdict and cleared Magness of liability, which is why the district court explicitly recognized that Magness "prevailed at trial on [its] good-faith defense." Pet.App.61. The Fifth Circuit's ultimate conclusion that Magness *should* be held liable, on an appeal filed by the Receiver, based on the Fifth Circuit's own assessment of whether Magness' investigation was diligent—a question the jury never answered and was explicitly told it need not decide—plainly contravened the jury's verdict. *Contra* BIO.31.

In the end, the Receiver's attempts to dispute even the most basic facts, such as what the jury found and who appealed, in an effort to make this case seem hopelessly factbound, can only backfire. While painting a case as factbound may be an effective argument against certiorari in many circumstances, it

is not a winning response where the fundamental constitutional problem is that the appellate court flouted the Seventh Amendment and due process by resolving all those factbound questions itself based on an evidentiary record directed to other issues, rather than leaving them for a properly instructed jury on remand. In that context, labeling the underlying dispute as factbound only heightens the constitutional problems.

II. The Decision Below Eviscerates Fundamental Seventh Amendment And Due Process Protections And Requires Immediate Review.

Once the Receiver's mischaracterizations of the record are cleared away, the constitutional flaws in the decision below are unmistakable. The Fifth Circuit's ruling in this case conflicts with decades of this Court's precedents and lower-court decisions correctly applying those precedents, and severely undermines the vital protections of the Seventh Amendment and the due process right to present every available defense. This Court's review is urgently warranted.

1. The decision below patently violates the established Seventh Amendment right to a jury trial on all disputed factual issues in civil cases at common law. U.S. Const. amend. VII; *see* Pet.18-28. The Receiver does not dispute the "basic and established Seventh Amendment principle" that "there is a right to have a jury decide disputed questions of fact." BIO.17 (emphasis omitted). Instead, he argues only that there is no need for this Court's review—despite the Fifth Circuit's decision to resolve the disputed

factual questions here for itself rather than reserving them for a properly instructed jury—because the Fifth Circuit purported to apply existing Seventh Amendment doctrine rather than "articulat[ing] any new standard." BIO.17-19. But there is no do-what-I-say-not-what-I-do exception to certiorari. A court of appeals cannot insulate its decisions from this Court's review by paying lip service to the correct principles while ignoring them in practice. The problem here is not what the Fifth Circuit said about the protections afforded by the Seventh Amendment, but what it did despite those protections.

2. So too for the Fifth Circuit's denial of Magness' due process right to present a full and fair defense. *See* Pet.28-32. Once again, the Receiver does not dispute that due process guarantees defendants "an opportunity to present every available defense." BIO.19 (quoting Pet.28). Instead, he simply argues that no further review is required because the Fifth Circuit ostensibly recognized the existence of that right in theory, even while refusing to give it any effect in practice. BIO.19-22. The fact that the Fifth Circuit concluded Magness "had an opportunity to establish" its good-faith defense at trial, BIO.19 (quoting Pet.App.14), is true only in the most technical and irrelevant sense: Magness had an opportunity to establish a good-faith defense in the first trial and *prevailed* only to have the Texas Supreme Court make dispositive a fact question that the first jury was expressly told it need not decide. Under those circumstances, to tell Magness that he had a chance to present his defense is not just wrong, but cruel. Both the Seventh Amendment and due process give a defendant a chance to present a defense to a properly

instructed jury. Winning before an improperly instructed jury does not disentitle a party to its constitutional rights. And having an appellate court undertake factfinding based on a record distorted by erroneous instructions and directed to other questions is no substitute for having one clear chance to present a defense to a properly instructed jury.

* * *

In short, the decision below implicates two fundamental constitutional rights and eviscerates both of them. It takes the extraordinary step of reversing a jury verdict and judgment for one party and rendering judgment on appeal for the other party, based on the Fifth Circuit's own evaluation of a disputed factual question that the jury was never asked to decide and that only became outcome-determinative after the Texas Supreme Court's intervening decision. That outcome cannot be squared with either the Seventh Amendment right to trial by jury or the Fifth Amendment due process right to present every available defense, and the Receiver comes nowhere near providing any good reason to allow the decision below to stand. This Court should grant further review and reverse.

CONCLUSION

This Court should grant the petition.

Respectfully submitted,

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