No. ________

IN THE

Supreme Court of the United States

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

Petitioners,

v.

RALPH S. JANVEY, *et al*.,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Fifth Circuit holds that a receiver who lacks standing to bring investor claims can nonetheless *settle* those claims, with all settlement proceeds going to the receivership estate, and the district court has jurisdiction to enter bar orders extinguishing the investors' claims as a condition of settlement. The decision represents an unprecedented expansion of Article III jurisdiction, contrary to ordinary Article III standing requirements, and directly conflicts with the law of the First, Sixth, Seventh, and D.C. Circuits.

The question presented is:

Whether a district court in a receivership action has Article III jurisdiction to bar investor claims for individual injuries when the receiver lacks standing to bring those claims himself due to the lack of an injury to the receivership estate.

PARTIES TO THE PROCEEDING

Petitioners comprise five groups of individual investors who filed lawsuits against the Willis Respondents in Florida state court. They are referred to collectively as the Zacarias Parties and were appellants in the Fifth Circuit appeal below. They are identified in the appendix, App., *infra*, 124a.

Respondents are Ralph S. Janvey; Official Stanford Investors' Committee; Manuel Canabal; Willis, Limited; Willis of Colorado, Incorporated, Willis Group Holdings Limited; Willis North America, Incorporated; Amy S. Baranoucky; Bowen Miclette; Britt, Incorporated; Samuel Troice. They were appellees in the Fifth Circuit appeal.

RULE 29.6 DISCLOSURE STATEMENT

R & A Consulting Ltd. has no parent company, and no publicly held company owns 10% or more of its stock.

Stemich International Holdings Corp., has no parent company, and no publicly held company owns 10% or more of its stock.

Inizia Holdings, S.A., has no parent company, and no publicly held company owns 10% or more of its stock.

Ocean Waters Holdings, S.A. has no parent company, and no publicly held company owns 10% or more of its stock.

LIST OF DIRECTLY RELATED PROCEEDINGS

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PETITION FOR A WRIT OF CERTIORARI

The Zacarias Parties petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the court of appeals, App., *infra*, 1a-39a, is reported and available at 945 F.3d 883. The original opinion of the court of appeals, App., *infra*, 40a-77a, later withdrawn and superseded, is reported and available at 931 F.3d 382. The Fifth Circuit's order denying panel rehearing and rehearing *en banc*, App., *infra*, 117a-121a, is unreported. The district court order denying objections to settlement, App., *infra*, 78a-90a, is unreported but available at 2017 WL 9989250. The district court order approving settlement and entering a Final Judgment and Bar Order in *Zacarias*, *et al v. Willis Group Holdings Public Ltd. Co.*, *et al.*, 3:13-CV-02570-N, App., *infra*, 105a-116a, is unreported but available at 2017 WL 6442190. Identical district court orders approving settlement and entering Final Judgments and Bar Orders in *Nuila*, *et al v. Willis Group Holdings Public Ltd. Co.*, *et al.*, No. 3:13-CV-02572-N and *Tisminesky*, *et al v. Willis Group Holdings Public Ltd. Co.*, *et al.*, No. :13-CV-02573-N are unreported.

JURISDICTION

The Fifth Circuit issued its judgment affirming the district court's final judgments and bar orders on December 19, 2019. The Fifth Circuit denied the Zacarias Parties' timely petition for panel rehearing and rehearing *en banc* on January 21, 2020. On March 19, 2020, this Court extended the deadline to file petitions for writs of certiorari in all cases to 150 days

from the date of the lower court judgment or order denying a timely petition for rehearing. That order extended the deadline in this case to and including June 19, 2020. This Court has jurisdiction over the Fifth Circuit's judgment pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, Section 2 of the United States Constitution provides,

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. Const. Art. III, § 2.

Relevant provisions of the Securities Act of 1933, 15 U.S.C. § 77v(a), and the Securities Exchange Act of 1934, 15 U.S.C. § 78aa(a), are reproduced at App, *infra*, 122a-123a.

STATEMENT OF THE CASE

Allen Stanford and his companies ("Stanford") bilked about 200,000 investors out of billions of dollars through his infamous Ponzi scheme. The scheme enticed investors with purportedly safe, high-yield certificates of deposit that, in reality, were backed by a handful of speculative real estate ventures and few if any other assets. Stanford had help. Willis, an international insurance broker, misleadingly vouched for Stanford through safety and soundness letters. These letters defrauded a select group of investors, of which the Zacarias Parties are a part, into investing with Stanford. The Zacarias parties sued Willis in Florida state court for over $132 million in injuries.

It is undisputed Stanford's court-appointed receiver lacked standing to sue for the Zacarias parties' injuries. But the receiver developed a plan to recover investor losses so that he would not have to have standing. The receiver sued Willis on completely different grounds, to claw back premiums and recover alleged losses for Willis' failure to thwart Stanford's fraud. Then, without any participation by the Zacarias parties, the receiver settled with Willis for $120 million, to be paid directly to the receivership estate. The settlement had one essential condition: the district court had to enter a bar order terminating all other investor claims against Willis, including specifically the Zacarias parties' claims. The district court approved this settlement, entered the bar orders, and the Fifth Circuit affirmed.

This case presents a vitally important question that has divided the circuits. Can a district court claim Article III jurisdiction to allow a receiver to assume control of investor claims the receiver lacks standing to bring? The First, Sixth, Seventh, and D.C. Circuits

hold that the answer is no. As the Sixth Circuit has explained, "we have uncovered no case in which a court held, or even suggested, that equitable considerations could trump a district court's exceeding its Article III powers by permitting a receiver to raise claims of investors." *Liberte Capital Group, LLC v. Capwill [Liberte II]*, 248 Fed. Appx. 650, 665 (6th Cir. 2007). Under this case law, standing and Article III jurisdiction are inseparably linked—a point this Court has repeatedly driven home. Only three weeks ago this Court admonished, "Courts sometimes make standing law more complicated than it needs to be," and proceeded to reject, in the context of the ERISA statute, any "exception to Article III" and "ordinary Article III standing analysis." *See Thole v. U. S. Bank N.A*, 140 S. Ct. 1615, 1622 (2020).

The decision below creates just such an Article III exception for federal receiverships. The Fifth Circuit jettisoned ordinary standing analysis in favor of a new court-made rule, where standing is unnecessary for the receiver to take possession of investor claims and settle as long as the receiver can bring claims against the same defendant arising out of the same Ponzi scheme. App., *infra*, 28a. The result exacerbates an existing circuit split over receiver standing to bring claims for injuries to investors, and conflicts with fundamental principles of Article III jurisdiction. And the potential for abuse is manifest in the facts of this case. While the receiver boasts that its $120 million settlement represents its largest recovery yet, the Zacarias parties, whose losses alone total more than $132 million, are relegated to sharing in the recovery with tens of thousands of other Stanford investors, the majority of whom never heard of Willis, to the tune of about two cents on the dollar.

This Court has already once granted review from the Stanford Ponzi scheme proceedings, specifically to enable defrauded investors like the Zacarias Parties to bring state law claims against defendants like Willis, who aided the Stanford fraud. *See Chadbourne & Parke LLP v. Troice*, 571 U.S. 377, 381 (2014) (holding the Securities Litigation Uniform Standards Act of 1998 did not bar to state law-based "class actions"). The Fifth Circuit's decision undermines *Chadbourne* in a different way—it allows the Stanford receiver to take investor claims for himself without standing, thereby depriving the investors of their day in court. This Court should grant the petition to resolve the circuit split and foreclose an unprincipled expansion of Article III jurisdiction.

A. Factual background.

From at least 1995 until February 2009, Stanford induced customers to purchase CDs purportedly yielding outsized returns. Stanford's marketing emphasized safety and soundness, falsely assuring investors that the CDs were backed by safe, liquid investments. Though not insured in the United States through the FDIC, Stanford told investors the CDs were backed by private insurance. App., *infra*, 6a-7a. In fact, the CDs were not insured, Stanford did not have close to sufficient assets to cover its liabilities, and Stanford was simply using new CD sales to make interest and redemption payments. *See Chadbourne*, 571 U.S. at 384.

Some investors wanted more assurance than their financial advisors' unadorned sales pitch. For these investors, Stanford called on Willis, an international, facially reputable insurance brokerage group, to provide "safety and soundness" letters. Willis had procured insurance policies for Stanford, for which

Willis received substantial fees, though the policies provided no meaningful coverage for investors. App., *infra*, 8a. The Willis letters, written on Willis letterhead and signed by Willis executives, cited policies Willis had supposedly "placed" through Lloyds of London, and touted Stanford as a fiscally sound and responsible bank that had passed rigorous examination. Sometimes a Willis letter was mailed or provided directly to the prospective investor, and sometimes it was shown to the prospective investor by a Stanford financial advisor. App., *infra*, 7a.

Only a segment of Stanford's thousands of investors saw or received and relied on the Willis letters. That group included every one of the Zacarias Parties, who relied on the Willis "safety and soundness" letters in making the decision to invest in the Stanford CDs. Together they lost over $132 million. App., *infra*, 14a.

B. Procedural background.

The SEC shut down the Stanford Ponzi-scheme in February 2009, filing an enforcement action in the Northern District of Texas. The SEC successfully moved to put the intertwined Stanford companies in a federal receivership under the "all suits in equity" provisions of the 1933 Securities Act (15 U.S.C. § 77v) and 1934 Securities Exchange Act (15 U.S.C. 78aa). The district court appointed Ralph Janvey as receiver, granting him authority to take immediate, complete, and exclusive control of the Stanford entities, and to recover assets "in furtherance of maximum and timely disbursement . . . to claimants." The Receivership Order enjoined all persons from, among other things, "[a]ny act to collect, assess, or recover a claim against the Receiver or that would attach to or encumber the Receivership Estate." App., *infra*, 12a.

In 2013, the Zacarias Parties sued Willis in Florida state court asserting state law claims of negligent misrepresentation and aiding and abetting fraud. Willis removed the cases to the Southern District of Florida. From there, the Judicial Panel on Multi-District Litigation sent the case to the District Court for the Northern District of Texas. The district court remanded two cases, the *Ranni* and *Barbar* actions, back to Florida state court for lack of subject matter jurisdiction, but not before immediately staying all five Zacarias Party actions indefinitely. App., *infra*, 15a.

Later in 2013, the receiver made himself plaintiff in an existing putative class action against Willis and brought entirely separate claims and theories. The receiver claimed Willis breached supposed fiduciary duties in failing to thwart Stanford's theft of $1.8 billion, allegedly deepening the receivership estate's liabilities. The receiver also alleged fraudulent transfer theories to claw back fees and premiums Stanford had paid Willis.[1] App., *infra*, 13a-14a.

While the stay of the investors' claims against Willis continued indefinitely, the receiver negotiated a settlement with Willis. The linchpin of the settlement was an order permanently barring all claims against Willis. In return, Willis agreed to pay the receivership estate $120 million. After payment of attorney's fees (amounting to about $30 million), these proceeds would be distributed through the estate to the entire body of Stanford investors. App., *infra*, 16a-17a. Most of the Zacarias Parties would receive about

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[1] The receiver raised the same claims against another insurance broker, Bowen, Miclette & Britt, Inc. ("BMB"), which had provided investors similar assurances.

two cents on the dollar from their losses; some who elected not to opt into the receivership estate would receive nothing.

The Zacarias Parties joined other investors in objecting to the settlement. Several objections focused on the established lack of standing the receiver had to bring investor claims, as the Fifth Circuit had already determined. *See Janvey v. Alguire*, 539 Fed. Appx. 478, 480 (5th Cir. 2013) ("a federal equity receiver may not pursue claims on behalf of creditors … [but] has standing to assert *only* the claims of the entities in receivership." (emphasis added) (citing *Janvey v. Democratic Senatorial Campaign Comm., Inc.* ["*DSCC*"], 712 F.3d 185, 190 (5th Cir. 2013)). The lack of standing, the investors argued, deprived the district court of jurisdiction to enjoin the claims and caused the bar orders to violate their due process rights. For those investors who had their claims remanded to state court, the investors claimed the bar orders violated the Anti-Injunction Act, as the receiver could not claim an injury to the receivership estate should the investors' claims go forward against Willis, a global brokerage conglomerate with assets worth many billions of dollars. Further, the parties objected, the settlement of the putative and uncertified class action with which the receiver joined his claims could not satisfy the fairness requirements of Federal Rule of Civil Procedure 23. App., *infra*, 84a-90a.

With little more analysis than to commend the receiver for his supposed hard work in negotiating the settlement and to note the court's own expansive equity powers, the district court denied all objections, approved the settlement, and issued a series of final judgments and bar orders permanently enjoining the Zacarias Parties' claims and all other investor claims

against Willis globally. App., *infra*, 78a-104a. In rejecting the jurisdictional objections based on the receiver's lack of standing, the district court reasoned, "the Receiver need not have standing to assert the universe of barred claims as long as he has standing to assert the claims he is settling and the settlement satisfies the requirements for barring other claims." App., *infra*, 85a. The district court determined that the objectors' claims against Willis were "sufficiently similar to the settled claims" to justify the bar orders as fair and "necessary to the Settlement." Reciting the words of the Tenth Circuit's decision in *SEC v. DeYoung*, 850 F.3d 1172, 1178-79 (10th Cir. 2017), the district court determined without analysis or explanation that "the claims involve the same parties, the same conduct, the same actors, [and] the same transactions and occurrences, . . . and the claims are all from the same loss." App., *infra*, 86a.

The Fifth Circuit originally affirmed on July 22, 2019, over a dissenting opinion from Judge Don R. Willett. Expanding on the district court's conclusions, the majority merged receiver and investor claims against Willis together on the theory that they "all suffer[ed] losses in the same Ponzi scheme." The receiver's lack of standing thus posed no obstacle to the district court channeling investor claims through the receivership within its "wide discretion to determine the appropriate relief in an equity receivership." App., *infra*, 65a-68a.

Judge Willett in dissent found the receiver's "standing defect is jurisdictional." Investor injuries from Willis' misrepresentations were separate, and therefore "[t]he prohibition on enjoining unrelated, third-party claims without the third parties' consent … is a maxim of law not abrogated by the district

court's equitable power." App., *infra*, 73a-77a. The authority for the bar orders, Judge Willett found, was "thin to none." App., *infra*, 76a.

The Zacarias Parties, joining fellow investors, filed a timely petition for en banc review. The Fifth Circuit granted panel rehearing, withdrew the original July 22 opinion, and substituted a new opinion reaching exactly the same result—the majority affirmed the settlement and bar orders, and Judge Willett dissented. App., *infra*, 5a, 38a. The majority reasoning did not change. The decision below finds that no matter what differences lay in the receiver's breach of fiduciary duty theories based on Willis' alleged failure to act, and the investor claims for Willis' affirmative misrepresentations, Willis in all instances was a co-conspirator in the Ponzi scheme. Any question about the receiver's lack of standing, therefore, could be excused because the "objectors were injured by the Ponzi scheme." App., *infra*, 28a-29a.

Judge Willett's dissent pointed out the fundamental differences between the Zacarias Parties' claims and those of the receiver. Willis "injured the Stanford entities by failing to thwart the Ponzi scheme. They turned a blind eye to Stanford officers' misdeeds—*inaction*. So the Receiver asserted breach of fiduciary duty and negligence claims against them." Conversely, Willis "sent the Objectors letters misrepresenting Stanford's soundness and its insurance coverage—*action*. So the Objectors asserted fraud and negligent misrepresentation against them. The Objectors' injuries are separate from Stanford's, and they resulted from separate action—or inaction—by Willis…." App., *infra*, 38a-39a. In Judge Willett's view, "merely having defendants in common (Willis

and BMB) or having a common destination for the plunder (Stanford officers) does not make claims the same." Because "the Objectors' claims are distinct from the Receiver's," Judge Willett concluded that "the district court lacked jurisdiction to adjudicate them, or to enjoin them." App., *infra*, 39a.

REASONS FOR GRANTING THE PETITION

The Fifth Circuit's decision throws into stark relief a three-way circuit split over district court jurisdiction to adjudicate investor claims in a federal receivership action. The First, Sixth, Seventh, and D.C. Circuits uniformly reject the ability of receivers to take control of investor claims against third-parties for misrepresentations. In these courts, the receiver's lack of standing is an essential obstacle to the district court adjudicating the claims. The Tenth Circuit also acknowledges that receivers lack standing to sue third parties. But the Tenth Circuit recognizes a theory of injury to the receivership estate, the deepening of the receivership's insolvency, that the D.C. and First Circuits have specifically rejected. These circuit conflicts were already in place at the time of the decision below.

The Fifth Circuit's decision stands apart from them all. It is the first circuit-level decision to find that the undisputed *lack* of receiver standing to bring the misrepresentation claims of investors does not matter. While in every other circuit, standing has remained an essential ingredient to jurisdiction, the Fifth Circuit has invented a new test, unrelated the ordinary Article III standing requirements. Rather than require a "'personal stake' in the alleged dispute," with an injury in fact "particularized as to him," *Raines v. Byrd*, 521 U.S. 811, 819 (1997) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 583 (1992)),

and "'fairly traceable' to the actions of the defendant," *Bennett v. Spear,* 520 U.S. 154, 162 (1997), a receiver need only show that the receivership entity's injuries and investors' injuries arise from the same Ponzi scheme. In that case *all* the claims belong to the receivership, and investors can be enjoined in the name of a supposed equitable and orderly administration of the estate. App., *infra*, 28a-29a.

The circuit split calls for this Court's intervention. The shift away from fundamental standing requirements and toward a virtually unlimited equity jurisdiction eliminates long-recognized boundaries on federal receiverships. And it threatens the foundational precept that "Federal courts are courts of limited jurisdiction," possessing "only that power authorized by Constitution and statute … which is not to be expanded by judicial decree." *E.g., Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). Indeed, the Fifth Circuit's standard, encompassing any injuries flowing from the same Ponzi scheme, opens up district court injunctions in favor of a receiver to virtually any claim an investor could conceivably bring in state or federal court. But merely having *other* claims, or dressing receiver claims up to look similar to investor claims for individual losses, has never been the test. Turning possession of investor claims over to a receiver when the receivership entities had no fairly traceable injury from the third-party's misrepresentations was unprecedented. It is no longer unprecedented. This Court should grant review to resolve the circuit split over this vital issue.

I. The decision below creates a three-way circuit split.

While "neither the Securities Act of 1933 nor the Securities Exchange Act of 1934 explicitly vests district courts with the power to appoint trustees or receivers, courts have consistently held that such power exists." *Eberhard v. Marcu*, 530 F.3d 122, 131 (2d Cir. 2008) (citation omitted). As a general rule the receiver's powers are determined by the district court's appointment. But the district court's appointment powers are themselves "inherently limited by the jurisdictional constraints of Article III and all other curbs on federal court jurisdiction." *Liberte II,* 248 Fed. Appx. at 655 (citation omitted). Courts have thus placed boundaries around receiver powers in equitable receiverships. One principle, well settled since at least 1935, is that "the plaintiff in his capacity of receiver has no greater rights or powers than the corporation itself would have." *Fleming v. Lind-Waldock & Co.*, 922 F.2d 20, 25 (1st Cir. 1990) (citing *Caplin v. Marine Midland Grace Trust Co.,* 406 U.S. 416, 429 (1972); *McCandless v. Furlaud*, 296 U.S. 140, 160 (1935) (Cardozo, J.)). Constraints on receiver standing to take possession of claims the receivership entity could not itself bring followed from this principle. But the circuits have come to conflicting conclusions about what kinds of claims receivers have standing to bring when the injured parties include defrauded investors.

A. In direct conflict with the decision below, three circuits hold misrepresentation claims belong solely to investors and not the receiver.

The Sixth Circuit's decision in *Liberte II* involved investor claims of misrepresentation no different than

the Zacarias Parties' claims against Willis. Liberte, a marketer of viatical insurance policies, sued entities that claimed to provide trustee and escrow agent services after they plundered Liberte's accounts. A court-appointed receiver took over those entities. When a group of investors brought an arbitration against third-party broker dealers for misrepresentations that induced the purchase of the viatical policies, the receiver claimed the right to bring the arbitration himself, arguing any damages the investors could recover belonged to the receivership estate. The district court agreed, but the Sixth Circuit reversed. *Liberte II*, 248 Fed. Appx. at 651.

Liberte II is built on a bedrock principle of federal court jurisdiction: "the 'case' or 'controversy requirement' of Article III … is the 'irreducible constitutional minimum' of standing," requiring that a plaintiff must have "suffered 'injury in fact,' that the injury is 'fairly traceable' *to the actions of the defendant*, and that the injury will likely be redressed by a favorable decision." *Id.* at 655 (emphasis added) (quoting *Bennett,* 520 U.S. at 162). The receivership entities had no injury "fairly traceable" to the misrepresentations of broker-dealers, as the mere fact the receiver "*would like* to pull the arbitration proceeds into the receivership pool does not establish a 'personal stake.'" *Liberte II*, 248 Fed. Appx. at 655–56. After cataloguing cases involving investor claims for misrepresentations that reached the same conclusion, the Sixth Circuit held that claims for "fraud on investors that damages those investors is for the investors, and not the receiver, to pursue…." *Id.* at 658-59.

In *Liberte II*, the lack of receiver standing had Article III consequences. As the Sixth Circuit

recognized, "the court lacked the authority to transfer property—*including causes of action*—from the investors to the receiver," for "to hold otherwise would extend a district court's jurisdiction beyond the confines of Article III." *Id.* at 658 (emphasis added) (citing *Marwil v. Farah,* No. 1:03–CV–0482–DFH, 2003 WL 23095657, at *7 (S.D. Ind. Dec. 11, 2003)). As for contentions that general equity jurisdiction, or the district court's own order of appointment, could expand the Article III jurisdiction, the Sixth Circuit held, "we have uncovered no case in which a court held, or even suggested, that equitable considerations could trump a district court's exceeding its Article III powers by permitting a receiver to raise claims of investors." *Liberte II*, 248 Fed. Appx. at 665. The decision below is that case, as it held exactly the opposite with respect to the Zacarias Parties' ability to recover individual injuries: "given the finite resources at issue in this litigation, Stanford's investors *must* recover Ponzi-scheme losses through the receivership distribution process." App., *infra*, 35a (emphasis added).

The D.C. Circuit's decision in *Goodman v. F.C.C.,* 182 F.3d 987 (D.C. Cir. 1999) came to the same conclusion as *Liberte II* in terms of a receiver's lack of standing to assert the claims of investors. The Federal Trade Commission sued sellers of Specialized Mobile Radio licenses for fraud after these companies, known as "application mills," misleadingly touted the licenses as supposedly valuable investments with the advent (in the 1990s) of cellular and data transmissions. *Id.* at 990. They neglected to mention the licenses expired if the transmission facilities were not built and in operation in eight months—something most licensees had neither the ability nor intention of doing. A court-appointed receiver took

over the application mills. When the Federal Communication Commission then refused to extend the build-out deadlines, the receiver challenged the decisions to the D.C. Circuit as arbitrary and capricious, claiming he had a buyer for the licenses if only the FCC extended the deadlines. *Id.* at 989.

Without reaching the merits of the FCC's decision, the D.C. Circuit held the receiver lacked standing. A "plaintiff must, in the ordinary case, assert [its] own legal interests, rather than those of third parties." *Id.* at 992 (citation, internal quotes omitted). The application mills had no ability to assert claims for the defrauded licensees who, the court held, were the ones harmed by the FCC decisions. The receiver argued to the contrary, claiming his interest in extending the deadline and licensees' interests were "congruent." Failing to allow the receiver to challenge the FCC's decision deepened the receivership entities' liability, the receiver argued, exposing the receivership to fraud claims by the licensees. That argument failed: "[a] mere congruence of interests between the receivership licensees and the application mills in whose place Goodman stands does not suffice to make Goodman a proper party to vindicate the interests of the receivership licensees." Rather, the receiver "does not represent the parties who sustained the injury of which he complains, nor is there anything preventing the parties who were injured from themselves protecting their rights." *Id.* at 992.

In *Goodman*, the threat of deepening the receivership entities' liability did not give the receiver standing. That directly conflicts with the Fifth Circuit's decision here. Not only did the Fifth Circuit find something "preventing the parties who were injured from themselves protecting their rights"—the

bar orders—the Fifth Circuit held those orders were wholly justified merely because "[t]he objectors were injured by the Ponzi scheme." App., *infra*, 31a. The Fifth Circuit thus fully embraced the "congruence of interests" theory *Goodman* rejected.

The Seventh Circuit joined the Sixth and D.C. Circuits in rejecting receiver standing over investor claims of misrepresentation. *See Knauer v. Jonathon Roberts Fin. Group, Inc.,* 348 F.3d 230, 233–34 (7th Cir. 2003). The receiver in *Knauer* sued broker dealers for misleading statements made to induce investments in a Ponzi scheme. The district court dismissed those counts, along with separate claims for fraudulent transfers, and the Seventh Circuit affirmed. In the Seventh Circuit's view, Ponzi schemes comprise "two phases. First, the schemer solicits and receives money for investment, guaranteeing high returns while doing little with the money to produce actual profits"—the "sales" phase. Next, the schemer "appropriat[es] large sums of money from the solicited funds, the pace of the withdrawals accelerating as he is ready to disband the Ponzi entity and make off with its assets"—the "embezzlement" phase. *Id.* at 234.

The Seventh Circuit found the receiver has no standing to pursue the Ponzi sales claims, since the "Ponzi entities themselves are not injured by the sales of securities." Those sales "result[] only in the fattening of the companies' coffers. Any claim relating to the fraudulent sales rightfully belongs to the wronged investors, and can be made by them against any … culpable person or entity…." *Id.* As in the Sixth and D.C. Circuits, the receiver's lack of standing to bring investor claims was fatal to the receiver's attempt to take over those claims for itself. That did not prevent the receiver in *Knauer* from suing the

same broker dealers for fraudulent transfers and clawback relief—much as the receiver here sued Willis for that relief.[2] But unlike this case, the receiver's attempt in *Knauer* to claim damages for misrepresentations to investors failed.

B. The circuits are split 2-2 over whether mismanagement claims belong to the receiver.

Not even the Tenth Circuit's *DeYoung* decision, cited by the Fifth Circuit's majority opinion in support of its ruling, App., *infra*, 27a-28a, actually supports the holding below. As Judge Willett pointed out in his original dissent, "*DeYoung* distinguished its holding from precisely this situation"—a case where the receivership entities lacked standing to sue a broker for misrepresentations to investors. App., *infra*, 79a. Even so, *DeYoung* and the decision below conflict directly with decisions from the First and D.C. Circuits.

DeYoung affirmed bar orders in a mismanagement case after the president and CEO of an administrator of self-directed individual retirement and 401(k) accounts absconded with $24 million from First Utah Bank. *DeYoung*, 850 F.3d at 1175. The receiver had reached a settlement with First Utah conditioned upon entry of a universal claims bar against all other claims relating to the retirement accounts. Investors objected to the settlement arguing, in part, that the receiver lacked standing to assert the investor claims the bar order would enjoin. The district court overruled the objections and approved the settlement and bar order.

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[2] Though in *Knauer*, those claims too were dismissed on *in pari delicto* grounds, *see id.* at 238.

The district court found the receiver's and investors' claims against First Utah were "inextricably intertwined," as they quite literally were "are all from the same loss, from the same entities, relating to the same conduct, and arising out of the same transactions and occurrences by the same actors." *Id.* at 1176. The Tenth Circuit held the receiver had standing to bring, and the district court had jurisdiction to enjoin, investor claims against the bank, by embracing the "congruence of interests" argument *Goodman* rejected. According to the Tenth Circuit, the receiver had standing to sue since the claims sought to recover for injuries to the estate—the receivership entity's own insolvency— "fairly traceable" to alleged breaches of duties that allowed the theft of account holder funds. *Id*. at 1182.

DeYoung took pains to distinguish its facts, involving claims of mismanagement, from *Liberte II*, where none of the entities in receivership could claim "any tangible injury traceable to the brokers' misrepresentations to the investors." *Id*. at 1181 (quoting *Wuliger v. Mfr's Life Ins. Co.*, 567 F.3d 787, 794 (6th Cir. 2009)). To that extent, *DeYoung* aligns with those circuits that reject the ability of receivers to take control of investor claims for misrepresentation claims. But in recognizing the deepening insolvency injury to the receivership entity from mismanagement claims, *DeYoung* creates another circuit split important to this case.

The First Circuit's decision in *Fleming* specifically rejected receiver standing to sue a third-party for mismanaging investor funds. *Fleming,* 922 F.2d at 24. The receiver in *Fleming* sued a Futures Commission Merchant for having mismanaged, through violations of the Commodity Exchange Act, accounts funded by

investors. Those claims, the court held, "belonged *entirely* to investors, not to" the receivership entity. *Id*. at 24 (emphasis added). *Fleming*'s holding, like the D.C. Circuit's decision in *Goodman*, directly conflicts *DeYoung*, a case where the receiver's alleged increased insolvency through a third party's mismanagement trumped the fact that the stolen funds belonged to account holders. Indeed, *Goodman* is essentially a mismanagement case. The only difference is that the purported negligent "manager" was the government, the FCC, for supposedly having refused the licensee's ability to extend the build-out deadlines in an arbitrary and capricious manner. *See Goodman,* 182 F.3d at 991-92. The Tenth Circuit would have found receiver standing to take over investor claims in *Fleming* and *Goodman*. The D.C. and First Circuits explicitly did not.

The Fifth Circuit is the outlier among these decisions. It is the only circuit ever to find that the lack of standing poses no obstacle to the receiver confiscating investor misrepresentation claims. The general equitable principles behind receiverships that the Sixth Circuit explicitly rejected as expanding Article III jurisdiction won the day in the Fifth Circuit. The Tenth Circuit may have whittled down the property rights of investors to sue for mismanagement of their funds. But the decision below ends investor claims for good, erasing any distinction between misrepresentations made to investors to induce investment and the mismanagement that enabled the theft of their funds. Either way, any conceivable claim a defrauded investor might bring is channeled into the receivership estate. This Court's intervention is needed to resolve these pervasive circuit conflicts.

II. This case is an ideal vehicle for this Court's review of the circuit split.

As the Seventh Circuit observed, Ponzi schemes fall into a familiar pattern. First, investors are induced by false statements or omissions, often made by third parties, to invest in a scheme. Second, the schemer absconds with the funds. *Knauer,* 348 F.3d at 234. The causes of action following Ponzi schemes fall into familiar categories, too, and this case was no exception. The Zacarias Parties brought prototypical common law claims of negligent misrepresentation and aiding and abetting fraud against Willis. Willis' false and misleading statements about Stanford's soundness and insurance coverage induced the Zacarias Parties' investment, causing them to part ways with substantial sums, resulting in individual injuries.

Every circuit to address the issue, other than the Fifth, recognizes that these claims belong solely to investors and not the receiver. *See Liberte II*, 248 Fed. Appx. at 655–56; *Knauer*, 348 F.3d at 233–34; *Goodman,* 182 F.3d at 992; *see also DeYoung*, 850 F.3d at 1181. There was no dispute that the receiver lacked standing to bring claims for Willis' misrepresentations to investors, *see id.*—indeed, the receiver did not actually allege any such claim. The dispute was over whether the receiver could *settle* them. Only the Fifth Circuit holds the receiver can, and that the district court has Article III jurisdiction to bar the investor misrepresentation claims outside of normal standing requirements. The split is plain.

As for the receiver's claims, they were no less prototypical, and undeniably distinct. The receiver sought clawback relief from Willis based on fraudulent conveyance theories and brought claims of

mismanagement, through breach of fiduciary duty and negligence theories, for Willis not having stopped the fraud. App., *infra*, 13a-14a. Receiver claims like these are extremely common. *See, e.g.*, *Knauer*, 348 F.3d at 232; *Scholes v. Lehmann*, 56 F.3d 750, 754 (7th Cir. 1995); *Boston Trading Group, Inc. v. Burnazos*, 835 F.2d 1504, 1516 (1st Cir. 1987) (discussing a receiver's fraudulent conveyance claim). They arise from the embezzlement stage of the Ponzi scheme. The Zacarias Parties did not attempt to raise them. The Fifth Circuit's decision to conflate receiver and investor claims together under the umbrella of the Ponzi scheme was a novel invention. The circuit split caused by this decision is thus squarely presented, free of factual disputes related to jurisdiction.

There was also no threat that receivership entities might be damaged by allowing the investor claims to go forward simultaneously with the receiver's claims. This was not a case of a "wasting asset," such as an insurance policy, with a limited pool of assets available to satisfy competing claims. Willis has a market capitalization today of over $25 billion.[3] It has more than enough assets to satisfy the claims of investors and the receiver alike. The decision below may have, in dicta, found to the contrary. *See* App., *infra*, 31a-32a ("The Plaintiffs-Objectors' claims affect receivership assets because every dollar the Plaintiffs-Objectors recover from Willis and BMB is a dollar that the receiver cannot, frustrating the receiver's pro rata distribution to investors—a core element of its draw upon equity."). But the finding was based on no facts or rational explanation, given Willis' extensive resources. It is, rather, another example of the circuit

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[3] *See* https://www.bloomberg.com/quote/WLTW:US (last visited June 18, 2020).

split. The contention that the receivership entities are potentially harmed by the Zacarias Parties vindicating rights only they possess to sue Willis for misrepresentations defies every other circuit—a receivership entity *has* no injury in fact from misrepresentations made to investors. *E.g., Liberte II*, 248 Fed. Appx. at 655.

No fact-bound disputes or overlapping claims complicate the analysis here. The legal issue is starkly presented: can a receiver lacking standing settle investor claims and obtain bar orders within a district court's Article III jurisdiction. This Court should grant the petition and answer this vital question.

III. The Fifth Circuit's decision is wrong, and violates essential Article III limitations and due process rights.

The decision below rewrites the rules of Article III jurisdiction in receivership actions. The traditional analysis is straightforward: did the receivership suffer an injury in fact fairly traceable to the *misrepresentations* made by Willis to the Zacarias Parties? *See Bennett*, 520 U.S. at 167 (finding "the injury must be fairly traceable to the *challenged action of the defendant*, and not the result of the independent action of some third party not before the court") (emphasis added). The First, Sixth, Seventh, and even the Tenth Circuits answer this question no. What the Fifth Circuit did was dramatically alter the question: did the receivership and investors suffer an injury from the *Ponzi scheme*? The Stanford Ponzi scheme was sweeping, involving hundreds if not thousands of entities and people throughout the world. Innumerable acts, omissions, and failures enabled and perpetuated the fraud. Under the Fifth Circuit's ruling, the receiver could claim possession of

virtually any action remotely tied to the Ponzi scheme. But this standard has no relationship with ordinary Article III standing requirements. The decision to separate district court jurisdiction to enjoin third party claims from Article III standing requirements is wrong and in clear conflict with basic principles of Article III jurisdiction.

As this Court has instructed, federal court jurisdiction is prescribed by the Constitution and Congress and "is *not* to be expanded by judicial decree." *See Kokkonen*, 511 U.S. at 377. Standing is fundamental to the receivership court's Article III jurisdiction. It is "a doctrine rooted in the traditional understanding of a case or controversy. The doctrine developed in [this Court's] case law to ensure that federal courts do not exceed their authority as it has been traditionally understood." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016); *Raines,* 521 U.S. at 818 (holding "[n]o principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies.") (citations, internal quotes omitted). As *Liberte II* correctly ruled, standing is not some flexible concept to be judicially expanded merely to suit the equitable goals of a federal receivership. Indeed, this Court's *Spokeo* decision held not even Congress could alter the traditional test of standing. An "[i]njury in fact is a constitutional requirement, and '[i]t is settled that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing.'" *Spokeo*, 136 S. Ct. at 1547–48 (citations omitted).

A federal court could not itself erase Article III's standing requirements or, in this case, replace it with

a standing requirement that represents almost no limitation at all—a mere injury flowing from a sprawling Ponzi scheme. The very requirement of Article III standing imposes limits "on the judicial Power." *Thole*, 140 S. Ct. at 1622 (Thomas, J., concurring) (citations, internal quotes omitted). At the most fundamental level, Article III standing "serves to prevent the judicial process from being used to usurp the powers of the political branches … and confines the federal courts to a properly judicial role." *Spokeo*, 136 S. Ct. at 1547 (citations omitted). In circumventing Article III standing requirements, the decision below not only committed reversible error in finding district court jurisdiction, it violated separation of powers principles.

The violation here went further still. It allowed the district court to erase the Zacarias Parties' property interests—their valuable causes of action against Willis. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 807 (1985) (recognizing "a constitutionally recognized property interest possessed by each of the plaintiffs."). These were claims only the Zacarias Parties could bring, and the bar orders, issued without jurisdiction, deprived them of their property. *Richards v. Jefferson County*, 517 U.S. 793, 797 (1996) (recognizing the "general consensus ... in Anglo-American jurisprudence [is] that one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process.") (quoting *Hansberry v. Lee*, 311 U.S. 32, 40 (1940)). It is a "deep-rooted historic tradition that everyone should have his own day in court." *See id.*; *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 327 n. 7 (1979) (finding "It is a violation of due process for a judgment to be binding on a litigant who was not a

party nor a privy and therefore has never had an opportunity to be heard."). Transferring the Zacarias Parties' claims to a receiver who had no standing to bring them, for purposes of a settlement that channeled all the proceeds to the receiver, violated the Zacarias Parties' due process rights. Merely being able to object to an unfair settlement, without having participated in the negotiations, and having their objections overruled, did not give the Zacarias Parties their day in court.

CONCLUSION

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

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