Nos. 19-1402 and 19-1411

IN THE

Supreme Court of the United States

ANTONIO JUBIS ZACARIAS, *et al.*,

Petitioners,

v.

RALPH S. JANVEY, *et al.*,

Respondents.

BARRY L. RUPERT, *et al.*,

Petitioners,

v.

RALPH S. JANVEY, AS RECEIVER FOR STANFORD RECEIVERSHIP ESTATE, *et al.*,

Respondents.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF STANFORD INVESTORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

CONSTANTINE Z. PAMPHILIS
J. MICHAEL WILSON
STEVEN OWENS
KASOWITZ BENSON TORRES LLP
1415 Louisiana, Suite 2100
Houston, Texas 77002
(713) 220-8800

GAVIN D. SCHRYVER
Counsel of Record
ANDREW K. GLENN
KASOWITZ BENSON TORRES LLP
1633 Broadway
New York, New York 10019
(212) 506-1700
gschryver@kasowitz.com

Counsel for Amici Curiae

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae include 60 long-suffering investors who collectively lost hundreds of millions of dollars as a result of the Ponzi scheme perpetrated by Robert Allen Stanford ("R.A. Stanford"), his associates, and various entities under his control (the "Stanford Entities") through the sale of certificates of deposit ("CDs") issued by Stanford International Bank, Ltd. ("SIBL"). *Amici* were putative class members of an unrelated lawsuit arising out of the Stanford Ponzi scheme originally brought as a class action on behalf of all Stanford investors—*Rotstain v. Trustmark National Bank*, No. 3:09-cv-02384-N-BQ, currently pending in the United States District Court for the Northern District of Texas (the "*Rotstain* Action")—who sought to intervene in that lawsuit after class certification was denied. The district court denied *amici* leave to intervene, and that order is currently pending appeal before the Fifth Circuit (Case No. 19-11131).

The Fifth Circuit's decision in the instant case poses a significant threat to all defrauded investors of Ponzi schemes, including *amici*. By granting federal receivers nearly unfettered power to extinguish through bar orders individual claims the receiver otherwise lacks Article III standing to assert—and

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[1] Pursuant to Supreme Court Rule 37.2(a), timely notice of intent to file this brief was provided to counsel for the parties, and all parties consented to the filing of this brief. Pursuant to Supreme Court Rule 37.6, no counsel for any party has authored this brief in whole or in part, and no person or entity, other than *amici* and their counsel, made a monetary contribution to the preparation or submission of this brief.

thus properly monetize through settlement—the Fifth Circuit's decision adversely impacts the value of receivership estates, and thus all defrauded investors.

This is particularly true given the fact that the Receiver[2] and his assignee, the Official Stanford Investors Committee ("OSIC"), have already sought to appropriate *amici*'s claims in the *Rotstain* Action, and will undoubtedly seek to extinguish *amici's* individual claims through bar orders if the Fifth Circuit's order is permitted to stand. It is thus of paramount importance to *amici* that this Court limit receivers' power to agree to bar orders to those situations where the receiver has standing to assert the claims so barred.

Amici are identified in the Appendix.

SUMMARY OF THE ARGUMENT

Petitioners challenge a Fifth Circuit opinion that effectively unmoors a federal receiver's power to extinguish claims through bar orders from any meaningful limitations otherwise imposed by Article III standing requirements. While it clearly recognizes that a receiver's ability to assert claims must necessarily be limited by traditional concepts of injury in fact, the Fifth Circuit inexplicably ignored those same concepts when deciding that a receiver can extinguish through bar orders all claims arising from a Ponzi scheme, including claims exclusively owned by

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[2] Capitalized terms not defined herein shall have the meanings ascribed to them in the Petition for Writ of Certiorari.

third parties, by virtue of the court's assertion of unbridled equity jurisdiction.

While the Fifth Circuit seeks to justify its departure from traditional standing requirements as a necessary means to maximize defrauded investors' recovery, its opinion will have the opposite effect. By granting receivers the power to extinguish all claims arising from a Ponzi scheme—and, even more strikingly, to extinguish claims the receiver had no standing to assert or prosecute in the first place—the Fifth Circuit creates an untenable imbalance of power between receivers' ability to assert claims—which is unquestionably limited by Article III standing requirements—and their ability to discharge tortfeasors' liability through bar orders, which would be practically limitless.

As a direct result, receivers and tortfeasors are now highly incentivized to exclude defrauded investors from the litigation process, allowing tortfeasors to entirely escape liability for a host of individually-owned claims the receiver lacks standing to assert, and depriving defrauded investors of their right to select their own legal counsel or decide how their claims are adjudicated. Indeed, this process has already begun to play out in other cases arising from the Stanford Ponzi scheme, including the *Rotstain* Action in which *amici* sought to intervene.

If left undisturbed, the Fifth Circuit's opinion will unnecessarily reduce the liability of tortfeasors and thus meaningfully diminish the ultimate recovery available to all defrauded investors. For these reasons, the Court should grant review to provide much-needed guidance on this fundamental standing issue.

ARGUMENT

The ultimate issue in this case is whether federal equity receivers may, for the exclusive benefit of the receivership estate, extinguish via bar orders claims held by individual investors against Ponzi scheme co-conspirators that the receiver lacks standing to assert. By granting such power, the Fifth Circuit abandons traditional notions of Article III standing and departs from the principled opinions of the First, Second, Sixth, Seventh and D.C. Circuits, which unquestionably impose on receivers a baseline inquiry of injury in fact. In doing so, the Fifth Circuit has created an indefensible situation where receivers have nearly unlimited power to extinguish even claims they have no power to assert, prosecute or monetize through settlement.

This imbalance will necessarily incentivize receivers and tortfeasors—the parties responsible for the fraud in the first place—to exclude from the litigation process the individual investors who have actually suffered harm. The end result is that tortfeasors never face any risk of liability or monetary loss for the victimized investors' individual claims, which, in turn, drives down settlement values, damaging not only the receivership estate, but all defrauded investors entitled to a pro rata distribution from that estate.

I. The Fifth Circuit Has Created an Imbalance Between the Power to Assert Claims and the Power to Extinguish Them

The Stanford Ponzi scheme was a massive operation that defrauded thousands of investors—including Petitioners and *amici*—out of billions of dollars. *See Sec. & Exch. Comm'n v. Stanford Int'l Bank, Ltd.*, 927 F.3d 830, 836 (5th Cir. 2019). After the SEC sued the Stanford Entities for securities fraud in 2009, the United States District Court for the Northern District of Texas appointed a Receiver "'to immediately take and have complete and exclusive control' of the receivership estate and 'any assets traceable' to it." *Id.*

Federal equity receivers are inherently limited by the jurisdictional constraints of Article III and all other curbs on federal court jurisdiction. *See, e.g.*, *Liberte Capital Grp., LLC v. Capwill*, 248 F. App'x 650, 655 (6th Cir. 2007). The doctrine of standing is rooted in the traditional understanding of the Constitution's "Cases" or "Controversies" requirement. *See* U.S. Const. art. III, § 2, cl. 1; *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016), as revised (May 24, 2016).[3] Standing is a threshold issue that must be considered in advance of considerations on the merits, and independent of any equitable concerns. *See, e.g., Frank v. Gaos*, 139 S. Ct. 1041, 1046 (2019); *cf. State v. Naylor*, 466 S.W.3d

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[3] To have standing, a plaintiff must "have (i) suffered an injury in fact, (ii) that is fairly traceable to the challenged conduct of the defendant, and (iii) that is likely to be redressed by a favorable judicial decision." *Spokeo*, 136 S. Ct. at 1547 (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)).

783, 796 (Tex. 2015) ("Courts cannot presume or create standing and jurisdiction, even for equitable reasons.") (Boyd, J., concurring).

The First, Second, Sixth, Seventh and D.C. Circuits have adopted a uniform approach to handling questions of court-appointed receiver standing, finding that receivers have "no greater rights and powers to sue than the person or entity whose property is in receivership." *Liberte*, 248 F. App'x at 656; *Goodman v. F.C.C.*, 182 F.3d 987, 991–92 (D.C. Cir. 1999) (noting that "a receiver has authority to bring a suit only if the entity in receivership could itself properly have brought the same action"); *Scholes v. Lehmann*, 56 F.3d 750, 753 (7th Cir. 1995) ("Like a trustee in bankruptcy . . . an equity receiver may sue only to redress injuries to the entity in receivership, corresponding to the debtor in bankruptcy."); *Fleming v. Lind-Waldock & Co.*, 922 F.2d 20, 25 (1st Cir. 1990) ("Since 1935 it has been well-settled that the plaintiff in his capacity of receiver has no greater rights or powers than the corporation itself would have."); *see also Eberhard v. Marcu*, 530 F.3d 122, 131–35 (2d Cir. 2008).

Thus, while a receiver's right to bring suit and assert claims is authorized by the district court's order appointing the receiver, the receiver's power to do so is not unlimited. *Fleming*, 922 F.2d at 25; *Liberte* 248 F. App'x at 665. The appointing court may not grant the receiver authority to bring suit where it cannot meet the "irreducible constitutional minimum" of Article III standing. *See Lujan*, 504 U.S. at 560; *Liberte*, 248 F. App'x at 655. In other words, the appointing court cannot create Article III standing in a receiver by a stroke of its pen. *See Bischoff v. Glickman*, 54 F. Supp. 2d 1226, 1232 (D. Wyo. 1999) ("The Court, however, cannot create standing where none exists"); *see also United States v. Hernandez*, No. CR-09-094-N-EJL, 2010 WL 1794301, at *3 (D. Idaho May 3, 2010) (same). This precludes receivers from bringing suit on behalf of others because a plaintiff must "assert its own legal interests, rather than those of third parties." *Goodman*, 182 F.3d at 992 (internal quotation marks omitted).

Instead, a receiver's capacity to assert and resolve claims is limited to only those claims that belong to the entities in receivership to the exclusion of all other factors, including equity. *See Liberte*, 248 F. App'x at 665 ("[W]e 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."). It is thus well established that a receiver merely stands in the shoes of the entity in receivership, has no greater rights in the entity's property than the entity itself, and may only assert claims the entity itself could bring. *See, e.g., Wuliger v. Manufacturers Life Ins. Co.*, 567 F.3d 787, 793 (6th Cir. 2009).

Ignoring these bedrock principles of standing law, the Fifth Circuit has now joined the Tenth Circuit[4] in a growing circuit split by holding that, though they have only limited standing to assert claims belonging to the receivership estate, receivers nonetheless

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[4] *See Sec. & Exch. Comm'n v. DeYoung*, 850 F.3d 1172 (10th Cir. 2017).

possess unfettered power to extinguish through bar orders individual claims that belong exclusively to individual investors, so long as a receiver could also bring claims of its own against the same defendant arising out of the same Ponzi scheme. *See Zacarias* Pet. App. At 28a–29a; *Rupert* Pet. App. at 32.[5]

In affirming bar orders without conducting a traditional Article III standing inquiry concerning the claims extinguished by those orders, the Fifth Circuit has sanctioned a receiver's ability to extinguish claims that it indisputably has no Article III standing to bring in the first place. Indeed, the Fifth Circuit essentially ignored a critical aspect of the underlying case: the fact that the parties at issue were injured in distinct ways, giving rise to independent causes of action that are not owned—and never were owned—by the receivership estate. The Receiver asserted claims on behalf of the Stanford Entities for breach of fiduciary duty and negligence based on Defendants' failure to thwart the Ponzi scheme, whereas Petitioners assert entirely different claims of fraud and negligent misrepresentation based on Defendants' affirmative actions in misrepresenting to

[5] Although the Fifth Circuit pays lip-service to the limitations on receiver standing recognized by other circuits, it ultimately ignores them and bases its ruling on principles of equity and judicial efficiency. *See Zacarias* Pet. App. at 19a–21a; *Rupert* Pet. App. at 21–23 (discussing the need to avoid a "disorderly race to the courthouse" resulting in inefficient distribution of assets, duplicative litigation and preventing claimants from "jump[ing] the queue"); *Zacarias* Pet. App. at 26a; *Rupert* Pet. App. at 29–30 ("the receivership exists precisely to gather such interests in service of equity and aggregate recovery"). In so doing, the Fifth Circuit strays far beyond the recognized boundaries on receiver standing.

investors the amount of insurance coverage protecting SIBL CD investments. *Zacarias* Pet. App. at 38a–39a; *Rupert* Pet. App. at 43–45 (Willet, J., dissenting). Notably, the Receiver did not—and could not, due to lack of standing—himself assert or purport to settle Petitioners' fraud and negligent misrepresentations claims.

By authorizing the Receiver to extinguish claims he lacked standing to assert, the Fifth Circuit has created an untenable imbalance between the limitations on a receiver's power to assert claims—which is unquestionably governed by a traditional Article III standing inquiry—and the receiver's power to extinguish claims via bar order—for which there would not be almost no limitation. In other words, while receivers continue to have limited constitutional standing to assert only those claims for which the receivership estate has suffered some injury in fact, those same receivers simultaneously possess the power to extinguish via bar order all claims arising from the Ponzi scheme without regard to who owns those claims or whether they resulted in injury to the receivership estate.

Foundational principles of Article III standing—clearly recognized by the First, Second, Sixth, Seventh and D.C. Circuits, but ignored by the Fifth and Tenth Circuits—simply do not provide any justification for allowing the Receiver to extinguish claims he lacks standing to assert. The Court should grant review to resolve this issue.

II. Eliminating Standing Requirements For Bar Orders Will Adversely Affect All Receivership Claimants

The Fifth Circuit's decision ignores constitutional standing requirements under the false premise that permitting expansive bar orders will maximize the recovery of the receivership estate.

To the contrary, however, the imbalance between receivers' rights to assert claims and their ability to extinguish them not only empowers receivers to seize control of all claims arising from a Ponzi scheme—regardless of who actually possesses the right to assert and thus monetize those claims—but further incentivizes both receivers and tortfeasors to exclude defrauded investors from the litigation process. This will result in diminished settlement values, damaging both receivership estates and all defrauded investors.

A. The Bar Order Sanctioned by the Fifth Circuit Will Diminish Settlement Values

The Fifth Circuit seeks to justify its decision to ignore standing requirements and to grant receivers power to extinguish all claims arising from a Ponzi scheme based on its view that all investors, regardless of their claims and their efforts to pursue them, should receive a pro-rata share of any recovery. The Fifth Circuit specifically states that receiverships can "curb investors' individual advantage-seeking in order to reach settlements for the aggregate benefit of investors under the court's supervision." *Zacarias* Pet. App. 20a; *Rupert* Pet. App. at 23. Indeed, the Fifth Circuit expressly noted that:

> The receivership solves a collective-action problem among the Stanford entities' defrauded investors, all suffering losses from the same Ponzi scheme. It maximizes assets available to them and facilitates an orderly and equitable distribution of those assets.

Zacarias Pet. App. at 32a–33a; *Rupert* Pet. App. at 37.

While facially desirable, increasing the efficiency of settlement simply does not justify eliminating constitutional standing, and it will not—as the Fifth Circuit seems to believe—maximize recovery for defrauded investors. Indeed, increased speed and efficiency of litigation mean little when the cost is a miscarriage of justice. *Cf. United States v. Tobin*, No. 04-CR-216-01-SM, 2005 WL 1868682, at *2 (D.N.H. July 22, 2005) ("[T]he wheels of justice grind slowly, but they grind exceedingly fine. The alternative—precipitous spinning of the powerful wheels of justice merely to satisfy popular demand—runs the unacceptable risk of those wheels running over the rights of both the accused and the government, and in the end, the people themselves.").

By ignoring the requirements of Article III standing in the context of a receiver's scope of authority to agree to bar orders, the Fifth Circuit's opinion will actually frustrate efforts to maximize the value of the receivership estate by creating an untenable lack of balance between the claims a receiver has the right to assert—and thus monetize through settlement—and the claims a receiver has the right to extinguish through bar orders.

This imbalance creates a substantial incentive for tortfeasors to litigate and negotiate settlement exclusively with the receiver—who has standing to assert only a limited universe of claims—and to then condition that settlement on a release of claims the receiver lacks standing to assert. This represents a vast windfall for tortfeasors: they can entirely escape liability for that separate set of claims—claims that provided no meaningful increase to the value of the settlement negotiated by the receiver and ultimately distributed to defrauded investors—at no additional cost to the tortfeasors' bottom line. This results in a substantial diminishment of the overall recovery by defrauded investors.

For example, in the instant case, the Fifth Circuit explicitly noted that the Receiver and OSIC asserted "only the claims of the Stanford entities—not of their investors—alleging injury to the Stanford entities, including the unsustainable liabilities inflicted by the Ponzi scheme." *Zacarias* Pet. App. at 25a–26a; *Rupert* Pet. App. at 28–29. The Fifth Circuit even cited to *Janvey v. Democratic Senatorial Campaign Committee, Inc.* (*Zacarias* Pet. App. at 25a; *Rupert* Pet. App. at 29), where it previously acknowledged that a "federal equity receiver has standing to assert only the claims of the entities in receivership, and not the claims of the entities' investor-creditors." 712 F.3d 185, 190 (5th Cir. 2013).

Thus, the only claims the Receiver and OSIC had standing to assert and to monetize via settlement were those belonging to the receivership estate. Petitioners, on the other hand, asserted entirely different claims for fraud and negligent misrepresentation, which exclusively belonged to Petitioners. *See Zacarias* Pet. App. at 38a–39a; *Rupert* Pet. App. at 44. As Judge Willet noted in his dissent, these claims assert separate injuries that "resulted from separate action—or inaction—by Willis and BMB." *See id.*

Despite the existence of these valuable claims—and despite the significant additional risk of liability and monetary loss they create for Willis and BMB—in reality these claims resulted in zero additional value for the defrauded Stanford investors. By essentially ignoring Petitioners' claims and litigating exclusively with the Receiver and OSIC, Willis and BMB were able to negotiate a settlement of only the Stanford entities' negligence and breach of fiduciary duty claims, yet nonetheless received a much broader release that also included all of Petitioners' separate claims.

The Fifth Circuit simply ignored this inequitable result, noting only that most Petitioners "have and will continue to recover as claimants in the receivership's distribution process." *Zacarias* Pet. App. at 10a; *Rupert* Pet. App. at 11. In other words, the Fifth Circuit's opinion assumes that Petitioners were adequately compensated simply because they will recover some portion of their overall losses. But Petitioners' ability to recover some portion of the Receiver's settlement through the receivership estate does not eliminate the larger issue of the tortfeasors escaping monetary liability for claims that were not asserted by the Receiver in the first place, and thus which never provided any compensation to defrauded investors. Indeed, the bar orders ensure that no

Stanford investor will ever receive any compensation for those claims, diminishing overall recoveries for all defrauded investors.

Thus, by ignoring the injury in fact requirement when examining a receiver's ability to extinguish claims via bar order, the Fifth Circuit is *actively encouraging* tortfeasors to exclude defrauded investors from the litigation process to ensure that the tortfeasors never have to face liability—or provide any compensation—for claims that receivers had no standing to assert in the first place, resulting in an overall diminishment of recovery by defrauded investors.[6]

Having fewer causes of action and fewer theories of recovery subject to litigation against tortfeasors will necessarily result in reduced risk of liability for those tortfeasors, and thus a reduced risk of monetary loss at trial in the event of an adverse judgment. This will

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[6] The Fifth Circuit inexplicably treats the $132 million settlement amount as the maximum investor recovery from Willis and BMB that could be achieved, as if damages were liquidated or Willis and BMB paid their last dollar to the receiver to settle these claims. *Zacarias* Pet. App. at 28a–29a; *Rupert* Pet. App. at 32 ("The [Petitioners'] claims affect receivership assets because every dollar the [Petitioners] recover from Willis and BMB is a dollar the receiver cannot."). That simply is not true. Damages in this case are unliquidated, and the total loss under the Stanford Ponzi scheme amounts to billions of dollars—far more than the $132 million offered via settlement. Petitioners' separate claims could have generated separate recovery above and beyond the Receiver's settlement, and thus would not have "affect[ed] receivership assets." This is particularly true given Willis' market capitalization of over $25 billion. *See* Bloomberg, https://www.bloomberg.com/quote/WLTW:US (last visited July 22, 2020).

necessarily diminish settlement values, which in turn reduces the assets available to the receivership estate and defrauded investors. By cutting out individual investors—and thus entirely avoiding litigation on claims that can be asserted only by those investors—tortfeasors avoid the burdens of such litigation, which could otherwise serve as leverage to drive up settlement values.

The Fifth Circuit's opinion thus accomplishes precisely the opposite result it seeks in sanctioning the elimination of individual investor claims through bar orders. Far from "maximiz[ing] assets available" to the receivership estate (*Zacarias* Pet. App. at 32a; *Rupert* Pet. App. at 37), by barring all claims arising from a Ponzi scheme without any analysis of Article III standing whatsoever, the Fifth Circuit's opinion will instead have the opposite effect.

These problems would not exist if—as remains the case in the First, Second, Sixth, Seventh and D.C. Circuits—individual defrauded investors were free to pursue their separate and independent claims which were not monetized in the settlement. But by giving federal receivers unrestrained power to extinguish all claims arising from the Ponzi scheme without regard for Article III standing, the Fifth Circuit's opinion effectively discharges the tortfeasors' liability for those separate claims at no cost and with no benefit to the defrauded investors. Such a result defies comprehension, strips defrauded investors of their constitutional rights, and deprives them of a reasonably complete recovery.

B. The Bar Order Sanctioned by the Fifth Circuit Will be Used to Bar Individual Investors From the Litigation Process

The Fifth Circuit's opinion similarly incentivizes federal receivers to seize complete control of all claims arising from a Ponzi scheme to the detriment of defrauded investors. Because tortfeasors will seek to exclude individual investors from the litigation process to eliminate—at no additional cost—any liability for independent claims held exclusively by those investors, those tortfeasors will necessarily leverage significant pressure against receivers to do the same. While such a process ostensibly simplifies the receiver's prospects for achieving settlement, the cost of that simplicity is a meaningful reduction to the overall recovery available to defrauded investors.

Had the Fifth Circuit, instead, applied Article III standing jurisprudence to the process of approving the requested bar orders—and found that receivers cannot extinguish claims they do not have standing to assert—the tortfeasors would have lacked any leverage to pressure the Receiver to extinguish those separate claims as part of settlement negotiations, as any resolution of the receivers' claims could not be conditioned on a release of separate claims owned exclusively by the defrauded investors.

Indeed, by granting receivers unconstrained power to dispose of all claims—even claims the receiver otherwise lacks standing to pursue directly—the Fifth Circuit's opinion eliminates any need for receivers to coordinate litigation efforts with the very investors entitled to any recovery. This, in turn, will embolden receivers to disregard strategy and input provided by individual investors—the actual aggrieved parties—who have no direct relationship to the receivers and thus no legal recourse to hold them accountable should the receivers fail to properly carry out their duties.

In fact, this exact process has already begun to play out in other cases arising from the Stanford Ponzi scheme, including the *Rotstain* Action in which *amici* sought to intervene. There, OSIC, through an assignment from the Receiver of the claims owned by the receivership, has sought to take complete control of investor claims it otherwise lacks standing to assert in a transparent attempt to exclude individual investors from the litigation process.

The *Rotstain* Action was originally filed in August 2009 as a class action asserting various claims, including fraud and violations of the Texas Securities Act, against several banks (the "*Rotstain* Bank Defendants") who were alleged to have aided and abetted the Ponzi scheme. Because SIBL—the entity issuing the CDs at the heart of the Ponzi scheme—was an offshore bank, it needed the *Rotstain* Bank Defendants to accept deposits from individual investors when they purchased CDs. The *Rotstain* Bank Defendants handled these transactions on behalf of SIBL in exchange for lucrative fees—thereby assisting in the perpetration of the Ponzi scheme—while ignoring glaring red flags that should have caused them to sever their banking relationship with Stanford and thwart the Ponzi scheme. *See* Brief For Appellants, Case No. 19-11131 (5th. Cir. Jan. 24, 2020), Doc. No. 00515285393, at p. 8.

Amici were putative members of the *Rotstain* class action, and thus did not file separate individual actions in order to avoid the types of excessive and duplicative litigation that the class action rules were designed to prevent. While the district court denied class certification in November 2017[7]—and the Fifth Circuit declined interlocutory review of that denial in April 2018[8]—*amici* erroneously believed that their individual interests were nonetheless being adequately protected by OSIC, which had intervened in the *Rotstain* Action and claimed that it was representing the interests of all victimized Stanford investors.

In early April 2019, however, Stanford investors began receiving solicitations from law firms concerning the potential expiration of their individual claims against the *Rotstain* Bank Defendants. While attempting to investigate this issue, *amici* received conflicting representations from OSIC and from the Examiner—who was appointed by the district court to advise on issues impacting Stanford investors—regarding whether *amici's* individual claims were being adequately protected. More specifically, while OSIC discouraged intervention by claiming there was no imminent risk of any individual claims being time-barred, the Examiner indicated that claims the *Rotstain* Bank Defendants aided and abetted a fraud perpetrated against Stanford investors actually belonged to the individual investors and not to any

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[7] *See* Order, *Rotstain v. Trustmark National Bank*, No. 3:09-cv-02384-N-BQ (N.D. Tex. Nov. 7, 2017), ECF No. 428.

[8] *See* Order, *Abbott v. Trustmark National Bank*, No. 17-90038 (5th Cir. Apr. 20, 2018), No. 00514440493.

Stanford entity represented by OSIC (via assignment from the Receiver).

As a result of these conflicting representations, *amici* moved to intervene in the *Rotstain* Action to protect their individual claims.[9] *Amici* did so to ensure survival of the strongest viable claims against the *Rotstain* Bank Defendants—claims for aiding and abetting violations of the Texas Securities Act ("TSA"). These are claims the Receiver and OSIC simply lack standing to assert, because TSA causes of action require, as a threshold element, that claimants establish that they purchased the securities at issue. *See Ratner v. Sioux Natural Gas Corp.*, 770 F.2d 512, 517–18 (5th. Cir. 1985) (reversing judgment for liability under the TSA because "[p]ersons who did not buy the security thus lack standing to sue the person who offered or sold it"). This is tantamount to a bankruptcy trustee bringing federal securities law claims on behalf of defrauded investors. There is no authority supporting this annexation of claims in a case under the U.S. Bankruptcy Code, and there should be no such power conferred on the Receiver, whose mandate is circumscribed solely by the order of the court appointing him.

While OSIC—standing in the shoes of the Stanford Entities through an assignment from the Receiver—purports to assert TSA claims in the *Rotstain* Action, there can be no question that the Stanford Entities represented by OSIC did not purchase the SIBL CDs at issue in that lawsuit. Because the receivership

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[9] The district court ultimately denied *amici's* motion for leave to intervene, and that order is currently pending appeal before the Fifth Circuit (Case No. 19-11131).

estate thus could not assert TSA claims, OSIC and the Receiver necessarily lack standing to do so themselves. *See Janvey*, 712 F.3d at 190; *see also Liberte*, 248 Fed. Appx. at 656 ("[A] receiver acquires no greater rights and powers to sue than the person or entity whose property is in receivership."). There is simply no legally cognizable basis for an issuer of a security to recover for fraudulent inducement claims on behalf of the parties it defrauded. Standing is a jurisdictional defense that can be raised at any stage of the proceeding. *See Nat'l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 255 (1994) ("Standing represents a jurisdictional requirement that remains open to review at all stages of the litigation"). Indeed, the *Rotstain* Bank Defendants have explicitly reserved all rights to raise their lack of standing defenses again in the future.

Because of this clear lack of standing, *amici* sought intervention to ensure that these valuable claims were not lost to limitations, and thus unable to be leveraged as part of any potential future settlement with, or trial against, the *Rotstain* Bank Defendants. Despite these efforts, OSIC opposed *amici's* motion for leave to intervene, arguing to the district court that intervention should only be granted if *amici* agreed to a complete stay of their claims—including a stay of discovery—until OSIC's claims were fully adjudicated and finally resolved.[10] In other words, OSIC sought

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[10] OSIC's response in opposition to *amici's* motion for leave indicated that the Receiver "agree[s] with and join[s] the views expressed in this Response." Response of the Official Stanford Investors Committee to Motions to Intervene, *Rotstain v. Trustmark Nat'l Bank*, No. 3:09-CV-2384-N-BQ (N.D. Tex. June 7, 2019), ECF No. 505 at p. 2.

complete control of the litigation and resolution of claims otherwise belonging exclusively to individual Stanford investors.

OSIC and the Receiver—who otherwise lack standing to assert these TSA claims—clearly seek to usurp control of those claims without *amici's* input or involvement, to preserve their ability to negotiate as part of any settlement with the *Rotstain* Bank Defendants a bar order prohibiting *amici* from subsequently prosecuting such individual claims. This would permit the Receiver, through OSIC, to unilaterally dominate control of the litigation against the *Rotstain* Bank Defendants while excluding the actual injured investors from the process altogether.[11]

Indeed, OSIC made this strategy perfectly clear by arguing to the Fifth Circuit—as part of the appeal of the denial of *amici's* motion to intervene in the *Rotstain* Action—that any issues stemming from OSIC's lack of standing to assert TSA claims could be resolved if *amici* would simply assign those individual claims to OSIC for prosecution. *See* Br. of Appellee Official Stanford Investors Committee, Case No. 19-11131 (5th. Cir. Mar. 16, 2020), Doc. No. 00515346681, at p. 40 ("Appellants could, for example, formally

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[11] This would also ensure that OSIC's own legal counsel will not have to split its 25% contingent fee with counsel for the individual investors that have an actual attorney-client relationship with the individual investors. In fact, in conjunction with separate bar order proceedings involving the Stanford Ponzi scheme, the Fifth Circuit has already acknowledged at least one instance of "the Receiver's very high fee request"—money that reduces the amount ultimately available to defrauded investors—and stated that "on remand the fee ought to be reconsidered." *See Stanford*, 927 F.3d at 839 n.4.

assign their claims to OSIC, thus eliminating any question regarding OSIC's standing."). OSIC thus apparently believes that stripping *amici* of their right to choose their own legal counsel and control the prosecution of their own legal claims is preferable to permitting *amici* to intervene in the *Rotstain* Action and participate in the prosecution of claims belonging exclusively to *amici*.

Not surprisingly, the Receiver, to Petitioners' detriment, followed the same playbook in the instant lawsuit, which the Fifth Circuit has now approved by eliminating any standing analysis in conjunction with issuing bar orders. This needless expansion of the power to extinguish claims through bar orders permits—and, indeed, incentivizes—receivers and tortfeasors to exclude individual investors from the litigation process, resulting in increased legal fees for the receivers' legal counsel, reduced liability to the tortfeasors, and reduced settlement values.

By departing from the traditional standing requirements recognized by the First, Second, Sixth, Seventh and D.C. Circuits, the Fifth Circuit's opinion causes significant harm not only to investors seeking to prosecute their individual claims, but to all defrauded investors who seek to share in any recovery through the receivership estate. Given this approach, it should not be surprising that, to date, Stanford investors have recovered less than 5 cents on the dollar for the billions of dollars lost in the Stanford Ponzi scheme. This pales in comparison to recoveries in other notable Ponzi schemes, such as Bernie Madoff's victims, who have recovered approximately 80 cents for every dollar invested.

Federal receivers should be required to establish an injury in fact not only for the claims they assert and settle, but also for claims they seek to extinguish through a bar order. This would eliminate the incentive for both receivers and tortfeasors to exclude individual claimants from the litigation process, as tortfeasors would have no choice but to separately resolve—and thus provide additional remuneration for—the claims of the individual investors, which would in turn result in greater overall recovery by the true victims of the Ponzi scheme: the defrauded investors.[12] As these standing requirements remain

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[12] This would also ensure that the defrauded investors' legal claims are properly protected against the district court's thinly-veiled judicial taking of Petitioners' property rights. It is well settled that a cause of action is a type of property interest. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982) ("[A] cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause."); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950); *see generally* Jeremy A. Blumenthal, *Legal Claims as Private Property: Implications for Eminent Domain*, 36:3 Hastings Const. L.Q. 373 (2009) (discussing the Court's treatment of legal claims as intangible personal property that are protected by the Takings Clause). By barring Petitioners' claims for the purpose of benefitting the Receivership Estate—a public use—the District Court has extinguished a valuable interest in personal property without providing just compensation to Petitioners. *See Horne v. Dep't of Agric.*, 576 U.S. 350, 358 (2015) (holding the Fifth Amendment applies to personal as well as real property); *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 560 U.S. 702, 715 (2010) (plurality opinion) ("If a legislature *or a court* declares that what was once an established right of private property no longer exists, it has taken that property, no less than if the State had physically appropriated it or destroyed its value by regulation."). By only permitting federal receivers to extinguish claims they have standing to assert themselves, any settlement of claims owned exclusively by individual investors would have to come through separate lawsuits or through the

applicable in the First, Second, Sixth, Seventh and D.C. Circuits, the Court should grant review to ensure that defrauded investors can maximize recovery for the substantial losses sustained in these Ponzi schemes.

CONCLUSION

Because of the increased use of receiverships to address investor claims such as this, it is imperative that the Court grant review to address the Article III standing requirements of federal receivers and reverse the decision below.

class action process governed by Federal Rule of Civil Procedure 23.

Respectfully submitted,

Gavin D. Schryver
Counsel of Record
Andrew K. Glenn
KASOWITZ BENSON TORRES LLP
1633 Broadway
New York, New York 10019
Telephone: (212) 506-1700
Facsimile: (212) 506-1800
Email: GSchryver@kasowitz.com

Constantine Z. Pamphilis
J. Michael Wilson
Steven Owens
KASOWITZ BENSON TORRES LLP
1415 Louisiana, Suite 2100
Houston, Texas 77002
Telephone: (713) 220-8800
Facsimile: (713) 222-0843
Email: DPamphilis@kasowitz.com

Counsel for Amici Curiae

July 23, 2020

APPENDIX

APPENDIX

List of Amici Curiae

Annalisa Mendez, Jana L. Amyx, Carlos Barbieri, Dorris Burchett, Giancarlo Delon, Dudley A. DeVore, Sandra H. Dorrell, Michael Drance, Patricia Fall, Debbi Fieldsend, Jeremy Fieldsend, Sonia Galvan, Lawrence Grasso, Rose-Marie Grasso, Bonnie O. Habel (f/k/a Bonnie O'Donnell-Painter), Diana Hanlen, Michael J. Hanlen, Heather Hodges, Kevin Hodges, Cindy C. Keenan, Jeffrey M. Keenan, Harry Margiolos, Joyce Margiolos, John Scott Martin, Jr., Ashton Todd Matthews, Sally Matthews, Horacio Mendez, John H. Murph, Jr., Judith E. Ochea, Daniel T. O'Malley, Cindy Pappas, William Pappas, Neil Potter, Teddie Potter, Reese R. Schmidt, Sylvia Slosel, Jane Torgerson, Harvey Trammel, John B. Turbeville, Jr., Teresita Vazquez Weisser, Philip A. Wilkinson, Ginger E. Winningkoff, Kenneth J. Winningkoff, CarVal GCF Lux Master S.a.r.l., Cheswold (Foxhill), LLC, Contrarian Capital Management, LLC, Corbin ERISA Opportunity Fund, Ltd., Corbin Opportunity Fund, L.P., CVI AA Lux Master S.a.r.l., CVI CHVF Lux Master S.a.r.l., CVI CVF II Lux Master S.a.r.l., CVI CVF III Lux Master S.a.r.l., CVIC II Lux Master S.a.r.l., CVIC Lux Master S.a.r.l., FH Stanford Investment Holdings LLC, Fulcrum Credit Partners LLC, Luxor Capital Group, LP, Next Egg Investments (NFF), LP, WBox 2018-1 LLC, Whitebox Asymmetric Partners, LP, Tommy Lee Allen Jr., Jonathan David Ivester, Jose Sanda, Gerald J. Hebert, Jose Adolfo Nunez Sanz, Angelo Coletta, Edwin Batiz, Cai Hollweg, Carolina Suarez, Ursula Hollweg, Terry C. Goodman, Barbara A. Goodman, Juan Carlos Macias, Carolina Macias, James Gerbert, Lilliam M. Socorro Musso, Lilian Musso de Socorro, Ana Maria Velázquez Anderson, José Sánchez Lecuna, Jorge A. Alvarez Carro, Leyzer L. Topel, Thomas G. Guennewig, Victoria B. Guennewig, Jerome Reinert, Paul Nightingale, Carolyn M. Nightingale, Nadim Saleeby, Margarita Saleeby, Basilisa Araujo Salcedo, Bonnis Leon Araujo, Carole Diana Bullard, Barnell Albers, Mariana Camero, Jose Miguel Lopez, Carla J. Kennedy, Stephen E. Kennedy, Diane B. Callahan, Cynthia P. Kubich, Randall J. Kubich, Roger Powell, Virginia A. Scherer, Thomas W. Scherer, Chian Jim Sun, Catherine Burnell, Deborah Eynon Finley, Keith A. Finley, David E. Herndon, Pierre Wouters, Jorge Enrique Lugo Rivera, Dora Maria Calderon Todd, Barry Hardin, Armando Sanda Berti, Silvia Landa de Sanda, Hoyt Mark White, Kathy R. White, Willis Hoyt White, Peggy Ruth White, Millard Ray Archer, Ronny E. Stage, Manuel A. Landa, Isabel Houtmann Landa, Jamie R. Alexis Arroyo Bornstein, Alfredo Machuca Gonzalez, Oralia Eugenia Vaca de Machuca, Alfredo Jose Machuca Vaca, Oralia Eugenia Machuca Vaca, Allen Iskiwitz, Nitin H. Shah, Sr., Douglas William Lancaster, Barbara Jean Lancaster, Edwin Houthuijzen, Jacobo Sulleh Perrez, Harold Eyre, Audrey Pamela Davies, Jose Pedro Minetti, Mark Ver Hoeve, Donald F. Wolfe, John W. Lane, Nicolas Pescatore, Susan Pescatore, Rolana K. Chu, Angel Landa, The Estate of Jessie Williams, Pride Construction, LLC, Cedar Glad Capital, LLC, ALJ Capital Management, LLC, and Davenport LLC