No. 24-1192

In the

Supreme Court of the United States

OVATION FUND MANAGEMENT II, LLC,
Petitioner,

v.

NOSSAMAN LLP, ET AL.,
Respondents.

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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

Respondents do not dispute that receivership courts around the country are extinguishing claims held by non-receivership entities to facilitate settlements between *other* third parties without their consent. As Ovation's petition explained, the Sixth Circuit held that federal courts lack the power to extinguish these third-party claims. *Digital Medial Solutions, LLC v. South Univ. of Ohio, LLC*, 59 F.4th 772, 777 (6th Cir. 2023). In contrast, the Fifth, Tenth, Eleventh, and now the Ninth Circuit all permit courts to extinguish these claims.

Respondents never address *Digital Media's* holding, and instead argue there is no circuit split because *Digital Media* "harmonized" its facts with the test used in the Fifth and Tenth Circuit cases. Yet *Digital Media's* holding rests on an analysis of the court's equitable power, not on fitting facts to a test. *Digital Media* specifically repudiated the analytical paradigm those cases used to justify their bar orders. *Id.* at 785. This circuit split is real and intractable.

Respondents argue that *Harrington v. Purdue Pharma L.P.*, 603 U.S. 204 (2024) is not a basis for review—devoting many pages to distinguishing it—but they miss the point. Ovation cited *Harrington* not because it controls, but because it demonstrates that this Court considers the question of extinguishing third-party claims for the expedience of others one of national importance. Ovation also cited *Harrington* to highlight the now-disparate treatment of bar orders in Chapter 11 bankruptcies and traditional receiverships. Respondents did not contest either point.

Instead, respondents argue that nothing is unfair about third-party bar orders because they are powerful tools that facilitate investor recovery, so there is no important issue to review. But respondents have it backwards—the good (and bad) this supercharged equitable power can cause is a reason to *grant* certiorari so that the power is uniformly and fairly applied nationwide.

Finally, respondents argue this case is not a suitable vehicle because, by appearing and objecting, Ovation is not a true "third party" to the receivership. Nonsense. Ovation is not a party to any receivership case, which is why even the district court called Ovation a "non-part[y]." App. 37a.

Respondents argue Ovation's settlement agreement with Chicago Title—whereby Ovation agreed not to oppose the Chicago Title Bar Order—creates obstacles to certiorari, but Ovation never objected to the Chicago Title Bar Order. Ovation challenges the Nossaman Bar Order. Respondents do not cite any contract that precludes Ovation from making that challenge.

Respondents also suggest that Ovation forfeited the question presented but ignore the first page of Ovation's opening brief: "This appeal presents the novel question of whether the district court has the authority to bar third-party claims to facilitate an indemnity settlement between two wrongdoers." Pet. C.A. Br., Dkt. 29 at 8. The Ninth Circuit also framed the issue this way: that "the district court had no authority to enter" the Nossaman Bar Order. App. 29a–30a. And respondents do not explain why the panel bothered discussing *Digital Media* and *Harrington* if Ovation did not challenge the court's

power—those cases serve no other purpose. The Court should grant the petition.

I. RESPONDENTS FAIL TO HARMONIZE THE CIRCUIT SPLIT

1. Respondents do not dispute or address the Sixth Circuit's holding that federal courts lack the equitable power to enjoin third-party claims against other third parties. Rather, respondents wrongly contend that *Digital Media's* holding rests on a factual finding that the extinguished claims were "independent" and not "derivative" of the receiver's claims. Chicago Title BIO ("CT-BIO") 10–12.

Digital Media framed the legal question as whether the district court had "the power to enter the Bar Order" enjoining art students' claims "against *third parties outside the receivership*," and concluded that the "district court had no such equitable power." *Digital Media*, 59 F.4th at 777. The subsequent analysis does not discuss whether the art students' claims are "independent" or "derivative" of the receiver's claims as the Ninth Circuit panel used those terms of art.

Nor was *Digital Media's* focus on who possessed the barred claim "shorthand" for the way other circuits analyze whether claims are "independent" or "derivative" as respondents suggest. CT-BIA 12–14. Instead, *Digital Media* criticized the independent/derivative paradigm for failing to consider the "key question" of whether the third party or the receiver "would have possessed the right" to

assert the claim "outside the receivership context." *Digital Media*, 59 F.4th at 785.

In contrast, the panel below found that key question irrelevant. *See* App. 31a (Ovation's claims properly barred even if receiver could not assert them because the claims arose from the Ponzi scheme, which "is enough"). *See also Zacarias v. Stanford Int'l Bank, Ltd.*, 945 F.3d 883, 905 (5th Cir. 2019) (Willett, J., dissenting) (disagreeing with majority conclusion that third-party claims are derivative of the receiver's when they "have origins in the same Ponzi scheme"); *SEC v. DeYoung*, 850 F.3d 1172, 1182 (10th Cir. 2017) (claims not independent where receivership entity also injured by same third-party defendant).

After Ovation filed its petition, Chicago Title asserted this "no circuit split" argument in the Ninth Circuit to oppose Kim Peterson's motion to stay the mandate. C.A. Opp., Dkt. 87 at 8–10. The Ninth Circuit rejected that argument in granting the stay, which required finding a likelihood of certiorari being granted. D. Ct. Doc. 1077 at 2. This Court should reject the argument too.

2. Respondents argue the circuit court decisions are in harmony when their facts are properly analyzed, CT-BIA 15–16, but here too they are mistaken. Ovation is a third party to the receivership whose claims against Nossaman—another third party to the receivership—were barred. In *Zacarias*, individual investors were third parties to the receivership whose claims against insurance brokers, also third parties to the receivership, were barred. *Zacarias*, 945 F.3d at 893–94. In *DeYoung*, individual account holders were third parties to the receivership

whose claims against a bank, also a third party to the receivership, were barred. 850 F.3d at 1179. In *SEC v. Quiros*, a law firm was a third party to the receivership whose claims against an insurer, also a third party to the receivership, were barred. 966 F.3d 1195, 1198–99 (11th Cir. 2020). And in *Digital Media*, art students were third parties to the receivership whose claims against a foundation and an insurer, both third parties to the receivership, were initially barred. 59 F.4th at 776.

The dispositive facts in all five cases are the same and there is no way to distinguish their outcomes factually. The sole difference is the Sixth Circuit's *legal* conclusion that federal court's lack the power to extinguish third-party claims without consent.

3. Respondents claim *Digital Media* is inapplicable to securities-receivership cases like this one, implying that the securities laws give receivership courts authority to extinguish third-party claims. CT-BIA 16–17. But respondents cite no case, statute, or rule supporting their assertion that a federal court's *inherent* equitable power differs depending on the subject matter of the equitable proceeding. Nor did *Digital Media's* analysis turn on that distinction. Instead, *Digital Media's* focus was on the "history of equity receiverships." 59 F.4th at 777. Respondents offer no rationale why that historical analysis does not apply to securities-fraud receiverships, which are also subject to historical equity principles. *See* Fed. R. Civ. P. 66.

4. Finally, despite respondents' contention, there is no internal conflict in the Sixth Circuit over the legality of bar orders warranting further percolation

of *Digital Media*. CT-BIA 17–18. Respondents rely on a case where the barred claims are against the receivership entities, s*ee e.g. United States v. Elliot*, 57 F.2d 843, 844 (6th Cir. 1932) (analyzing whether IRS's claim against bankruptcy estate was properly barred), and an unpublished case challenging the fairness of a settlement—not the bar order. *Gordon v. Dadante*, 336 Fed. App'x. 540, 545 (6th Cir. 2009).

In contrast, this petition, and the circuit split upon which it relies, focuses solely on injunctions extinguishing claims held by and asserted against third parties to the receivership without consent. Ovation's petition does not concern situations where bar orders extinguish claims against receivership entities, or where the barred claims were compensated by the receivership, or any other type of bar order. This Court made a similar distinction in *Harrington*, emphasizing that its holding does not call into question "consensual third-party releases," express a view on "what qualifies as a consensual release," or analyze a plan "that provides for the full satisfaction of claims against third parties." 603 U.S. at 226.

Further percolation is unwarranted. The conflict is binary and will never be resolved by lower-court development. Given the substantial power courts are exercising and the severe prejudice third parties face by having their claims extinguished without their consent, this Court should resolve the issue now to ensure uniformity in both fairness and exercise of this potent judicial power.

II. RESPONDENTS DO NOT MEANINGFULLY DISPUTE THE IMPORTANCE OF THE QUESTION PRESENTED

1. Rather than address *Harrington's* import vis-à-vis the question presented, respondents argue that, as a bankruptcy case, it does not provide a basis to review this non-bankruptcy case. CT-BIA 18–23. This is a non-sequitur. Ovation does not contend that *Harrington* is controlling precedent. Instead, Ovation cites *Harrington* to show that this Court previously considered the nonconsensual extinguishment of third-party claims worthy of its review, and to highlight the disparate treatment of these claims that now exists between bankruptcies and receiverships post-*Harrington*. Respondents failed to address either point.

After Ovation filed its petition, this Court decided *Trump v. CASA, Inc.*, ruling that federal courts likely lacked the equitable power to issue universal injunctions that nationally restrained government enforcement of executive or legislative policy against anyone, even nonparties. 606 U.S. 831, 837 (2025). To reach that conclusion, the Court examined traditional equity principles prohibiting courts from issuing injunctions to "bind one who was not a 'party to the cause.'" *Id.* at 842 (*quoting F. Calvert*, Suits in Equity 120 (2d ed. 1847)). If it was of national significance to address whether federal courts have the power to *help* nonparties, it is equally—if not more—important to address whether federal courts have the power to *hurt* nonparties like Ovation.

2. Respondents argue that the question presented is unimportant because there is nothing untoward

about sacrificing third-party claims against other third parties for the greater good. CT-BIA 23–24. The receiver adds that these bar orders are an "essential piece in a complex puzzle" that facilitated investor recovery. Frietag-BIA 4. Yet neither "net gain" nor judicial expedience explains why the question presented is not important. If anything, that extinguishing third party claims has become so important to receivers and wrongdoers alike is even more reason to determine whether this is a valid exercise of judicial power—or to use the receiver's analogy, whether these bar orders are a legitimate puzzle piece at all.[1] The Sixth Circuit does not allow them, and if that is incorrect, this Court should say so to allow courts in Michigan, Ohio, Kentucky, and Tennessee to use that power.

Respondents likewise argue that the question presented does not recur because some of the district courts cases the petition highlights are unpublished. CT-BIA 24. But whether an opinion is published does not inform whether the issue recurs—even unpublished cases confirm that district courts are repeatedly barring third-party claims. Until this Court intervenes, lower courts will continue to extinguish valuable claims for the benefit of others.

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[1] Respondents claim the Global Settlement would collapse without the Nossaman Bar Order, CT-BIA 7—but this is not true. The Global Settlement is not conditioned on the Nossaman Bar Order. D. Ct. Dkt. 795-4 at 8 (¶10).

III. RESPONDENTS' VEHICLE ARGUMENTS ARE MERITLESS

1. Respondents argue this case does not implicate the question presented because Ovation "consented" to the district court's authority to enter the Chicago Title Bar Order in its settlement with Chicago Title. CT-BIA 24–26, 28–30. The argument is specious. Ovation has never challenged the *Chicago Title* Bar Order—that order does not impact Ovation and Ovation would have no standing to challenge it. Ovation's sole challenge is to the *Nossaman* Bar Order, which no contract prohibits Ovation from challenging.

Further, and contrary to respondents' contention, the settlement agreement *does not* state that Ovation "consented" to any bar order—it merely states that Ovation will support any future good faith settlement motion brought by Chicago Title and will not "oppose" any bar order *Chicago Title* seeks. D. Ct. Doc. 757-13 at 4–5 (¶7). These provisions have no connection to Ovation challenging the *Nossaman* Bar Order to the full extent the law allows.

2. Respondents next argue that this case is a poor vehicle because Ovation and Nossaman both "participated" in the receivership, so they are not truly third parties to the receivership. CT-BIA 25. But neither Ovation nor Nossaman is a receivership entity, and even the district court called Ovation a "non-part[y]." App. 37a. Procedurally, Ovation is in the same position as the opioid victims in *Harrington,* who, despite objecting, were considered third parties to the bankruptcy that extinguished their claims against the Sackler family.

3. Respondents argue Ovation invited error by arguing its appeal under the tests used by the other

circuits. CT-BIA 26–28. The invited-error doctrine, however, does not prohibit a party from pressing alternative legal theories. This is particularly true here because the question of third-party bar orders was one of first impression in the Ninth Circuit and Ovation could not be certain which approach the panel would take.

Similarly, respondents argue that whether Ovation owns the claims the district court extinguished is a factual question. CT-BIA 15, 22–23. For example, respondents argue Ovation's claims have been "judicially determined" to be derivative—and from this, respondents reason that Ovation cannot obtain relief because it does not seek review of this "fact" or any case-specific arguments. *See e.g.* CT-BIA 22. This is pure wordplay.

The Ninth Circuit did not hold that Ovation's claims are "derivative" of the receiver's claims as that term is typically used—Ovation is not a stockholder of any receivership entity. Instead, the panel used the word "derivative" to mean the claims "derive" from the same facts as the Ponzi scheme the receiver was appointed to manage. App. 31a.

Wordplay aside, Ovation does not challenge this "derivative" ruling, which does not inform whether the district court had the power to extinguish claims Ovation owns and asserts against non-receivership third parties. This is a question of law. And there is no dispute that Ovation owns its claims against Nossaman because all agree the Nossaman Bar Order restrains *Ovation* from asserting them.

4. Respondents argue that Ovation forfeited the question presented by failing to press it in the Ninth Circuit and note the Ninth Circuit did not pass upon the question. CT-BIA 27–28. Yet in its opinion, the

Ninth Circuit considered and rejected both *Digital Media* and *Harrington*. App. 21a n.13, 30a n.18. Those cases hold that federal courts lack the power to extinguish third party claims asserted against other third parties—*Digital Media* in receivership and *Harrington* in bankruptcy. Neither case has any other relevance, so the notion that Ovation failed to press the issue, especially after filing a Rule 28(j) letter specifically calling *Harrington* to the Ninth Circuit's attention, is incorrect. And as quoted above, Ovation's opening brief identified the issue expressly: the "novel question of whether the district court had the authority to bar third party claims to facilitate" settlement of other claims. Pet. C.A. Br., Dkt. 29 at 8.

The panel distinguished *Digital Media* and *Harrington* for not arising in the securities fraud context, rather than conform their legal holdings. If the Court views this as significant, the Court should summarily reverse and remand the case back to the Ninth Circuit with directions to expressly analyze whether the district court had the equitable power to issue the Nossaman Bar Order, including under *Trump v. CASA*.

Respondents also argue that Ovation pressed only "factbound" issues with the Ninth Circuit, CT-BIA 2, but this is plainly wrong. Even putting aside the novel legal argument Ovation pressed on the first page of its opening brief, Ovation also argued the Anti-Injunction Act prohibited the bar order, and that California law did not recognize the indemnity claim Nossaman threatened against the receivership. App. 23a, 34a. These are all legal issues.

5. Respondents argue Ovation's claims could still be extinguished under *Digital Media* after this Court's review. CT-BIA 31–32. But as discussed above,

Digital Media held that receivership courts lack the power to issue this type of bar order at all, so it follows that a reversal by this court would necessarily foreclose the Nossaman Bar Order on remand.

6. Finally, Nossaman argues that this case is a bad vehicle because it might win the underlying case. Nossaman-BIA 8–11. Even if true, that would not justify denying review, given the intractable circuit conflict and the undisputed importance of the federal question presented. But it is not true. To take one example, Nossaman argues Ovation's claims are barred by the one-year statute of limitations—calculating that Ovation sued after 17 months. Nossaman-BIA 10. But that calculation does not account for the Judicial Council of California's Emergency Rule 9 tolling the statute of limitations for six months due to COVID-19. With this tolling, Ovation filed in 11 months—timely even under Nossaman's calculation. Nossaman's other merits-related arguments are riddled with similar errors.

Respondents similarly deride the nature of Ovation's damages, suggesting that Ovation is not a "true victim" because it was not a direct investor in the scheme. CT-BIA 30–31. But there is no victim hierarchy empowering lower courts to sacrifice valid claims to assist perceived "worthier" victims, and even if there were, it would not justify denying review of this important federal question.

CONCLUSION

For these reasons, and those stated in Peterson's petition (No. 25-151), the petition for a writ of certiorari should be granted, or the Court should

summarily reverse and remand for proceedings consistent with *Trump v. CASA*.

Respectfully submitted,

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