No. 24-874

IN THE

Supreme Court of the United States

DOUGLAS A. KELLEY, IN HIS CAPACITY AS THE TRUSTEE OF THE BMO LITIGATION TRUST,

Petitioner,

v.

BMO HARRIS BANK NATIONAL ASSOCIATION, AS SUCCESSOR TO M&I MARSHALL AND ILSLEY BANK

Respondent.

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

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QUESTION PRESENTED

The choice whether to certify a question of state law in any particular case "rests in the sound discretion of the federal court." *Lehman Bros.* v. *Schein*, 416 U.S. 386, 391 (1974). The question presented is whether the Eighth Circuit abused that discretion when it addressed, rather than certified, a question of Minnesota law that it deemed clear, in a case in which no party requested certification until a petition for rehearing that was filed *after* the Eighth Circuit issued its decision.

PARTIES TO THE PROCEEDINGS

Petitioner is Douglas A. Kelley, in his capacity as the Trustee of the BMO Litigation Trust. Petitioner was plaintiff-appellee and cross-appellant below.

Respondent is BMO Bank N.A.,[*] as successor to M&I Marshall and Ilsley Bank. Respondent was defendant-appellant and cross-appellee below.

[*] After district court proceedings, Respondent's name changed from "BMO Harris Bank N.A." to "BMO Bank N.A."

CORPORATE DISCLOSURE STATEMENT

BMO Bank N.A., as successor to M&I Marshall and Ilsley Bank, is a national banking association organized under the laws of the United States. It is wholly owned by BMO Financial Corp., a Delaware corporation, which is wholly owned by the Bank of Montreal, a publicly traded company.

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INTRODUCTION

Tom Petters is serving a 50-year prison sentence for running a massive Ponzi scheme. The company he used to carry out that scheme—Petters Company, Inc. (PCI)—pled guilty to fraud and conspiracy charges. As part of PCI's fraudulent scheme, PCI funneled investor funds through hundreds of bank accounts at numerous banks. One bank that PCI exploited was Marshall & Ilsley (M&I). Respondent BMO Bank N.A. (BMO or "the Bank"[1]) acquired M&I long after the Ponzi scheme had ended.

In 2012, PCI's bankruptcy trustee—petitioner Douglas Kelley—filed an adversary proceeding on behalf of PCI against the Bank. As is typical in such bankruptcy proceedings, the Bank raised the equitable defense of *in pari delicto*, which bars a trustee's recovery when the debtor is at least equally responsible for the injury the trustee seeks to remedy. That defense is governed by state law—here, Minnesota's. At each stage of this case—from bankruptcy court, to district court, to the Eighth Circuit—the parties "debate[d]" how Minnesota law "affects th[e] proceeding." Pet.App.6. Kelley did not request certification of any state-law question at any point in bankruptcy court, or in district court, or in his merits briefing or oral argument at the Eighth Circuit.

Accordingly, the Eighth Circuit—like the bankruptcy court and district court before it—reviewed Minnesota law on *in pari delicto*. The Eighth Circuit held that the defense bars Kelley's claims against the

[1] This brief uses "the Bank" to refer to M&I or BMO as is relevant. BMO purchased M&I in 2011. All conduct prior to 2011 was by M&I.

Bank in bankruptcy proceedings. As the court explained in a straightforward, unanimous opinion by Chief Judge Colloton, a trustee in bankruptcy stands in the shoes of the debtor, and here the debtor (PCI) was a wrongdoer of substantially greater fault than the Bank. After all, "PCI was created solely to operate the Ponzi scheme," Pet.App.12, and—at Kelley's own direction—PCI pled guilty in a criminal case to fraud and other wrongdoing. Unsatisfied with that result, Kelley for the first time sought certification to the Minnesota Supreme Court in a *rehearing petition* in the Eighth Circuit. The Eighth Circuit denied the petition without discussion.

In this Court, Kelley has a fundamental problem. His core argument is that Minnesota law does not recognize the *in pari delicto* defense in this context, but this Court does "not normally grant petitions for certiorari solely to review what purports to be an application of state law." *Leavitt* v. *Jane L.*, 518 U.S. 137, 144 (1996). So Kelley tries a different tack. He faults the Eighth Circuit for addressing rather than certifying the state-law issue put before it—or, in his words, for "ignor[ing]" this Court's "advice" on certification. Pet.1. Never mind that Kelley did not ask for certification in his merits briefing in the court of appeals. Never mind that the Eighth Circuit, like other circuits, has a sensible rule against "allow[ing] certification after a case has been decided." *Jung* v. *General Cas.*, 651 F.3d 796, 801 (8th Cir. 2011). Never mind that this Court too has declined certification requests that "come[] very late in the day." *Minnesota Voters Alliance* v. *Mansky*, 585 U.S. 1, 22 n.7 (2018). Kelley still insists that the Eighth Circuit's decision is "troubling," Pet.31, and he asks this Court to decide "[w]hether the Eighth Circuit should have certified the controlling

question of Minnesota law to the Minnesota Supreme Court," Pet.i-ii.

That question is unworthy of this Court's attention. Kelley's strategic decision not to request certification prior to the Eighth Circuit's decision, only to then request it on rehearing after he lost, is sheer gamesmanship. His late request is enough on its own to doom his petition; it makes this (split-less) case an exceptionally poor candidate for any error correction, and it presents a vehicle problem as to any issue the Court might want to reach. And even if Kelley *had* made a timely certification request, there would be nothing wrong with the Eighth Circuit addressing rather than certifying the state-law issue, considering that certification rests in the "sound discretion of the federal court" and is advisable only in "exceptional instances" clearly not present here. *McKesson* v. *Doe*, 592 U.S. 1, 5 (2020). In addition, the Eighth Circuit decided the state-law issue correctly, and its decision is completely consistent with the uniform approach that the courts of appeals take in bankruptcy cases, where *in pari delicto* is an available defense and has been applied many times to prevent bankruptcy trustees from recovering from parties that allegedly aided and abetted Ponzi schemes.

It would be unusual in the extreme for this Court to take up a question about whether certification should have been granted and to second guess the Eighth Circuit for not certifying—especially when Kelley himself never timely requested it. That is all the more true when the Eighth Circuit correctly decided a straightforward state-law issue; there are many additional grounds for applying *in pari delicto* and even more alternative grounds for reversing the original judgment against the Bank; and the supposedly "inno-

cent" creditors whom Kelley insists have been deprived of recovery are, in many cases, themselves complicit in the Ponzi scheme or have recovered substantial amounts through other means. The Court should deny the petition and allow bankruptcy proceedings that began more than a decade ago to finally end.

STATEMENT

1. Tom Petters owned Polaroid and Sun Country Airlines, among other well-known companies. CA8.App.1886.[2] He also orchestrated an infamous Ponzi scheme.

He did so through a company—PCI—that he owned and ran. CA8.App.1921. Petters was CEO, sole shareholder, and sole director; he controlled PCI "in all respect[s]." *Ibid.* In theory, PCI used investor funds to purchase consumer electronics from wholesalers for resale to big-box retailers at a profit. CA8.App.1846. In fact, PCI used those funds to repay earlier investors and to enrich Petters and other PCI officers. CA8.App.1914-1915. PCI was never "a real entity" with legitimate business operations—it was insolvent and, at all times, a "massive fraud." CA8.App.2031.

The scheme Petters perpetrated was "staggering" in its scope and complexity, "involving dozens of Petters entities" funneling funds through "hundreds of bank accounts" at numerous banks. CA8.App.2026-2029. Petters routinely lied to auditors and banks, including by fabricating purchase orders, invoices, and bank statements. CA8.App.1914-1915, 2048-2050.

One bank that Petters exploited was a small regional bank called Marshall & Ilsley (M&I). In 1999, PCI opened a standard checking account at a small

[2] "CA8.App." refers to Appellant's Eighth Circuit Appendix.

branch office of M&I's predecessor bank. CA8.App.2074. PCI officers lied to M&I bank employees and actively hid from them that PCI was using the account to further its Ponzi scheme. CA8.App.2145-2146. BMO purchased M&I in 2011, long after Petters' fraud had ended.

When the Ponzi scheme fell apart, PCI pled guilty to criminal fraud and conspiracy charges. Pet.App.3. Petters was convicted and sentenced to 50 years of imprisonment. *Ibid.* A number of PCI's investors were in on or otherwise aided Petters' Ponzi scheme, see CA8.App.216-228, 1020-1028, and the principals of several were criminally convicted as a result. The government conducted a thorough investigation that brought other complicit individuals to justice but resulted in no criminal charges against the Bank or its personnel.

2. In 2008, a Minnesota federal judge placed PCI into receivership and appointed petitioner Douglas Kelley as federal receiver under 18 U.S.C. 1345. See Pet.App.3. Five days later, Kelley filed a Chapter 11 bankruptcy petition on behalf of PCI. *Ibid.* Several months after that, in early 2009, the bankruptcy court appointed Kelley as bankruptcy trustee. CA8.App.1315.

In November 2012, Kelley—acting as PCI's bankruptcy trustee—filed an adversary proceeding on behalf of PCI against the Bank. Kelley brought four claims under Minnesota state law, including a claim that the Bank had aided and abetted PCI's officers in breaching their fiduciary duties to PCI. CA8.App.1421-1422. Kelley sought to recover losses suffered by eight specific PCI investors who had participated in the Ponzi scheme. Among those eight, principals of three served prison time or were found liable to the SEC for their role in the PCI Ponzi

scheme. CA8.App.1019-1025. And Kelley sought to disallow the bankruptcy claims of numerous investors, including six of those eight, because they knew about or "[p]articipate[d] in" PCI's fraud. CA8.App.1020-1028; see CA8.App.216-228.

In response to Kelley's suit, the Bank raised the defense of *in pari delicto*. Under Minnesota law, that defense bars a plaintiff's recovery when the plaintiff "bears at least substantially equal responsibility for the injury it seeks to remedy." *Christians* v. *Grant Thornton*, 733 N.W. 2d 803, 814 (Minn. Ct. App. 2007). The Bank argued that the defense barred Kelley's claims in bankruptcy on behalf of PCI because PCI was a wrongdoer of equal or greater (in fact, far greater) fault. Pet.App.4.

3. a. The bankruptcy court recognized that *in pari delicto* is "an equitable defense governed by state law" and that Minnesota courts apply the defense to avoid "wast[ing] judicial resources on equally at-fault wrongdoers." Pet.App.60-61. Yet the court concluded that Kelley's appointment as PCI's receiver, just days before the bankruptcy filing, "removed the wrongdoers and corrupt management" from PCI and made the defense unavailable. Pet.App.62; see Pet.App.29-32.[3]

b. Kelley's suit against the Bank was then transferred to the district court. The court acknowledged the universally accepted principle that "the equitable defense of in pari delicto is available in an action by a bankruptcy trustee against another party if the defense could have been raised against the debtor," but

[3] Separate from this case, the bankruptcy court ultimately approved distribution of many hundreds of millions of dollars to PCI creditors, and those creditors have received additional recoveries, of similar magnitude, via other sources. See p.30, *infra*.

agreed with the bankruptcy court that Kelley's appointment as receiver rendered PCI free of the *in pari delicto* defense under Minnesota law. See Pet.App.77-79, 97 n.4, 109.

In October 2022, the district court held a trial that was riddled with errors. See CA8.Appellant.Br.9-15. Kelley's claim that M&I should be held liable as an aider and abettor required Kelley to prove M&I's knowledge of the wrongdoing by PCI's officers, blameworthy assistance by M&I, and causation of recoverable losses. See Pet.App.98. The Bank showed that M&I did not participate in the Ponzi scheme, did not meaningfully profit from its very limited relationship with one Petters entity, did not know the fraud was occurring, and could not have caused any losses given that PCI was insolvent well before it opened an M&I account. CA8.Appellant.Br.31-43. Kelley's theory was that M&I employees should have noticed "red flags" that would have alerted them to the Petters fraud, but his evidence showed only that M&I opened a checking account for PCI and provided routine banking services. See CA8.App.1122-1128, 2056-2063. M&I received alerts relating to PCI's account, but those did not necessarily indicate suspicious activity, and M&I personnel reviewed all of the alerts and found nothing amiss. CA8.App.1929-1930, 2076-2084.

The district court bolstered Kelley's weak presentation through a variety of mistaken rulings. The court barred evidence of PCI investors' complicity in the fraud; imposed spoliation sanctions against the Bank, including an adverse jury instruction, without proof that the Bank had intentionally sought to hide evidence and without permitting the Bank to offer certain evidence showing the absence of any such intent; watered down the elements of aiding-and-abetting liability in the jury instructions; allowed Kelley to seek

damages based on an impermissible damages theory divorced from the amounts lost by PCI; and erroneously permitted the jury to consider punitive damages even though the legal preconditions for such damages were not satisfied. See CA8.Appellant.Br.11-14, 31-64.

The jury found the Bank liable on a single claim, for aiding and abetting PCI's officers in a breach of fiduciary duties to PCI, while rejecting all other claims that Kelley advanced. The jury awarded PCI, a convicted felon, compensatory damages of more than $480 million and punitive damages of almost $80 million. Pet.App.82.

4. a. The Eighth Circuit reversed in a unanimous decision authored by Chief Judge Colloton, concluding that the "defense of *in pari delicto* * * * bars Kelley's claims on behalf of PCI." Pet.App.12. Given that ruling, the court of appeals had no occasion to reach the other arguments the Bank raised on appeal.

The court of appeals began, as the district court had, by recognizing the rule governing this case: a "trustee in bankruptcy stands in the shoes of the debtor" (here, PCI), and so the "defense of *in pari delicto*" is "available in an action by a bankruptcy trustee against another party if the defense could have been raised against the debtor." Pet.App.5-6. The only question was whether Kelley's appointment as a receiver days prior to filing for bankruptcy justified an exception to that rule. The court of appeals explained that "State law governs" whether *in pari delicto* "could have been raised against the debtor" as well as "a federal receiver's rights in a state-law cause of action." Pet.App.6.

The "parties debate[d]" before the Eighth Circuit "how Minnesota law on receiverships affects this proceeding." Pet.App.6. Accordingly, the court of appeals reviewed that Minnesota law and found it clear: *in pari delicto* applies to the claim in this case, which was brought by a bankruptcy trustee on behalf of PCI, not by a receiver on behalf of creditors. Pet.App.7. Relying on three key Minnesota Supreme Court decisions,[4] the Eighth Circuit explained that Minnesota caselaw speaks "only in terms of the *receiver* and what defenses are available against a receiver"; it "does not establish that the *entity* is 'cleansed' of any prior wrongdoing" when a receivership begins. Pet.App.8. Indeed, the court explained, in Minnesota "the appointment of a receiver does not change the receivership entity," but instead "changes only the corporation's management." *Ibid*. Accordingly, although Kelley "could have pursued claims in Minnesota court, on behalf of creditors, as a receiver who was unconstrained by the fraudulent acts of PCI's officers," his "appointment as receiver" did "not change PCI, which remained a wrongdoer." *Ibid.* The court therefore concluded that when the bankruptcy began, and when Kelley sued the Bank on behalf of PCI in his capacity as bankruptcy trustee, the *in pari delicto* defense was fully available to the Bank. Pet.App.7-10; see Pet.App.9-10 ("[n]o Minnesota decision purports to eliminate the defense of *in pari delicto* in a bankruptcy case" and "the receiver is not involved in the bankruptcy proceeding").

The Eighth Circuit explained that its decision accords with a slew of cases applying *in pari delicto* to bar a bankruptcy trustee from recovering against an

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[4] See *German-American Finance* v. *Merchs.' & Mfrs.' State Bank*, 225 N.W. 891, 893 (Minn. 1929); *Magnusson* v. *American Allied Ins.*, 189 N.W. 2d 28 (Minn. 1971); *Bonhiver* v. *Graff*, 248 N.W. 2d 291 (Minn. 1976).

entity that allegedly aided a Ponzi scheme. The court pointed to the Second Circuit's ruling that "the doctrine of *in pari delicto* barred" claims brought on behalf of a Madoff Ponzi-scheme entity by an individual vested with a bankruptcy trustee's powers—a ruling not affected by the fact that New York law provides, as Minnesota law does, that *in pari delicto* does not apply to claims brought by a receiver on behalf of creditors. See Pet.App.10-11 (citing *In re Bernald L. Madoff*, 721 F.3d 54 (2d Cir. 2013)).

The Eighth Circuit deemed remand unnecessary given the overwhelming record establishing PCI as the greater wrongdoer. See Pet.App.11-12. The court explained that "PCI was created solely to operate the Ponzi scheme," and the Bank "cannot be more culpable than the entity that orchestrated the scheme." Pet.App.12.

b. Kelley petitioned for rehearing en banc or panel rehearing. At no point in the twelve years of litigation prior to the rehearing petition—during which time the availability of the *in pari delicto* defense under Minnesota law had been disputed in bankruptcy court, in district court, and before the Eighth Circuit panel—had Kelley requested that any issue be certified to the Minnesota Supreme Court, or even suggested certification as a possible course. In a discussion occupying less than one full page, the petition raised that issue for the first time. See CA8.Rehearing.Pet.15-16. The Eighth Circuit denied rehearing in a two-line order that does not explain the reasons for the denial. Pet.App.14.

REASONS FOR DENYING THE PETITION

I. The Question The Petition Asks This Court To Address Was Not Timely Raised

Kelley leads his petition with an untrue claim—that the Eighth Circuit "ignored" this Court's teachings on certification. Pet.1. In fact, the Eighth Circuit did not "ignore[]" anything, because Kelley never once raised the notion of certification until his petition for rehearing in that court—that is, not until *after* he had urged the court of appeals to address Minnesota law and received a result he did not like. Kelley therefore seeks a decision from this Court on an issue that he did not timely raise below and as to which the Eighth Circuit never spilled a drop of ink. He also seeks to enlist this Court's assistance in what is plainly gamesmanship: having failed to prevail on state law in the Eighth Circuit, he wants to re-run the same arguments before a state court and see if he can do any better. But this Court is not a court "of first view," *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005), and there is also "considerable prudential objection to" disturbing a lower court's judgment due to use of a method of analysis "that petitioner[s] accepted, and indeed * * * requested," *City of Springfield* v. *Kibbe*, 480 U.S. 257, 259 (1987). The petition should be denied on those grounds alone.

A. Kelley's failure to timely raise the certification argument is beyond dispute. Kelley urged the bankruptcy court and the district court to address for themselves Minnesota law on whether the *in pari delicto* doctrine applied in this case. See Dist.Ct.Dkt.56, at 7 (arguing that bankruptcy-court "orders included a careful analysis of Minnesota law" and "should not be disturbed"); Dist.Ct.Dkt.313, at 43-45. His view of Minnesota law prevailed in those courts. In the Eighth Circuit, hoping to hold onto that victory, Kelley

once again urged the court of appeals in his merits briefs and in his oral argument to make its own decision about what Minnesota law has to say. See, *e.g.*, CA8.Appellee.Br.65 (arguing that district court decision was "consistent with a century of Minnesota precedent"). Through those many stages of the case, he never once suggested that any of those decisionmakers should certify a state-law question to the Minnesota Supreme Court, or suggested certification as an alternative if the courts were not entirely convinced by his arguments, or even mentioned certification at all.

Just as Kelley had urged, the Eighth Circuit examined Minnesota law for itself—and it came up with an unambiguous answer, see Pet.App.6-8, that was not the one for which Kelley was hoping. At that point, for the very first time in what had then been *twelve years* of federal litigation, Kelley changed course and asked the Eighth Circuit in his rehearing petition to certify to the Minnesota Supreme Court.

But by then, it was too late. The Eighth Circuit has discretion over whether to grant rehearing requests, and—although it did not provide any reasoning for denying rehearing here—it considers a certification request first raised at rehearing to be untimely, as do the other circuits to have considered the issue. See, *e.g.*, *Rural Water Sys.* v. *Sioux Ctr.*, 202 F.3d 1035, 1037 n.6 (8th Cir. 2000) (parties "should be discouraged from the practice of asking for certification after an adverse judgment has been rendered"); *Perkins* v. *Clark Equip.*, 823 F.2d 207, 210 (8th Cir. 1987); *Jung*,

651 F.3d at 801; see *Floyd Cnty. Mut. Ins.* v. *CNH Indus.*, 18 F.4th 1024, 1027 n.2 (8th Cir. 2021).[5] Indeed, the Eighth Circuit generally considers a request for certification asserted at the *merits* stage in the court of appeals to be untimely if the party failed to make such a request in the district court. See, *e.g.*, *Floyd*, 18 F.4th at 1027 n.2.

The reasons for those rules are obvious. A party that waits to raise certification until after it has *lost* on a state-law issue is trying to get two bites at the apple: it has already made one (unsuccessful) attempt to win the state-law issue in federal court, and a subsequent certification would give it another chance to win that same issue in state court. Allowing certification in that circumstance renders the initial federal decision an empty exercise. See, *e.g.*, *Perkins*, 823 F.2d at 210 (treating "the initial federal court decision" as "nothing but a gamble with certification sought only after an adverse decision" is impermissible). It also is inconsistent with more general party-presentation principles that the Eighth Circuit and other circuits regularly enforce, including that arguments first raised in a rehearing petition come too late. See *Christopherson* v. *Bushner*, 34 F.4th 1123, 1124 (8th Cir. 2022); see also, *e.g.*, *Jenkins* v. *Winter*, 540 F.3d 742, 751 (8th Cir. 2008) (forfeiture of "[c]laims not raised in an opening brief"); *Shelton* v. *ContiGroup*, 285 F.3d

[5] See also, *e.g.*, *Boyd Rosene* v. *Kansas Mun. Gas Agency*, 178 F.3d 1363, 1364 (10th Cir. 1999) ("Never before has a party first requested certification after this court has issued an opinion."); 3d Cir. R. 110.1 (certification motion "must be included in the moving party's brief" on the merits); 7th Cir. R. 52 (same).

640, 643 (8th Cir. 2002) (forfeiture of "arguments first raised on appeal").[6]

This Court applies the *very same* principles where parties make certification requests for the first time in this Court—which is the equivalent of what Kelley has done here. For instance, this Court has previously "decline[d] to exercise [its] discretion" to certify a question to the Minnesota Supreme Court where the party's "request for certification c[a]me[]" only in "its merits brief before this Court," after litigation had been "ongoing in the federal courts for over seven years"—*i.e.*, for less time than this case had been going on when Kelley filed his Eighth Circuit rehearing petition.

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[6] To be sure, a court can order certification *sua sponte*. Wright & Miller, 17A *Fed. Prac. & Proc. Juris.* § 4248 (3d ed.); see *Mansky*, 585 U.S. at 29 (Sotomayor, J., dissenting). But this is not a case involving *sua sponte* certification in the course of considering some other issue on the merits; it is a request for discretionary review of *the certification issue itself*. And here, Kelley not only failed to timely suggest certification under the Eighth Circuit's law; he affirmatively *urged* federal-court review of the state-law issue, only to turn around and request certification after he lost. The Eighth Circuit does not accept such gamesmanship. See pp.12-13, *supra*; cf. Wright & Miller § 4248 (certification request from party "who chose to invoke federal jurisdiction" disfavored). Moreover, under this Court's precedent, the Eighth Circuit's stated views on that matter are dispositive. In *Lehman Brothers* v. *Schein*, an unusual case that this Court took in the early 1970s to "for the first time express[] its view as to the use of certification procedures," the petitioner did not seek certification until rehearing in the court of appeals—and this Court left it to the "sound judgment" of the court below whether certification was appropriate "in view of the lateness of its suggestion by petitioners." 416 U.S. at 392-393 (Rehnquist, J., concurring); see pp.20-21, *infra*. Here, the Eighth Circuit's denial of rehearing and its other precedent on certification makes clear how that court would treat Kelley's stratagem.

Mansky, 585 U.S. at 22 n.7; see, *e.g.*, *Stenberg* v. *Carhart*, 530 U.S. 914, 945 (2000); cf. *Hostetter* v. *Idlewild Bon Voyage Liquor*, 377 U.S. 324, 329 (1964) (similar approach to abstention).

Under the circumstances presented here, granting plenary review or otherwise requiring certification would violate multiple principles that govern this Court's decisions about how to allocate its scarce resources. It would involve considering an issue not properly presented to the lower courts, thereby setting aside the Eighth Circuit's supervisory decisions regarding how that court should function. See *Granfinanciera* v. *Nordberg*, 492 U.S. 33, 39 (1989). It would make this Court a court of first view, given that the Eighth Circuit—understandably—said nothing about certification. See *Cutter*, 544 U.S. at 718 n.7. And it would allow Kelley to play games with the federal courts, urging the Eighth Circuit panel to address state law and then, having convinced the panel to take that very approach but received an unfavorable result, characterizing the approach as badly mistaken and asking this Court to render the Eighth Circuit's decision a nullity so that he can try again in a different forum. See *Springfield*, 480 U.S. at 259; see also, *e.g.*, *New Hampshire* v. *Maine*, 532 U.S. 742, 749-751 (2001) (discussing judicial estoppel). None of that comports with this Court's precedents.

B. Kelley does not attempt to explain why the untimeliness of his certification request, along with his affirmative arguments to the Eighth Circuit that it should address the Minnesota state-law issue on its own, do not doom his petition. But he does seem to preview his likely response to those dispositive points: he asserts that he urged certification at the rehearing stage "[a]fter seeing the Eighth Circuit's rewrite of

Minnesota law in ways unimagined by the courts below or even BMO." Pet.17. Kelley thus appears poised to argue that his late certification request was justified because the Eighth Circuit's decision as to Minnesota law was somehow a surprise.

That argument does not withstand the slightest scrutiny. Even assuming that it were true that Kelley did not anticipate the precise ground for the Eighth Circuit's decision on state law, he still had every opportunity to raise a certification argument prior to the rehearing stage. He knew that the Eighth Circuit would look to Minnesota law to decide the applicability of the *in pari delicto* doctrine; indeed, that is what the district court had done, and that is what Kelley *asked* the Eighth Circuit to do. Given that the state-law issue was front and center in this case, there is no excuse for his failure to raise certification until after he had already lost the appeal.

Kelley also is flatly wrong to suggest that the ground for the Eighth Circuit's decision was surprising, as the Bank repeatedly made the argument accepted by the court of appeals. Both the bankruptcy court and the district court addressed the state-law issue at the heart of the Eighth Circuit's opinion—whether "Minnesota law 'cleanses' an entity that is placed in receivership" such that the *in pari delicto* doctrine is no longer applicable. Pet.App.7; see Pet.App.62 (bankruptcy court opining that "appointment as equity receiver had removed the wrongdoers"); Pet.App.78 (district court echoing that view). Accordingly, on appeal, the Bank directly attacked the conclusion that Minnesota law has any "cleansing" effect where the receiver himself has not brought a claim on behalf of creditors. The Bank explained that the Minnesota Supreme Court decisions on which the district court relied "rejected *in pari delicto* only because

the receiver was 'su[ing]' or otherwise acting 'for the[] benefit' of 'creditors' who committed no wrongdoing." CA8.Appellant.Br.26-27. The Bank made the same argument in its reply brief, explaining that, although *in pari delicto* does not apply "when a receiver brings claims directly on behalf of creditors," here Kelley "(in his role as trustee)" is "not doing so," and thus "there is no basis for any 'cleansing.'" CA8.Reply.7; see *id.* at 8-9 (explaining why Minnesota caselaw cited by Kelley does not provide for any cleansing).

When the Eighth Circuit reviewed the Minnesota decisions cited in the courts below and in the parties' appellate briefing, the court of appeals held—exactly as the Bank had urged—that those decisions do not stand for the "cleansing" proposition on which the lower-court decisions rested. Pet.App.7-8. Moreover, the court of appeals specifically noted that the issue was one that "[t]he parties [had] debate[d]" in their briefing. Pet.App.6.

Kelley's assertion that the Eighth Circuit "invent[ed]" (Pet.25) the rationale for applying the *in pari delicto* doctrine here thus does not square with the facts. In all events, given Kelley's choice not to ask for certification until after he lost this case on appeal, he must now "be bound by the outcome." *Perkins*, 823 F.2d at 210.

II. Even If Kelley Had Timely Requested Certification, The Question Whether The Eighth Circuit Should Have Certified Would Not Merit This Court's Attention

Even if the certification issue had been timely raised below, nothing about the Eighth Circuit's decision to address rather than certify a question of Minnesota law would come close to being worthy of this Court's attention.

A. The petition barely mentions this Court's precedent on certification and does not challenge in any way any existing decision or law on the standard for when certification is warranted—even though certification is the *only* federal issue discussed in the petition.

That precedent makes clear that Kelley's request for certification here is badly misguided. For over fifty years, this Court has ruled consistently that use of certification "in a given case rests in the sound discretion of the federal court." *Lehman*, 416 U.S. at 391. That discretion serves important purposes. This Court has explained that there is typically no need for certification, as "[o]ur system of 'cooperative judicial federalism' presumes federal and state courts alike are competent to apply federal and state law." *McKesson*, 592 U.S. at 5. The Court also has recognized that "certification procedures" can "prolong the dispute and increase the expenses incurred by the parties." *Ibid.* Thus, when a "court of appeals believes that it can resolve an issue of state law with available research materials already at hand, and makes the effort to do so, its determination should not be disturbed simply because the certification procedure existed but was not used." *Lehman*, 416 U.S. at 395 (Rehnquist, J., concurring); see *id.* at 390-391 (majority opinion, to same effect).

The petition wholly ignores the fact that certification is a discretionary decision. Of course, Kelley never gave the Eighth Circuit the opportunity to consider certification before it issued a decision—so there could be no plausible abuse of discretion. But even in a case in which certification had been timely raised, the Eighth Circuit would have considerable discretion to determine the best course, and review by this Court to second-guess the Eighth Circuit would be unusual

in the extreme. Certainly Kelley has not come close to showing (as is typically essential in an error-correction petition) that, in addressing rather than certifying a question of Minnesota law, the Eighth Circuit's decision "conflicts with relevant decisions of this Court." S. Ct. R. 10(c).

B. The petition likewise ignores that this Court has virtually *never* taken up a case to address a question presented that is specifically about whether a lower court should have certified a state-law question.

With only one exception, every certification-related case cited in the petition falls into the same category: a case in which the Court was presented with *an independently cert-worthy question* about whether a state statute violates the federal Constitution, but then found that the state statute was ambiguous and that interpretation of it by a state court might avoid the constitutional question. See, *e.g.*, *Bellotti* v. *Baird*, 428 U.S. 132, 148 (1976) (certification warranted where state statute could be interpreted to "avoid or substantially modify the federal constitutional challenge"); *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 79-80 (1997) (lower courts should have granted timely certification request rather than construe state law so as to "invalidate" it under federal Constitution); *Fiore* v. *White*, 528 U.S. 23, 29 (1999) (certification to "help determine the proper state-law predicate for [the Court's] determination" of "federal constitutional questions"); *McKesson*, 592 U.S. at 6 (similar); *Cline* v. *Oklahoma Coalition for Reproductive Justice*, 570 U.S. 930 (2013) (similar).

This case is nothing like those cases, in several respects. Petitioner does not ask this Court to decide a question independent of certification; rather, certification *is* the question that petitioner presents. And certification was warranted in those cases only because of

"exceptional instances" of constitutional avoidance, *McKesson*, 592 U.S. at 5, that do not exist here. Finally, here the controlling issue of state law is not a "novel" one like interpretation of a newly enacted or little applied state statute. *Ibid*. To the contrary, it is a basic state-law question about the significance of receivership that the Eighth Circuit readily answered by applying existing state-court precedent stretching back nearly 100 years. Pet.App.7-9.

Kelley cites one, and only one, example of a case in which an issue about certification was contained in the question presented: *Lehman Brothers* v. *Schein*, 416 U.S. 386 (1974), decided more than a half-century ago. That case is distinguishable as well. The petitioners in that case argued that abstention—then the typical federal-court procedure for dealing with opaque issues of state law—was inferior to certification, and urged this Court to endorse the possibility of certification by federal courts in certain circumstances. See Pet. Br., 1974 WL 185704, at *17 (U.S.) (arguing that "this is an ideal case for the Court to encourage the use of certification and its broader adoption"). This Court took up the case and laid out basic principles of certification, including that "[i]ts use in a given case rests in the sound discretion of the federal court" and that it is not "obligatory" even where "there is doubt as to local law." 416 U.S. at 390-391. And the Court concluded that certification may have been appropriate given a confluence of special circumstances: there was no "decisive" state-court decision on a "novel[]" question; the lower courts had looked to the law of an entirely *different* state to try to decide the question; and, in the context of mid-twentieth-century technology and mores, the state at issue was quite "distant" from the state where the lower federal courts sat. See *id.* at

389-391 (New York federal judges who "predict uncertain Florida law" are acting "as 'outsiders' lacking" any "common exposure to local law").

Not one of those things is true in this case. Basic principles of certification are now well established, and Kelley does not suggest that they need to be altered. Federal courts regularly certify state-law issues, in their discretion, where warranted. The Eighth Circuit looked at Minnesota law and found decisive Minnesota court decisions that resolved the issue before it. And the Eighth Circuit is not ill suited to address Minnesota law; that court sits in Minnesota and is regularly called on to address the law of that state.

In light of the striking dearth of precedent doing what he seeks, Kelley principally contends that "there is every reason to think that the Eighth Circuit has gotten Minnesota law badly wrong." Pet.34. But that kind of "we need a do-over" rationale as to a bare state-law issue appears *nowhere* in this Court's certification cases. It is particularly misplaced here, given Kelley's gamesmanship, see pp.11-15, *supra*, and the fact that the Eighth Circuit's reading of Minnesota law was straightforward and correct, see pp.23-29, *infra*. But even setting those points aside, the fact that the petition depends on this Court agreeing with Kelley's *substantive* view of Minnesota law lays bare what he is truly asking this Court to do: take up a case to address purely state-law issues.

C. There are a number of additional reasons why this case is a bad candidate for certification—which also makes it a bad candidate for any consideration by this Court, whether plenary or summary.

First, the question Kelley wants certified is non-dispositive. The Minnesota Supreme Court "may answer a [certified] question" only if "the answer may be determinative of an issue in * * * the certifying court." Minn. Stat. 480.065, subd.3. Here, the particular certification question set forth in Kelley's Eighth Circuit rehearing petition could not resolve this case in his favor. That question is, "[u]nder Minnesota law, are *in pari delicto* or similar defenses available when raised in response to the claim of an entity in receivership against a third-party for aiding and abetting the misconduct of the former management of the receivership entity?" CA8.Rehearing.Pet.15. But the Eighth Circuit's decision already "assum[es]" that, under Minnesota law, "a receiver, acting on behalf of creditors, may avoid the defense of *in pari delicto* even when *he brings a claim that belongs to the corporate entity*." Pet.App.7 (emphasis added). The answer to the question Kelley posed, which does not specify whether the claim in question has been brought by a receiver, a bankruptcy trustee, or someone else, therefore could not change the Eighth Circuit's result. See *Stenberg*, 530 U.S. at 945.

Meanwhile, in this Court, Kelley never actually spells out the precise question he thinks should be certified. *E.g.*, Pet.26. If the question he has in mind is the one he stated in his appellate rehearing petition, it is off point for the reason given above. And if it is a different question, that is even more reason for this Court to deny the petition, because that would mean that Kelley's certification proposal was *never* raised in the Eighth Circuit—not even in his rehearing petition. See pp.11-12, *supra*.

Second, regardless of the exact formulation of any certified question, there are multiple reasons why *in*

pari delicto must apply here regardless of what Minnesota law has to say about receiverships—all of which would likewise render any state-court decision on certification futile. For instance, the federal-court orders appointing Kelley as receiver require application of normal bankruptcy rules, which include the regular availability of *in pari delicto*. See CA8.App.1305 (order that "[a]ny bankruptcy cases" commenced "by the Receiver" shall "be governed by and administered pursuant to" Bankruptcy Code's "requirements"). And the Bankruptcy Code, which trumps Minnesota law, provides that PCI's claims against the Bank cannot be "modifi[ed]" by nonbankruptcy law that is triggered by appointment of a receiver, 11 U.S.C. 541(c)(1)(B)—but erasing the *in pari delicto* defense under Minnesota receivership law would do precisely that. See, *e.g.*, *Nisselson* v. *Lernout*, 469 F.3d 143, 156 (1st Cir. 2006); CA8.Appellant.Br.22-23.

III. The Eighth Circuit Correctly Decided The Single, Purely State-Law Issue That This Case Presents

Kelley's request that this Court order the Eighth Circuit to certify is, in the end, just an effort to wring a federal(ish) issue out of a case that is now *solely* about a question of state law. It is therefore not surprising that Kelley spends the bulk of his petition arguing that the Eighth Circuit got Minnesota receivership law wrong. See Pet.19-31. But the Eighth Circuit is perfectly "competent" to address state law, *McKesson*, 592 U.S. at 5, and its decision is correct—making this case a particularly poor candidate for any action by this Court. In addition, Kelley's efforts to suggest that this Court's intervention to require certification could somehow address federal bankruptcy

"policy issues," Pet.35-36—not, notably, any actual issues of bankruptcy *law*—lack merit. But federal bankruptcy law does demonstrate how wrong Kelley (and amicus) are in arguing that the Eighth Circuit's decision will have harmful effects.

A. Chief Judge Colloton began his opinion by setting forth a basic rule: the "defense of *in pari delicto*" is "available in an action by a bankruptcy trustee against another party if the defense could have been raised against the debtor." Pet.App.5-6. That is the unanimous view of the courts of appeals, which have repeatedly held—as to Ponzi schemes large and small—that *in pari delicto* applies to bar claims brought by a bankruptcy trustee (like Kelley) on behalf of an entity used to perpetrate a Ponzi scheme (like PCI).[7] For instance, as the Eighth Circuit specifically noted, in *In re Bernard L. Madoff*, 721 F.3d 54 (2d Cir. 2013), the Second Circuit held that *in pari delicto* barred claims brought by a Madoff-company trustee vested with the same powers as a bankruptcy trustee. See *id.* at 63; Pet.App.10.[8] Minnesota law is in accord with the federal consensus. See *Christians*, 733 N.W. 2d at 814.

Although Kelley does not (and could not) contest that basic rule, he does suggest that *in pari delicto*

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[7] See also, *e.g.*, *Nisselson*, 469 F.3d at 147, 153; *Off. Comm.* v. *R.F. Lafferty*, 267 F.3d 340, 343-344, 357-360 (3d Cir. 2001); *Peterson* v. *McGladrey & Pullen*, 676 F.3d 594, 597-599 (7th Cir. 2012); *Mosier* v. *Callister*, 546 F.3d 1271, 1276 (10th Cir. 2008); *Off. Comm.* v. *Edwards*, 437 F.3d 1145, 1150 (11th Cir. 2006).

[8] That case is especially instructive because Madoff's firm (like PCI) went into receivership before the trustee was appointed. See *SEC* v. *Madoff*, No. 08-cv-10791 (S.D.N.Y.), Dkts. 2-5. Yet the Second Circuit applied *in pari delicto* to bar the trustee's claim.

should not apply when a company's "corrupt management" has been replaced, on the ground that "any recovery by the company will not reward th[e] wrongdoing officials." Pet.22; accord Amicus.Br.4-7. But that argument runs headlong into the uniform rule applying *in pari delicto* to bankruptcy trustees. Prior management is often replaced just before or during bankruptcy proceedings, which means that prior managers do not obtain any benefit from a restructuring or liquidation. See, *e.g.*, *In re Wedtech*, 138 B.R. 5, 8 (S.D.N.Y. 1992). *In pari delicto* nevertheless applies to a bankruptcy trustee's claims, because any other result would be deeply unfair to the holder of that defense and would encourage corporate wrongdoing in the first instance.

B. Kelley contends that Minnesota law provides a special exception to the rule that a bankruptcy trustee's claims are subject to the *in pari delicto* defense. According to Kelley, Minnesota law dictates that appointment of a receiver creates a "'cleansed' receivership entity that is no longer bound by its prior wrongdoing," so that a subsequent bankruptcy trustee is not bound by that wrongdoing either. Pet.App.7; Pet.27-28. But the Eighth Circuit concluded that Minnesota law clearly *does not* create that cleansing effect, and none of Kelley's arguments undermines the Eighth Circuit decision.

1. Kelley first contends that the Eighth Circuit gave "short shrift" to a trilogy of Minnesota Supreme Court decisions (*German-American Finance*, *Magnusson*, and *Bonhiver*). Pet.App.26. But the Eighth Circuit directly addressed those decisions and explained why they do not assist him. The Eighth Circuit concluded that they "speak only in terms of the *receiver* and what defenses are available against a receiver"—

who represents not the rights of the receivership entity, but "the rights of creditors" of that entity. Pet.App.7-8. They do "not establish that the *entity* is 'cleansed' of any prior wrongdoing," *ibid.*, and so they are not relevant to a case like this one in which a bankruptcy trustee is asserting, on behalf of the bankrupt entity (and not its creditors), a claim as to which *in pari delicto* is a defense.

The decisions are precisely aligned with the Eighth Circuit's treatment of them. In *German-American Finance*, the Minnesota Supreme Court explained that *in pari delicto* does not bar claims brought by a receiver when "an act has been done in fraud of *the rights of the creditors*" and the receiver is "su[ing] *for their benefit*." 225 N.W. at 893 (emphases added). *Magnusson* quotes that same language and draws from it the same key point: "The receiver *represents the rights of creditors* and is not bound by the fraudulent acts of a former officer of the corporation." 189 N.W. 2d at 33 (emphasis added). And *Bonhiver*, relying on the other two decisions, says the same thing. See 248 N.W. 2d at 296-297. Those decisions thus do nothing to bolster Kelley's view that, where no claim brought by a receiver on behalf of creditors is at issue, state law somehow allows PCI to escape the *in pari delicto* defense.

Just as revealing is other Minnesota caselaw that Kelley largely ignores. Most notably, in *Christians* v. *Grant Thornton*, the Minnesota Court of Appeals considered an action brought by a bankruptcy trustee in state court asserting claims on behalf of a bankrupt entity. In that case, as here, the trustee argued that *in pari delicto* should not apply "because it would harm innocent creditors." 733 N.W. 2d at 814. The Minnesota court rejected that argument. Invoking the "numerous federal bankruptcy cases applying in pari delicto," the Minnesota court declined to "vary from the

settled application of the doctrine." *Ibid.* In other words, when confronted with a bankruptcy trustee (like Kelley), the Minnesota court held that *in pari delicto* may bar claims in bankruptcy.

Taken together, those decisions dictate exactly the state-law conclusion that the Eighth Circuit reached. The Minnesota cases that Kelley cites declining to apply *in pari delicto* are limited by their terms to receivers bringing claims on behalf of creditors. Minnesota caselaw that arises in the bankruptcy context has *applied* the *in pari delicto* defense—just as the Eighth Circuit did. The Eighth Circuit did not "distort[] Minnesota law" (Pet.4) by applying the caselaw that fits the facts here rather than the caselaw that does not.

2. Kelley also suggests that the Eighth Circuit rendered Minnesota law inconsistent with the "general rule that a party enters bankruptcy with the same property rights it had immediately before filing." Pet.21; see Pet.19-20. But the Eighth Circuit did nothing of the kind, and Kelley's argument implicates only state-law issues, not federal bankruptcy-law issues. In a bankruptcy proceeding, PCI's property rights are governed by state law. See, *e.g.*, *Butner* v. *United States*, 440 U.S. 48, 54 (1979). And under Minnesota law, as the Eighth Circuit explained, the fact that a receiver was appointed prior to bankruptcy and could sue on behalf of creditors has no effect on PCI's state-law property rights: "PCI itself was never 'cleansed'" by the receivership appointment under state law, "so the *in pari delicto* defense was never 'extinguished.'" Pet.App.9. Accordingly, both before and after entering bankruptcy, PCI—the debtor—was subject to *in pari delicto*, and its property rights never changed.

3. Kelley finally says that the decision below "undermines important federal bankruptcy policies"

(Pet.29) by creating a "disincentive for receivers to invoke the bankruptcy process" (Pet.31). That policy argument could not be more incorrect.

As noted, the uniform rule across the circuits is that the *in pari delicto* defense is fully available when bankruptcy trustees bring claims. See p.24, *supra*. That means that the rule that Kelley calls a disincentive to entering bankruptcy already applies *across the country*—and the sky has not fallen. And even with respect to receivers specifically, there are plenty of reasons to choose to "tak[e] advantage of" the highly valuable "tools available in federal bankruptcy" (Pet.18), and to do so regardless of the availability of the *in pari delicto* defense to tort claims.[9]

In fact, it is *Kelley*'s proposed state-law exception that would create perverse incentives. In his view, even a few days of receivership before bankruptcy is enough to erase a key defense to a debtor's tort claims and subvert the typical rules governing bankruptcy proceedings. Kelley never gives a reason why a few days of receivership should make so much difference. Nor does he account for the obvious policy problems with his approach. Among them, Kelley's rule would encourage misuse of the receivership process, encouraging debtors to obtain pro forma receivership orders to erase counterparties' defenses rather than for appropriate protection of company assets. It also would encourage companies to wait for a receivership before

[9] Amicus's claim that the Eighth Circuit's decision will harm consumers, Amicus.Br.7, is baffling. If the Eighth Circuit's decision regarding a highly unusual receivership-followed-by-bankruptcy could have that effect, then the background rule that bankruptcy trustees are subject to *in pari delicto* would have devastated consumers long ago—but that has not occurred.

availing themselves of the "manifold tools" that bankruptcy provides. Pet.30. None of that serves "important federal bankruptcy policies." Pet.29.

IV. In All Events, This Case Does Not Warrant This Court's Attention

In all events, Kelley falls far short of showing that this split-less case, turning on state law, warrants this Court's attention. The decision below is exceedingly narrow. It concludes that, under Minnesota law, Kelley cannot proceed free from the *in pari delicto* defense simply because he was appointed receiver a few days before commencement of bankruptcy proceedings. There is no call for this Court to intervene for purposes of overseeing the discretionary process the Eighth Circuit used to ascertain Minnesota law on receiverships, especially in a case involving the rarely occurring intersection of receiverships and bankruptcy. That is true with respect not only to plenary review but also to any kind of summary action (for which the petition does not ask). And even if the Court were to act, that ultimately could not change the result in this case.

A. Kelley asserts that this case is important on the ground that PCI is a "victim" and the decision below will have a "devastating effect on innocent creditors," whom he claims are "left" with "nothing." Pet.3, 27-28. Those unsupported assertions are dead wrong.

PCI was a fraud from start to finish, not a victim of fraud. It was *never* a "real entity" with legitimate business operations, CA8.App.2031; it was just a front for Tom Petters to run a massive Ponzi scheme and commit devastating financial crimes. That is exactly why, at Kelley's own direction, PCI pled guilty to criminal fraud and conspiracy charges during the pendency of the bankruptcy proceedings. CA8.App.2207.

The Eighth Circuit's sound decision also does not harm any innocent creditors. Many of the creditors in PCI's bankruptcy were far from "innocent." Some of the largest creditors knew about or recklessly disregarded evidence of PCI's fraud. CA8.App.216-228, 1019-1028. Principals of three creditors served prison time or were found liable to the SEC for their role in the PCI Ponzi scheme. *Ibid.* And Kelley himself sought to disallow the bankruptcy claims of six creditors and to recover money from numerous others by arguing in court that those creditors knew about or even "[p]articipate[d] in" Petters' Ponzi scheme. CA8.App.1020-1028; see CA8.App.216-228.

In addition, the Eighth Circuit's decision leaves untouched numerous routes to recovery for any innocent creditors that may exist. The PCI bankruptcy estate collected over $400 million and distributed over $300 million to creditors. Dist.Ct.Dkt.121-12. The receivership separately collected $140 million and distributed almost $90 million. Dist.Ct.Dkt.121-13. As of 2021, all creditor distributions from Petters-related entities totaled over $720 million. *Ibid.* Creditors also can assert their own tort claims against third parties related to the PCI Ponzi scheme, so long as their claims are individual to them—and a number of creditors have done just that. See, *e.g.*, *Ritchie Special Credit Invs.* v. *JPMorgan Chase*, 48 F.4th 896, 899-900 (8th Cir. 2022) (PCI creditor had standing for claim directly against consulting firm).[10]

B. Kelley next contends that, absent this Court's review, "there is no obvious way for the Minnesota

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[10] Innocent creditors in future cases will have all of those options and more—including recovery via government actions or via avoidance actions (a special form of bankruptcy action not subject to *in pari delicto*).

court system to correct" the Eighth Circuit's decision. Pet.19; accord Amicus.Br.13. That decision does not need correcting. See pp.23-29, *supra*. But even if it did, Kelley is wrong.

Most importantly, nothing prevents the Minnesota courts from reaching a different conclusion about Minnesota law than the Eighth Circuit did here. *German-American Finance*, *Magnusson*, and *Bonhiver*, on which the Eighth Circuit's decision turned, are all decisions of the Minnesota Supreme Court—and similar receivership cases could arise again in the Minnesota courts, which could then address the extent to which a company's receivership might have a "cleansing" effect. And just as *Christians* proceeded through the Minnesota courts, so too may future claims brought by bankruptcy trustees in which an *in pari delicto* defense is at issue. See *Christians* v. *Grant Thornton*, 2006 WL 5668739 (Minn. Dist. Ct. Nov. 12, 2006) (noting that claim was asserted in state court by a bankruptcy trustee), *aff'd*, 733 N.W.2d 803.

In addition, the Eighth Circuit could choose in its discretion to take a different approach in the future. For instance, the absence of certification here, where Kelley strategically gave up any entitlement to seek it, would not necessarily bar the Eighth Circuit from granting a timely certification request in another case.

C. Finally, this case does not warrant this Court's attention because there is no possibility of a different result.

Inapplicability of *in pari delicto* would not change the outcome because Kelley failed to establish three separate elements of the only claim on which the jury found for him—aiding and abetting PCI officers' breach of fiduciary duty to PCI. CA8.Br.31-43. First, the Bank can be liable only if it substantially assisted

wrongdoing in a blameworthy manner, which requires something beyond "sloppy banking" or "provision of routine professional services." *Zayed* v. *Associated Bank*, 913 F.3d 709, 720 (8th Cir. 2019). But the trial evidence showed only that Bank employees provided routine services (*e.g.*, processing some wire transfers manually), which does not constitute the requisite blameworthiness. See CA8.Appellant.Br.39-40.

Second, the Bank cannot be liable unless its conduct proximately caused recoverable losses. *In re TMJ Implants*, 113 F.3d 1484, 1495 (8th Cir. 1997). Even assuming that the investor losses sought by and awarded to Kelley were recoverable (contrary to established law), the Bank could not possibly have caused those losses because PCI was insolvent, and thus unable to repay the investors, long before PCI opened its account with M&I. CA8.App.1922-1923.

Third, the Bank has no aiding-and-abetting liability unless Kelley adequately establishes the Bank's *actual* knowledge of misconduct. *Zayed*, 913 F.3d at 715. He did not meet that demanding standard at trial, as perhaps best demonstrated by his complete reliance on the legally insufficient theory that the Bank *should* have known about PCI's wrongdoing. See CA8.Appellant.Br.34-39.

The Eighth Circuit had no need to address those points (or other points BMO raised on appeal) because of its ruling on the *in pari delicto* defense. But even if Kelley could somehow prevail in showing the inapplicability of that defense, the Eighth Circuit would still reach the same result given those independently dispositive failures of proof.

CONCLUSION

The petition should be denied.

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