No. 13-913

IN THE
Supreme Court of the United States

RALPH S. JANVEY,
Petitioner,
v.
JAMES R. ALGUIRE, *ET AL.*,
Respondents.

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

REPLY FOR PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES Page

OTHER AUTHORITIES

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REPLY FOR PETITIONER

Respondents offer nothing that disturbs petitioner's arguments in support of certiorari. None of their "vehicle" arguments is meritorious, and they cannot dispute the importance and urgency of the question presented. Respondents' insistence that receivers' standing has not been the subject of widespread confusion is belied by their choice to wholly ignore, rather than contest or explain, the authorities that demonstrate this disarray. And as evidence that they are right on the merits, and that the lower court's opinion accords with this Court's precedent, they actually offer a First Circuit opinion that mistakenly quoted *the losing party's argument* in this Court's *McCandless* decision. But only this Court can decide whether *McCandless* means what it says. Too much is at stake for too many innocent investors, in this and other receiverships, to delay resolving that question.

A. The "vehicle problems" identified by respondents are illusory

Respondents' lead argument is that the Court should not grant review of an interlocutory or unpublished decision. See Br. in Opp. 11-13. But the Court frequently reviews such decisions, particularly in cases like this one. Respondents' suggestion that this controversy will likely become "moot," *id.* at 12, is also mistaken.

1. Respondents wrongly suggest that the interlocutory status of this appeal is a basis for denying review. See Br. in Opp. 11-12. But while resolution of a *merits* issue usually benefits from a final judgment, jurisdictional or procedural issues are often most efficiently addressed before irrelevant and extraneous case development has occurred. In this case, the question presented is about receivers' *standing* to assert claims on behalf of the estate's creditors—a purely legal threshold issue that is unrelated to the litigation's ultimate merits. Insisting that parties proceed to final judgment before this Court resolves a question of standing would be as inefficient and illogical as insisting on a trial before this Court addresses motion-to-dismiss standards. See, *e.g.*, *Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544, 553 (2007).

Interlocutory review is also warranted here because the nature of the Receiver's standing is "fundamental to the further conduct of the case," and reversing the Fifth Circuit's judgment would effectively end the litigation below. See *Gillespie* v. *United States Steel Corp.*, 379 U.S. 148, 153 (1964) (internal quotation marks omitted). A ruling that the Receiver *does* have standing to assert fraudulent-transfer claims on behalf of creditors would terminate the parties' arbitrability dispute, which has been pending for five years, because the lower courts have already ruled that those creditors' claims are not subject to arbitration. See Pet. 7. Such a ruling would also pretermit the need, in case after case, to hunt for al-

ternative means to pursue assets that rightfully belong to the creditors—the Receiver's entire *raison d'être.* Under these circumstances, "where the opinion of the court below has decided an important issue * * * and Supreme Court intervention may serve to hasten or finally resolve the litigation," immediate interlocutory review is both appropriate and desirable. E. Gressman *et al.*, Supreme Court Practice 282 (9th ed. 2007).

Respondents nonetheless urge this Court to deny the petition by emphasizing that the Receiver could still prevail in the remanded district court proceedings, and that the standing issue therefore might not be "outcome determinative."[1] Br. in Opp. 11. Their argument misses the point. If the Court reverses the Fifth Circuit's ruling, then standing *will* be the decisive issue in this litigation. If certiorari is denied, on the other hand, the parties will be forced to complete lengthy and expensive remand proceedings before the already-ripe standing issue returns to the Court. It is precisely to avoid such potentially unnecessary litigation that this Court grants certiorari to review interlocutory decisions, even if the petitioner could still prevail on other grounds before the district court. See, *e.g.*, *Norfolk S. Ry. Co.* v. *Kirby*, 543 U.S. 14 (2004) (granting certiorari to determine whether a limitation-on-liability provision applied to as-yet-undetermined damages); *F. Hoffman-LaRoche Ltd.* v. *Empagran S.A.*, 542 U.S. 155 (2004) (granting certiorari to review wheth-

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[1] Respondents accuse the Receiver of making inconsistent arguments by stating in the petition that the Fifth Circuit's ruling will force the Receiver to arbitrate his claims, while continuing to resist arbitration in the district court. See Br. in Opp. 10. This is false. The petition clearly states: "Although the Receiver believes that [his claims] are not arbitrable * * * the judgment below would force him to wage that new battle, instead of going about the urgent business of resolving the claims * * * under *McCandless*." Pet. 29.

er plaintiff's claims should have been dismissed rather than remanded under the governing statute).

3. Respondents are also wrong to suggest that review is unwarranted solely because the judgment below was unpublished. See Br. in Opp. 12. Nearly 10% of the Court's cases in the past three Terms have reviewed unpublished decisions by the courts of appeals.[2] A rule precluding certiorari in such cases would effectively transfer this Court's authority to the lower courts, and immunize a large group of cases from review.

In this case, the unpublished nature of the opinion below weighs in favor of granting certiorari. When an appellate court has settled on a rule—even an erroneous one—further applications of that rule will likely come in unpublished opinions that do not "establish new law." See Br. in Opp. 12. The Fifth Circuit's decision *not* to publish its opinion highlights that the question presented—which has been hotly contested in that court, see Pet. 20-22—is now considered settled, and therefore ready for this Court's review.

It is true, as respondents observe, that the Fifth Circuit case that "settled" the question was another in which the Receiver was a party, *Janvey* v. *Democratic Senatorial Campaign Comm., Inc.*, 712 F.3d 185 (5th Cir. 2013) (*DSCC II*). But it does not follow that the lack of a petition for certiorari in *DSCC II* makes a petition less appropriate here. Cf. Br. in Opp. 13. Not only is there no support for such an odd principle, but this case illustrates why such a principle would be foolish. The Receiver *could not* have sought certiorari after *DSCC II* because he was the prevailing party in that case on other grounds.

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[2] From the beginning of October Term 2011 to the present, the Court has released 191 opinions, of which 18 reviewed unpublished decisions (including 5 of the 34 cases decided thus far this Term—an even higher ratio).

See Pet. 8. *DSCC II*'s rule is hardly insulated from review now that the Receiver *can* appeal it.

4. Finally, respondents' contention that this appeal "will become moot" before the Court decides it is also misdirected. Br. in Opp. 12. The issue of standing—the sole issue in the petition—was not remanded to the district court and is ripe for review. See *id.* at 8. In an effort to make proceedings as expeditious as possible if this Court were to deny certiorari, the Receiver agreed to submit briefing on the remanded issues while the petition in this case was being prepared and filed. After all, this litigation has been pending for five years, and the defrauded investors justifiably expect the Receiver to pursue all paths toward recovery. If certiorari is granted, the Receiver can and will request a stay in the district court.[3] See, *e.g.*, *Empagran S.A.* v. *F. Hoffman-LaRoche*, Case No. 1:00-CV-01686, at Doc. 58 (D.D.C. 2000) (granting motion for stay filed *after* the Supreme Court granted certiorari, despite a pending hearing).

In any event, even if the district court were to rule prior to the stay, it is certain that the losing party will appeal, maintaining the live case and controversy. See Br. in Opp. 12 ("if [the Receiver] prevails * * * Respondents will file a new interlocutory appeal").

B. Only this Court's review can resolve the conflict and confusion between and among this Court and the circuits

Aside from purported "vehicle problems," respondents urge this Court to deny the petition because, they contend, the Fifth Circuit's ruling that the Receiver "cannot assert claims on behalf of third-party creditors" relies on "an unbroken line of authority dating back 75 years." Br.

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[3] Respondents claim no prejudice by these proceedings. Indeed, they acknowledge that their post-remand briefing simply "reiterated their prior arguments." Br. in Opp. 9.

in Opp. 13. This assertion is baseless.

1. Respondents wholly ignore the cases and treatises identified in the petition that do not fall within this so-called "unbroken line." Instead of making even the slightest effort to differentiate or otherwise explain those authorities, the brief in opposition omits *every one of them*. Compare Br. in Opp. 13-16, with Pet. at 10-12, 16-17 (discussing *Deitrick* v. *Greaney*, 309 U.S. 190 (1940); *Boston Trading Group, Inc.* v. *Burnazos*, 835 F.2d 1504 (1st Cir. 1987); *Koch Refining* v. *Farmers Union Century Exchange, Inc.*, 831 F.2d 1339 (7th Cir. 1987); *Lank* v. *New York Stock Exchange*, 548 F.2d 61 (2d Cir. 1977); *Central Hanover Bank & Trust Co.* v. *Presidents & Directors of Manhattan Co.*, 105 F.2d 130 (2d Cir. 1939); *A.B. Leach & Co.* v. *Grant*, 54 F.2d 731(6th Cir. 1932); *Drennen* v. *Southern States Fire Insurance Co.*, 252 F. 776 (5th Cir. 1918); 75 C.J.S. Receivers § 392 (2013); 2 R. Clark, Law and Practice of Receivers § 362, at 620 (3d ed. 1959)).

Respondents' refusal to acknowledge these contrary authorities is a tacit acknowledgment that respondents' position—that there is no conflict or confusion on this issue—is irreconcilable with those authorities. And it is. While the trend among the circuits has been to hold that a receiver cannot bring claims on behalf of creditors, some opinions have continued to acknowledge that there are exceptions to this general rule. See Pet. 10-12, 16-17 (collecting cases).

The nature of this confusion is especially important. As the petition explains, the disarray in this area of the law traces directly to this Court's seemingly inconsistent statements in *McCandless* v. *Furlaud*, 296 U.S. 140 (1935) and *Caplin* v. *Marine Midland Grace Trust Co. of New York*, 406 U.S. 416 (1972). See Pet. 13-20. Because the confusion flows from this Court's opinions, only this Court can authoritatively settle it. See, *e.g.*, *Gonzaga*

Univ. v. *Doe*, 536 U.S. 273, 282-283 (2002) (granting certiorari because "[s]ome language in our opinions" could be read to support both parties' positions, thus creating "confusion" and "uncertainty" for the lower courts).

2. The central case in this area—the one decision from this Court that actually addressed *receivership standing*—is *McCandless*. Respondents fail to show how *McCandless* can plausibly be read to support their view or the Fifth Circuit's opinion. Although they claim that *McCandless* holds that a receiver cannot assert claims "in the name of third-party creditors," Br. in Opp. 15, that is flatly wrong.

McCandless stated that the receiver was bringing fraudulent transfer claims "as the representative of creditors," and "in [the creditors'] behalf." 296 U.S. at 159. Justice Cardozo, the opinion's author, is hardly known for imprecision in drafting or an inability to perceive the meaning of the words he wrote. And far from "permit[ting] [the] receiver to recover assets [only] on behalf of the company," Br. in Opp. 15, the Court in *McCandless* expressly declined even to consider whether the corporation could have brought a fraudulent-transfer claim in that case: "There is no occasion to consider whether the corporation itself * * * would be permitted to * * * maintain a suit in equity for appropriate relief." 296 U.S. at 160. The opinion is clear: A receiver has standing to assert fraudulent-transfer claims on behalf of the estate's creditors.

Ignoring all of the above, respondents latch on to just two sentences from *McCandless*:

> As we have striven to make clear, *the receiver does not claim to have succeeded to the rights of bondholders or noteholders* to recover damages for deceit. The wrong that is here redressed is the unlawful depletion of the assets

> *whereby the company was made insolvent* and the creditors were defrauded of their lawful rights and remedies.

Br. in Opp. 15 (quoting 296 U.S. at 167) (emphasis added by respondents).

According to respondents, this passage conclusively proves the receiver in *McCandless* was bringing fraudulent-transfer claims on behalf of the entity and not the creditors. But they emphasize exactly the wrong words. These two sentences come from Justice Cardozo's discussion of *damages* at the end of the opinion, not standing, and are preceded by context respondents omit: "We find it immaterial that the defendants or some of them may be liable to creditors in common-law actions to recover damages for false representations * * *. That is not the basis of the suit before us now." 296 U.S. at 167.

In context, it is readily apparent that this passage sought to clarify, for purposes of assessing damages, that the receiver was not asserting a claim "for deceit" (*i.e.*, common-law fraud)—the phrase that respondents should have italicized above—but instead was bringing a claim based on the "depletion of the assets" that had "defrauded" the creditors (*i.e.*, a fraudulent-transfer action). See *McCandless*, 296 U.S. at 167. Rather than the smoking gun that respondents hoped for, see Br. in Opp. 15, this passage actually demonstrates that *McCandless* recognized the well-established rule that a receiver has standing "to assert claims that belong to *all* creditors generally, including fraudulent-transfer claims," even though he could not "selectively bring claims that are personal to a particular creditor or group of creditors," Pet. 10.

That principle was established by this Court, and it was correctly established. Receivers should have authority to bring claims on behalf of the creditors as a whole, whose interests they are appointed to represent, in order

to perform their duties as effectively and equitably as possible. The judgment below abrogates that principle. Even if—perhaps especially if—other courts are similarly in error, certiorari is proper. See this Court's Rule 10(c).

3. Respondents also attempt to bolster their substantive position by relying on descriptions of *McCandless* in two other opinions, *Fleming* v. *Lind-Waldock & Co.*, 922 F.2d 20 (1st Cir. 1990) and *Caplin*. Again, their efforts only prove petitioner's point. Respondents begin by quoting *Fleming*'s statement that, under *McCandless*, "the plaintiff in his capacity of receiver has no greater rights or powers than the corporation itself would have." Br. in Opp. 13 (quoting *Fleming*, 922 F.2d at 25). But as the petition explained, the First Circuit was mistaken; although it purported to quote *McCandless*'s holding, it actually quoted from the "Arguments of Respondents" preceding Justice Cardozo's opinion. In other words, the First Circuit confused the views of the *losing party* in *McCandless* with the views of the Court. See Pet. at 18 & n.5. Respondents' repeated reliance on *Fleming* demonstrates that the only way *McCandless* supports respondents' position is if one effectively swaps the majority and the dissent.

Finally, respondents rely on *Caplin*'s description of *McCandless* as "emphasiz[ing] that the receiver in that case was suing on behalf of the corporation, not third parties." Br. in Opp. 13 (quoting 406 U.S. at 429). Respondents' reliance on *Caplin*'s puzzling description of *McCandless* is misplaced. The petition offered several reasons for why *Caplin*'s description of *McCandless* is not as straightforward as it may appear. See Pet. 13-15. Another possibility is that this statement was no more than an oversight. *Caplin* was decided during October Term 1971—along with 195 other cases, taking up five volumes (404 through 408) of the United States Reports.

By contrast, in the last full Term this Court—with a larger staff of law clerks and the additional benefits of electronic research and word processing—released 79 opinions, in three volumes of the United States Reports (volumes 568 through 570). *Caplin*'s reference to *McCandless* in a single stray sentence of dictum could hardly have intended to implicitly overrule *McCandless*, but could easily have been a misstatement that simply slipped past unnoticed.

But even if respondents *were* correct, and *Caplin* consciously read *McCandless* to rigidly prohibit receivers from asserting claims on behalf of creditors, certiorari would still be justified. *Caplin*'s reference to *McCandless* has, at best, created an ambiguity in the case law and, at worst, established two irreconcilable decisions. Either one of these justifies certiorari, as only this Court can clarify or rectify its own precedents. See *Gonzaga Univ.*, 536 U.S. at 283; see also *Eberhart* v. *United States*, 546 U.S. 12, 19 (2005) *(per curiam)* (granting certiorari to resolve "an error * * * caused in large part by imprecision in our prior cases").

C. The Receiver's arguments are not contrary to public policy

Finally, respondents criticize the Receiver for telling the Court about the significant burdens that compelling arbitration would impose on the Receivership Estate in this case. Those arguments are improper, they contend, because arbitration is favored by the Court. See Br. in Opp. 16-18.

Respondents wholly miss the point. The question presented to the Court is not about arbitration; it is about the nature of a receiver's standing and his ability to protect the interests of the receivership's creditors. This Court's exercise of discretion in granting or denying the petition can and should be informed by the consequences

of leaving the judgment below unreviewed. In this case, those consequences may include binding the Receiver and the creditors to burdensome arbitration agreements to which they never consented, and that would not be binding if the judgment were reversed.

* * *

The Stanford Receiver is responsible for unwinding the most complex Ponzi scheme in history, and protecting the interests of the almost 20,000 investors who were defrauded out of approximately $5 billion. See Pet. 3-5. Since the Receiver was appointed five years ago, however, his efforts have been repeatedly stymied by the seemingly straightforward question of whether he has standing to assert claims on behalf of those creditors as a whole. The immediate need for that review is further highlighted by the Madoff Trustee's pending petition, No. 13-448, which presents the same standing question to this Court in the bankruptcy context. See Pet. 22-24.

The Court should grant the petition.

Respectfully submitted.

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