No. ________

IN THE

Supreme Court of the United States

JAMES R. ALGUIRE, ET AL.,
Petitioners,

v.

RALPH S. JANVEY,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

This case arises from the Allen Stanford Ponzi scheme, and it involves the intersection of federal receivership law and the Federal Arbitration Act. The Fifth Circuit held that the Stanford receiver is not bound by the receivership entities' arbitration agreements, in direct conflict with multiple decisions from other circuits and this Court's strong policy in favor of arbitration. The Sixth, Tenth, and Eleventh Circuits have previously held that federal receivers are bound by the receivership entities' arbitration agreements.

The question presented is whether a federal receiver, who stands in the shoes of the receivership entities, can avoid the receivership entities' arbitration agreements.

LIST OF PARTIES TO THE PROCEEDINGS

This Petition is filed on behalf of 158 financial advisors, who were defendants in four separate actions in the district court and appellants in a consolidated action in the court of appeals.

In *Janvey v. Alguire*, the "Alguire Petitioners" are Jim Alguire, Orlando Amaya, Victoria Anctil, Tiffany Angelle (Degeyter), Sylvia Aquino, Mike Arthur, Brown Baine, Andrea Berger (Freedman), Michael Bober, Nigel Bowman, Alexandre Braune, Nancy Brownlee, George Cairnes, Scott Chaisson, Neal Clement, Jay Comeaux, Michael Conrad, John Cravens, Patrick Cruickshank, Mike DeGolier, Arturo Diaz, Tom Espy, Jason Fair, Evan Farrell, Roger Fuller, Attlee Gaal, Gregg Gelber, John Glennon, Ward Good, Patricia Herr, John Mark Holliday, Charles Hughes, David Innes, Bill Leighton, Robert (Bobby) Lenoir, Chris Long, Robert Long, Humberto Lopez, Michael Macdonald, Maria Manerba, Mike Mansur, Bert "Deems" May, Doug McDaniel, Matt McDaniel, Pamela McGowan, Lawrence Messina, Bill Metzinger, Trent Miller, Peter Montalbano, David Morgan, Jon Nee, Aaron Nelson, Norbert Nieuw, Scott Notowich, Monica Novitsky, Saraminta Perez, Randy Pickett, Edward Prieto, Christopher Prindle, Andrew Pritsios, Judith Quinones, Michael Ralby, Steven Restifo, Jeff Ricks, Alan Riffle, Steve Robinson, Eddie Rollins, John Santi, Bill Scott, Haygood Seawell, Paul Stanley, Sandy Steinberg, David Heath Stephens, William O. Stone, Jr., Jose Torres, Audrey Truman, Roberto Ulloa, Tim Vanderver, Ed Ventrice, Maria

Villanueva, Bill Whitaker, Donald Whitley, and Hunter Widener.

The "*Anguiano Petitioners*" are Susana Anguiano, George Arnold, Donal Bahrenburg, Jon Barrack, Teral Bennett, Lori Bensing, Norman Blake, Susana Cisneros, Ronald Clayton, Raymond Deragon, James Fontenot, Miguel Garces, Mark Groesbeck, Bill Gross, Rodney Hadfield, Gary Haindel, Dirk Harris, Steven Hoffman, Charles Jantzi, Allen Johnson, Bruce Lang, Grady Layfield, James LeBaron, Jason Leblanc, Trevor Ling, Anthony Makransky, Claudia Martinez, Janie Martinez, Aymeric Martinoia, Carol McCann, Gerardo Meave, Donald Miller, Hank Mills, Rolando Mora, Shawn Morgan, Spencer Murchison, Lupe Northam, Timothy Parsons, James D. Perry, Louis Perry, Sumeet Rai, Rocky Roys, John Schwab, Doug Shaw, Brent Simmons, Steven Slewitzke, Brent Sutton, Paula Sutton, Chris Thomas, Miguel Valdez, Chuck Vollmer, David Whittemore, Michael Word, and Ryan Wrobleske.

The "*Brookshire Petitioners*" are Alan Brookshire, James C. Chandley, David Braxton Gray, Gregory C. Gibson, Steven Glasgow, Jason Likens, Timothy D. Rogers, and John Whitfield Wilks.

The "*Farhy Petitioners*" are Nolan Farhy, Blanca Fernandez, Virgil Harris, Nancy Huggins, Lou Schaufele, and Eric Urena.

The remaining petitioners are Mark Tidwell, Charles Rawl, David Krumrey, and Randolph Robertson.

In *Janvey v. Rincon*, the petitioner is Juan A. Rincon. In *Janvey v. Giusti*, the petitioner is Luis

Giusti. In *Janvey v. Tonarelli*, the petitioner is Oreste Tonarelli.

The Respondent is Ralph S. Janvey, in his capacity as the court-appointed receiver for the Stanford entities, who was the sole plaintiff in each of the foregoing proceedings in the district court and the appellee in the court of appeals.

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully submit this petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The Fifth Circuit and the district court have issued seven different opinions addressing the Petitioners' motions to compel arbitration.

The Fifth Circuit's January 31, 2017 opinion ("*Alguire IV*") is reported at 847 F.3d 241 and reproduced at App. 1a-37a. The district court's July 30, 2014 opinion was unreported, but is available at 2014 WL 12654910 and reproduced at App. 38a-98a.

The Fifth Circuit's August 2013 opinion ("*Alguire III*") is reported at 539 Fed. Appx. 478 and reproduced at App. 99a-104a. This Court denied the Receiver's petition for certiorari on June 30, 2014. *See Janvey v. Alguire*, 134 S. Ct. 2871 (2014). The previous opinions of the Fifth Circuit are reported at 647 F.3d 585 ("*Alguire II*") and 628 F.3d 164 ("*Alguire I*") and reproduced at App. 116a-153a and 154a-193a.

The district court's August 2011 opinion was unreported, but is available at 2011 WL 10893950 and reproduced at App. 105a-115a. The district court's June 2010 opinion was unreported, but is reproduced at App. 194a-228a.

JURISDICTION

The Fifth Circuit rendered its decision on January 31, 2017, and it denied rehearing *en banc* on March 8, 2017. App. at 229a-232a. On May 24, 2017, Justice Thomas granted the Petitioner's application for extension of time to file a petition for writ of certiorari, extending the time to file until August 5, 2017. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 2 of the Federal Arbitration Act (9 U.S.C. § 2) provides, in pertinent part:

> A written provision in … a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction … shall be valid, irrevocable and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Section 3 of the Federal Arbitration Act (9 U.S.C. § 3) provides, in pertinent part:

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement ....

Section 4 of the Federal Arbitration Act (9 U.S.C. § 4) provides, in pertinent part:

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States District Court which, save for such agreement, would have jurisdiction . . . [over] a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement ....

INTRODUCTION

The Fifth Circuit has created a significant circuit conflict involving arbitration and federal receivership law. In this case arising from the Allen Stanford Ponzi scheme, the Fifth Circuit permitted a federal receiver to avoid the Stanford entities' arbitration agreements, in direct conflict with multiple decisions from other circuits and this Court's strong policy in favor of arbitration.

Respondent Ralph Janvey (the "Receiver") is the court-appointed receiver for the Stanford entities, including Stanford Group Company ("SGC") and the Stanford International Bank ("SIB"). In the underlying lawsuits, the Receiver has sued hundreds of former SGC employees seeking to "claw back" their employment compensation.

SGC is a registered broker-dealer and a member of the Financial Industry Regulatory Authority ("FINRA"), and the Petitioners are FINRA-licensed stockbrokers. In response to the Receiver's lawsuits, Petitioners filed motions to compel arbitration pursuant to FINRA rules, their FINRA U-4 Forms, and the terms of their written agreements with SGC.

Petitioners have consistently argued throughout this seven-year dispute that the Receiver stands in the shoes of the Stanford entities, and therefore must honor SGC's arbitration agreements. The Petitioners' argument is supported by decisions from the Sixth and Eleventh Circuits, each of which has squarely held that court-appointed receivers in Ponzi scheme cases are bound by the debtors' arbitration agreements. *See Javitch v. First Union Securities Inc.,* 315 F.3d 619, 627 (6th Cir. 2003) (receiver "is bound to the arbitration agreements to the same extent that the receivership entities would have been absent the appointment of the receiver"); *Wiand v. Schneiderman*, 778 F. 3d 917, 924 (11th Cir. 2015) ("we find that there is no inherent conflict between arbitration and the underlying purpose of court-appointed receivers pursuing clawback claims.").

This Court has repeatedly emphasized that the Federal Arbitration Act ("FAA") embodies a strong public policy in favor of arbitration and that courts must "rigorously enforce arbitration agreements." *Shearson/American Express Inc. v. McMahon*, 482 U. S. 220, 226 (1987). Nevertheless, the lower courts in this case have rejected the very idea of arbitrating the Receiver's claims – permitting the Receiver to assert wave after wave of arguments in an attempt to avoid the Stanford entities' arbitration agreements, and even suggesting new arguments *sua sponte* for the Receiver's benefit, while evincing outright hostility towards FINRA's SEC-approved arbitration framework. *See, e.g.*, App. at 35a ("The arbitration clauses, including their ostensible compliance with FINRA rules, perpetuated the Ponzi scheme by shielding the fraudulent activity from potentially revealing discovery...")(Higginbotham, J., concurring); App. at 97a ("Large numbers of separate arbitrations would be disastrous to the Stanford receivership … ").[1]

To permit a federal receiver to avoid the receivership entities' arbitration agreements is unprecedented, and the Fifth Circuit's decision directly conflicts with decisions from other circuits. Indeed, the Fifth Circuit has created an active conflict involving two of the nation's largest Ponzi schemes – the Allen Stanford Ponzi scheme in Texas and the Arthur Nadel Ponzi scheme in Florida. In *Janvey* and *Wiand*, two SEC receivers – whose counsel worked together, each filing an amicus brief in support of the other – made essentially identical arguments in an effort to side-step the receivership entities' arbitration agreements. And yet the Fifth Circuit and Eleventh Circuit reached precisely opposite conclusions. This conflict warrants Supreme Court review.

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1 *Cf. McMahon*, 482 U.S. at 234 ("In the exercise of its regulatory authority, the SEC has specifically approved the arbitration procedures of the New York Stock Exchange, the American Stock Exchange, and the NASD" [the regulatory predecessors to FINRA]).

STATEMENT OF THE CASE

A. The Receiver's Lawsuit

This case arises from the Stanford Ponzi scheme, and it is ancillary to the Securities and Exchange Commission's civil suit against Allen Stanford. Respondent Ralph Janvey is the court-appointed Receiver for the Stanford entities, including Stanford Group Company ("SGC") and the Stanford International Bank ("SIB").

Stanford had operations in 15 U.S. states and 13 foreign countries. At the outset of the receivership, the Stanford entities had more 3,000 employees, including approximately 1,200 employees in the United States. Unlike Bernie Madoff, whose operation could be described as a "black box in a dark room," Stanford's business was public and high profile. It hosted a PGA Tour event, advertised on television, and included a former Federal Reserve governor in its Washington-based research group. Less than six months before his operations were shut down, Allen Stanford appeared on the Forbes list of "The 400 Richest Americans."

The Receiver has acknowledged that "it could be anticipated, and in fact is true, that many of {Stanford's] employees were honest and were victims of the fraud themselves." ROA.14-10857.18378-79. Indeed, the Securities and Exchange Commission has publicly stated that Allen Stanford and his senior officers "lied to financial advisors." ROA.14-10857.15483.

In the underlying lawsuits, the Receiver has sued the Petitioners seeking to "claw back" their employment compensation. The Petitioners were employed by SGC, and they received all of their compensation from SGC in the form of standard employee paychecks. They were not employees of SIB, nor did they receive payments from SIB.[2]

The Receiver's claims are subject to mandatory arbitration. SGC is a registered broker-dealer and a member of the Financial Industry Regulatory Authority ("FINRA"), and the Petitioners are FINRA-licensed stockbrokers. As a member of FINRA, SGC is bound under FINRA rules to arbitrate all disputes with its registered employees. Finra Manual Rules 0140(a), 13200(a).

Moreover, the majority of the compensation the Receiver seeks to recover from the Petitioners consists of upfront loan payments. Upfront payments are an industry-standard form of compensation paid to financial advisors when they move between brokerage firms. The Petitioners' loan payments were documented with Promissory Notes that included substantially the same broad-form arbitration clause: "Borrower hereby agrees that any controversy arising out of or relating to this Note, or default of this Note, shall be submitted to and settled by arbitration pursuant to the constitutions, by-laws, rules and regulations of the Financial Industry Regulatory Authority (FINRA) [or its predecessor, the NASD] …." ROA.14-10857.2044-45, 2139-2443.

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[2] The exception is Luis Giusti, who was sued separately in *Janvey v. Giusti*. He had a direct relationship (and arbitration agreement) with SIB. App. at 10a-11a, 18-20a.

The Promissory Notes expressly state that SGC's affiliates – which include SIB – are third-party beneficiaries to the agreement: "This Promissory Note shall inure to the benefit of the Company [SGC], its affiliates, and any successor in interest to the business of the Company, whether through merger, acquisition, sale or otherwise."

B. The First Fifth Circuit Appeal

In January 2010, Petitioners filed motions to compel arbitration pursuant to 9 U.S.C. § 4, seeking to enforce the arbitration agreements contained in FINRA's governing rules and their Stanford employment agreements, and to stay all proceedings in the district court pursuant to 9 U.S.C. § 3. In response, the Receiver did not challenge the arbitration agreements themselves, but instead sought to side-step Stanford's arbitration agreements by arguing that he stands in the shoes of third-party creditors rather than the Stanford entities.

Prior to issuing a ruling on the motions to compel arbitration, the district court entered a preliminary injunction freezing the personal assets of former Stanford employees. The Petitioners filed an interlocutory appeal, arguing *inter alia* that the district court lacked the power to enter a preliminary injunction because the Receiver's claims are subject to arbitration.

In the Fifth Circuit's initial opinion dated December 15, 2010, the court held that "[t]he Receiver's claims are not subject to arbitration because he is suing on behalf of estate creditors." *Janvey v. Alguire* ("*Alguire I*"), 628 F.3d 164, 185

(5th Cir. 2010), App. at 193a. The court stated that Stanford's third-party creditors "are not party to the arbitration agreements and therefore [the Receiver] is not bound by the arbitration agreements." *Id.*

The Alguire Petitioners filed a petition for rehearing *en banc*, and in July 2011, the Fifth Circuit withdrew its initial opinion and issued a substitute opinion affirming the district court's preliminary injunction and remanding the motion to compel arbitration to the district court "for a ruling in the first instance." *Janvey v. Alguire* ("*Alguire II*"), 647 F.3d 585, 605 (5th Cir. 2011), App. at 153a.

The preliminary injunction, however, remained in place. FINRA rules do not contemplate pre-arbitration injunctive relief, nor do they allow court-ordered injunctions lasting longer than 15 days. App. at 125a, 127a. Nevertheless, the Petitioners' personal assets have been frozen for more than seven years.

C. The Second Fifth Circuit Appeal

In August 2011, the district court issued an order denying the Petitioners' motions to compel arbitration, basing its holding on the Fifth Circuit's now-withdrawn December 2010 opinion. The Alguire Petitioners filed a second interlocutory appeal.

On August 30, 2013, the Fifth Circuit reversed the decision of the district court, rejecting the Receiver's creditor-standing arguments. App. at 102a-104a. In *Alguire III*, the Fifth Circuit acknowledged that a federal receiver cannot assert claims on behalf of third-party creditors. Indeed, this is a bedrock principle of law, supported by an unbroken line of authority dating back 75 years, including this Court's decision in *Caplin v. Marine Midland Grace Trust Co. of New York*, 406 U.S. 416 (1972). *See Fleming v. Lind-Waldock & Co.*, 922 F.2d 20, 25 (1st Cir. 1990) ("Since 1935 it has been well established that the plaintiff in his capacity of receiver has no greater rights or powers than the corporation itself would have. . . . In other words, the receiver can only make a claim which the corporation itself could have made.") (citing *McCandless v. Furlaud*, 296 U.S. 140, 148 (1935)).

Nevertheless, the Fifth Circuit gave the Receiver another bite at the apple, remanding the case to the district court to determine whether the Receiver "is bound by the arbitration clauses if he sues, as he must, on behalf of the Stanford Entities." *Alguire III*, App. at 104a.

D. The Third Fifth Circuit Appeal

On remand, the district court resolved all relevant fact issues in favor of the Petitioners, determining that: (1) the Receiver's claims in this case are derived solely from the Stanford Entities; (2) the Stanford entities operated as a single entity; (3) the Receiver's claims are encompassed by the defendants' arbitration agreements; and (4) the arbitration agreements are valid under state law. App. at 49a-51a, 53a-57a.

Based on its factual findings, the district court was required to compel arbitration. Nevertheless, it denied Appellants' motions on policy grounds – concluding that federal receivership law "overrides" the FAA, and expressing hostility towards FINRA arbitration. App. at 94a ("Arbitration decentralizes, deconsolidates, strips the court and the receiver of exclusive jurisdiction over the receivership assets, [and] interferes with the broad powers of both the court and the receiver … Large numbers of separate arbitrations would be disastrous to the Stanford receivership …").

In *Alguire III*, the Fifth Circuit held that the Receiver "must" sue on behalf of the Stanford entities, foreclosing any argument that the Receiver can use his office to side-step Stanford's arbitration agreements. Nevertheless, the district court declined to enforce the arbitration agreements on various legal and policy grounds that were premised on the *difference* between the Receiver and the Stanford entities, and that would *not* have been available to the entities themselves. App. at 57a-98a.[3]

1. The District Court Held That the Receiver Can "Reject" Stanford's Arbitration Agreements

First, the district court determined that Stanford's arbitration agreements are "executory" contracts that the Receiver has the power to "reject" under federal bankruptcy and receivership law. App. at 57a-68a. This holding is contrary to the overwhelming weight of federal authority, and it

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[3] The district court followed up with orders in *Rincon*, *Tonarelli*, and *Giusti* adopting its reasoning in *Alguire*. The court also concluded (without discussion) that Rincon had waived his right to arbitrate. App. at 9a-10a, n. 4-6.

granted a power to the Receiver that he had not previously requested or even acknowledged.[4]

The district court's decision is erroneous on multiple counts. As a threshold matter, Stanford's arbitration agreements are not "executory" contracts. Except for the requirement to arbitrate, there are no executor contractual obligations between the Receiver and the Petitioners, whose employment with SGC has been terminated. The existence of an arbitration provision in an otherwise non-executory contract does not render the contract executory. *See Hays & Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 885 F.2d 1149, 1153 (3rd Cir. 1989) ("We see no reason to make an exception for arbitration agreements to the general rule binding trustees to pre-petition *non-executory* contracts, especially in face of the strong federal policy favoring arbitration.") (emphasis added).

Moreover, even in the case of true "executory" contracts, federal courts have consistently held that bankruptcy trustees cannot "reject" arbitration provisions contained within such contracts. "Rejection of a contract, or even breach of it, will not void an arbitration clause. . . . To allow a

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[4] The Receiver had never previously attempted to "reject" the arbitration agreements. Nevertheless, the court explained: "[T]he Court determines that the Receiver in the present case has rejected the arbitration agreements. Receivership caselaw is clear that federal equity receivers are under no obligation to affirmatively reject an executory contract. . . . The Court deems the Receiver's actions in filing this lawsuit in federal court against the Employee Defendants as rejection of the arbitration agreements." App. at 65a.

party to avoid arbitration by simply terminating the contract would render arbitration clauses illusory and meaningless." *In re Fleming Cos.*, 325 B.R. 687, 693-94 (Bankr. D. Del. 2005). This rule is consistent with Supreme Court precedent holding that "arbitration clauses as a matter of federal law are 'separable' from the contracts in which they are embedded." *Prima Paint Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 402 (1967); *see also Buckeye Check Cashing Inc. v. Cardegna*, 546 U.S. 440, 445 (2006) ("as a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract").

The district court also acknowledged that "there are strong federal policy considerations behind the FAA that should be taken into account" (citing *Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 24 (1983)), and further, that "allowing the Receiver to reject these arbitration agreements in some ways invokes specters of the past – where courts treated arbitration agreements with hostility, a problem that Congress intended to resolve with the FAA." App. at 66a. Indeed.

2. The District Court Held That the Federal Receiver Law "Overrides" the Federal Arbitration Act

Second, the district court held that federal receivership law conflicts with and therefore "overrides" the Federal Arbitration Act. App. at 69a-98a. The district court largely relies on two Fifth Circuit bankruptcy cases to support his analysis – *In re Gandy*, 299 F.3d 489 (5th Cir. 2002) and *In re National Gypsum Co.*, 118 F.3d 1056 (5th Cir. 1997).

But these cases actually *require* arbitration. In *Gandy* and *National Gypsum*, the Fifth Circuit held that enforcement of arbitration agreements is mandatory if a bankruptcy trustee is asserting claims that are *derivative of the debtor*.

Under *National Gypsum* and *Gandy*, a court may deny arbitration only where "the proceeding *derives exclusively from the provisions of the Bankruptcy Code*" and "arbitration … would conflict with the purposes of the Code." *National Gypsum*, 118 F. 3d at 1067 (emphasis added); *Gandy*, 299 F.3d at 495. This rule is premised on a perceived conflict between two federal statutes – the Federal Arbitration Act and the Bankruptcy Code. This premise is questionable in light of this Court's decisions on arbitration, but in the context of the present case it's also academic.

Mr. Janvey is a federal equity receiver, not a bankruptcy trustee.[5] He has no rights under the Bankruptcy Code, and he is not asserting – and cannot assert – any claims that "derive exclusively from the provisions of the Bankruptcy Code." To the contrary, Mr. Janvey's claims are exclusively brought "on behalf of the Stanford Entities." *Alguire*

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5 Mr. Janvey has long opposed any efforts to place the Stanford entities into bankruptcy. ROA.14-10857.15522. This is a fundamental problem, and it has created numerous issues and inefficiencies that otherwise could have been avoided. The Second Circuit has expressed "strong reservations as to the propriety of allowing a receiver to liquidate [an estate]." *Eberhard v. Marcu*, 530 F.3d 122, 132 (2d. Cir. 2008). "[R]eceivership should not be used as an alternative to bankruptcy." *Id.*

III, 539 Fed. Appx. at 480. Bankruptcy trustees have statutory powers that simply do not apply to court-appointed receivers. A bankruptcy trustee has the statutorily-created right to pursue fraudulent transfer claims on behalf of creditors. *See* 11 U.S.C. § 544. A receiver does not.

Even so, the district court applied the rationale of *National Gypsum* and *Gandy* to equity receiverships, and it concluded that the general purpose and framework of the federal receivership laws should override the explicit statutory requirements of the FAA. The Securities and Exchange Commission supported this argument at the court of appeals. But it has no basis in law, and it ignores this Court's precedents.

Congress enacted the FAA "in response to widespread judicial hostility to arbitration." *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304, 2308-09 (2013). The FAA requires courts to enforce arbitration agreements according to their terms, even when the claims at issue are federal statutory claims, unless the FAA's mandate has been "overridden by a contrary congressional command." *Shearson/American Express Inc. v. McMahon*, 482 U. S. 220, 226 (1987).

"In every case the Supreme Court has considered involving a statutory right that does not explicitly preclude arbitration, it has upheld the application of the FAA." *DR Horton, Inc. v. National Labor Relations Board*, 737 F.3d 344, 357 n.8 (5th Cir. 2013); *see also CompuCredit v. Greenwood*, 132 S. Ct. 665, 672 (2012) (when Congress has intended to prohibit arbitration clauses, it has done so with "clarity"). Notably, the Court has expressly held that there is no "contrary congressional command" prohibiting arbitration of statutory claims under the federal securities laws. *See McMahon*, 482 U.S. at 242 (requiring arbitration of claims under Securities Exchange Act of 1934); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989) (requiring arbitration of claims under Securities Act of 1933).

The receivership statutes are rather bare bones. *See* 28 U.S.C. §§ 754, 959, and 1692. They generally authorize the receiver to take possession of property and litigate claims in different districts. But "the appointment of the receiver does not necessarily grant the federal court the exclusive right to determine all questions or rights of action affecting the debtor's estate." *Riehle v. Margolies*, 279 U.S. 218, 223 (1929).

Certainly, there is no "congressional command" in the receivership laws prohibiting arbitration with "clarity." *McMahon*, 482 U.S. at 226; *CompuCredit*, 132 S. Ct. at 672. The receivership statutes are silent on arbitration. But the FAA is not. The FAA contains an explicit "congressional command," and it requires arbitration.

3. Based on the Receiver's Own Admissions, the District Court Held That SGC and SIB Were Alter Egos

Despite the district court's policy objections to arbitration, it rejected a key argument asserted by the Receiver. In his February 2014 post-remand brief, the Receiver raised an entirely new argument in an effort to avoid arbitration. Disregarding his prior briefing, the Receiver claimed that he was acting solely on behalf of SIB, as a distinct and separate entity from SGC, and therefore he did not have to honor SGC's arbitration agreements.

This argument was meritless, and it was summarily rejected by the district court. When a signatory to an arbitration agreement is the alter ego of a non-signatory, the non-signatory is bound to the arbitration agreement. *See Arthur Andersen LLP v. Carlisle*, 129 S. Ct. 1896, 1902 (2009) (arbitration agreements may be enforced under alter ego theory). In the Stanford litigation, the Receiver has repeatedly argued that SGC and SIB were alter egos of a single business enterprise:

- "The Court should not treat SIB as a separate corporate entity." ROA.14-10857.19226.
- "SIB was a sham corporation whose separateness was ignored by Stanford and his co-conspirators." ROA.14-10857.19222.
- "The facts of the Stanford Ponzi scheme are such that multiple alter ego grounds … support disregarding SIB's supposed corporate separateness." ROA.14-10857.19183.
- "Ponzi schemes fit precisely the alter ego and 'sham to perpetrate a fraud' grounds for disregarding the corporate fiction." ROA.14-10857.19196.

In related proceedings, the SEC has likewise argued in favor of piercing SIB's corporate veil. ROA.14-10857.19166 ("Petitioners' legal arguments hinge on a false premise, i.e., that this Court is required to treat Stanford International Bank, Ltd. as if it were a legitimate business.").

In light of the *Receiver's own arguments* in favor of an alter ego determination, the district court had ample discretion to find that SIB and SGC operated as alter egos of a single business enterprise.

4. The Fifth Circuit's Decision

At the Fifth Circuit, the hostility to arbitration continued. The appellate court expressed numerous concerns about arbitration, both in its per curiam opinion and more forcefully in Judge Higginbotham's concurrence. App. at 21a (Receiver "makes a strong argument" that "enforcement of the arbitration agreements would give effect to the very fraud the Receiver is charged with unwinding …"); App. at 25a ("Simply put, arbitration agreements may be rejected when they are instruments of a criminal enterprise, as these arbitration agreements were.").

The language of the court's opinion, particularly its misunderstanding of this Court's holdings in *Prima Paint* and *Buckeye*,[6] is likely to have a chilling effect on the arbitration of fraud claims in the Fifth Circuit. Even so, the Fifth Circuit did not directly override the FAA in the context of federal receiverships. Instead, it affirmed the district court's order through the back door, by *reversing* the district court's factual findings on alter ego. It did so

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6 *See* discussion *infra*, at 32-36. "[A]rbitration clauses as a matter of federal law are 'separable' from the contracts in which they are embedded." *Prima Paint Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 402 (1967).

on a *de novo* basis, without any discussion or analysis of the district court's contrary findings, the Receiver's admissions that SIB was a "sham" entity, the SEC's failure to support this argument in its *amicus curiae* brief, or the proper standard of review articulated by this Court. *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 947-48 (1995) (circuit court reviewing district court decision regarding agreement to submit dispute to arbitration should accept findings of fact that are not "clearly erroneous").

The Fifth Circuit held that the Receiver may avoid arbitration by suing solely on behalf of SIB – an entity that had no separate corporate existence, did not employ or make payments to the Petitioners, and is covered by Petitioners' arbitration agreements anyway as an "affiliate" of SGC. The Fifth Circuit's opinion disregards public policy favoring arbitration and conflicts with decisions from multiple circuits enforcing arbitration agreements according to their terms. Most strikingly, it conflicts with the Eleventh Circuit's decision in *Wiand*, which specifically rejected similar attempts by an SEC receiver to "pick and choose" among receivership entities in an effort to duck his arbitration agreements. *See Wiand*, 778 F.3d at 925.

REASONS FOR GRANTING THE PETITION

The Fifth Circuit has repeatedly allowed the Receiver to tap dance around Stanford's arbitration agreements – first by permitting him to sue on behalf of third-party creditors, and eventually by allowing him to "pick and choose" among receivership hats until he found one that fits. The district court went even further – attempting to override the FAA itself. Throughout the years, as the Receiver and the lower courts have proffered and discarded theory after theory, only one thing has remained constant: the answer to the arbitration question has always been "no."

The Fifth Circuit's decision in *Alguire IV* creates a circuit split over the arbitrability of the Receiver's claims, and its policy statements are contrary to 50 years of precedent from this Court. The Petition should be granted.

I. THE FIFTH CIRCUIT'S DECISION CREATES A CIRCUIT SPLIT OVER THE ARBITRABILITY OF FEDERAL RECEIVERSHIP CLAIMS

The Fifth Circuit's decision throws the law of receivership into disarray. Until now, no federal circuit court had permitted a receiver to avoid the receivership entities' arbitration agreements. The Sixth and Eleventh Circuits unequivocally stand on one side of the issue, with additional support from the Tenth Circuit, the Third Circuit in a related context, and the Southern District of New York. The Fifth Circuit, overseeing the second largest Ponzi scheme in American history, stands on the other. The issue is ripe for Supreme Court review.

In *Javitch v. First Union Securities Inc.*, 315 F.3d 619, 627 (6th Cir. 2003), the Sixth Circuit held that a receiver "is bound to the arbitration agreements to the same extent that the receivership entities would have been absent the appointment of the receiver." *See also Wuliger v. Mfrs Life Ins. Co.*, 567 F.3d 787, 798-99 (6th Cir. 2009) (federal receiver is "subject to the same claims and defenses as the received entity he represents"). Like this case, *Javitch* involved claims brought by a receiver for an alleged Ponzi scheme against a group of stockbrokers.

In another Ponzi scheme case, the Eleventh Circuit likewise held that "there is no inherent conflict between arbitration and the underlying purpose of court-appointed receivers pursuing clawback claims." *Wiand v. Schneiderman*, 778 F. 3d 917, 924 (11th Cir. 2015). *Wiand* is the single most analogous case to this one, addressing in considerable detail – and rejecting – the same policy arguments advanced by the Receiver here.

The *Wiand* receiver argued that there is an inherent conflict between arbitration and federal receivership law. The Eleventh Circuit rejected this argument out of hand, at least in part because it misconstrues the receivership statutes. *Wiand*, 778 F.3d at 923 ("Wiand's argument is fundamentally flawed because he mischaracterizes the statute on which he relies. … The jurisdiction mentioned in the statute … does not refer to the district court's authority to decide all disputes relating to the contested property, but rather to the receiver's right to take charge of all contested property regardless of its physical location."); *see Riehle v. Margolies*, 279 U.S. 218, 223 (1929) (receivership court does not have "the exclusive right to determine all questions or rights of action affecting the debtor's estate").[7]

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[7] The district court acknowledged this rule in a different Stanford proceeding, which did not involve arbitration. "Section 754 literally grants the receiver exclusive jurisdiction over receivership property, [but] there is nothing in Section 754

The Tenth Circuit also has held that "a receiver 'stands in the shoes' of the [receivership entity]" and therefore may be compelled to arbitrate. *Capitol Life Ins. Co. v. Gallagher*, 47 F.3d 1178, 1995 WL 66602, at *2 (10th Cir. Feb. 7, 1995). The Southern District of New York has as well. *U.S. Small Bus. Admin. v. Coqui Capital Mgmt., LLC*, No. 08 Civ. 0978(LTS)(THK), 2008 WL 4735234, at *2 (S.D.N.Y. Oct. 27, 2008) ("[A] receiver's ability to litigate claims in federal court is limited by any valid agreement, previously executed by the receivership entity, that mandates arbitration."). In the bankruptcy context, the Third Circuit has reached a similar conclusion. *Hays v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 885 F.2d 1149, 1153-54 (3rd Cir. 1989) (bankruptcy trustee "stands in the shoes of the debtor" for purposes of arbitration clause and must arbitrate all claims that are derived from the rights of the debtor").

Importantly, the Eleventh Circuit rejected the Nadel receiver's attempt to "pick and choose" which entity he represents in an effort to avoid arbitration. *Wiand*, 778 F.3d at 925. This is consistent with the district court's analysis in the present case.

Although the district court rejected the Petitioners' arbitration agreements on multiple policy grounds, it drew the line at permitting the Receiver to engage in a sleight-of-hand to avoid

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to suggest that it grants the appointing court exclusive jurisdiction over any *claim* connected to that property." *Rishmague v. Winter*, No. 3:11-cv-02024 (Sept. 9, 2014), at 5.

SGC's arbitration agreements. The SEC, which filed an amicus brief in support of the Receiver, likewise did not support the Receiver's argument that he can pick and choose among the receivership entities, so that he may honor some contracts and avoid others.

The district court ruled that the Stanford entities operated as a single business enterprise, and therefore the Receiver is bound by SGC's arbitration agreements. In so holding, the court observed that "allowing the Receiver to pick and choose, as a litigation strategy, among separate Stanford corporations in deciding upon which Stanford entity the Receiver brings his various claims would be inconsistent with the Court's previous rulings and inconsistent with equity." App. at 49a.

In light of the *Receiver's own arguments* in favor of an alter ego determination, the district court had ample discretion to make this finding.[8] And yet the Fifth Circuit ignored the district court's findings, the requisite standard of review, the contrary decisions

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[8] In fact, the district court's decision on this point was emphatically correct. The Receiver had previously sought and obtained an alter ego ruling from the district court, and he was judicially estopped under Fifth Circuit precedent from reversing himself as a tactic to avoid arbitration. *See RSR Corp. v. Int'l Ins. Co.*, 612 F.3d 851, 859 (5th Cir. 2010) ("The doctrine of judicial estoppel prevents a party from asserting a position in a legal proceeding that is contrary to a position previously taken in the same or some earlier proceeding."); *Ahrens v. Perot Systems Corp.*, 205 F. 3d 831 (5th Cir. 2000).

of other circuit courts,[9] and public policy favoring arbitration.

By conducting a *de novo* review without regard to the district court's findings, the Fifth Circuit's opinion conflicts with this Court's decision in *First Options v. Kaplan*, as well as multiple decisions from other circuit courts of appeal. *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 947-48 (1995) (circuit court reviewing district court decision regarding agreement to submit dispute to arbitration should accept findings of fact that are not "clearly erroneous"); *see also Horton Dairy, Inc. v. U.S.*, 986 F.2d 286, 289 (8th Cir. 1993) ("We review the district court's finding [of] alter ego … under a clearly erroneous standard."); *Nordell Intern. Resources Ltd. v. Triton Oil*, 97 F.3d 1460 (9th Cir. 1996) (alter ego determination reviewed under clearly erroneous standard); *G.M. Leasing Corp. v. United States*, 514 F.2d 935, 939 (10th Cir. 1975) ("Trial court's finding that party is an alter-ego is presumptively correct and must be left undisturbed on appeal unless it is clearly erroneous.").

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9 The Fifth Circuit's opinion did not mention *Javitch* at all, and it relegated *Wiand* to a single footnote. It dismissed the Eleventh Circuit's decision as "distinguishable," ostensibly because TUFTA permits creditors to pursue claims against "subsequent transferees." *Alguire IV*, 2017 WL 430078, at *5 & n.9. But so does the analogous Florida statute at issue in *Wiand*. *See* Fla. Stats. §726.109(2)(b)(creditor may recover from "subsequent transferee" under FUFTA). It is, after all, a "uniform" fraudulent transfer statute. The Fifth Circuit's purported distinction is therefore illusory.

Moreover, the Fifth Circuit's decision conflicts with its own precedents, both as to the appropriate standard of review and specifically as to the nature of the Stanford entities themselves. *See Jab Energy Sols. II, LLC v. Servicio Marina Superior, LLC*, 640 Fed. Appx. 373, 376 (5th Cir. 2016)("We review alter ego determinations for clear error."), *cert. denied*, 137 S. Ct. 161 (2016); *Bridas S.A.P.I.C. v. Gov't of Turkm.*, 345 F.3d 347, 359 (5th Cir. 2003) ("Alter ego determinations are reviewed in this circuit only for clear error.").

The district court has issued multiple orders holding that the Stanford entities operated as a single business enterprise, including a prior order in *Janvey v. Alguire*, which was affirmed by the Fifth Circuit. *See Janvey v. Alguire*, 2013 WL 2451738, at *2 (N.D. Tex. 2013) ("The Court … treats the Stanford Entities as a single entity."), *aff'd sub nom., Janvey v. Brown*, 767 F.3d 430 (5th Cir. 2014).

In *Brown*, the Receiver *specifically represented to the Fifth Circuit* that SIB was a "sham" corporation controlled from Texas. *See* Receiver's Brief, Fifth Cir. Case No. 13-10266, at 9, 38. Accordingly, the Fifth Circuit held that SIB should not be treated as legitimate entity for choice of law purposes. *Janvey v. Brown*, 767 F.3d at 434-36. Applying a "false-conflict" analysis, the court held that "although there were numerous Stanford entities, these entities were mere conduits by which Stanford and Davis carried out the Ponzi scheme." *Id*. at 436.

Brown arose from the same underlying lawsuit as this action – the Receiver is asserting claims against both investors and employees in *Janvey v. Alguire*.

And yet in stark contrast to *Brown*, the *Alguire IV* panel held that the Stanford entities should be treated as "separate legal entities … [that] are distinct from one another." App. at 13a.

It is nonsensical to permit the Receiver to make inconsistent alter ego arguments in the same case, piercing the corporate veil to avoid choice of law concerns, but hiding behind "sham" corporate walls to avoid honoring his contracts. But this outcome is consistent with the overall tenor of the court's results-oriented opinion.

Throughout the opinion, there is a pervasive anti-arbitration bias:

(1) The court dispensed with the promissory notes in one sentence. "[T]he references to 'affiliates' in the arbitration agreements are insufficient to bind the Bank." App. at 14a-15a. In support, it cited a single state court opinion, while ignoring its own prior decisions enforcing arbitration agreements against affiliates. *See, e.g.*, *Tristar Fin. Ins. Agency, Inc. v. Equicredit Corp.*, 97 Fed. Appx. 462, 464 (5th Cir. 2004).

(2) Giusti, who had an arbitration agreement directly with SIB, was deemed to have waived it. App. at 18a-20a. The district court had not even addressed this issue.

(3) Rawl and Tidwell were sued by Stanford *in arbitration* on issues that overlap the Receiver's claims, and this suit was still ongoing when the Receiver was appointed. These petitioners have unique estoppel arguments, which the Fifth Circuit rejected in a single-sentence footnote. App. at 23a.

In summary, the Fifth Circuit's decision is inconsistent with multiple decisions from other circuits, inconsistent with its own prior decisions and the factual findings of the district court, inconsistent with principles of equity, and most importantly, inconsistent with the FAA and this Court's clearly and repeatedly articulated policy in favor of arbitration.

II. THE FIFTH CIRCUIT'S DECISION CREATES A CIRCUIT SPLIT OVER THE SCOPE OF A FEDERAL RECEIVER'S STANDING

The Fifth Circuit decision also creates a circuit split over the scope of a receiver's standing to pursue asset recovery claims. The Fifth Circuit permitted the Receiver to pursue claims solely on behalf of SIB, which neither employed nor made payments to the Petitioners. This conflicts with *Wiand*, in which the Eleventh Circuit rejected the Nadel receiver's standing under similar circumstances.

In *Wiand*, the Nadel receiver attempted to sidestep his arbitration agreements in the same manner as Mr. Janvey – by nominally asserting his claims on behalf of receivership entities that did *not* have arbitration agreements with the defendant. The Eleventh Circuit held that such entities, by virtue of their lack of relationship with the defendant, lacked standing to bring their claims:

> Wiand next argues that even if there is a valid and enforceable arbitration clause, it is binding only on Victory and not on the other five funds for which he serves as receiver. Because the other funds did not

> enter into contracts agreeing to arbitrate with Schneiderman in this case, Wiand asserts that these other hedge funds cannot be forced into arbitration. The flaw in Wiand's argument is the very fact that these other hedge funds have no relationship at all with Schneiderman. Only Victory made a transfer of funds to Schneiderman.

Wiand, 778 F.3d at 925.

The Fifth Circuit relied on the Seventh Circuit's decision in *Scholes* for the proposition that the Stanford entities, once freed of Allen Stanford's coercion, were "separate legal entities with rights and duties." App. at 13a (quoting *Scholes v. Lehmann*, 56 F.3d 750, 754 (7th Cir. 1995)). But *Scholes* did not involve a situation in which the receiver *wanted* to treat to entities as alter egos, and it certainly did not endorse the selective deployment of alter ego arguments as a litigation tactic. It also was not an arbitration case. Therefore, the Fifth Circuit's singular reliance on the *Scholes* decision was misplaced.

Moreover, the standing issues in this case go deeper than a mere shell game among receivership entities. The Second and Seventh Circuits have held that a receiver may bring claims on behalf of a bad actor's captive corporation, but not on behalf of the bad actor himself. *Eberhard v. Marcu*, 530 F.3d 122, 132 (2d. Cir. 2008); *Troelstrup v. Index Futures Group, Inc.*, 130 F.3d 1274, 1277 (7th Cir.1997).

But what if the corporation was fictitious, and the bad actor and the entity were simply alter egos?

Here, the Receiver has admitted that SIB was a "sham."[10] *See supra*, at 17-18. That fact may be immaterial under the expansive language of *Scholes*, but the Eleventh Circuit has expressed reluctance to extend *Scholes* to sham entities. *O'Halloran v. First Nat'l Bank of Fla.*, 350 F.3d 1197, 1204 (11th Cir. 2003) (following *Scholes*, but noting that "there might be no standing" if the entity "was merely the alter ego" of the bad actor).[11]

Furthermore, since the Receiver's only remaining client is a sham, he is transparently pursuing claims on behalf of investors – which he lacks standing to do. On June 15, 2017, the Receiver filed an amended complaint in the district court ostensibly on behalf of

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10 By contrast, SGC was a licensed broker-dealer with real income. ROA.14-10857.2043; *see also In re: Danny Bogar, et al.*, SEC Admin. Rel. 3-15003 (Aug. 31, 2012), at 20 (approximately 45% of SGC's income from 2006 through 2008 came from sources other than SIB CDs).

11 The Eleventh Circuit cited an earlier bankruptcy decision, which colorfully described the trustee's standing problems as follows:

> All corporations are legal fictions. In this case, however, [the entities] were simply fictitious. The complaint alleges that [the entities] were sham corporations, alter egos with no corporate identity separate from [the bad actor]. ... Everything [he] stole from the debtor corporations, the debtors had stolen from the creditors. Thus, any alleged injury to the debtors is as illusory as was their corporate identity.

Feltman v. Prudential Bache Sec., 122 B.R. 466, 473-74 (S.D.Fla.1990).

SIB. From the start, it's apparent that the Receiver is actually asserting claims on behalf of defrauded investors:

> The ultimate purpose of this Receivership is to make the "maximum disbursement to claimants." … When Stanford made the Transfers to the Former Stanford Employees, he did no more than take stolen money and put it into the hands of the Former Stanford Employees. … The Transfers to the Former Stanford Employees came not from revenue generated by legitimate business activities, but from monies contributed by defrauded investors.

See Doc. # 1532 in Case No. 3:09-cv-00724-N, at 1-3.

"Fraud on *investors* that damages those *investors* is for those *investors* to pursue, not the receiver." *Scholes v. Schroeder*, 744 F. Supp. 1419, 1422 (N.D. Ill. 1990) (emphasis original); see also *Javitch v. First Union Secs., Inc.*, 2014 WL 3510603, *2-3 (N.D. Ohio) (federal receiver could "only assert claims regarding Receivership property," and funds that ultimately belonged to the investors "were beyond the scope of the Receiver's authority").

In short, the Fifth Circuit has not only created a circuit split, it has created broader standing concerns emanating from its ill-conceived decision. In essence, the court has moved full circle to *Alguire I,* which permitted the Receiver to avoid arbitration by suing on behalf of investors. He cannot do so, of course. *See, e.g.*, *Fleming v. Lind-Waldock & Co.*, 922 F.2d 20, 25 (1st Cir. 1990) ("receiver can only make a claim which the corporation could have made"); *Eberhard*, 530 F.3d at 132 ("the authority of a receiver is defined by the entity or entities in the receivership"); *Marion v. TDI Inc.*, 591 F.3d 137, 147 (3d Cir. 2010) (an "equity receiver may sue only to redress injuries to the entity in receivership"); *Javitch*, 315 F.3d at 625 (6th Cir. 2003) ("Because they stand in the shoes of the entity in receivership, receivers have been found to lack standing to bring suit unless the receivership entity could have brought the same action.").

All of this could have been avoided if the Fifth Circuit had simply accepted the district court's *alter ego* findings, as required by the applicable "clearly erroneous" standard, and then proceeded to address the district court's policy arguments. Instead, it piled one fiction on top of another: SIB was a legal fiction. *Scholes* also rests on a legal fiction.[12] The arbitration agreements are real, but the Fifth Circuit has made them disappear.

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[12] In his Petition for Certiorari challenging *Alguire III*, the Receiver acknowledged that *Scholes* relied on a "legal fiction" to turn the Ponzi scheme debtors into creditors. "[This legal fiction was necessary because the receiver needed to be able to get those assets to perform his duties; turning the entities into creditors enabled the court to reach the right result." Receiver's Pet., No. 13-913, at 27. Like the present case, *Scholes* was a results-oriented decision. This seems to be a common occurrence in the wild west of receivership law.

III. THE LOWER COURTS' POLICY OBJECTIONS TO ARBITRATION ARE CONTRARY TO SUPREME COURT PRECEDENT

The lower courts' hostility to FINRA arbitration is striking in its similarity to recent state court decisions reversed by this Court. In *Nitro-Lift Technologies, L.L.C.* v. *Howard*, 133 S. Ct. 500 (2012) (per curiam), this Court summarily vacated a decision from the Oklahoma Supreme Court that refused to apply the severability doctrine articulated in *Prima Paint* and *Buckeye*. The Court noted that the FAA forecloses "judicial hostility towards arbitration." *Nitro-Lift*, 133 S. Ct. at 503.

Likewise, in *Marmet Health Care Center, Inc.* v. *Brown*, 132 S. Ct. 1201, 1202 (2012) (per curiam), the Court summarily vacated and remanded a West Virginia decision for "misreading and disregarding the precedents of this Court." *See also Kindred Nursing Centers Ltd. Partnership v. Clark*, 137 S. Ct. 1421 (2017) (Kentucky Supreme Court violated FAA by singling out arbitration agreements for disfavored treatment); *DIRECTV, Inc.* v. *Imburgia*, 136 S. Ct. 463, 468 (2015) (Court reversed California court's dubious interpretation of arbitration agreement).

The district court summarized its policy objections to arbitration as follows:

> Arbitration decentralizes, deconsolidates, strips the court and the receiver of exclusive jurisdiction over the receivership assets, interferes with the broad powers of both the court and the receiver to adjudicate all issues affecting receivership assets, and opens the door to the possibility

> of a distribution process that becomes, in part, "first-come, first-served." … [A]rbitration of the Receiver's claims against the Employee Defendants would produce dozens if not hundreds of separate arbitrations spread across the country. … Large numbers of separate arbitrations would be disastrous to the Stanford receivership …

App. at 94a, 97a.

In light of this Court's clear and unmistakable precedent, the Receiver cannot avoid arbitration based on policy concerns that "large numbers of separate arbitrations" would "disrupt" the receivership process. The Court has explicitly rejected similar challenges to arbitration based on expense or inconvenience. *See American Express Co. v. Italian Colors Restaurant,* 133 S. Ct. at 2310-12 (FAA does not permit courts to invalidate contractual waiver of class arbitration on the ground that plaintiff's cost of individually arbitrating federal statutory claim exceeds potential recovery); *see also McMahon*, 482 U.S. at 226 ("we are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals should inhibit enforcement of the [Federal Arbitration] Act").

The Fifth Circuit's policy statements were even more concerning. In the per curiam opinion, the court stated that the Receiver "makes a strong argument" that "enforcement of the arbitration agreements would give effect to the very fraud the Receiver is charged with unwinding …" App. at 21a.

In a concurring opinion, Judge Higginbotham expanded on this "strong argument":

> [A]rbitration agreements may be rejected when they are instruments of a criminal enterprise, as these arbitration agreements were. The Federal Arbitration Act ("FAA") evinces Congress's desire to enforce arbitration agreements, an expression warmly embraced by the judiciary. But, there are limits.
>
> …
>
> I am persuaded that the Receiver—standing in the shoes of the Stanford entities—is not bound by the arbitration agreements because those agreements were instruments of Stanford's fraud.

App. at 25a, 34a.

The foregoing statements disregard – indeed, they reject outright – this Court's holdings in *Prima Paint* and *Buckeye*. Even if the Receiver believes that Stanford's arbitration agreements were "instruments of fraud," that has no bearing on the validity of the Petitioners' arbitration agreements.

This Court has repeatedly emphasized that "a challenge to the validity of a contract as a whole, and not specifically to the arbitration clause within it, must go to the arbitrator, not the court." *Buckeye Check Cashing, Inc. v. Cardegna,* 546 U.S. 440, 449 (2006); *Prima Paint*, 388 U.S. at 402 ("arbitration clauses as a matter of federal law are 'separable' from the contracts in which they are embedded"); *see also Preston v. Ferrer*, 552 U.S. 346, 353 (2008) ("attacks on an entire contract's validity, as distinct from attacks on the arbitration clause alone, are within the arbitrator's ken"); *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 70 (2010) (under the FAA, arbitration agreement is "'valid, irrevocable, and enforceable' *without mention* of the validity of the contract in which it is contained")(emphasis original).

The *Wiand* receiver similarly argued Ponzi-scheme contracts were "bogus" and their arbitration provisions should not be enforced. Citing Supreme Court precedent, the court held that "attacks on the validity of an entire contract, as distinct from attacks aimed at the arbitration clause, are within the arbitrator's ken." *In re Wiand*, 2011 WL 4530203, at *10 (M.D. Fla. Sept. 29, 2011), *aff'd*, *Wiand v. Schneiderman*, 778 F.3d 917, 924 (11th Cir. 2015).

Here, the lower courts' policy statements reflect a hostility to arbitration that is squarely at odds with Supreme Court precedent. They also disregard the nature of FINRA arbitration. The arbitration agreements contained in FINRA's rules and U-4 forms were not drafted by Stanford. The Receiver's obligation to arbitrate isn't tied up with fraudulent conduct, it flows from a comprehensive system of mandatory arbitration that applies to every broker-dealer in the nation. FINRA operates "the largest securities dispute resolution forum in the United States," and it is regulated by the SEC. *See* http://www.finra.org/arbitration-and-mediation. This isn't frontier justice. As this Court observed, "We are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals should inhibit enforcement of the [Federal Arbitration] Act." *McMahon*, 482 U.S. at 226.

This Court's pronouncements are clear: the FAA embodies a 'national policy favoring arbitration." *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984). Courts must "rigorously enforce arbitration agreements." *McMahon*, 482 U.S. at 226. Questions of arbitrability should be addressed with a "healthy regard for the federal policy favoring arbitration." *Moses Cone*, 460 U.S. at 24-25. "[D]oubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Id*. The Fifth Circuit's decision could not be further from this paradigm.

CONCLUSION

For the foregoing reasons, the Court should grant the petition.

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