No. _____

IN THE

Supreme Court of the United States

IRVING H. PICARD, as Trustee for the substantively consolidated SIPA liquidation of Bernard L. Madoff Investment Securities LLC and the estate of Bernard L. Madoff,

Petitioner,

v.

JPMORGAN CHASE & CO., et al.,

Respondents.

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

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

When Bernard Madoff's Ponzi scheme collapsed, nearly $20 billion in funds invested by his customers had disappeared. Petitioner was appointed Trustee pursuant to the Securities Investor Protection Act, 15 U.S.C. § 78aaa *et seq.*, and charged with making them whole, or as nearly as possible. Also pursuant to SIPA, the Securities Investor Protection Corporation funded cash advances of over $800 million to Madoff's customers, assigning its resulting subrogation rights to the Trustee. The Trustee filed suit against the financial institutions, feeder funds, and individuals that facilitated or acquiesced in Madoff's fraud, asserting New York contribution and common law claims, such as aiding and abetting fraud, for conduct that deepened customers' losses and thereby increased SIPC and the Trustee's commensurate obligations. The Second Circuit affirmed dismissal of the Trustee's claims.

The questions presented are:

1. Whether, in conflict with decisions of the Third and Sixth Circuits, SIPC's right to subrogation is limited to customers' SIPA claims against a failed brokerage's estate and therefore does not reach claims against third parties that share responsibility for the brokerage's collapse and customers' losses;

2. Whether, in conflict with decisions of the Fourth and Eighth Circuits, federal statutory silence overrides any right to contribution under state law for liabilities arising under the federal statute re-

gardless of whether Congress intended to preempt the state law; and

3. Whether, in conflict with decisions of the First and Seventh Circuits, a trustee lacks standing under SIPA or the Bankruptcy Code to assert claims against parties that hastened or deepened the bankruptcy and are therefore general to all of an estate's customers or creditors.

PARTIES TO THE PROCEEDING

Petitioner is Irving H. Picard, plaintiff-appellant below, appointed pursuant to the Securities Investor Protection Act, 15 U.S.C. § 78aaa *et seq.* ("SIPA"), as Trustee for the substantively consolidated liquidation of Bernard L. Madoff Investment Securities LLC ("BLMIS") and the estate of Bernard L. Madoff.

Respondent Securities Investor Protection Corporation ("SIPC") is a nonprofit corporation established under 15 U.S.C. § 78ccc, and intervened below as of right, § 78eee(d).

The other respondents were appellees below and defendants in three separate actions brought by the Trustee against parties that he alleged facilitated Madoff's fraud.

The defendants in the first action (collectively, "JPM") are JPMorgan Chase & Co. and its affiliates JPMorgan Chase Bank, N.A., J.P. Morgan Securities LLC, and J.P. Morgan Securities Ltd.

The defendants in the second action ("UBS" and "Access") are: (1) Swiss bank UBS AG ("UBS") and related entities and individuals UBS (Luxembourg) S.A., UBS Fund Services (Luxembourg) S.A., UBS Third Party Management Company S.A., Roger Hartmann, Ralf Schroeter, Rene Egger, Bernard Stiehl, Alain Hondequin, and Hermann Kranz; (2) Access International Advisors LLC ("Access") and related entities and individuals Access International Advisors Europe Limited, Access International Advisors Ltd.; Access Partners (Suisse) S.A., Access

Management Luxembourg S.A., as represented by its Liquidator Maitre Ferdinand Entringer, f/k/a Access International Advisors Luxembourg S.A.; Access Partners S.A., as represented by its Liquidator Maitre Ferdinand Entringer; Patrick Littaye; Claudine Magon de la Villehuchet, in her capacity as Executrix under the Will of Thierry Magon de la Villehuchet (a/k/a Rene Thierry de la Villehuchet), individually and as the sole beneficiary under the Will of Thierry Magon de la Villehuchet (a/k/a Rene Thierry de la Villehuchet), a/k/a Claudine de la Villehuchet; Pierre Delandmeter; and Theodore Dumbauld; (3) certain funds created by UBS and Access, and those funds' liquidators: Luxalpha Sica V, as represented by its Liquidators Maitre Alain Rukavina and Paul Laplume; Groupement Financier Ltd., Maitre Alain Rukavina, in his capacity as liquidator and representative of Luxalpha Sica V; and Paul Laplume, in his capacity as liquidator and representative of Luxalpha Sica V.

The "HSBC" defendants in the third action are HSBC Bank PLC and its affiliates HSBC Holdings PLC, HSBC Private Banking Holdings (Suisse) S.A., HSBC Private Bank (Suisse) S.A., HSBC Securities Services (Luxembourg) S.A., HSBC Fund Services (Luxembourg) S.A., HSBC Institutional Trust Services (Ireland) Limited, HSBC Securities Services (Ireland) Limited, HSBC Institutional Trust Services (Bermuda) Limited, HSBC Securities Services (Bermuda) Limited, HSBC Bank Bermuda Limited, HSBC Bank (Cayman) Limited, and HSBC Bank USA, N.A.

The "Unicredit" defendants in the third action are Unicredit S.p.A. and its affiliates Unicredit Bank Austria AG, Pioneer Alternative Investment Management Limited, and Alpha Prime Fund Limited.

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PETITION FOR WRIT OF CERTIORARI

Bernard L. Madoff did not act alone. The Ponzi scheme that he operated through Bernard L. Madoff Investment Securities ("BLMIS") could not have persisted for so long, or defrauded so many of so much, without a network of financial institutions, feeder funds, and individuals who participated in his fraud or acquiesced in it—just like any large-scale financial fraud. Those parties, which include the respondents in this case, took millions in fees in exchange for facilitating the world's largest-ever Ponzi scheme. They are as responsible as Madoff for the enormous magnitude of customer losses, which it is now the Trustee's obligation to make good. The Trustee seeks, in this litigation, to hold those parties to account and recover funds that will be used to make whole BLMIS customers and satisfy the Securities Investor Protection Corporation's ("SIPC") right of subrogation for the more than $800 million that it provided for advances to customers on their claims.

Yet the Second Circuit held that the Trustee, despite his obligation to compensate customers for their losses and repay SIPC's advances, is absolutely barred from bringing suit against the responsible parties. Its three central holdings make nonsense of the Securities Investor Protection Act ("SIPA") and squarely conflict with the decisions of other circuits:

First, despite Congress's decision to provide SIPC a right of subrogation to the claims of customers receiving advances and to ratify a line of cases recog-

nizing SIPC's equitable right of subrogation, *see* 15 U.S.C. § 78fff-3(a), the Second Circuit held that SIPC's subrogation rights are limited to customers' claims against the failed brokerage's estate, inevitably insolvent. This evisceration of SIPC's subrogation rights conflicts with decisions of the Third and Sixth Circuits.

Second, despite Congress's directive that SIPA trustees investigate the circumstances of a broker's failure and muster assets necessary to make customers whole, the Second Circuit held that SIPA's statutory silence on obtaining contribution from joint tortfeasors overrides any state law that provides trustees a right of contribution, even in the absence of any indication that Congress intended to preempt those laws. This decision rejects the Court's standard approach to preemption, leaves a SIPA trustee powerless to obtain compensation from the promoters and servicers that a Ponzi scheme depends upon to achieve any degree of scale, and conflicts with decisions of the Fourth and Eighth Circuits.

Third, despite Congress's decision to empower trustees under SIPA or the Bankruptcy Code with all "the rights and powers" of a generalized creditor of a bankruptcy estate, 11 U.S.C. § 544(a), the Second Circuit held that a trustee lacks standing to bring claims that are common to all customers or creditors by dint of their status as such. The court's denial of a trustee's ability to bring suit against parties that wrongfully acted to hasten or deepen a bankruptcy, thereby injuring all customers or credi-

tors equally, breaks with decisions of the First and Seventh Circuit.

Taken together, the Second Circuit's errors of law undermine every single one of Congress's objectives in enacting SIPA. Congress's most immediate goal was to restore confidence in capital markets by protecting investors against the risk of loss due to broker failure. Yet the Second Circuit's decision guarantees that, when third parties collaborate with a broker to defraud its customers—something that is inevitable given a Ponzi scheme's unquenchable thirst for more investors and more money—there will never be enough funds available to compensate investors' losses. Congress sought to make this protection cost-effective and self-sustaining by allowing SIPC to recover any funds that it advanced to customers. Yet the Second Circuit's decision effectively bars it from doing so in every case. And Congress sought to prod financial intermediaries to address the risks that lead to customer loss. Yet the Second Circuit absolves those in the best position to uncover and expose broker fraud from any possible liability in a SIPA liquidation—indeed, here it absolves those who could not help but know that Madoff was engaged in fraud. Congress thought that it was enacting broad protections for securities investors, but what remains after the Second Circuit put SIPA through the wringer is exceedingly narrow and entirely inadequate.

If this aberrant decision is allowed to stand, the law governing SIPA liquidations will be in turmoil

and SIPA will be left unequal to the task of unraveling modern-day financial frauds, to the enormous detriment of those whom Congress sought to protect: securities investors. The Court should grant certiorari to give SIPA the force and effect that Congress intended and to correct the Second Circuit's marked departure from ordinary principles of statutory interpretation.

OPINIONS BELOW

The Second Circuit's opinion is reported at 721 F.3d 54 and reproduced at App. 1a. The opinions of the United States District Court for the Southern District of New York are reported at 454 B.R. 25 and 460 B.R. 84 and reproduced at App. 50a and 79a.

JURISDICTION

The Second Circuit rendered its decision on June 20, 2013. App. 1a. Justice Ginsburg extended the time in which to file a petition for certiorari to and including October 18, 2013. *See* No. 13A196. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Bankruptcy Code's provision providing a trustee the rights and powers of the estate's creditors as a whole, 11 U.S.C. § 544, is reproduced at App. 126a. The liquidation-related provisions of the Securities Investor Protection Act, 15 U.S.C. §§ 78fff-1, 78fff-2, and 78fff-3, are reproduced at App. 128a. New York's

statutory cause of action for contribution, N.Y. C.P.L.R. § 1401, is reproduced at App. 147a.

STATEMENT OF THE CASE

A. The Securities Investor Protection Act

Congress enacted the Securities Investor Protection Act of 1970, Pub. L. No. 91-598, 84 Stat. 1636, to restore confidence in the securities markets following the chaotic liquidations of numerous broker-dealers that collapsed due to fraud and mismanagement, taking their customers' investments down with them. At the time, securities law provided "no protection . . . for the investor whose broker goes bankrupt." S. Rep. No. 91-1218, at 3 (1970). Looking to the Federal Deposit Insurance Corporation as a model, Congress created the Securities Investor Protection Corporation to provide advances to customers of failed brokers and dealers up to a certain amount—today, $500,000. *Id.* at 4; *see* 15 U.S.C. § 78fff-3(a). That money would, in turn, come from a fund built up from regular assessments on the industry, § 78ddd(c), and replenished through SIPC's right of subrogation to the claims of customers receiving advances, § 78fff-3(a). No taxpayer dollars are involved.

The Act also established a broker-specific liquidation proceeding, layered over the Bankruptcy Code, that is managed by a trustee with special powers in addition to those provided by the Code. *See generally* § 78fff. A SIPA trustee is charged with investigating the circumstances of a broker's collapse, § 78fff-1(d),

and, if the remaining assets are insufficient to reimburse customers—for example, if customer assets have been looted—recovering the property necessary to do so. §§ 78fff(a)(1)(B), 78fff-1(a). The trustee carries out this mandate through litigation against those responsible for customers' losses—typically, in the case of a fraud, individuals and entities that received payments in connection with their participation in the fraud. *E.g.*, *Touche Ross & Co. v. Redington*, 442 U.S. 560, 565–66 (1979) (Exchange Act claim against accounting firm). Pursuant to SIPA's priority scheme, the proceeds of these efforts are distributed to customers, in satisfaction of their claims, on a *pro rata* basis. § 78fff-2(c)(1). Once the customers have been satisfied, additional funds are allocated to SIPC as subrogee of customers' claims and in repayment for its advances. *Id.*

In this way, SIPA provides securities investors a first line of protection against brokerage misconduct through SIPC advances, while also providing for additional recoveries through litigation by the trustee. Such litigation also helps to make this system cost-effective and sustainable because it allows SIPC to recover its out-of-pocket expenses. And by holding responsible parties to account, litigation works to "achieve a general upgrading of financial responsibility requirements of brokers and dealers to eliminate, to the maximum extent possible, the risks which lead to customer loss," just as Congress anticipated. S. Rep. No. 91-1218, at 4 (1970); *see also SIPC v. Barbour*, 421 U.S. 412, 415 (1975). Thus, SIPA

would improve investor confidence both by establishing backstop protection against broker-related losses and by deterring the conduct (or passive acquiescence) that allows those losses to occur.

B. Respondents Prolonged and Expanded Madoff's Ponzi Scheme

On December 11, 2008, Bernard L. Madoff was arrested and charged with securities fraud. That same day, the Securities and Exchange Commission filed a complaint against Madoff and BLMIS, alleging they were operating a massive Ponzi scheme. On December 15, 2008, the SEC and SIPC jointly filed for liquidation under SIPA. The petitioner was appointed Trustee and soon found that nearly $20 billion in actual investor principal (as opposed to fictitious returns) had been lost. To provide some relief to Madoff's victims, SIPC committed $808.7 million to the Trustee to make advances on customer claims.

Through investigation, the Trustee confirmed what anyone could have guessed: Madoff did not sustain this unprecedented fraud for more than two decades by himself. Instead, he was aided by a network of financial institutions, feeder funds, and individuals who funneled investments into BLMIS, provided services essential to maintaining the fraud, hid Madoff's role as custodian of investors' assets, and (of course) skimmed off substantial amounts for their efforts. They, as much as Madoff, are responsible for the extent of the losses when the scheme finally collapsed.

1. JPMorgan Chase & Co.

JPMorgan Chase & Co. ("JPM") was foremost among these collaborators, standing at the very center of Madoff's fraud for over 20 years. App. 9a. Every single dollar that went into or out of BLMIS went through Madoff's "703 account," an ordinary retail checking account maintained by JPM. App. 10a. Madoff purported to employ a "split strike conversion strategy" that involved hedging purchases of S&P 100 stocks with options. App. 7a. In reality, he engaged in no securities transactions at all. *Id*. As JPM was well aware, billions of dollars flowed from customers into the 703 account, without being segregated in any fashion. App. 10a. Billions flowed out, some to customers and others to Madoff's friends in suspicious and repetitive round-trip transactions. *Id*. But in the 22 years that JPM maintained the 703 account, there was not a single check or wire to a clearing house, securities exchange, or anyone who might be connected with the purchase of securities. JPM Complaint, ¶2.[1] All the while, JPM knew that Madoff was using the account to run an investment advisory business with thousands of customers and billions under management and knew that Madoff was using its name to lend legitimacy to his enterprise.

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[1] Amended Complaint, *Picard v. JPMorgan Chase & Co.*, No. 11-cv-913 (S.D.N.Y. June 24, 2011), ECF No. 50.

JPM was well aware that others suspected Madoff of impropriety. Its Chief Risk Officer, John Hogan, warned his colleagues about 18 months prior to BLMIS's collapse that he had learned that "there is a well-known cloud over the head of Madoff and that his returns are speculated to be part of a ponzi scheme." App. 10a. The bank's response? It tasked a junior employee to see what a Google search could turn up about Madoff. App. 10a–11a.

Of course, JPM had its own suspicions over the years—how could it not? There were the unusual flows of money into and out of Madoff's checking account that were inconsistent with the investment business he claimed to run. There were the massive inconsistencies between BLMIS's regulatory filings and its actual finances, between its reported cash on hand and the money in its account, between its spare disclosures and its obligations as a broker to its investment advisory accounts. There was Madoff's selection of a small, unknown auditor rather than one of the marquee firms employed by every other operation with billions under management. *See generally* JPM Complaint, ¶¶9, 96, 143, 147.

And then there were Madoff's golden returns. Unsatisfied with the revenue it made from Madoff—which amounted to a half billion dollars by the time of BLMIS's collapse—JPM initiated an internal campaign to become a major investor in Madoff by structuring derivative products directly tied to BLMIS feeder funds. As part of this process, JPM began an investigation of Madoff's strategies. Its an-

alysts were puzzled that Madoff managed to earn consistent returns even when the markets were down and acknowledged that his "[r]eturn[s] seem[ed] a little too good to be true," suggesting some kind of fraud. JPM Complaint, ¶163. Indeed, JPM questioned whether BLMIS actually invested in any assets at all, noting that all of Madoff's "investors, sub-Custodians, auditors etc [sic] rely solely on Madoff produced statements and have no real way of verifying positions at Madoff itself." *Id.* at ¶111. It concluded that "given the significant reliance on [Madoff] for verification of assets held, and no real way to confirm those valuations, fraud presents a material risk." *Id.* Indeed, in the aftermath of BLMIS's collapse, JPM conceded that it had "never been able to reverse engineer how [Madoff] made money" and that Madoff "did not satisfy [JPM's] requirement for administrative oversight." *Id.* at ¶171.

Nonetheless, JPM did invest with several Madoff feeder funds. But unlike other investors, it managed to escape BLMIS's collapse virtually unscathed by redeeming over $276 million in the final weeks, as major withdrawals began to hit the 703 account. App. 11a. Finally, at that time, it sent a Suspicious Activity Report to the United Kingdom's Serious Organized Crime Agency, identifying the same red flags it had known about for years: that Madoff's consistent performance, no matter market conditions, "appear[ed] too good to be true—meaning that it probably is"; that Madoff maintained an unusual "lack of transparency" regarding all aspects of his

operation; and that Madoff was entirely "unwilling[] to provide helpful information." JPM Complaint, ¶¶11, 155. But these revelations came too late to do anyone, save JPM, any good.

2. The Feeder Funds and Their Affiliates

In addition to JPM, Madoff relied on a web of feeder funds to satisfy the Ponzi scheme's insatiable thirst for new investors and their cash. A number of these funds and their affiliates, including those named as respondents here, had knowledge of Madoff's fraud even as they profited handsomely from their affiliation with him.

a. The Swiss bank UBS held itself out as sponsor, manager, administrator, custodian, and prime banker for two funds created and promoted by Access International Advisors that, in reality, funneled all assets and delegated all authority to BLMIS. App. 11a–12a. Access's own officer testified that it "was using [UBS's] balance sheet or its reputation in order to be compliant with regulations in Luxembourg" so that Access could market them throughout the European Union. UBS Complaint, ¶183.[2] UBS's representations were also essential to create the impression that the funds were safe investments. UBS was paid more than $80 million in fees for lending its reputation to this scheme. App. 11a.

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[2] Amended Complaint, *Picard v. UBS AG*, No. 11-cv-4212 (S.D.N.Y. Aug. 17, 2011), ECF No. 23.

Yet UBS was well aware that Madoff was a fraud. From 2000 on, it repeatedly refused to endorse Madoff to its clients, or to invest its own money with him, because of his lack of transparency and suspiciously consistent returns, which UBS itself identified as "more or less impossible." UBS Complaint, ¶¶107, 111. The bank stated this conclusion plainly: "If Madoff were to run the strategy totally independently from his [broker/dealer business], it would be IMPOSSIBLE to generate the returns that he has produced since 1990." *Id.* at ¶122. UBS knew that Madoff's claim that he traded options with UBS—a representation brought to UBS's attention by the SEC in 2006—was false, and it knew that Access's Madoff feeder funds required it to accept "backdated monthly investment recommendation[s]," *id.* at ¶¶127, 178—a blazing red flag. Yet UBS did nothing and said nothing, content to receive its fees.

Even as it recruited investors for its funds, Access also noted serious red flags. It knew there was no way that Madoff could be executing the volumes of trades he claimed in account statements. In 2006, it hired an independent consultant to investigate, and he confirmed the point, finding in just four days of work that the purported trades for Access's funds exceeded the entire volume of options on the market. App. 12a. On that basis, the consultant recommended that Access exit its BLMIS investments immediately. *Id*. Instead, Access kept these findings to itself, content to continue marketing its funds and taking fees. *Id*.

b. HSBC, one of the world's largest banks, used its reputation to promote a network of Madoff feeder funds that brought BLMIS billions in fresh capital at a time when it was on the verge of collapse. App. 14a. HSBC marketed these funds to its private banking clients, identifying itself as the administrator and custodian of eighteen of them, and pitched them as safe, market-neutral investments. *Id*. But in its internal reports, HSBC identified BLMIS as the ultimate custodian of all assets—something that it hid from its customers—and flagged that as a serious risk. *Id.*; HSBC Complaint, ¶¶12, 169.[3] So did HSBC's auditor, KPMG, which warned HSBC that BLMIS's unusual role as custodian of assets posed a risk that its reported trades were "a sham in order to divert client cash." App. 14a.

HSBC's own due diligence team openly questioned the viability of Madoff's trading strategy, declaring themselves "baffled" by his performance. HSBC Complaint, ¶¶19, 186. Indeed, on numerous occasions, the volume of reported trades for HSBC's accounts exceeded more than ten times the actual volume of the entire options market. *Id.* at ¶¶155-60. And BLMIS reported over a thousand phony trades outside of market prices and claimed to trade more than the entire market volume of a particular S&P 100 stock nearly 500 times. *Id.* at ¶¶151, 164. Still, rather than confront Madoff, HSBC continued send-

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[3] Amended Complaint, *Picard v. HSBC Bank PLC*, No. 09-1364 (Bankr. S.D.N.Y. Dec. 5, 2010), ECF No. 170.

ing him investments and collecting fees for services that it left to Madoff.

c. Unicredit and its associates managed funds that invested more than $2.8 billion with BLMIS despite knowing, like the others, that Madoff's reported trading volumes were impossible. App. 12a–13a. Unicredit's own analysts faulted Madoff's lack of transparency and Unicredit's failure to conduct reasonable due diligence on BLMIS. App. 13a. Unicredit acquiesced in Madoff's insistence that his name be kept off all offering materials and accepted his refusal to identify counterparties in transactions, his bizarre fee structure, and the obviously phony reported trades outside of market prices. HSBC Complaint, ¶¶146–47, 163, 190–93, 209–214. For simply sending investors' money to Madoff, Unicredit and its associates received tens of millions in fees. App. 13a. Perhaps for that reason, it never confronted Madoff, reported him, or even stopped sending him money.

C. The District Court Decisions

Based on these facts and others uncovered through investigation, the Trustee brought suit against each of the respondents, asserting both avoidance claims and various New York common law claims, such as aiding and abetting fraud, aiding and abetting breach of fiduciary duty, knowing participation in a breach of trust, conversion, aiding and abetting conversion, fraud on the regulator, and unjust enrichment. The Trustee also asserted claims for contribution under New York law, on the basis that BLMIS

and the respondents jointly caused customers' injuries and so should share in liability.

In a July 28, 2011, decision, the District Court for the Southern District of New York (Rakoff, J.) held that the Trustee lacked standing to bring common law claims against HSBC and Unicredit on behalf of BLMIS customers. App. 50a *et seq*. This Court's decision in *Caplin v. Marine Midland Grace Trust Co. of New York*, 406 U.S. 416 (1972), it said, generally defeated the Trustee's standing to bring such claims. App. 55a. And SIPC's assignment to the Trustee of its subrogation rights made no difference, because that right extends only to "customer net equity claims against the estate, not to all customer claims against third parties." App. 64a. It also dismissed the Trustee's contribution claims, on the basis that the availability of contribution "in connection with a federal statutory scheme is a question governed solely by federal law." App. 74a (quotation marks omitted).

The district court's November 1, 2011, decision (McMahon, J.) on the Trustee's claims against JPM and UBS adopted largely the same reasoning and reached the same result. App. 78a *et seq*.[4]

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[4] Neither decision addressed the Trustee's avoidance claims, which are limited to wrongful transfers from BLMIS and do not seek to redress the injuries that Madoff's joint tortfeasors inflicted on BLMIS customers.

D. The Second Circuit Decision

The Second Circuit affirmed the district court's decisions. App. 1a *et seq*. It held, first, that the Trustee's claims for contribution under New York state law are barred by SIPA. Rather than undertake any kind of preemption analysis, it reasoned that federal law automatically overrides state contribution law in every instance: "there is no claim for contribution unless the operative federal statute provides one." App. 22a. Thus, because the Trustee's payments to customers "fulfilled an obligation created by SIPA, a federal statute that does not provide a right to contribution," App. 23a, the Trustee could press no claim under state law, even where BLMIS and the respondents jointly caused the losses for which SIPC advanced funds and which the Trustee is now obligated to make good.

Second, the court held that a SIPA or bankruptcy trustee generally lacks standing to bring claims on behalf of customers or creditors. That result, it said, was compelled by *Caplin*, which it interpreted as holding flatly that "federal bankruptcy law does not empower a trustee to collect money owed to creditors." App. 25a. Instead, a trustee "may only assert claims held by the bankrupt [estate] itself." App. 26a (quotation marks omitted). On that basis, the court rejected the Trustee's argument that its own precedent under Section 544 of the Bankruptcy Code established that a trustee may assert creditors' claims that "are generalized in nature, and not particular to any individual creditor." App. 32a–35a (discussing

St. Paul Fire & Marine Ins. Co. v. PepsiCo, Inc., 884 F.2d 688 (2d Cir. 1989)).[5]

Third, the court denied that SIPC possesses any right of subrogation beyond that to customers' "claims against the fund of customer property"—*i.e.*, against the failed brokerage's estate. App. 43a. The court acknowledged that it had, in fact, found otherwise in *Redington v. Touche Ross & Co.*, 592 F.2d 617, 624–25 (2d Cir. 1978), *rev'd on other grounds*, 442 U.S. 560 (1979), which held that SIPC was subrogated to customers' claims against third parties responsible for their losses and that a SIPA trustee could pursue such claims as an assignee. App. 27a. But *Redington*, the court said, was not binding, because it had been reversed and then vacated, and was distinguishable on several arbitrary bases—for example, it concerned only a cause of action under the Exchange Act. App. 28a–32a.

The court also rejected the Trustee's argument that Congress's 1978 amendment to SIPA to provide that SIPC's statutory subrogation right should not be read to diminish "all other rights [SIPC] may have at law or in equity," § 78fff-3(a), confirms that SIPC also possesses an equitable right of subrogation, the same as any other insurer. *Caplin*, it said, was to the contrary, and if Congress had wished to

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[5] The court also held that the Trustee lacks standing to bring the common law claims on behalf of the estate due to the state law doctrine of *in pari delicto*, an issue not raised in this petition.

make clear its intention to overrule *Caplin*, it would have said so clearly, under the premise that it "does not . . . hide elephants in mouseholes." App. 45a (quoting *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001)).[6] Moreover, the court's preference was to "avoid engrafting common law principles onto a statutory scheme unless Congress's intent is manifest," and here it was not. App. 46a.

In the end, the Second Circuit recognized that there was merit to the Trustee's concerns that, unless he is able to spearhead litigation against those malefactors responsible for customers' losses and for SIPC's and the Trustee's commensurate obligations, "the victims will not be made whole, SIPC will be unable to recoup its advances, and third-party tortfeasors will reap windfalls." App. 46a. But rather than apply traditional equitable remedies like subrogation to avoid that result—particularly where Congress sought to preserve and expand such remedies—it concluded that Congress must legislate yet again in this area.

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[6] *Caplin*, it should be noted, had nothing to do with subrogation, and recognizing or granting SIPC even the broadest right of subrogation would not overrule *Caplin*, even in part.

REASONS FOR GRANTING THE PETITION

The Second Circuit's conclusion that a SIPA trustee is barred from bringing claims against parties responsible for a brokerage's collapse, its customers' losses, and SIPC and the trustee's commensurate obligations to those customers has no basis in law or logic. All three of its major holdings—concerning SIPC's right of subrogation, a trustee's ability to seek contribution from joint tortfeasors, and a trustee's standing to assert claims common to all customers or creditors—created or deepened splits in authority with other courts of appeals. This Court's review is essential to bring consistency to the law and achieve SIPA's objectives of protecting securities investors and maintaining confidence in U.S. securities markets by holding financial institutions to account for their conduct.

I. The Court Should Grant Certiorari To Resolve the Scope of SIPC's Subrogation Rights

When SIPC provided more than $800 million for advances to BLMIS customers, it obtained a right of subrogation to their claims by operation of statute and equity. 15 U.S.C. § 78fff-3(a). The Second Circuit's decision disregards that right, compromising the SIPA regime, while allowing parties that profited from the looting of investors' assets to pass the buck to SIPC and SIPA trustees. This Court's guidance is necessary to correct this error and resolve the split in authority that the Second Circuit's decision created with decisions of the Third and Sixth Circuits.

A. The Second Circuit's decision squarely conflicts with the Sixth Circuit's holding in *Appleton v. First National Bank of Ohio*, 62 F.3d 791, 800 (6th Cir. 1995), that SIPA establishes "a right of subrogation . . . on behalf of customers whose claims have been paid by the SIPC against third parties" responsible for customer losses. That case concerned another Ponzi scheme run by a brokerage. Its owner diverted customers' checks to a separate account under his control, and two banks credited those deposits, despite the checks' restrictive endorsements. As here, following the brokerage's collapse, SIPC advanced funds to the SIPA trustee to satisfy those customers' claims and then assigned its right of subrogation to the trustee, who brought suit against the banks to recover the wrongfully deposited funds.

Reversing the district court, the Sixth Circuit rejected the argument that SIPC (and, by extension, the trustee) lacked standing to assert the customers' claims against the banks. The court agreed with the Second Circuit's view in *Redington v. Touche Ross & Co.*, 592 F.2d 617 (2d Cir. 1978), *rev'd on other grounds*, 442 U.S. 560 (1979),[7] that "'it is more in keeping with the intent of Congress that wrongdoers not receive a windfall benefit from the existence of

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[7] Repudiated by the Second Circuit in the instant case. App. 27a, 30a. While this Court reversed *Redington* on other grounds, it "express[ed] no opinion" on whether "SIPC can assert state-law subrogation rights against third parties." *Holmes v. SIPC*, 503 U.S. 258, 271 n.18 (1992).

SIPC, and that SIPC be able to recoup its losses from solvent wrongdoers.'" 62 F.3d at 799 (quoting 592 F.2d at 624). SIPC, it reasoned, operates in the nature of an insurer, and so its subrogation rights should be understood to have the same scope as those of an insurer, which "is entitled to be subrogated to any right of action which the insured may have against a third party whose wrongful act caused the loss." *Id.* And the amendment of § 78fff-3(a) after *Redington* to provide that SIPC's statutory subrogation right is "*in addition to* all other rights it may have at law or in equity" only confirmed that Congress did not intend to limit SIPC's rights in any fashion. *Id.* (emphasis added).

The Third Circuit also recognized SIPC's right to subrogation of customers' claims against third parties responsible for their losses in *SEC v. Albert & Maguire Securities Co., Inc.*, 560 F.2d 569 (3d Cir. 1977). That case too concerned fraud by a broker, which forged signatures to sell a customer's stock to a third party in a transaction guaranteed by a bank. *Id.* at 570. The bank ultimately purchased new shares for the customer, and then filed a claim in the broker's SIPA liquidation, asserting it had priority customer status. *Id.* The bank was due no such priority, the Third Circuit held. Had SIPC advanced the shares to the customer and then filed suit, it would "stand not in the shoes of the debtor . . . but, rather, in those of the customer," because, "upon payment to a customer, SIPC becomes subrogated to the customer's rights against third parties." *Id.* at 574. As

such, any recovery would flow, in the first instance, to the customer fund to satisfy customers' claims and, only then, to SIPC itself and other creditors. *Id*. Thus, the bank could not leapfrog this place in line by settling the customer's claim rather than by allowing itself to be sued and then filing a general creditor claim, on its own behalf, on the estate.

The decision below denied that SIPC's right of subrogation extends beyond customers' claims on the estate itself, App. 42a–43a, and so cannot be squared with *Appleton* and *Albert & Maguire*'s recognition of a more meaningful right of subrogation to customers' claims against third parties responsible for their losses. The Court's guidance is necessary to resolve this conflict.

B. In addition, the decision below ignores the fundamental principle that, in determining the application of a common law principle to a federal statutory scheme, a court "may take it as given that Congress has legislated with an expectation that the principle will apply except 'when a statutory purpose to the contrary is evident.'" *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991) (quoting *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952)); s*ee also Briscoe v. LaHue*, 460 U.S. 325, 330 (1983) (42 U.S.C. § 1983 does not abrogate the common law immunity afforded to witnesses); *United States v. Bestfoods*, 524 U.S. 51, 63 (1998) (CERCLA does not alter fundamental principles of corporate law).

The Second Circuit's apparent error was confusing the situation where Congress legislates against the backdrop of the common law with that where a court is asked to create federal common law. *See, e.g.*, *Burks v. Lasker*, 441 U.S. 471, 477–79 (1979) (recognizing the distinction). The scope of SIPC's right of subrogation is plainly in the former camp: as several courts of appeals recognized in the 1970s, SIPC is a classic subrogee under common law. *See Redington*, 592 F.2d at 624–25; *Albert & Maguire*, 560 F.2d at 574. And Congress ratified that view when it amended SIPA to expressly provide a statutory subrogation right while specifically preserving "all other rights [SIPC] may have at law or in equity." 15 U.S.C. § 78fff-3(a); *see* Pub. L. No. 95-283, § 9, 92 Stat. 249, 266 (1978).

There can be no question, then, that SIPC's right of subrogation extends to the claims here. Subrogation simply establishes "that a surety who pays the debt of another is entitled to all the rights of the person he paid to enforce his right to be reimbursed." *Pearlman v. Reliance Ins. Co.*, 371 U.S. 132, 137 (1962). SIPC became subrogated to customers' claims against Madoff's enablers and abettors when it provided advances for losses that they helped to bring about. Accordingly, the Trustee, to whom SIPC assigned its claims, is entitled to step into the shoes of BLMIS's customers and attempt to recover the funds that it advanced to compensate for others' malfeasance. There is no basis in law to deny it that right.

C. This question is important, for the very reasons identified by the Second Circuit. App. 46a. Its decision denies BLMIS customers, in their protected status as customers in a SIPA liquidation, essential compensation for their losses. It precludes SIPC from recouping the funds that it advanced to remedy injuries caused, in part, by others, undermining the sustainability and cost effectiveness of the SIPA regime.[8] And it defeats entirely SIPA's purpose of holding financial institutions to account for customer loss and thereby incentivizing them to "eliminate . . . the risks which lead to customer loss." S. Rep. No. 91-1218, at 4 (1970). In short, the Second Circuit's evisceration of SIPC's subrogation rights undermines Congress's objectives in enacting SIPA, while throwing the law into a state of confusion. Because broker failures are a common occurrence, particularly within the footprint of the Second Circuit,[9] the Court should act to correct the decision below before it can injure more investors.

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[8] Indeed, the perverse result of the decision below is that SIPC alone, despite its congressionally conferred role as insurer of securities investors and special powers, lacks the traditional equitable rights that any other corporation providing similar services would have.

[9] *See* SIPC, Open Filing Deadline Cases, http://www.sipc.org/Cases/CasesOpen.aspx (visited September 30, 2013) (listing two failures since May 2013, both of firms located in New York).

II. The Court Should Grant Certiorari To Resolve When Federal Law Preempts State Contribution Claims

The decision below rejects the bedrock rule underlying our federalist system that federal law does not preempt state law except where Congress so intended. *See Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (Given the "presum[ption] that Congress does not cavalierly pre-empt state-law causes of action," "[t]he purpose of Congress is the ultimate touchstone in every pre-emption case.") (quotation marks omitted).

The State of New York has created a cause of action that allows the Trustee, on BLMIS's behalf, to sue joint tortfeasors for payments made to BLMIS customers under SIPA. *See* N.Y. C.P.L.R. § 1401 (McKinney 2011).[10] That cause of action may be asserted "whether or not the culpable parties are allegedly liable for the injury under the same or different theories" and "may be invoked against concurrent, successive, independent, alternative and even intentional tortfeasors." *Calcutti v. SBU, Inc.*, 273 F. Supp. 2d 488, 493 (S.D.N.Y. 2003) (quotation marks omitted). Adoption of that right represents New

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[10] That statute provides, "[T]wo or more persons who are subject to liability for damages for the same personal injury, injury to property or wrongful death, may claim contribution among them whether or not an action has been brought or a judgment has been rendered against the person from whom contribution is sought."

York's considered public policy choice and should be respected by the federal courts unless it has actually been preempted by federal law. *See Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 647 (1981) (providing for contribution is "a matter of high policy for resolution within the legislative process.") (quotation marks omitted).

The Second Circuit's blithe dismissal of New York law, without any consideration of whether it actually *conflicts* with federal law, conflicts with the decisions of other circuits that have correctly treated the application of state contribution claims to liabilities arising under federal law as a preemption question and thereby accorded state contribution laws the respect to which they are entitled.

A. Rather than undertake a standard preemption analysis, the Second Circuit broke with decisions of the Fourth and Eighth Circuits by holding that the availability of state contribution claims, where the underlying liability arises under federal law, is governed entirely by that federal law. In other words, even where there is no apparent conflict between federal law and a state law providing for contribution, the state law is nonetheless *always* preempted, and a right of contribution therefore unavailable, "unless the operative federal statute provides one." App. 22a. The Second Circuit's sole rationale for this unusual rule was the assertion that "'[t]he source of a right to contribution under state law must be an *obligation imposed by state law*.'" App. 23a (quoting *LNC Invs., Inc. v. First Fid. Bank*, 935 F. Supp.

1333, 1349 (S.D.N.Y. 1996)). Applying that rule, it rejected the Trustee's contribution claims as unauthorized by SIPA, given that SIPA is silent on the matter. App. 23a–24a.

Other circuits to consider whether state contribution claims may be premised on liability under federal law have correctly applied preemption analysis. In *Baker, Watts & Co. v. Miles & Stockbridge*, 876 F.2d 1101, 1107–08 (4th Cir. 1989) (en banc), the Fourth Circuit found that there was no federal contribution right for a claim under Section 12(2) of the Securities Act, but nonetheless allowed a contribution claim under Maryland law. As it explained, "[t]he lack of a federal cause of action, however, does not necessarily preclude the existence of state-law remedies. Unless preempted, plaintiff may be entitled to recover based on Maryland statutory or common law." *Id.* at 1106. Because there was no indication that Congress intended to preempt state contribution claims, they remained available for liabilities arising under Section 12(2).

In *Travelers Casualty & Surety Co. of America v. IADA Services, Inc.*, 497 F.3d 862, 867–68 (8th Cir. 2007), the Eighth Circuit applied identical reasoning to determine whether a right to contribution exists for liabilities arising under the Employee Retirement Income Security Act ("ERISA"). After finding that there was no right of contribution between shared fiduciaries under ERISA, it went on to consider whether a state law contribution claim was preempted. Reasoning that such a right "would un-

dermine the comprehensive federal scheme," and thereby "pose an obstacle to the purposes and objectives of Congress," the court held it preempted. *Id.* (quotation marks omitted).

By contrast, the First, Sixth, and now the Second Circuits have eschewed any standard preemption analysis for matters of contribution, concluding instead that, where federal law provides for liability, only federal law may provide for contribution. *See Fleming v. Lind-Waldock & Co.*, 922 F.2d 20, 27 (1st Cir. 1990) ("[A] right to contribution for liability arising from a violation of a federal statute is a matter of federal law."); *McDannold v. Star Bank, N.A.*, 261 F.3d 478 (6th Cir. 2001) (remanding with instructions for the district court to look solely to federal law to determine whether a right to contribution exists).

Reflecting the confusion in the lower courts is the Seventh Circuit's opinion in *Donovan v. Robbins*, 752 F.2d 1170, 1179 (7th Cir. 1985). Even though it stated that "the scope and limitations of the right of contribution are invariably treated as questions of federal rather than state law" when liability arises under federal law, it nonetheless undertook a thorough preemption analysis and rejected contribution under state law solely on that basis. *Id.* at 1179–80.

The Second Circuit's decision therefore deepens a Circuit split on a matter that has thrown the lower courts into substantial confusion. This Court's review is necessary to bring clarity and uniformity to the law.

B. In addition to splitting with other circuits' mode of analysis, the Second Circuit's rejection of preemption analysis is incorrect under this Court's decisions requiring that state law be respected except where in conflict with federal law. Congress, of course, is presumed to legislate against the background of pre-existing federal *and* state law. *Atherton v. FDIC*, 519 U.S. 213, 218 (1997) ("'Congress acts . . . against the background of the total *corpus juris* of the states . . . .'") (quoting *Wallis v. Pan Am. Petroleum Corp.*, 384 U.S. 63, 68 (1966)). Moreover, "[a]bsent a demonstrated need for a federal rule of decision, the Court has taken 'the prudent course' of 'adopt[ing] the readymade body of state law as the federal rule of decision until Congress strikes a different accommodation.'" *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2536 (2011) (quoting *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 740 (1979)).

On that basis, in *O'Melveny & Meyers v. FDIC*, 512 U.S. 79 (1994), this Court explained that "matters left unaddressed in [a comprehensive and detailed federal statutory] scheme are presumably left subject to the disposition provided by state law." *Id.* at 85 (citing *Nw. Airlines, Inc. v. Transp. Workers Union of Am., AFL-CIO*, 451 U.S. 77, 97 (1981)). At issue was what "rule of decision" should apply to whether a failed bank's knowledge of attorney malpractice could be imputed to the bank's FDIC receiver under the Financial Institutions Reform, Recovery, and Enforcement Act ("FIRREA"). Yes, the

Court acknowledged, "federal law governs," but that left open the question of "whether the California rule of decision is to be applied to the issue of imputation or displaced" through preemption. *Id.* Indeed, the Court forcefully rejected the FDIC's argument that the Court should apply anything other than a standard preemption analysis: "To create additional 'federal common-law' exceptions is not to 'supplement' this scheme, but to alter it." *Id.* at 87. Finding "*no* significant conflict with an identifiable federal policy or interest," the Court held that California law applied. *Id.* at 88.

By rejecting that approach out of hand, the decision below simply cannot be reconciled with this Court's decisions that, consistent with our federalist system, recognize the vitality of state laws except for in the narrow circumstance that displacing them "was the clear and manifest purpose of Congress." *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977) (quotation marks omitted).

C. The availability of a right to contribution under state law for liabilities arising under federal law is a question of the foremost importance deserving this Court's resolution. Contribution was unavailable at common law. As a result, the contribution rights now provided for by more than three-quarters of the States[11] represent the considered policy de-

[11] The number may now be as high as 44. *See generally* Primerus Defense Institute, A Survey of the Law of Non-Contractual Indemnity and Contribution (Apr. 2012).

terminations of their legislatures. *See Nw. Airlines*, 451 U.S. at 87–88 & n.17. Those determinations should not be swept aside by adoption of a rule that denies contribution whenever liability arises under a federal statute. Respect for the states demands at least some indication that Congress actually intended to displace their laws.

If this case raised the issue of contribution only in the context of SIPA, it would present an important and frequently recurring question, meriting the Court's review, because rarely is a single tortfeasor responsible for the collapse of a brokerage and loss of customer funds, here amounting to billions. But this issue arises under a host of federal statutes, from the Federal Commodity Exchange Act to ERISA and many more—potentially any federal scheme where more than one party may be responsible for the plaintiff's injury. Application of federal or state rules to the apportionment of damages in such cases should not turn, as it does today, on which circuit the plaintiff has chosen for his suit. This Court's review is necessary to adopt a uniform, national approach that provides greater predictability to litigants and consistency of results.

III. The Court Should Grant Certiorari To Resolve a Bankruptcy Trustee's Standing To Bring Claims General to All Creditors

Section 544(a) of the Bankruptcy Code provides that a trustee possesses all of "the rights and powers" of a hypothetical creditor that held a judicial lien on all property of the estate prior to the debtor's bankruptcy filing. On that basis, the Seventh and First Circuits have recognized that a trustee may bring claims against third parties that are "general" to all creditors—typically, alter ego claims or claims that a third party conspired with the debtor to defraud its creditors as a class. Nonetheless, the Second Circuit held that the Trustee lacks "prudential" standing to assert BLMIS customers' common claims against the financial intermediaries that facilitated and participated in Madoff's fraud. App. 6a, 24a. As a result, while the Trustee may bring fraudulent transfer claims against those defendants, he is barred from asserting fraud-related claims against those same parties, premised on much of the same conduct, involving many of the same transactions, and causing injury to the same class of BLMIS customers—a bizarre result that should not be allowed to stand.

A. In a case materially identical to this one, the Seventh Circuit held that the bankruptcy trustee was the proper party to assert alter ego claims against the debtor's shareholders, who had allegedly misappropriated its assets and otherwise contributed to its failure. *Koch Ref. v. Farmers Union Cent.*

Exch., 831 F.2d 1339, 1341 (7th Cir. 1987). The court reasoned that, because a bankruptcy trustee "has creditor status under section 544 to bring suits for the benefit of the estate and ultimately of the creditors . . . . [,] allegations that could be asserted by any creditor could be brought by the trustee as a representative of all creditors." *Id.* at 1348–49.

The key is that a "trustee may maintain only a general claim," one where "the liability is to all creditors of the corporation without regard to the personal dealings between such officers and such creditors." *Id.* at 1349. By contrast, a trustee may not maintain a claim that is "personal" to one or more creditors because it does not accrue to the entire class of creditors on an equal basis. *Id.* at 1348–49. *See also Fisher v. Apostolou*, 155 F.3d 876, 881 (7th Cir. 1998) (enjoining action by defrauded commodities investors against clearinghouse through which debtor illegally traded investor funds so that bankruptcy trustee could pursue claims on behalf of entire class of investors). This pragmatic distinction has also been adopted by the First Circuit. *City Sanitation, LLC v. Allied Waste Servs. of Mass., LLC (In re Am. Cartage, Inc.)*, 656 F.3d 82, 90 (1st Cir. 2011) (holding that commercial tort claims against debtor's former employee were "general" and therefore exclusive to the trustee).

B. The Second Circuit, however, held that the Trustee's standing to bring such general claims was barred by this Court's decision in *Caplin v. Marine Midland Grace Trust Co.*, 406 U.S. 416 (1972). *Cap-*

lin ruled that a reorganization trustee under Chapter X of the old Bankruptcy Act lacked standing to assert, on behalf of a small group of creditors holding the debtor's debentures, claims of misconduct against the debenture trustee. The Court reasoned that, while "Congress has established an elaborate system of controls with respect to indenture trustees and reorganization proceedings," that statutory scheme gave no "suggestion that the trustee in reorganization is to assume the responsibility of suing third parties on behalf of debenture holders." *Id.* at 428.

The Second Circuit took this rather specific holding to express a general "prudential" policy that a bankruptcy trustee lacks standing to pursue claims against third parties on behalf of the estate's creditors, but for fraudulent transfer and other avoidance actions. App. 6a, 25a–26a. But *Caplin* says no such thing, does not purport to address a trustee's standing to bring claims that are common to all creditors, and even suggests, with respect to suits on behalf of debenture holders, that Congress would not be "unwise to confer such standing on trustees in reorganization." 406 U.S. at 454.[12] There is simply no reason

[12] Indeed, *Caplin* actually did not address Bankruptcy Act Section 70c, which was the forerunner of Section 544 of today's Bankruptcy Code. Instead, it construed Bankruptcy Act Section 70a, which corresponds to Bankruptcy Code Section 541. *See* Steven Boyce, Koch Refining and In Re Ozark, 64 Am. Bankr. L.J. 315, 324 (1990).

to expand *Caplin*'s holding beyond its terms, particularly when Section 544 of the Bankruptcy Code (enacted shortly after *Caplin*) gives a trustee all the "rights and powers" of a general creditor of the estate. Yet the Second Circuit's misapprehension is one that is shared by the Eighth and the Ninth Circuits. *See Mixon v. Anderson (In re Ozark Rest. Equip. Co., Inc.)*, 816 F.2d 1222, 1228 (8th Cir. 1987) (trustee lacks standing to bring alter ego claim on behalf of creditors); *Williams v. Cal. 1st Bank*, 859 F.2d 664 (9th Cir. 1988) (following *Ozark*).

C. Worse still is that the Second Circuit's approach makes a hash of the law. The chief advantage of allowing a trustee to bring all claims general to the estate's creditors is that "[t]he trustee's single effort eliminates the many wasteful and competitive suits of individual creditors." *Koch*, 831 F.2d at 1342–43. That is, of course the rationale for the bankruptcy process generally and the appointment of a trustee in the first place: "to prevent creditors from stealing a march on each other." *Brown v. Armstrong*, 949 F.2d 1007, 1010 (8th Cir. 1991) (quotation marks omitted).

Yet, according to the Second Circuit, that rationale holds only when the trustee seeks to bring fraudulent transfer and other avoidance actions that otherwise would belong generally to the estate's creditors, and has no bearing at all on related fraud, conversion, and other common law claims that also are general to the estate's creditors, concern much the same conduct, and would be subject to much the

same proof and many of the same defenses. App. 25a–26a. There is no logical reason why Congress would have required that these closely-related actions be brought and tried in separate lawsuits, one by the trustee for the benefit of all creditors and the other by the same creditors for their own benefit. The Court should reject this absurd result and give Section 544 its more natural meaning of conferring standing on the trustee to bring all claims that are general to the estate's creditors.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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