No. 13-448

In the Supreme Court of the United States

IRVING H. PICARD, PETITIONER

v.

JPMORGAN CHASE & CO., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
MALCOLM L. STEWART
Deputy Solicitor General
ELAINE J. GOLDENBERG
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

MICHAEL A. CONLEY
Deputy General Counsel
JOHN W. AVERY
Deputy Solicitor
TRACEY A. HARDIN
Assistant General Counsel
THEODORE J. WEIMAN
Senior Counsel
Securities and Exchange Commission
Washington, D.C. 20549

QUESTIONS PRESENTED

1. Whether the Securities Investor Protection Corporation, having paid advances to a trustee appointed under the Securities Investor Protection Act of 1970 (SIPA), 15 U.S.C. 78aaa *et seq.*, for his use in satisfying customer claims against a failed brokerage, is equitably subrogated to customers' common-law claims against third parties.

2. Whether a SIPA trustee seeking recovery for payments made to customers pursuant to SIPA may assert state-law contribution claims against alleged joint tortfeasors of the failed brokerage.

3. Whether Section 544(a) of the Bankruptcy Code confers standing on a SIPA trustee to assert common-law claims on behalf of customers.

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This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

1. In the Securities Investor Protection Act of 1970 (SIPA), 15 U.S.C. 78aaa *et seq.*, Congress established "a new form of liquidation proceeding." *Securities Investor Prot. Corp.* v. *Barbour*, 421 U.S. 412, 416 (1975). SIPA "authorized the formation" of the Securities Investor Protection Corporation (SIPC), "a private nonprofit corporation" of which "most broker-dealers registered under § 15(b) of the Securities Exchange Act of 1934 * * * are required to be 'members.'" *Holmes* v. *SIPC*, 503 U.S. 258, 261 (1992); see *Barbour*, 421 U.S. at 417-418 (explaining

that Securities and Exchange Commission has "plenary authority to supervise the SIPC") (internal quotation marks and citations omitted). If a member "has failed or is in danger of failing to meet its obligations to customers," and if certain other statutory conditions are satisfied, SIPC may seek a "protective decree" in federal district court. 15 U.S.C. 78eee(a)(3). If the court finds that such a decree is appropriate, see 15 U.S.C. 78eee(b)(1), it must "forthwith" appoint "as trustee for the liquidation of the business" of the broker-dealer a person that "SIPC, in its sole discretion, specifies," 15 U.S.C. 78eee(b)(3).

A SIPA liquidation proceeds, "[t]o the extent consistent with the provisions of [SIPA]," as if it were "being conducted under * * * chapter 7 of title 11." 15 U.S.C. 78fff(b); see Pet. App. 8a, 80a. The SIPA trustee, who exercises the same powers as a bankruptcy trustee exercises with respect to a debtor, see 15 U.S.C. 78fff-1(a) and (b), is "empowered and directed by [SIPA] to return customer property, complete open transactions, enforce rights of subrogation, and liquidate the business of the member." *Barbour*, 421 U.S. at 417 (citing 15 U.S.C. 78fff(a)).

In carrying out those tasks, the trustee must deliver to customers any securities specifically registered in their names. See 15 U.S.C. 78fff(a)(1)(A), 78fff-2(c)(2). The trustee must also "distribute customer property and * * * otherwise satisfy net equity claims of customers to the extent provided," 15 U.S.C. 78fff(a)(1)(B)—that is, put into a pool any securities not registered to particular customers, as well as other customer property, and "divide this pool ratably to satisfy customers' claims" against the broker-dealer's estate, *Holmes*, 503 U.S. at 261 (citing 15

U.S.C. 78fff-2(b)); see 15 U.S.C. 78fff-2(c)(1)(B) and (3); see also 15 U.S.C. 78*lll*(2), (4) and (11) (defining "customer," "customer property," and "net equity").

If the pool of customer property is not adequate to satisfy customers' net equity claims, SIPC must "advance to the trustee such moneys, not to exceed $500,000 for each customer, as may be required to pay * * * claims for the amount by which the net equity of each customer exceeds his ratable share." 15 U.S.C. 78fff-3(a); see 15 U.S.C. 78fff-3(a)(1)-(5) and (d) (capping at $250,000 an advance on a customer "claim for cash"); Pet. App. 8a.[1] To enable SIPC to make such advances, SIPA establishes a "SIPC Fund" into which members must pay assessments. See 15 U.S.C. 78ddd, 78jjj(a).

When SIPC pays advances, it also obtains "rights of subrogation as provided in" SIPA. 15 U.S.C. 78fff(a)(3). SIPA states that, "[t]o the extent moneys are advanced by SIPC to the trustee to pay or otherwise satisfy the claims of customers, in addition to all other rights it may have at law or in equity, SIPC shall be subrogated to the claims of such customers with the rights and priorities provided in this chapter, except that SIPC as subrogee may assert no claim against customer property until after the allocation thereof to customers." 15 U.S.C. 78fff-3(a); see 15 U.S.C. 78fff-2(c) (setting forth order of priority under which SIPC may recover from customer property "as subrogee for the claims of customers" only after the trustee has ratably paid "customers * * * on the

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[1] If "customer property and SIPC advances * * * are not sufficient to pay" net equity claims "in full," customers may participate in the "general estate" as "unsecured creditors." 15 U.S.C. 78fff-2(c).

basis and to the extent of their respective net equities"); 15 U.S.C. 78fff-4(c).

2. This case arises from the SIPA liquidation of Bernard L. Madoff Investment Securities LLC (BLMIS), the brokerage firm that Bernard L. Madoff ran as a "vast Ponzi scheme" without engaging in any "securities transactions at all." Pet. App. 7a. After Madoff was arrested in December 2008, SIPC sought a protective decree for BLMIS under SIPA. See *id.* at 7a-8a. The district court granted the decree, referred the case to the bankruptcy court, and appointed petitioner as trustee. See *id.* at 8a. Petitioner then proceeded with the tasks associated with liquidation of BLMIS, including providing monies advanced by SIPC to customers with allowed claims. See *ibid.*

In 2009 and 2010, petitioner brought a number of adversary proceedings in the bankruptcy court against respondents, alleging that they had aided and abetted BLMIS's fraud. See Pet. App. 9a, 15a-16a. Petitioner alleged that the JPMorgan respondents, see JPMorgan Resp. Br. in Opp. 1 n.1, who had knowledge of an account at JPMorgan Chase & Co. through which Madoff funneled billions of dollars, had disregarded indications that BLMIS was engaged in fraud and had "failed to tip off regulators." Pet. App. 10a-11a. Petitioner asserted against the JPMorgan respondents various common-law claims—including a state-law claim for contribution on behalf of BLMIS itself, as well as state-law fraud, breach-of-fiduciary-duty, unjust-enrichment, conversion, and aiding-and-abetting claims on behalf of BLMIS's customers—and sought approximately $19 billion in damages. See *id*. at 15a-16a, 80a-81a. Petitioner made similar allegations and asserted similar common-law claims against

the UBS respondents (see JPMorgan Resp. Br. in Opp. 1 n.1), the HSBC respondents (see HSBC Resp. Br. in Opp. 4 n.1), and the UniCredit respondents (see HSBC Resp. Br. in Opp. 6 n.3), seeking a total of approximately $10.6 billion from those parties on the ground that they had established, sponsored, or promoted BLMIS "feeder funds" despite their awareness that the brokerage was likely engaging in fraud. See Pet. App. 11a-15a, 52a-53a, 81a-83a.[2]

3. a. The district court withdrew the reference to the bankruptcy court for the purpose of deciding respondents' motions to dismiss the common-law claims. See Pet. App. 15a-16a. One district judge (McMahon, J.) granted motions to dismiss the claims against the JPMorgan and UBS respondents. See *id.* at 78a-84a. In a separate opinion, another district judge (Rakoff, J.) granted a motion to dismiss the claims against the HSBC and UniCredit respondents. See *id.* at 50a-52a, 74a-75a.

Both district judges ruled that petitioner could not assert contribution claims against respondents for recovery of money paid to customers under SIPA procedures. Those judges concluded that SIPA provided no right to contribution and that state-law contribution claims did not apply with respect to a federal-law obligation. See Pet. App. 74a, 103a-105a. The judges also concluded that petitioner had failed in any event to "adequately allege a right to relief under New York's contribution statute," *id.* at 104a, because the SIPC advances did not constitute "'liability for

[2] In claims that are not at issue here, petitioner also sought to recover from respondents (and from others) various transfers made by BLMIS. See, *e.g.*, Pet. App. 15a, 52a-53a; see also 15 U.S.C. 78fff(b), 78fff-1(a); 11 U.S.C. 541, 547, 548.

damages' in the sense contemplated by" that statute, *id.* at 74a; see *id.* at 102a-104a.

In rejecting the various common-law claims that petitioner had asserted on behalf of BLMIS's customers, both district judges held that petitioner lacked standing "to pursue claims that properly belong to creditors" and was "empowered to pursue only those claims that properly belonged to the debtor before it entered bankruptcy." Pet. App. 85a; see *id.* at 58a. More specifically, they ruled that petitioner could not pursue customer claims as assignee of SIPC's subrogation rights because, when SIPC provides advances to pay customers, it "is only subrogated to customer * * * claims against the estate, not to all customer claims against third parties." *Id.* at 64a-65a (emphasis omitted); see *id.* at 70a, 88a, 108a-116a, 118a-120a. One of the judges rejected a theory that petitioner had raised only in the actions against the JPMorgan and UBS respondents: that a SIPA trustee has standing to assert customer claims pursuant to 11 U.S.C. 544(a), a Bankruptcy Code provision that permits a bankruptcy trustee to "stand in the shoes of a hypothetical judgment creditor that extended credit to [the debtor] at the commencement of its bankruptcy." Pet. App. 88a. The judge concluded that the "problems with this theory" were "legion"—among them, the fact that Section 544(a) does not cover "pre-petition wrongs" or allow one creditor to "appropriat[e] causes of action" that belong to "other creditors." *Id.* at 91a-92a; see *id.* at 93a-99a.

b. Addressing both district court decisions in a single opinion, the court of appeals affirmed. See Pet. App. 1a-49a. First, the court ruled that petitioner could not assert state-law contribution claims on be-

half of BLMIS. The court concluded that "the SIPA payments for which [petitioner] seeks contribution" amounted to an "obligation of federal law"; that in such circumstances "there is no claim for contribution unless the operative federal statute provides one"; and that SIPA itself does not authorize such a claim. *Id.* at 22a-24a; see *id.* at 22a (explaining that the New York contribution statute applies only when a party was compelled to make payments, and that SIPA payments "were not compelled by BLMIS's state law fraud liability to its customers"); see also *id.* at 17a-21a, 21a n.15 (discussing *in pari delicto* doctrine).

Second, the court of appeals ruled that petitioner lacked standing to assert the common-law claims on behalf of BLMIS's customers. See Pet. App. 24a.[3] In rejecting petitioner's argument that he could assert the claims at issue because they were general to all creditors, the court held that the claims were not general because the alleged wrongful acts could not have "harmed all customers in the same way." *Id.* at 32-35a. The court also concluded that the claims were improper under this Court's holding in *Caplin* v. *Marine Midland Grace Trust Co.*, 406 U.S. 416 (1972), that a trustee may not sue non-debtor parties on behalf of creditors. See Pet. App. 25a-26a; see also *id.* at 27a-32a (explaining that *Redington* v. *Touche Ross & Co.*, 592 F.2d 617 (2d Cir. 1978), rev'd, 442 U.S. 560 (1979), which had suggested a different approach, was both "non-binding" and "inapposite").

[3] The court of appeals noted that petitioner had "abandoned * * * on appeal" his standing argument "grounded" in "Section 544(a) of the Bankruptcy Code, which gives a trustee the rights of a hypothetical lien creditor." Pet. App. 25a n.16.

The court of appeals likewise rejected petitioner's argument that he had standing to pursue claims on behalf of customers as assignee of SIPC's subrogation rights. See Pet. App. 42a. While acknowledging that SIPA creates subrogation rights for SIPC based on advances to customers, the court found those rights applicable only with respect to claims that customers have against the failed brokerage, not claims that customers could bring against third parties. *Id.* at 42a-43a. The court described petitioner's assertion of an "implied right of equitable subrogation," grounded in the statute's statement that SIPC retains "all other rights * * * at law or in equity," 15 U.S.C. 78fff-3(a), as too "long" a "reach." Pet. App. 42a-44a. The court stated that any such implied right would be inconsistent with the "plain language of the statute" and its legislative history, *id.* at 42a; see *id.* at 43a-46a; would be "fraught with unanswered questions," *id.* at 47a (quoting *Holmes*, 503 U.S. at 270); and would likely create serious practical problems by interfering with suits that customers themselves have already brought against respondents, see *id.* at 47a-48a & n.29.

4. In the wake of the court of appeals' decision, the SIPA liquidation of BLMIS remains ongoing. As of May 5, 2014, petitioner had returned nearly $6 billion to BLMIS customers with allowed claims, an amount that includes approximately $800 million in advances from SIPC. See Pet. App. 8a; *SIPC: Nearly $6 Billion Now Distributed to Madoff Victims* (May 5, 2014), http://www.sipc.org/news-and-media/news-releases/20140505.

DISCUSSION

The Second Circuit correctly rejected petitioner's assertion of contribution claims on behalf of BLMIS and various common-law claims on behalf of BLMIS customers. That decision does not conflict with any decision of this Court or of another court of appeals. The decision below also does not preclude customers from pursuing their own actions against respondents based on the same alleged conduct that forms the basis of petitioner's claims. Further review is not warranted.

1. With respect to the claims for contribution asserted on behalf of BLMIS, petitioner argues (Pet. 25-26) that the court of appeals erred by failing to undertake a "standard preemption analysis" to determine whether New York's contribution statute permits recovery of amounts paid to customers under SIPA. That issue does not warrant this Court's review.

a. Petitioner's preemption argument was not presented to or ruled on by the court of appeals. See JPMorgan Resp. Br. in Opp. 12-13. In his briefs in that court, petitioner never mentioned preemption or cited authority discussing preemption principles. Rather, he accepted that the viability of his state-law contribution claims depended entirely on whether "state law supplied the appropriate rule of decision." 11-5175 Pet. C.A. Br. 61 (quoting *Northwest Airlines, Inc.* v. *Transport Workers Union of Am., AFL-CIO*, 451 U.S. 77, 97 n.38 (1981)); see *id.* at 60-61 (citing *Northwest Airlines* for the proposition that a state-law contribution claim does not lie if "the liability that is the basis for the contribution claim is entirely a creature of federal statute") (internal quotation marks omitted); see also 11-5051 Pet. C.A. Reply Br. 30-31

(addressing respondents' argument "that where a federal statutory scheme compels payment, the Trustee must look to federal law for contribution rights," by stating that "the Trustee's contribution claims, pursuant to New York statute, are based on violations of New York tort law").

Petitioner's failure to make a preemption argument below explains the court of appeals' failure to engage in a preemption analysis. Instead, the court accepted the very legal rule that petitioner had described: that "[t]he source of a right of contribution under state law must be an obligation imposed by state law." Pet. App. 23a (internal quotation marks and emphasis omitted). The court also explained and rejected petitioner's argument that state law supplied the relevant rule of decision here, and petitioner does not challenge that aspect of the ruling in this Court. See *id.* at 23a-24a; Pet. 25-31. Because the court below had no occasion to analyze the approach that petitioner now advocates, this Court's review is not warranted. See *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) ("[W]e are a court of review, not of first view."); *United States* v. *Williams*, 504 U.S. 36, 41 (1992).[4]

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[4] This case is a poor vehicle for consideration of the preemption issue for another reason as well: petitioner does not have valid claims under New York contribution law. Under the New York statute, BLMIS must be "subject to liability for damages for * * * injury to property" in order to be entitled to contribution for payments made to customers under SIPA. N.Y. C.P.L.R. § 1401 (McKinney 2012); see Pet. App. 74a, 102a-104a. Those SIPA payments, however, do not reflect a determination that BLMIS is liable for tort damages. Rather, they reflect a statutory scheme that calls for return of certain property, regardless of fault, when a brokerage cannot meet its obligations. See *id.* at 74a, 88a, 103a; see also *id.* at 22a (concluding that "the SIPA payments

b. Even if petitioner's argument were properly preserved, the preemption issue would not warrant this Court's review. Petitioner asserts (Pet. 26-28) that the Fourth and Eighth Circuits have held, in conflict with the decision below, that state contribution law always applies unless it is preempted. But the Second Circuit's contribution ruling is consistent with the decisions of those courts of appeals as well as with this Court's precedents.

In *Baker, Watts & Co.* v. *Miles & Stockbridge*, 876 F.2d 1101 (4th Cir. 1989) (en banc), the Fourth Circuit did not address whether state contribution law might apply when federal law is the only source of the obligation as to which contribution is sought. The plaintiff in that case was adjudged to have violated both federal and state securities laws, and it sought contribution under both bodies of law for the resulting monetary judgment. See *id.* at 1103. The court allowed the state-law contribution claim to go forward (if properly repleaded), see *id.* at 1106-1109, but that contribution claim was specifically linked to an underlying violation of state law. Indeed, the basis of the claim was a subsection of the state securities statute providing that "[t]here is contribution" among persons "jointly and severally" liable "under subsection (a) of this section." Md. Code Ann., Corps. and Ass'ns § 11-703(c) (LexisNexis 1985); see 876 F.2d at 1109. The Fourth Circuit's conclusion that federal securities law did not preempt use of a state contribution statute to allocate responsibility for a state-law liability, see *id.* at 1107-

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for which [petitioner] seeks contribution were not compelled by BLMIS's state law fraud liability"); JPMorgan Resp. Br. in Opp. 13-14; see generally *Holmes* v. *SIPC*, 503 U.S. 258, 261-262 (1992).

1108, has no bearing on the issue the Second Circuit resolved here.

Likewise, the court in *Travelers Casualty & Surety Co. of America* v. *IADA Services, Inc.*, 497 F.3d 862 (8th Cir. 2007), did not conclude that state contribution law applies unless preempted by the federal statute imposing the underlying obligation. The Eighth Circuit held that a state-law contribution claim was preempted by ERISA—a sufficient basis for disposing of that claim, and one that was consistent with the way that the case was litigated. See *id.* at 867-868; *id.* at 867 (stressing the "strong preemptive effect" of ERISA's "comprehensive legislative scheme"). The court did not suggest, however, that the claim would necessarily have survived if it was not preempted, nor did it discuss more generally the possible application of state-law contribution rights to federal obligations. See *id.* at 867-868; see also *Professional Beauty Supply, Inc.* v. *National Beauty Supply, Inc.*, 594 F.2d 1179, 1182 n.3 (8th Cir. 1979) (recognizing that "the extent and nature of the legal consequences of" a federal statutory obligation are "federal questions").

The Second Circuit's decision thus is not at odds with either of these decisions, and it finds substantial support in this Court's precedents. In *Northwest Airlines*, this Court explained that a contribution right with respect to obligations under the Equal Pay Act and Title VII "may have been created in either of two ways": as "part of the federal common law," or by the federal statutes themselves (either expressly or impliedly). 451 U.S. at 90. The Court did not suggest that the widely differing contribution laws of the various States would apply so long as they were not preempted. See *id.* at 97 n.38 (recognizing the possi-

bility of "a right to contribution under state law in cases in which state law supplied the appropriate rule of decision"). Similarly, in *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630 (1981), the Court treated federal common law and federal statutory authority as the only possible "source[s]" of "any right to contribution" arising from payment of an obligation under federal antitrust law. *Id.* at 640; see *id.* at 638; see also, *e.g.*, *Sola Elec. Co.* v. *Jefferson Elec. Co.*, 317 U.S. 173, 176 (1942) (stating that "[w]hen a federal statute condemns an act as unlawful, the extent and nature of the legal consequences of the condemnation" are "federal questions, the answers to which are to be derived from the statute and the federal policy which it has adopted"); *Deitrick* v. *Greaney*, 309 U.S. 190, 200-201 (1940); cf. *Paroline* v. *United States*, No. 12-8561 (Apr. 23, 2014), slip op. 17-19.[5]

2. Petitioner also asserts (Pet. 19-24) standing to bring claims on behalf of customers, rather than on behalf of BLMIS itself, on a subrogation theory. Petitioner does not appear to contend that the subrogation right expressly granted to SIPC in 15 U.S.C. 78fff-3(a) encompasses the claims he wishes to assert as SIPC's assignee to recover amounts that SIPC advanced to BLMIS customers. See Pet. App. 42a-43a (explaining that SIPA "allows only a narrow right of subrogation—for SIPC to assert claims against the fund of customer property and thereby recoup any

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[5] Petitioner's reliance (Pet. 29-30) on *O'Melveny & Myers* v. *FDIC*, 512 U.S. 79 (1994), is misplaced. As respondents explain (JPMorgan Resp. Br. in Opp. 18-19), the Court there addressed the distinct question whether a federal "rule of decision" should be engrafted onto a state-law cause of action.

funds advanced to customers"); Reply Br. 4-5. Rather, petitioner argues that the statutory phrase "in addition to all other rights [SIPC] may have at law or in equity" preserves SIPC's equitable-subrogation rights. That contention does not warrant this Court's review.

a. The Second Circuit's rejection of petitioner's equitable-subrogation argument finds support in SIPA's text. See Pet. App. 42a-48a. The statute provides that SIPC "shall be subrogated to" customer claims "with the rights and priorities provided in this chapter." 15 U.S.C. 78fff-3(a); see 15 U.S.C. 78fff(a)(3) (stating that one of the purposes of a SIPA liquidation is to "enforce rights of subrogation as provided in this chapter"). But permitting SIPC to bring equitable subrogation claims could enable it to circumvent those rights and priorities—for instance, the requirement that SIPC recover as subrogee only after customers' net equity claims against the brokerage have been fully satisfied. See Pet. App. 64a-65a (citing 15 U.S.C. 78fff-2(c)(1)); *id.* at 119a-120a; see also HSBC Resp. Br. in Opp. 23. The statute therefore can be read to place express limits on SIPC's subrogation rights while preserving "all other rights"—that is, rights "other" than subrogation—that SIPC may possess as a matter of common law. 15 U.S.C. 78fff-3(a); see Pet. App. 45a (discussing legislative history describing addition of the phrase "all other rights" as a "[m]inor" technical amendment).

b. The subrogation question that petitioner presents has arisen very infrequently, and there is no meaningful division of authority warranting this Court's review.

Contrary to petitioner's argument (Pet. 21-22), *SEC* v. *Albert & Maguire Securities Co.*, 560 F.2d 569 (3d Cir. 1977), has no bearing on the subrogation issue decided by the court below. In *Albert & Maguire*, the Third Circuit ruled that, when a customer of a failed brokerage assigned a claim against that entity to a bank in exchange for the bank's delivery of missing shares, the bank was not entitled to be treated as a customer for purposes of a SIPA distribution from the fund of customer property. See *id.* at 572. The court's determination that the bank did not meet the "equitable qualifications" for such treatment, *ibid.*, was supported by the conclusion that, if the bank had not voluntarily delivered the missing shares, it would nevertheless have been liable to the SIPA trustee, which would have been a proper assignee of the customer's claim against the bank. See *id.* at 573-574. That conclusion, however, flowed from the law of assignment, not of subrogation, as demonstrated by the court's reliance on a then-existing statutory provision that "specifically authorize[d] the trustee to receive affidavits and assignments from customers in such form as he determines." *Id.* at 573; see *id.* at 574 ("the trustee should be entitled to take an assignment of the claim"). The court's only mention of subrogation was in a passing statement meant to help show that a trustee can sometimes stand in a customer's shoes: "Upon payment of benefits, the trustee and SIPC stand not in the shoes of the debtor, as the Bank contends, but, rather, in those of the customer. If the analogy to insurance is followed, upon payment to a customer, SIPC becomes subrogated to the customer's rights against third parties." *Ibid.* That statement—itself based on an analogy that the court did

not definitively accept, see *Mishkin* v. *Peat, Marwick, Mitchell & Co.*, 744 F. Supp. 531, 557-558 (S.D.N.Y. 1990)—was not necessary to the Third Circuit's holding.

The Sixth Circuit's decision in *Appleton* v. *First National Bank*, 62 F.3d 791 (6th Cir. 1995), cited in Pet. 20-21, is more closely on point than *Albert & Maguire*, but any tension between *Appleton* and the decision below is not significant. In *Appleton*, the court of appeals ruled that the trustee (as assignee of SIPC) could pursue equitable-subrogation claims against third-party banks that had deposited checks meant for a brokerage into a fraudster's account. See 62 F.3d at 794, 800. In reaching that conclusion, however, the Sixth Circuit relied heavily on the Second Circuit's decision in *Redington* v. *Touche Ross & Co.*, 592 F.2d 617 (2d Cir. 1978), rev'd, 442 U.S. 560 (1979), which the Second Circuit has now declared was not good law at the time *Appleton* was decided. Pet. App. 30a-32a; see 62 F.3d at 799-800; Pet. App. 42a-48a. If the equitable-subrogation issue arises again in the Sixth Circuit, that court may well revisit the issue and adjust its views in light of the Second Circuit's repudiation of *Redington*. Even under *Appleton*, moreover, it is far from clear that the equitable-subrogation claims asserted by petitioner in this case would survive. As respondents explain, *Appleton* involved claims to money that had been diverted from the debtor, and the court in that case did not approve recovery of any amounts beyond those that had already been advanced to customers under SIPA. See HSBC Resp. Br. in Opp. 12.[6]

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[6] Petitioner's reply brief (at 4) asserts for the first time that the decision below conflicts with *SIPC* v. *Vigman*, 803 F.2d 1513 (9th

c. Finally, there is no merit to petitioner's contention (Pet. 24) that recognition of equitable-subrogation rights here is critical to ensuring a full recovery for BLMIS customers and protecting the SIPC Fund. As subrogee, SIPC (or its assignee) would be entitled to recover from respondents only the amounts it has advanced to customers—amounts far less than the billions in dollars of damages sought in the present suits. See Pet. App. 8a, 15a-16a. And any such recovery would belong to the subrogee, not to the customers, who are already receiving from SIPC the maximum advances permissible under SIPA. See 15 U.S.C. 78fff-3(a).[7] Customers are entitled to bring—and have already brought—their own suits against respondents for allegedly facilitating Madoff's fraud. See, *e.g.*, Pet. App. 47a n.29. If SIPC were permitted to pursue the same claims while standing in the cus-

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Cir. 1986). But the court in *Vigman* did not unambiguously accept that SIPC is entitled to assert subrogation rights against third parties with respect to any "monies advanced." *Id.* at 1516; see *id.* at 1517 n.1 (stating that "[t]he customer would retain any securities fraud claim against the broker for inducing the purchase"); see also *Mishkin*, 744 F. Supp. at 556-557. And to the extent that the *Vigman* court did accept that proposition, it did so with virtually no analysis, and only by reference to the express subrogation rights set forth in SIPA, see 803 F.3d at 1516—rights on which petitioner does not rely. In addition, this Court reversed the judgment in *Vigman* on other grounds in *Holmes*, *supra*, and in doing so expressed doubts about permitting SIPC to pursue an equitable-subrogation theory. See 503 U.S. at 270-271.

[7] Even assuming that petitioner intends to use any subrogation recovery to pay customer claims against BLMIS, it is not clear how the recovery would become part of the fund of customer property, see 15 U.S.C. 78fff-2(b)(1) and (c)(1), 78fff-3(a), 78*lll*(4), let alone that such use would be attempted in any future case in which SIPC or its assignee asserts equitable-subrogation rights.

tomers' shoes, that could raise complicated problems. See *id.* at 47a-48a; see generally *Holmes* v. *SIPC*, 503 U.S. 258, 270 (1992) (describing the equitable-subrogation theory as "fraught with unanswered questions"). And such duplication of effort is not necessary to protect the SIPC Fund. While the failure of BLMIS imposed burdens on the SIPC Fund, the statutory mechanisms in place to ameliorate such burdens have been effective. See SIPC, *2013 Annual Report* 10 (2014), http://www.sipc.org/Content/media/annual-reports/2013-annual-report.pdf; see also 15 U.S.C. 78ddd.

3. Petitioner contends (Pet. 32-33) that 11 U.S.C. 544(a) gives a bankruptcy trustee standing to pursue claims that are "general" to all creditors, and that he is entitled to invoke that authority here. Review of that issue is not warranted.

a. As respondents explain (JPMorgan Resp. Br. in Opp. 20-21), petitioner did not present his Section 544(a) argument to the court of appeals, and that court did not analyze the provision. Although petitioner argued in the Second Circuit that he had standing to pursue general customer claims against third parties, he expressly disclaimed any reliance on Section 544(a). See Pet. App. 25a n.16 (explaining that "before one of the district courts, [petitioner] grounded his standing argument in large part on Section 544(a)," but that petitioner had "abandoned" any such argument on appeal); see also 11-5044 Pet. C.A. Br. 7 n.4 (explaining that petitioner "does not pursue * * * on appeal" whether the district court erred in holding that he "could not pursue common law claims as a 'hypothetical judgment creditor' under section 544(a)," but that petitioner "does appeal

* * * with respect to [the district court's] reading of *Caplin v. Marine Midland Grace Trust Co.*, 406 U.S. 416 (1972)"); 11-5051 Pet. C.A. Br. 7 n.5 (similar). Accordingly, the Section 544(a) standing argument was not adequately "pressed or passed upon below." *Williams*, 504 U.S. at 41.

b. Although the court of appeals had no occasion to consider the argument, the district judge that did address it (in the actions against the JPMorgan and UBS respondents) correctly held that Section 544(a) does not confer standing here. See Pet. App. 88a-99a. That provision gives a bankruptcy trustee the "rights and powers" of a hypothetical "creditor that extends credit to the debtor at the time of the commencement of the case, and that obtains, at such time and with respect to such credit, a judicial lien on all property on which a creditor on a simple contract could have obtained such a judicial lien." 11 U.S.C. 544(a)(1). Section 544(a) thus has the effect of "empower[ing] the trustee to avoid certain prebankruptcy transfers that could have been avoided by certain types of creditors" under state law, "whether or not such creditors * * * actually exist." 5 *Collier on Bankruptcy* ¶ 544.01, at 544-3 (Alan N. Resnick & Henry J. Sommer, eds., 16th ed. 2014) (emphasis omitted); see *Musso* v. *Ostashko*, 468 F.3d 99, 104-105 (2d Cir. 2006) (per curiam). But nothing in the provision authorizes a trustee with hypothetical-creditor status to pursue tort claims belonging to *other* creditors—much less claims that accrued to those creditors before the hypothetical lien attached. See, *e.g.*, Pet. App. 91a-92a; see also 5 *Collier* ¶ 544.01, at 544-4 ("Section 544 * * * does not give the trustee standing to pursue tort claims that were not the property of the estate at

the commencement of the case."); *In re Ozark Rest. Equip. Co.*, 816 F.2d 1222, 1227-1228 (8th Cir.), cert. denied, 484 U.S. 848 (1987). Nor can Section 544(a) reasonably be read to confer on petitioner the entitlement to pursue claims held by all customers, even if those claims are not common to all creditors of the BLMIS estate. Cf. Pet. App. 34a-35a.

c. The circuits have not diverged as to the meaning of Section 544(a). Petitioner cites (Pet. 32-33) the First Circuit's decision in *In re American Cartage*, 656 F.3d 82 (1st Cir. 2011), and the Seventh Circuit's decision in *Koch Refining* v. *Farmers Union Central Exchange, Inc.*, 831 F.2d 1339 (7th Cir. 1987), cert. denied, 485 U.S. 906 (1988), but neither of those courts interpreted Section 544(a). The court in *American Cartage* did not mention that provision at all. See 656 F.3d at 90. The court in *Koch* cited it to support the proposition that "the trustee, in his capacity as a creditor, may bring suit to reach property or choses in action belonging to the estate," 831 F.2d at 1342-1343; see *id.* at 1348-1349 (stating that Section 544 gives a trustee creditor status "to bring suits for the benefit of the estate"); see also *id.* at 1346 & n.7, 1351, but did not expressly ground its ruling on the scope of the trustee's powers in the language of Section 544(a).

This case also does not implicate any broader division among the circuits as to whether a trustee can assert claims that are common to all creditors. The First and Seventh Circuit decisions on which petitioner relies make clear that a trustee can in no event bring claims that "belong personally to the creditors" and therefore are not common claims. *In re American Cartage*, 656 F.3d at 90; see *Koch*, 831 F.2d at 1348-1349; *Fisher* v. *Apostolou*, 155 F.3d 876, 879-881 (7th

Cir. 1998) (explaining that trustee could bring claims arising from third parties' misappropriation of funds invested with the failed brokerage, but that customers had independent and personal claims for fraud against those parties); see also *Steinberg* v. *Buczynski*, 40 F.3d 890, 893 (7th Cir. 1994) (explaining that a trustee cannot bring a "creditor's own direct—not derivative—claim against the third party, which only the creditor himself can enforce"), cited in Pet. App. 34a. The court of appeals in this case accepted that rule. See *id.* at 32a-34a (stating that a trustee cannot assert claims "particular to any individual creditor").

The court below then made a fact-bound determination that the claims at issue here are personal to particular customers, not "general" to all BLMIS customers (who are only a subset of all BLMIS creditors). See Pet. App. 34a-35a. As the court explained, petitioner "seeks to assert claims on behalf of thousands of customers against third-party financial institutions for their handling of individual investments made on various dates in varying amounts"—acts that "could not have harmed all customers in the same way." *Id.* at 35a; see *id.* at 9a-15a (describing petitioner's allegations as focused on representations that respondents made, or failed to make, to customers and regulators, not on harm that respondents caused to BLMIS). Because the claims at issue belong "personally to the creditors," *In re American Cartage*, 656 F.3d at 90, petitioner's standing argument would not have succeeded in the First or Seventh Circuits, and he could not benefit from a ruling by this Court that a trustee may assert "general" creditor claims.[8]

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[8] On different facts, it might be appropriate to consider whether the rule set forth in *Caplin* applies outside of standard bankruptcy

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
MALCOLM L. STEWART
Deputy Solicitor General
ELAINE J. GOLDENBERG
Assistant to the Solicitor General

MICHAEL A. CONLEY
Deputy General Counsel
JOHN W. AVERY
Deputy Solicitor
TRACEY A. HARDIN
Assistant General Counsel
THEODORE J. WEIMAN
Senior Counsel
Securities and Exchange Commission

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proceedings—for instance, in a context like a SIPA liquidation or a receivership. It is unclear whether the reasoning of *Caplin* is applicable to "general" claims asserted by a trustee on behalf of a statutorily favored class of creditors such as the customers in a SIPA liquidation. Petitioner, however, has not made such SIPA-specific arguments for distinguishing *Caplin*. Indeed, his choice to tether his position to Section 544(a), see Pet. 32, which covers all bankruptcy trustees, precludes any such arguments.