Nos. 11-968, 11-969 and 11-986

In the Supreme Court of the United States

STERLING EQUITIES ASSOCIATES, ET AL., PETITIONERS

v.

IRVING H. PICARD, ET AL.

THERESA ROSE RYAN, ET AL., PETITIONERS

v.

IRVING H. PICARD, ET AL.

LAWRENCE R. VELVEL, PETITIONER

v.

IRVING H. PICARD, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

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QUESTION PRESENTED

In a proceeding to liquidate a failed broker-dealer under the Securities Investor Protection Act of 1970 (SIPA), 15 U.S.C. 78aaa *et seq*., a brokerage customer's "net equity" both determines the customer's pro rata share of the remaining customer property to be distributed from the insolvent broker-dealer's assets, and affects whether the customer will receive a payment from the customer protection fund maintained by the Securities Investor Protection Corporation. SIPA defines "net equity" as "the dollar amount of the account or accounts of a customer, to be determined by * * * calculating the sum which would have been owed by the debtor to such customer if the debtor had liquidated, by sale or purchase on the filing date, all securities positions of such customer." 15 U.S.C. 78*lll*(11). The liquidation trustee's duty is to "discharge * * * net equity claims based upon[] securities or cash * * * insofar as such obligations are ascertainable from the books and records of the debtor or are otherwise established to the satisfaction of the trustee." 15 U.S.C. 78fff-2(b). The question presented is as follows:

Whether a customer's "net equity" in a SIPA liquidation of a failed broker-dealer involved in a fraudulent trading scheme may be determined from the customer's actual cash deposits into and withdrawals from his account, when those are the only "ascertainable" transactions that occurred, or whether the customer's "net equity" must instead be determined on the basis of fictitious securities transactions that the perpetrator of the fraud arbitrarily and inequitably assigned to various customer accounts.

TABLE OF CONTENTS

Page

Opinions below 2
Jurisdiction 2
Statement 2
Argument 9
Conclusion 19

TABLE OF AUTHORITIES

Cases:

American Sur. Co. v. *Sampsell*, 327 U.S. 269 (1946) 17

Barnhill v. *Johnson*, 503 U.S. 393 (1992) 17

Butner v. *United States*, 440 U.S. 48 (1979) 16, 17

Cunningham v. *Brown*, 265 U.S. 1 (1924) 4

New Times Sec. Servs., Inc., In re:

371 F.3d 68 (2d Cir. 2004) 11, 15

463 F.3d 125 (2d Cir. 2006) 13, 14

New York v. *FERC*, 535 U.S. 1 (2002) 13

Old Naples Sec., Inc., In re, 311 B.R. 607 (M.D. Fla. 2002) 14

Rodriguez v. *United States*, 480 U.S. 522 (1987) 13

SEC v. *S.J. Salmon & Co.*, 375 F. Supp. 867 (S.D.N.Y. 1974) 2

Securities Inv. Prot. Corp. v. *Barbour*, 421 U.S. 412 (1975) 2

Securities Inv. Prot. Corp. v. *C.J. Wright & Co.*, 162 B.R. 597 (M.D. Fla. 1993) 14

Statutes: Page

Securities Investor Protection Act of 1970, 15 U.S.C. 78aaa *et seq.*: 2

15 U.S.C. 78ccc 3

15 U.S.C. 78ddd(c) 3

15 U.S.C. 78eee(a)(3)(A) 6

15 U.S.C. 78eee(b) 6

15 U.S.C. 78eee(c) 3

15 U.S.C. 78fff(a)(1)(B) 3

15 U.S.C. 78fff-2(b) 4, 7, 9, 10, 17

15 U.S.C. 78fff-2(c)(1) 3

15 U.S.C. 78fff-2(c)(1)(B) 3, 12

15 U.S.C. 78fff-3(a) 3, 4, 12

15 U.S.C. 78fff-3(d) 4

15 U.S.C. 78*lll*(4) 3, 9

15 U.S.C. 78*lll*(11) 4, 7, 17

15 U.S.C. 78*lll*(11)(A) 10

Miscellaneous:

H.R. Rep. No. 1613, 91st Cong., 2d Sess. (1970) 2

U.S. Gov't Accountability Office, GAO-12-414, *Securities Investor Protection Corporation: Interim Report on the Madoff Liquidation Proceeding* (Mar. 2012), http://www.gao.gov/assets/590/589087.pdf 14, 18

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-25a)[1] is reported at 654 F.3d 229. The opinion of the bankruptcy court (Pet. App. 36a-75a) is reported at 424 B.R. 122.

JURISDICTION

The judgment of the court of appeals was entered on August 16, 2011. A petition for rehearing was denied on November 8, 2011 (Pet. App. 108a). The petitions for writs of certiorari were filed on February 3, 2012 (Nos. 11-968 and 11-969) and February 6, 2012 (No. 11-986). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In response to a large number of brokerage-firm insolvencies, Congress enacted the Securities Investor Protection Act of 1970 (SIPA or Act), 15 U.S.C. 78aaa *et seq.*, to "restore investor confidence in the capital markets, and upgrade the financial responsibility requirements for registered brokers and dealers." *Securities Inv. Prot. Corp.* v. *Barbour*, 421 U.S. 412, 415 (1975). In particular, Congress sought to "provide investors protection against losses caused by the insolvency of their broker-dealer." H.R. Rep. No. 1613, 91st Cong., 2d Sess. 2 (1970); see *SEC* v. *S.J. Salmon & Co.*, 375 F. Supp. 867, 871 (S.D.N.Y. 1974) ("[SIPA] was designed to facilitate the return of the property of customers of insolvent brokerage firms or, where this cannot be done, to reimburse such customers if their property has been lost or misappropriated."). To that end, the Act estab-

[1] Unless otherwise noted, all references to "Pet. App." are to the appendix to the petition for a writ of certiorari in No. 11-968.

lished the Securities Investor Protection Corporation (SIPC), a nonprofit membership corporation to which most registered brokers and dealers are required to belong. 15 U.S.C. 78ccc. SIPC is required to maintain a fund for customer protection funded by assessments on SIPC members. 15 U.S.C. 78ddd(c), 78fff-3(a).

The Act establishes procedures for liquidating failed broker-dealers under the supervision of a trustee in a manner intended "to distribute customer property and (in advance thereof or concurrently therewith) otherwise satisfy net equity claims of customers." 15 U.S.C. 78fff(a)(1)(B).[2] In a liquidation, a fund of "customer property" is established for priority distribution among customers of the failed broker-dealer. 15 U.S.C. 78fff-2(c)(1). The term "customer property" is defined as "cash and securities * * * at any time received, acquired, or held by or for the account of a debtor from or for the securities accounts of a customer, and the proceeds of any such property transferred by the debtor, including property unlawfully converted." 15 U.S.C. 78*lll*(4). If the customer property fund is too small to satisfy every customer's "net equity" claim, customers share ratably in the fund to the extent of an individual customer's "net equity." See 15 U.S.C. 78fff-2(c)(1)(B),

[2] SIPA authorizes the Securities and Exchange Commission (SEC) to enter its appearance and participate as a party in "any proceeding under [SIPA]." 15 U.S.C. 78eee(c). The SEC filed briefs in this case in the bankruptcy court and in the court of appeals, and its brief to the Second Circuit noted the SEC's statutory authority to appear and participate as a party. See SEC C.A. Br. 1 n.1. Although the court of appeals' opinion characterizes the SEC as an amicus curiae, see 11-986 Pet. App. 4a, the SEC has since made clear its election under 15 U.S.C. 78eee(c) to participate as a party in this Court, first by filing a waiver of its right to respond to the certiorari petitions, and now by filing this brief in response to the Court's request.

78fff-3(a). In addition, SIPC is required to advance money from the SIPC fund to the SIPA trustee to satisfy each eligible customer's "net equity" claim up to $500,000 per customer for claims for securities and $100,000 (since increased to $250,000) for claims for cash. See 15 U.S.C. 78fff-3(a) and (d).

The Act defines "net equity" as "the dollar amount of the account or accounts of a customer, to be determined by * * * calculating the sum which would have been owed by the debtor to such customer if the debtor had liquidated, by sale or purchase on the filing date, all securities positions of such customer." 15 U.S.C. 78*lll*(11). The trustee is required to "discharge * * * all obligations of the debtor to a customer relating to, or net equity claims based upon, securities or cash * * * insofar as such obligations are ascertainable from the books and records of the debtor or are otherwise established to the satisfaction of the trustee." 15 U.S.C. 78fff-2(b).

2. Bernard L. Madoff Investment Securities LLC (BLMIS) was a securities broker-dealer registered with the Securities and Exchange Commission (SEC) and a member of SIPC. Pet. App. 6a n.4. The firm's principal, Bernard L. Madoff, operated BLMIS as a Ponzi scheme. *Id.* at 4a.[3] The customers of BLMIS deposited with the firm money that Madoff told them would be invested in securities pursuant to what he called a "split-strike conversion strategy." *Id.* at 3a. This strategy supposedly

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[3] See *Cunningham* v. *Brown*, 265 U.S. 1, 7, 8 (1924) (describing the "remarkable criminal financial career of Charles Ponzi," who induced investors with the promise of exorbitant returns and paid those returns with new investor funds; "He was always insolvent and became daily more so, the more his business succeeded. He made no investments of any kind, so that all the money he had at any time was solely the result of loans by his dupes.").

involved purchasing a basket of stocks listed on the Standard & Poor's 100 Index and hedging through the use of options. *Ibid.*

BLMIS customers received confirmations "document[ing]" securities transactions implementing this strategy, as well as monthly statements listing the securities positions "held" for the customers' accounts, but the money the customers deposited was never actually invested in securities for their accounts. Rather, Madoff used customer funds for his own purposes and to pay other investors' requests for distributions of purported profits. Thus, the "profits" withdrawn from customers' BLMIS accounts were, in fact, other BLMIS customers' initial investments. See Pet. App. 3a-5a.

Purported increases in the value of customers' BLMIS accounts, moreover, were entirely fictitious. To produce consistently positive returns, Madoff fabricated the trading information shown on customer confirmations and monthly statements by selecting prices after the fact from trading data. Such consistent returns over an extended period could not have been achieved through actual trading in the securities markets. Indeed, in many instances, the transactions listed on a customer's account statement were purportedly effectuated at prices that were outside of the exchange's price range for the security in question on the date on which the transaction purportedly occurred. Customer funds were never exposed to the uncertainties of price fluctuation. See Pet. App. 3a-5a.

Thus, the account statements of BLMIS customers did not reflect actual trading on the securities markets, or even a trading strategy that could feasibly have been implemented. Nor did Madoff assign investors consistent rates of return. Although all BLMIS customers

were told that they had earned positive annual returns, Madoff arbitrarily assigned different rates to different customers. The only verifiable transactions for BLMIS customers therefore were their cash deposits into, and cash withdrawals out of, their BLMIS accounts. See Pet. App. 4a-5a.

The scheme collapsed in December 2008, when Madoff was unable to take in enough new investor funds to cover customer withdrawals. Pet. App. 5a.

3. On December 11, 2008, the SEC filed a civil enforcement action against Madoff, alleging that he had violated antifraud and other provisions of the federal securities laws. Complaint, *SEC* v. *Madoff*, 08-cv-10791 Docket entry No. 1 (S.D.N.Y.). Madoff was also arrested that day, and in subsequent criminal proceedings, he pleaded guilty to an 11-count criminal information charging him with securities fraud, wire fraud, money laundering, perjury, and related offenses. Criminal Information, *United States* v. *Madoff*, 09-cr-213 Docket entry No. 38 (S.D.N.Y. Mar. 10, 2009). Madoff was sentenced to 150 years of imprisonment. Judgment, *United States* v. *Madoff*, 09-cr-213 Docket entry No. 100 (S.D.N.Y. June 29, 2009).

On December 15, 2008, respondent SIPC applied to the United States District Court for the Southern District of New York for a decree that the customers of BLMIS were in need of the protections afforded by SIPA. *SEC* v. *Madoff*, 08-cv-10791 Docket entry No. 5; see 15 U.S.C. 78eee(a)(3)(A). The district court granted SIPC's application, appointed respondent Irving H. Picard as Trustee, and removed the liquidation proceeding to bankruptcy court. *SEC* v. *Madoff*, 08-cv-10791 Docket entry No. 4 (S.D.N.Y. Dec. 15, 2008); see 15 U.S.C. 78eee(a)(3)(A) and (b).

The Trustee determined that, under SIPA, each customer's "net equity" was equal to the money the customer had deposited with BLMIS less any withdrawals the customer had made. Pet. App. 7a. The parties and the courts below have referred to that approach as the Net Investment Method. *Ibid.* Petitioners and certain other BLMIS customers challenged the Trustee's determinations, arguing that their "net equity" should be determined based upon the securities positions shown on the last account statements they had received from BLMIS before it failed, an approach the parties and courts below have referred to as the Last Statement Method. *Id.* at 8a. The bankruptcy court held that, under the circumstances of this case, the Net Investment Method was the only method consistent with SIPA. *Id.* at 36a-75a.

4. The court of appeals affirmed. Pet. App. 1a-25a. As relevant here, the court held that SIPA's text and purpose supported the Trustee's use of the Net Investment Method in liquidating BLMIS following the particular fraudulent scheme involved in this case. *Id.* at 14a-25a. The court observed that the Act "does not define 'net equity' by reference to a customer's last account statement," nor does it "say specifically how 'net equity' should be calculated" when "a dishonest broker failed to place a customer's funds into the security market." *Id.* at 16a.

Accordingly, the court of appeals construed the term "net equity" "in context with and by reference to the whole statutory scheme." Pet. App. 16a (citation omitted). In particular, the court found it necessary to read the definition of "net equity" in 15 U.S.C. 78*lll*(11) in tandem with 15 U.S.C. 78fff-2(b), which directs the trustee to satisfy the debtor's "obligations * * * to a

customer relating to, or net equity claims based upon . . . securities . . . insofar as such obligations are ascertainable from the books and records of the debtor or are otherwise established to the satisfaction of the trustee." Pet. App. 15a. "Ascertaining the proper measure of 'net equity' in a given case is for the ultimate purpose of issuing payments to customers," the court reasoned, "so, the ability to deduce payment amounts (to the satisfaction of the trustee) will bear upon the method selected for calculating 'net equity.'" *Id.* at 18a.

The court of appeals held that calculating BLMIS customers' net equity using the Net Investment Method was necessary because that method relied "solely on unmanipulated withdrawals and deposits" that "can be confirmed by the debtor's books and records." Pet. App. 17a-18a (citation omitted). The court expressed concern that using the Last Statement Method instead would give effect to Madoff's arbitrary and unequal assignment of customer profit, with "[t]he inequitable consequence * * * that those who had already withdrawn cash deriving from imaginary profits in excess of their initial investment would derive additional benefit at the expense of those customers who had not withdrawn funds." *Id.* at 17a. The court emphasized the limited reach of its holding, noting that it was "[t]he extraordinary facts of this case [that] make the Net Investment Method appropriate," while "in more conventional [SIPA liquidation] cases," relying on customer account statements "will likely be the most appropriate means of calculating 'net equity.'" *Id.* at 18a.

The court of appeals further explained that, "[u]nder the circumstances of this case, the limitation on [petitioners'] recovery imposed by the Net Investment Method is consistent with the purpose and design of SIPA." Pet.

App. 18a. The court emphasized that "SIPA is intended to expedite the return of *customer property*," as that phrase is defined in 15 U.S.C. 78*lll*(4). Pet. App. 20a-21a. "Here," the court explained, "notwithstanding the BLMIS customer statements, there were no securities purchased and there were no proceeds from the money entrusted to Madoff for the purpose of making investments." *Id.* at 21a.

ARGUMENT

Petitioners contend that, under the circumstances of this case, SIPA required the Trustee to apply the Last Statement Method in determining their "net equity." The court of appeals' decision sustaining the Trustee's use of the Net Investment Method is correct, and it does not conflict with any decision of this Court or of another court of appeals. Further review is not warranted.

1. a. The court of appeals' decision is correct. The court recognized that using the Last Statement Method to determine customers' "net equity" would treat fictional profits and securities transactions—all of which were invented and many of which could not possibly have occurred at the prices Madoff claimed—as if they were real. Under those circumstances, the only claims for "net equity" that are "ascertainable from the books and records of the debtor or are otherwise established to the satisfaction of the trustee," 15 U.S.C. 78fff-2(b), are customers' cash deposits into and withdrawals from their BLMIS accounts. The Trustee's Net Investment Method correctly relies on those ascertainable transactions and refuses to give effect to the transactions Madoff invented to perpetuate his fraud.

b. Petitioners' contrary arguments are unpersuasive. Petitioners contend (11-968 Pet. 13-14, 11-969 Pet.

9-10, 11-986 Pet. 17-18) that the court of appeals failed to apply SIPA's definition of "net equity." The statutory formula for computing a customer's "net equity" requires a determination of, *inter alia*, "the sum which would have been owed by the debtor to such customer if the debtor had liquidated, by sale or purchase on the filing date[,] * * * all securities positions of such customer." 15 U.S.C. 78*lll*(11)(A); see 11-968 Pet. 13. As the court of appeals recognized, however, the Act "does not define 'net equity' by reference to a customer's last account statement," Pet. App. 16a, and "[d]iffering fact patterns will inevitably call for differing approaches to ascertaining the fairest method for approximating 'net equity,'" *id.* at 11a. In particular, the statutory directive to determine the sum that would have been owed if a customer's "securities positions" had been "liquidated" (15 U.S.C. 78*lll*(11)(A)) provides no clear guidance for a case like this one, where "a dishonest broker" (Pet. App. 16a) falsely informed customers that they had acquired securities positions that did not in fact exist and could not have been obtained through real-world trading. The need for varying approaches to determining "net equity" also results from the fact that the particular circumstances of a given broker-dealer's failure will affect what "obligations are ascertainable from the books and records of the debtor." 15 U.S.C. 78fff-2(b).

Petitioners contend that Congress intended for SIPA's protections to apply "even if * * * securities were never purchased." 11-969 Pet. 4, 9-11; see 11-968 Pet. 14. That is true to an extent. If a customer deposits cash with a broker for the purpose of purchasing specified securities, and the broker reports that the trades have been made but in fact fails to execute them, the customer's "net equity" is typically calculated by

reference to the value that the securities would ultimately have had if the trades had been made. See, *e.g.*, *In re New Times Sec. Servs., Inc.*, 371 F.3d 68, 74 (2d Cir. 2004) (*New Times I*). In that context, use of the Last Statement Method is justified because that method provides an accurate means of determining the amount of money that liquidation of the customer's account would have produced if the broker had performed his duties in an appropriate manner.

Here, by contrast, Madoff did not simply fail to execute trades that his customers had directed him to make. Rather, his customers' account statements reflected fictional transactions executed at prices selected after the fact to produce predetermined rates of return. Moreover, those transactions were themselves predicated on the reinvestment of fictional profits, and many of the trades could not have been executed at the prices reported to customers. Because the purported profits reflected on petitioners' account statements could not have been achieved through any real-world trading strategy, petitioners cannot reasonably contend that they would have realized those profits if Madoff had appropriately performed his duties. Indeed, Madoff's Ponzi scheme departed so substantially from legitimate brokerage practices that it is essentially meaningless to ask what returns the appropriate conduct of that scheme would have produced.

Petitioners assert (11-968 Pet. 14) that the use of the Net Investment Method upsets their "legitimate expectations." Whatever relevance petitioners' expectations may have in other contexts, they cannot substitute for SIPA's framework, under which customers' "net equity" determines the division of a limited fund of customer property and entitlement to SIPA advances. Similarly,

although customers may have relied on their BLMIS account statements in organizing their affairs (11-968 Pet. 14, 11-969 Pet. 11), "it is clear that [SIPA] is not designed to insure investors against all losses," Pet. App. 20a (emphasis omitted), let alone the failure to realize profits that never could have existed.

Some petitioners imply (11-968 Pet. 16, 11-986 Pet. 11) that the correctness of the Trustee's method of determining "net equity" bears only on whether advances should be made from the SIPC fund, and that inequities in the distribution of customer property are irrelevant. That argument reflects a misunderstanding of SIPA's operation. Under SIPA, "net equity" is always relevant to the distribution of customer property in a broker-dealer liquidation because a particular customer's "net equity" determines his pro rata share of customer property. See 15 U.S.C. 78fff-2(c)(1)(B), 78fff-3(a). Only if the customer property fund is insufficient to satisfy every customer's "net equity" claim at the time of distribution is SIPC required to advance money from the SIPC fund to the SIPA trustee. See 15 U.S.C. 78fff-3(a). When (as in this case) the customer fund is insufficient to pay all customer claims, a particular customer's "net equity" is therefore used to determine both the customer's pro rata share of customer property and his entitlement to a SIPC advance. As the court of appeals correctly recognized (Pet. App. 17a), using the Last Statement Method here thus would have had the inequitable consequence of allowing investors who had withdrawn more than they had deposited into Madoff's scheme to draw on customer property to the detriment of those investors who had not withdrawn funds before the scheme collapsed.

Petitioner Velvel argues that the court of appeals should have rejected the Net Investment Method in light of floor statements of Members of Congress "that Congress wanted SIPA to protect investors, especially small ones, and to build their confidence in markets." 11-986 Pet. 15. The cited statements are unhelpful because they do not pertain to the specific issue in this case. Cf. *New York* v. *FERC*, 535 U.S. 1, 23 (2002) (noting that "[w]hatever persuasive effect legislative history may have in other contexts, * * * it is not particularly helpful" if Congress did not contemplate the issue presented). The fact that Congress intended to protect investors does not mean that, as between two competing formulae for computing "net equity," a court should always choose the formula that will produce the higher valuation. Cf. *Rodriguez* v. *United States*, 480 U.S. 522, 525-526 (1987) (per curiam) (explaining that "no legislation pursues its purposes at all costs," and that "it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law"). That is particularly so in the SIPA context, where an increase in one investor's "net equity" reduces the pro rata shares of customer property to which other investors will be entitled.

2. The Second Circuit's decision does not conflict with any decision of this Court or of another court of appeals.

a. No petitioner contends that the decision below conflicts with a decision of another court of appeals. Use of the Net Investment Method here is consistent with all other reported decisions involving SIPA liquidations in Ponzi-scheme cases. See *New Times I*, *supra*; *In re New Times Sec. Servs., Inc.*, 463 F.3d 125 (2d Cir. 2006)

(*New Times II*); *In re Old Naples Sec., Inc.*, 311 B.R. 607, 616-617 (M.D. Fla. 2002) ("[P]ermitting claimants to recover not only their initial capital investment but also the phony 'interest' payments they received and rolled into another transaction is illogical."); *Securities Inv. Prot. Corp.* v. *C.J. Wright & Co.*, 162 B.R. 597, 609-610 (M.D. Fla. 1993) ([C]laimants have a claim for that which they entrusted to debtor as customer property: the principal amount that was to be invested."). Indeed, the Government Accountability Office recently reported, based on available records dating back to 1995, that the Net Investment Method has been used to determine customers' "net equity" in all SIPA liquidations involving Ponzi schemes. See U.S. Gov't Accountability Office, GAO-12-414, *Securities Investor Protection Corporation: Interim Report on the Madoff Liquidation Proceeding* 19 (Mar. 2012) (*GAO Report*), http://www.gao.gov/assets/590/589087.pdf.

The Second Circuit's prior decisions in the *New Times* cases are particularly instructive. Those cases involved a Ponzi scheme in which some customers were solicited to invest in money market funds that existed, while other customers were solicited to invest in a fund that did not exist. None of the customers' money was ever invested; it was instead converted by the firm's principal. *New Times I*, 371 F.3d at 71-72.

The court of appeals in *New Times I* agreed with the trustee's decision (which, like the Trustee's decision here, both SIPC and the SEC supported) to use different methods to determine "net equity" for those two types of customers. In determining the "net equity" of customers within the first category, the trustee used the value of the real securities that should have been purchased for their accounts, thus "mirror[ing] what would

have happened had the given transaction been executed." *New Times I*, 371 F.3d at 74. By contrast, the *New Times* trustee determined the "net equity" of customers within the second class by reference to the cash they had invested, less any cash they had withdrawn, and did not include the fictitious "interest" shown on their account statements. *Ibid.* The court in *New Times I* endorsed that approach, explaining that "basing customer recoveries on 'fictitious amounts in the firm's books and records would allow customers to recover arbitrary amounts that necessarily have no relation to reality.'" *Id.* at 88 (quoting Br. for Amicus Curiae SEC). In *New Times II*, the court further explained that valuing claims based on nonexistent securities would, in essence, require the trustee to treat an imaginary trading world as if it were real. 463 F.3d at 129-130.

Consistent with the approach upheld by the Second Circuit in the *New Times* cases, the court below held that "[i]t would * * * have been legal error for the Trustee to discharge claims upon the false premise that customers' securities positions are what the account statements purport them to be." Pet. App. 24a (internal quotation marks and citation omitted). The court correctly explained that, even though petitioners' account statements purported to reflect investments in real stocks listed on the Standard & Poor's 100 Index, petitioners were "similarly situated" to the *New Times* investors who had invested in the nonexistent money market fund. *Id.* at 23a. Unlike the *New Times* investors who had been solicited to invest in actual mutual funds, whose "net equity" was computed by reference to the securities positions they would have acquired if their broker had appropriately performed his duties, petitioners' account statements referred to fictional purchases,

made with nonexistent profits, which could not feasibly have been carried out through any real-world trading strategy.

The *New Times* cases and the decision below thus stand for the sound proposition that, although "net equity" under SIPA may sometimes be based on securities transactions that the relevant broker-dealer could have made but failed to execute, "net equity" cannot be based on transactions that would have been infeasible. In the *New Times* cases, various transactions reported on customers' account statements could not have occurred because the securities in question did not exist. Here, the transactions reported on petitioners' account statements were infeasible because (1) the purported trades were contrived after the fact by selecting prices from trading data; (2) the profits purportedly used to buy securities did not exist; and (3) in many instances, Madoff claimed to have purchased securities outside the exchange's trading range for the security in question on the day in question. Thus, although petitioners' account statements bore the names of actual securities, the securities *positions* reflected on the statements could not have been achieved through legitimate trading. The Trustee "properly declined to calculate 'net equity' by reference to impossible transactions." Pet. App. 24a. If the Trustee "had done otherwise," the court of appeals recognized, "the whim of the defrauder would have controlled the process that is supposed to unwind the fraud." *Ibid.*

b. Petitioners argue (11-968 Pet. 6-8, 14-15) that the decision below conflicts with this Court's statement in *Butner* v. *United States*, 440 U.S. 48 (1979), that in the Bankruptcy Act, "Congress has generally left the determination of property rights in the assets of a bankrupt's

estate to state law." *Id.* at 54. Petitioners contend that, under applicable state law, "a broker 'owes' its customer the securities on the statements it has issued." 11-968 Pet. 8. Petitioners further argue (*ibid.*) that SIPA's definition of "net equity"—which depends on the liquidation value of securities positions "which would have been owed by the debtor to such customer * * * on the filing date," 15 U.S.C. 78*lll*(11)—must be read in light of that state-law requirement.

The court of appeals' decision does not conflict with *Butner*. The Court in *Butner* recognized that, in determining whether state law governs the determination of property rights in a bankrupt debtor's assets under a particular federal insolvency statute, the relevant question is whether "Congress has * * * chosen to exercise its power to * * * defin[e a particular] interest * * * in a bankrupt estate." 440 U.S. at 54; see *Barnhill* v. *Johnson*, 503 U.S. 393, 398 (1992) (noting that property interests are defined by state law "[i]n the absence of any controlling federal law"); *American Sur. Co.* v. *Sampsell*, 327 U.S. 269, 272 (1946) ("[T]he extent to which state law is to be * * * considered is in the last analysis a matter of federal law."). SIPA defines "net equity" by reference to the amount that "liquidat[ion]" of the customer's "securities positions" would have produced. 15 U.S.C. 78*lll*(11). And, under SIPA, the trustee must satisfy the debtor's "obligations" relating to claims for "net equity" only "insofar as such obligations are ascertainable from the books and records of the debtor or are otherwise established to the satisfaction of the trustee." 15 U.S.C. 78fff-2(b). SIPA's own provisions therefore are controlling, whatever the extent of the debtor's obligations might be under applicable state law.

3. The question presented does not otherwise require this Court's resolution. As the court of appeals recognized in contrasting the "extraordinary facts of this case" with "more conventional [SIPA liquidation] cases," Pet. App. 18a, cases with facts like those here arise infrequently. In the past 18 years, there have been only seven Ponzi-scheme SIPA liquidations. See *GAO Report* 19. And even within that narrow set, the decision below reflects the Second Circuit's continuing recognition that the choice between the Net Investment Method and the Last Statement Method turns on the details of a particular fraudulent scheme. See Pet. App. 21a-25a. Petitioners thus do not present an issue of recurring significance warranting this Court's review.[4]

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[4] This Court should reject petitioner Velvel's request (11-986 Pet. 3-4, 8) to wade into a discovery dispute relating to the motives of the Trustee in adopting the Net Investment Method. Subjective motives (and thus the requested discovery) are irrelevant to the question of statutory interpretation that the court of appeals decided.

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

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