No. 12-528

In the Supreme Court of the United States

GOLDMAN, SACHS & CO., ET AL.,

Petitioners,

v.

NECA-IBEW HEALTH & WELFARE FUND,

Respondent.

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

BRIEF OF DRI—THE VOICE OF THE DEFENSE BAR AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICUS CURIAE*

DRI—The Voice of the Defense Bar ("DRI") is an international organization comprising more than 23,000 attorneys who defend businesses and individuals in civil litigation. DRI addresses issues germane to defense attorneys and works to improve the civil justice system in America. DRI has long been a voice in the ongoing effort to make the civil justice system more fair, efficient, and—where national issues are involved—consistent. To promote these objectives, DRI participates as *amicus curiae* in cases such as this one that raise issues of importance to its membership and to the judicial system.[1]

DRI's members regularly defend their clients in class action suits, and that real-world experience informs DRI's view that the "class standing" doctrine adopted by the Second Circuit in this case would change class action practice in ways that make review by this Court critically important. The Second Circuit's decision conflicts with long-established Supreme Court standing precedents and a recent First Circuit decision on nearly identical facts. It also opens the door for abusive class actions that will defy efficient judicial management and exacerbate the problem of coercive settlements. DRI's interests in protecting the important role of standing requirements and in curbing run-away class actions compel

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[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* and its counsel made a monetary contribution to its preparation or submission. Counsel of record for all parties received notice at least 10 days prior to the due date of the intention of *amicus* to file this brief. The parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

DRI to voice its support for the petition for a writ of certiorari.

SUMMARY OF ARGUMENT

The Second Circuit's decision in this case casts aside fundamental principles of Article III standing law in order to facilitate ever larger class actions. Invoking something it called "class standing," the Second Circuit ruled that a named plaintiff who lacked constitutional and statutory standing to bring an individual Securities Act claim related to securities it did not purchase nevertheless could bring that claim as part of a class action. That ruling pays no heed to this Court's command that bringing a claim in a class action format "adds nothing" to the Article III standing inquiry. *Lewis* v. *Casey*, 518 U.S. 343, 357 (1996). The ruling also fails to acknowledge the prudential limitations on standing that require attention to the strict standing limitations of the Securities Act.

In addition, the Second Circuit's "class standing" doctrine promises to encourage increasingly unmanageable and coercive class actions. The court of appeals' vague test for "class standing"—whether all of the claims "raise a sufficiently similar set of concerns"—will produce burdensome litigation as parties and courts struggle with that nebulous, fact-intensive, and unpredictable test. Greatly expanded class actions, with class representatives who have no stake in many of the claims, will be even more likely to force blackmail settlements and even more difficult to fairly and efficiently manage. These burdens, moreover, will not be restricted to class actions under the Securities Act; the Second Circuit's broad standing test will lead to expansive class actions in numerous areas of the law.

To resolve the conflicts created by the Second Circuit's decision and avert its detrimental consequences, this Court should grant the petition.

ARGUMENT

I. The Second Circuit's Novel "Class Standing" Doctrine Conflicts With This Court's Precedents.

In ruling that a named plaintiff can assert class-action Securities Act claims related to securities that the plaintiff did not purchase, the Second Circuit invented a novel "class standing" doctrine that contradicts bedrock standing precedents from this Court. As petitioners explain at length—and we will not repeat—the Second Circuit's ruling also conflicts with a First Circuit decision on the same issue. See *Plumbers' Union Local No. 12 Pension Fund* v. *Nomura Asset Acceptance Corp.*, 632 F.3d 762, 771 (1st Cir. 2011). Certiorari should be granted to address the conflict between this Court's standing decisions and the Second Circuit's ruling on this important question of federal law that has divided the courts of appeals.

1. A fundamental principle of Article III's case or controversy requirement is that standing to bring suit in federal court "is not dispensed in gross." *Lewis* v. *Casey*, 518 U.S. 343, 358 n.6 (1996). Instead, "a plaintiff must demonstrate standing for each claim he seeks to press." *DaimlerChrysler Corp.* v. *Cuno*, 547 U.S. 332, 352 (2006). In other words, "a plaintiff who has been subject to injurious conduct of one kind" does not "possess by virtue of that injury the necessary stake in litigating conduct of another kind,

although similar, to which he has not been subject." *Blum* v. *Yaretsky*, 457 U.S. 991, 999 (1982).[2]

Critically, "[s]tanding cannot be acquired through the back door of a class action." *Allee* v. *Medrano*, 416 U.S. 802, 829 (1974) (Burger, C.J., concurring in part and dissenting in part). The fact "'[t]hat a suit may be a class action * * * adds nothing to the question of standing.'" *Lewis*, 518 U.S. at 357 (quoting *Simon* v. *E. Ky. Welfare Rights Org.*, 426 U.S. 26, 40 n.20 (1976)).

Applying these core principles, this Court has refused to allow a named plaintiff to assert class claims that the plaintiff lacked standing to assert individually. In *Lewis*, the Court ruled that a prisoner with standing to challenge inadequacies in a prison's services for illiterate prisoners who wanted to file court papers could not litigate class claims challenging other alleged failures to facilitate court filings. 518 U.S. at 357-358. In *Blum*, the Court held that a nursing home resident with standing to challenge a transfer to a lower level of care could not litigate class claims challenging transfers to a higher level of care. 457 U.S. at 999-1002. As *Blum* and *Lewis* make clear, the only justiciable class claims are ones that

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[2] See also *DaimlerChrysler*, 547 U.S. at 353 (standing to challenge one tax issue did not confer "ancillary standing" to challenge other non-justiciable tax issues); *Gen. Tel. Co. of the Sw.* v. *Falcon*, 457 U.S. 147, 159 & n.15 (1982) (plaintiff subjected to one discriminatory employment practice lacked "standing" to bring "across-the-board" class action asserting "all possible claims of discrimination against a common employer"); *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163, 166-167 (1972) (plaintiff excluded under discriminatory guest policy lacked standing to challenge discriminatory membership requirements).

the named plaintiff has standing to assert in an individual action.

In this case, the Second Circuit disregarded that clear law. The court of appeals expressly acknowledged that named plaintiff NECA-IBEW Health & Welfare Fund ("NECA") "clearly lacks standing to assert" claims "on its [own] behalf" related to securities that "it did not purchase." Pet. App. 24a. Yet the court determined that NECA could assert such claims on behalf of others in a class action because so-called "class standing" "does not turn on whether NECA would have statutory or Article III standing" for its own claims. *Ibid*. Under this "class standing" theory, claims that would have to be dismissed for lack of standing in an individual action are justiciable if the plaintiff brings the claims as part of a class action. Standing thus would depend on whether the plaintiff's suit is a class action.

That approach directly contradicts this Court's express instruction in *Lewis* and *Simon* that a class action "adds nothing" to the standing inquiry.

2. The Second Circuit's "class standing" determination likewise tramples prudential limitations on standing, which "serve to limit the role of the courts in resolving public disputes." *Warth* v. *Seldin*, 422 U.S. 490, 500 (1975). Those limitations require that "a plaintiff's grievance must arguably fall within the zone of interests protected or regulated by the statutory provision or constitutional guarantee invoked in the suit." *Bennett* v. *Spear*, 520 U.S. 154, 162 (1997). Thus, "the source of the plaintiff's claim to relief assumes critical importance" because "the standing question in such cases is whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the

plaintiff's position a right to judicial relief." *Warth*, 422 U.S. at 500.

With respect to the Securities Act claims that NECA asserts, there is no dispute that the statute expressly limits the right to judicial relief so that a plaintiff can bring suit regarding only those securities that it purchased or acquired, without any exception for class actions. A Section 11 plaintiff must be a "person acquiring such security." 15 U.S.C. § 77k(a). A Section 12(a)(2) plaintiff likewise must be a "person purchasing such security." 15 U.S.C. § 77*l*(a)(2). And a Section 15 plaintiff must have a claim under Section 11 or 12. 15 U.S.C. § 77*o*. Claims related to securities not purchased by a private plaintiff are left to the SEC. 15 U.S.C. § 77t.

Under this Court's prudential standing precedents, the Second Circuit should have respected the judgments made in the Securities Act about who has standing to bring what claims. See *Air Courier Conference of Am.* v. *Am. Postal Workers Union*, 498 U.S. 517, 524-531 (1991) (postal workers lacked standing to challenge regulation under statutes not designed to protect them); *Gen. Tel. Co. of the Sw.* v. *Falcon*, 457 U.S. 147, 159 n.15 (1982) (fact that "Title VII prohibits discriminatory employment practices, not an abstract policy of discrimination" limited "standing" of plaintiff to bring expansive class action); *Warth*, 422 U.S. at 512-514 (absence of statutory authorization for broad challenge to zoning law foreclosed standing on prudential grounds).

Indeed, the Second Circuit's failure to heed the Securities Act's standing limitations undermines the crucial role standing plays in "preventing courts from undertaking tasks assigned to the political branches." *Lewis*, 518 U.S. at 357; accord *Daimler-*

Chrysler, 547 U.S. at 352-353. The "class standing" doctrine effectively gives the SEC's broad enforcement power to plaintiffs' lawyers and the courts. And it usurps Congress's right to determine who may bring private securities actions.

3. The Second Circuit purported to derive its novel "class standing" doctrine from this Court's decision in *Gratz* v. *Bollinger*, 539 U.S. 244 (2003). But nothing in *Gratz* remotely supports such a departure from this Court's standing precedents.

The *Gratz* Court determined that plaintiff Hamacher had standing to seek an injunction against the use of race in undergraduate admissions at the University of Michigan, for both freshman and transfer applicants, even though he could have applied only as a transfer student when he filed suit. 539 U.S. at 262-268. The Court did not rule that bringing his suit as a class action allowed Hamacher to leverage individual standing to challenge transfer admission policies into "class standing" to challenge freshman admission policies. Instead, the Court ruled that Hamacher had standing, *as an individual*, to challenge the use of race in both kinds of admission decisions. *Id.* at 266. Consistent with the broad constitutional and statutory provisions on which he founded his suit (*id.* at 249-251), Hamacher could raise such a challenge because the university had a "singular policy" of using race in admissions to promote diversity. *Id.* at 267-268. Nothing about his challenge—or the way the parties litigated it—implicated any difference in the application of that policy to freshman versus transfer applicants. *Id.* at 263-266.

In this case, by contrast, liability under Sections 11 and 12(a)(2) of the Securities Act cannot arise from a general policy or practice of making mis-

statements. A plaintiff must show that the registration statement or prospectus for the relevant security offering contains a specific misstatement of material fact. 15 U.S.C. §§ 77k(a), 77*l*(a)(2). For purposes of determining liability under the Securities Act, each security offering has its own unique registration statement and prospectus. 17 C.F.R. § 229.512(a)(2). As a result, there can be no general challenge to supposed misstatements in the offering documents for securities sold in different offerings.

By nonetheless granting NECA "class standing" to sue over securities that were not part of the same offering as the securities NECA purchased, the Second Circuit completely misread *Gratz* and placed itself into direct conflict with the rest of this Court's standing precedents. Certiorari should be granted to address that conflict.

II. The Second Circuit's "Class Standing" Doctrine Imposes Enormous Litigation Burdens.

The Second Circuit's decision in this case not only tramples this Court's standing precedents, it also threatens to increase the difficulty, cost, and scope of securities class actions. Those burdensome consequences make the standing issues raised here exceedingly important questions of federal law that should be settled by this Court.

A. The Second Circuit's Ruling Creates Confusion And Expands Litigation.

1. The "class standing" test devised by the Second Circuit is completely subjective and almost infinitely elastic. Whether claims relating to different securities offerings "raise a sufficiently similar

set of concerns" (Pet. App. 35a) will depend on whom you ask.

Would claims alleging a $25 million revenue overstatement in the offering documents for the security purchased by a plaintiff "raise a sufficiently similar set of concerns" as claims alleging a *$100 million* revenue overstatement in the offering documents for a different security issued under the same shelf registration statement? What if the latter claims alleged a $25 million *understatement of expenses*? Would there be "class standing" if a plaintiff purchased a bond, yet asserted claims on behalf of common stock purchasers? What if, after the offering of the securities bought by a plaintiff, but before other offerings targeted by the class action, *The Wall Street Journal* reported a piece of information that all of the offering documents misleadingly omitted? And what if a plaintiff's claims were subject to due diligence or loss causation defenses different from those applicable to the claims related to the securities that the plaintiff did not buy?

The Second Circuit's opinion is no help in determining these kinds of questions. Its only guidance is that "class standing" is not precluded by the different registration statements that mark each securities offering and is not guaranteed by merely alleging the same misconduct across different offerings. Pet. App. at 24a, 31a. Instead, standing "will depend" in some unspecified way "on the nature and content of the specific misrepresentation alleged." *Id.* at 31a.

Invoking that nebulous standard, plaintiffs' lawyers will bring class actions encompassing every offering that has any relationship at all to any alleged misstatement in any of the offering documents for the securities purchased by the named plaintiff. De-

fendants will challenge "class standing" with respect to the securities not purchased by the named plaintiff. And district courts will be forced to divine what a "sufficiently similar set of concerns" requires and determine whether the claims at issue meet that requirement. Unpredictable and conflicting decisions will inevitably result.

Because securities law is "'an area that demands certainty and predictability,'" "decisions 'made on an ad hoc basis, offering little predictive value'" to those in the securities business, are an "undesirable result." *Cent. Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 188 (1994) (quoting *Pinter* v. *Dahl*, 486 U.S. 622, 652 (1988)). Indeed, this Court has made clear that "a shifting and highly fact-oriented disposition of the issue of who may bring" a securities claim is not "a satisfactory basis for a rule of liability imposed on the conduct of business transactions." *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 755 (1975) (rejecting effort to expand statutory standing).

2. The Second Circuit's vague "class standing" test will be particularly burdensome to administer because the "nature and content" of alleged misstatements are not objective matters obvious from the face of a complaint. They depend largely on how plaintiffs choose to plead their claims and what discovery reveals about the misstatements. Plaintiffs pick the misstatements to allege and can readily frame their complaint in a way that tries to link misstatements in different registration statements. A court thus may be forced to go beyond the complaint and wait for fuller development of the case to determine the true "nature and content" of the alleged misstatements. As a result, a district court

would face serial litigation over "class standing," at the motion-to-dismiss, class-certification, summary-judgment, and trial stages, under different standards and on different records.

This kind of unbounded litigation over the "class standing" doctrine would be extremely burdensome for courts and litigants alike. Litigants would spend time and money preparing round after round of motion papers on the subject. Meanwhile they also would have to spend time and money pursuing discovery regarding any potential differences (or similarities) among the securities at issue. And district courts would have to devote enormous judicial resources to sort through all of the conflicting arguments, evidence, and case law.

None of those consequences can be squared with this Court's commitment to "reject," where possible, legal theories that would produce "procedural intractability" in securities litigation by making the relevant "issues * * * hazy, their litigation protracted, and their resolution unreliable." *Virginia Bankshares, Inc.* v. *Sandberg*, 501 U.S. 1083, 1105-1106 (1991). Indeed, in the securities litigation context, lax rules that rarely allow for prompt dismissals only encourage "nuisance filings," "vexatious discovery requests," and "extortionate settlements." *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Dabit*, 547 U.S. 71, 81-82 (2006). Thus, it is crucial that deficiencies in the standing of purported class representatives "'be exposed at the point of minimum expenditure of time and money by the parties and the court.'" *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 558-559 (2007).

3. In addition, any time a court granted a plaintiff "class standing" to bring claims related to securi-

ties that she did not buy, the complexity and cost of class litigation would multiply exponentially. The number of securities at issue could easily increase by double, triple, or more. See, *e.g.*, *Plumbers' & Pipefitters' Local # 562 Supp. Plan & Trust* v. *J.P. Morgan Acceptance Corp. I*, No. 08 CV 1713, 2012 WL 4053716 (E.D.N.Y. Sept. 14, 2012) (going from 8 securities to 30, under "class standing" doctrine). In turn, every aspect of the litigation would expand correspondingly, from pleading to discovery to dispositive motions, because Sections 11 and 12(a)(2) of the Securities Act still require proof of liability (and defenses) on a security-by-security basis. 15 U.S.C. §§ 77k(a), 77*l*(a)(2).

Class certification proceedings would become especially burdensome and difficult to manage. Because the named plaintiff will not have bought all of the securities at issue, the defendant would need to expand class discovery to unnamed class members in order to show the diversity of the individual claims of the putative class. A defendant would likewise broaden its papers opposing class certification to include adequacy and typicality arguments founded on the limited scope of the named plaintiff's securities purchases. Without a plaintiff who bought each security at issue, moreover, a district court could not engage in the kind of subclassing that might help efficiently manage a sprawling class action and ensure proper representation for purchasers of different securities. Fed. R. Civ. P. 23(c)(5). The prospect of objectors and opt-outs would also increase with the aggregation of disparate claims related to disparate securities that the named plaintiff did not purchase.

There is no reason to impose these burdens on a judicial system in which securities class actions al-

ready represent "the 800-pound gorilla that dominates and overshadows other forms of class actions," consuming "significant judicial resources." John C. Coffee, Jr., *Reforming the Securities Class Action*, 106 COLUM. L. REV. 1534, 1539-1540 (2006). Nor should the Court approve the "urge to aggregate litigation" when the resulting class actions would be so monstrous that no court could adjudicate the case without losing the individual claims and defenses "in the shadow of a towering mass litigation." *Malcolm* v. *Nat'l Gypsum Co.*, 995 F.2d 346, 350 (2d Cir. 1993).

B. The Second Circuit's Decision Encourages Abusive Class Actions.

1. The Second Circuit's test for "class standing" encourages lawyers bringing a Securities Act suit to give up potentially meritorious claims in order to convince the district court that all of the alleged claims "raise a sufficiently similar set of concerns." Asserting every colorable claim related to each individual securities offering would undermine "class standing" by introducing differences in the "set of concerns" raised by the claims related to each offering. A plaintiff's lawyer therefore will allege only those claims that are common among the various offerings in order to maximize the scope of the class action, the potential contingent fee for the lawyer, and the settlement pressure on the defendant. While that sort of manipulation may be good for the plaintiff's lawyer, it sells out the class members, who will lose potentially valuable claims. See, *e.g.*, *Reppert* v. *Marvin Lumber & Cedar Co., Inc.*, 359 F.3d 53, 55-57 (1st Cir. 2004) (class settlement precluded class members' subsequent individual actions for additional damages). Avoiding that kind of failure "to

present to a court a complete perspective upon the adverse consequences flowing from the specific set of facts undergirding [the plaintiff's] grievance" is a core function of the Article III standing requirements. *Schlesinger* v. *Reservists Comm. to Stop the War*, 418 U.S. 208, 221 (1974).

Allowing sweeping class actions untethered to the securities purchased by the named plaintiff also promises to worsen the already troubling tendency for securities class actions to be lawyer-driven. A named plaintiff has no stake in monitoring how its lawyers litigate claims regarding securities that the plaintiff did not purchase. In the Private Securities Litigation Reform Act, Congress enacted a series of measures "intended to empower investors so that they, not their lawyers, control securities litigation." S. Rep. No. 104-98, at 6 (1995); see 15 U.S.C. § 77z-1(a). The "class standing" doctrine does the opposite, empowering lawyers, rather than investors, to control securities litigation. As we have explained, those statutory policies should not be ignored in assessing standing. See *supra* pp. 5-7.

2. The expansive "class standing" that the Second Circuit's decision affords named plaintiffs will also exacerbate the problem of coercive settlements in securities class actions.

This Court has long recognized that securities litigation "presents a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general." *Blue Chip Stamps*, 421 U.S. at 739. Because "[t]he very pendency" of such litigation can "frustrate or delay normal business activity of the defendant," "even a complaint which by objective standards may have very little chance of success at trial has a settlement value to the plaintiff out of any

proportion to its prospect of success" if the plaintiff can "prevent the suit from being resolved against him by dismissal or summary judgment." *Id.* at 740. The "threat of extensive discovery," which would be extremely costly and highly disruptive, adds an "in terrorem increment" to that settlement value. *Id.* at 741-742. And actions under Sections 11 and 12(a)(2), which "impose essentially strict liability," are particularly "'notable'" for the "'*interrorem* nature of the liability they create.'" Pet. App. 3a, 20a.

Class actions seeking significant damages likewise often lead to "'blackmail settlements'" "induced by a small probability of an immense judgment." *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995) (Posner, C.J.) (quoting HENRY J. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 120 (1973)). If they survive dismissal, the risks to a defendant of a jury trial are so enormous that even weak cases are usually settled. See THOMAS WILLGING, ET AL., FED. JUDICIAL CTR., EMPIRICAL STUDY OF CLASS ACTIONS IN FOUR FEDERAL DISTRICT COURTS: FINAL REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES 179, 184 tbls. 39, 40, 46 (1996). However meritless the class action, defendants typically cannot "stake their companies on the outcome of a single jury trial." *Rhone-Poulenc Rorer*, 51 F.3d at 1299.

Combining the "in terrorem" effect of securities litigation with the "blackmail settlement" potential of class actions, securities class actions are particularly effective in forcing defendants to pay enormous settlements that are neither "voluntary," because the risks mean that trial is not "a practically available alternative," nor "accurate," because "the strength of the case on the merits has little or nothing to do with determining the amount of the settlement." Janet

Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497, 499 (1991). Studies confirm that virtually every securities class action that survives a motion to dismiss is settled. See CORNERSTONE RESEARCH, SECURITIES CLASS ACTION FILINGS: 2011 YEAR IN REVIEW 18 & App'x 1 (2012) (hereinafter "2011 FILINGS") (41% dismissed, 51% settled, 8% reached summary judgment). And those settlements typically represent only a small portion of the potential damages, reflecting the dubious merits of the claims. CORNERSTONE RESEARCH, SECURITIES CLASS ACTION SETTLEMENTS: 2011 REVIEW AND ANALYSIS 7-8 (2012) (settlements recovered less than 4% of potential damages measured under one method used by plaintiffs and less than 9% under another such method).

Making it possible for plaintiffs to bring securities class actions that encompass more securities, claim more damages, and require more discovery and motion practice will only encourage the kind of "extortionate settlements" that Congress and this Court have tried to constrain. *Dabit*, 547 U.S. at 80-82.

3. The abusive securities class actions invited by the Second Circuit's decision would have destructive consequences throughout the economy. "[U]ncertainty and excessive litigation" in securities actions "can have ripple effects." *Central Bank*, 511 U.S. at 189. The risk of open-ended liability deters competent individuals from serving as independent directors on corporate boards and makes D&O insurance harder to obtain. S. Rep. No. 104-98, at 21. That risk also drives up the cost and limits the availability of the services essential to capital markets that auditors, underwriters, and other professionals provide. *Id.* at 21-22. "[N]ewer and smaller companies," in particu-

lar, are often unable to obtain high-quality professional services, because their "business failure would generate securities litigation against the professional, among others." *Central Bank*, 511 U.S. at 189; H.R. Rep. No. 104-50, at 20 (1995).

C. Class Certification Rulings Will Not Protect Against Abusive Class Actions.

A district court's ability to deny class certification is not sufficient protection against the harmful consequences of the Second Circuit's "class standing" doctrine.

In the first place, the coercive power of securities class actions will force many defendants to settle before any class certification ruling. The discovery stay that applies to such actions dissolves after the denial of a motion to dismiss. 15 U.S.C. § 77z-1(b)(1). A defendant who wants to contest class certification thus not only will have to endure the considerable cost of preparing class certification papers (which increasingly requires expensive fact gathering and expert analysis), but also will have to submit to costly and disruptive merits discovery. And it can take well over a year to move from the dismissal ruling to a class certification ruling. See, *e.g.*, *In re IndyMac Mortg.-Backed Sec. Litig.*, 718 F. Supp. 2d 495 (S.D.N.Y. 2010) (dismissal); *In re IndyMac Mortg.-Backed Sec. Litig.*, No. 09 Civ. 4583, 2012 WL 3553083 (S.D.N.Y. Aug. 17, 2012) (class certification). Understandably, many defendants opt to settle before incurring those burdens. See, *e.g.*, *In re Lehman Bros. Sec. & ERISA Litig.*, No. 09 MD 2017, Dkt. 965 (S.D.N.Y. June 21, 2012).

Furthermore, many courts (incorrectly) place a pro-certification thumb on the scale in securities

class actions that makes the prospect of defeating class certification, based on disparities among the securities at issue, a daunting one. Indeed, quite a few courts explicitly organize their class certification analysis around the notion that "suits alleging violations of the securities laws, particularly those brought pursuant to Sections 11 and 12(a)(2), are especially amenable to class action resolution." *Pub. Emps.' Ret. Sys. of Miss.* v. *Merrill Lynch & Co., Inc.*, 277 F.R.D. 97, 101 (S.D.N.Y. 2011) ("*MissPERS I*"); accord *IndyMac*, 2012 WL 3553083, at *2.

Not surprisingly, those courts do not rigorously apply the typicality, adequacy, and superiority requirements that might otherwise foreclose large classes inspired by the Second Circuit's decision. For instance, many courts will find the "not demanding" typicality requirement satisfied if "each class member's claim arises from the same course of events and each class member makes similar legal arguments." *MissPERS I*, 277 F.R.D. at 106-107; *Pub. Emps.' Ret. Sys. of Miss.* v. *Goldman Sachs Grp., Inc.*, 280 F.R.D. 130, 135 (S.D.N.Y. 2012) ("*MissPERS II*"). In judging a class representative's adequacy, those same courts ask merely whether the "plaintiffs' interests are antagonistic to the interest of other members of the class"; they view typicality as "strong evidence" of adequacy; and they give no weight to "potential" or non-"fundamental" conflicts. *MissPERS I*, 277 F.R.D. at 109; *MissPERS II*, 280 F.R.D. at 135; *N.J. Carpenters Health Fund* v. *DLJ Mortg. Capital, Inc.*, No. 08 Civ. 5653, 2011 WL 3874821, at *3-*4 (S.D.N.Y. Aug. 16, 2011). Likewise, many decisions hold that "securities cases easily satisfy the superiority requirement" (*In re NYSE Specialists Sec. Litig.*, 260 F.R.D. 55, 80 (S.D.N.Y. 2009)) and that a "failure to certify an action under Rule 23(b)(3) on the sole ground that it

would be unmanageable is disfavored and should be the exception rather than the rule" (*In re Currency Conversion Fee Antitrust Litig.*, 264 F.R.D. 100, 117 (S.D.N.Y. 2010)).

Courts following these pro-certification precedents are unlikely to perceive any obstacle to class certification if they have already determined that the claims of the named plaintiff and the absent class members "raise a sufficiently similar set of concerns." Indeed, those courts may well read this Court's instruction that "Rule 23's requirements must be interpreted in keeping with Article III constraints" (*Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 612-613 (1997)) to mean that disparities among offerings that do not defeat "class standing" also should not defeat class certification.

III. The Second Circuit's Ruling Would Have Widespread Detrimental Effects On Class Action Practice.

The Second Circuit's decision in this case especially warrants review by this Court because it promises to be an unusually influential decision, if allowed to stand.

1. The Second Circuit has long been known as "the 'Mother Court' of securities law." *Morrison* v. *Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2889 (2010) (Stevens, J., concurring in judgment); accord *Blue Chip Stamps*, 421 U.S. at 762 (Blackmun, J., dissenting); *Zoelsch* v. *Arthur Andersen & Co.*, 824 F.2d 27, 32 (D.C. Cir. 1987); *Cont'l Grain (Austl.) Pty. Ltd.* v. *Pac. Oilseeds, Inc.*, 592 F.2d 409, 413 (8th Cir. 1979); *SEC* v. *Kasser*, 548 F.2d 109, 115 & n.29 (3d Cir. 1977). And fully a quarter of the nation's securities class actions are filed in the Second Circuit. 2011

FILINGS, *supra*, at 26. Whether as controlling precedent inside the Second Circuit or as persuasive authority outside it, the Second Circuit's decision here is likely to have an outsized impact on the scope of securities class actions.

Indeed, that decision already is having a direct effect on a host of pending cases. Many suits arising out of the 2008 financial crisis are putative class actions under Sections 11 or 12(a)(2) based on alleged misstatements that supposedly affected numerous securities, only some of which the named plaintiffs purchased. In virtually every case, the district court had dismissed claims related to the unpurchased securities.[3] After the Second Circuit's decision here, plaintiffs in many of those cases sought reconsideration to reinstate claims collectively seeking billions of dollars.[4] Such enormous stakes make review in this case all the more vital.

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[3] See, *e.g.*, *Plumbers' & Pipefitters' Local # 562 Supp. Plan & Trust* v. *J.P. Morgan Acceptance Corp. I*, No. 08 CV 1713, 2012 WL 601448, at *6 (E.D.N.Y. Feb. 23, 2012) (citing 11 cases); *Emps.' Ret. Sys. of Gov't of V.I.* v. *J.P. Morgan Chase & Co.*, 804 F. Supp. 2d 141, 150-151 (S.D.N.Y. 2011) (citing 5 cases).

[4] See, *e.g.*, *In re IndyMac Mortg.-Backed Sec. Litig.*, No. 09 CV 4583, Dkt. 375 (S.D.N.Y. Oct. 12, 2012); *In re Bear Stearns Mortg. Pass-Through Certificates Litig.*, No. 08 CV 8093, Dkt. 186 (S.D.N.Y. Oct. 5, 2012); *Fort Worth Emps.' Ret. Fund* v. *J.P. Morgan Chase & Co.*, No. 09 CV 3701, Dkt. 183 (S.D.N.Y. Oct. 1, 2012); *In re Lehman Bros. Sec. & ERISA Litig.*, No. 09 MD 2017, Dkt. 1010 (S.D.N.Y. Sept. 21, 2012); *In re Morgan Stanley Mortg. Pass-Through Certificates Litig.*, No. 09 CV 2137, Dkt. 163 (S.D.N.Y. Sept. 20, 2012); *Plumbers' & Pipefitters' Local # 562 Supp. Plan & Trust* v. *J.P. Morgan Acceptance Corp. I*, No. 08 CV 1713, 2012 WL 4053716 (E.D.N.Y. Sept. 14, 2012); *N.J. Carpenters Health Fund* v. *Home Equity Mortg. Trust 2006-5*, No. 08 CV 5653, Dkt. 139 (S.D.N.Y. Sept. 11, 2012).

2. The Second Circuit's decision threatens to encourage expanded class actions far beyond the securities context. Its lax "sufficiently similar set of concerns" test purports to be a "broad standard for class standing," rather than anything limited to securities cases. Pet. App. 31a. And it is easy to see how plaintiffs will use the "class standing" doctrine to bring sweeping class actions in numerous areas of the law.

Recently, courts have encountered many class actions claiming that food labels describing products as "natural" or "healthy" are misleading and violate various state or federal laws. Stephanie Strom, *Lawyers From Suits Against Big Tobacco Target Food Makers*, N.Y. TIMES, Aug. 18, 2012, at A1. Under the "class standing" doctrine, a single plaintiff who bought only a few such products could bring scores of other products into a single class action. That doctrine could likewise give new impetus to the longstanding (and largely rejected) effort to allow a plaintiff who suffered one kind of unlawful employment practice (like discrimination in hiring) to bring a class action encompassing other practices as well (like discrimination in promotion). See, *e.g.*, *Griffin* v. *Dugger*, 823 F.2d 1476, 1483-1484 (11th Cir. 1987).

In each of these areas—and countless others—the refrain will be that all of the claims raise a "sufficiently similar set of concerns" to confer "class standing." And, as in securities cases, if the claims survive a dismissal motion, the sheer breadth of the claims will almost always coerce a settlement. The Second Circuit's ruling in this case should not be allowed to have such sweeping consequences without review by this Court.

3. Granting certiorari now is important because other opportunities to consider the Second Circuit's

"class standing" doctrine will arise only rarely. If dismissal (or summary judgment) on standing grounds is denied, settlement is far more likely than a post-judgment appeal. If dismissal (or summary judgment) is granted on the claims related to securities not purchased by the plaintiff, that ruling ordinarily will leave untouched the claims regarding the securities that the plaintiff did purchase, ruling out an immediate appeal. A permissive appeal from a class certification decision is possible, but any standing issue would be thoroughly entangled in an evaluation of Rule 23's requirements. In short, this case presents a rare opportunity to cleanly address a surpassingly important ruling that threatens immense harm from an expansion of standing in the class action context.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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