13-1776-cv(L), 13-1777(xap)

United States Court Of Appeals
for the
Second Circuit

RETIREMENT BOARD OF THE POLICEMEN'S ANNUITY AND BENEFIT FUND OF THE CITY OF CHICAGO, on behalf of itself and similarly situated Certificate Holders, WESTMORELAND COUNTY EMPLOYEE RETIREMENT SYSTEM, CITY OF GRAND RAPIDS GENERAL RETIREMENT SYSTEM, AND CITY OF GRAND RAPIDS POLICE AND FIRE RETIREMENT SYSTEM,

Plaintiffs – Appellant – Cross-Appellee,

v.

THE BANK OF NEW YORK MELLON,
as Trustee under various Pooling & Servicing Agreements,

Defendant – Appellee – Cross-Appellant.

Appeal from an Order of the United States
District Court for the Southern District of New York

William H. Pauley III, District Judge
Case No. 1:11-cv-5459

OPENING BRIEF FOR APPELLEE – CROSS-APPELLANT THE BANK OF NEW YORK MELLON

Charles A. Rothfeld
Paul W. Hughes
Mayer Brown LLP
1999 K Street NW
Washington, DC 20006
(202) 263-3000

Matthew D. Ingber
Christopher J. Houpt
Mayer Brown LLP
1675 Broadway
New York, NY 10019
(212) 506-2500

Counsel for Defendant – Appellee – Cross-Appellant BNYM

CORPORATE DISCLOSURE STATEMENT

The Bank of New York Mellon ("BNYM") is a wholly owned subsidiary of The Bank of New York Mellon Corp., a Delaware corporation, which is a publicly held company. No publicly held company owns 10% or more of The Bank of New York Mellon Corp.'s stock.

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ISSUES PRESENTED FOR REVIEW

1. Whether certificates representing a beneficial ownership interest in a trust that holds hundreds or thousands of home mortgage loans and whose governing document was not qualified under the Trust Indenture Act are nonetheless subject to that Act.

2. Whether plaintiffs—who allege that they suffered personal losses in fifteen trusts for which the defendant acts as trustee—have "class standing" to pursue claims against the defendant that challenge its administration of 519 *other* trusts in which plaintiffs had no interest.

STATEMENT OF THE CASE

This case involves claims growing out of the administration of 534 securitizations of home mortgage loans. Plaintiffs, who invested in fifteen of these securitizations, assert that defendant The Bank of New York Mellon ("BNYM"), the trustee or (for one securitization) indenture trustee, violated duties imposed by the Trust Indenture Act of 1939 ("TIA"), 15 U.S.C. §§ 77aaa *et seq*. These claims are insupportable, for two principal reasons.

First, the TIA simply does not apply to the vast majority of securitizations at issue in this case. Congress wrote the Act with precision, excluding from its scope (1) certificates that evidence an "interest or participation" in multiple securities; (2) all securities other than debt instruments or certificates of interest or participation in debt; and (3) trusts that have not been "qualified" under the Act. *All* of those exclusions operate here. It therefore is unsurprising that plaintiffs' understanding of the TIA has been uniformly and consistently rejected by the Securities and Exchange Commission ("SEC"), numerous commentators, and (until very recently) *all* participants in the decades-old multi-trillion-dollar market in residential mortgage-backed securities ("RMBS").

Second, plaintiffs seek to assert claims regarding more than 500 trusts in which they do not now, and never had, an ownership interest. Fundamental principles of standing preclude plaintiffs from asserting claims of this sort, in circumstances where plaintiffs themselves have no stake in the dispute regarding those trusts and the third parties on whose behalf plaintiffs purport to sue would have claims that differ materially from the claims that plaintiffs bring on their own behalf. No court ever has held standing to exist in such circumstances.

A. Residential Mortgage-Backed Securities.

The financial instruments that underlie the claims in this case were constructed out of residential mortgages that have been "securitized." As this Court has explained, "[t]o raise funds for new mortgages, a mortgage lender sells pools of mortgages into trusts created to receive the stream of interest and principal payments from the mortgage borrowers. The right to receive trust income is parceled into certificates and sold to investors, called certificateholders." *BlackRock Fin. Mgmt. Inc. v. Segregated Account of Ambac Assur. Corp.*, 673 F.3d 169, 173 (2d Cir. 2012). The terms of most of the trusts at issue in this case, "as well as the rights, duties, and obligations of the trustee, seller, and servicer [of the underlying mortgage loans,] are set forth in a Pooling and Servicing Agreement ('PSA')." *Id.* A representative PSA, which plaintiffs attached to their complaint, appears at JA999-1247.[1]

These Certificates, also known as "mortgage pass-through certificates," "entitle the holders of those securities to the payments received by the trust on account of its mortgage holdings" (*Am. Int'l Grp., Inc. v. Bank of Am. Corp.*, 712 F.3d 775, 778 (2d Cir. 2013)) and "represent[] a beneficial ownership interest in the Trust Fund." JA1191 (PSA, Ex. E). That is, "[t]he trust collects the principal and interest payments made by borrowers under the mortgages, and pays those amounts out to the holders of the RMBSs in accordance with the terms established for division of the trust's revenues and assets." *Am. Int'l Grp.*, 712 F.3d at 778. Each class of Certificate is entitled to

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[1] Some of the securitizations are subject to "Sale and Servicing Agreements" ("SSAs"), paired with indentures. JA936. Investors in those securitizations hold notes, rather than trust certificates. These structures differ in some important respects from PSA securitizations and, where relevant, we explain the differences. Of the 534 trusts identified in the original complaint, 516 are organized pursuant to PSAs and the remaining eighteen under SSAs and indentures. JA314.

a "distribution," up to a specified maximum, from whatever income the trust collects each month. JA1088-92 (PSA § 4.02).

To manage the day-to-day servicing of the mortgage loans that provide each trust its income, "a mortgage servicer . . . administer[s] the mortgages by enforcing the mortgage terms and administering the payments." *BlackRock*, 673 F.3d at 173. This servicer is responsible for, among other things, collecting mortgage payments from borrowers, making monthly payments of the aggregate mortgage proceeds to the Trustee for distribution to investors, and, where necessary, foreclosing on properties with defaulted loans. JA1063-64, JA1078-81 (PSA §§ 3.01, 3.11). The market in such loans is enormous; as of 2013, non-U.S. agency RMBS had a total outstanding value exceeding $1 trillion. SIFMA, US Non-Agency CMBS and RMBS Outstanding (2014), http://tinyurl.com/7dylnd4.

B. The Role Of BNYM As Trustee.

In administering the trusts at issue here, BNYM serves as trustee. Trustees of commercial trusts, which have limited and contractually specified duties, "play an essential role in the process that brings corporate financings to the public market." *Meckel v. Cont'l Res. Co.*, 758 F.2d 811, 815 (2d Cir. 1985). The "fiduciary duties present in ordinary testamentary trusts ... are not applicable with respect to the securitizations governed by

PSAs." *Ellington Credit Fund, Ltd. v. Select Portfolio Servicing, Inc.*, 837 F. Supp. 2d 162, 190 (S.D.N.Y. 2011).

Parties to securitizations may limit the trustee's pre-default responsibilities to reduce administrative costs and pass through to investors as much income as possible from the underlying assets. This Court has therefore "consistently rejected the imposition of additional duties" on such trustees. *Elliott Assocs. v. J. Henry Schroder Bank & Trust Co.*, 838 F.2d 66, 71 (2d Cir. 1988). Likewise, the New York Court of Appeals has rejected efforts to "expand[] indenture trustees' recognized administrative duties" beyond those obligations found in the contract. *Racepoint Partners, LLC v. JPMorgan Chase Bank, N.A.*, 928 N.E.2d 396, 399 (N.Y. 2010).

BNYM's duties are in fact narrowly constrained by the PSAs. As a general matter, Section 8.01 of the PSAs provides that the Trustee "shall undertake to perform such duties and only such duties as are specifically set forth in this Agreement." JA1113. Prior to a defined "Event of Default" that is "known to the Trustee," "the duties and obligations of the Trustee shall be determined solely by the express provisions of this Agreement, the Trustee shall not be liable except for the performance of such duties and obligations as are specifically set forth in this Agreement, no implied covenants or obligations shall be read into this Agreement against the Trustee and the Trustee may conclusively rely, as to the truth of the statements and the correctness of the opinions expressed therein, upon any certificates or opinions furnished to the Trustee and conforming to the requirements of this Agreement." *Id*. And the Trustee is not "bound to make any investigation into the facts or matters stated in any … statement … unless requested in writing to do so by … Holders of Certificates evidencing not less than 25% of the Voting Rights allocated to each Class of Certificates." JA1114-15 (PSA § 8.02(iv)).

In addition to this broad rejection of implied duties, many of the Trustee's specific duties are expressly limited. When it receives mortgage files, for example, "[t]he Trustee shall be under no duty or obligation to inspect, review or examine said documents … to determine that the same are genuine, enforceable or appropriate for the represented purpose or that they have actually been recorded in the real estate records or that they are other than what they purport to be on their face." JA1056 (PSA § 2.02(a)). When preparing monthly reports for Certificateholders, "the Trustee's responsibility … is limited to the availability, timeliness and accuracy of the information provided by the Master Servicer." JA1092 (PSA § 4.06(b)). And the Trustee has no "responsibility or liability for any action or failure to act by the Master Servicer nor shall the Trustee … be obligated to supervise the performance of the Master Servicer under this Agreement or otherwise." JA1065 (PSA § 3.03).

C. The Trust Indenture Act.

This case presents questions about the scope of the Trust Indenture Act, which creates certain substantive requirements for the securities that it covers. When the TIA applies, a security must be issued under an "indenture," which is a contract setting out the duties of the parties to the security. 15 U.S.C. § 77ccc(7). If applicable, the TIA requires the indenture to place certain duties on the trustee, including reporting requirements and duties in the event of a default. *Id.* §§ 77mmm, 77*ooo*.

By its terms, however, the TIA does not apply to all securities or indentures. It governs only debt securities and "certificates of interest or participation" in a debt security, specifically exempting (through a double negative) "any security other than … a note, bond, debenture, or evidence of indebtedness" or a "certificate of interest or participation in any such" instrument. 15 U.S.C. § 77ddd(a)(1). Additionally, many other kinds of securities are exempt. Most relevant here, Section 304(a)(2) exempts "any certificate of interest or participation in two or more securities having substantially different rights and privileges." *Id.* § 77ddd(a)(2).

If a security *is* covered by the terms of the TIA, it must be issued with a "qualified" indenture. With respect to securities that must be registered under the Securities Act of 1933 ("the '33 Act"), which includes the PSA-governed trusts at issue here, an issuer must provide the SEC with certain information so that the Commission may determine whether a new issuance is covered by the TIA. 15 U.S.C. § 77eee(a). An indenture becomes "qualified" under the Act when the "registration becomes effective as to such security." *Id.* § 77iii(a)(1). If an issuer files a registration statement that does not propose a "qualified" indenture in accord with the TIA, but the SEC determines that the TIA applies, the Commission is obligated to block issuance of that security. *Id.* § 77eee(b).

The SEC plays a critical role in determining whether the TIA applies to a security *before* it issues because, as Congress recognized in enacting the TIA, "it would be difficult to correct inadequacies [in compliance with the TIA] discovered after the indenture has been executed and some of the securities sold." S. Rep. No. 76-248, at 9 (1939).

D. The Proceedings Below.

This case concerns RMBS securitizations sponsored by Countrywide Home Loans, Inc. ("Countrywide"), with defendant BNYM serving as Trustee. Countrywide deposited individual home mortgage loans into each trust, and then sold Certificates to investors that reflected interests in a particular trust. *See* JA1051-58 (PSA §§ 2.01, 2.02). Currently, the Master Servicer is Bank of America, N.A.

Plaintiffs brought this action in the Southern District of New York, contending that BNYM breached the TIA, its contractual duties, and alleged implied common-law duties in its administration of PSA-governed trusts that were *not* qualified under the TIA. JA26-80.[2] Plaintiffs initially identified twenty-six individual trusts in which they claimed to have an ownership interest (reduced to fifteen in a subsequent amended complaint (JA993-998)), but sought to represent a class asserting claims involving 534 trusts administered by BNYM. SPA2, JA26. These 534 trusts consisted of some (but not all) securitizations of Countrywide mortgage loans; plaintiffs have never explained how they determined which trusts to include in this action or whether they perceive material differences between included and excluded trusts. BNYM moved to dismiss, arguing in relevant part that the TIA does not apply to trusts governed by PSAs and that plaintiffs in any event lack standing to sue with respect to the hundreds of trusts in which they never invested. D. Ct. Dkt. No. 18.

The district court granted BNYM's motion with respect to standing; it held that plaintiffs lack standing to "pursue claims relating to securities in which they never invested." SPA6. The court dismissed those claims with

[2] Eighteen of the 534 trusts mentioned in the complaint were issued under a TIA-"qualified" indenture, and BNYM does not challenge the application of the TIA to those securitizations. *See*, *e.g.*, JA303 (Indenture § 1.02). The TIA argument in this brief does not apply to those trusts.

prejudice, leaving "claims relating only to the … trusts in which [plaintiffs] allege current or former holdings." *Id.*

But the court denied BNYM's motion to dismiss plaintiffs' surviving TIA claims. SPA8-12. Rejecting the longstanding position of the SEC on the scope of the TIA, the court held that the Certificates are not exempt from application of the TIA under the exception stated in Section 304(a)(2) for certificates of interest or participation in two or more securities; the court reasoned that the Certificates "do not evidence 'participation' in the underlying mortgage loans because the certificateholders' rights are not wholly contingent on the performance of those loans." SPA12. The court also held that the Certificates are not exempt under Section 304(a)(1), concluding that they are debt: "[u]nlike equity securities, the certificates entitle their holders to regular payments of principal and interest on fixed 'Distribution Date[s].'" SPA11.

The district court certified its TIA ruling for interlocutory appeal pursuant to 28 U.S.C. § 1292(b), recognizing that the question of the TIA's application to the securities at issue here "raises 'novel and complex' issues that could impact a large number of cases," as to which there is "substantial grounds for difference of opinion." SPA29. Although plaintiffs did not move the district court to certify its ruling on standing, they did petition this Court to address the standing issue along with the question on the scope of the TIA presented by BNYM. This Court granted both petitions. CA2 Dkt. Nos. 1 & 3; JA927.[3]

SUMMARY OF ARGUMENT

Although the TIA and the financial instruments at issue here are complex, the legal questions before the Court are straightforward. The plain terms of the TIA establish unambiguously that the Act does not apply to PSA-governed securities in trusts administered by BNYM. And fundamental Article III principles establish that plaintiffs lack standing to assert claims regarding trusts in which they have no interest and that differ in material respects from trusts in which plaintiffs *do* have a personal stake.

I. For several independent reasons, the TIA does not apply to PSA-governed certificates.

First, these instruments are exempted from the TIA by Section 304(a)(2) because they are "certificate[s] of interest or participation in two or more securities having substantially different rights and privileges." That

[3] While this appeal was pending, plaintiffs sought leave to file a third amended complaint that would add allegations with respect to standing; pursuant to Federal Rule of Civil Procedure 62.1, they also asked the district court for an "indicative ruling" that, if this Court were to remand, the district court would reverse its earlier decision with respect to standing. Dkt. 84; *see* SPA32-42. The district court rejected this request, recognizing that "the same question" is now before this Court. SPA37.

literally describes the certificates here, which confer a participatory interest in multiple securities (home mortgage notes) that have widely varying terms and characteristics. That conclusion is supported by the TIA's history, which shows that Congress expressly contemplated exempting fixed trust certificates that were identical in relevant respects to the certificates here. And it is confirmed by the consistent, decades-old view of the SEC, left undisturbed by Congress, that such certificates are exempt under Section 304(a)(2).

Second, these securities also are exempt under Section 304(a)(1) because they are non-debt instruments. Trust certificates lack the defining characteristic of debt: an obligation to pay a sum certain on demand or at a fixed maturity date. Instead, these certificates provide the holder the right only to a pro rata share of *whatever* monies are generated by the underlying mortgages each month—which in an extreme case could be nothing at all. This understanding that pass-through certificates are equity rather than debt has been the uniform view of scholars and commentators.

Third, an action is unavailable here under the TIA because the PSA-governed securities at issue in this case were not issued in conjunction with TIA-"qualified" indentures. The TIA's duties and protections apply only when an indenture has been "qualified" under the Act, which occurs when an issuer registers a security with an accompanying indenture that incorporates the duties required by the TIA; if a security is not accompanied by a TIA-qualified indenture but the SEC determines that the Act applies, the SEC must block the registration. Accordingly, if a security is registered without a TIA-qualified indenture and the SEC *permits* that security to issue, the indenture necessarily is not qualified—and therefore is outside the scope of the TIA. The securities here were never accompanied by an indenture that was qualified under the Act, and therefore cannot give rise to a TIA claim.

II. Plaintiffs lack standing to assert class claims relating to the many hundreds of trusts that they never owned and that differ in material respects from the trusts in which they did have an ownership stake. It is fundamental that, for a plaintiff to have class standing, he or she must stand in the shoes of absent class members in every material respect. Under this principle, standing exists when, by prevailing on his or her personal claim, the plaintiff necessarily would establish the claims of absent class members; it does *not* exist when a victory by the plaintiff on his or her individual claim would not be sufficient to establish the class members' right to prevail on their claims. That is the case here.

Plaintiffs cannot evade this principle by relying on the rule of *NECA-IBEW Health & Welfare Fund v. Goldman Sachs & Co.*, 693 F.3d 145 (2d Cir. 2012). The Court there found class standing in circumstances where the plaintiffs, by prevailing on their individual claims, necessarily *would* establish that the class claims also should prevail. But the Court rejected standing as to claims that differed in material respects from the plaintiffs' personal claims and that would require different proof.

That describes the claims in this case regarding the trusts in which plaintiffs had no ownership interest. Those claims would have to be established on a loan-by-loan and trust-by-trust basis. Proof regarding a trust in which plaintiffs had an ownership interest would not establish, or even tend to establish, the validity of claims regarding another trust, which would contain a wholly different set of loans with very different characteristics. Plaintiffs, moreover, would have to establish trust-specific developments that triggered BNYM's duties as to *that* trust. In these circumstances, the holding of *NECA* establishes that class standing is impermissible in this case.[4]

ARGUMENT

I. Plaintiffs May Not Assert TIA Claims Relating To Trust Certificates.

A. The TIA Does Not Apply To Certificates Governed By PSAs.

The argument advanced by plaintiffs in this case for application of the TIA is extraordinary. It departs from the plain meaning of the statutory

[4] The Court reviews *de novo* questions both of standing and of the meaning of the TIA. *NECA*, 693 F.3d at 156.

terms; repudiates the legislative history; disregards the long-settled view of the SEC; and rejects the unanimous views of scholars and commentators. It also posits that everyone who participated in an enormous market over a period of decades—including myriad issuers, purchasers, and the SEC itself—misunderstood and disregarded their legal obligations. This improbable contention is wrong. The TIA does not apply to PSA-governed trust certificates for two reasons: those securities are certificates of interest or participation in two or more securities, which are expressly exempted from the TIA; and the securities are non-debt instruments, which are also not subject to the TIA.

1. Certificates of beneficial ownership interests in pools of mortgage loans are exempt pursuant to Section 304(a)(2).

a) The plain statutory language shows that the TIA is not applicable here.

We begin with the language of Section 304(a)(2). "The preeminent canon of statutory interpretation" is the "presum[ption] that the legislature says in a statute what it means and means in a statute what it says there." *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004) (quotation omitted). Statutory interpretation thus "ends" with the text of a statute that is "unambiguous." *Id*. That principle resolves this case: The Certificates at issue here are exempt from the TIA under Section 304(a)(2) because they are (a) "certificates of interest or participation" (b) "in two or more securities" (c) "having substantially different rights and privileges," within the plain meaning of each of those terms. *See* 14 Guy P. Lander, U.S. Securities Law for Int'l Fin. Trans. & Cap. Mkts. § 4:36 n.8 (2d ed. Nov. 2013 update).

i. A PSA-governed trust certificate is a "certificate of interest or participation."

1. The first of the controlling statutory terms, "certificate of interest or participation," has a long-settled meaning: it is an investment where "the payment of dividends" is "contingent upon an apportionment of profits." *Tcherepnin v. Knight*, 389 U.S. 332, 339 (1967). Thus, a certificate of interest or participation in a trust gives the holder of the certificate some right to a portion of proceeds generated by the trust.[5] This plain-reading understanding of a certificate of interest of participation is ubiquitous. *See*, *e.g.*, *All Seasons Resorts, Inc. v. Abrams*, 497 N.E.2d 33, 37-38 (N.Y. 1986) (a "participation" or "participation interest" describes an "expectation of sharing of profits"); Willis R. Buck Jr., *Bank Insolvency and Depositor Setoff*, 51 U. Chi. L. Rev. 188, 190 (1984) (certificates of interest in bank loans "distribute the borrower's payments on the loan pro rata to the participants"); Joseph C.

[5] *Hibernia National Bank v. Federal Deposit Insurance Corp.*, 733 F. 2d 1403, 1405 (10th Cir. 1984), illustrates how participations operate in the context of a loan. There, one bank (Hibernia) purchased "certificates of participation" in certain loans from another bank (Penn Square). "Under the certificates of participation, Penn Square retained all the original loan documents including the notes, continued to service the loans, and remitted to Hibernia its portion of all payments and collections in accordance with Hibernia's percentage of ownership." *Id.* at 1405.

Long, *What is a Security?*, 12 Blue Sky Law § 2:90 (2013) (one "example" of "certificates of interest or participation" is an "undivided interest[] in pools of mortgages on residential and commercial real property").

Unsurprisingly, the term "certificates of interest or participation" had this same meaning when the TIA was drafted in 1939, a point of particular importance because construction of a statute must focus "on the ordinary meaning" of the relevant term "at the time Congress enacted it." *BedRoc*, 541 U.S. at 184. Courts at that time understood such a certificate to be one that provides its holder the right to some portion of proceeds of income from the underlying instrument. *See*, *e.g.*, *Flanagan v. Comm'r,* 1938 WL 8495 (B.T.A. 1938) ("certificates of interest" "entitled" holders "to proportionate distributions of the dividends received by the trustee"); *SEC v. Wickham*, 12 F. Supp. 245, 248-49 (D. Minn. 1935) (a "certificate entitling each holder to participate proportionately" in a race-track bettor's earnings qualifies as a "certificate of interest or participation in a profit-sharing agreement").

The pooling of mortgage loans and the issuance of certificates of interest or participation in such a pool was well known at the time the TIA was enacted. Indeed, a contemporaneous decision of this Court described "first mortgage participation certificates" that evidenced "undivided shares" in a pool of "notes secured by mortgages on real estate" held by a trust company for the benefit of the certificate purchasers. *Lawyer's Mortg. Co. v. Anderson*, 67 F.2d 889, 891 (2d Cir. 1933). A New Jersey court similarly characterized "participation certificates" that "entitle[d] the holder to a proportionate share in a series or number of mortgages … deposited under a trust agreement." *Gates v. Plainfield Trust Co.*, 191 A. 304, 310 (N.J. Ch. 1937); *see also Participation Mortgages As A Method of Trust Investment by Corporate Fiduciaries*, 45 Yale L.J. 857, 860 (1936) (discussing "the creation of participating interests in a pool of mortgages").

2. The terms of the Certificates confirm that they are "certificates of interest or participation." Each is titled "Certificate," and each states that it "represent[s] a beneficial ownership interest" in the pool of mortgage loans. *E.g.*, JA1191. Form Certificates are attached as exhibits to the PSAs. *See, e.g.*, JA1164-94. For example, Exhibit A, the form of a "Senior Certificate," states that it "evidenc[es] a percentage interest in the distributions allocable to the Certificates of the above-referenced Class." JA1165.

Each month, the Master Servicer collects loan payments and other income, such as foreclosure proceeds. JA1066-67 (PSA § 3.05(b)). These "Available Funds" are then distributed to the various classes of Certificates. JA1088-92 (PSA § 4.02). The *legal right* to payment, therefore, is defined to be the amount allocable to the particular class under the PSAs; that amount, in turn, is defined to be a portion of the "Available Funds." This right to share in whatever monies have been collected from the mortgage notes makes the Certificates a paradigm of a certificate of interest or participation.

3. In finding that the Certificates at issue here do not qualify as "certificates of interest or participation," the district court reasoned that the Certificates "do not evidence 'participation' in the underlying mortgage loans because the certificateholders' rights are not wholly contingent on the performance of those loans." SPA12. This conclusion is both legally and factually mistaken.

First, the court erred as a legal matter: it provided no reason to conclude that a party must be entitled to *all* of the proceeds of an underlying asset to have an "interest" in that asset. The defining characteristic of a certificate of interest is that the holder has a right to *some* proportionate share of proceeds; in the ordinary meaning of the words, that right gives the holder an "interest" and a right to "participate" in the underlying security. *Cf. Lavin v. Data Sys. Analysts, Inc.*, 443 F. Supp. 104, 109 (E.D. Pa. 1977) (describing certificates of participation as "instruments that give the holder at least some rights to future profits"). In fact, certificates of interest or participation often transfer only a partial share in the underlying asset. *See*, *e.g.*, *Hibernia*

Nat'l Bank, 733 F. 2d at 1404. Thus, the district court's observation, even if correct, is not legally relevant.

Second, the court's description of the securities is belied by the PSAs: Certificateholders' rights *are* "wholly contingent" on the underlying mortgage loans. *See* JA1088-92 (PSA § 4.02). The proceeds of those loans are the *only* source of payment to Certificateholders, and the Certificateholders receive *all* of those payments, less administrative fees. That is why they are called "pass-through certificates"—homeowners' loan payments "pass through" to investors.

In reaching the contrary conclusion, the district court did not identify any alternative source of income for Certificateholders, but instead pointed to two possible income streams *for the Master Servicer*. SPA12. The court reasoned that those terms gave the Master Servicer an interest in the loan pool. But that was a misunderstanding of both provisions. The first, the "Excess Proceeds" provision (SPA12), simply provides that, in the rare circumstance where the Master Servicer collects more money than was owed on a defaulted loan (and is not obliged to return that overage to the homeowner), the Master Servicer may retain those proceeds. JA1023 (PSA § 1.01). The second requires the Master Servicer to turn over to the trust exactly the amount that it collects from homeowners each month; if the servicer invests those funds in the meantime, it keeps any profits "as servicing compensation" and bears any losses. JA1068-69 (PSA § 3.05(e)). On the face of it, neither provision makes Certificateholders' income less than wholly contingent on the performance of the loans. (In fact, the latter provision ensures that an extraneous factor—the servicer's investment returns—does *not* affect investors' income.)

ii. A PSA-governed certificate is a certificate of interest or participation "in two or more securities."

Certificates governed by PSAs also relate to "two or more securities" because the mortgage-securitization trusts hold hundreds or thousands of pooled mortgage notes—*each* of which is a "security" in the relevant sense. *Okla. Police Pension & Ret. Sys. v. U.S. Bank Nat'l Ass'n*, 291 F.R.D. 47, 63 (S.D.N.Y. 2013). A PSA-governed certificate therefore necessarily reflects interest and participation in a substantial number of separate securities.

This, too, follows from the TIA's plain language. The TIA adopts the definitions used by the Securities Act of 1933 ("the '33 Act"). 15 U.S.C. § 77ccc(1). The '33 Act defines a "security," "unless the context otherwise requires," to include "any note." *Id.* § 77b(a)(1). And here, nothing in the context of the TIA precludes treatment of a mortgage note as a "security."

This conclusion is bolstered by the structure of the TIA, which makes clear that individual mortgage notes qualify as "securities" for these purposes. Under Section 304(a)(1), the TIA applies to a certificate of interest only if the certificate reflects an interest in a debt instrument that itself would have been subject to the TIA. 15 U.S.C. § 77ddd(a)(1)(B) (interests in "any *such* note," referring to the covered securities addressed in subsection (a)(1)(A) (emphasis added)).[6]

Although the court below did not dispute that the Certificates relate to "two or more securities," a different district court found that MBS trusts represent a "single interest" because they "intentionally group a pool of mortgages into a single security with a single principal balance." *Policemen's Annuity & Benefit Fund v. Bank of Am., NA*, 943 F. Supp. 2d 428, 439 (S.D.N.Y. 2013) ("*Bank of Am. II*"). Under that reasoning, whenever securities are pooled for the purpose of issuing certificates of interest in them, the multiple underlying securities *always* become a "single security." But that would read Section 304(a)(2) out of the Act; there could be no such thing as a "certificate of interest or participation in *two or more* securities" because any securities for which certificates of interest have been issued will have been pooled and, according to *Bank of America II*, turned into *one* security. Congress could have had no such intent. Indeed, the Senate Report accompanying the TIA

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[6] If the mortgage notes were not securities, the Certificates would be exempt under Section 304(a)(1). *See*, *infra*, 31-34. The Certificates are not debt securities themselves ((a)(1)(A)), and they would not be interests in a debt security ((a)(1)(B)) either.

(which we discuss in more detail, *supra*, at 24-26), notes that one example of such a device is a "fixed trust certificate[] evidencing an interest in a group of assorted bonds." S. Rep. No. 76-248, at 15.[7]

> *iii. A PSA-governed certificate is a certificate of interest or participation in two or more securities "having substantially different rights and privileges."*

Finally, the rights and privileges of the individual mortgage notes differ from one another substantially. In finding PSA-governed certificates exempt from the TIA pursuant to Section 304(a)(2), Judge Koeltl looked to precisely these differences, explaining that "[t]he mortgage loans have different obligors, payment terms, maturity dates, interest rates, and collateral securing the loans, and they originate in different states and are subject to different laws regarding foreclosure procedures and deficiency judgments." *Okla. Police*, 291 F.R.D. at 63.

In fact, the only thing these notes have in common is that all relate to residential mortgage loans. Yet Congress did not provide that the TIA applies to certificates of interest in pools of loans that involve assets of a single

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[7] *Bank of America II* also is inconsistent with the '33 Act's definition of "security" (incorporated in Section 303(1) of the TIA). That definition includes "any note," like the mortgage notes here, but it does not state that *pools* of notes are themselves securities.

general *type*; instead, it stated the exemption in terms of *legal* "rights and privileges" accorded by each security.

b) Exempting trust certificates from the TIA is supported by the legislative history.

Congressional action, both before and after the enactment of the TIA in 1939, confirms that PSA-governed trust certificates are exempt from the statute under Section 304(a)(2). *See Okla. Police*, 291 F.R.D. at 65.

1. The House and Senate reports on the TIA both explained that Section 304(a)(2) was designed to exempt, "for example, fixed trust certificates evidencing an interest in a group of assorted bonds." S. Rep. No. 76-248, at 15; H.R. Rep. No. 76-1016, at 41 (1939). Because a PSA-governed trust has all of the characteristics of a "fixed trust," as that term was understood in 1939, this is powerful evidence that these trusts are exempt.

A "fixed-trust" is (and in 1939 was understood to be) a vehicle that pools a variety of investments, in which the corpus of the trust is fixed. *N. Am. Bond Trust v. Comm'r,* 1940 WL 10009 (B.T.A. 1940) (a "fixed investment trust" is one where "the Trustee has no power to change the securities which constitute the corpus"). As a 1937 article in the Yale Law Journal explained the structure of a fixed trust:

> [T]he sponsor deposits with the trustee under a trust indenture a certain diversified group of securities called a unit. Against this unit the trustee issues participation certificates which the spon-

> sor sells to the public. In the fixed trust the composition of the unit remains unchanged during the duration of the trust.

The Regulation of Management Investment Trusts for the Protection of Investors, 46 Yale L.J. 1211, 1213 (1937).

Thus, contemporaneously with the enactment of the TIA, this Court noted that a "fixed trust" is designed "to provide investor[s] with a means for acquiring an undivided beneficial interest in a comparatively static list of securities and enable them to participate in a relatively wide-spread investment." *Comm'r v. Chase Nat'l Bank*, 122 F.2d 540, 541 (2d Cir. 1941); *see also* 2 George Gleason Bogert, *Trusts and Trustees* § 249 (1935) (defining a "fixed trust" as one "where the securities originally bought and placed in trust are to be held throughout the life of the trust (with some exceptions)"); John Sherman Myers, *Fixed Investment Trusts—Some Observations*, 4 St. John's L. Rev. 1, 2 (1929) (contrasting a "managerial" or "management" trust with a "fixed" trust; "[a]s its name implies, it is fixed" because "there is no opportunity for change in underlying securities except in specific emergencies").

In all essential respects, these accounts describe the Certificates at issue in this case. Here, Countrywide deposited a fixed set of mortgage loans into the trust. Participation certificates were then sold to the public. BNYM does not actively manage the assets of the trust (*i.e.*, it does not have discretionary authority to buy or sell assets). The securities at issue here are, therefore, identical to the "fixed trust[s]" that Congress meant to exempt from the terms of the TIA.

2. Recent congressional action following the mortgage crisis confirms the consistent congressional understanding that PSA-governed Certificates are exempt from the TIA pursuant to Section 304(a)(2). In 2011, Senator Sherrod Brown proposed amending Section 304(a)(2) to exclude from its exemption "residential mortgage-backed securities having substantially different rights and privileges, or a temporary certificate for any such certificate." Foreclosure Fraud and Homeowner Abuse Prevention Act of 2011, S. 824, 112th Cong. § 3(b)(1). Senator Brown explained that this legislative proposal would have "remove[d] the exemption from the standards and requirements established by the Trust Indenture Act for trustees of pools of mortgage-backed securities." *Foreclosure Fraud & Homeowner Abuse Prevention Act of 2011: Solutions for the Foreclosure Crisis*, http://tinyurl.com/mb9x85t. But that bill, which was premised on the view that securities like those at issue here *should* be covered by the TIA but are not under current law, never left committee.

That "Congress considered and rejected [a] bill[]" that would have amended the TIA to adopt plaintiffs' view demonstrates that it adhered to the view that such trusts fall outside the TIA. *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 144 (2000); *see also Simonton v. Runyon*, 232 F.3d 33, 35 (2d Cir. 2000) (Court "informed by Congress's rejection" of a bill that would have extended the law). Where "Congress has refused to pass bills that would have amended" a statute, it is evidence of the correct interpretation of the Act. *N. Haven Bd. of Ed. v. Bell*, 456 U.S. 512, 534 (1982).

c) The SEC agrees that PSA-governed certificates are exempt from the TIA.

Not only is the TIA clear on its face, but the Securities and Exchange Commission has long been of the view that PSA-governed certificates are exempt from the TIA pursuant to Section 304(a)(2). This consistent and longstanding "SEC[] interpretation of the TIA lends further support to the conclusion that section 304(a)(2) exempts the certificates from the TIA." *Okla. Police*, 291 F.R.D. at 63-64.

At least since 1997, the SEC has taken the view in informal guidance that "[c]ertificates representing a beneficial ownership interest in a trust" where the "assets of the trust include a pool of mortgage loans with multiple obligors administered pursuant to a 'pooling and servicing agreement' … are 'treated as exempt from the Trust Indenture Act under Section 304(a)(2) thereof.'" SEC Trust Indenture Act Interpretations, Compliance & Disclosure Interpretations 202.01 (May 3, 2012), http://tinyurl.com/cmud2j.[8]

And the SEC has acted on this guidance: Although Section 305 of the Trust Indenture Act *requires* the SEC to refuse registration of a publicly issued security that should be, but is not, qualified under the TIA (15 U.S.C. § 77eee(b)), the SEC has *never* refused a registration pursuant to Section 305—despite *thousands* of PSA-governed MBS securities having been registered with the SEC over the past few decades.

Indeed, in a "no-action letter" dating back almost thirty years, the SEC specifically agreed that certificates reflecting an interest in a pool of mortgages are exempt from the TIA. In *Marion Bass Securities, Inc.*, SEC No-Action Letter, 1984 WL 45531, at *1 (July 9, 1984), SEC staff issued a no-action letter stating that it would "not recommend any enforcement action to the Commission" for issuance of "Certificates without qualifying an indenture under the Trust Indenture Act of 1939." The requester had explained that the certificates were exempt under Section 304(a)(2) because they "would represent a fractional undivided interest in the Pool," which "would

[8] The same guidance earlier appeared in a July 1997 SEC release. *See* SEC Div. of Corp. Fin., Manual of Publically Available Telephone Interpretations, Trust Indenture Act of 1939, ¶ 10 (July 1997), http://tinyurl.com/lvcuf7x. Following the decision below, the SEC staff noted that it "is considering" this guidance; nevertheless, the SEC staff's longstanding position remains unchanged.

consist of Bonds from several different bond issues, each with its own interest rate, redemption provisions, trustee and collateral security." *Id.* at *6. The underlying mortgage loans in this case have similar characteristics.[9]

Because this SEC guidance has not been the subject of formal rulemaking by the Commission, we do not contend that it warrants *Chevron* deference. But it is entitled to deference pursuant to the framework established in *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001). *Cf. Vincent v. Money Store*, 736 F.3d 88, 101 n.12 (2d Cir. 2013) ("Although the FTC Staff Commentary is likely not entitled to *Chevron* deference, we look to the FTC's informal opinions as persuasive authority."). Although SEC no-action letters are not "bind[ing]," they may be "persuasive." *Allaire Corp. v. Okumus*, 433 F.3d 248, 254 (2d Cir. 2006).

Here, the SEC possesses undoubted "expertness" with respect to the TIA, a statute it administers. *Mead Corp.*, 533 U.S. at 228. And given the clarity of the statutory language, the SEC's confirmation that Section 304(a)(2) applies in these circumstances is especially "persuasive[]." *Id.* Ac-

[9] In *Citytrust*, SEC No-Action Letter, 1990 WL 305068, at *4 n.1 (Dec. 19, 1990), the requester noted that pass-through certificates organized under a PSA, "like pooling and servicing agreements used in pass-through securitizations generally, will not be qualified under the Trust Indenture Act of 1939 in reliance on Section 304(a)(2) thereof." Although the requester did not specifically request a ruling on the TIA, SEC staff advised that it would not recommend any enforcement action against this structure. *Id.* at *1-4.

cordingly, that "the SEC has consistently found that section 304(a)(2) exempts from the TIA certificates like those at issue in this case supports the conclusion that the certificates are not subject to the TIA." *Okla. Police*, 291 F.R.D. at 65.

Moreover, although Congress amended the TIA in 1987, 1990, 1996, 1998, 2002, and 2010, it has never altered the TIA to override the SEC's longstanding interpretation. *See*, *e.g.*, Pub. L. No. 100-181, §§ 501, 502, 101 Stat. 1249 (1987); Pub. L. No. 101-550, tit. IV §§ 401-18, 104 Stat. 2713 (1990); Pub. L. No. 104-290, § 508, 110 Stat. 3416 (1996); Pub. L. No. 105-353, § 301, 112 Stat. 3227 (1998); Pub. L. No. 107-123, § 7, 115 Stat. 2390 (2002); Pub. L. No. 111-203, §§ 985, 986, 124 Stat. 1376 (2010). In such circumstances, "[i]t is well established that when Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress." *CFTC v. Schor*, 478 U.S. 833, 846 (1986) (quotation omitted); *see also Bell*, 456 U.S. at 535 ("Where 'an agency's statutory construction has been fully brought to the attention of the public and the Congress, and the latter has not sought to alter that interpretation although it has amended the statute in other respects,'" "'presumably the legislative intent has been correctly discerned.'").

2. The Certificates also are exempt pursuant to Section 304(a)(1).

For the foregoing reasons, the trusts here are exempt from coverage of the TIA under the plain terms of Section 304(a)(2). If, however, the Court believes that a PSA-governed Certificate is *not* a "certificate of interest or participation in two or more securities having substantially different rights and privileges," it should find that the Certificates are exempt pursuant to Section 304(a)(1). That provision exempts from the TIA *any* security other than "(A) a note, bond, debenture, or evidence of indebtedness, whether or not secured" or "(B) a certificate of interest or participation" in any such device. 15 U.S.C. § 77ddd(a)(1). The instruments at issue in this case do not fall into this category of non-exempt security.

To begin with, each Certificate is "a beneficial *ownership* interest in the Trust Fund," a status that is characteristic of equity rather than debt. JA1191. And beyond the terms of the securities themselves, trust certificates lack the defining characteristic of debt: an obligation to pay a sum certain on demand or at a fixed maturity date. *See Gilbert v. Comm'r*, 248 F.2d 399, 402 (2d Cir. 1957) ("The classic debt is an unqualified obligation to pay a sum certain at a reasonably close fixed maturity date along with a fixed percentage in interest payable regardless of the debtor's income or lack thereof."). No Certificateholder is owed any sum certain. Rather, the Certificate provides the holder the right only to a *pro rata* share of whatever monies are generated by the underlying mortgage loans each month; in an extreme case, if that amount were zero, Certificateholders would lack not only the ability to collect from the trust, but also the legal right to payment.

The structure of PSA-governed certificates also demonstrates that they are equity instruments. Pursuant to Section 3.05(b), the Master Servicer must deposit into the "Certificate Account" the various "payments and collections" received with respect to the Mortgage Loans in the trust. JA1066. The Master Servicer has no obligation to deposit any sum certain into the Certificate Account; its obligation is coextensive with the payments that it receives. *Id*. If, for example, it receives no payments at all, it has no obligation to deposit money into this account.

Each month, the Master Servicer withdraws the "Available Funds" from the Certificate Account and transfers those funds to the Trustee for deposit in the Distribution Account. JA1073 (PSA § 3.08(a)(ix)). "Available Funds" is defined as the amount in the Certificate Account, subject to some adjustments. JA1014. For the reasons just stated, the amounts are variable. There is thus no sum certain amount of "Available Funds."

Then, on the various Distribution Dates, the Trustee withdraws funds in the Distribution Account to distribute to Certificateholders. JA1073 (PSA § 3.08(b)). The Trustee proceeds to distribute the Distribution Account balance according to a payment "waterfall," making each type of payment in order until the funds are exhausted. JA1088-91 (PSA § 4.02). Again, there is no defined amount of distribution. The last class of Certificateholders receives "any remaining amount." JA1091.

Given that no sum certain is due to *any* Certificateholder, the failure to pay any Certificateholder a certain amount is not an Event of Default. *See* JA1109-11 (PSA § 7.01, defining conditions that cause an "Event of Default"). In this structure, the defining feature of debt—the right to receive a sum certain—simply does not exist with respect to PSA-governed securities.[10]

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[10] By contrast, securities governed by indentures *are* clearly debt. Unlike the PSA-governed securities, indenture trusts issue Notes that provide a right to a sum certain. The indenture provides that the Issuer (*i.e.*, the trust) "will duly and punctually pay the principal of the Principal Amount Notes and interest on the Interest Bearing Notes and other amounts payment on the Notes in accordance with the terms of the Notes and this Indenture." JA312 (Indenture, § 3.01). The failure to make a payment qualifies as an Event of Default, which occurs upon a "default by the Issuer in the payment of any interest on any Interest Bearing Note when it becomes payable, and the default continues for five days." JA324 (Indenture § 5.01(i)). For these reasons, the indentures expressly adopt the TIA in several ways. *See*, *e.g.*, JA303 (Indenture § 1.02 (incorporating TIA by reference and adopting TIA defini-

This understanding that Certificates have the fundamental characteristics of equity rather than debt is confirmed by the uniform view of scholars and commentators, who have agreed that pass-through certificates are exempt from the TIA because they are not debt. *See*, *e.g.*, *Mortgage-Backed Securities* § 6:70 (2014) ("Pass-through certificates, because they represent ownership of the underlying mortgages, are regarded as equity rather than debt and are not issued under a qualified indenture."); John Arnholz & Edward E. Gainor, *Offerings of Asset-Backed Securities* § 14.05[A] & nn.78-79 (2006) ("Section 304(a)(1) excludes equity securities from the TIA. Nearly every offering of securities structured as pass-through certificates is therefore exempt.").[11] So far as we are aware, no scholar or commentator *ever* has disagreed with this analysis. Accordingly, if Section 304(a)(2) does not exempt PSA-governed trusts from the TIA, Section 304(a)(1) does.[12]

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tions)), JA370 (Indenture § 11.07 (providing that the TIA governs in event of conflict)).

[11] Many others have reached the same result. *See*, *e.g.*, Tamar Frankel, *Securitization* § 12.26 (2d ed. 2005); Talcott J. Franklin & Thomas F. Nealon, *Mortgage & Asset Backed Securities Litigation Handbook* §§ 1:44, 4:36 (2012 update); Mortgage-Backed Securities § 6:67 (2012); Edward J. O'Connell & Emily Goodman, 981 Prac. Law Inst., *New Developments in Securitization 2004*, at 989; Frank J. Fabozzi, *Accessing Capital Markets Through Securitization* 238 (2001); Michael S. Gambro & Scott Leichtner, *Selected Legal Issues Affecting Securitization*, 1 N.C. Banking Inst. 131, 149 (1997).

[12] In concluding otherwise, the district court looked to dicta in other decisions that refer to PSA-governed certificates as "resembling debt." SPA9-10. *See*, *e.g.*, *Greenwich Fin. Servs. Distressed Mortg. Fund 3 LLC v. Country-*

3. Applying the TIA to PSA-governed certificates would lead to enormous practical difficulties in a major securities market.

Against this background, the plain text of the statute, instructive legislative history, the consistent guidance of the SEC, and the views of every commentator to have addressed the issue settle the question here. But if there is any doubt, it should be resolved by adopting the reading of the TIA that, for decades, has been uniformly followed by *all* participants in an enormous market. During that time, tens of trillions of dollars worth of securities have been created under PSA agreements, and—so far as we are aware—*none* of those securities was qualified under the TIA. Retroactively applying the TIA to these investment structures would radically upset long-settled expectations, with destructive and destabilizing practical consequences.

For one thing, finding the TIA applicable to PSA-governed trusts would impose unanticipated and often impossible obligations on thousands of people. TIA Section 303(12) defines an "obligor" as "every person (including a guarantor) who is liable" on an "indenture security." 15 U.S.C. § 77ccc(12). "[I]f such security is a certificate of interest or participation," the Obligor is

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wide Fin. Corp., 603 F.3d 23, 29 (2d Cir. 2010); *LaSalle Bank Nat'l Ass'n v. Nomura Asset Capital Corp.*, 424 F.3d 195, 200 (2d Cir. 2005). But none of these decisions examined the legal terms of any certificates in making that observation, and all were careful not to say that trust certificates actually *are* debt, let alone subject to the TIA.

"every person (including a guarantor) who is liable upon the security or securities in which such certificates evidences an interest or participation." *Id.* Under this definition, if the TIA applies, *every* homeowner who is a borrower on any one of the hundreds or thousands of loans in a PSA-governed trust is an Obligor within the meaning of the TIA.[13] Likewise, because a "guarantor" is also an "Obligor" under the TIA, any party that guaranteed any part of the trust, or any loan within the trust, would also qualify. This would include both issuers of private mortgage insurance for individual loans and the Federal Housing Administration (insofar as it acts as the guarantor of FHA-insured loans). *See*, *e.g.*, JA1076 (PSA § 3.09(c)).[14]

Applying the TIA and this set of duties to PSA-governed trusts would render them unadministrable. The TIA requires every Obligor to report the identity of the Certificateholders to the trustee at least every six months. 15 U.S.C. § 77*lll*(a) ("Each obligor upon the indenture securities shall furnish … to the institutional trustee thereunder at state intervals of not more than six months … all information in the possession or control of such obligor … as to the names and addresses of the indenture security holders …."). But the

[13] Indeed, the PSA defines a "Mortgagor" as "[t]he obligor(s) on a Mortgage Note." JA1030 (PSA § 1.01).

[14] BNYM as Trustee, however, cannot be an Obligor; Section 310(a)(5) states that "[n]o obligor upon the indenture securities … shall serve as trustee upon such indenture securities." 15 U.S.C. § 77jjj(a)(5).

mortgagee obligors here (*i.e.*, homeowners) and their mortgage insurers do not possess this information, nor could individual mortgagees possibly comply with this administrative burden. Nor could individual mortgagees be expected to provide regular reporting to the trustee (potentially to each Certificateholder) as to their compliance with the terms of the indenture, as Section 314 of the TIA requires of each Obligor. *Id.* § 77nnn(a).[15]

Imagining that the "trust" is the obligor creates its own problems, even beyond inconsistency with the statutory definition. For example, as common-law trusts, the PSA trusts consist of property that is legally owned by the Trustee. Section 310(a)(5), however, prohibits any party "directly or indirectly controlling … such obligor" from "serv[ing] as trustee." 15 U.S.C. § 77jjj(a)(5). No party could serve as trustee under the PSA without owning the trust corpus, but no party that owns the corpus could serve as trustee under the TIA.

Applying the TIA to PSA-governed trusts would also fundamentally upset the rights of certain Certificateholders. The TIA provides that a "majority in principal amount of the indenture securities" has certain rights, including the right to "consent to the waiver of any past default and its conse-

[15] With respect to the Indentures, the statutory trust itself is a legal entity that serves as the Obligor. *See* JA303 (Indenture § 102) (defining the "obligor" as the "Issuer"). But under a PSA-governed trust, there is no independent legal entity that could act as an Obligor.

quences." 15 U.S.C. § 77ppp(a)(1). When the TIA applies, by its terms it thus permits a majority of Certificateholders (such as senior holders) to require action adverse to the rights of others (such as junior holders). But the TIA also addresses this possible problem, expressly permitting a qualified indenture to prohibit bondholders from altering certain terms. *Id*. The PSAs, however, have no such provision, because no one imagined that the TIA would apply to them. Applying the TIA to the affected securities now therefore would give certain holders rights without including in the indenture a reservation to protect other holders. By contrast, the indentures for securitizations that were thought at the outset to be subject to the TIA do include a provision that expressly bars a majority of bondholders from altering the rights to payment held by other bondholders. JA331 (Indenture § 5.13).

Similarly, some of the PSAs require the "Principal" balance on certificates to be written down whenever the Master Servicer determines that part of the balance on a particular mortgage loan is non-recoverable. *See* JA1091-92, PSA § 4.02. This term is necessary to ensure that the amounts allocable to each Certificate class do not exceed the balances of the outstanding loans. Section 316(b) of the TIA, however, expressly *prohibits* the "impair[ment]" of "the right of any holder of any indenture security to receive payment of the principal of and interest on such indenture security." 15 U.S.C. § 77ppp(b).

Thus, application of the TIA may make it impossible for mortgage servicers to modify mortgage loans, because that would automatically "impair" Certificate principal. And it would also *require* the trustee to disregard the contractually-mandated writedowns every time a loan defaulted, wreaking havoc with the agreed-upon allocations among classes of Certificates.

These are just some of the practical consequences that would result from subjecting PSA-governed trusts to the TIA decades after the creation of the underlying instruments. The full, disruptive consequences are unforeseeable. In these circumstances, that there has been a "long time acceptance of a reasonable statutory interpretation, coupled with Congress's failure to reject the same," "'argues significantly' in favor" of the existing interpretation. *Harris v. Sullvan*, 968 F.2d 263, 265 (2d Cir. 1992). Absent unequivocal and compelling contrary direction in the text of the TIA, the Court should not upset settled expectations that have been relied upon by innumerable participants in the RMBS market.

B. The TIA May Not Be Applied Retroactively To Securities That The SEC Permitted To Issue Without TIA Qualification.

The analysis set out above is reason enough to find that the TIA does not apply in the circumstances of this case. But the Court also should reach that conclusion for the separate and additional reason that the PSA-governed securities at issue in this case were not issued in conjunction with a TIA-"qualified" indenture.

The SEC is vested with significant authority to determine whether a security must be "qualified" under the TIA. By giving the SEC this authority, Congress specifically designed the TIA so that parties could know *before* a security is sold whether it is subject to the provisions of the Act, avoiding the enormous practical problems that would follow from imposition of the TIA's requirements years after the fact. As a consequence, when the SEC permits issuance of securities without requiring a TIA-qualified indenture—as it did in this case—no claim under that Act is cognizable.

1. The scope of the TIA is limited to securities that have been issued in conjunction with a "qualified" indenture. Section 318(c) provides that only a "qualified indenture" is "deemed" to include the various protections of the TIA. 15 U.S.C. § 77rrr(c). Likewise, the provisions under which plaintiffs here sue—*i.e.*, Section 315, *see* JA984-86—specifically relate to indentures that are "qualified" under the Act. 15 U.S.C. § 77*ooo*.

The TIA sets forth a straightforward "qualification" process. With respect to securities that are registered under the '33 Act, Section 305 of the TIA requires the issuer to provide certain information in the registration statement that will allow the SEC to determine whether the TIA applies. 15

U.S.C. § 77eee(a); *see also* Loss, Seligman, & Paredes, *Securities Regulation* 12-22 (4th ed. 2013). If an issuer registers a security with an accompanying indenture that incorporates the TIA duties, that indenture (and thus the security itself) becomes "qualified" under the TIA once the security's registration statement becomes effective. 15 U.S.C. § 77iii(a)(1).

If an issuer registers a security and *does not* propose a TIA-qualifying indenture, Section 305 of the TIA *obligates* the SEC to block the security from issuing if it finds that the TIA applies. That is, if a security "is not to be issued under an indenture," but the Act applies, the SEC "*shall* issue an order prior to the effective date of registration refusing to permit such a registration statement to become effective." 15 U.S.C. § 77eee(b)(1) (emphasis added).[16] Indeed, the Senate Report accompanying the TIA explains that the SEC must "determine … whether the terms of such indentures conform to the standards prescribed by the [TIA]." S. Rep. No. 76-248, at 2. As a leading commentator has explained, the TIA thus "places upon the Commission (and, of course, the issuer) the sole responsibility for ascertaining that particular indentures actually conform to the statutory standards." Loss, Seligman, &

[16] With respect to securities that are *not* registered under the '33 Act, Section 307 requires the issuer to file an application for qualification with the SEC. 15 U.S.C. § 77ggg. In the context of these securities, Section 306 renders it unlawful for an issuer to sell a security without a TIA-qualified indenture if the Act applies. *Id.* § 77fff. Any violation of this provision creates a claim against the *issuer*, not the trustee.

Paredes, *Securities Regulation* 20. Once the SEC blocks issuance of a security under Section 305, the issuer must remedy the shortcomings identified by the SEC.

But if a security is registered *without* a TIA-qualifying indenture and the SEC permits that security to issue, it is, by definition, *not* "qualified" under the Act. *See* 6 Thomas Lee Hazen, *Treatise on the Law of Securities Regulation* § 19.5 (2013) ("In order to qualify under the Act, the trust indenture must contain certain required provisions."). The necessary implication is that the security is outside the scope of the TIA.

The TIA is structured this way for good reason: as we have noted, Congress recognized that "it would be difficult to correct inadequacies discovered after the indenture has been executed and some of the securities sold." S. Rep. No. 76-248, at 9. The "appropriate time" to correct any deficiencies in an indenture "is *before* the bonds are offered." *Id*. at 8 (emphasis added). In fact, the TIA expressly provides that a "subsequent rule or regulation on qualification" issued under the Act "shall not affect" a prior security. 15 U.S.C. § 77iii(c). As Congress recognized, it makes no sense—and it would create enormous practical problems—to rewrite the legal terms of a non-qualifying security years after its issuance.

2. This is not a novel conclusion. In *Vernon Johnson Family Ltd. P'ship v. Bank One Texas, N.A.*, 80 F. Supp. 2d 1127, 1131 (W.D. Wash. 2000), the plaintiffs purchased securities that were *not* qualified under the TIA at the time of issue; the issuer there, like the issuer here, regarded them as exempt. *Id*. The plaintiffs there—again, like plaintiffs here—argued "that the notes were not exempt" and thus *should have* been issued "under the ambit of the TIA." *Id*. But the court rejected this kind of after-the-fact analysis: Because the "notes were not qualified under the TIA," there was "no basis" for a TIA claim and thus no grounds to exercise federal jurisdiction under that Act. *Id*. As the court found, "[i]f plaintiffs are challenging the exempt status of the notes, that is not a claim against the indenture trustee, nor is it a claim arising under the TIA." *Id*. The same conclusion applies here.

3. If there is any doubt on this, the fact that any private cause of action under the TIA must be implied by the courts counsels in favor of narrowly construing the TIA's scope. "[I]t is settled that there is an implied cause of action only if the underlying statute can be interpreted to disclose the intent to create one." *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 164 (2008). But here, the text of the TIA creates no gen-

eral private cause of action,[17] and the legislative history suggests that Congress believed it unnecessary to create a private TIA right of action because the Act's protections would be enforced as a matter of contract law. *See* S. Rep. No. 76-248, at 2 ("After the indenture has been executed it will be enforceable only by the parties, *like any other contract*." (emphasis added)); Hearings Before a Subcommittee of the H. Comm. on Interstate and Foreign Commerce, 75th Cong. 23 (Apr. 25, 1938) (statement of Chairman William O. Douglas, Securities and Exchange Commission) (explaining that a TIA-qualified indenture is enforced as a contract).[18] Whether or not the TIA nev-

[17] The TIA *does* create a limited express private cause of action with respect to false or misleading statements made to the SEC in connection with administration of the TIA (15 U.S.C. § 77www), which strongly suggests that Congress did not intend to create a private cause of action with respect to the balance of the Act. *Touche Ross & Co. v. Redington*, 442 U.S. 560, 571-72 (1979) (Where a provision is "flanked by" other provisions that do "explicitly grant private causes of action," it is "[o]bvious[]" that, "when Congress wished to provide a private damage remedy, it knew how to do so and did so expressly.").

[18] Prior to *Stoneridge* and *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001), the Third Circuit implied a private right of action under the TIA with respect to a security that *was* TIA-qualified. *See Zeffiro v. First Pa. Banking & Trust Co.*, 623 F.2d 290, 292 (3d Cir. 1980). In 1990, Congress amended the TIA and purported to codify *Zeffiro*'s holding. *See* S. Rep. No. 101-155 (1989). But that Act simply amended the jurisdictional provision of the statute to provide concurrent state and federal jurisdiction for "any liability *or duty* created by this subchapter." *See* Securities Acts Amendment of 1990, Pub. L. No. 101-550, § 418, 104 Stat. 2713 (emphasis indicating addition by amendment). More than a decade earlier, however, the Supreme Court considered *identical* jurisdictional language in the Securities Exchange Act of 1934 and held that it does *not* establish a private cause of action: "The source of plaintiffs'

ertheless should be thought to create an implied private cause of action in some circumstances, the caution with which the Court must approach implied causes of action generally provides a further basis to preclude suit under the TIA regarding securities that never were "qualified" under the Act: "Concerns with the judicial creation of a private cause of action caution against its expansion." *Stoneridge*, 552 U.S. at 165.

4. This understanding does not leave investors without remedies if they believe that the SEC erred in permitting PSA-governed securities to issue without "qualifying" under the Act. The TIA itself provides that an aggrieved party may seek judicial review of an SEC order. 15 U.S.C. § 77vvv(a). Moreover, if investors believe that the SEC improperly failed to require qualification under the TIA, they may pursue an action against the Commission pursuant to the Administrative Procedures Act. The APA authorizes suit by "[a] person suffering legal wrong because of agency action" (5 U.S.C. § 702), defines "agency action" to include a "failure to act" (*id.* § 551(13)), and provides that the reviewing court shall "compel agency action unlawfully withheld." *Id.* § 706(1). *See Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 64

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rights must be found, if at all, in the substantive provisions of the 1934 Act which they seek to enforce, not in the jurisdictional provision." *Touche Ross & Co.*, 442 U.S. at 577. This history leaves unclear whether it is appropriate to imply a right of action under the securities that are "qualified" under the Act, and says nothing about this case, where the securities were not "qualified" under the Act.

(2004). Accordingly, if plaintiffs think that the SEC should require PSA-governed certificates to qualify under the TIA, they have legal avenues to pursue that relief.

5. The securities at issue here were never "qualified" under the TIA and, accordingly, were not accompanied by any "indenture" containing the TIA-required terms. Plaintiffs may not now demand that the terms of these securities be rewritten years after they issued.

In issuing the securities at the heart of this suit, Countrywide filed registration statements with the SEC. *See*, *e.g.*, JA999; *see also* Registration Statement on Form S-3 Under the Securities Act of 1933 (Feb. 7, 2006); Form 8-K, Alternative Loan Trust 2006-OA3 (Mar. 31, 2006); Free Writing Prospectus, Alternative Loan Trust 2006-OA3 (Mar. 31, 2006). Although these documents revealed the full structure of the PSAs, and although the SEC has a duty under Section 305 to block securities that should be, but are not, accompanied by a "qualified" TIA indenture, the SEC permitted the issuance and sale of these securities without any such indenture. The securities, accordingly, fall outside the plain scope of the TIA—and plaintiffs can have no claim under the Act at all.

II. The Plaintiffs' Personal Claims Regarding Fifteen Trusts Do Not Confer "Class" Standing To Sue With Respect To 519 Other Trusts.

Plaintiffs in this case also are wrong in making the independent argument, advanced in their opening brief, that they have standing to assert claims regarding the management of trusts that they did not purchase, that they never owned, that did not injure them, and that differ in material respects from the trusts in which they *did* have an ownership interest. Plaintiffs actually invested in, and assert losses relating to, fifteen trusts; but they also purport to sue on behalf of the owners of 519 *other* materially different trusts. No court ever has permitted plaintiffs to advance claims in such extraordinary circumstances.

Plaintiffs' argument to the contrary rests entirely on a distortion of this Court's decision in *NECA-IBEW Health & Welfare Fund v. Goldman Sachs & Co.*, 693 F.3d 145 (2d Cir. 2012).[19] But the Court there was careful to limit its holding to preclude precisely the sort of expansive claims, untethered to the plaintiffs' experience, that are asserted here. In this case, the injuries al-

[19] Plaintiffs also invoke *New Jersey Carpenters Health Fund v. Royal Bank of Scotland Group, PLC*, 709 F.3d 109, 114 (2d Cir. 2013). *See*, *e.g.*, Policemen Br. 24. But that decision, which considered claims nearly identical to those in *NECA* and did not resolve the standing issue, adds nothing to the inquiry in this case. Indeed, the Court there emphasized the close factual inquiry necessary to determine whether differences in the nature of the claims made class standing inappropriate. *Id.* at 128.

legedly suffered and the nature of the claims that could be asserted by investors in the 519 trusts in which plaintiffs had no ownership interest "ha[ve] the potential to be very different" (*id.* at 163) from plaintiffs' personal claims—the very circumstance where boundless standing is impermissible. Plaintiffs' argument to the contrary runs afoul both of fundamental principles of standing and of the specific holding of *NECA*.

A. A Plaintiff Has Class Standing When, And Only When, A Ruling For The Plaintiff On His Or Her Personal Claim Necessarily Also Will Establish The Class Members' Claims.

As a general matter, standing has three elements: a plaintiff must prove (a) "injury in fact," (b) which is "fairly traceable to the challenged action of the defendant," and is (c) "redress[able]." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (quotations and alterations omitted). It is fundamental to Article III that "a plaintiff must demonstrate standing for each claim he seeks to press." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006). Critically, "'[t]hat a suit may be a class action … adds nothing to the question of standing.'" *Lewis v. Casey*, 518 U.S. 343, 357 (1996).[20]

[20] Permitting the class action device to expand the standing of the parties would depart from the Rules Enabling Act, which forbids a Federal Rule from "abridg[ing], enlarg[ing] or modify[ing] any substantive right." 28 U.S.C. § 2072(b). If the addition of class-action allegations to a complaint permits a plaintiff who holds a claim against a defendant to assert an *additional* non-identical claim, the class action device of Rule 23 would alter a plaintiff's substantive rights. Rule 23, however, "must be interpreted with fi-

Against this background, the Supreme Court has held that a putative class plaintiff has standing to pursue claims on behalf of a class only insofar as each member of the class suffered the *same* injury and possesses the *same* interest. "[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) (emphasis added). To have standing as a putative class representative, the plaintiff must not only "suffer the *same* injury shared by all members of the class he represents," but he or she must also "possess the *same* interest." *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 216 (1974) (emphasis added).

The Court found that to be the case in *Gratz* v. *Bollinger*, 539 U.S. 244 (2003), where the plaintiff had standing to challenge racial preferences that applied to both freshman and transfer applicants because the defendant university had a "singular policy" of using race in admissions to promote diversity. *Id.* at 267-68. Because this policy was "*identical*" for both "transfer applicant[s]" and "freshman applicants," a ruling for the plaintiff necessarily would establish that the university's policy was constitutionally defective as

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delity to the Rules Enabling Act." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 629 (1997).

applied to *all* applicants. The plaintiff therefore could represent all class members affected by this single policy. *Id*.

But the limits of this principle are demonstrated by *Lewis* and *Blum*. In *Lewis*, a prisoner with standing to challenge inadequacies in prison services for illiterate prisoners who sought to file court papers lacked standing to litigate class claims challenging other alleged failures to facilitate court filings. 518 U.S. at 357-58. Likewise, 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. In each case, "'[a] plaintiff who ha[d] been subject to injurious conduct of one kind'" did 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.'" *Plumbers' Union Local No. 12 Pension Fund v. Nomura Asset Acceptance Corp.*, 632 F.3d 762, 771 (1st Cir. 2011) (quoting *Blum*, 457 U.S. at 999).

The lesson of these decisions is that, for a plaintiff to have class standing, he or she must stand in the shoes of the absent class members in every material respect. That was the case in *Gratz* because, by prevailing on his personal claim, the plaintiff there necessarily would establish that the university's defense of its singular policy of racial preferences was defective as applied to *any* applicant; the plaintiff in *Gratz* challenged the "sole rationale" the university used to defend its policy of racial preferences as it applied to both freshman and transfer applicants. 539 U.S. at 267. But class standing was rejected in *Lewis* and *Blum* because, despite general similarities between the individual and class claims, a victory by the plaintiff on his individual claim in those cases would not, by itself, be sufficient to establish the class members' right to prevail on claims that differed in character; so far as the individual plaintiffs were concerned, those class claims lacked "'immediacy and reality.'" *Blum*, 457 U.S. at 1001 (quoting *Golden v. Zwickler*, 394 U.S. 103, 108 (1969)).

B. *NECA* Demonstrates That Plaintiffs Lack Standing To Press Claims Against Trusts In Which They Did Not Invest.

1. NECA *precludes class standing when there are material differences between the class plaintiffs.*

NECA was decided in this context. This Court there recognized both that there was "'tension'" in the Supreme Court's holdings on the application of class standing rules (693 F.3d at 160 (quoting *Gratz*, 539 U.S. at 263 n.15)) and that "constitutional litigation seeking injunctive relief [*i.e.*, in *Gratz*] does not map all that neatly onto statutorily based securities litigation seeking monetary damages." *Id*. at 162. But—in a holding that courts have criticized as pushing standing doctrine beyond the limits recognized by the Supreme Court[21]—this Court indicated that a plaintiff may have class standing if he or she experienced conduct that "implicates 'the same set of concerns' as the conduct alleged to have caused injury to other members of the putative class by the same defendants." *Id.* Having said that, however, the Court quickly added that determining whether even "identical [false] statements" *do* "implicate[] the same set of concerns" in a given case may be "hard[] to answer," and that even when the defendant's conduct is "the same" as to each potential class member—for example, "the making of a false or misleading statement" to each—"[w]hether that conduct implicates the same set of concerns for distinct sets of plaintiffs … will depend on the nature and content of the specific misrepresentation alleged." *Id.*

In *NECA*, the Court addressed that question in a specific setting, where the plaintiffs asserted claims involving numerous trusts but the same assertedly false statement was directed at each injured party. In particular, NECA brought suit regarding MBS trusts that several Goldman Sachs entities had marketed and sold under seventeen different offerings. *NECA*, 693

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[21] One court concluded that, "consistent with the majority of federal courts outside the Second Circuit," it "does not find the court's decision in *NECA–IBEW* persuasive." *FDIC v. Countrywide Fin. Corp.*, 2012 WL 5900973, at *12 (C.D. Cal. 2012); *see also Nat'l Credit Union Admin. Bd. v. Goldman Sachs & Co.*, 2013 WL 3020373, at *2 (C.D. Cal. 2013) ("This Court shares its colleague's disagreement with the Second Circuit's decision in *NECA-IBEW*"); *FDIC v. Banc of Am. Secs. LLC*, 2013 U.S. Dist. LEXIS 40726, at *24-27 (C.D. Cal. 2013).

F.3d at 149. Although NECA purchased Certificates in only two of those seventeen trusts, it sought to represent a class including purchasers of all seventeen. *Id*.

All seventeen securities were issued under a *single* Shelf Registration Statement in which Goldman Sachs made several assertedly false representations, "including the types of securities to be offered and a description of the risk factors of the offering." *NECA*, 693 F.3d at 150.[22] Although the "Shelf Registration Statement" was supported by "a unique Prospectus Statement" for each individual offering (*id*. at 151), the focus of NECA's allegations was on the uniform Shelf Registration Statement: NECA "argue[d] that the single Shelf Registration Statement common to all the purchasers' Certificates was 'rife with misstatements,'" that each assertedly false "Prospective Supplement" "was 'expressly incorporated' into the same false and misleading Shelf Registration Statement," and that "'the common [Shelf] Registration Provides the glue that binds together the absent Class Members' purchases of certificates.'" *Id*. at 157. NECA alleged that these false statements amounted to material misrepresentations in violation of Sections 11, 12(a)(2) and 15 of the '33 Act regarding all seventeen trusts, provisions

[22] "The shelf registration process enables qualified issuers to offer securities on a continuous basis by first filing a shelf registration statement and then subsequently filing separate prospectus supplements for each offering." *NECA*, 693 F.3d at 150.

that create strict liability for false statements in securities offerings. *Id*. at 148.

But those allegations, even coupled with strict-liability claims, were not enough to give NECA standing to bring suit regarding all seventeen trusts. Instead, the Court insisted on a closer and more nuanced review of NECA's specific allegations to determine whether it really was situated identically to absent class members who might assert claims relating to other trusts.

Because the misconduct at issue was Goldman Sachs' alleged misrepresentation of the underwriting standards used by the loan originators, proving those claims would "center on whether the particular originators of the loans backing the particular Offering … had in fact abandoned its underwriting guidelines, rendering defendants' Offering Documents false or misleading." *NECA*, 693 F.3d at 163. The loans in the two trusts in which NECA invested were originated by GreenPoint and Wells Fargo. *Id*. at 153. Loans in the other trusts were originated by a variety of loan originators, including not only GreenPoint and Wells Fargo, but also Countrywide and others. *Id*.

Against this background, because NECA had invested in trusts containing loans originated by GreenPoint and Wells Fargo, to prevail on its *own* claims NECA had to prove that Goldman Sachs misrepresented the underwriting standards used by those lenders. If NECA established this, because Goldman Sachs made the same statement regarding *all* trusts, NECA would *necessarily* also have proven a claim relating to the other trusts containing only GreenPoint or Wells Fargo loans. That is, success on NECA's claim was alone sufficient to establish liability against Goldman Sachs for its conduct with respect to the five other trusts that contained loans originated by GreenPoint or Wells Fargo. As to these trusts, the Court found that "NECA's claims raise a sufficiently similar set of concerns to permit it to purport to represent Certificate-holders from those offerings." *NECA*, 693 F.3d at 164.

With respect to the ten trusts that did *not* contain loans originated by GreenPoint or Wells Fargo, however, the Court reached a very different conclusion. To prevail as to those trusts, plaintiffs would have to introduce evidence that *other* originators had underwriting standards that differed from Goldman's representations. "That is because, to the extent the representations in the Offering Documents were misleading with respect to one Certificate, they were not necessarily misleading with respect to others. Thus, while the alleged injury suffered by each Offering's Certificate-holder may 'flow from' the same Shelf Registration Statement or from nearly identical misstatements contained in different Prospective Supplements, each of those alleged injuries has the potential to be very different—and could turn on very different proof." *NECA*, 693 F.3d at 163. The securities in these trusts, accordingly, "were sufficiently different in character and origin" that NECA lacked standing to assert these claims (*id.* at 164)—and this was so even though the '33 Act "impose[s] essentially strict liability for material misstatements contained in registered securities offerings." *Id.* at 148, 151.

The Court thus found that NECA had class standing to pursue a claim against the five trusts where (1) the claims against the trust were identical to its own and (2) the same evidence would be used to prove those claims, so that success on NECA's claim would *necessarily* establish a claim against the other trusts. But NECA lacked standing where those characteristics were not present.

2. Under NECA*, plaintiffs lack standing to bring claims relating to securities they never purchased.*

Under this framework, plaintiffs here lack standing to pursue claims involving the 519 trusts in which they had no ownership interest. Plaintiffs cannot allege that BNYM committed the *same* misconduct with respect to each trust because, even if similar in a general sense, BNYM's duties to each trust turn on the particulars of that trust. By the same token, proof of plaintiffs' claims against BNYM would involve different evidence for each trust.

For these reasons, the reasoning of *NECA* demonstrates that plaintiffs lack standing to sue beyond their own investments.

a) Plaintiffs' claims must be assessed on a trust-by-trust basis.

1. In *NECA*, Goldman Sachs issued a *single* allegedly false Shelf Registration Statement concerning loan registration policies that applied to *each* trust and, insofar as the loans were originated by the same entity, "would infect the debt issued from every offering in like manner." 693 F.3d at 163. This case, however, is quite different. Instead of a strict liability claim for a misrepresentation, plaintiffs here bring three kinds of claims relating to BNYM's alleged duties as trustee: violations of the TIA, breach of contract, and breach of common law duties (such as breach of a fiduciary duty). *See* Policemen Br. 8-9. Plaintiffs assert three general theories of how BNYM breached these duties: that BNYM (1) failed to give notice to Certificateholders of alleged events of default by Countrywide; (2) failed to require Countrywide to repurchase defective loans following alleged events of default; and (3) permitted document deficiencies with respect to loans contained within the hundreds of trusts. *Id*. at 6-9.

Unlike *NECA*, there is no single statement or action that applies to each of the 534 trusts against which plaintiffs attempt to assert claims. Rather, these claims turn on thousands of different, unique actions (or, as plaintiffs may allege, inactions) with respect to BNYM's administration of the hundreds of different trusts. In fact, the scope of BNYM's duties—and thus the possible allegations against BNYM—*must* turn on a trust-by-trust analysis, which itself requires a loan-by-loan inquiry.

As plaintiffs acknowledge, the vast bulk of the misconduct they allege against BNYM requires, as a predicate, the occurrence of a trust-specific "Event of Default." Certain alleged violations of the TIA require a showing of an Event of Default, as defined in the PSA. For example, Section 315(c) of the TIA (which plaintiffs assert at JA985-86, SAC ¶ 116), imposes a prudent-person duty only when there is a "default," as "such term is defined in such indenture." 15 U.S.C. § 77*ooo*(c). Likewise, plaintiffs assert a breach-of-contract claim, again recognizing that the contractual duties hinge on the occurrence of an Event of Default. Policemen Br. 8-9; JA987-88 (SAC ¶¶ 121-25). And, with respect to plaintiffs' common-law claims, those too turn on an Event of Default as defined by the indenture. *See Meckel v. Cont'l Res. Co.*, 758 F.2d 811, 816 (2d Cir. 1985); *Lorenz v. CSX Corp.*, 1 F.3d 1406, 1415 (3d Cir. 1993); *Elliott Assocs.*, 838 F.2d at 71 ("It is … well-established under state common law that the duties of an indenture trustee are strictly defined and limited to the terms of the indenture.").

Whether an Event of Default that triggered BNYM's obligations (and a possible breach of duty) occurred requires a trust-by-trust inquiry. With respect to PSA-governed trusts, Section 7.01(ii) of the PSA defines Events of Default as "any failure," other than failure to make certain required payments, "by the Master Servicer to observe or perform in any material respect any … covenants or agreement on the part of the Master Servicer" regarding that trust, that persist for 60 days *after* notice has been provided to the Master Servicer. JA1109. Accordingly, an Event of Default as defined by the PSA could take place—and potentially actionable duties on the part of BNYM could exist—only after, among other things, certain notices are provided to the Master Servicer for a *particular* trust.

Although such a notice may be provided by the Trustee or Certificateholders representing 25% or more of the voting rights (JA1109, PSA § 7.01(ii)), plaintiffs cannot argue that BNYM had a roving obligation to ferret out Countrywide's asserted misconduct. Under the PSA, the "Trustee shall not be bound to make any investigation into the facts or matters" relating to the Trust "unless requested in writing so to do" by either an Insurer or Certificateholders representing 25% or more of the voting rights. JA1114-15 (PSA § 8.02(iv)). Moreover, "the Trustee shall not be deemed to have knowledge of an Event of Default until a Responsible Officer of the Trustee shall have received written notice thereof." JA1115 (PSA § 8.02(viii)).[23] Thus, plaintiffs cannot evade this limitation by arguing that BNYM should have found an Event of Default as to *all* trusts—or, for that matter, any trust—based on "news reports and publicly available legal filings." Policemen Br. 43-44.

A trust-specific inquiry also is necessary for the eighteen trusts that are governed by indentures. For these trusts, a failure by the Master Servicer generally does *not* qualify as an "Event of Default." JA324 (Indenture § 5.01). Instead, the indenture (because it issues debt in the form of notes) defines an Event of Default in terms of failure by the Issuer to make payments to Noteholders. *Id*. Whether there has been an "Event of Default" with respect to these trusts must therefore turn on a trust-by-trust analysis to determine if there has been a payment shortfall.

On the face of it, plaintiffs do not assert any strict liability duty, the breach of which would "infect the debt issued from every offering in like manner." *NECA*, 693 F.3d at 163. To the extent that BNYM's asserted failures to act as to certain trusts could be actionable, "they were not necessarily

[23] This is for good reason: under New York law, the duties of a corporate trustee are quite limited prior to an Event of Default; if a trustee *did* have a duty to monitor the activity of the loan originator and/or master servicer, that obligation would vastly increase both administrative costs and risks to the trustee, drastically increasing the transaction costs for the parties to the security. *See*, *supra*, 4-7.

[actionable] with respect to others." *Id*. The duties BNYM holds can only be assessed on a trust-by-trust basis.

Consequently, unless the plaintiffs' claims here are stated at an incomprehensibly high level of generality (*e.g.*, the defendant "made inaccurate statements" or "failed to fulfill its obligations"), the class allegations here do not implicate "the same set of concerns for distinct sets of plaintiffs." *NECA*, 693 F.3d at 162. There are, accordingly, no allegations of *common* misconduct in the relevant sense. As Judge Forrest properly concluded, "the structure of the Trusts means that a breach of the Trustee's duties with respect to one Trust does not necessarily implicate the same 'set of concerns' that certificate-holders in another Trust would have." *Policemen's Annuity & Benefit Fund v. Bank of Am., NA*, 907 F. Supp. 2d 536, 547 (S.D.N.Y. 2012) ("*Bank of America I*").[24]

2. In arguing to the contrary, plaintiffs err in three critical ways.

First, attempting to shoehorn this case into the *NECA* framework, plaintiffs argue that the representations contained "in the Governing Agreements here" are comparable to "the offering documents in *NECA*." Po-

[24] Applying *NECA*, another district court arrived at the same result as the court below. *See Bank of Am. I,* 907 F. Supp. 2d at 546-47. Plaintiffs, by contrast, rely on *Oklahoma Police*, 291 F.R.D. at 58-60, which found that a plaintiff that invested in two trusts had standing to sue a trustee with respect to twelve others. We explain throughout our analysis the errors made in *Oklahoma Police*.

licemen Br. 35. In *NECA*, however, the allegedly false offering documents were written *by the defendant Goldman Sachs* and, if indeed false, engendered strict liability for the defendant. *NECA*, 693 F.3d at 148. By contrast, as plaintiffs themselves acknowledge, the claimed misrepresentations here (in the Governing Agreements) were made "*by Countrywide*." Policemen Br. 4 (emphasis added). BNYM, the actual defendant here, did *not* make representations (false or otherwise) in the Governing Agreements. *See id.* at 8-9; JA985-90. Thus, as Judge Forrest explained in a parallel case, "whether the originators complied with their underwriting guidelines in originating the loans underlying the Trusts" "is certainly not" "the focus of the 'nature' of this action." *Bank of Am. I*, 907 F. Supp. 2d at 546 n.10.

Second, plaintiffs revert to boilerplate when they repeatedly assert in conclusory terms that BNYM breached the "same obligations" to all class members through a "common course of culpable inaction" regarding "similar" trusts. Policemen Br. 41, 43, 46. But that is no different from what the plaintiffs said in *NECA*, regarding the insupportable and rejected claims in that case, to the effect that Goldman Sachs breached the "same duty" (to tell the truth) in the "same way" (by misstating loan origination policy) for trusts that were "substantially similar" (because assembled under the same shelf registration by the same underwriter). Stated at that level of generality, such allegations and labels are chimerical. Plaintiffs may purport to advance claims of the same general sort as to each trust, but (as also was true of the claims held inadequate in *NECA*) whether such claims have merit necessarily will turn on the particular characteristics of each individual trust. A contrary rule would make class standing practically universal in every case.[25]

Third, plaintiffs point to BNYM's settlement with Countrywide, which they characterize as showing that "BNYM has also admitted to the substantial similarity of its duties and authority in the Settlement Action." Policemen Br. 42-43. But this confuses two very different things. That claims brought by BNYM and investors against Countrywide have certain common characteristics relevant to a settlement of potential suits *against Countrywide* arising out of Countrywide's flawed loan origination policies says nothing as to the critical question here: whether the circumstances of each trust administered by BNYM were identical in ways that triggered BNYM's obligations to investors in each trust.

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[25] Plaintiffs' reliance on *Oklahoma Policemen* for this point (Br. 41, 44, 50) is unavailing because that court did not recognize that the scope of a trustee's duty necessarily turns on trust-specific facts, like the occurrence of an Event of Default. For that reason, it *cannot* be the case that plaintiffs "allege[] the same breaches by the trustee relating to each of the Covered Trusts." *Okla. Police*, 291 F.R.D. at 59.

b) Because plaintiffs' claims turn on an analysis of the loans in each trust, the evidence to prove those claims differs as to each individual trust.

Not only are the duties different across trusts, but plaintiffs would be required to present very different proof with respect to each trust. For this reason, too, plaintiffs lack class standing under *NECA*.

1. Plaintiffs contend that individual loans in each RMBS were defective—because the loans breached Countrywide's various "Representations & Warranties" (Policemen Br. 16-20) or because the loans had document deficiencies (*id.* at 20-21). Plaintiffs assert that BNYM should have responded to these issues differently than it did, and further that BNYM's conduct allegedly decreased the value of these trusts. *Id.* at 17-22.

To prove these claims, plaintiffs would have to produce loan-specific evidence for *each* trust demonstrating, among other things, (1) that the trust in fact contained individual loans that breached representations and warranties,[26] (2) that the trust contained individual loans that had defective loan documents,[27] (3) that BNYM had notice or knowledge of each individual loan that breached a representation and warranty or had defective loan documen-

[26] Each loan is subject to 50 or more different representations or warranties.

[27] This includes considering whether each individual file contains the note, the mortgage, and the title insurance policy; whether the note is original; whether the mortgage is recorded; and whether any necessary endorsements and assignments were made.

tation, (4) the number and proportion of defective loans in each trust, (5) the severity of those loan defects for each trust, (6) the extent to which the value of each individual trust was impaired, (7) how BNYM should have responded to a trust with those specific characteristics, and (8) the extent to which BNYM could have, but did not, enhance the value of each particular trust.

This cannot be a one-size-fits all determination; evidence as to the loans in one trust does not establish—and certainly does not *necessarily* establish—the state of an entirely separate corpus of loans in a different trust. That is so because "loan defaults" in one trust "will not 'infect' the value of certificates issued" by a different trust. *Bank of Am. I*, 907 F. Supp. 2d at 547. A mortgage loan exists only in a *single* trust; proof relating to one mortgage loan therefore says nothing about the status of loans in *another* trust. Plaintiffs' claims, accordingly, require analysis of the loans in each trust.[28]

And it is apparent on the face of the trusts that the loans in one differ substantially from those in the others. These loans differ in rate; in date of maturity; in location of the underlying property (*e.g.*, California, Florida, or

[28] Plaintiffs point to *Oklahoma Police*, 291 F.R.D. at 60 (Br. 51), which suggested that *NECA* "did not require that the loan defaults in one trust 'infect' the value of the loans in another trust for there to be class standing." But that misses the critical point of *NECA*. It was not that the *loan defaults* would infect other trusts, but that the proof essential to the plaintiffs' claim—failure to adhere to underwriting standards—*would* apply equally to every trust. That consideration was central to *NECA*, but is missing here.

elsewhere); in type (*e.g.*, adjustable rate mortgage or home equity); and so on. *See*, *e.g.*, Alternative Loan Trust 2006-OA3 (JA999); Free Writing Prospectus, Alternative Loan Trust 2006-OA3 (Mar. 31, 2006); CWHEQ Home Equity Loan Trust Series 2006-S7 (*see* JA994); Free Writing Prospectus, CWHEQ Home Equity Loan Trust, Series 2006-S&, Reg. File No. 333-132375 (Dec. 4, 2006). Accordingly, as with the trusts where this Court rejected standing in *NECA*, litigating the claims as to the fifteen trusts in which plaintiffs here assert losses would "turn on very different proof" than litigating claims against the additional 519 trusts. *NECA*, 693 F.3d at 163.

2. Plaintiffs again strain to make this case fit *NECA* by arguing that the commonality of loan originators is the operative fact (*i.e.*, GreenPoint and Wells Fargo in *NECA* and Countrywide here). *See*, *e.g.*, Policemen Br. 38. They argue that "the commonality … of the underlying loan originators is equally important here in providing the 'glue' that gives *all* MBS holders a common interest." *Id.* at 37; *see also id.* at 36 ("[c]ommonality of [l]oan [o]riginators"); *id.* at 39 ("the commonality of loan originators across multiple offerings is the most important factor"). But this is sleight-of-hand.

In *NECA*, because Goldman Sachs made representations about the *lending standards* used by loan originators, the proof in that case concerned the standards actually employed by those originators. For example, because

Goldman Sachs represented that the loan originator "applies the underwriting standards to evaluate the borrower's credit standing and repayment ability" and "makes a determination as to whether the prospective borrower has sufficient monthly income available" (*NECA*, 693 F.3d at 151 (quotation omitted)), proof that GreenPoint or Wells Fargo *did not* adhere to these procedures would render that statement false and the defendants strictly liable. *Id.* at 164. That statement would be false for *every* trust that contained GreenPoint or Wells Fargo loans because, by hypothesis, those loans were not based on use of the advertised standard. *Id.* Thus, contrary to the plaintiffs' suggestion (Br. 37), NECA did not have to show that *individual* loans were deficient.

Here, however, the question *is* the quality of *individual loans* in each particular trust (*see*, *e.g.*, Policemen Br. 6)—not whether Countrywide, as a matter of policy, did or did not adhere to certain underwriting standards. Unlike Goldman Sachs (the underwriter and issuer in *NECA*), BNYM as trustee made no representations regarding the underwriting standards used by Countrywide. Indeed, as Judge Forrest explained, "the question of whether the originators complied with the underwriting guidelines may not even be addressed where the Court is looking at what the *Trustee* itself did." *Bank of Am. I*, 907 F. Supp. 2d at 546 n.10.

Considering that there are hundreds or thousands of individual loans within each trust, plaintiffs' suit here involving 534 different trusts seeks to put at issue the quality of approximately 1.6 million loans. The difference between this case and *NECA*, where proof that the loan originator used procedures other than those represented by Goldman was *sufficient* to show a claim, is manifest.

3. In fact, plaintiffs implicitly recognize both the need to analyze the individual loans within each trust and the impossibility of doing so in one lawsuit. Acknowledging that this kind of claim often leads a defendant to argue that "a loan-by-loan reunderwriting review" is necessary, plaintiffs assert that they may use statistical sampling across trusts. Policemen Br. 38 n.9. This argument, however, serves only to highlight *why* plaintiffs lack standing.

First, plaintiffs' argument misunderstands *NECA*. There, the evidence that would be used to support NECA's individual claim—that GreenPoint or Wells Fargo failed to adhere to the advertised underwriting standards—was *identical* to what would be used to prove claims against different trusts containing loans from those originators. Not so here. To prove claims involving trusts in which plaintiffs never invested in this case, the evidence they would have to employ, whether or not based on statistical sampling, would have to be drawn from the individual loans in *other* trusts. Unlike in *NECA*, it cannot be the case here that adjudication of plaintiffs' claims as to the trusts in which they actually had an interest would be *sufficient* to prove claims against additional trusts.

Second, plaintiffs' authority on this point demonstrates why its argument fails. In *Assured Guaranty Municipal Corp. v. Flagstar Bank, FSB*, 920 F. Supp. 2d 475, 481 (S.D.N.Y. 2013), the district court embraced statistical sampling with respect to loans *within two specific trusts*. *Id*. at 478. (There, the expert sampled 800 loans for 2 trusts (400 loans per trust, *id*. at 486), compared to the 2,000 loans that plaintiffs propose they will sample for 534 trusts (3.75 loans per trust), Policemen Br. 38 n.9.) Approving the use of statistical sampling to determine the frequency of loan deficiencies in a *single* trust says nothing about using sampling to assess hundreds of *other* trusts. Different trusts have vastly different compositions (some, for example, are weighted to specific parts of the country, others are weighted to particular home values), and *Assured Guaranty* provides no basis at all to approve use of statistical sampling in the dramatically different circumstances here.

Third, plaintiffs miss the fundamental purpose of the standing inquiry. The question for standing is not whether a claim is *capable* of class-wide adjudication, in the sense that the class plaintiff could mechanically assemble the necessary evidence. If that were sufficient, class standing would have existed in *Lewis* and *Blum*. Instead, the issue is whether a putative class plaintiff has a sufficient "*personal* stake in the outcome of the controversy." *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009) (emphasis added). Plaintiffs' suggested invention of a statistical sampling model solely for the purpose of bringing claims against hundreds of trusts in which they never invested shows, in the starkest of terms, why claims against those trusts do not "raise a sufficiently similar set of concerns." *NECA*, 693 F.3d at 164.

CONCLUSION

The Court should reverse the Order below with respect to the Trust Indenture Act and conclude that the TIA does not apply to securities governed by PSAs. The Court should affirm the district court's ruling that plaintiffs lack standing to sue BNYM with respect to securities that they did not purchase.

Respectfully submitted,

/s/ Charles A. Rothfeld

Charles A. Rothfeld
Paul W. Hughes
Mayer Brown LLP
1999 K Street NW
Washington, DC 20006
(202) 263-3000

Matthew D. Ingber
Christopher J. Houpt
Mayer Brown LLP
1675 Broadway
New York, NY 10019
(212) 506-2500

Counsel for The Bank of New York Mellon

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

Pursuant to Fed. R. App. P. 32(a)(7)(C), undersigned counsel certifies that this brief:

(i) complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i) because it contains 16,490 words, including footnotes; and

(ii) complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6).

/s/ Charles A. Rothfeld
Charles A. Rothfeld

CERTIFICATE OF SERVICE

I certify that on January 9, 2014, I served the foregoing Opening Brief of Appellee – Cross-Appellant BNYM on all counsel via the Court's ECF system.

Dated: January 9, 2014

/s/ Charles A. Rothfeld
Charles A. Rothfeld
Mayer Brown LLP
1999 K Street NW
Washington, DC 20006