No. 12-528

IN THE

Supreme Court of the United States

GOLDMAN, SACHS & CO., *et al.*,
Petitioners,

v.

NECA-IBEW HEALTH & WELFARE FUND,
Respondent.

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

BRIEF OF THE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION AND THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*

The Securities Industry and Financial Markets Association ("SIFMA") and the Chamber of Commerce of the United States of America (the "Chamber") submit this brief as *amici curiae* in support of the petition for a writ of certiorari filed by Goldman, Sachs & Co., Goldman Sachs Mortgage Company, GS Mortgage Securities Corp. ("GS Mortgage"), and certain current and former officers of GS Mortgage.[1]

SIFMA is a securities industry trade association that brings together the shared interests of hundreds of securities firms, banks, and asset managers. SIFMA's mission is to support a strong financial industry, investor opportunity, capital formation, job creation, and economic growth, while building trust and confidence in the financial markets.

The Chamber is the world's largest business federation, directly representing 300,000 members and indirectly representing the interests of 3,000,000 companies and professional organizations of every size, in every industry sector, and from every region of the country. Chamber members transact business throughout the United States and around the world. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts.

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or any party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than *amici curiae*, their members, and their counsel, made a monetary contribution intended to fund its preparation or submission. Counsel of record for all parties have received timely notice of *amici curiae*'s intent to file this brief and have consented to the filing of this brief in letters on file with the Clerk's office.

SIFMA and the Chamber regularly file *amicus curiae* briefs in cases such as this that raise issues of vital concern to the participants in the securities industry and the nation's business community. Both have appeared before this Court as *amici curiae*, jointly or separately, in several such cases, most recently in *Amgen, Inc.* v. *Connecticut Retirement Plans & Trust Funds*, No. 11-1085 (2012) (relationship between proof of materiality and class certification based upon fraud-on-the-market theory); *Credit Suisse Securities (USA) LLC* v. *Simmonds*, 132 S. Ct. 1414 (2012) (tolling under Section 16(b) of the Securities Exchange Act of 1934 (the "Exchange Act")); *Janus Capital Group, Inc.* v. *First Derivative Traders*, 131 S. Ct. 2296 (2011) (liability of investment advisor under Rule 10b-5); *Erica P. John Fund, Inc.* v. *Halliburton Co.*, 131 S. Ct. 2179 (2011) (requirements for class certification of fraud-on-the-market based claims); and *Matrixx Initiatives, Inc.* v. *Siracusano*, 131 S. Ct. 1309 (2011) (pleading standard for materiality in private securities fraud actions).

This case involves important issues regarding a plaintiff's standing to assert class action claims under the federal securities laws. In particular, *amici* are concerned that the Second Circuit's articulation of an unprecedented and amorphous "class standing" standard will result in greater burdens on lower courts and parties in determining what constitutes "similar" or the "same" set of concerns. As applied below, this novel test threatens to radically expand the claims that an individual plaintiff may allege on behalf of absent class members under the federal securities laws. *Amici* also are concerned about multiple conflicts among the federal courts concerning this issue and the resulting inconsistent scope of class claims that district courts permit to proceed—

and the resulting inconsistent settlement pressures brought to bear on defendants—based solely on the venue in which the class action complaint is filed.

SUMMARY OF ARGUMENT

In the decision below, the Second Circuit held that "class standing" permits a named plaintiff to assert claims under the Securities Act of 1933 (the "Securities Act") on behalf of absent class members that purchased securities that the named plaintiff did not itself purchase, so long as the claims "implicate[] the same set of concerns" or "raise a sufficiently similar set of concerns." *NECA-IBEW Health & Welfare Fund* v. *Goldman Sachs & Co.*, 693 F.3d 145, 162, 164 (2d Cir. 2012) ("*NECA*").

That holding directly conflicts with the First Circuit's ruling in *Plumbers' Union Local No. 12 Pension Fund* v. *Nomura Asset Acceptance Corp.*, 632 F.3d 762, 768–71 (1st Cir. 2011), which held that a class action plaintiff may sue only with respect to the specific securities it purchased. Moreover, if permitted to stand, the decision below will magnify already existing confusion among the lower courts with respect to standing under the Securities Act in class actions. As one district court observed, the Second Circuit's ruling "has thrown the jurisprudence in this area into disarray." *FDIC* v. *Countrywide Fin. Corp.*, No. 2:12-CV-4354, 2012 WL 5900973, at *10 (C.D. Cal. Nov. 21, 2012). This Court's intervention is needed to clarify, in accordance with its prior jurisprudence, that merely adding class allegations does not permit plaintiffs to assert claims they lack standing to assert on their own.

The Second Circuit's analysis has a basic flaw: There is no such thing as "class standing." To the contrary, as this Court repeatedly has held, "[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) (quoting *Simon* v. *E. Ky. Welfare Rights Org.*, 426 U.S. 26, 40 n.20 (1976)). Standing analysis is the same regardless of whether a plaintiff purports to act on behalf of a class. Here, the plaintiff's standing is limited by the Securities Act, which expressly permits a plaintiff to sue only with respect to the particular security it purchased.

The Second Circuit's "similar" or "same" set of concerns standard is also vague and indeterminate, in contrast to the statutory test. It rewards a plaintiff that pleads its claim broadly—indeed, in *Plumbers' & Pipefitters' Local No. 562 Supplemental Plan & Trust* v. *J.P. Morgan Acceptance Corp. I*, No. 08-CV-01713 (E.D.N.Y. filed Apr. 25, 2008), application of the *NECA* standard resulted in an increase of defendants' potential liability by 6,000 percent. *See* Alison Frankel, *First Big Victim of 2nd Circuit's MBS Standing Opinion: JPMorgan*, Thompson Reuters News & Insight (Sept. 17, 2012), http://news andinsight.thomsonreuters.com/Legal/News/2012/09_-_September/First_big_victim_of_2nd_Circuit_s_MBS_standing_opinion__JPMorgan/. In doing so, it will unjustifiably multiply defendants' potential liability under the Securities Act, further burden already busy courts, and result in increased vexatious, abusive litigation and coercive multi-million or billion dollar settlements to the detriment of the nation's economy.

ARGUMENT

I. THE COURT OF APPEALS' DECISION CONFLICTS WITH THE APPROACH TO STANDING TAKEN BY OTHER COURTS IN SECURITIES ACT LITIGATION.

The Second Circuit's holding calls into sharp relief a broad split of authority in the lower courts regarding so-called "class standing." As discussed in the petition, that holding directly conflicts with the First Circuit's decision in *Plumbers' Union*. It also conflicts with the holdings of virtually every district court that has considered whether purchasers of a mortgage-backed security ("MBS") have standing to pursue claims on behalf of purchasers of other MBS issued pursuant to different registration statements, but that derive from a common shelf registration statement.

The Second Circuit's decision, however, will not be limited in application to MBS litigation. Rather, the Second Circuit established a broad standard for determining "class standing" in any putative class action—whether the putative class claims concern violations of the federal securities laws related to MBS, other types of securities, or any other statutory or common law violation. The Second Circuit's new standard will magnify the existing confusion among the lower courts regarding standing, creating uncertainty and inconsistent outcomes, as well as cumbersome litigation regarding the "same" or "similar" concerns standard. This problem is particularly acute in the context of Securities Act class actions,[2] as these examples illustrate:

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[2] The conflict is not limited to litigation arising under the Securities Act. Many of the cases addressing class standing

1. *Whether MBS purchasers from one tranche of an offering have standing to represent a class that includes purchasers of different tranches of the same offering, or other MBS offerings based on the same shelf registration*. These are the questions at issue in this case—which have given rise to opposite rulings by the First and Second Circuits, and disparate rulings from numerous district courts contending with a tidal wave of MBS litigation in the wake of the global financial and credit crisis.

MBS, like other asset-backed structured credit products, are divided into tranches with different rights, risk profiles and rates of return. Each tranche is a separate and unique security with its own CUSIP. Generally speaking, the senior-most tranches receive cash distributions first and thus are less risky and have a lower rate of return than the subordinated tranches that receive cash distributions last. A purchaser of the least risky, or highest-rated, tranche has no economic interest in the underlying mortgages continuing to generate revenue once sufficient payments have been made to ensure that the highest-rated tranche is fully paid. Conversely, the purchaser of the lowest-rated tranche has no economic interest in further deficiencies in the underlying mortgages once enough defaults have occurred to ensure that its tranche will receive no further payments.

Lower courts repeatedly have questioned whether a plaintiff that purchased one MBS security has standing to assert claims on behalf of purchasers of other tranches in that offering. Some courts have

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cited in this Section involve claims arising under the Exchange Act or other provisions of federal or state law.

held that the purchaser of one tranche has standing to represent all tranches, while others have concluded that such purchasers lack the requisite standing.[3]

In addition, MBS plaintiffs—including respondent—also have asserted that they have standing to assert class claims arising out of entirely different offerings of MBS (founded on the same general shelf registration). The differences among such offerings are particularly acute, because each offering is backed by a unique securitization pool that typically does not exist until the specific MBS is structured. *NECA* is the first—and, to our knowledge, the only—decision in which a court concluded that such plaintiffs have standing to pursue a claim on behalf of purchasers of different MBS.[4] Every other court to consider the question, including the First Circuit in *Plumbers'*

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[3] *Compare In re Wa. Mut. Mortg.-Backed Sec. Litig.*, 276 F.R.D. 658, 663–64 (W.D. Wash. 2011) (Article III does not permit cross-tranche standing); *Me. State Ret. Sys.* v. *Countrywide Fin. Corp.*, No. 2:10-CV-0302, 2011 WL 4389689, at *3–8 (C.D. Cal. May 5, 2011) (same); *Plumbers' & Pipefitters' Local No. 562 Supplemental Plan & Trust* v. *J.P. Morgan Acceptance Corp. I*, No. 08 CV 1713, 2012 WL 601448, at *4–6 (E.D.N.Y. Feb. 23, 2012) (same), *overruled by NECA*, 693 F.3d 145, *with In re Bear Stearns Mortg. Pass-Through Certificates Litig.*, 851 F. Supp. 2d 746, 775–79 (S.D.N.Y. 2012) (purchaser of one tranche had standing to represent all tranches); *Genesee Cnty. Emps. Ret. Sys.* v. *Thornburg Mortg. Sec. Trust 2006-3*, 825 F. Supp. 2d 1082, 1152 (D.N.M. 2011) (same).

[4] *NECA*, 693 F.3d 145, 161–64; *see also Plumbers' & Pipefitters' Local No. 562 Supplemental Plan & Trust* v. *J.P. Morgan Acceptance Corp. I*, No. 08 CV 1713, 2012 WL 4053716 (E.D.N.Y. Sept. 14, 2012) (denying leave to file an interlocutory appeal as moot and amending its prior order consistent with *NECA*).

Union, has held that the *NECA* approach violates Article III and the Securities Act.[5]

2. *Whether purchasers of one security have standing to sue on behalf of purchasers of different securities issued under a common shelf registration statement*. Outside the MBS context, Securities Act plaintiffs have asserted claims on behalf of purchasers of different securities across lengthy time periods simply because the securities were issued pursuant to the same shelf registration statement.

Shelf registration statements are a staple of securities offerings. *See generally* 17 C.F.R. § 230.415. Because the rules of the Securities and Exchange Commission permit shelf registration statements to describe securities in the most general terms, a single shelf registration statement commonly forms the basis for dozens of offerings over several years. Importantly, each security subsequently issued pursuant to the shelf remains a distinct offering, with its own prospectus supplement that provides investors with detailed disclosures concerning the specific offering as required under the Securities Act. 17

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[5] *E.g.*, *Genesee Cnty. Emps.' Ret. Sys.*, 825 F. Supp. 2d at 1151–54; *Me. State Ret. Sys.* v. *Countrywide Fin. Corp.*, 722 F. Supp. 2d 1157, 1163–65 (C.D. Cal. 2010); *In re Wells Fargo Mortg.-Backed Certificates Litig.*, 712 F. Supp. 2d 958, 963–66 (N.D. Cal. 2010). These decisions are in accord with pre-*NECA* decisions by district courts in the Second Circuit. *E.g.*, *N.J. Carpenters Health Fund* v. *Novastar Mortg., Inc.*, No. 08-5310, 2011 WL 1338195, at *5–6 (S.D.N.Y. Mar. 31, 2011); *Mass. Bricklayers & Masons Funds* v. *Deutsche Alt-A Sec.*, No. 08-3178, 2010 WL 1370962, at *1 (E.D.N.Y. Apr. 6, 2010); *N.J. Carpenters Health Fund* v. *Residential Capital, LLC*, No. 08 CV 8781, 2010 WL 1257528, at *3–4 (S.D.N.Y. Mar. 31, 2010); *City of Ann Arbor Emps.' Ret. Sys.* v. *Citigroup Mortg. Loan Trust Inc.*, 703 F. Supp. 2d 253, 259–61 (E.D.N.Y. 2010).

C.F.R. §§ 230.424(b), 230.430B. That information includes the offering's terms, price and quantity, risk factors, and the identity of any underwriters. The combination of the prospectus supplement, the base prospectus incorporated in the shelf registration statement, and the registrant's Exchange Act filings incorporated by reference, creates the complete registration statement and prospectus required for a particular security.

Several courts have held that a named plaintiff lacks standing to assert claims arising out of offerings in which it did not purchase, notwithstanding the existence of a common shelf registration statement. Others have held that stock or bond purchasers do have such standing. That significant conflict will continue to arise, given the conflicting guidance of the First and Second Circuits.[6]

3. *Whether stock and bond purchasers have standing to represent a class that includes purchasers of different offerings from the same issuer offered under different shelf registration statements*. Even absent a common shelf registration statement, plaintiffs have

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[6] *Compare, e.g.*, *In re Thornburg Mortg., Inc. Sec. Litig.*, 824 F. Supp. 2d 1214, 1269–74 (D.N.M. 2011) (no standing to assert claims on behalf of purchasers of other securities issued pursuant to common shelf); *In re Lehman Bros. Sec. & ERISA Litig.*, 799 F. Supp. 2d 258, 273–74 (S.D.N.Y. 2011) (same), *with In re Am. Int'l Grp., Inc. 2008 Sec. Litig.*, 741 F. Supp. 2d 511, 537–38 (S.D.N.Y. 2010) (named plaintiff that purchased twelve securities had standing to represent purchasers of all 101 securities issued under three shelf registration statements); *In re Countrywide Fin. Corp. Sec. Litig.*, 588 F. Supp. 2d 1132, 1157–58 (C.D. Cal. 2008) (named plaintiff had standing to represent different securities issued under the same shelf); *In re Friedman's, Inc. Sec. Litig.*, 385 F. Supp. 2d 1345, 1367–68, 1370–72 (N.D. Ga. 2005) (same).

pursued claims on behalf of purchasers of entirely distinct securities offered by the same issuer. Several courts have permitted such putative classes to survive motions to dismiss, rejecting defendants' arguments that the named plaintiffs lacked standing,[7] while other courts have dismissed such expansive claims for lack of standing.[8] The Second Circuit's decision leaves open the possibility of either outcome, creating further and broader conflict.

4. *Whether mutual fund purchasers have standing to represent a class that includes purchasers of different funds managed by the same advisor.* Just as stock- and bond-drop plaintiffs have sought to increase the settlement value of their claims by asserting claims relating to securities they did not purchase, so too have mutual fund plaintiffs sought to assert claims on behalf of investors in different funds managed by the same advisor. So-called "fund families" typically include funds with divergent investment strategies that may have nothing in common other than management. Some courts have held that mutual fund investors have standing to

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[7] *E.g.*, *Facciola* v. *Greenberg Traurig LLP*, 281 F.R.D. 363, 367 (D. Ariz. 2012); *In re DDi Corp. Sec. Litig.*, No. CV 03-7063, 2005 WL 3090882, at *6 (C.D. Cal. July 21, 2005); *In re Fleming Inc. Cos. Sec. & Derivative Litig.*, No. 5:03-MD-10530-DF, 2004 WL 5278716, at *37 n.7, *45–51 (E.D. Tex. June 16, 2004).

[8] *E.g.*, *King Cnty.* v. *IKB Deutsche Industriebank AG*, Nos. 09 Civ. 8387, 09 Civ. 8822, 2010 WL 2010943 (S.D.N.Y. May 18, 2010); *Abu Dhabi Commercial Bank* v. *Morgan Stanley & Co. Inc.*, 651 F. Supp. 2d 155, 174–75 (S.D.N.Y. 2009); *Caiafa* v. *Sea Containers Ltd.*, 525 F. Supp. 2d 398, 406–08 (S.D.N.Y. 2007); *Cats* v. *Protection One, Inc.*, No. CV99-3755-DT, 2001 WL 34070630, at *9–10 (C.D. Cal. June 4, 2001).

assert such claims,[9] while others have rejected such claims.[10]

* * *

We respectfully submit that this Court's intervention is needed to resolve these inconsistent lower court rulings regarding the critical, threshold question concerning the scope of a named plaintiff's standing to assert Securities Act claims on behalf of a putative class.

II. THE SECOND CIRCUIT'S DECISION IS INCONSISTENT WITH THE STRUCTURE AND OPERATION OF THE SECURITIES ACT.

The Second Circuit erred by introducing the concept of "class standing" distinct from the plaintiff's standing to prosecute its own claim. *NECA*, 693 F.3d at 158 ("But whether NECA has 'class standing' . . . does not turn on whether NECA would have statu-

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[9] *See, e.g.*, *In re Mut. Funds Inv. Litig.*, 590 F. Supp. 2d 741, 759 (D. Md. 2008); *In re Dreyfus Mut. Funds Fee Litig.*, 428 F. Supp. 2d 342, 350 n.7 (W.D. Pa. 2005); *Mutchka* v. *Harris*, 373 F. Supp. 2d 1021, 1023–24 (C.D. Cal. 2005); *In re Dreyfus Aggressive Growth Mut. Fund Litig.*, No. 98 Civ. 4318, 2000 WL 1357509, at *3 (S.D.N.Y. Sept. 20, 2000).

[10] *See, e.g.*, *In re Direxion Shares ETF Trust*, 279 F.R.D. 221, 230 (S.D.N.Y. 2012); *In re Scudder Mut. Funds Fee Litig.*, No. 04 Civ. 1921, 2007 WL 2325862, at *7–10 (S.D.N.Y. Aug. 14, 2007); *In re AIG Advisor Grp. Sec. Litig.*, No. 06 CV 1625, 2007 WL 1213395, at *3–6 (E.D.N.Y. Apr. 25, 2007); *Forsythe* v. *Sun Life Fin., Inc.*, 417 F. Supp. 2d 100, 117–20 (D. Mass. 2006); *In re Am. Mut. Funds Fee Litig.*, No. CV 04-5593, 2005 WL 3989803, at *1–2 (C.D. Cal. Dec. 16, 2005); *Nenni* v. *Dean Witter Reynolds, Inc.*, No. CIV A 98-12454, 1999 WL 34801540, at *2 (D. Mass. Sept. 29, 1999).

tory or Article III standing . . . ."); *see also id*. ("class standing analysis is different" from individual standing analysis). To the contrary, this Court repeatedly has held, "[t]hat a suit may be a class action . . . adds nothing to the question of standing . . . ." *Lewis*, 518 U.S. at 357 (internal quotation marks omitted). The issue in the class context is the same as in an individual action: Whether a plaintiff can "demonstrate standing for each claim he seeks to press." *DaimlerChrysler Corp.* v. *Cuno*, 547 U.S. 332, 352 (2006).

The Second Circuit departed from this well-accepted analytical framework by inventing a "class standing" analysis based on the "same set of concerns" language in *Gratz* v. *Bollinger*, 539 U.S. 244, 267 (2003). But *Gratz* left open whether its discussion was even pertinent to standing rather than an application of Rule 23. *Id*. at 263 & n.15. More importantly, the Second Circuit disregarded the critical fact that—unlike in *Gratz* and the cases on which it relied[11]—the plaintiff here is asserting a claim under a statute that contains clear standing limitations. *Cf. Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91, 103 n.9 (1979) (when a claim is brought under a statute, the court must consider whether "Congress intended standing . . . to extend to the full limits of Art. III"). The Second Circuit failed to consider the text and structure of the Securities Act, which reflect Congress's balancing of narrow statutory standing with a broad statutory remedy.

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[11] *NECA*, 693 F.3d at 160–62 (citing *Blum* v. *Yaretsky*, 457 U.S. 991 (1982) (due process); *Lewis*, 518 U.S. 343 (right of access to courts); *Gratz*, 539 U.S. 244 (equal protection)).

A. Sections 11 and 12 Confer Standing Only on Actual Purchasers of the Specific Security Sold Pursuant to Allegedly Defective Offering Materials.

In determining that the plaintiff below had standing to pursue claims on behalf of purchasers of securities it did not itself purchase, the Second Circuit ignored the limits on standing imposed by the Securities Act itself. Although Sections 11 and 12(a)(2) impose near strict liability for material misrepresentations in a registration statement or prospectus, *see Gustafson* v. *Alloyd Co., Inc.*, 513 U.S. 561, 582 (1995), they authorize only an *actual purchaser* of the particular security described in the offering materials to sue.

The plain language of Sections 11 and 12(a)(2) makes this limitation clear. Section 11 provides a cause of action *only* with respect to an investor's purchase of a security in, or whose purchase is traceable to, a public offering pursuant to a registration statement containing a false or misleading statement. *See* 15 U.S.C. § 77k(a) (if "any part of the registration statement" contains a false statement then "any person acquiring *such security*" may sue (emphasis added)). Similarly, under Section 12(a)(2), a person selling "a security . . . by means of a prospectus" containing a misrepresentation is liable only to "the person purchasing *such security*." 15 U.S.C. § 77l(a)(2) (emphasis added). The phrase "such security" in both Sections 11 and 12 expressly limits standing.

Sections 11 and 12 further limit potential claims by authorizing a plaintiff to sue only for a misrepresentation contained within the four corners of a registration statement or prospectus. As the Securities Act

and related regulations make clear, even securities issued pursuant to the same shelf registration are distinct for purposes of liability—and therefore standing—under Sections 11 and 12. For each takedown, the relevant prospectus is the document formed by the combination of the base prospectus, which does not offer specific securities, and the prospectus supplement, which does. Only that combination satisfies the Section 12 prospectus requirements. *See, e.g.*, 15 U.S.C. § 77b(10) (defining "prospectus" as a communication that actually "offers" a "security for sale"); 17 C.F.R. § 229.512(a)(2). Similarly, the relevant registration statement for Section 11 differs for each shelf offering because the registration statement for any particular offering contains the base prospectus *after* it has been supplemented by a specific prospectus supplement.[12] *See* 15 U.S.C. §§ 77f(a) (registration statement is "deemed effective only as to the securities specified therein as proposed to be offered"), 77aa(13), (15)–(18), (21), (28)–(29), (32) (registration statement must include certain information, which is necessarily unique to each offering). A plaintiff is "not harmed by, and thus has no standing to sue for, alleged misrepresentations contained in other prospectuses or registration statements offering other securities that it did not purchase." *Emps. Ret. Sys. of the Gov't of the V.I.* v.

[12] Different offerings from the same shelf also have different "effective dates" for purposes of Section 11 based upon the date when the shelf registration statement incorporates the prospectus supplement, 17 C.F.R. §§ 230.158(c), 230.430B(f), 230.430C; Securities Offering Reform, Securities Act Release No. 33-8591, 70 Fed. Reg. 44,722 (Aug. 3, 2005), and therefore are considered separate offerings for statute of repose purposes, *see P. Stolz Family P'ship L.P.* v. *Daum*, 355 F.3d 92, 104 (2d Cir. 2004).

J.P. Morgan Chase & Co., 804 F. Supp. 2d 141, 151 (S.D.N.Y. 2011).

The Second Circuit ignored the statutory test of standing—i.e., was it the same security?—in favor of its "similar" or "same" set of concerns test that has no statutory basis. As this Court explained in discussing another limit on Section 12 liability—the limit upon potential defendants—it is "particularly unlikely that Congress would have ordained *sub silentio* the imposition of strict liability" beyond that which is clearly defined in the statute. *Pinter* v. *Dahl*, 486 U.S. 622, 652 (1988).

B. The Second Circuit's Decision Disregards the Plain Language of the Securities Act in Favor of a Standard that Will Be Difficult for Lower Courts to Apply Consistently.

The Second Circuit replaced a clear statutory test for standing with one that is vague, indeterminate, and susceptible to artful pleading. Left undisturbed, the "similar" or "same" set of concerns test will cause confusion and inconsistent results in the lower courts and wasteful litigation over compliance with the standard.

NECA held that the presence of similar misstatements in offering documents for different securities might raise "similar" or the "same" set of concerns in some instances, but not others, depending on the circumstances. 693 F.3d at 162–64. It held that because the alleged misstatements related in part to loan origination guidelines, the "same set of concerns" test would turn on whether the various securities bundled loans of the same originators (regardless, apparently, of when the loans were originated or

the percent of the pools they comprised). *Id.* at 30–31. It therefore found standing with respect to securities that had *any* overlap, no matter how small, in the identity of the originators. And that overlap was small indeed: As little as 9% in one offering for which the Second Circuit found standing was underwritten by an originator that originated loans backing the securities the plaintiff purchased. *Id.* at 164.

The Second Circuit's test makes little sense in an MBS setting, where there are often significant differences in loans originated even by a single originator. By 2005, mortgages were originated pursuant to many different origination guidelines, including fixed-rate mortgages, standard and hybrid adjustable rate mortgages, and less traditional products such as balloon mortgages, interest-only mortgages, and negative amortizing mortgages. *See, e.g.*, Jennifer E. Bethel et al., *Legal and Economic Issues in Litigation Arising from the 2007–2008 Credit Crisis* 6 (The Harvard John M. Olin Discussion Paper Series 2008); Paul Calem et al., *"Cherry Picking" in Subprime Mortgage Securitizations* 14–15 (Kansas City Federal Reserve Bank 2010). Likewise, MBS issuers might issue scores of securitizations that include collateral from the same originator over several years, during which the quality of the underlying mortgages or dynamics of the market and economy could vary significantly. *See, e.g.*, Yuliya Demyanyk & Otto Van Hemert, *Understanding the Subprime Mortgage Crisis*, 24 Rev. Fin. Stud. 1848, 1848 (2011) (discussing significant variance in quality of mortgage collateral across vintages). The Second Circuit test disregards these important distinctions, its stated emphasis on "similar concerns" notwithstanding.

The Second Circuit test similarly fails to account for the wide variety of securities that issuers may offer pursuant to a single shelf. First, because issuers may initially register multiple types of securities, 17 C.F.R. § 230.415, a single shelf registration may permit the issuance of equity and debt securities, common and preferred stock, and convertible and non-convertible securities. Second, even when a shelf registration permits only the offering of debt, the particular securities offered may differ depending on their positions in the capital structure, the type and quality of any underlying collateral, and the underwriters.[13] Finally, because representations in a shelf registration statement become effective for a particular offering only once the prospectus supplement issues, those representations will vary based upon when each specific offering occurs. 17 C.F.R. §§ 230.158(c), 230.415, 230.430B(f).

In practice, *NECA*'s test will reward plaintiffs that plead the broadest and most generic possible claims with standing to sue on behalf of the largest conceivable class.[14] It will invite confusion and uncertainty

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[13] For example, in this case a single offering included forty-two separate classes of certificates, at various positions in the capital structure, offering a variety of interest rates and risk profiles. *See* GS Home Equity Trust 2007-5, Prospectus Supplement to Prospectus Dated February 13, 2007 (Form 424(b)(5)) (Apr. 16, 2008), available at http://sec.gov/Archives/edgar/data/1395402/000090514808002292/efc8-0744_emailform424b5.htm.

[14] In the context of claims under Sections 11 and 12 of the Securities Act, this incentive would not be constrained by heightened pleading standards applicable to Exchange Act claims. Fed. R. Civ. P. 9(b) (party must state with particularity circumstances constituting fraud or mistake); 15 U.S.C. § 78u-4(b)(1) (Section 10(b) plaintiffs must "specify each statement alleged to have been misleading, the reason or reasons why the

about when "concerns" are sufficiently "similar" to confer standing, as well as burdensome litigation to determine whether the standard is met. And it will clothe plaintiffs and their lawyers with the ability to assert claims on behalf of absent class members whose investments and economic interests may differ substantially from their own.

III. THE SECOND CIRCUIT'S APPROACH WILL SIGNIFICANTLY INCREASE THE SCOPE OF POTENTIAL SECURITIES ACT LIABILITY AND COERCE SETTLEMENTS OF CLAIMS PLAINTIFFS DO NOT HAVE STANDING TO PURSUE.

It would be difficult to overstate the significance of the threshold question whether a named plaintiff has standing to pursue Securities Act claims on a class-wide basis. The Second Circuit's test invites a litigious plaintiff and its lawyer to increase exponentially the magnitude of their lawsuit—and leverage—far beyond any claim the plaintiff would otherwise have a stake in prosecuting.

A. In Practice, the Application of the "Similar" or "Same" Set of Concerns Test Will Multiply Securities Act Defendants' Potential Liability.

As discussed above, the securities markets rely upon the shelf registration process for the efficient issuance of all types of securities, not just the MBS at

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statement is misleading"); 15 U.S.C. § 78u-4(b)(2) (Section 10(b) plaintiffs must "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind").

issue in *NECA*. The Second Circuit's test will permit a plaintiff to bring securities class actions concerning not only the offerings in which it purchased, but all offerings issued pursuant to a common shelf registration statement. And plaintiffs will undoubtedly seek to satisfy the "similar" or "same" set of concerns standard through artful pleading, emphasizing perceived similarities among the offerings no matter how trivial. The consequences for securities issuers are staggering, as a review of the public filings of seasoned issuers demonstrates.

With respect to MBS, *amici* reviewed all MBS prospectus supplements issued pursuant to SEC Rule 424(b)(5) for twenty individual shelf registration statements registered between 2004 and 2008. A total of 691 offerings were issued pursuant to these twenty shelves, an average of 35 distinct offerings per shelf. The total notional value of the offerings issued pursuant to a common shelf averaged $30 billion, and reached as high as $70 billion.

The number and size of offerings of other types of securities issued pursuant to a common shelf are similarly immense. For example, the companies included in the S&P Banks Select Industry Index issued, on average, approximately 31 offerings of equity, debt, and other securities pursuant to each individual shelf registration statement filed between 2010 and the present. The total notional value of all offerings issued pursuant to a single registration statement exceeded $5.6 billion, while individual offerings varied in size from $23,000 to more than $1 billion. Certain banks offered as many as four different classes of securities pursuant to a single registration statement, including common stock, preferred

stock, senior debt, subordinated debt, depositary shares, or warrants.

The Second Circuit's decision would permit plaintiffs routinely to convert their claims, however modest, into multi-billion dollar lawsuits, dramatically altering the risks and consequences of litigating Securities Act class actions.

B. The Second Circuit's Test Will Increase Pressure on Defendants to Settle and Impose a Burden on the Nation's Economy.

As this Court has recognized, "[t]he practical consequences of an expansion" of liability under the federal securities laws are stark for defendants. *Stoneridge Inv. Partners, LLC* v. *Scientific-Atlanta, Inc.*, 552 U.S. 148, 162–64 (2008). "[E]xtensive discovery and the potential for uncertainty and disruption in a lawsuit allow plaintiffs with weak claims to extort settlements from innocent companies." *Id.* (citing *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 740–41 (1975)). The enormous and asymmetric discovery costs imposed on defendants in complex securities litigations have been well-chronicled.[15] And even the small probability of an immense judgment in a class action often results in "blackmail

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[15] *See, e.g.*, Brian P. Murray & Sharon Lee, *The 'Automatic Stay' of Discovery*, N.Y.L.J., Mar. 3, 2003, at 4 (80 percent of the cost of securities class actions is associated with discovery); Hillary A. Sale, *Heightened Pleading and Discovery Stays: An Analysis of the Effect of the PSLRA's Internal-Information Standard on '33 and '34 Act Claims*, 76 Wash. U. L.Q. 537, 582 (1998) ("Despite their voluminous discovery requests to defendants, plaintiffs have very little to offer in the form of reciprocal discovery . . . .").

settlements" irrespective of the strength of the claims asserted by the putative class. *See* Henry J. Friendly, *Federal Jurisdiction: A General View* 120 (1973). In the securities context, key indicators of the potential settlement value of a case are (i) the size of the decline in value of the securities at issue and (ii) the amount of available insurance coverage—not the merits. Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 Stan. L. Rev. 497, 514–19, 550–57 (1991); *see also* Denise N. Martin et al., *Recent Trends IV: What Explains Filings and Settlements in Shareholder Class Actions*, 5 Stan. J.L. Bus. & Fin. 121, 156 (1999) ("Generally, we find that the merits do not have much, if any, explanatory power on settlement size.").

The costs of overbroad class action litigation burden not just defendants, but the economy as a whole. As one court noted, "[n]o one sophisticated about markets believes that multiplying liability is free of cost." *SEC* v. *Tambone*, 597 F.3d 436, 452 (1st Cir. 2010) (Boudin, J., concurring). The costs of abusive class actions inevitably "get passed along to the public." *Id.* These costs also impact markets: The average securities class action alone reduces a defendant's equity value by 3.5%. *See* Anjan V. Thakor, *The Unintended Consequences of Securities Litigation* 14 (U.S. Chamber Inst. for Legal Reform 2005). As this Court has observed, the costs associated with class actions often are "payable in the last analysis . . . for the benefit of speculators and their lawyers." *Blue Chip Stamps*, 421 U.S. at 739 (quoting *SEC* v. *Tx. Gulf Sulphur Co.*, 401 F.2d 833, 867 (2d Cir. 1968) (Friendly, C.J., concurring)). Particularly in securities class actions, the result often is a transfer of wealth from current to former sharehold-

ers, with the plaintiffs' bar collecting a sizable tax on the transfer. *See, e.g.*, Janet Cooper Alexander, *Rethinking Damages in Securities Class Actions*, 48 Stan. L. Rev. 1487, 1503 (1996).

It is imperative that our markets remain attractive to outside investment. Yet it is widely perceived that the United States legal system imposes greater costs on businesses than the legal systems of other major capital markets. *See, e.g.*, Michael R. Bloomberg & Charles E. Schumer, *Sustaining New York's and the US' Global Financial Services Leadership* ii (2007). As a result, "foreign companies [are] staying away from US capital markets for fear that the potential costs of litigation will more than outweigh any incremental benefits of cheaper capital." *Id.* at 101. The perception of higher litigation costs frequently is cited as one reason for the decline in the competitiveness of American capital markets. *See, e.g.*, Fin. Servs. Forum, *2007 Global Capital Markets Survey* 8 (2007) (senior executives from nine of ten foreign companies that delisted from the United States between 2003 and 2007 cited litigation risk as a factor); Comm. on Capital Mkts. Regulation, *Interim Report of the Committee on Capital Markets Regulation* 5 (2006); *cf. Stoneridge*, 552 U.S. at 164 ("Overseas firms with no other exposure to our securities laws could be deterred from doing business here. This, in turn, may raise the cost of being a publicly traded company under our law and shift securities offerings away from domestic capital markets." (internal citations omitted)). For this reason, the Second Circuit's decision, which dramatically expands the scope of potential Securities Act liability, should be reviewed and rejected.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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No. 12-528

GOLDMAN, SACHS & CO., *et al.*,
Petitioners,

v.

NECA-IBEW HEALTH & WELFARE FUND,
Respondent.

AFFIDAVIT OF SERVICE

I HEREBY CERTIFY that on December 3, 2012, three (3) copies of the BRIEF OF THE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION AND THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS in the above-captioned case was served, as required by U.S. Supreme Court Rule 29.5(c), on the following:

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My commission expires June 14, 2013.

No. 12-528

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Supreme Court of the United States

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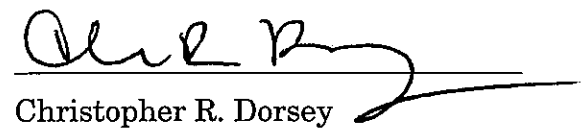
BRIEF OF THE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION AND THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1(h), I certify that the document contains 5,987 words, excluding the parts of the document that are exempted by the Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 3, 2012



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