No. 12-528

IN THE

Supreme Court of the United States

GOLDMAN SACHS & CO., GOLDMAN SACHS MORTGAGE COMPANY, GS MORTGAGE SECURITIES CORP., DANIEL L. SPARKS, MICHELLE GILL, and KEVIN GASVODA,

Petitioners,

—v.—

NECA-IBEW HEALTH & WELFARE FUND, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Respondent.

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

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

SAMUEL H. RUDMAN
ROBBINS GELLER RUDMAN & DOWD LLP
58 South Service Road, Suite 200
Melville, New York 11747
(631) 367-7100

PATRICK J. O'HARA
CAVANAGH & O'HARA
407 East Adams Street
Springfield, Illinois 62701
(217) 544-1771

DARREN J. ROBBINS
ERIC ALAN ISAACSON
Counsel of Record
ARTHUR C. LEAHY
JOSEPH D. DALEY
ROBBINS GELLER RUDMAN & DOWD LLP
655 West Broadway, Suite 1900
San Diego, California 92101
(619) 231-1058
erici@rgrdlaw.com

Counsel for Respondent

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QUESTION PRESENTED

In this class action complaining of Petitioners' offering of mortgage-backed securities pursuant to false and misleading offering documents, each of 17 mortgage-backed offerings utilized the same common "shelf" registration statement and a prospectus supplement that together repeated identical, and nearly-identical, misrepresentations concerning mortgage-loan-origination practices. Respondent alleges that the lenders which originated the loans backing the securities failed to employ stated loan-origination practices, used inflated property appraisals, and falsified the underlying loan documentation. Notably, loans from two specific originating lenders backed seven of the 17 offerings, and Respondent purchased its securities in two of those seven offerings.

The Question Presented is:

Whether the Second Circuit erred in holding that to the extent the two lenders' loans backed securities in seven of the offerings – causing economic injury to all who purchased those securities – Respondent's own claims arising from two of those offerings raise a sufficiently similar set of concerns for it to represent a class of purchasers of securities with respect to all seven offerings. App. 35a.

RULE 29.6 STATEMENT

Pursuant to this Court's Rule 29.6, NECA-IBEW Health & Welfare Fund states that it is a Taft-Hartley Fund that issues no stock, has no parent corporation, and is not controlled by any publicly traded corporation.

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INTRODUCTION

In this case, institutional investor NECA-IBEW Health & Welfare Fund ("NECA") filed a class-action complaint alleging that Petitioners created 17 trusts into which they deposited mortgage loans whose originators had abandoned the loan-origination standards that Petitioners said the originators utilized to verify that borrowers could repay the loans. NECA, which acquired Certificates issued through two such trusts, originally asserted claims on behalf of itself individually, and on behalf of purchasers of Certificates issued through each of the 17 trusts.

As the securities that NECA acquired were backed by loans originated by lenders GreenPoint Mortgage Funding, Inc. and Wells Fargo Bank, NECA obviously has a concrete interest in demonstrating that these two loan originators' deficient conduct caused Petitioners' offering materials to be misleading, resulting in economic loss to investors. The Second Circuit accordingly held that NECA has standing to proceed on behalf of investors who purchased securities from the Petitioners' seven trusts backed in significant part by loans from these two common originators. It further ruled that NECA lacks standing to proceed on behalf of investors in the remaining ten trusts, with Certificates backed by mortgage loans originated by different loan originators, whose deviations from their stated lending practices could not have injured NECA.

Goldman contends that this holding conflicts irreconcilably with the First Circuit's decision in *Plumbers' Union Local No. 12 Pension Fund v. Nomura Asset Acceptance Corp.*, 632 F.3d 762, 768-

71 (1st Cir. 2012)*,* which held that plaintiffs lacked standing to proceed on behalf of a class against defendants with whom they had no dealings and against whom they had no claims, or on behalf of investors in trust certificates backed by loans from different loan originators than those backing securities the named plaintiffs acquired.

The two decisions do not conflict. The First Circuit and Second Circuit agree that "'for every named defendant there must be at least one named plaintiff who can assert a claim directly against that defendant.'"[1] They agree, moreover, that a representative plaintiff lacks a sufficient interest to pursue claims that loan originators abandoned underwriting standards, unless those originators' loans backed securities that the representative plaintiff itself acquired.

Nor is there anything particularly novel about the Second Circuit's holding which – like the First Circuit's holding in *Nomura* – limits a class representative's standing to litigating class-action claims sufficiently similar to those possessed by the class representative that it has a genuine stake in establishing liability on all of the claims asserted. The Second Circuit's decision applies the same words and reasoning that this Court did in *Gratz v. Bollinger*, 539 U.S. 244 (2003), which focused on whether a representative plaintiff's

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[1] App. 25a. (quoting *Central States S.E. & S.W. Health & Welfare Fund v. Merck-Medco Managed Care, L.L.C.*, 504 F.3d 229, 241 (2d Cir. 2007)); *accord Nomura*, 632 F.3d at 769-70 (following *Barry v. St. Paul Fire & Maine Ins. Co.*, 555 F.2d 3 (1sr Cir. 1977), *aff'd* 438 U.S. 531 (1978)).

claims and claims of the class it sought to represent involved "'fundamentally different concerns,'" or "'the same set of concerns.'" App. 31a (quoting *Gratz*, 539 U.S. at 264, 267). That phraseology has caused no problems in the decade since this Court employed it in *Gratz*, and will not do so now that the Second Circuit has merely repeated it.

STATEMENT OF THE CASE

A. Factual Background[2]

1. Nature of the Case

Respondent, institutional investor NECA, brought the underlying putative class action on behalf of all persons who acquired certain residential-mortgage-loan-backed certificates (the "Certificates") all of which were underwritten by petitioner Goldman, Sachs & Co. ("Goldman Sachs") and issued by petitioner GS Mortgage Securities Corp. ("GS Mortgage"). App. 4a; JA-204:¶1.[3] Relief is sought from defendants responsible for false and misleading statements in

[2] These facts are drawn from Petitioners' Appendix ("App. __") and from the record below, as presented in the parties' Second Circuit Joint Appendix ("JA-__").

[3] The Certificates are securities backed by pools of residential real estate loans acquired by Goldman Sachs Mortgage Company ("GSMC") through two primary channels: (1) the "Goldman Sachs Mortgage Conduit Program" (the "Conduit Program"), and (2) bulk acquisitions in the secondary market. App. 5a. GSMC pooled and conveyed those loans to its subsidiary GS Mortgage; GS Mortgage then securitized the loans and issued the Certificates through 17 "Trusts." App. 5a n.2.

the offering documents used to sell the Certificates, including GS Mortgage, Goldman Sachs, GSMC, and GS Mortgage officers and directors Daniel Sparks, Michelle Gill, and Kevin Gasvoda. JA-207-JA-208:¶¶10-15. NECA seeks relief under Securities Act §11, §12(a)(2), and §15. 15 U.S.C. §§77k, 77*l*(a)(2), 77*o*.

GS Mortgage issued Certificates in 17 offerings under a common "Shelf" Registration Statement containing alleged misrepresentations and omissions (*see infra* at 5-9), as amended by some 17 follow-on Prospectus Supplements (together, with the Shelf Registration Statement, the "Offering Documents") in which, the Second Circuit noted, the Shelf Registration Statement's falsehoods were "essentially repeated." App. 5a. GreenPoint Mortgage Funding, Inc. ("GreenPoint") and/or Wells Fargo Bank ("Wells Fargo") were major originators of the loans in seven of the 17 Trusts. App. 5a-6a. NECA purchased its Certificates in the GSAA Home Equity Trust 2007-5 and the GSAA Home Equity Trust 2007-10. App. 6a. GreenPoint originated nearly 25% of the loans in "Group I" of the GSAA Home Equity Trust 2007-5 and was also a major originator of loans in the GSAA Home Equity Trust 2007-10; Wells Fargo originated loans for both Trusts. JA-213:¶¶32-33.

NECA alleges that the Offering Documents falsely stated the various originators of the loans in the Trusts had evaluated borrowers' ability to repay the loans according to standard guidelines; that they misrepresented appraisal-related information, including whether the appraisals conformed to requisite standards; that they falsely claimed that the underlying loan documents were neither falsified nor contained any untrue

statements; that they misstated the "loan-to-value" ratios of the loans within the Trusts; and that they failed to disclose that even as Petitioners peddled the Certificates to investors, Goldman Sachs was betting that borrowers would default on the same type of loans underlying the Certificates. JA-211-JA-236:¶¶28-94.

2. The Single "Shelf" Registration Statement Utilized to Complete Every One of the 17 Offerings Contained Misstatements Repeated in Offering Documents for Each of Them

Under federal securities regulations, a "shelf" registration enables issuers to offer securities on a continuous basis by first filing a shelf registration statement for all of the securities, and then filing prospectus supplements for each offering. App. 7a.; 17 C.F.R. §230.415; 17 C.F.R. §229.512(a)(2). As the Second Circuit noted, the "representations in the shelf registration statement are simply deemed to be made again at the effective date" of each offering. App. 8a. Thus, in the underlying action, each of the 17 offerings that NECA challenged was conducted using a Prospectus Supplement incorporating "the same Shelf Registration Statement" and its alleged misrepresentations. *Id.*

NECA alleges that the single Shelf Registration Statement common to all of the offerings contained certain false and misleading statements, including that:

- originating lenders determined that the borrower's monthly income (if required to be stated) would be

sufficient for the borrower to meet its monthly obligations on the mortgage loan and other expenses related to the property. (JA-116:¶29; JA-212:¶29);

- each mortgage loan was supported by an appraisal conducted by an appraiser "whose compensation is not affected by the approval or disapproval of the mortgage loan," and that the appraisals were based upon market data analysis of recent, comparable properties (JA-127:¶57; JA-221:¶¶52-53);
- the "documents . . . submitted for loan underwriting were not falsified and contain no untrue statement" and "are free of fraud and any misrepresentation" (JA-132:¶76; JA-227:¶70); and
- concealed the fact that Goldman Sachs was betting that mortgages like those in the Trusts would be defaulted on, at the same time defendants were selling the Certificates as "investment grade" instruments. JA-137-JA-138:¶¶89-93; JA-234-JA-235:¶¶85-89.

Prospectus Supplements for the individual Offerings contained similar misrepresentations. For example, NECA alleges that the (false) reassurances about underwriting standards also appeared in the Prospectus Supplements for the 2007-5 and 2007-10 Certificates it purchased (JA-

212-JA-213:¶¶30-31), and that identical or nearly identical representations appeared in the remaining 15 Prospectuses.[4] The Prospectus Supplements for the 2007-5 and 2007-10 Certificates also falsely claimed – like the Shelf Registration Statement – that appraisals were based upon recent market data, and that the appraisers' compensation was "not affected by the approval or disapproval of the mortgage loan." JA-221:¶¶52-53.

NECA explained how the foregoing representations and omissions were false and misleading:

- As to the assertion that borrowers' ability to repay their loans was scrutinized, neither the defendants nor the loan originators employed standards aimed at determining whether the borrowers were able to meet their loan-repayment obligations. JA-214-JA-215:¶36; *see also* JA-219:¶¶48-49 (describing GreenPoint's inadequate underwriting guidelines); JA-220:¶50 (Wells Fargo "completely ignore[d] its loan underwriting standards").

- As to the "appraisal" assertions, appraisers were required by loan originators to give predetermined, inflated appraisals to ensure loan approval. JA-222:¶56. If the appraiser objected, he or she was

[4] *See* JA-117:¶¶33, 35; JA-118-JA-119:¶¶38-40.

threatened with being black-balled within the industry. *Id*; *see also* JA-225-JA-226:¶¶66-67 (citing myriad inflated appraisals for Wells Fargo loans).

- As to the no-false-documents claim, borrowers *and* loan originators were systematically falsifying borrowers' incomes on loan applications, and property appraisals were routinely inflated. JA-227-JA-228:¶72. Based upon an analysis of actual loan files, NECA alleges that at least 90% of the loan files were falsified or contained misrepresentations. JA-228:¶73.

- NECA also alleges that using so-called "credit-default swaps," Goldman Sachs simultaneously placed exotic bets that residential mortgages similar to those backing the Certificates would default.[5]

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[5] JA-234:¶86. In its simplest form, a "credit-default swap" allows a party to offload or eliminate the risk of its investment in an entity and/or profit from that entity's subsequent problems:

> First, a credit default swap is a private contract in which private parties bet on a debt issuer's bankruptcy, default, or restructuring. For example, a bank that has loaned $10 million to a company might enter into a $10 million credit default swap with a third party for hedging purposes. If the company defaults on its debt, the bank will lose money on the loan, but make money on the swap.

[footnote continued]

> Petitioner Daniel Sparks – while serving as CEO of GS Mortgage – was overseeing these credit-default swaps *at the very same time* he signed the Certificates' Registration Statement. JA-234:¶88.

3. Investors Suffered Injury as Their Certificates Diminished in Value

Major downgrades to Certificates acquired by NECA and other putative class members occurred in 2008, with some purportedly "AAA" Certificates falling to "CCC" – well *below* the threshold for "junk" status. JA-235:¶90. These downgrades were required because the original ratings used to sell the Certificates had not accurately reflected the risk associated with the underlying loans. JA-235:¶91. Moreover, the delinquency rates of the underlying mortgage loans skyrocketed. *Id.* For example, as of February 2010, the total percentage of delinquent and foreclosed loans and bank-owned and sold properties in the GSAA Home Equity Trust 2007-5 and 2007-10 Trust both exceeded 30% of the total loan pools. *Id.*

As a direct consequence of misrepresentations in their Offering Documents, the Certificates' value, and the price at which they could be disposed of in the market, declined substantially. JA-235:¶92.

Frank Partnoy & David A. Skeel, Jr., *Nineteenth Annual Corporate Law Symposium: Debt as a Lever of Control: The Promise and Perils of Credit Derivatives*, 75 U. Cin. L. Rev. 1019, 1021-22 (Spring 2007).

NECA and other putative class members were damaged thereby. *Id.*; JA-236:¶94.

Securities Act Sections 11 and 12 provide for recovery of such losses.[6]

B. The District Court's Rulings

Through oral rulings, short orders memorializing those rulings, and a published opinion, the district court ruled on NECA's standing *vis-à-vis* the 17 offerings, the viability of its §12(a)(2) claims, and §11 damages.

The district court held that NECA lacked standing to bring §§11 and 12 claims of behalf of purchasers of Certificates from 15 of the 17 Trusts because it had purchased Certificates from only the 2007-5 and 2007-10 Trusts.[7] The court also held that NECA failed to plead a "cognizable loss" under §11 despite allegations that its Certificates had declined in value. App. 47a.

The district court granted leave to amend as to the 2007-5 and 2007-10 Trusts, whose Certificates NECA had purchased. App. 48a.

Following amendment, on a motion to dismiss the district court orally ruled that NECA had satisfactorily alleged its §12(a)(2) rescission claim, but reserved decision on §11 claims, App. 55a-56a,

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[6] *See* 15 U.S.C. §77k(e); *see also* 15 U.S.C. §77*l*(a)(2).

[7] App. 45a-46a. The district court later stated its "no-standing" holding extended to impair NECA's ability to represent claims of purchasers from other "tranches" within the two Trusts whose Certificates it had purchased. App. 53a-54a.

which the district court then dismissed with a written opinion holding that NECA pleaded no cognizable loss. App. 67a.

That left NECA only rescission, under §12(a)(2), of its purchase of the 2007-10 Certificates, App. 19a, which the district court deemed unavailable after NECA sold those Certificates at a 32% loss in November 2010 – a loss that the district court denied NECA leave to allege as damages. *Id.* Its entire case gone, NECA obtained entry of judgment and appealed. App. 71a-72a.

C. The Second Circuit's Decision

On appeal, the Second Circuit reinstated NECA's class-action claims with respect to seven of the 17 offerings. App. 4a-5a.

The Second Circuit held that NECA had "plausibly pled a cognizable injury – a decline in value," which it might recover under §11. App. 39a. It was "not just plausible – but obvious – that mortgage-backed securities like the Certificates would suffer a decline in value," on the facts alleged. App. 39a-40a.

The Second Circuit further held that NECA had standing to assert claims on behalf of purchasers of Certificates backed by mortgages originated by the same lenders that had originated mortgages underlying NECA's Certificates. App. 4a. "[S]uch claims implicate the 'same set of concerns' as [NECA's] claims," the Second Circuit explained, quoting this Court's decision in *Gratz*, 539 U.S. at 267. App. 4a.

The Second Circuit observed that NECA "has Article III standing to sue defendants in its own

right," as it had plausibly alleged a diminution in the value of its purchased Certificates, attributable to defendants' misstatements, which was redressable by damages under §§11 and 12(a)(2). App. 23a (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)).

The court observed that NECA also has "statutory standing," *i.e.*, a cause of action, under Section 11, having purchased 2007-5 and 2007-10 Certificates issued "pursuant to registration statements, parts of which are alleged to have contained materially misleading statements," and also under §12, having purchased the 2007-10 Certificates directly from Goldman Sachs. App. 23a (citing 15 U.S.C. §77k(a) and *l*(a)(2)).

With NECA's Article III standing and right to seek relief thus clearly satisfied, the Second Circuit moved on to NECA's "standing to assert claims *on behalf of* purchasers of Certificates from other Offerings, or from different tranches of the same Offering." App. 24a (Second Circuit's emphasis).

The Second Circuit's answer to that question followed from its analysis of this Court's decisions in *Blum v. Yaretsky*, 457 U.S. 991 (1982), *Lewis v. Casey*, 518 U.S. 343 (1996), and *Gratz*, 539 U.S. 244. App. 27a-31a.

In *Blum*, the Second Circuit recounted, two nursing-home residents challenged decisions by a utilization-review committee to transfer them to lower levels of care without adequate notice or a hearing. App. 27a. After certifying a class, the district court expanded it to include patients "transferred to *higher* levels of care." *Id.* (Second Circuit's emphasis). This Court held that the plaintiffs lacked standing to seek an adjudication

of the procedures attending the latter transfers, since "'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.'" App. 27a-28a (quoting *Blum*, 457 U.S. at 999). The Second Circuit summarized this Court's stated rationales for so holding:

> Because the conditions under which transfers to higher versus lower levels of care occurred were "sufficiently different," and because plaintiffs' attack "presuppose[d] a *deprivation* of protected property interests" – in contrast to the *increase* in Medicaid benefits attendant upon transfers to *higher* levels of care – any judicial assessment of the procedural adequacy of the latter "would be wholly gratuitous and advisory."

App. 28a (quoting *Blum*, 457 U.S. at 1001-02) (emphasis in original).

The Second Circuit recounted that in *Lewis*, 22 inmates of various prisons operated by the Arizona Department of Corrections ("ADOC") sought to prosecute a class action on behalf of all adult prisoners "'who are or will be incarcerated by [ADOC]' alleging that the ADOC was depriving them of their rights of access to the courts and counsel." App. 28a (quoting *Lewis*, 518 U.S. at 346). Though finding actual injury to only one named plaintiff in only one facility, the district court issued a 25-page injunction "mandating sweeping changes to the ADOC system" across its

many facilities. App. 28a. This Court eliminated from the injunction's scope any provisions directed at inadequacies "not 'found to have harmed any plaintiff in this lawsuit.'" *Id.* (quoting 518 U.S. at 358). This Court held that the "'remedy must . . . be limited to the inadequacy that produced the injury in fact that the plaintiff has established.'" *Id.* (quoting 518 U.S. at 357).

In *Gratz*, on the other hand, this Court concluded a named plaintiff's claims were "sufficiently similar" to those of his fellow class members to support his standing to proceed on behalf of a class. App. 29a. Class representative Hamacher, a white male who had enrolled at another college, alleged that the University of Michigan's use of race in undergraduate admissions denied him the opportunity to compete for admission on an equal basis. *Id.* Hamacher demonstrated that he was "'able and ready' to apply as a transfer student" should the University cease using race in undergraduate admissions. *Id.* (quoting *Gratz*, 539 U.S. at 262). This of course raised the question whether a *transfer* student could litigate on behalf of applicants for admission *as freshmen* students, given substantial differences in criteria for admission between the two.

This Court held that the University's use of race in undergraduate transfer admissions "'does not implicate *a significantly different set of concerns* than does its use of race in undergraduate freshman admissions.'" App. 30a (quoting *Gratz*, 539 U.S. at 265) (Second Circuit's emphasis). This Court explained that in *Blum* the nursing-home transfers to lower levels of care had "'involved a *number of fundamentally different concerns* than did transfers to higher ones,'" while in *Gratz* "'*the*

same set of concerns is implicated by the University's use of race in evaluating all undergraduate admissions applications.'" App. 31a (quoting *Gratz*, 539 U.S. at 264, 267) (Second Circuit's emphasis).

The Second Circuit concluded that *Blum*, *Lewis*, and *Gratz* stand collectively for the proposition that

> in a putative class action, a plaintiff has class standing if he plausibly alleges (1) that he "personally has suffered some actual... injury as a result of the putatively illegal conduct of the defendant," *Blum*, 457 U.S. at 999 (quotation marks omitted), and (2) that such conduct 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, *Gratz*, 539 U.S. at 267.

App. 31a.

Employing both this Court's rationale and the operative language from *Gratz*, the Second Circuit held that NECA may proceed only on behalf of investors who, like it, were injured by purchasing securities backed by mortgage loans originated by GreenPoint and Wells Fargo.

The court noted that NECA is not suing the lenders themselves "for abandoning their underwriting standards; it is suing the three Goldman Sachs entities that issued, underwrote, and sponsored every Certificate from all 17 Trusts." App. 32a. However, the "same three

defendants are alleged to have inserted nearly identical misrepresentations into the Offering Documents associated with *all* of the Certificates." *Id.* (Second Circuit's emphasis). That those nearly identical misrepresentations appeared in separate Offering Documents "does not by itself raise 'a number of fundamentally different concerns,'" if NECA had a stake in proving them false. App. 32a-33a (quoting *Gratz*, 539 U.S. at 264).

Given this Court's precedents – and this action's focus on "misstatements about [loan] *origination guidelines*" – the Second Circuit concluded that the "differences in the identity of the originators backing the Certificates matter[] for the purposes of assessing whether those claims raise the same set of concerns." App. 34a (Second Circuit's emphasis). "The originator-specific allegations provide the necessary link between (1) the Offering Documents' representations in a vacuum and (2) the *falsity* of those representations." *Id.* (Second Circuit's emphasis).

Thus, the Second Circuit held, to the extent that specific Offerings were backed by loans from the two originators whose loans backed the 2007-5 and 2007-10 Offerings from which NECA's Certificates came, "NECA's claims raise a sufficiently similar set of concerns to permit it to purport to represent Certificate-holders from those Offerings." App. 35a. NECA obviously possessed a concrete interest in demonstrating GreenPoint and Wells Fargo's deficiencies as originators of loans backing the securities it acquired, and thus "has class standing to assert the claims of purchasers of Certificates from the five additional Trusts containing loans

originated by GreenPoint, Wells Fargo, or both." App. 35a.[8]

The Second Circuit accordingly permitted NECA to proceed with respect to a total of seven trusts – not five, as the Petition for a Writ of Certiorari erroneously states. *See* Pet. at 9. "However," the Second Circuit held, "plaintiff lacks standing to assert claims on behalf of purchasers of Certificates from the other 10 Trusts," which were backed by loans originated by entirely different loan originators than the two whose loans backed the Certificates that NECA acquired. App. 36a.

Turning to Petitioners' contentions about "tranche"-level standing, the Second Circuit held that each Certificate holder within an Offering or tranche backed by loans from a common originator "has the same 'necessary stake in litigating'" whether the lenders had in fact abandoned their guidelines. App. 36a (quoting *Blum*, 457 U.S. at 999). Indeed, the "'claims of the named plaintiffs necessarily give them – not just their lawyers – essentially the same incentive to litigate the counterpart claims of the class members because the establishment of the named plaintiffs' claims necessarily establishes those of other class members.'" App. 36a-37a (quoting *Nomura*, 632 F.3d at 770).

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[8] Those other five Trusts included GSAA Home Equity Trust 2007-3 (29% GreenPoint-originated loans), 2007-4 (36% GreenPoint-originated loans), 2007-6 (9% GreenPoint-originated loans), 2007-7 (23% GreenPoint-originated and 67% Wells Fargo-originated loans), and the GSR Mortgage Loan Trust 2007-3F (47% Wells Fargo-originated loans). App. 35a-36a.

REASONS FOR DENYING THE PETITION

A. Goldman has Demonstrated No Need for this Court's Review

NECA alleges it is one of many investors that acquired securities issued via 17 Trusts into which Petitioners had deposited mortgage loans from loan originators which had abandoned their loan-underwriting standards, and that all these investors were injured when their investments subsequently declined in value. Noting that the two Trusts whose Certificates NECA purchased were backed by loans originated by GreenPoint and Wells Fargo, the Second Circuit held that NECA has standing to proceed on class claims with respect to these two and the five other Trusts similarly backed by loans originated by GreenPoint or Wells Fargo. By proving that GreenPoint and Wells Fargo had abandoned stated loan-origination practices, NECA would establish both its own claims and those of other investors whose securities were backed by the two originators' loans. App. 24a-37a.

Petitioners charge the Second Circuit with creating an "amorphous" and "broad standard for class standing" by permitting a class representative with its own claims to litigate on behalf of others whose claims against the same defendants implicate the "same set of concerns." Pet. at 3, 8. But the standard the Second Circuit employed comes directly from this Court's opinion in *Gratz*, which held that despite the differences in undergraduate admissions standards between freshman and transfer-student applicants, a would-be transfer student could litigate race-discrimination claims on behalf of new freshman

applicants because "the same set of concerns is implicated by the University's use of race in evaluating all undergraduate admissions applications under the guidelines." *Gratz*, 539 U.S. at 264, 267.

The *Gratz* standard is neither amorphous nor broad. Rather, it is settled precedent that has created no meaningful problems in the ten years since *Gratz* was decided – a decade in which thousands of class certification motions have been decided by the federal courts. Petitioners fail to demonstrate why the Second Circuit's adherence to *Gratz* should demand this Court's review.

The decision below is entirely unremarkable. The Second Circuit *denied* NECA standing to litigate on behalf of investors in Trusts backed wholly by loans from originators whose departures from stated loan-origination practices would not establish NECA's individual claims. App. 35a. It held that NECA may litigate only on behalf of a narrow class of investors who share its interest in demonstrating that GreenPoint and Wells Fargo abandoned their stated loan-origination practices. App. 32a-36a. By proving its claims, NECA will prove the claims of investors in Petitioners' seven trusts that are backed by loans from GreenPoint or Wells Fargo. NECA's concrete interest in establishing those claims is clear. App. 35a-36a.

That NECA has Article III standing to litigate in its own right is not disputed. By asserting that NECA suffered losses by purchasing Petitioners' securities that were issued pursuant to misleading Offering Documents and whose value has declined, its "complaint satisfied the case-or-controversy requirement of Art. III of the Constitution."

Deposit Guaranty Nat'l Bank v. Roper, 445 U.S. 326, 332 (1980) ("*Roper*"). NECA alleged a concrete injury fairly traceable to the complained-of conduct, which is likely to be redressed by a ruling in its favor. *See* App. 23a. NECA clearly has Article III standing. *Id.*; *accord, e.g.*, *Already, LLC v. Nike, Inc.*, 184 L. Ed. 2d 553, 559-60 (2013); *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102-03 (1998); *Lujan*, 504 U.S. at 560-61; *Allen v. Wright*, 468 U.S. 737, 751, 756 (1984).

Having established its own standing to sue, moreover, NECA's "right to assert [its] own claims in the framework of a class action is clear," *Roper*, 445 U.S. at 332, provided of course that Rule 23 requirements can be satisfied – including "numerosity, commonality, typicality, and adequacy of representation." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1437 (2010). For Rule 23's text "creates a categorical rule entitling a plaintiff whose suit meets the specified criteria to pursue his claim as a class action." *Id.*; *see also United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 403 (1980) ("the Federal Rules . . . give the proposed class representative the right to have a class certified if the requirements of the Rules are met").

In the typical case, the conclusion that a representative plaintiff such as NECA has Article III standing "does not automatically establish that [it] is entitled to litigate the interests of the class [it] seeks to represent, but it does shift the focus of examination from the elements of justiciability to the ability of the named representative to 'fairly and adequately protect the interests of the class.'" *Sosna v. Iowa*, 419 U.S. 393, 403 (1975) (quoting Fed. R. Civ. P. 23(a)).

The Second Circuit noted that *Gratz* observed some ambiguity exists in this Court's precedents concerning whether variation between a named plaintiff's claims and those of putative class members "is a matter of Article III standing . . . or whether it goes to the propriety of class certification" under Rule 23(a). *Gratz*, 539 U.S. at 263 & n.15. But *Gratz* concluded the ambiguity was of little moment: "Regardless of whether the requirement is deemed one of adequacy or standing, it is clearly satisfied in this case." *Gratz*, 539 U.S. at 263. And any lingering ambiguity on the point by no means warrants a grant of certiorari here.

If the precedents have been less than perfectly clear, at times, in delineating between Article III standing concerns and the Rule 23 requirements, that should not be surprising. For the two involve similar – and substantially overlapping – concerns. "The standing inquiry focuses on whether the plaintiff is the proper party" to assert a claim, *Raines v. Bird*, 521 U.S. 811, 818 (1997), just as Rule 23's focus is on whether a plaintiff with a claim of its own is the proper party to represent the interests of a class. The requirement of Article III – that the plaintiff have a concrete interest in litigating a claim – obviously overlaps with Rule 23(a) requirements permitting a litigant to proceed on behalf of a class only if a court finds "there are questions of law or fact common to the class," that its claims "are typical of the claims . . . of the class," and that the class representative "will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(2)-(4).

As a consequence neither this Court's decisions, nor decisions of the lower courts, have found it

important to distinguish in every case between the requirements of Article III and the requirements of Rule 23, which together overlap to ensure that none may prosecute claims that they have no interest in proving.

In *East Texas Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395, 403-04 (1977), for example, this Court reversed certification of an employment-discrimination class under Rule 23 because the class representatives, lacking qualifications needed for the positions they sought, "*could have suffered no injury* as a result of the alleged discriminatory practices, and they were, therefore, simply not eligible to represent a class of persons who did allegedly suffer injury." *Id.* (emphasis added). "As this Court has repeatedly held, a class representative must be part of the class and 'possess the same interest and suffer the same injury' as the class members.'" *Id.* at 403 (quoting *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 216 (1974)). As a consequence, "the named plaintiffs were not proper class representatives under Fed. Rule Civ. Proc. 23(a)." *East Texas*, 431 U.S. at 403. Whether this is characterized as a Rule 23(a) decision, or as a "standing" decision, really matters very little – for both the underlying concerns and the ultimate result are the same.

Respondents make much of this Court's statement in *Blum*, that to assert claims on behalf of a class,

> [i]t is not enough that the conduct of which the plaintiff complains will injure *someone*. The complaining party must also show that he is within

> the class of persons who will be concretely affected. Nor does a plaintiff who has been subject to injurious conduct of one kind 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, 457 U.S. at 999.

But the Second Circuit acknowledged this principle. *See* App. 27a-28a. And the holding below is wholly consistent with it. For investors in all seven trusts backed by GreenPoint and Wells Fargo loans were subject to injurious conduct of a single kind: Their investments were impaired because these lenders had abandoned their stated loan-origination practices. Quoting *Blum*, the Second Circuit held NECA has the "'necessary stake in litigating' whether those lenders in fact abandoned their underwriting guidelines." App. 36a.

The Second Circuit created no significant conflict with existing precedent by quoting and applying this Court's opinions in *Gratz* and *Blum*, and Petitioners have identified no problems requiring this Court's attention.

B. The Decision Below Does Not Conflict with the First Circuit's *Nomura* Decision

Petitioners say the decision below "created an irreconcilable conflict with the First Circuit by holding that a named plaintiff may assert on behalf of a putative class claims that the plaintiff could *not* bring by itself." Pet. at 10-11 (emphasis in original). Yet the First Circuit's *Nomura* decision

acknowledges that "[i]n a properly certified class action, the named plaintiffs regularly litigate not only their own claims but also claims of other class members based on transactions in which the named plaintiffs played no part." *Nomura,* 632 F.3d at 769. Indeed, that is the *defining* characteristic of the class-action device, which permits a representative plaintiff to assert the individual claims of others provided Rule 23's requirements for class treatment are satisfied. *See Shady Grove,* 130 S. Ct. at 1437; *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2548-49 (2011).

The decision below does not conflict with *Nomura,* a case in which the named plaintiffs had no dealings with, let alone claims against, *most* of the named defendants. *See Nomura*, 632 F.3d at 769. With the securities involved sold by different defendants, in offerings underwritten by different securities underwriters, and backed by loans from different loan originators, the *Nomura* named plaintiffs had no concrete interest in establishing the liability of most of the defendants named, let alone in establishing deviations from stated loan-origination practices by loan originators whose loans did not back securities that the named plaintiffs had acquired. *Id.* at 768-71.

Here, by contrast, the same issuer and underwriter defendants stand behind *all* of the offerings at issue. The Second Circuit allowed NECA to proceed against these defendants – against each of which it asserts *its own* claims – only on behalf of investors who similarly acquired securities from the same defendants' offerings, and only to the extent that those securities were backed by mortgages from the same loan originators. NECA obviously has a concrete interest in

establishing that these originators abandoned their stated guidelines – to the injury of a class of investors who had acquired securities backed by the same originators' loans. Nothing in *Nomura* suggests the First Circuit would hold otherwise on the same facts.

The *Nomura* plaintiffs had acquired registered securities issued by two trusts that were backed in substantial part by loans originated by the First National Bank of Nevada ("FNBN"), which had allegedly abandoned its loan-underwriting guidelines. *See Nomura*, 632 F.3d at 772. The securities of both trusts were issued in registered offerings underwritten by Nomura Securities International, Inc. ("Nomura Securities"). The plaintiffs sought, however, to proceed against six additional trusts that had issued securities *backed by loans from different loan originators*, and in offerings underwritten by different underwriters – including Greenwich Capital Markets, Inc., Merrill Lynch, Pierce, Fenner & Smith, Inc., Goldman Sachs & Co., UBS Securities LLC, and Citigroup Global Markets, Inc. – with whom the named plaintiffs had no dealings, and against whom they asserted no claims of their own. *Id.* at 767 & n.2. The only common denominator was that Nomura Asset Acceptance Corp. ("Nomura Asset"), had deposited the mortgages from the different loan originators in the various trusts whose securities offerings were underwritten by different underwriters.

In *Nomura*, the named plaintiffs asserted no claims themselves against most of the defendants, who therefore could not possibly be "liable to the named plaintiffs on *any* claims." *Id.* at 769 (court's emphasis). The First Circuit emphasized that *on*

the record before it, "the necessary identity of issues and alignment of incentives" as to the defendants with whom the named plaintiffs had no dealings, and against which they had no claims, was simply lacking. *Id.* at 771. "Each trust is backed by loans from a different mix of banks," the First Circuit further observed, so that on the record before it, "no named plaintiff has a significant interest in establishing wrongdoing by the particular group of banks that financed a trust from which the named plaintiffs made no purchase." *Id.*

Thus, the First Circuit concluded, "the named plaintiffs have no stake in establishing liability as to misconduct involving the sales of those certificates" which were not backed by loans from the same originators as those that the named plaintiffs purchased, depriving them of standing to proceed against Nomura Asset as the one "common defendant with respect to all eight of the trusts." *Id.*

The Second Circuit's holding in this case by no means conflicts with the First Circuit's holding that investors could not proceed on behalf of a class against defendants with whom they had no dealings and could not assert claims of their own. For NECA asserts claims of its own against every one of the named defendants. And the Second Circuit agrees with the First Circuit, "that '[t]o establish Article III standing in a class action . . . for every named defendant there must be at least one named plaintiff who can assert a claim directly against that defendant.'" App. 25a (quoting *Central States SE & SW Areas Health & Welfare Fund v. Merck-Medco Managed Care, L.L.C.*, 504 F.3d 229, 241 (2d Cir. 2007)).

The Second Circuit also agrees with the First Circuit that the named plaintiff must have "a significant interest in establishing wrongdoing by the particular group of banks that financed a trust from which the named plaintiffs made no purchases." *Nomura*, 632 F.3d at 771. That is why the Second Circuit permitted NECA to proceed only on behalf of investors whose Certificates are backed by the same loan originators that back NECA's certificates. App. 36a. "NECA has the same 'necessary stake in litigating whether those lenders in fact abandoned their underwriting guidelines.'" App. 36a (quoting *Blum*, 457 U.S. at 999).

The First Circuit expressly reserved judgment in *Nomura* on standing to sue defendants against whom the named plaintiff has no claim of its own but "where the claims of the named plaintiffs necessarily give them – not just their lawyers – essentially the same incentive to litigate the counterpart claims of the class members because the establishment of the named plaintiffs' claims necessarily establishes those of other class members." *Nomura*, 632 F.3d at 770. "The matter is one of identity of issues not in the abstract but at a ground floor level," the First Circuit observed, adding that "[i]n such a case, which might include the kind of claims that were present in *Payton* [*v. County of Kane*, 308 F.3d 673 680 (7th Cir. 2002)], and *Fallick* [*v. Nationwide Mutual Ins. Co.*, 162 F.3d 410, 423 (6th Cir. 1998)], the substance of the Article III concern may vanish even if in form it might seem to persist." *Nomura*, 632 F.3d at 770.

In sum, both *Nomura* and the Second Circuit's decision below limit standing to investors with claims of their own, whose individual claims give

them a concrete interest in establishing factually similar claims that other class members have against the very same defendants. There is no conflict.

C. The Lower Courts Are Not In Disarray

Petitioners say that the supposed conflict between the decision below and the First Circuit's *Nomura* decision "brings to a head broader existing conflict and confusion among the circuits regarding the requirements of class standing in general, with implications far beyond the securities field." Pet. at 16. Yet the decisions themselves evidence no such conflict, and demonstrate that the issues involved can be readily dealt with at class certification.

Petitioners cite *Hines v. Widnall*, 334 F.3d 1253 (11th Cir. 2003), where the Eleventh Circuit affirmed denial of class certification because Rule 23(a)'s requirements of commonality and typicality went unsatisfied. "'Without individual standing to raise a legal claim,'" the Eleventh Circuit observed, "'a named representative does not have the requisite typicality to raise the same claim on behalf of a class.'" *Id.* at 1256 (quoting *Prado-Steiman v. Bush*, 221 F.3d 1266, 1279 (11th Cir. 2000)). Failure to exhaust administrative remedies deprived them of "standing," and thus of the "typicality" Rule 23 requires to represent a class. *Id.*

Petitioners also cite *Lierboe v. State Farm Mut. Auto Ins. Co.*, 350 F.3d 1018, 1022 (9th Cir. 2003), where a plaintiff sued an insurance company on behalf of a class of insureds whose insurance

claims their insurer had limited by refusing to "stack" the benefits when more than one policy covered an accident. Pet. at 16-17. Yet "Lierboe's accident in her Jeep was covered only by a single policy," and "there was no second covering policy to stack." 350 F.3d at 1021-22. The named plaintiff had no claim of her own to assert; she accordingly lacked Article III standing, and thus could not proceed on behalf of a class of which she was not a member.

Petitioners assert that *Hines* and *Lierboe* are correctly decided, but that they somehow conflict with holdings of the Third, Sixth, and Seventh Circuits that once a named plaintiff establishes its own standing to assert a claim, whether that plaintiff may also represent a class ordinarily "'depends solely on whether he is able to meet the additional criteria encompassed in Rule 23,'"[9] as this Court itself said in *Sosna*. *See supra* at 20.

Yet *Hines* and *Lierboe*, which both involved plaintiffs with no individual standing, were both appeals from orders on class-certification motions. Petitioners' images of "conflict," "confusion," and "disarray" are wholly imagined. All they have shown is that questions of standing, and Rule 23 considerations, tend to overlap. That is hardly news.

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[9] Pet. at 17 (quoting *Fallick v. Nationwide Mut. Ins. Co.*, 162 F.3d 410, 423 (6th Cir. 1998), and citing *Grasty v. Amalgamated Clothing & Textile Workers Union*, 828 F.2d 123, 130 n.8 (3d Cir. 1987), *abrogated on other grounds by Reed v. United Transp. Union*, 488 U.S. 319, 323-34 (1989); *Payton v. Cnty. of Kane*, 308 F.3d 673, 677 (7th Cir. 2002)).

It is, moreover, a compelling reason for *denying* certiorari. For Petitioners themselves effectively concede that Rule 23 eliminates any need for this Court's immediate review of Article III's application to class claims:

> Because Rule 23's criteria *narrow* the scope of constitutionally permissible class actions – and indeed "must be interpreted in keeping with Article III constraints," *ibid.* (quoting *Amchem*, 521 U.S. at 613) – a case might never arise where the Court concludes that Rule 23's criteria are met but Article III's demands are not.

Pet. at 33.

The Second Circuit's opinion itself emphasizes that "[t]he district court, after reviewing all of the Rule 23 factors, retains broad discretion" as to certifying a class action in this case. App. 37a. Thus, the interlocutory character of the ruling below weighs heavily against the need for this Court's immediate review.[10]

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[10] *See Brotherhood of Locomotive Firemen & Enginemen v. Bangor & A. R. Co.*, 389 U.S. 327, 328 (1967) (denying certiorari "because the Court of Appeals remanded the case [which thus] is not yet ripe for review by this Court"); *see also Virginia Military Institute v. United States*, 508 U.S. 946, 946 (1993) (Scalia, J., concurring) ("We generally await final judgment in the lower courts before exercising our certiorari jurisdiction.").

D. The Case Is a Poor Vehicle for Reaching the More Interesting Article III Standing Questions Addressed in *Nomura*

This case is a poor vehicle for addressing the different – and more interesting – Article III standing issue that the First Circuit's opinion in *Nomura* addressed at some length. That concerns whether and when a class representative may possess standing to assert claims on behalf of a class against defendants with whom it had no dealings and against whom it asserts no claim of its own.

Much of the First Circuit's opinion in *Nomura* is devoted to that question, for the *Nomura* plaintiffs had no dealings with most of the defendants, who thus were "not liable to the named plaintiffs on *any* claims." *Nomura*, 632 F.3d at 769 (emphasis added).

"In these circumstances older cases," including one from the First Circuit, "have refused to allow the case to proceed – whether as a class action or not – against defendants not implicated in any of the wrongs done to the named plaintiffs." *Id.* (citing *Barry v. St. Paul Fire & Marine Ins. Co.*, 555 F.2d 3 (1st Cir. 1977), *aff'd,* 438 U.S. 531 (1978)); *see also, e.g., Haas v. Pittsburgh Nat'l Bank*, 526 F.2d 1083, 1095-96 & n.18 (3d Cir. 1975). The Second Circuit agrees that "'[t]o establish Article III standing in a class action . . . for every named defendant there must be at least one named plaintiff who can assert a claim directly against that defendant.'" App. 25a (quoting *Merck-Medco Managed Care*, 504 F.3d at 241).

The First Circuit followed that approach in *Nomura,* yet it noted that "several circuits have cut themselves loose from a strict requirement that, in a plaintiff class action, no defendant may be sued unless a named plaintiff has a counterpart claim against that defendant." *Nomura*, 632 F.3d at 770.

Such decisions include *Payton*, 308 F.3d at 680-81, where named plaintiffs injured by two defendant counties were permitted to proceed against 17 other counties engaged in similar conduct, and *Fallick*, 162 F.3d at 421-24, where a named plaintiff who participated in one ERISA plan was permitted to proceed against all of the defendants' ERISA plans because the gravamen of the challenge was a general practice affecting all the plans.

Assuming that the scenario raised by *Nomura* presents a genuine conflict among the circuits – one that might even warrant this Court's attention – this case presents no opportunity to resolve it. For NECA has asserted claims of its own against each of the defendants.

E. Petitioners' Speculative Fears Do Not Warrant Granting Certiorari

Petitioners serve up a final grab bag of reasons they say justifies certiorari: (i) the "already staggering" stakes of RMBS litigation will increase and plaintiffs will file "new suits" alleging "similarly broad claims"; (ii) federal courts applying the Second Circuit's holding will face "tremendous" hardship; and (iii) plaintiffs will attempt to extend the Second Circuit's reasoning into other class-action litigation. Pet. at 26-30. Each of the three entries in Petitioners' parade of horribles fails.

First, while the stakes in RMBS suits are not immaterial given the economic devastation that Petitioners (and others like them) helped foment, that alone is no reason to revisit the Second Circuit's opinion that is firmly grounded in this Court's class-action precedents like *Blum* and *Gratz*. Petitioners try to paint the opinion as allowing attenuated claims with only "minimal overlap" among the originating lenders (Pet. at 27), but that broad brushstroke is belied by the facts: Two loan originators – GreenPoint or Wells Fargo, or both – are common to *each* of the seven Trusts at issue (App. 35a), and Petitioners "are alleged to have inserted *nearly identical* misrepresentations into the Offering Documents associated with *all* of the Certificates" whose purchasers NECA seeks to represent. App. 32a (emphasis in original); *see also* App. 8a-9a (Shelf Registration Statement common to all Certificates repeated *same* misstatements).

Petitioners' suggestion that "new suits . . . are sure to follow" (Pet. at 27) is specious – both as a matter of law, and of common sense. Securities Act claims are subject to 1-and-3-year periods of limitation and repose. 15 U.S.C. §77m. With the RMBS crisis having reached its zenith in 2008, the bulk of those suits have already been brought and disposed of. Indeed, Cornerstone Research's latest annual survey of securities class action filings declares flatly that "[t]he wave of credit crisis-related filings is over."[11] "No new class actions

[11] Cornerstone Research, *Securities Class Action Filings: 2012 Year in Review* 1 (2012). Moreover, securities class-action filings in 2012 decreased 19% from 2011 – "the second-lowest level in 16 years." *Id.* at 3.

related to the credit crisis were filed in 2012 compared with three such filings in 2011." *Id.* Plainly, RMBS-related class-action litigation has run its course.

Petitioners make the unsurprising observation that litigation risks may exert "tremendous pressure" on defendants to settle claims before the class-certification stage, citing similar concerns expressed in case law and Congressional materials from 15 or more years ago. Pet. at 28. They overlook, however, that since the passage of the Private Securities Litigation Reform Act of 1995 ("PSLRA"), the PSLRA's gatekeeping function has reduced that pressure. *See, e.g.*, *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 324 (2007) (PSLRA's heightened pleading requirements "are but one constraint among many the PSLRA installed to screen out frivolous suits, while allowing meritorious actions to move forward"); *Adams v. Kinder-Morgan*, Inc., 340 F.3d 1083, 1100 (10th Cir. 2003) (PSLRA's stringent pleading standard "creates a significant hurdle for plaintiffs to overcome before discovery, but it permits plaintiffs with valid claims to proceed with their lawsuits"). Petitioners suggest that some RMBS defendants "are considering" multi-million-dollar settlements (Pet. at 28), but that by itself does not show that the settlements are uncalled for: They offer no facts showing those defendants either (i) do not deserve to settle up meritorious claims, or (ii) are facing claims brought by plaintiffs with purported class standing issues.

Moreover, the decision below will work no hardship upon federal courts – let alone a "tremendous" one – considering whether various claims implicate "sufficiently similar" concerns

supporting class standing. Federal judges make judgment calls in litigation all of the time; it is their bailiwick. *See, e.g.*, *Nomura*, 632 F.3d at 773 (remanding while noting: "this case presents a judgment call" whether allegations link certain "practices with specific lending banks that supplied the mortgages that underpinned the trusts"). Indeed, this Court's decision in *Gratz* illustrated that mathematical certainty is not required – even in class actions. *Cf. Gratz*, 539 U.S. at 265 (university's use of race in undergraduate versus transfer admissions "does not implicate a significantly different set of concerns"). And Petitioners concede that, even prior to the Second Circuit's decision, lower courts have "largely adhered" to what they consider proper class standing analysis – citing *Nomura* for the proposition. Pet. at 26. Petitioners thus concede that the judicial landscape *is* fairly uniform on the point, as opposed to the wholesale disarray painted earlier in their Petition. Moreover, because NECA has already shown how the Second Circuit's reasoning is perfectly consonant with *Nomura* (*supra* at 23-28), Petitioners' concession further undermines any supposed "confusion" in the courts.

Finally, Petitioners' suggestion that plaintiffs *may* attempt to export and extend the underlying opinion into other areas such as mutual-fund, product-liability, and employment-discrimination class actions, is speculation. *Cf. Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001) ("But the dissent's own language (e.g., 'may,' 'potentially') betrays the speculative nature of its claims."). Rank speculation does not justify granting certiorari.

Petitioners overlook that *Gratz*'s "same set of concerns" holding, 539 U.S. at 267 – the centerpiece of the Second Circuit's decision – did not open the class-action floodgates, as Petitioners suggest will happen now because the Second Circuit has applied *Gratz*'s holding. If *Gratz* did not result in the unwarranted expansion of class-standing concepts into other class-action litigation, there is no reason to believe that the Second Circuit's decision will. As such, Petitioners' fears are illusory.

Moreover, Petitioners' assertion that plaintiffs in product-liability litigation complaining of *different* products will exploit the Second Circuit's decision simply makes no sense. Are they suggesting that class-action plaintiffs complaining of a defective screwdriver will also claim standing to represent purchasers of defective drills from the same manufacturer? From a different one? Petitioners never explain, and their suggestion is a flimsy platform upon which to grant certiorari.

Likewise, this Court's decision in *Dukes*, 131 S. Ct. 2541, surely obviates any concern that plaintiffs alleging one particular unlawful employment practice will nonetheless succeed in enlarging their suit to cover "many others." Pet. at 30. *Dukes* counsels the opposite result, for a class action will not lie where there is "nothing to unite all of the plaintiffs' claims." *Dukes*, 131 S. Ct. at 2557 n.10. That reasoning is consistent with the Second Circuit's embrace of the "same set of concerns" and its rejection of "'fundamentally different concerns'" on the facts here. App. 32a-33a (citing *Gratz*, 539 U.S. at 264).

Beyond asserting the decision below will have sweeping consequences for a wide variety of cases, Petitioners say that because the 1933 Act provides the theory of liability under which NECA has chosen to prosecute its claims, the Court can decide the case "without setting forth a definitive test for determining – in contexts less clear than this one – whether claims are the same claim for Article III purposes." Pet. at 31. Their Petition, then, is not about Article III standing so much as about statutory construction of §§11 and 12 of the 1933 Act.[12] But that is not a point on which Petitioners can identify any significant conflict among the lower courts.

In sum, Petitioners' unfounded fears and suppositions are poor substitutes for compelling reasons justifying certiorari.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,
DARREN J. ROBBINS
ERIC ALAN ISAACSON
(Counsel of Record)
ARTHUR C. LEAHY
JOSEPH D. DALEY
ROBBINS GELLER RUDMAN

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[12] *See Bond v. United States*, 131 S. Ct. 2355, 2362 (2011) (distinguishing Article III standing from "statutory standing" which typically asks whether the plaintiff states a cause of action); *Steel*, 523 U.S. at 97 n.2; *In re Century Aluminum Co. Sec. Litig.*, No. 11-15599, 2013 U.S. App. LEXIS 24, at *11-*12 (9th Cir. Jan. 2, 2013); *Roberts v. Hamer*, 655 F.3d 578, 580-81 (6th Cir. 2011).

& DOWD LLP
655 WEST BROADWAY,
SUITE 1900
SAN DIEGO, CA 92101
619/231-1058
eisaacson@rgrdlaw.com

SAMUEL H. RUDMAN
ROBBINS GELLER RUDMAN
& DOWD LLP
58 South Service Road
Suite 200
Melville, NY 11747
631/367-7100

PATRICK J. O'HARA
CAVANAGH & O'HARA
407 EAST ADAMS STREET
SPRINGFIELD, IL 62701
217/544-1771

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Attorneys for Respondent