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

REPLY BRIEF FOR PETITIONERS

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RULE 29.6 STATEMENT

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

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The Second Circuit adopted what it described as a "broad standard for class standing" that empowers a representative plaintiff to assert claims that the plaintiff could not bring independently so long as they implicate a "sufficiently similar set of concerns," App. 31a, 35a—in NECA's words, any "factually similar claims that other class members have," Opp. 28. NECA's portrayal of that novel holding as an "entirely unremarkable" application of this Court's "settled precedent" (Opp. 19) is demonstrably untrue.

As lower courts have recognized, the decision below *is* remarkable, and "has thrown the jurisprudence in this area into disarray." *FDIC* v. *Countrywide Fin. Corp.*, 2012 WL 5900973, at *10 (C.D. Cal. Nov. 21, 2012). Courts struggling to apply the Second Circuit's amorphous standard have acknowledged that it "constitutes a … change in controlling law" and "creates a circuit split with … *Plumbers' Union Local No. 12 Pension Fund* v. *Nomura Asset Acceptance Corp.*, 632 F.3d 762 (1st Cir. 2011)." *N.J. Carpenters Health Fund* v. *Residential Capital, LLC*, __ F.R.D. __, 2013 WL 55854, at *5 (S.D.N.Y. Jan. 3, 2013). *Amici* have attested to the "multi-billion-dollar" consequences in securities litigation alone. SIFMA Br. 20. And plaintiffs are already exploiting it in other contexts.

Far from supporting the decision below, this Court's "settled precedent" (Opp. 19) holds that "a plaintiff must demonstrate standing for each claim he seeks to press," *DaimlerChrysler Corp.* v. *Cuno*, 547 U.S. 332, 352 (2006), and that the class-action procedure "'adds nothing to the question of standing,'" *Lewis* v. *Casey*, 518 U.S. 343, 357 (1996) (cita-

tion omitted). Astonishingly, NECA does not attempt to grapple with these precedents, which belie its position that Article III requires only *ad hoc* "judgment calls." Opp. 35.

NECA's suggestion that *Gratz* v. *Bollinger*, 539 U.S. 244 (2003), supports this approach is refuted by *Nomura*, which acknowledged *Gratz* but correctly held—as courts until now overwhelmingly had agreed—that class representatives lacked standing to assert claims concerning securities they never purchased because they had "no stake in establishing liability as to misconduct involving the sales of those certificates." 632 F.3d at 771. NECA labors mightily to manufacture factual distinctions with *Nomura*, but they crumble upon inspection; the conflict is irreconcilable.

This Court's review is warranted.

I. THE DECISION BELOW CONFLICTS DIRECTLY WITH THE FIRST CIRCUIT'S RULING AND DEEPENS EXISTING DISAGREEMENT.

A. Lower courts have recognized that the Second Circuit's holding that NECA may pursue claims on behalf of a class that it lacks standing to pursue in its *own* name "creates a circuit split with [*Nomura*]," which reached the opposite conclusion on nearly identical facts. *N.J. Carpenters*, 2013 WL 55854, at *5; *see Countrywide*, 2012 WL 5900973, at *12 (noting split).

NECA's attempts to explain away this clear and acknowledged circuit split are specious. NECA contends that *Nomura* turned on the fact that the named plaintiffs had no claims of their own against "*most*" of the defendants, and thus could not represent class members who did. Opp. 24-26, 31-33. The

decision below does not conflict with that holding, NECA argues, because NECA has claims against every defendant. Opp. 24-25. That is irrelevant. The First Circuit explicitly held that, even though the named plaintiffs had *some* claims of their own against one defendant—Nomura Asset, which allegedly played a central role in creating, issuing, and selling the securities for all eight trusts, 632 F.3d at 766—based on securities that the named plaintiffs had purchased, their "claims against [Nomura Asset] *as well fail* so far as they are based on the six trusts whose certificates were purchased by no named plaintiff." *Id.* at 771 (emphasis added). The named plaintiffs' claims against Nomura Asset based on securities they did not purchase are indistinguishable from NECA's claims here. Yet the First Circuit barred those claims, while the Second Circuit here allowed them.

NECA also asserts that these disparate outcomes can be reconciled because the decision below permitted NECA to pursue only claims involving RMBS backed (even in part) by loans originated by common banks, whereas in *Nomura*, the six trusts over which the named plaintiffs lacked standing to sue "were not backed by loans from the same originators as those that the named plaintiffs purchased." Opp. 26-27. NECA misstates *Nomura*'s facts. As here, several of the other trusts *were* partially backed by loans from banks whose loans also backed RMBS the named plaintiffs acquired. Pet. 13-14 n.6. For example, First National Bank of Nevada and Metrocities each originated some loans backing one or both trusts from which the named plaintiffs purchased RMBS

(the AF1 and AP1 trusts), but *also* loans backing other trusts.[1]

The First Circuit correctly concluded that "the named plaintiffs have no stake in establishing liability as to misconduct involving the sales of those certificates." 632 F.3d at 771. Because, as here, each of the certificates involved "loans from a different mix of banks," "the necessary identity of issues and alignment of incentives" that conceivably could enable a plaintiff to aggregate claims based on certificates it did not purchase "is not present." *Ibid.* NECA thus is wrong to suggest that the First Circuit would allow a named plaintiff to assert "factually similar claims that other class members have." Opp. 28.[2]

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[1] Regarding First National Bank of Nevada, compare Decl. Supp. Mot. Dismiss Ex. A, at 39, Ex. B, at 68, *Plumbers' Union Local No. 12 Pension Fund* v. *Nomura Asset Acceptance Corp.*, 658 F. Supp. 2d 299 (D. Mass. 2009) (No. 08-cv-10446) (Dkt. #42), with *id.*, Ex. G, at 53. Regarding Metrocities, compare *id.*, Ex. B, at 68, with *id.*, Ex. C, at 10, Ex. F, at 9.

[2] The First Circuit's suggestion in dictum that a class representative might have standing if "establishment of [its] claims necessarily establishes those of other class members" is irrelevant. 632 F.3d at 770. *Nomura* made clear that that potential "qualification" "d[id] not affect the outcome." *Ibid*. Because NECA identifies no pertinent factual difference, that "qualification" likewise has no bearing here. Moreover, it simply is not true that "[b]y proving its claims, NECA will prove" all other claims relating to "trusts … backed by loans from GreenPoint or Wells Fargo." Opp. 19. The loans backing each trust not only were originated by a "different mix of banks," as in *Nomura*, but also are of different *vintages*. Proving that a bank abandoned its underwriting guidelines in originating one set of loans during *one* period of time would not demonstrate—necessarily or otherwise—that it did so as to *other* loans, especially loans originated *earlier*.

B. NECA likewise fails to refute the broader disagreement regarding standing in class actions that the decision below exacerbates. As *Nomura* observed, the Sixth and Seventh Circuits (before *Gratz*) had "cut themselves loose from a strict requirement" that a named plaintiff have standing to assert every class claim; while not adopting a standard as permissive as the Second Circuit's, these courts nonetheless allow such claims if they "are essentially of the same character" as a claim that a named plaintiff has standing to bring. 632 F.3d at 770 & n.7 (citing *Payton* v. *Cnty. of Kane*, 308 F.3d 673, 680-81 (7th Cir. 2002); *Fallick* v. *Nationwide Mut. Ins. Co.*, 162 F.3d 410, 421-24 (6th Cir. 1998)).

NECA denies that the Ninth and Eleventh Circuits follow a different course than the Sixth and Seventh (and now Second) Circuits. Opp. 28-30. But both *Lierboe* v. *State Farm Mutual Automobile Insurance Co.*, 350 F.3d 1018, 1022 (9th Cir. 2003), and *Hines* v. *Widnall*, 334 F.3d 1253, 1257 (11th Cir. 2003) (per curiam), expressly held, as *Nomura* did, that class representatives lacked standing to pursue class claims that they lacked standing to pursue themselves. NECA's response that those cases denied *class* standing only because the plaintiffs lacked standing to pursue the relevant claims in their *own* right (Opp. 28-29) only underscores the core of the conflict.[3]

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[3] *Hines* did not, as NECA argues (Opp. 28), equate standing with typicality, but deemed standing an essential *prerequisite* and decided it *before* "turn[ing] to" typicality. 334 F.3d at 1257.

II. THE DECISION BELOW CONTRADICTS THIS COURT'S PRECEDENTS.

A. In defending the decision below, NECA never grapples with this Court's controlling precedents. It does not even mention *Cuno*, which held that federal-court plaintiffs must establish Article III standing for "each claim" they assert. 547 U.S. at 352. Nor does NECA address *Lewis*'s holding that denominating a suit as a class action "'adds nothing to the question of standing,'" and that a class representative therefore must demonstrate his standing for each claim he asserts on behalf of the class. 518 U.S. at 357 (citation omitted); *see also Blum* v. *Yaretsky*, 457 U.S. 991, 1001-02 (1982); *Schlesinger* v. *Reservists Comm. to Stop the War*, 418 U.S. 208, 216 (1974).

These precedents foreclose the Second Circuit's theory of "class standing," which is undoubtedly why NECA ignores them. NECA "clearly lacks" standing to assert by itself claims based on RMBS it never acquired. App. 24a. It has "no stake in establishing" that offering documents for *other* RMBS inaccurately described the lending practices for *different* pools of mortgages. *Nomura*, 632 F.3d at 771. And it has zero interest in proving other elements of class members' claims, including whether they actually acquired those securities or suffered a loss.

NECA nevertheless defends the Second Circuit's novel standard under which standing is not *claim*-specific—as *Cuno* requires—but instead *concern*-specific, requiring only that each claim "raise a sufficiently similar set of concerns." App. 35a. NECA's assertion that once a plaintiff establishes standing to pursue his own claims, Rule 23 *overrides* any further standing inquiry (Opp. 20) contradicts *Lewis*, 518 U.S. at 357-58 & n.6, and this Court's other holdings

that class representatives lacked standing for *class* claims despite having standing to pursue their *own* claims, *see*, *e.g.*, *Blum*, 457 U.S. at 1001-02; *Rosario* v. *Rockefeller*, 410 U.S. 752, 757-59 & n.9 (1973); *Bailey* v. *Patterson*, 369 U.S. 31, 32-33 (1962) (per curiam). It also disregards *Sosna* v. *Iowa*, 419 U.S. 393, 403 (1975), the Rules Enabling Act, 28 U.S.C. § 2072(b), and courts' obligation to construe Rule 23 "in keeping with Article III constraints," *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 612-13 (1997).

B. NECA defends the decision below as an "entirely unremarkable" application of *Gratz*, 539 U.S. 244. Opp. 19. It cannot explain, however, why until now courts overwhelmingly rejected NECA's theory of standing in the decade after *Gratz*. *See Nomura*, 632 F.3d at 770-71. The reason is that *Gratz* did *not* overturn the Court's cases prohibiting class representatives from pursuing claims they lack standing to pursue themselves. *See* 539 U.S. at 262-66. It simply allowed a class representative to challenge, on broad equal-protection and other grounds, a university's consideration of race in admissions decisions, employing "*identical*" criteria to assess applicants' contributions to diversity. *Id.* at 263-68.

NECA's claims and those of putative class members, in contrast, are fundamentally different. The legal standard is narrow and security-specific. *See* 15 U.S.C. §§ 77k(a), 77*l*(a)(2), 77*o*(a). NECA points to the common base shelf-registration statement. Opp. 5-9. But it was drafted before the securities at issue *existed* or the underlying mortgage pools were identified, and so could have said nothing about specific originator practices or loans originated at varying times. And SEC regulations make clear that

each ensuing securitization is a separate and distinct offering.

NECA also substantially overstates the overlap in the sources of the underlying loans. The five additional trusts over which the Second Circuit held NECA may sue were not "backed by the same loan originators that back NECA's certificates." Opp. 27. Each was backed by mortgages of varying vintages from a different mix of banks; less than 10% of those backing the 2007-6 trust, for example, were originated by a bank (GreenPoint) whose loans also backed RMBS that NECA purchased. App. 35a. And NECA is now attempting, based on the Second Circuit's reasoning, to pursue claims based on seven *more* offerings than that decision authorized. Fourth Am. Compl. ¶¶ 14, 20 (S.D.N.Y. Dkt. #157).

III. THIS COURT'S REVIEW IS URGENTLY NEEDED GIVEN THE SEVERE PRACTICAL EFFECTS OF THE DECISION BELOW.

A. NECA's assertion that the Second Circuit's decision will not unsettle the law is belied by the upheaval it *already* has caused. The decision below has "thrown the jurisprudence in this area into disarray," upending the well-settled law that class representatives *cannot* pursue claims based on RMBS they never acquired. *Countrywide*, 2012 WL 5900973, at *10. Based on the decision below, several courts in the Second Circuit have already revived *billions* of dollars of RMBS claims previously dismissed for lack of standing. *See*, *e.g.*, *N.J. Carpenters Health Fund* v. *DLJ Mortg. Capital, Inc.*, 2013 WL 357615, at *8-9 (S.D.N.Y. Jan. 23, 2013); *In re Morgan Stanley Mortg. Pass-Through Certificates Litig.*, 2013 WL 139556, at *2-3 (S.D.N.Y. Jan. 11, 2013); *Fort Worth Emps.' Ret. Fund* v. *J.P. Morgan Chase & Co.*, No.

09-3701 (S.D.N.Y. Jan. 4, 2013) (Dkt. #197); *Plumbers' & Pipefitters' Local No. 562 Supplemental Plan & Trust* v. *J.P. Morgan Acceptance Corp.*, 2012 WL 4053716, at *1 (E.D.N.Y. Sept. 14, 2012).

The same issue is being presented in other courts across the country. At least one court not bound by the decision below has joined *Nomura* and rejected the Second Circuit's analysis. *See Countrywide*, 2012 WL 5900973, at *10-12. But until *this* Court provides authoritative guidance, lower courts and litigants will remain in limbo—knowing an eventual ruling may send their cases back to square one, rendering years of litigation a waste and distorting settlement dynamics in pending cases.

B. Where efforts to revive or add RMBS claims succeed, "the scope of the cases could change radically." *N.J. Carpenters*, 2013 WL 55854, at *5 (number of RMBS offerings involved could increase from six to 73); *see* SIFMA Br. 18-22. Increasing the scope of RMBS lawsuits significantly increases defendants' potential liability, and may force defendants to settle meritless claims to avoid the cost of defending class litigation and "the risk of potentially ruinous liability." Fed. R. Civ. P. 23(f) advisory committee's note (1998); *see* DRI Br. 14-17. For this reason, some courts even within the Second Circuit have declined to apply the ruling immediately, awaiting the outcome of this case before drastically reshaping the cases before them. *See N.J. Carpenters*, 2013 WL 55854, at *5; *see also In re Lehman Bros. Sec. & ERISA Litig.*, No. 09-2017 (S.D.N.Y. Nov. 20, 2012) (Dkt. #1054).

NECA blithely acknowledges that the stakes are "not immaterial," contending only that many *new* claims are unlikely. Opp. 33-34. Given how many

existing suits the decision below could transmogrify, to the tune of billions of dollars in exposure, that is cold comfort. And although many new claims would indeed be time-barred, the decision below could encourage some plaintiffs to try to resurrect them on the ground that the prior limitations period was tolled by some other plaintiff's "class standing" under *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538 (1974). *See*, *e.g.*, Pls.' Opp. at 19-25, *Nat'l Credit Union Admin. Bd.* v. *Goldman, Sachs & Co.*, No. 11-6521 (C.D. Cal. Jan. 28, 2013) (Dkt. #134); Pls.' Opp. at 34-36, *Nat'l Credit Union Admin. Bd.* v. *UBS Sec., LLC*, No. 12-2591 (D. Kan. Nov. 29, 2012) (Dkt. #26). Some have already done so. *See Morgan Stanley*, 2013 WL 139556, at *2-3.

C. NECA similarly gives short shrift to the massive difficulties that the Second Circuit's standard imposes on lower courts that must struggle to apply it. Opp. 34-35; *cf.* Pet. 28-29; DRI Br. 8-13. Some courts already have candidly expressed uncertainty regarding the Second Circuit's new standard. *See*, *e.g.*, *N.J. Carpenters*, 2013 WL 55854, at *5. And decisions applying it reveal confusion and disagreement about its scope. *Compare Morgan Stanley*, 2013 WL 139556, at *2-3 (extending decision below to case where misrepresentations did not concern common originators, but common entity that *bundled* RMBS), *with Policeman's Annuity & Benefit Fund of Chi.* v. *Bank of Am., N.A.*, __ F. Supp. 2d __, 2012 WL 6062544, at *6-7 (S.D.N.Y. Dec. 7, 2012) (allowing plaintiffs to sue over RMBS in certain other tranches of same trust but *not* other trusts).

NECA cavalierly claims that this uncertainty is unproblematic because standing comes down to "judgment calls," which "judges make … all of the

time." Opp. 35. Threshold constitutional questions of federal jurisdiction, however, should not be left to *ad hoc* intuitions. Jurisdictional rules "should above all be clear," *Budinich* v. *Becton Dickinson & Co.*, 486 U.S. 196, 202 (1988), particularly in securities litigation, "'an area that demands certainty and predictability,'" *Cent. Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 188 (1994) (citation omitted). Yet few rules of jurisdiction could be murkier than a "sufficiently similar set of concerns" standard. App. 35a.

D. There is every reason to expect that these problems will spread to other contexts. The Second Circuit adopted a general standard—borrowed from a racial-discrimination case, but broad enough to govern securities litigation.

NECA's rejoinder that the decision below will not "open the class-action floodgates" because *Gratz* itself did not (Opp. 36) merely reflects the novelty of the Second Circuit's misreading of *Gratz*. But that error will now propagate. Plaintiffs in one suit have invoked it to support their standing for claims alleging deceptive marketing of fortified-milk products. *See* Pls.' Resp. to Def.'s Mot. to Dismiss at 26, *In re Horizon Organic Milk Plus DHA Omega-3 Mktg. & Sales Practice Litig.*, No. 12-2324 (S.D. Fla. Sept. 18, 2012) (Dkt. #83). And another relied on it, albeit unsuccessfully, to support her standing to sue over oil and gas leases. *See* Appellant's Rule 28(j) Ltr., *McCall* v. *Chesapeake Energy Corp.*, No. 11-4164 (2d Cir. Dec. 21, 2012) (Dkt. #121); *McCall* v. *Chesapeake Energy Corp.*, 2013 WL 335981 (2d Cir. Jan. 30, 2013).

Regardless whether such arguments prevail, courts and litigants will expend incalculable time

and resources litigating them. This Court should review the decision below before putting them to those severe, needless burdens.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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