No. 13-791

In the Supreme Court of the United States

JOHN J. MOORES, ET AL., PETITIONERS

v.

DAVID HILDES, INDIVIDUALLY AND AS TRUSTEE OF THE DAVID AND KATHLEEN HILDES 1999 CHARITABLE REMAINDER UNITRUST DATED JUNE 25, 1999

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

ANNE K. SMALL
General Counsel
MICHAEL A. CONLEY
Deputy General Counsel
JACOB H. STILLMAN
Solicitor
RANDALL W. QUINN
Assistant General Counsel
JACOB R. LOSHIN
Senior Counsel
Securities and Exchange Commission
Washington, D.C. 20549

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
MALCOLM L. STEWART
Deputy Solicitor General
ROMAN MARTINEZ
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether a person who acquires stock in a stock-for-stock merger pursuant to a false registration statement may raise a claim under Section 11 of the Securities Act of 1933, 15 U.S.C. 77k, even if he agreed to vote his shares in favor of the merger before the registration statement was filed.

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This brief is submitted in response to the order of the Court inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be granted.

STATEMENT

This case presents the question whether a person who acquires stock in a stock-for-stock merger pursuant to a false registration statement, and suffers loss as a result, may bring a claim under Section 11 of the Securities Act of 1933 (Securities Act), 15 U.S.C. 77k, even if he agreed to vote his shares in favor of the merger before the registration statement was filed. Petitioners argue that such a person cannot recover because, in promising to vote his shares in favor of the

merger, he could not have relied on a false registration statement that had not yet been filed. The court of appeals held that such reliance is not a prerequisite to a valid Section 11 claim, and it allowed the claim at issue in this case to proceed. Pet. App. 4a.

1. The Securities Act protects investors by requiring companies to make full and accurate disclosures regarding the nature of securities offered and sold to the public. Under Section 5 of the Act, an issuer of securities must file a registration statement with the Securities and Exchange Commission (SEC) for a securities offering, unless subject to an exemption. 15 U.S.C. 77e(c). Those registration statements are made available to the public, and they include a variety of information regarding the financial condition of the issuer, the nature of the securities, and the nature of the offering. 15 U.S.C. 77g; 15 U.S.C. 77aa, Scheds. A and B.

In Section 11 of the Act, Congress established an express private right of action against those responsible for a false registration statement. 15 U.S.C. 77k. As relevant here, Section 11 states that "any person acquiring such security" (*i.e.*, a registered security) "may * * * sue * * * every person who signed the registration statement" for that security if "any part of the registration statement, when such part became effective, contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading." 15 U.S.C. 77k(a)(1).[1]

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[1] A registration statement must be signed by each issuer, its principal executive officer, its principal financial officer, its comptroller or principal accounting officer, and the majority of its board of directors or persons performing similar functions. 15 U.S.C.

Under Section 11, a successful plaintiff may recover damages in the amount of the difference between the price he paid for the security and its price at the time of suit or sale. 15 U.S.C. 77k(e); see 15 U.S.C. 77k(g) (providing that "[i]n no case shall the amount recoverable * * * exceed the price at which the security was offered to the public"). The plaintiff need not introduce affirmative proof that the false registration statement caused his losses. The defendant may limit the amount of damages, however, by proving that some or all of the difference in price resulted from something other than the "depreciation in value" of the stock caused by the falsity in the registration statement. 15 U.S.C. 77k(e).

Section 11's private right of action "was designed to assure compliance with the disclosure provisions of the Act by imposing a stringent standard of liability on the parties who play a direct role in a registered offering." *Herman & MacLean* v. *Huddleston*, 459 U.S. 375, 381-382 (1983) (footnote omitted). Section 11 thus imposes liability on responsible parties without regard to scienter. It also "places a relatively minimal burden on a plaintiff." *Id.* at 382. With one exception explained below, Section 11 does not require the plaintiff to prove that he relied on a false registration statement. Rather, "[i]f a plaintiff purchased a security issued pursuant to a registration statement, he

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77f(a). In addition to those individuals, a Section 11 suit may be brought against every director or partner in the issuer (including individuals identified in the registration statement as being about to become a director or partner); every accountant, engineer, appraiser, or other professional involved in the preparation of the registration statement; and every underwriter of the registered securities. 15 U.S.C. 77k(a)(2)-(5).

need only show a material misstatement or omission to establish his prima facie case." *Ibid.*

Congress limited Section 11's reach in various ways. For example, defendants other than the issuer may rely on an affirmative defense of due diligence that permits them to avoid liability if they prove that they "had, after reasonable investigation, reasonable ground to believe and did believe" that the registration statement was true and not misleading. 15 U.S.C. 77k(b)(3). And while Section 11 generally does not require proof that the plaintiff relied on the false registration statement, such proof *is* required if the plaintiff acquired the security after the public issuance of "an earning statement covering a period of at least twelve months beginning after the effective date of the registration statement." 15 U.S.C. 77k(a). Defendants may also avoid liability if they prove that the plaintiff "knew of such untruth or omission" in a registration statement at the time he acquired the registered security. *Ibid.*

2. Respondent David Hildes was a director and shareholder of Harbinger Corporation, a publicly traded software company. Harbinger was acquired by Peregrine Systems, Inc., another publicly traded software company, in a stock-for-stock merger executed in the spring of 2000. Pet. App. 4a-5a.

a. On April 5, 2000, the two companies entered into a merger agreement. Pet. App. 5a, 27a. The agreement provided that, upon shareholder approval, Harbinger would become a wholly-owned subsidiary of Peregrine, and each outstanding share of Harbinger common stock would be exchanged for .75 shares of Peregrine common stock. *Id.* at 5a. The agreement to

effectuate the merger was subject to several conditions, three of which are relevant here.

First, the merger agreement required Peregrine to file a registration statement for the stock to be issued in the merger. Pet. App. 3a, 5a. The agreement provided that such a registration statement would be filed "[a]s promptly as practicable." C.A. E.R. 206.[2] Peregrine further promised that "[n]one of the information" it would supply for inclusion in the registration statement would "contain any untrue statement of a material fact or omit to state any material fact." Pet. App. 5a-6a (brackets in original).

Second, the agreement required Harbinger's board of directors to recommend the merger to its shareholders. Pet. App. 5a. If the merger was not approved by a majority of Harbinger's shareholders, Harbinger could terminate the agreement. *Ibid.* Harbinger could also terminate the merger agreement "upon a breach of any representation, warranty, covenant or agreement" by Peregrine, "or if any representation or warranty of [Peregrine] shall have become untrue." *Ibid.* (brackets in original).

Third, as a condition of the merger agreement, respondent and certain other Harbinger shareholders, whose holdings collectively totaled approximately 15% of Harbinger shares, personally executed accompanying agreements in which each granted Peregrine an

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[2] Before 1972, business combinations were treated as corporate acts that did not involve the sale of securities, and thus did not require registration. See 37 Fed. Reg. 23,631 (Nov. 7, 1972). That treatment changed with the SEC's adoption of Rule 145, which was "designed to make available the protection provided by registration * * * to persons who are offered securities in a business combination." *Id.* at 23,636; see 17 C.F.R. 230.145.

irrevocable proxy to vote his or her shares in favor of the merger. Pet. App. 6a, 12a. Such "lock-up" agreements are increasingly common in mergers, as a way to protect deals from third-party interference before a shareholder vote. See, *e.g.*, John C. Coates IV & Guhan Subramanian, *A Buy-Side Model of M&A Lock-ups: Theory and Evidence*, 53 Stan. L. Rev. 307, 310 (2000); Shmuel Leshem, *A Signaling Theory of Lock-ups in Mergers*, 47 Wake Forest L. Rev. 45, 45-46 (2012) (Leshem). Although respondent's proxy was irrevocable "to the fullest extent permissible by law," it automatically terminated upon termination of the merger agreement. Pet. App. 6a.

b. After the merger and lock-up agreements were executed, Peregrine filed its registration statement for the offering of its shares on May 10, 2000, followed by an amendment on May 22, 2000. Pet. App. 6a. The amended registration statement included Peregrine's current financial statements, and it was signed by Peregrine's outside directors, who are petitioners in this case. *Ibid.* The registration statement covered all shares to be issued by Peregrine to all holders of Harbinger shares, including respondent. See Peregrine Systems Inc., Current Report 2 (Form 8-K) (June 16, 2000) ("The shares of Peregrine Common Stock issued in connection with the merger were registered * * * pursuant to a Registration Statement on Form S-4.").

Several weeks later, a majority of Harbinger shareholders voted to approve the merger, which was completed on June 16, 2000. Pet. App. 6a. In exchange for all outstanding Harbinger shares, Peregrine issued approximately 30 million shares pursuant to the May registration statement. *Ibid.* Respondent

relinquished his Harbinger shares to Peregrine and received in return approximately one million registered Peregrine shares, which were worth more than $25 million based on Peregrine's share price at the time. C.A. E.R. 28 ¶ 22; 88 ¶ 198; 89 ¶ 200.

c. In May 2002, Peregrine announced financial irregularities. C.A. E.R. 33-34. The SEC subsequently brought an action against Peregrine for fraudulently filing "materially incorrect financial statements * * * for 11 consecutive quarters between April 1, 1999 and December 31, 2001," including the financial statements that had been included in the registration statement for the 2000 merger. Pet. App. 7a. That registration statement allegedly overstated Peregrine's annual revenue by more than $120 million and understated its annual net losses by more than $190 million. *Id.* at 6a.

Peregrine's share price deteriorated, and Peregrine filed for bankruptcy in September 2002. C.A. E.R. 33-34, 43 ¶ 49. Respondent lost virtually the entire $25 million value of his shares. *Id.* at 28 ¶ 22.

3. In 2007, respondent filed this individual action in federal district court against Peregrine's former auditor, Arthur Andersen LLP, and several individual defendants allegedly responsible for the false registration statement. Pet. App. 7a. In 2009, respondent moved for leave to amend his complaint to add a Section 11 claim against petitioners, who are former outside directors of Peregrine who signed the false registration statement. *Ibid.*

The district court denied the motion on the ground that "amendment would be futile." Pet. App. 34a. The court explained that Section 11(e) of the Act creates a "negative causation" (or "loss causation") defense by

which "a defendant may limit its liability to the extent that [the] plaintiff's alleged loss was not attributable to the alleged misrepresentations or omissions [in the registration statement]." *Id.* at 25a-26a (citing 15 U.S.C. 77k(e)). The court found that there was no causal connection between the false registration statement and respondent's losses. *Id.* at 26a-28a, 34a. It reasoned that respondent had made a "binding commitment to exchange" his Harbinger stock, and thereby to "purchase" Peregrine's stock, when the merger and lock-up agreements were signed on April 5, 2000. *Id.* at 28a. The district court concluded that, because respondent had committed to purchasing the shares several weeks before the false statements were actually made, those statements could not have caused his loss. *Id.* at 33a-34a.

4. Respondent appealed the denial of his motion to amend the complaint. In response, petitioners' primary argument was that respondent's Section 11 claim was futile because he could not have relied on the false registration statement when he agreed, on April 5, 2000, to vote his shares in favor of the merger. Pet. C.A. Br. 17-19, 21-34, 42. Petitioners conceded that a Section 11 plaintiff does not bear an affirmative burden of showing reliance. *Id.* at 23. They argued, however, that while Section 11 establishes a *presumption* of reliance, a defendant can rebut the presumption in particular cases by showing that reliance was impossible because an investment decision predated the false registration statement.[3] In making that argument, petitioners endorsed the Eleventh Circuit's

[3] See, *e.g.*, Pet. C.A. Br. 18 ("a plaintiff can[not] state a Section 11 claim where reliance was impossible as a matter of law because the registration statement had not issued"); *id.* at 23, 26-27, 42-43.

decision in *APA Excelsior III L.P.* v. *Premiere Technologies, Inc.*, 476 F.3d 1261 (2007), which they characterized as holding that "Section 11 implicitly *does* require reliance." Pet. C.A. Br. 30; see generally *id.* at 27-34.

The court of appeals reversed. Pet. App. 1a-19a. The court first rejected petitioners' impossibility-of-reliance argument. The court explained that Section 11 "imposes broad liability without regard to reliance," *id.* at 4a, and that the statute's "plain text * * * imposes a reliance element only as to investors who purchased a security at least twelve months after the registration statement became effective," *id.* at 9a (citing 15 U.S.C. 77k(a)). The court also cited, with approval, the Third Circuit's determination that "reliance is irrelevant in a [Section] 11 case." *Id.* at 10a (quoting *In re Constar Int'l Inc. Sec. Litig.*, 585 F.3d 774, 784 (2009)).

The court of appeals also rejected petitioners' argument based on "loss causation" under 15 U.S.C. 77k(e). Pet. App. 12a. The court explained that, "[a]lthough the Voting Agreement and Irrevocable Proxy irrevocably committed [respondent] to have his shares voted in favor of the merger, it did not irrevocably commit him to exchange his Harbinger shares for Peregrine shares." *Ibid.* Rather, "[a]ny exchange of shares remained contingent on the consummation of the merger." *Ibid.* The court determined that respondent "plausibly alleges * * * [that] the merger would not have occurred had the Registration Statement been truthful." *Ibid.* The court explained, *inter alia*, that if Peregrine had issued a truthful registration statement that described the company's actual financial condition, Harbinger's board might have

terminated the merger agreement (based on Peregrine's prior provision of false information) or Harbinger's shareholders might have refused to approve the merger. *Id.* at 12a-13a. The court concluded that respondent had validly alleged that, but for Peregrine's false registration statement, he would have retained his Harbinger stock and thereby avoided his losses. *Id.* at 13a. The court of appeals subsequently denied rehearing en banc. *Id.* at 41a-42a.

DISCUSSION

The court of appeals correctly held that respondent has stated a potentially meritorious Section 11 claim. In reaching that conclusion, the court sharpened a circuit conflict on the question whether reliance is relevant to a Section 11 claim based on securities acquired within 12 months after the effective date of a registration statement. Although the court below correctly determined that reliance is not relevant to such a claim, its decision conflicts with the Eleventh Circuit's ruling in *APA Excelsior III L.P.* v. *Premiere Technologies, Inc.*, 476 F.3d 1261 (2007), which held that a lock-up agreement not materially distinguishable from the one in this case barred the plaintiffs' Section 11 suit. This Court's review is warranted to resolve that disagreement.

A. The Court Of Appeals Correctly Held That Respondent Has Stated A Section 11 Claim

1. Section 11 provides, in relevant part, as follows:

> In case any part of the registration statement, when such part became effective, contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not mis-

> leading, any person acquiring such security (unless it is proved that at the time of such acquisition he knew of such untruth or omission) may, either at law or in equity, in any court of competent jurisdiction, sue—
>
> (1) every person who signed the registration statement * * * .

15 U.S.C. 77k(a). Section 11 thus establishes an express private right of action and identifies two requirements that a plaintiff must satisfy "to establish his prima facie case." *Herman & MacLean* v. *Huddleston*, 459 U.S. 375, 382 (1983). The plaintiff must show (1) that he "purchased a security issued pursuant to a registration statement"; and (2) that the statement contained "a material misstatement or omission." *Ibid.*

Accepting as true respondent's allegations (as the courts below were required to do at the present stage of this case, see Pet. App. 4a n.1), both of those textual requirements are satisfied here. The Peregrine shares that respondent acquired in the merger were issued "pursuant to" Peregrine's registration statement. *Id.* at 17a; see C.A. E.R. 88, ¶ 198. And the registration statement allegedly contained material misstatements regarding Peregrine's financial condition. Pet. App. 6a-7a. The court of appeals therefore correctly held that respondent had stated a valid Section 11 claim.

The court of appeals also correctly held that respondent's claim for damages was not barred by Section 11(e). That provision bars recovery under Section 11 if a defendant proves "that any portion or all of such damages represents other than the depreciation in value of such security resulting from" the falsity in the registration statement. 15 U.S.C. 77k(e); Pet.

App. 11a-13a. Petitioners have not identified any particular alternative factor responsible for the decline in value of respondent's shares, much less proved that such factor caused the decline.

In addition, respondent has alleged "several theories" under which "the merger would not have occurred," and respondent would not have received the overvalued Peregrine shares, "had the Registration Statement been truthful." Pet. App. 12a. *Inter alia*, if Peregrine had issued an accurate registration statement that revealed the company's true financial condition, the Harbinger board might have terminated the merger agreement based on Peregrine's prior provision of false information, or a majority of the Harbinger shareholders might have voted against the merger. *Id.* at 12a-13a. There is accordingly no basis for concluding, at this stage of the case, that the false registration statement did not cause respondent's loss.

2. Petitioners argued below that respondent's claim fails as a matter of law because respondent agreed to vote his shares in favor of the merger before Peregrine filed the allegedly false registration statement. See Pet. C.A. Br. 20-47. In their view, the timing of respondent's agreement matters because Section 11 implicitly requires that a plaintiff have relied on the registration statement when purchasing the shares at issue. *Ibid.* Following the Eleventh Circuit's decision in *APA Excelsior*, petitioners suggest that this element is ordinarily satisfied by a "presumption of reliance," but that the presumption is negated where reliance is shown to have been impossible. Pet. 12-13. Here, they contend, respondent could not possibly have relied on a registration statement issued in May

2000 when he agreed, in April 2000, to vote his shares in favor of the merger. Pet. 13-14. Petitioners' interpretation of Section 11 is mistaken.

a. The plain language of Section 11 permits investors like respondent to recover their losses caused by a false registration statement regardless of whether they relied on that statement when purchasing their shares. There is no textual indication that Congress intended to make such reliance an element of every Section 11 violation. Rather, Section 11 provides that "any person" who acquires a security pursuant to a false registration statement "may * * * sue * * * every person who signed the registration statement." 15 U.S.C. 77k(a)(1). Nothing in this broadly inclusive language restricts Section 11's availability to those persons who rely on a registration statement.

That interpretation is confirmed by Section 11's express imposition of a reliance requirement in one specific situation. The statute provides:

> If [a Section 11 plaintiff] acquired the security after the issuer has made generally available to its security holders an earning statement covering a period of at least twelve months beginning after the effective date of the registration statement, then the right of recovery under this subsection shall be conditioned on proof that such person acquired the security *relying upon* such untrue statement in the registration statement or *relying upon* the registration statement and not knowing of such omission * * * .

15 U.S.C. 77k(a) (emphases added); see 15 U.S.C. 78r (expressly requiring reliance in private right of action under Section 18 of the Act). The fact that Section 11 requires reliance in this limited circumstance rein-

forces the conclusion that reliance is *not* required in other situations.[4] In addition, the defendant in a Section 11 suit may avoid liability by proving that the plaintiff "knew of such untruth or omission" in a registration statement at the time the plaintiff acquired the registered security. 15 U.S.C. 77k(a). That specific defense would be superfluous if a Section 11 cause of action were generally unavailable in situations where reliance is impossible.

The legislative history of the Securities Act confirms that Section 11 does not implicitly require reliance. In the course of drafting the Act, Congress considered and rejected two proposals that would have incorporated a presumption of reliance into the provision that became Section 11. See Marc I. Steinberg & Brent A. Kirby, *The Assault on Section 11 of the Securities Act: A Study in Judicial Activism*, 63 Rutgers L. Rev. 1, 23 (2010) (Steinberg & Kirby) (providing detailed discussion of Section 11's history). When Congress drafted the Securities Exchange Act of 1934 the following year, it likewise rejected multiple proposals to add a general reliance requirement to Section 11. *Id.* at 25-26; see 15 U.S.C. 78a *et seq*. Commenting on these proposals at the time, James M. Landis (then serving as Commissioner of the Federal Trade Commission) argued that requiring reliance was not "consonant with the present-day methods of distributing securities in this country" and would "place altogether too hopeless a burden upon any attempt at recovery by the purchaser of a security." 78 Cong. Rec. 8716 (1934).

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[4] See, *e.g.*, *Dean* v. *United States*, 556 U.S. 568, 572-573 (2009) (declining to infer an implicit intent element when a neighboring subprovision expressly included that element).

b. Petitioners' reliance argument is particularly misconceived in this case because it focuses exclusively on an "investment decision" (*e.g.*, Pet. 9) *other than* respondent's ultimate acquisition of Peregrine stock. Petitioners are correct that, in promising to support the merger and in executing the proxy agreement in April 2000, respondent could not have relied on a registration statement that was issued a month later. But while the registration statement was issued after respondent made those contractual commitments, it was issued before the merger was actually approved. And, as the court of appeals explained, there were several steps that respondent and others might have attempted to take in order to prevent consummation of the merger if the May 2000 registration statement had accurately revealed Peregrine's precarious financial condition. See Pet. App. 12a-13a; pp. 9-10, *supra*.

c. In the court below, petitioners relied heavily on the Eleventh Circuit's decision in *APA Excelsior*. Pet. C.A. Br. 27-34. In that case, the court of appeals considered the legislative history of Section 11, determined that "[t]he concept of reliance was obviously important to Congress," and held that "[t]he statute creates a presumption that 'any person acquiring [a] security [pursuant to a false registration statement] was legally harmed by th[at] defective registration statement." *APA Excelsior*, 476 F.3d at 1271-1272 (quoting 15 U.S.C. 77k(a)). Based on its assessment of Congress's "intended purpose," the court in *APA Excelsior* held that, in circumstances where reliance is impossible, the presumption of reliance does not apply and the plaintiff cannot state a valid Section 11 claim. *Id.* at 1272-1277. The Eleventh Circuit applied that principle to a lock-up agreement in which the plaintiff

shareholders (like respondent in this case) had promised to support a proposed merger and had given their proxies to the defendant. See *id.* at 1264. The court concluded that, because the plaintiffs had made those commitments before the allegedly false registration statement was issued, the plaintiffs "could not possibly have relied on the registration statement." *Id.* at 1273.

The Eleventh Circuit's approach to Section 11 ignores that the "[a]scertainment of congressional intent with respect to the standard of liability created by a particular section of the [Securities Act] rest[s] primarily on the language of that section." *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 200 (1976); see *id.* at 195. The Eleventh Circuit strained to read Section 11 "so as to avoid" what it apparently considered an "unjust or absurd conclusion." *APA Excelsior*, 476 F.3d at 1268 (citation omitted). But there is nothing unjust or absurd about affording Section 11's protections to shareholders who bear losses that would not have occurred but for the filing of false registration statements. Congress knew that the "statements for which [Section 11 defendants] are responsible * * * may never actually [be] seen by the prospective purchaser," but it also recognized that such purchasers "may reasonably *be affected by*" such false statements. H.R. Rep. No. 85, 73rd Cong., 1st Sess. 10, 22 (1933) (emphasis added). And where purchasers are adversely affected, Congress made the reasonable decision to "make the directors executing the registration statement liable for the consequences of untrue statements rather than to throw the loss on the buyer." S. Rep. No. 47, 73d Cong., 1st Sess. 5 (1933).

3. Petitioners also suggest (Pet. 19-22) that the decision below creates tension with SEC Rule 145, 17 C.F.R. 230.145, and certain staff guidance regarding lock-up agreements in stock-for-stock mergers. Rule 145 clarifies that a stock-for-stock merger is a transaction that "involve[s]" an "offer" or "sale" of securities, so that the securities issued in such a transaction are subject to the registration requirements of Section 5 of the Securities Act. 17 C.F.R. 230.145(a); see 15 U.S.C. 77e. The staff guidance states that a lock-up agreement "may constitute a contract of sale under the Securities Act." Div. of Corporate Fin., SEC, *Compliance and Disclosure Interpretations, Securities Act Sections*, Question 139.30 (Aug. 11, 2010), http://www.sec.gov/divisions/corpfin/guidance/sasinterp.htm (last visited Aug. 26, 2014).

Petitioners read those documents to indicate "that the SEC views the execution of the pre-registration statement lock-up agreement itself, *and not the post-registration statement exchange of shares*, as the event defining the relevant transaction." Pet. 21-22 (emphasis added). But those documents address only the registration requirements of Section 5, not the application of Section 11. And petitioners do not explain why they are relevant for purposes of determining Section 11 liability. In any event, the SEC staff's recognition that a lock-up agreement "may be a contract of sale" does not negate the fact that the sale is consummated upon the actual exchange of shares. Nor does it cast doubt on the analysis of the court of appeals below, which emphasized that, even after lock-up agreements have been executed, various contingencies may prevent the contemplated stock-for-stock exchange from taking place. See Pet. App. 12a-13a.

B. The Decision Below Conflicts With The Eleventh Circuit's Analysis In *APA Excelsior*

1. As explained above, the court of appeals correctly held that respondent had stated a valid Section 11 claim. It did so based in significant part on its determination that Section 11 generally allows a plaintiff to recover "without regard" to whether the plaintiff actually relied on the false registration statement giving rise to the claim. Pet. App. 4a; see *id.* at 9a (Section 11 "imposes a reliance element *only* as to investors who purchased a security at least twelve months after the registration statement became effective") (emphasis added); *id.* at 10a ("reliance is irrelevant in a [Section] 11 case") (citation omitted). The Third Circuit appears to have reached the same conclusion that "reliance is irrelevant" to a standard Section 11 claim, albeit in a case involving different facts. *In re Constar Int'l Inc. Sec. Litig.*, 585 F.3d 774, 784 (2009).

The decision below conflicts with the Eleventh Circuit's ruling in *APA Excelsior*. The Eleventh Circuit held that, although Section 11 contains an implicit "presumption of reliance," a Section 11 claim cannot go forward "when reliance is rendered impossible by virtue of a pre-registration commitment" by the plaintiff to purchase the shares at issue. *APA Excelsior*, 476 F.3d at 1272. The Eleventh Circuit applied that principle to conclude that a lock-up agreement not materially different from the one at issue here barred the Section 11 claims of the shareholders who had executed the agreement.

2. Respondent maintains (Br. in Opp. 9-11) that *APA Excelsior* is "distinguishable" because the Eleventh Circuit assumed that the plaintiffs there had

"irrevocably committed" to exchange their stock in the merger. See *APA Excelsior*, 476 F.3d at 1269-1270. Here, by contrast, the court of appeals stated that respondent "was not irrevocably bound" to exchange his stock because the merger and exchange might not have occurred had the registration statement been truthful. Pet. App. 14a-15a (distinguishing this case from *APA Excelsior* on that basis). That disparity, however, does not appear to reflect any difference between the terms of the lock-up agreements in the two cases. Rather, the Eleventh and Ninth Circuits simply expressed divergent views about the agreements' legal effect.

More generally, the differing outcomes in this case and in *APA Excelsior* rest on the courts of appeals' disagreement over whether reliance is an element of a Section 11 claim. In the Ninth Circuit's view, reliance is not part of a Section 11 claim. Pet. App. 4a, 9a-11a. As a result, whether the merger and exchange of stock would have occurred but for the false registration statement is relevant (if at all) only to the separate question of whether the registration statement caused respondent's losses for purposes of Section 11(e). *Id.* at 17a-19a. By contrast, the Eleventh Circuit believes that reliance is a requirement of Section 11. *APA Excelsior*, 476 F.3d at 1272; see Br. in Opp. 9 (acknowledging that *APA Excelsior* "held that 'impossibility of reliance' [i]s a defense to a Section 11 claim" in certain circumstances) (citation omitted). On that view, the degree to which the plaintiff is bound to the transaction at the time of a merger agreement could arguably bear on whether or not he relied on the false registration statement when the exchange was later consummated. See *APA Excelsior*, 476 F.3d at 1273,

1277 (resting reliance holding on the fact that the plaintiffs had "ma[d]e a legally binding investment commitment months before the filing of a defective registration statement").

C. This Court's Review Is Warranted

1. Although Section 11's application to lock-up agreements does not appear to have been litigated frequently, the practice of using such agreements in connection with mergers is an increasingly common practice. See Steven M. Davidoff & Christina M. Sautter, *Lock-Up Creep*, 38 J. Corp. L. 681, 682 (Summer 2013) ("Lock-ups are * * * ubiquitous in merger agreements."); Leshem 46 ("The use of lockups not only has increased over time, but has also become increasingly important in merger and acquisition deals."). The conflict between the Ninth and Eleventh Circuits creates uncertainty for parties on both sides of these agreements, even when the transactions do not ultimately result in litigation. By resolving that conflict, this Court would provide clarity and ensure that Section 11 is enforced in accordance with its terms.

2. More generally, *APA Excelsior*'s erroneous holding that impossibility of reliance precludes a Section 11 claim undermines the nationwide uniformity of the securities laws. Although that decision is binding only within the Eleventh Circuit, its analysis has generated broader confusion nationwide. As one district court has observed, in light of *APA Excelsior*, "the caselaw is not entirely clear as to the circumstances in which reliance can be relevant to a [Section] 11 claim." *In re Refco, Inc. Sec. Litig.*, 503 F. Supp. 2d 611, 634 (S.D.N.Y. 2007); see Steinberg & Kirby 12, 17 (arguing that *APA Excelsior* debstabilized the law and has had "far reaching impact" in subsequent cases).

Several district courts across the country have relied on the Eleventh Circuit's analysis to indicate that a defendant may defeat a Section 11 claim by establishing that the plaintiff's reliance on the allegedly false registration statement was impossible. See, *e.g.*, *In re Gentiva Sec. Litig.*, 932 F. Supp. 2d 352, 395-396 (E.D.N.Y. 2013) (following *APA Excelsior*, but declining to dismiss claim on case-specific factual grounds); *Genesee Cnty. Emps.' Ret. Sys.* v. *Thornburg Mortg. Sec. Trust*, 825 F. Supp. 2d 1082, 1215 (D.N.M. 2011) (endorsing *APA Excelsior* analysis); *In re HealthSouth Corp. Sec. Litig.*, 261 F.R.D. 616, 647-649 (N.D. Ala. 2009) (holding, based on *APA Excelsior*, that investors "cannot recover under Section 11" because they "made their decision to purchase the registered bonds before the filing of the registration statement"); *In re Levi Strauss & Co. Sec. Litig.*, 527 F. Supp. 2d 965, 976-977 (N.D. Cal. 2007); *In re Refco*, 503 F. Supp. 2d at 634-635; but see *Federal Hous. Fin. Agency* v. *Bank of Am. Corp.*, No. 11 Civ. 6195, 2012 WL 6592251, *3 (S.D.N.Y. Dec. 18, 2012) (finding that "Congress did not intend reliance to be a factor" and that implied reliance element has "no support in the law of this Circuit or in the text of the statute").

Respondent notes (Br. in Opp. 13) that some of the district court decisions relying on *APA Excelsior* do not involve lock-up agreements in stock-for-stock mergers, and instead involve a different kind of transaction known as an "*Exxon Capital* exchange." But this only underscores the confusion that *APA Excelsior* has created. The fact that courts have extended *APA Excelsior* beyond stock-for-stock mergers indicates that the consequences of that decision may be far-reaching. Once the impossibility of reliance is

treated as a bar to recovery under Section 11, defendants in such suits may argue that various other circumstances likewise made reliance impossible.

Section 11 suits brought by private parties are an essential supplement to criminal prosecutions and civil enforcement actions. Section 11 serves important federal interests by promoting truthfulness and accuracy in registration statements and helping investors harmed by false registration statements to recover for their losses. *APA Excelsior*'s unwarranted restriction of Section 11 impairs these interests.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
MALCOLM L. STEWART
Deputy Solicitor General
ROMAN MARTINEZ
Assistant to the Solicitor General

ANNE K. SMALL
General Counsel
MICHAEL A. CONLEY
Deputy General Counsel
JACOB H. STILLMAN
Solicitor
RANDALL W. QUINN
Assistant General Counsel
JACOB R. LOSHIN
Senior Counsel
Securities and Exchange Commission

AUGUST 2014