NO. _____

In the
Supreme Court of the United States

CARDONE CAPITAL, LLC;
GRANT CARDONE; CARDONE EQUITY FUND V, LLC;
CARDONE EQUITY FUND VI, LLC,
Petitioners,

v.

LUIS PINO,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

It is a bedrock principle of the Securities Act that investors are responsible for bearing the risks of investments about which they are adequately warned. Accordingly, the bespeaks caution doctrine protects projections and other forward-looking statements from liability when cautionary warnings and risk disclosures render those projections immaterial. But courts have split over when such cautionary statements must be made and what they must say.

Courts have also split over the proper interpretation of Section 12 of the Securities Act, which narrowly cabins a "seller" to a person who makes an "offer" to the person "purchasing such security from him." 15 U.S.C. § 77*l*(a) (emphasis added). Two courts of appeals have required that an offer be actively made to and directed at a plaintiff-purchaser and that there be a relationship akin to traditional contractual privity. The Ninth and Eleventh Circuits, however, have not.

The questions presented are:

1. Whether the bespeaks caution doctrine imposes a categorical requirement that cautionary language be made after or at the same time as the challenged misstatements, and what standards apply in determining whether cautionary language satisfies the bespeaks caution standard.

2. Whether a suit can proceed under Section 12 of the Securities Act where a plaintiff has not alleged that the defendant actively and directly solicited a plaintiff's investment.

CORPORATE DISCLOSURE STATEMENT

Cardone Capital, LLC ("Cardone Capital") has no parent corporation and no publicly held corporation currently owns ten percent or more of its membership interests. Cardone Equity Fund V, LLC, and Cardone Equity Fund VI, LLC also have no parent corporations, and no publicly held corporation owns more than 10% of the A units in either fund.

RELATED PROCEEDINGS

- *Pino v. Cardone Capital, LLC*,
  No. 21-55564, 2023 WL 2158802
  (9th Cir. Feb. 22, 2023)
- *Pino v. Cardone Capital, LLC*,
  55 F.4th 1253 (9th Cir. 2022),
  judgment entered on December 21, 2022
- *Pino v. Cardone Capital, LLC*,
  No. 21-55564, 2022 WL 17834235
  (9th Cir. Dec. 21, 2022)
- *Pino v. Cardone Capital, LLC*,
  No. 2:20-cv-08499-JFW (KSx),
  2021 WL 2273461 (C.D. Cal. Apr. 30, 2021)
- *Pino v. Cardone Capital, LLC*,
  No. 2:20-cv-08499-JFW (KSx),
  2021 WL 3502493 (C.D. Cal. Apr. 27, 2021)
- *Pino v. Cardone Capital, LLC*,
  No. 2:20-cv-08499-JFW (KSx),
  2020 WL 7585839 (C.D. Cal. Dec. 18, 2020)

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PETITION FOR WRIT OF CERTIORARI

This Petition raises two important issues over which courts have split. First, under black-letter securities law, investors are responsible for bearing the risks of investments about which they are adequately warned. *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 345 (2005). Accordingly, the bespeaks caution doctrine—"the pragmatic application of two fundamental concepts in the law of securities fraud: materiality and reliance"—protects projections and other forward-looking statements when a listener also receives cautionary language. *In re Worlds of Wonder Sec. Litig.*, 35 F.3d 1407, 1414 (9th Cir. 1994). That doctrine reflects the commonsense point that investors cannot be misled, or an alleged misstatement be material, if those investors understand the risks they face. But even though this Court has explained that the federal securities laws are not an insurance policy against buyer's remorse, *Dura Pharms.*, 544 U.S. at 345, the Ninth Circuit's decision converts them into exactly that, by cutting back on the bespeaks caution doctrine even when, as here, investors were expressly warned about the risks they faced.

Respondent Luis Pino invested in Petitioners Cardone Equity Fund V, LLC and Cardone Equity Fund VI, LLC, two of the equity funds managed by Petitioners Grant Cardone and Cardone Capital. Pino's complaint primarily challenged a series of social media posts on Instagram or YouTube made by Grant Cardone and Cardone Capital, although he never claimed to have seen any of those posts. And Pino, whose investments have performed just as predicted, was expressly warned that: (1) the Funds "may never

become profitable or generate any significant amount of revenues;" (2) "potential investors have a possibility of losing their investments;" (3) there was no basis for the predicted returns other than Grant Cardone's prior track record, and importantly past results were no guarantee of future profitability; (4) the Funds would finance properties and investors would be responsible for debt service payments; (5) the Funds might borrow as much as 80% of the value of the properties, which could limit the amount of cash available and result in a decline in investment value; (6) "[t]he timing and amount of distributions are the sole discretion of our Manager;" (7) "[w]e cannot assure you that we will generate sufficient cash in order to pay distributions;" (8) the Funds would "[i]nvest in any opportunity our Manager sees fit within the confines of the market, marketplace and economy so long as those investments are real estate related and within the investment objectives of the" Funds; and (9) "there are conflicts of interest between us, our Manager, and its affiliates." 1-ER-7-10, 14, 17, 19, 21, 23; 2-ER-102, 111.[1] The Funds' Offering Circulars also listed ten pages of risk factors that could affect the Funds' success. 2-ER-106-16; 2-ER-223-33.

Applying the bespeaks caution doctrine here, Petitioners' detailed warnings should have disposed of all of the alleged misstatements, which related to the projected internal rate or return, anticipated distributions, and forward-looking investment

[1] "ER" and "SER" are references to the Ninth Circuit appendix of the Excerpts of Record and Supplemental Excerpts of Record.

strategy. The Ninth Circuit nonetheless concluded that the detailed warnings in the Offering Circulars—Circulars which were referenced in all of the challenged social media posts and which any investor had to acknowledge receiving before they could invest—did not insulate the alleged misstatements made on social media because (1) they were "too broad" to immunize the "otherwise actionable alleged misstatements about IRR and distributions;" and (2) those Offering Circulars preceded the alleged social media statements and thus were "too attenuated from the release of the offering circulars to be insulated by the warnings contained therein." App.24. In so doing, it improperly curtailed the bespeaks caution doctrine and created a conflict with existing case law.

That was not the only part of the Ninth Circuit's decision that conflicts with other cases and expands securities liability beyond its proper limits. The second question presented arises out of the Ninth Circuit's conclusion that even though neither Cardone nor Cardone Capital sold any securities in the funds, they were nonetheless statutory sellers under 15 U.S.C. § 77*l*, the provision of the Securities Act of 1933 imposing liability on those who "offer[] or sell[] a security" by means of a misleading prospectus or oral communication. It reached that conclusion based not on the statutory text, which courts have concluded requires something akin to contractual privity, but based upon judicial concerns about the use of social media. And in so doing, it rejected the district court's (and other circuits') test requiring that a plaintiff allege that a defendant be "directly and actively involved in soliciting Plaintiff's investment, or that

Plaintiff relied on such a solicitation when investing," App.71—a test that balances the Act's remedial purpose with the text of Section 12 and *Pinter v. Dahl*'s concern that the statute not be broadly expanded beyond buyer-seller relationships. 486 U.S. 622, 642 (1988).

The Ninth Circuit's novel test, which aligns it with the Eleventh Circuit, but against other Circuits, relied on social-media engagement alone to extend statutory liability beyond those who affirmatively "offer" or "sell" to "significant participants in the selling transaction." The Eleventh Circuit did so based on social media posts that featured direct links for readers to click on to invest. But the Ninth Circuit went even further by permitting claims based on passive social media posts that do not offer a direct link to invest and in some instances did not even reference the Funds at issue here, all without any allegation that Pino saw those posts. The Ninth Circuit justified doing so because, it opined, "social media's nature present[s] a danger that investors would invest without full and fair information." But Congress, not the courts, is charged by the Constitution with the authority to amend the statutory language to accommodate such concerns. It has not, and courts cannot second-guess that decision.

Because this Petition presents important questions about when statements can be actionable despite specific cautionary language and who can be sued for such statements, this Court should grant review on both questions presented and reverse.

OPINIONS BELOW

The order of the Ninth Circuit denying the petition for rehearing after amending the decision is unpublished but available at 2023 WL 2158802 (9th Cir. Feb. 22, 2023), and reproduced at App.74-86. The Ninth Circuit's published decision is reported at 55 F.4th 1253 (9th Cir. Dec. 21, 2022), and reproduced at App.1-15. Its companion memorandum disposition is unpublished but available at 2022 WL 17834235 (9th Cir. Dec. 21, 2022), and reproduced at App.16-26. The judgment of the Central District of California is unpublished but available at 2021 WL 2273461 (C.D. Cal. Apr. 30, 2021), and reproduced at App.27-28.

JURISDICTION

The Ninth Circuit issued its companion decisions on December 21, 2022, and its order amending its decision and denying the petition for rehearing on February 22, 2023. This Court has jurisdiction under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

15 U.S.C. § 77*l* and 15 U.S.C. § 77o are reproduced at App.87-89.

STATEMENT OF THE CASE

A. Legal Background

The bespeaks caution doctrine protects projections and other forward-looking statements from liability when cautionary warnings and risk disclosures render those projections immaterial. The doctrine "provides a mechanism by which a court can rule as a matter of law … that defendants' forward-

looking representations contained enough cautionary language or risk disclosure to protect the defendant against claims of securities fraud." *Worlds of Wonder*, 35 F.3d at 1413 (quoting Donald C. Langevoort, *Disclosures That "Bespeak Caution,"* 49 Bus. Law. 481, 482-83 (1994)).[2]

The bespeaks caution doctrine, at its core, is "the pragmatic application of two fundamental concepts in the law of securities fraud: materiality and reliance." *Id.* at 1414. It "reflects the unremarkable proposition that statements must be analyzed in context," *id.*, and both "context" and "materiality" look at the total mix of information available to investors. *Basic Inc. v. Levinson*, 485 U.S. 224, 238 (1988). The doctrine "has developed to address situations in which optimistic projections are coupled with cautionary language—in particular relevant specific facts or assumptions—affecting the reasonableness of reliance on and the materiality of those projections." *Rubinstein v. Collins*, 20 F.3d 160, 167 (5th Cir. 1994) (footnotes omitted). It is meant "to minimize the chance that a plaintiff with a largely groundless claim will bring a suit and conduct extensive discovery in the hopes of obtaining an increased settlement." *Worlds of Wonder*, 35 F.3d at 1415.

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[2] In the Private Securities Litigation Reform Act ("PSLRA"), Congress partially codified the bespeaks caution doctrine for certain forward-looking statements not applicable here. In passing the Act, Congress expressly acknowledged it did not intend the PSLRA to replace the bespeaks caution doctrine or foreclose its development. H.R. Conf. Rep. No. 104-369, at 31-34 (1995), *as reprinted in* 1995 U.S.C.C.A.N. 730, 730-33.

Just as the bespeaks caution doctrine limits what statements can be actionable, Section 12 of the Securities Act limits who a putative plaintiff can sue. Under Section 12(a)(2), "[a]ny person who … *offers or sells* a security in violation of [the subsection] … shall be liable … to the person purchasing such security from him." 15 U.S.C. § 77*l* (emphasis added). This "purchase from" language, the Supreme Court has explained, "focuses on the defendant's relationship with the plaintiff-purchaser." *Pinter*, 486 U.S. at 651. And that language, "[a]t the very least, … contemplates a buyer-seller relationship not unlike traditional contractual privity." *Id.* at 642, 650 (noting that "failure to impose express liability for mere participation in unlawful sales transactions suggests that Congress did not intend that the section impose liability on participants collateral to the offer or sale," and rejecting substantial-factor test).

B. Factual Background

1. Grant Cardone and Cardone Capital

Grant Cardone is a real estate entrepreneur, sales trainer, and speaker who has invested in real-estate properties for over 30 years. 2-ER-149; 1-ER-6. He is also the founder of Cardone Capital, LLC, a real estate property management company. 2-ER-149. Over the years, Cardone has purchased over 40 properties across eight states with a total purchase price of over $650,000,000. 1-ER-6. At the time the Funds here were created, Cardone managed a multi-family real estate portfolio consisting of over 4,500 units in 20 communities and valued in excess of $700 million. 1-ER-6.

Cardone Capital is a real estate syndicator, investing in real estate by pooling money from many other investors. 1-ER-6-7. It identifies potential properties to acquire, generally targeting under-valued rental properties in growing real estate markets in the central and southeastern United States. 3-ER-332-39. Its strategy is to buy apartment communities at below-market prices and improve the properties to increase their rental value and thus its cashflow, which it in turn distributes to investors. *Id.* It also negotiates purchasing and financing properties, manages the holdings, and makes distributions to its investors. *Id.* After seven to ten years, when the property has gained in value, it sells the property, distributes the proceeds to its investors, and closes the fund. 2-ER-101-02; 2-ER-218-19.

Cardone and Cardone Capital discussed many potential investment opportunities, and investment strategies more generally, in social media posts, including Instagram and YouTube. Some social media posts contained explicit cautionary language (although plaintiff strategically omitted that language from his complaint). All of them referred to Offering Circulars containing detailed warnings about the risks of such investments.

2. The Funds

This suit concerned two funds—Cardone Equity Fund V and Cardone Equity Fund VI—launched in 2018. 2-ER-101; 2-ER-214. Both are separate Delaware corporations formed to "acquire various real estate assets throughout the United States." 2-ER-102; 2-ER-215. Both were categorized as emerging growth companies under the 2015 U.S. JOBS Act,

which reduced reporting and accounting requirements for emerging companies and enabled the sale of securities using crowdfunding techniques. 1-ER-7. Cardone Capital managed the Funds, focusing on investments in income-producing multi-family residential properties that could provide attractive cash flow and long-term asset appreciation for investors. 2-ER-102; 2-ER-215.

Both Funds made offerings under Regulation A of the Securities Act. 2-ER-57. Regulation A offerings are exempt from the Securities Act's registration requirements. Issuers must instead file offering statements with the SEC, and after SEC staff qualify the statement, an issuer can accept payment for the sale of securities. The offering statement includes the offering circular, which as the SEC explains, "is the primary disclosure document for investors." SEC, *Introduction to Investing: Regulation A*, Investor.gov, https://tinyurl.com/34ymy4fw. Offering circulars include detailed information about a security's business plan, financial projections, and potential risks. However, when the SEC reviews an offering circular "for compliance with disclosure obligations," it does not "in any way validate[] or approve[] of the offering." Press Release, SEC, *Investor Alert: Beware of Claims That the SEC Has Approved Offerings* (Apr. 30, 2019), https://tinyurl.com/6kbz6f56.

Here, the Funds filed preliminary offering documents for comment and qualification from the SEC. 3-ER-301. After revising those documents to respond to feedback from the SEC, the Funds filed final versions, which detailed their business plan,

financial projections, and, most importantly, the risks of investing. 2-ER-106-16; 2-ER-223-33.

Among other things, the Offering Circulars cautioned potential investors that:

• "At this stage of our business operations, even with our good faith efforts, we may *never* become profitable or generate any significant amount of revenues, thus potential investors have a possibility of losing their investments." 2-ER-106; 2-ER-223 (emphasis added).

• "The timing and amount of distributions are the sole discretion of our Manager …. We cannot assure you that we will generate sufficient cash in order to pay distributions." 2-ER-113; 2-ER-230.

• "There is nothing at this time, other than the track record of our Manager, on which to base an assumption that our business operations will prove to be successful or that we will ever be able to operate profitably. However, past results do not guarantee future profitability." 2-ER-223; 3-ER-310.

• "Acquisition of properties entails risks that investments will fail to perform in accordance with expectations. In undertaking these acquisitions, we will incur certain risks, including the expenditure of funds on, and the devotion of management's time to, transactions that may not come to fruition." 2-ER-224.

• "There is no assurance that our real estate investments will appreciate in value or will ever be sold at a profit. The marketability and value of the

properties will depend upon many factors beyond the control of our management." 2-ER-110; 3-ER-314.

• "Our future operating results will depend on many factors including our ability to raise adequate working capital, availability of properties for purchase, the level of our competition and our ability to attract and maintain key management and employees." 2-ER-106; 2-ER-223.

• "Cardone Capital, LLC, our Manager, will make all decisions relating to the business, operations, and strategy, without input by the Members." 2-ER-107; 2-ER-224. The Funds would "[i]nvest in any opportunity our Manager sees fit within the confines of the market, marketplace and economy so long as those investments are real estate related and within the investment objectives of the" Funds. 2-ER-102; 2-ER-219.

• The Funds would finance properties and investors would be responsible for debt service payments. Thus, "[a]lthough we intend to borrow typically no more than 70% of a property's value, we may borrow as much as 80% of the value of our properties…. High debt levels would cause us to incur higher interest charges and higher debt service payments … [t]hese factors could limit the amount of cash we have available to distribute and could result in a decline in the value of our investors' investments." 2-ER-111; 2-ER-228.

The Offering Circulars also included ten pages of warnings about risk factors, including management changes, the nature of blind pool offerings, changes in the real estate market, lack of investment

diversification, and competition. 2-ER-106-16; 2-ER-223-33. They warned of the risk that properties might not achieve anticipated sales prices, rents, or occupancy levels, that increases in real estate tax rates, utility costs, operating expenses, insurance costs, repairs and maintenance, administrative and other expenses can reduce cash flow, that multifamily real estate markets were currently experiencing a substantial influx of capital that could result in inflated prices, and that a multifamily or commercial property's income and value could decrease based on, inter alia, local real estate conditions including the oversupply of properties or a reduction in demand, competition from other similar properties, and the Funds' ability to provide adequate maintenance and rents for the properties. 2-ER-107.

They also cautioned that "the matters discussed herein are forward-looking statements that involve risks and uncertainties," and "[f]orward-looking statements include, but are not limited to, statements concerning anticipated trends in revenues and net income, projections concerning operations and available cash flow. Our actual results could differ materially from the results discussed in such forward-looking statements." 2-ER-122; 2-ER-239.

To participate, potential investors had to sign Subscription Agreements, setting forth terms and additional details. *E.g.*, 2-ER-160-69; 2-ER-277-84. Purchasers had to (1) confirm receipt of the Offering Documents (including the Circulars); (2) acknowledge that "any … forward-looking statements or projections" in those documents "should not be relied upon;" and (3) represent that "except as expressly set

forth in [those] Documents, no representations or warranties have been made to the Subscriber by the Issuer or by any agent, sub-agent, officer, employee or affiliate of the Issuer and, in entering into this transaction, the Subscriber is not relying on any information other than that contained in the Offering Documents and the results of independent investigation by the Subscriber." 2-ER-161, 163, 166, 2-ER-277, 278, 279.

Pino executed Subscription Agreements to invest in both Funds in September 2019. 1-SER-4. Under those Agreements, as the Offering Circulars disclosed, the Manager of the Funds had complete discretion in making cash distributions to investors. *E.g.*, 2-ER-113; 2-ER-230. In April 2020, near the beginning of the COVID-19 pandemic, out of an abundance of caution, cash distributions were temporarily suspended. 2-ER-83. However, these distributions resumed after two months, with payments made in June 2020 to make up for the temporary suspension. *Id.*; 1-SER-4. And it is undisputed that to date Pino's investments have performed as projected.

3. Pino's Suit

Pino filed this putative class action on September 16, 2020. In the First Amended Complaint (the operative one here), he alleged that Cardone, Cardone Capital, and the Funds had violated Section 12(a)(2) of the Securities Act and asserted a control-person claim against Cardone and Cardone Capital under Section 15. 2-ER-57. Pino sought to represent a class of all investors and requested recission, damages, and attorney's fees.

Pino identified three categories of supposed misstatements made mostly on social media: (1) the projected internal rate of return for the Funds, 2-ER-74-79; (2) the likelihood and amount of cash distributions to investors, 2-ER-79-83; and (3) the acquisition and financing of properties by the Funds, 2-ER-83-90. Even though Pino had signed a Subscription Agreement acknowledging that he had not relied on information outside of the Offering Circulars or Agreement, some of the alleged misstatements he identified appeared in social media posts. Pino, however, did not allege that he ever saw any of those social media posts.

C. The Decisions Below

After Plaintiffs filed their First Amended Complaint and Cardone moved to dismiss it, the district court granted that motion, dismissing the action with prejudice. App.29-73.

First, the court held, none of the complaint's allegations pleaded a plausible misstatement or omission. Pino did not claim that Cardone did not believe his projections or was aware of undisclosed facts undermining the accuracy of those projections. App.52-54. Instead, he claimed only that Cardone lacked a reasonable basis for his projections, but, the district court held, "[t]he FAC does not allege a single fact that would undermine Defendants' projected IRR or that would otherwise make the projection unreasonable." App.53-54. In alleging this, Pino did not address the fact that Cardone had over thirty years of experience successfully investing in income-producing, multifamily real estate properties and syndicating real estate investments. App.53-54.

Second, the court found that Cardone's statements were protected by the bespeaks caution doctrine. App.57-61. Under that doctrine, the court noted, defendants are not liable for forward-looking statements—including projections for an investment's performance—when plaintiffs also receive cautionary language. App.49-51, 57-58. As the district court held, the Offering Circulars provided specific, detailed warnings about the risks associated with those investments and how the Funds would function, and Pino and other investors represented at the time of investment that they had reviewed those cautions. App.57-61.

Third, the court found that Cardone and Cardone Capital were not "sellers" within the meaning of Section 12(a)(2). 1-ER-23-24. Pino did not allege that Cardone or Cardone Capital passed title to the securities to Pino or that Cardone or Cardone Capital directly solicited his investment. He alleged only that Cardone made public presentations, not that he actively and directly solicited Pino's investment. That, the court concluded, was not enough. App.70-71 (citing cases).

Finally, having found that Pino failed to plead a violation of Section 12, the district court dismissed the control-person claim as well, because that claim requires "a primary violation" of the Securities Act and Pino had failed to plead such a violation. App.71-72 (citing *SEC v. Todd*, 642 F.3d 1207, 1223 (9th Cir. 2011)).

After Pino appealed, the Ninth Circuit issued a published opinion and memorandum disposition, affirming in part and reversing in part. App.1-26.

First, the Ninth Circuit affirmed the district court's dismissal as to a series of alleged misrepresentations or omissions made in the Fund V and VI offering circulars, which they concluded were not actionable. App.24-25. (Specifically, it agreed that allegations about the funds' investment strategy, financing of properties, and the interest and fees born by investors in connection with the acquisition of properties were not actionable. App.25 n.4.)

Second, the Ninth Circuit reversed the district court's decision as to Defendants' alleged statements regarding the projected IRR and future distributions, as well as the Funds' anticipated debt obligations. App.26. However, because Pino's complaint did not satisfy *Omnicare, Inc. v. Laborers District Council Construction Industry Pension Fund*, 575 U.S. 175 (2015), by sufficiently alleging facts that "call[ed] into question the issuer's basis for offering the opinion," the Ninth Circuit remanded the case to the district court to allow him a chance to submit another amended complaint that did. App.20 (quoting *Omnicare*, 575 U.S. at 194).

In the published opinion, the Ninth Circuit concluded that Cardone and Cardone Capital were statutory sellers within the meaning of 15 U.S.C. § 77*l*(a). App.2. It held that they were potentially liable to investors in the funds, even though Cardone and Cardone Capital did not target plaintiff with direct, individualized solicitations. App.13. Instead, the Court concluded, they qualified as statutory sellers because they were "significant participants in the selling transaction" given their social-media engagement disseminating information to would-be

investors. App.13. The appellate court justified that expansive approach to the statutory language by contending that social media presented a danger that investors would invest without full and fair information. App.13-14.

After Petitioners sought panel rehearing, the Ninth Circuit amended the memorandum disposition, and denied the petition for rehearing. App.77-89.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit's decision here expands both what statements can serve as the basis for securities liability and who can be tagged with that liability. In so doing, it answered two important and recurring questions in ways that cannot be squared with the law of other circuits or, as to the latter question, the express statutory language. By concluding that the bespeaks caution does not apply here, the Ninth Circuit imposed limits on when cautionary statements must be made and what they may contain that make the doctrine largely a dead letter. And by concluding that the statute can be judicially rewritten to extend liability to "significant participants" in a transaction, even though they themselves neither sell nor offer securities, the Ninth Circuit expanded who can be the target of such litigation. By on the one hand curtailing an important protection against meritless suits and on the other eliding an express statutory limitation on who such suits can target, the Ninth Circuit has put itself at odds with other courts, including this one, as well as with basic principles of securities law. That decision has potentially wide-ranging consequences. Because this case presents both issues cleanly and provides an excellent vehicle for this Court to dispel

the confusion over these two important issues, this Court should grant certiorari as to both questions presented.

I. The Ninth Circuit's Decision Creates A Circuit Split Around The Bespeaks Caution Doctrine.

A. The Circuits Are Split Over When Cautionary Language Bespeaks Caution.

The decision below declined to apply the bespeaks caution doctrine to cautionary language made in offering circulars drafted before the forward-looking projections on the grounds that the cautionary language was "too attenuated" from the supposed misstatement, both in time and in substance. That decision parts ways with the decisions of the other circuits to address this question.

Contrary to the decision below, other circuits that have addressed this question have applied the bespeaks caution doctrine even when the forward-looking prediction and cautionary statements were made at different times.

Start with the Tenth Circuit. The court held in *Grossman* that the bespeaks caution doctrine insulated a defendant from liability even though the defendant provided cautionary language months before the allegedly false statements. *Grossman v. Novell, Inc.*, 120 F.3d 1112, 1116-17 (10th Cir. 1997). There, it found that cautionary language made in registration statements issued months before a purported misstatement bespoke caution. As the court explained, "the cautionary statements contained

in the registration statement may fairly be considered as limiting the forward-looking predictions made in *subsequent* discussions of the same transaction." *Id.* at 1123 (emphasis added). *Grossman*'s holding is thus squarely at odds with the Ninth Circuit's conclusion that cautionary language that preceded the alleged misstatements was necessarily "too attenuated" because it came before, rather than at the same time as or after those statements.

Similarly, the Second Circuit found that cautionary language in a subscription agreement bespoke caution as to separate "oral representations" made by the company. *P. Stolz Family P'ship L.P. v. Daum*, 355 F.3d 92, 98 (2d Cir. 2004). As it explained, cautionary language in a subscription agreement "sufficiently cautions prospective investors," and "[a]ny oral representations" on the same subject "were neutralized by these cautionary statements." *Id.*; *see also San Leandro Emergency Med. Grp. Profit Sharing Plan v. Philip Morris Cos.*, 75 F.3d 801, 811 (2d Cir. 1996) (cautionary language in report held to "bespeak caution" as to optimistic statements in press releases and newspaper articles).

The Third Circuit, for its part, at one time characterized its precedent as "suggesting that the 'bespeaks caution' doctrine requires the cautionary language to accompany the misrepresentation." *EP Medsystems, Inc. v. EchoCath, Inc.*, 235 F.3d 865, 875, 878-79 (3d Cir. 2000). But it declined to make such a holding, and instead appears to have jettisoned that line altogether. Instead, it has since concluded in a related context that "[c]autionary statements do not have to be in the same document as the forward-

looking statements." *In re Merck & Co. Sec. Litig.*, 432 F.3d 261, 273 n.11 (3d Cir. 2005) (case under PSLRA).

Four other circuits recognize the bespeaks caution doctrine but do not appear to have addressed the question presented in this petition. *Rubinstein v. Collins*, 20 F.3d 160 (5th Cir. 1994); *Saltzberg v. TM Sterling/Austin Assocs.*, 45 F.3d 399 (11th Cir. 1995) (per curiam); *Romani v. Shearson Lehman Hutton*, 929 F.2d 875 (1st Cir. 1991); *Moorhead v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 949 F.2d 243 (8th Cir. 1991).

In addition to opening a split with other circuits, the Ninth Circuit's decision also contravenes the basic policy rationale underlying the bespeaks caution doctrine.

For starters, it elevates off-the-cuff remarks made in social media posts above the extensive disclosures and cautions in formal offering circulars and other documents. But in *Omnicare*, this Court expressly differentiated between statements made in formal documents filed with the SEC as opposed to those made in other, less formal contexts, when assessing whether an opinion is actionable. It explained that "[r]egistration statements as a class are formal documents …. Investors do not, and are right not to, expect opinions contained in those statements to reflect baseless, off-the-cuff judgments, of the kind that an individual might communicate in daily life." *Omnicare*, 575 U.S. at 190. Likewise, the Tenth Circuit in *Grossman* found it significant that "the cautions were contained in formal documents of considerable legal weight—the registration statement," while the "misleading predictions were

contained in less formal press releases." 120 F.3d at 1123.

The decision below turns this differentiation upside down. That inversion makes even less sense given that a potential investor had to confirm that he had received the cautionary statements contained in the Offering Circulars and was not relying on any representations outside of them before he could invest in the Funds.

The decision below also gives short shrift to the context- and materiality-based considerations at the heart of the bespeaks caution doctrine. As the Fifth Circuit has explained, the doctrine "reflects the unremarkable proposition that statements must be analyzed in context." *Rubinstein*, 20 F.3d at 167. But the decision below artificially cuts out the cautionary warnings and disclosures contained in the formal documents made available to investors from the total "mix" of information.

B. The Circuits Are Split Over What Language Sufficiently Bespeaks Caution.

The panel's characterization of the cautionary language here as "too broad" or "general" also stands in sharp contrast with the decisions of other circuits, not to mention common sense. Although other courts have focused on whether the subject matter of warnings corresponds to the subject matter of the alleged misstatements, the Ninth Circuit effectively took the position that warning about industry-wide risks could never bespeak caution, even where, as here, those risks go directly to the subject matter of

the challenged statements. This Court should grant review to clarify that a cautionary statement bespeaks caution when it addresses the same risk as the alleged misstatement.

The Second Circuit has considered cautionary language materially indistinguishable from the language the panel considered below and found it to bespeak caution. Thus, in *Luce*, it held that an offering memorandum's cautionary language that potential cash and tax benefits were "necessarily speculative in nature" and that "[n]o assurance [could] be given that these projections [would] be realized" "clearly" bespoke caution. *Luce v. Edelstein*, 802 F.2d 49, 56 (2d Cir. 1986) (quotation marks omitted) (citing *Polin v. Conductron Corp.*, 552 F.2d 797, 806 n.28 (8th Cir. 1977)).

No meaningful difference exists between those warnings and the warnings here. Among other things, Pino and other investors were cautioned that with respect to the IRR and distributions:

1. "[W]e may never become profitable or generate any significant amount of revenues, thus potential investors have a possibility of losing their investments;"

2. "There is nothing at this time, other than the track record of our Manager, on which to base an assumption that our business operations will prove to be successful or that we will ever be able to operate profitably. However, past results do not guarantee future profitability;"

3. "[P]otential investors have a possibility of losing their investments" and could realize an IRR of zero;

4. "The timing and amount of distributions are the sole discretion of our Manager;"

5. "We cannot assure you that we will generate sufficient cash in order to pay distributions."

1-ER-7-10, 14, 17, 18, 19, 20, 21, 23; 2-ER-102, 106, 111, 113, 223, 227, 230; 3-ER-310, 314, 317. The Circulars also included ten pages of detailed warnings about all the various factors that could affect the success of any investment in the funds.

Comparing this language—which this Court characterized as "too broad" and "general"—to the language in *Luce*—which the Second Circuit found sufficiently narrow and precise—makes the conflict clear. Faced with similar facts, these two Courts reached fundamentally different results. Had this case been decided by the Second Circuit, it most likely would have found the language to bespeak caution. *See also Halperin v. eBanker USA.com, Inc.*, 295 F.3d 352, 360 (2d Cir. 2002) (finding language that in part cautioned that "[t]here can be no assurance that the company's securities will have any value or that a liquid market for those securities will ever develop" to "not only bespeak caution, they shout it from the rooftops" (quotation marks omitted)). And had *Luce* been decided by the Ninth Circuit, it most likely would have found that detailed language did *not* bespeak caution.

In short, the Court's decision opens a series of circuit splits about the application of the bespeaks

caution doctrine. And those splits were outcome-determinative below. This Court should grant review to address them.

II. This Court Should Resolve The Circuit Split Over Who Can Qualify As A Statutory Seller.

The Ninth Circuit also deepened a split over who can be sued as a statutory seller. Under Section 12(a)(2), "[a]ny person who … offers or sells a security in violation of [the subsection] … shall be liable … to the person purchasing such security from him." 15 U.S.C. § 77*l* (emphasis added). This "purchase from" language, the Supreme Court has explained, "focuses on the defendant's relationship with the plaintiff-purchaser." *Pinter*, 486 U.S. at 651. And that language, "[a]t the very least, … contemplates a buyer-seller relationship not unlike traditional contractual privity." *Id.* at 642.

To state a statutory seller claim, a plaintiff must therefore allege a relationship "not unlike traditional contractual privity" between the person who "'offers or sells'" a security and the person "'purchasing such security from him.'" *Id.* at 641-42 (quoting 15 U.S.C. § 77*l*). That requires that a defendant actively and directly solicit someone's investment. *Id.* at 647 (extending liability to "person who successfully solicits the purchase"). The solicitation must be "active" because the Act only encompasses an "active solicitation of an offer to buy." *Id.* at 645. And it must be "direct" because the statute only extends liability for the sale of a security that is "purchas[ed] … from him." *Id.* at 647. In so holding, the Court rejected a substantial-factor test—namely, extending liability to one "whose participation in the buy-sell transaction is

a substantial factor in causing the transaction to take place" because it "introduces an element of uncertainty into an area that demands certainty and predictability." *Id.* at 649 (quotation marks omitted).

Despite that statutory language and this Court's reinforcement of its limiting principles, the Eleventh and Ninth Circuits have taken an expansive and unwarranted approach to the statutory seller issue that conflicts with the approach other circuits have taken.

In *Wildes v. BitConnect International PLC*, 25 F.4th 1341 (11th Cir. 2022), the Eleventh Circuit held that someone could "solicit a purchase, within the meaning of the Securities Act, by promoting a security in a mass communication," even without alleging that the communication was directed at a plaintiff-purchaser. *Id.* at 1345. In that case, plaintiffs who invested in a cryptocurrency called "BitConnect" sued after discovering that BitConnect was a Ponzi scheme rather than a legitimate investment program. *Id.* at 1343. To promote BitConnect, the company had created "multiple websites where [its national promoter] encouraged viewers to buy BitConnect coins." *Id.* at 1344. The posts and videos described "'how to make huge profits with BitConnect'" or "how to create a BitConnect account and how to transfer bitcoin there." *Id.* Those posts included click funnels that contained a direct link to invest with the statement "passive income [is] 'a click away.'" *Id.* And the plaintiffs included those who "had signed up for BitConnect directly through the promoters' referral links." *Id.* at 1345.

The district court dismissed the claims against the promoters, reasoning that "the plaintiffs needed to allege that the promoters had urged or persuaded them—'individually'—to purchase BitConnect coins." *Id.* at 1344. Because the plaintiffs had only pointed to publicly available posts and videos, the district court held they had not described the kind of direct and individual communications it concluded the Act required. *Id.*

The Eleventh Circuit reversed. It did not take on whether a solicitation must be active and direct, but instead rejected the requirement that it be a "'personal'" or "individualized one[]." *Id.* at 1345. As it described the issue, "nothing in the Securities Act makes a distinction between individually targeted sales efforts and broadly disseminated pitches." *Id.* In so doing, the court did not examine the language of Section 12 itself, but instead canvassed a variety of definitions in the Act. *See id.*

Wildes' conclusion "that nothing in the Securities Act makes a distinction between individually targeted sales efforts and broadly disseminated pitches" both misstated the issue and elided the text of Section 12. *Id.* The issue is not whether an offer is "personalized" in the sense of whether it is "broadly disseminated" or not. The issue is whether a solicitation is actively and directly made to a plaintiff such that the plaintiff can say she received an offer from, and "purchas[ed] from," the solicitor. A person who, for instance, uses a telephone service to call thousands of prospective clients might be said to have engaged in "mass communications." But it is only the call made to a particular plaintiff that gives rise to a solicitation of

that plaintiff. Likewise, a newspaper advertisement that is broadly disseminated but never seen by a plaintiff is not actionable, unless the plaintiff alleges that the advertisement was directed to or seen by him—something Pino has not done here. *See* 1 Williston on Contracts §§ 4:16, 4:18 (4th ed.); Restatement (Second) of Contracts § 29 (1981).

The Ninth Circuit's decision here dispensed with any such requirement. Worse yet, it went even further than *Wildes*, substituting for the statutory language an alternative theory of liability predicated on whether someone is a "significant participant"—a vague definition akin to the substantial-factor test *Pinter* rejected and determined in this instance based on social-media engagement, and justifying that based on the Court's concern that it would lead individuals to invest without full and fair information. And while *Wildes* concluded that the requirement of direct solicitation was satisfied by posts which expressly invited the viewer to invest and took them directly to a site where they could do so, the Ninth Circuit here ignored that requirement entirely in lieu of its amorphous and ill-defined significant participation standard.

Moreover, the Ninth Circuit did not even tether that social media engagement to the particular plaintiff or require that the plaintiff allege a nexus between the two.[3] On appeal, the only communication

[3] While reliance is not an element of Pino's substantive cause of action, whether Pino saw those statements is relevant to whether he can bring such a cause of action against Cardone and Cardone Capital because that turns on "the defendant's

Pino alleged between himself and Cardone or Cardone Capital is a "Breakthrough Wealth Summit." Pino Br. 69; 2-ER-68. But the complaint never alleged that Cardone or Cardone Capital even mentioned Fund V or Fund VI at this event, much less solicited any investments for the Funds. And while Pino also pointed to a hodgepodge of social media posts, he connected none of them to his investment. Indeed, the complaint did not even identify a social media post made on Grant Cardone's Instagram that pitches one of the Funds, and many of Cardone Capital's Instagram posts do not identify specific funds, much less resemble anything that would amount to an "offer." To the contrary, the posts generally contained a disclaimer noting that "[f]or our anticipated Regulation A offering, until such time that the Offering Statement is qualified by the SEC, no money or consideration is being solicited, and if sent in response prior to qualification, such money will not be accepted." *E.g.*, 2-ER-64, 69.

That cannot be squared with the statutory language or this Court's and other appellate courts' case law. As an initial matter, a broadly distributed communication bears no resemblance to "traditional contractual privity." *E.g.*, *McGill v. Gen. Motors Corp.*, 231 A.D.2d 449, 450 (N.Y. App. Div. 1996) ("[A] mass communication cannot establish 'privity' with unidentified members of the public." (citing *Metral v. Horn*, 213 A.D.2d 524, 526 (N.Y. App. Div. 1995)). That is particularly true where the plaintiff makes no

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relationship with the plaintiff-purchaser." *Pinter*, 486 U.S. at 651-52.

allegations about which communications, if any, he actually saw. Instead, a communication must be made directly to—or seen by—a plaintiff. *See* 1 Williston on Contracts § 4:16 ("An offeree cannot actually assent to an offer unless the offeree knows of its existence."); *id.* § 4:18 (an offer by mail "must be known in order to be accepted").

The requirement that a communication be directed to (or seen by) a plaintiff finds additional support from Section 12's focus on "offers." 15 U.S.C. § 77*l* ("[a]ny person who … offers or sells" (emphasis added)). An essential characteristic of an "offer" is that it must be directed at a particular person or group of persons in which the offeror creates the power of acceptance. Restatement (Second) of Contracts § 29. As the Restatement provides, an offeror may choose to make an offer to many persons, but it must still be presented to a person to constitute an offer that may be accepted. *Id.* § 29 cmt. b, ill. 2.

Even the word "solicit" itself points away from, rather than towards, the Eleventh and Ninth Circuit's approaches. *Cf. Wildes*, 25 F.4th at 1346. As *Wildes* correctly observes, "to solicit" means "to approach with a request or plea, as in selling." *Id.* (quoting Webster's New International Dictionary of the English Language 2393-94 (2d ed. 1938)). "To approach," however, means to approach someone—"to draw closer to" or "near" (as "approach" signifies) connotes directing a request or plea at someone. *Approach*, Merriam-Webster.com (2023), https://tinyurl.com/2p9ye7m9. A banker might approach a client with a new investment opportunity. But no ordinary English

speaker would describe an advertisement posted on a bulletin board as an "approach."

Consistent with these principles, other courts have read Section 12 to require that a defendant actively and directly solicit a plaintiff's investment. Pointing to the same language ignored by the Eleventh and Ninth Circuits, the Third Circuit held that "[t]he purchaser must demonstrate direct and active participation in the solicitation of the immediate sale to hold the issuer liable as a § 12(2) seller." *In re Craftmatic Sec. Litig. v. Kraftsow*, 890 F.2d 628, 636 (3d Cir. 1989), *as amended* (Jan. 30, 1990). The Fifth Circuit, relying on *Craftmatic*, has agreed. *Rosenzweig v. Azurix Corp.*, 332 F.3d 854, 871 (5th Cir. 2003); *see also Lone Star Ladies Inv. Club v. Schlotzsky's Inc.*, 238 F.3d 363, 370 (5th Cir. 2001) ("preparing a prospectus and conducting a road show" insufficient for Section 12 liability).

Ditto for the Second Circuit. It explained that Section 12 requires that "plaintiffs must show that [a defendant] *actually solicited* their investment" to bring a statutory-seller claim. *Capri v. Murphy*, 856 F.2d 473, 479 (2d Cir. 1988) (emphasis added). There, the court found that a claim could be brought against two defendants who actually "prepared and circulated the prospectus to plaintiffs," *id.* at 478 (emphasis added), but not against another defendant, because there was no allegation that that defendant "actually solicited their investment." *Id.* at 479; *see also Wilson v. Saintine Exploration & Drilling Corp.*, 872 F.2d 1124, 1126-27 (2d Cir. 1989) (law firm that never contacted plaintiff directly does not qualify as seller). Similarly, the Tenth Circuit rejected a plaintiff's

Section 12 claims because he alleged only that the defendants "induced his purchase of the stock," but did not allege any facts indicating a solicitation. *Maher v. Durango Metals, Inc.*, 144 F.3d 1302, 1307 (10th Cir. 1998).

Many district courts have agreed, and have applied a test like the one the district court did here. 1-ER-23-24; *e.g.*, *Steed Fin. LDC v. Nomura Sec. Int'l, Inc.*, 2001 WL 1111508, at *7 (S.D.N.Y. Sept. 20, 2001) (dismissing claims because "Plaintiff … has failed to allege that plaintiff in fact purchased the Certificates as a result of [defendant's] solicitation"); *Moskowitz v. Mitcham Indus.*, 2000 WL 33993307, at *13 (S.D. Tex. Oct. 2, 2000) ("[w]hile surely a prospectus is a 'solicitation document', its issuance alone is not adequate to qualify Defendants as sellers, without some further action on their part"); *Fransen v. Terps Liab. Co.*, 153 F.R.D. 655, 658-59 (D. Colo. 1994) ("cases construing *Pinter* uniformly have held that some form of active participation in the solicitation of the a sale is required; collateral participants are not liable as statutory sellers"); *Montcalm Cnty. Bd. of Comm'rs v. McDonald & Co. Sec., Inc.*, 833 F. Supp. 1225, 1234 (W.D. Mich. 1993) ("no evidence that this generic advertising played any part whatsoever, either in the continuing dealings between plaintiff and defendant …, or as an inducement to plaintiff's 'beginning' its dealings with defendant"); *In re Newbridge Networks Sec. Litig.*, 767 F. Supp. 275, 280-81 (D.D.C. 1991) (noting that the "only participation by defendants in the sale of the securities consisted of 'meetings' with their underwriters and collaboration on the preparation of the offering materials" and holding that "absent any allegation of direct contact of

any kind between defendants and plaintiff-purchasers, the Court rules as a matter of law that defendants are not statutory sellers"); *In re Gas Reclamation, Inc. Sec. Litig.*, 733 F. Supp. 713, 723 (S.D.N.Y. 1990) ("Each investor, therefore, must prove that Esrine, as Northwestern's agent, personally solicited him or her."); *Hudson v. Sherwood Sec. Corp.*, 1989 WL 108797, at *1 (N.D. Cal. July 27, 1989) (allegations that defendant "made a presentation at a meeting of prospective investors" insufficient to establish Section 12 liability), *aff'd*, 951 F.2d 360 (9th Cir. 1991).

There are good policy reasons to require active and direct solicitation. Section 12 is focused on liability for "those situations in which a sale has taken place." *Pinter*, 486 U.S. at 644. Under its text, the person who "sells" the security—in this case, Fund V and Fund VI—are already swept in by the Act. Although the Supreme Court has extended liability to certain kinds of solicitors who do not directly pass title, it also explained that determining whether someone is a seller must focus on the "defendant's relationship with the plaintiff-purchaser," for fear of extending liability too broadly. *Id.* at 651-52. Extending liability based on social media posts—without any allegation that the post was directed to the plaintiff or even seen by him—would extend liability past even the "substantial-factor" test rejected in *Pinter*. And it would threaten to extend liability to anyone who merely published information about investments.

Nor would adhering to the line drawn in *Pinter* undermine the Securities Act. To be sure, the

Securities Act was adopted with a broad remedial purpose, but as this Court said in *Pinter*, "[t]he broad remedial goals of the Securities Act are insufficient justification for interpreting a specific provision 'more broadly than its language and the statutory scheme reasonably permit.'" *Id.* at 653 (quoting *Touche Ross & Co. v. Redington*, 442 U.S. 560, 578 (1979)).

That does not mean "mass communications" are categorically outside Section 12's reach. To the contrary, as the district court concluded, to state a claim, a plaintiff must allege that the defendant actively and directly solicited a plaintiff's investment. App.69-71. For a plaintiff alleging a misrepresentation in a social media post, that requires the plaintiff to allege that the particular defendant "was directly and actively involved in soliciting Plaintiff's investment, or that Plaintiff relied on such a solicitation when investing." App.71. That test balances the Act's remedial purpose with the text of Section 12 and *Pinter*'s concern that the statute not be expanded outside of buyer-seller relationships. The test the Ninth Circuit imposed here, however, does not. This Court should grant certiorari and resolve this issue.

III. This Case Represents A Clean Vehicle To Address Two Exceptionally Important Issues.

This Court has recognized the tremendous power that securities litigation wields over both investors and the national economy. *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 80-81 (2006) (noting that, in the context of securities, the "class action device" can "injure 'the entire U.S.

economy'" (quoting H.R. Conf. Rep. No. 104-369, at 31); *see also Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 277 (2014) (Congress enacted the PSLRA "to combat perceived abuses in securities litigation"); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 739 (1975) ("There has been widespread recognition that litigation under Rule 10b-5 presents a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general.").

The bespeaks caution doctrine and the statutory seller limitation represent critical safeguards against abusive securities class actions, rooting out claims based on buyer's remorse rather than misleading statements, and limiting the targets of litigation to those who actually offer or sell securities. This preserves the resources of defendants, limiting downstream effects on the American economy. This Court's review is needed to ensure that the Ninth's Circuit decision does not create confusion about the application of these important doctrines.

In 2022, 205 new securities class actions were filed. Janeen McIntosh et al., Recent Trends in Securities Class Action Litigation: 2022 Full-Year Review, NERA Econ. Consulting 1 (Jan. 24, 2023), https://www.nera.com/content/dam/nera/publications/2023/PUB_2022_Full_Year_Trends.pdf. In the same year, companies paid $4 billion to settle securities class actions. The costs of defending these lawsuits, on top of paying these settlements, are enormous. As Justice Gorsuch has observed, "new corporate investments are deterred, the efficiency of the capital markets is reduced, and the competitiveness of the

American economy declines." Neil M. Gorsuch & Paul B. Matey, *Settlements in Securities Fraud Class Actions: Improving Investor Protection* 32 (Wash. Legal Found., Critical Legal Issues Working Paper No. 128, 2005).

Settlement pressures magnify as cases proceed through the motion to dismiss stage and class certification stage. And securities litigation is ripe for "nuisance filings, targeting of deep-pocket defendants, vexatious discovery requests, and … extortionate settlements." *Merrill Lynch*, 547 U.S. at 81. The costs of discovery alone are "astronomical," *Swanson v. Citibank, N.A.*, 614 F.3d 400, 411 (7th Cir. 2010) (Posner, J., dissenting), creating a "hydraulic pressure to settle." *See Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 165 (3d Cir. 2001). And "[l]ooming in the background" of all securities class actions "is a potentially bankrupting judgment." M. Todd Henderson, *Halliburton Will Raise Cost of Securities Class Actions*, Law360 (July 2, 2014), https://www.law360.com/articles/552839/halliburton-will-raise-cost-of-securities-class-actions. As a result, investors end up "footing the bill" to neither side's benefit because these settlements often have nothing to do with the merits. *Id.*; *see also, e.g.*, Janet Cooper Alexander, *Rethinking Damages in Securities Class Actions*, 48 Stan. L. Rev. 1487, 1503 (1996); Henderson, *Halliburton Will Raise Cost of Securities Class Actions*, *supra*.

A. Review Is of Critical Importance to Enforce the Bespeaks Caution Doctrine.

The bespeaks caution doctrine is an important tool to intercept meritless lawsuits before they proceed

to class certification and beyond. Accordingly, review is especially critical here because the Ninth Circuit's decision spawns confusion and uncertainty, which in turn has downstream effects "lead[ing] to many undesirable consequences," like "increas[ing] the costs of doing business and raising capital." *Pac. Inv. Mgmt. Co. v. Mayer Brown LLP*, 603 F.3d 144, 157 (2d Cir. 2010). If companies cannot rely on these types of cautionary statements to shield them from liability, they will resist making the forward-looking statements that are a fundamental aspect of American capital markets.

The Ninth Circuit's decision will have outsized impact in this area. Most securities class actions are filed in the Second, Ninth, and Third Circuits. McIntosh et al., Recent Trends in Securities Class Action Litigation, *supra*, at 2. Courts in these jurisdictions are all over the map in applying this doctrine. *See supra* Section I. Some apply it even if the forward-looking prediction came after a cautionary statement or was not contained in the same document. *See, e.g.*, *San Leandro Emergency Med. Grp.*, 75 F.3d at 811. Some do not. *See, e.g.*, App.6-8; *EP Medsystems,* 235 F.3d at 878-79; *In re Apple Comput., Inc., Sec. Litig.*, 243 F. Supp. 2d 1012, 1024-25 (N.D. Cal. 2002). Some acknowledge the reality that cautionary language, by its nature, is "necessarily speculative." *E.g.*, *Luce*, 802 F.2d at 56 (quotation marks omitted). Some reject this. *See* App.7-8.

The adequacy of a company's cautionary statements should not depend on the jurisdiction where it is sued. These divides will encourage forum

shopping, generate further excessive and vexatious litigation, and leave other courts in doubt about how to apply the doctrine.

B. Review Is of Critical Importance to Enforce the Express Statutory Limits on Who Can Be a Seller for Purposes of Securities Law.

The question about who constitutes a statutory seller is of equal importance. Both the Ninth and Eleventh Circuits have effectively rewritten the statutory language to expand its scope beyond its proper bourns. And the Ninth Circuit's novel test, turning, as it does, on whether an individual or entity was a "significant participant," leaves parties and the courts alike at sea in determining whether and when an entity who did not either offer or sell securities can nonetheless be held liable. Moreover, it substitutes the Ninth Circuit's judgment for that of Congress based on the Ninth Circuit's concerns about social media engagement. There is a difference between courts applying the law to new and unforeseen circumstances on the one hand, and rewriting that law on the other. This Court should grant certiorari to correct that judicial overreach.

This case is the ideal vehicle for this Court's review. It cleanly presents two important legal questions about the operation of the bespeaks caution doctrine and the statutory seller doctrine. There are no factual or procedural issues to decide. Given the economic impact of securities litigation on the U.S. economy and the uncertainty flowing from the Ninth Circuit's decision, this Court should intervene and

clarify the scope of the bespeaks caution doctrine and the proper definition of statutory seller.

CONCLUSION

This Court should grant the petition for certiorari.

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