No. 22-1016

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Ninth Circuit correctly applied the well-settled bespeaks-caution doctrine to the facts of this case in its unpublished and nonprecedential memorandum decision denying a motion to dismiss?

2. Whether the Ninth Circuit correctly held, in agreement with all other courts of appeal to have considered the issue, that Respondent properly pleaded that Petitioners solicited a purchase within the meaning of the Securities Act by promoting the sale of a security in a mass communication?

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INTRODUCTION

Petitioners seek review of the denial of a motion to dismiss a superseded complaint. But there is no reason for the Court to review these issues, particularly before the lower courts have the opportunity to address them on a factual record. Petitioners conjure up conflicts where none exist and mischaracterize the Ninth Circuit's measured and factbound holdings, which align with decades of precedent. Because the Ninth Circuit's interlocutory decisions applied well-settled legal standards to the specific allegations of this case, review is unwarranted.

On the first question presented, Petitioners disregard the substance of the Ninth Circuit's unanimous decision rejecting dismissal based on a fact-specific application of the bespeaks-caution doctrine. The court recognized that for purposes of the bespeaks-caution doctrine, "[w]hether a statement in a public document with cautionary language is misleading may only be determined as a matter of law when reasonable minds could not disagree that the 'mix' of information in the document is not misleading." App-83-84. The cases cited in Petitioners' nonexistent "split" took the same fact-bound, contextual approach to evaluating the doctrine's applicability; they simply applied that approach to entirely different sets of alleged facts.

Petitioners likewise identify no conflict on the second question presented. The panel's decision aligns the Ninth Circuit with the Eleventh Circuit, the only other court of appeal to have addressed social-media solicitations. *See Wildes v. BitConnect International PLC*, 25 F.4th 1341 (11th Cir. 2022). The supposedly-conflicting cases Petitioners cite did not address online solicitation and merely reinforce that tangential involvement in a solicitation, unlike the active and extensive promotional conduct at issue here, is insufficient for liability.

Section 12(a) itself imposes liability for misrepresentations and omissions made on radio and television, yet Petitioners seek to exclude the modern-day analogues of Instagram and YouTube. Petitioners' naked plea for error correction fares no better. Petitioners would reduce the panel's analysis to "judicial concerns about the use of social media," Pet. 3, but the panel extensively analyzed the statutory text, precedent, and policy implications of its ruling. The Ninth Circuit's rejection of the "direct solicitation" requirement Petitioners advance, and its holding that Petitioners could be held liable as statutory sellers for extensively promoting Cardone Equity Fund V and Cardone Equity Fund VI (collectively, the Funds) over social media, faithfully hewed to these authorities, including the statutory language and this Court's holding in *Pinter v. Dahl*, 486 U.S. 622 (1988). *Pinter* imposed only two requirements for solicitation under Section 12(a)(2), both of which are easily met here: (1) "successful[] solicit[ation of] the [securities] purchase" that is (2) "motivated at least in part by a desire to serve [a person's] own financial interests or those of the securities owner." *Id.* at 647.

Indeed, just one year ago, this Court denied certiorari review of the Eleventh Circuit's holding in *Wildes* that online promoters who solicit investors using social-media posts directed to the public at large can qualify as sellers under Section 12(a). *See Arcaro v. Parks*, 143 S. Ct. 427 (Mem.) (2022). The lack of "compelling reasons" for the Court to review that petition, S. Ct. R. 10, apply equally to Petitioners' second question presented.

While there is no reason for the Court to address either question, this case presents a particularly poor vehicle for doing so. Since the filing of the Petition, Pino has, consistent with the Ninth Circuit's decision, filed a second amended complaint, and Petitioners have again moved to dismiss (their motion is pending before the district court). The Petition therefore seeks interlocutory review of a denial of a motion to dismiss a now-inoperative complaint.

Finally, the Ninth Circuit's decisions do not have the drastic consequences Petitioners claim. The unpublished, nonprecedential ruling on the bespeaks-caution defense binds only the parties and is limited to pre-discovery allegations. Likewise, far from developing some "novel test," Pet. 4, the Ninth Circuit based its determination that Petitioners were plausibly alleged to be statutory sellers on the fact-specific allegations of Petitioners' extensive promotional social-media activity.

Petitioners' request to review the application of well-settled law to specific facts, with no arguable conflict of authority—and for a case already on remand for further proceedings—should be denied.

STATEMENT OF THE CASE

1. Grant Cardone and Cardone Capital engaged in an extensive social-media campaign to lure

"everday investor[s]" into crowdfunding their equity funds, including Cardone Equity Fund V and Cardone Equity Fund VI, through misleading posts and videos.[1] 2-ER-69-71 (FAC ¶¶ 38-40).[2] As alleged in detail in the complaint, Petitioners published numerous posts and videos to Instagram and YouTube containing misrepresentations such as:

- "[Y]ou're gonna walk away with a 15% annualized return. If I'm in that deal for 10 years, you're gonna earn 150%. You can tell the SEC that's what I said it would be. They call me Uncle G and some people call me Nostradamus, because I'm predicting the future dude, this is what's gonna happen." 2-ER-57 (FAC ¶ 1); *see also* ER-76-78 (FAC ¶¶ 59, 61) (alleging promises of internal rates of return ("IRR") of 15% and 17.88%).
- Projecting 8% in distributions every year, promising that a "6 yrs CashFlow" on a "1,000,000" investment would be "$480,000." 2-ER-79-80 (FAC ¶ 67).

Contrary to those representations, Cardone's promises were baseless. 2-ER-76-77 (FAC ¶¶ 57, 59,

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[1] Cardone is CEO of Cardone Capital. 2-ER-66-67 (FAC ¶ 31). He and Cardone Capital create equity funds used to acquire various real estate assets through the United States, manage these properties, and collect rents from tenants. 2-ER-58 (FAC ¶ 4); 2-ER-98. Cardone manages and controls these funds. 2-ER-66-67 (FAC ¶ 31), 2-ER-86 (FAC ¶ 84).

[2] "ER" refers to the Ninth Circuit appendix of the Excerpts of Record. "FAC" refers to the First Amended Complaint.

61), 2-ER-80 (FAC ¶ 68). While the SEC directed Cardone to remove Cardone's projection of a 15% IRR from the Fund V offering document, given his lack of any "basis for such return," Cardone persisted in promising a 15% IRR to everyday investors over social media mere months later. 2-ER-75-76 (FAC ¶¶ 55, 56).

In addition to Petitioners' misrepresentations relating to IRR and distributions, the complaint alleged Cardone falsely told prospective investors that he solely was "responsible for" the Funds' debt payments. 2-ER-83-84 (FAC ¶¶ 79, 80). In reality, the Funds used investor money to service their significant debt obligations. *Id.*

Cardone hosted conferences to further promote investment in his funds and, in 2019, Luis Pino attended Cardone's "Breakthrough Wealth Summit" in California. 2-ER-67-70 (FAC ¶ 34-38). Two days later, he invested thousands of dollars in Fund V, and shortly after, also invested in Fund VI. 2-ER-66, 68 (FAC ¶¶ 29, 36). Pino, one of the "everyday investors" targeted by Cardone, subsequently filed this suit on behalf of a putative class of investors alleging claims under Sections 12(a)(2) and 15 of the Securities Act of 1933.[3]

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[3] The district court appointed Luis Pino as lead plaintiff under the Private Securities Litigation Reform Act. *See Pino v. Cardone Cap., LLC*, 2020 WL 7585839 (C.D. Cal. Dec. 18, 2020). After the Ninth Circuit's ruling, Luis Pino passed away, and the district court ordered his daughter and successor-in-interest, Christine Pino, to be substituted in his place. *Pino v. Cardone Cap., LLC*, Case No. 2:20-cv-04899 (C.D. Cal.), ECF No. 124. Respondent's unopposed motion to substitute Ms. Pino as Respondent in this Court is pending.

2. The district court dismissed Pino's complaint with prejudice. The district court concluded that he had not alleged any actionable misrepresentations and that the bespeaks-caution doctrine protected Petitioners' social-media statements because the Funds' offering documents contained cautionary language. APP-54-69. The district court further concluded that Cardone Capital and Cardone were not "sellers" as defined by Section 12(a)(2) because "Plaintiff does not allege that Cardone or Cardone Capital was directly and actively involved in soliciting Plaintiff's investment, or that Plaintiff relied on such a solicitation when investing." APP-69-71.

3. The Ninth Circuit reversed the dismissal of the complaint and remanded for further proceedings. It did so in two separate opinions: an unpublished, nonprecedential opinion concerning the bespeaks-caution doctrine, and a published opinion concerning whether Petitioners qualified as statutory sellers.

In an unpublished, nonprecedential opinion,[4] the Ninth Circuit reversed the district court's dismissal of the complaint, holding that the complaint stated an actionable claim based on alleged misstatements about the debt obligations, which are plausibly alleged as untrue statements of fact, App-83, and IRR and distributions, which are not protected by

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[4] After Petitioners filed for rehearing of the panel decision, the panel amended its memorandum order to clarify that Petitioners may raise arguments to the district court on remand regarding application of the *Omnicare* standard and otherwise denied rehearing. App-75. The citations in this Opposition refer to the Amended Memorandum, App-76-86.

the bespeaks-caution doctrine. App-81. The court also "assume[d], without deciding, that cautionary language need not necessarily appear in the same document as the alleged misstatement." App-84. The panel held that the "stringent" standard for the bespeaks-caution doctrine to apply was not met, because the "offering circulars contain only generalized cautionary language that is too broad to immunize the otherwise actionable alleged misstatements about IRR and distributions" and "many of the misstatements are too attenuated from the release of the offering circulars to be insulated by the warnings contained therein." *Id.* The panel remanded to the district court "to allow Pino to replead consistent with our memorandum disposition and opinion." App-78.

In a separate published opinion on whether Petitioners were "statutory sellers" under Section 12(a)(2), the panel followed this Court's holding in *Pinter v. Dahl*, 486 U.S. 622 (1988). App-7-8. The panel found "no question that Cardone and Cardone Capital had financial interests tied to the Funds," and thus turned to the narrow question of "whether Cardone and Cardone Capital 'engaged in solicitation.'" App-8. In answering this question, the panel adopted the textual analysis of the Eleventh Circuit in *Wildes v. BitConnect Int'l PLC*, 25 F.4th 1341 (11th Cir. 2022). App-9. Because "nothing in § 12 expressly requires that solicitation must be direct or personal to a particular purchaser," App-9, direct solicitation was not required based on statutory text, including statutory definitions, App-10, or the remedial purpose of the Act, App-13. The panel observed that *Pinter* imposes no such requirement. App-10-12. The court therefore held "that § 12 contains no requirement that a solicitation be directed or targeted to a particular plaintiff, and accordingly, join[ed] the Eleventh Circuit in holding that a person can solicit a purchase, within the meaning of the Securities Act, by promoting the sale of a security in a mass communication." App-14.

The panel held that given Petitioners' use of social media to solicit investors, evidenced by Cardone's own posts touting the financial benefits of crowdfunding on social media and extensive solicitation on YouTube and Instagram, "through their social media engagement, Cardone and Cardone Capital were significant participants in the selling transaction because they disseminated material information to would-be investors." App-13. The panel also referenced Petitioners' "extensive solicitation efforts, including through the 'Breakthrough Wealth Summit'. . . and Defendants' extensive social media posts." App-14. As a result, Cardone and Cardone Capital were held to be "statutory sellers" under the 1933 Act.

REASONS FOR DENYING THE PETITION

There is no conflict as to either question presented in this Petition, nor any other "compelling reason[]" for this Court's review. S. Ct. R. 10. As to the bespeaks-caution doctrine, the Ninth Circuit applied well-settled law in evaluating the doctrine's applicability by reviewing whether reasonable minds could disagree that the "mix" of information was not misleading. Its case-specific holding on this fact-dependent question does not conflict with the case-specific determinations in Petitioners' cited cases and is entirely consistent with the concerns animating the bespeaks-caution doctrine.

On the statutory-seller requirement, Petitioners fare no better. Petitioners accuse the panel of "judicially rewrit[ing]" Section 12, Pet. 17, but it is Petitioners who seek to read into the statute an "active and direct" solicitation requirement where none exists. The Ninth Circuit's well-reasoned opinion rejecting that requirement and holding that Petitioners' extensive social-media promotion sufficiently states a claim for seller liability is not grounds for review, particularly where the circuits are aligned, not split, on this issue.

Further, there are no urgent or compelling reasons warranting the Court's interlocutory review now, particularly before the lower courts even have the opportunity to evaluate the issues with the benefit of a full factual record.

I. The Ninth Circuit's Nonprecedential Rejection of the Bespeaks-Caution Doctrine Does Not Create or Deepen a Conflict.

The Ninth Circuit recognized that "[w]hether a statement in a public document with cautionary language is misleading may only be determined as a matter of law when reasonable minds could not disagree that the 'mix' of information in the document is not misleading." App-83-84. This analysis, long referred to as the bespeaks-caution doctrine, has roots in this Court's mandate to determine the materiality of an alleged misstatement by its context. *Basic v.*

Levinson, 485 U.S. 224, 231-32 (1988) (courts must consider "total mix" of information). Undertaking that contextual analysis, the panel correctly held that Petitioners' purported cautionary language was insufficient to vitiate materiality as a matter of law because the "offering circulars contain only generalized cautionary language that is too broad to immunize the otherwise actionable alleged misstatements about IRR and distributions" and "many of the misstatements are too attenuated from the release of the offering circulars to be insulated by the warnings contained therein." App-84.

Petitioners do not complain that the Ninth Circuit applied the wrong bespeaks-caution standard. Petitioners complain only about the ultimate *outcome* of the panel's analysis. Even if the Ninth Circuit's outcome was incorrect (and it is not), the Court does not revisit factual determinations, particularly in cases involving nonprecedential, pleading-stage decisions. *See* S. Ct. R. 10(a). Petitioners' quibble with the application of settled law to now-superseded allegations cannot convert the issue into one worthy of review for two additional reasons.

First, Petitioners' alleged conflict is entirely illusory. Given the fact-specific nature of determining whether disclaimers bespoke caution, it is hardly surprising that ***none*** of Petitioners' cited cases conflict with the decision below.

Second, the decision below is entirely consistent with the policy rationale underlying the doctrine and securities law more broadly. If anything, it is Petitioners who seek to change the law by imposing categorical rules through the bespeaks-caution doctrine.

A. Petitioners' Alleged Conflict Is Illusory.

None of the cases cited by Petitioners as allegedly giving rise to a "split" conflict with the Ninth Circuit's ruling. These cases reach different outcomes because they have different facts, not because the circuits are in conflict.

"[C]autionary language is not necessarily sufficient, in and of itself, to render predictive statements immaterial as a matter of law." *Rubinstein v. Collins*, 20 F.3d 160, 167-68 (5th Cir. 1994). The bespeaks-caution doctrine simply mandates "that statements must be analyzed in context when determining whether or not they are materially misleading." *Grossman v. Novell, Inc.*, 120 F.3d 1112, 1120 (10th Cir. 1997) (internal quotation marks and citation omitted).

Consistent with these principles, the Ninth Circuit conducted a holistic review of the allegations, including the alleged misrepresentations Petitioners made in social-media posts to unaccredited investors. App-81-82 nn.1-2. In light of these alleged misrepresentations, the Ninth Circuit concluded that, based on both the timing and substance of the cautionary language, a reasonable mind may find Petitioners' generic cautionary language (like telling investors "we may never become profitable," 2-ER-106) insufficient to insulate the alleged misstatements. App-24. As the other Circuits indicate, this is precisely what the bespeaks-caution doctrine requires.

Yet the Petition distorts the Ninth Circuit's decision to make it appear at odds with the precedent. Petitioners suggest the panel held cautionary language must appear at the same time as the misleading statements and that industry-wide risk warnings were never sufficient for language to bespeak caution. The Ninth Circuit made neither holding. It expressly assumed that warnings and projections could be in different documents and implicitly accepted that they could occur at different times; it simply held the temporal attenuation here was too much when the substance was also considered. Likewise, the Ninth Circuit did not categorically disregard industry-wide risk warnings; it held only that they were insufficient on these facts given their generic nature compared to the specificity of the alleged misrepresentations and the attenuated timing of the cautionary language.

Though Petitioners rely heavily on *Grossman v. Novell, Inc.*, the "relatively general" misstatements there "directly related to the transactions described in great detail in the registration statement" and were "all closely proximate in time." 120 F.3d at 1116, 1122-23. The first misstatement was only five days after the registration statement, and the second misstatement was just one month after three registration-statement amendments were filed. Here, by contrast, the supposedly cautionary language in the offering circulars was far more general and issued months apart from the social-media misrepresentations.

In addition, the Tenth Circuit carefully cabined its holding, explaining, "*Under the circumstances presented in this case*, *in a claim of fraud on the marketplace*, we believe 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); *see also id.* at 1122 ("Particularly in a fraud on the market case, the relevant inquiry concerns the *total* mix of information *available to the market* at the time of the allegedly fraudulent statements." (emphasis added)). In other words, because the "market price of shares . . . reflects all publicly available information," *id.* at 1123 (citation omitted), including the cautionary disclosures, the exact timing and placement of the cautionary language matters less when fraud on the market is alleged.

This case does not, in any way, implicate a fraud on the market. Pino's Section 12(a)(2) claim does not require reliance (unlike Rule 10b-5 in *Grossman*) and so does not rely on the "fraud on the market" assumption. *See Fed. Hous. Fin. Agency, Nat'l Mortg. Ass'n & the Fed. Home Loan Mortg. Corp. v. Nomura Holding Am., Inc.*, 873 F.3d 85, 98 (2d Cir. 2017) (reliance not element of Section 12(a)(2)); *In re Evergreen Ultra Short Opportunities Fund Sec. Litig.*, 275 F.R.D. 382, 389 (D. Mass. 2011) (fraud-on-the-market theory does not apply to Section 12(a)(2)).

Petitioners also analogize to *Luce v. Edelstein*, but ignore that the cautions there appeared in the same document (an offering memorandum) as the predictions that satisfied the Rule 9(b) pleading standard, and specifically referenced the predictions.

802 F.2d 49, 56 (2d Cir. 1986). Any reasonable investor reading the alleged misrepresentations about "the potential cash and tax benefits of the partnership" would also come across the cautionary language that those projections were "necessarily speculative in nature," with "[n]o assurance . . . that these projections [would] be realized," and "[a]ctual results may vary from the predictions and these variations may be material." *Luce*, 802 F.2d at 56; *see also Halperin v. eBanker USA.com, Inc.*, 295 F.3d 352, 360 (2d Cir. 2002) (applying bespeaks-caution doctrine where alleged misstatements "are couched in hortatory language . . . *surrounded by* warnings that registration cannot be assured" or "are qualified by the *immediately proceeding* sentences" in the same document (emphasis added)); *In re Worlds of Wonder Sec. Litig.*, 35 F.3d 1407, 1415-20 (9th Cir. 1994) (applying bespeaks-caution doctrine where misrepresentations and cautions were in same document). In this case, by contrast, the alleged misrepresentations and Petitioners' generic cautions appeared in *separate* places at *separate* times.

When faced with circumstances like those here, the circuits are in fact aligned. In *EP Medsystems, Inc. v. EchoCath, Inc.*, the Third Circuit held cautionary language did not immunize a representation that the defendant was "on the verge of signing contracts" with four companies where (1) the cautionary language was contained in a separate document, (2) several months had passed since the cautionary language was published, and (3) the cautionary language contained only "general language" and did not "specifically refer[] to the imminent contracts with the four companies" identified in the subsequent representation. 235 F.3d 865, 876-77 (3d Cir. 2000). Pino's allegations, and the timing and generic nature of Petitioners' purported cautions, track those in *EP Medsystems*.

None of Petitioners' remaining arguments succeed. First, the Subscription Agreement signed by investors, which Petitioners rely on to avoid liability, Pet. 21, does not affect the bespeaks-caution analysis. The generic reliance disclaimers in those documents are irrelevant given that reliance is not required for a Section 12(a)(2) claim, *Pinter*, 486 U.S. at 652, and, in any event, an issuer cannot evade the securities laws by requiring investors to sign boilerplate contracts. 15 U.S.C. § 77n; *see McMahan & Co. v. Wherehouse Entm't, Inc.*, 65 F.3d 1044, 1051 (2d Cir. 1995) ("[I]ndividual securityholders may not be forced to forego their rights under the federal securities laws due to a contract provision."). Second, there is no conflict with decisions applying the bespeaks-caution doctrine to different documents. *See* Pet. 19-20. The Ninth Circuit expressly "assume[d], without deciding, that cautionary language need not necessarily appear in the same document as the alleged misstatement." App-84. Third, far from cutting out cautionary warnings from the "mix" of information to consider, the panel explicitly considered the cautionary language; it simply held that language to be insufficient for dismissal as a matter of law. App-84. That the Ninth Circuit did not find the offering circulars as curative as Petitioners would have liked does not mean that the Ninth Circuit's analysis was flawed.

In sum, the circuits have taken the same careful, fact-bound, and contextual comparison between purportedly cautionary language on the one hand and alleged misstatements on the other, which the Ninth Circuit conducted in this case. Petitioners wrongly perceive a split where there is only uniformity.

B. The Ninth Circuit's Decision is Consistent with Policy Rationales and *Omnicare*.

Petitioners ask this Court to adopt a sweeping rule absolving issuers from liability for making egregious misrepresentations on social media, *as a matter of law*, so long as they include some boilerplate disclaimers in offering documents. Such a rule is contrary to the very contextual analysis that Petitioners' cited authorities require. *See Rubinstein*, 20 F.3d at 168 ("[C]autionary language . . . is not per se dispositive of [the materiality] inquiry.").

Petitioners now try to downplay Cardone and Cardone Capital's promises to investors, but these were no "off-the-cuff remarks." Pet. 20. Grant Cardone and Cardone Capital have tens of millions of followers on Instagram and YouTube; their posts were at the heart of a years-long social-media strategy that raised almost $100 million for the Funds from mostly unaccredited investors. 2-ER-74 (FAC ¶ 51), 2-ER-69-71 (FAC ¶¶ 38-40); 2-ER-106 (Fund VI's offering document: "We expect that our investor base will be largely drawn from Mr. Cardone's exposure on social media and on media content delivered over the Company's website."); 2-ER-223 (same representation in Fund V's offering document). In dozens of social-media posts, not once did Petitioners tell investors to review the Funds' offering documents before making an investment decision. Taking statements made in such posts at face value "furthers the purposes of the Securities Act—to promote full and fair disclosure of information to the public in the sale of securities." *Pinter*, 486 U.S. at 646. The Ninth Circuit's decision rightly recognizes that investors increasingly make investments based on statements made on social media, and the protections of the securities laws do not disappear in this new forum.

The Ninth Circuit's holistic analysis is also consistent with *Omnicare, Inc. v. Laborers District Council Construction Industry Pension Fund*, where this Court explained "whether an omission makes an expression of opinion misleading *always depends on context*." 575 U.S. 175, 190 (2015) (emphasis added). *Omnicare* did not create a categorical "differentiation" between formal documents and social-media posts. While the *Omnicare* Court observed that statements in formal documents are expected to be taken seriously, *id.*, it did not hold that misrepresentations *outside* formal documents, no matter how egregious, are immaterial as a matter of law so long as offering materials contain boilerplate disclaimers of risk.

The plain text of the statute rejects such a rule. Section 12(a)(2) states that "any person" who "offers or sells a security . . . by means of a *prospectus or oral communication*, which . . . omits to state a material fact" may be liable to an unknowing purchaser. 15 U.S.C. § 77l (emphasis added). "If Congress intended sellers of securities to be held liable only when there is not complete disclosure in the prospectus, it could have limited the scope of the statute in that regard." *MidAmerica Fed. Sav. & Loan Ass'n v. Shearson/Am.*

Exp., Inc., 886 F.2d 1249, 1255 (10th Cir. 1989). Instead, Congress put the prospectus and communications to investors outside the prospectus, like those here, on equal footing; the statute does not categorically differentiate between the two.

II. The Ninth Circuit's Statutory-Seller Holding Was Correct and Does Not Implicate a Conflict.

The Ninth Circuit correctly held that "§ 12 contains no requirement that a solicitation be directed or targeted to a particular plaintiff, and . . . a person can solicit a purchase, within the meaning of the Securities Act, by promoting the sale of a security in a mass communication," as Petitioners did here. App-14. This Court's review is not warranted for the following reasons.

First, Petitioners have failed to identify any circuit split on this issue. The Ninth Circuit's holding was consistent with the only other court of appeals to consider solicitation via online mass communications, *Wildes v. BitConnect International PLC*, 25 F.4th 1341 (11th Cir. 2022). Petitioners' cited cases are readily distinguishable and do not involve, as here, promoters engaged in a nationwide marketing campaign using social media and mass events aimed at soliciting investments in their funds.

Second, Section 12(a)(2) does not require "direct and active" solicitation, as Petitioners incorrectly define the phrase. Petitioners distort statutory text to impose a backdoor reliance requirement, cabining liability only to situations where a plaintiff explicitly alleges that a mass communication was targeted to the plaintiff or relied upon by the plaintiff. Pet. 33. This novel rule is unsupported by the statute itself—which expressly extends liability for misrepresentations and omissions made by issuers on radio or television—and the Court's holding in *Pinter v. Dahl*, 486 U.S. 622 (1988).

A. The Circuits Are Uniform, Not Split, on This Issue.

As Petitioners recognize, the only other case addressing whether online mass communications can give rise to statutory seller liability under Section 12 is *Wildes v. BitConnect International PLC*, 25 F.4th 1341 (11th Cir. 2022), *cert. denied sub. nom*, *Arcaro v. Parks*, 143 S. Ct. 427 (Mem.) (2022). *Wildes* addressed whether online promoters, who had posted on websites and YouTube "extolling" BitConnect, could be statutory sellers under Section 12(a). *Id.* at 1344-45. Though the promoters argued that "the Securities Act covers sales pitches to particular people, not communications directed to the public at large,"[5] the Eleventh Circuit disagreed, explaining, "[s]olicitation has long occurred through mass communications, and online videos are merely a new way of doing an old thing." *Id.* at 1343. In reaching that conclusion, the Eleventh Circuit issued a carefully reasoned opinion addressing the statutory text,[6] history, and policy, as

[5] Petitioners' attack on *Wildes* as ignoring whether solicitation must be active and direct (Pet. 26) fails because that argument was directly before, and rejected by, the Eleventh Circuit. *See Wildes*, 25 F.4th at 1345.

[6] Petitioners claim the Eleventh Circuit "did not examine the language of Section 12 itself," Pet. 26, but that is incorrect. *See Wildes*, 25 F.4th at 1345.

the Ninth Circuit did here. *See id.* at 1345-46 ("A seller cannot dodge liability through his choice of communications—especially when the Act covers 'any means' of 'communication.'").

This Court denied certiorari in *Wildes*. *See Arcaro v. Parks*, 143 S. Ct. 427 (Mem.) (2022). The exact same question is presented here. Petition, *id.* (No. 22-267), at *i* ("Whether the Eleventh Circuit's Opinion violates this Court's decision in *Pinter v. Dahl* by creating a new test for statutory seller liability under the Securities Act which extends 'seller' liability under Section 12 of the Securities Act beyond the plain language of the statute and congressional intent."). The reasons for denying review there apply with equal force here.

Petitioners attempt to distinguish the Ninth Circuit's decision from *Wildes* because "*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," claiming the panel here ignored this "requirement." Pet. 27. But nothing in the Eleventh Circuit's analysis referenced, let alone turned on, whether the online videos linked to an investment site. Nor did the Eleventh Circuit revive only the claims of plaintiffs who had signed up for the cryptocurrency through the promoters' referral links.[7] All that mattered was that "the promoters urged people to buy BitConnect coins in online videos." 25 F.4th at 1346. It

[7] As Petitioners note, the plaintiffs in *Wildes* contained both additional plaintiffs who "had signed up for BitConnect directly through the promoters' referral links" and original plaintiffs, who did not. 25 F.4th at 1345. The Eleventh Circuit did not distinguish between these investor groups.

is thus the *promoters*' conduct that is relevant for the seller inquiry, not whether that conduct induced reliance. Petitioners mischaracterize *Wildes* to instill some "direct solicitation" or reliance requirement where none exists.

Petitioners thus fail to show a conflict with the Eleventh Circuit— or any other circuit. In fact, at least one of Petitioners' cited cases actually *aligns* with the Ninth Circuit's decision here. *See Capri v. Murphy*, 856 F.2d 473, 478 (2d Cir. 1988) (holding that defendants who were not in direct communication with the plaintiffs could be liable).

The other cases Petitioners cite simply follow the line *Pinter* drew decades ago between persons who tangentially support a solicitation or sale (by providing professional services, for instance), and those who directly participate in solicitation, as Petitioners did here through their social-media advertising. *See, e.g.*, *Wilson v. Saintine Expl. & Drilling Corp.*, 872 F.2d 1124, 1126 (2d Cir. 1989) (rejecting seller liability for law firm whose "participation in the sale consisted solely of the ministerial act of mailing a copy"); *see also Maher v. Durango Metals, Inc.*, 144 F.3d 1302, 1307 (10th Cir. 1998) (rejecting seller liability against two defendants where plaintiff "alleged no facts" that they solicited purchase).

For instance, Petitioners point to the Third Circuit's decision in *In re Craftmatic Securities Litigation v. Kraftsow*, which explained there must be "direct and active *participation* in the solicitation" for seller liability. 890 F.2d 628, 636 (3d Cir. 1989) (emphasis added). "Direct and active *participation* in solicitation" is not "direct and active *solicitation*." Rather, *Craftmatic* holds that an issuer is not liable "solely on the basis of its involvement in preparing the prospectus," and thus merely reaffirms the distinction *Pinter* created between those "collateral to the offer or sale" and those who actually participated in the solicitation. *Id.* Indeed, as support for its "direct and active participation" requirement, the Third Circuit cited a case recognizing the liability of an issuer who "engage[d] in intensive marketing to convince [the] public to purchase their securities"—just as Petitioners did here. *See id.* (citation omitted).

Petitioners' reliance on *Rosenzweig v. Azurix Corp.*, 332 F.3d 854, 871 (5th Cir. 2003), fails for the same reason. That case involved a "firm commitment underwriting," meaning plaintiffs purchased securities from underwriters, who in turn purchased from the defendant-issuers, and there were no allegations of defendants' "actively solicit[ing]" plaintiffs. *Id.*; *see also Lone Star Ladies Inv. Club v. Schlotzsky's Inc.*, 238 F.3d 363, 370 (5th Cir. 2001) (distinguishing situation where "issuer is sufficiently active in promoting the securities"). This case does not involve a "firm commitment underwriting," and Petitioners do not dispute that their extensive social-media campaign to raise investments funds (complemented by Cardone's roadshow) constitutes active solicitation, only that it is insufficiently "direct"—an issue these cases do not address.

Finally, Petitioners cite to a smattering of district court cases, none of which relate to social media, to bolster support for their "direct solicitation" requirement. Pet. 31-32. These cases, like the others Petitioners cite, involved entirely different facts and different arguments.[8] More recent district court cases, on the other hand, including from Circuits that Petitioners claim have split with the Ninth Circuit, have imposed seller liability on promoters for mass communications. *See, e.g.*, *Yi v. GTV Media Grp. Inc.*, 2021 WL 2535528, at *1, *3 (S.D.N.Y. June 18, 2021) (finding allegations of "posting videos and documents related to investment," including YouTube videos "in which he 'touted GTV as an investment,'" sufficient to support seller liability); *see also* 2 Thomas Lee Hazen, The Law of Securities Regulation § 7.46 (2023) ("Section 12(a)(2) applies to both written and oral

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[8] *See, e.g.*, *Steed Fin. LDC v. Nomura Sec. Int'l, Inc.*, 2001 WL 1111508, at *7 (S.D.N.Y. Sept. 20, 2001) (plaintiff alleged "only that [defendant's] name appears" in a prospectus and related supplement); *Moskowitz v. Mitcham Indus.*, 2000 WL 33993307, at *14 (S.D. Tex. Oct. 2, 2000) (no allegation particular defendants solicited investors *at all*, beyond issuing a prospectus); *Fransen v. Terps Ltd. Liab. Co.*, 153 F.R.D. 655, 658-59 (D. Colo. 1994) (in addressing motions for attorney fees, noting plaintiff made no colorable claim of *any* solicitation by certain defendants); *Montcalm Cty. Bd. of Comm'rs v. McDonald & Co. Sec., Inc.*, 833 F. Supp. 1225, 1234 (W.D. Mich. 1993) (rejecting argument that generic advertisement for brokerage firm's services constituted solicitation for sale of at-issue stock purchase); *In re Newbridge Networks Sec. Litig.*, 767 F. Supp. 275, 280-81 (D.D.C. 1991) ("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."); *In re Gas Reclamation, Inc. Sec. Litig.*, 733 F. Supp. 713, 723 (S.D.N.Y. 1990) (noting uncontradicted evidence that alleged agent "never spoke to any investor about the merits of the GRI deal, but only occasionally instructed investors and salesmen how to fill out some of the documents" at summary judgment (emphasis added)); *Hudson v. Sherwood Sec. Corp.*, 1989 WL 108797, at *1 (N.D. Cal. July 27, 1989) (defendant made some statements at a single presentation during which he vaguely promoted the sale of shares).

commuications. In fact, section 12(a)(2) has been applied to social media posts and to YouTube and similar postings." (footnotes omitted)). This aligns with the longstanding recognition that direct solicitation is not required. *See, e.g.*, *In re Independent Energy Holdings PLC Sec. Litig.*, 154 F. Supp. 2d 741, 761-62 (S.D.N.Y. 2001) (holding that executive could be statutory seller based on press releases and conference calls with analysts, not plaintiffs).

B. Section 12(a)(2) Does Not Require "Direct and Active" Solicitation.

There appears to be no dispute that Petitioners' solicitation in this case was active. (Nor can there be, given Cardone and Cardone Capital's extensive "crowdfunding" on websites like Instagram and YouTube). Instead, Petitioners focus their fire on whether that solicitation was "direct," which Petitioners apparently define as solicitation that was "made to a particular plaintiff," or "directed to or seen by" the plaintiff. *See* Pet. 26-27; *see also id.* at 29. But as the Ninth Circuit held, neither Section 12 nor *Pinter* imposes such a requirement.

As the Ninth Circuit observed, Section 12(a)(2) extends liability to a statutory seller who engages in security fraud "by means of a prospectus or oral communication." 15 U.S.C. § 77*l*(a)(2); *see also* App-10. "Prospectus," in turn, is defined to include "any prospectus, notice, circular, advertisement, letter, or communication, *written or by radio or television*, which offers any security for sale or confirms the sale of any security." 15 U.S.C. § 77b(a)(10) (emphasis added); *see also* App-10. The choice to extend liability to advertisements by radio or television defeats Petitioners' argument that the statute requires "direct solicitation." No advertisement broadcast by radio or television can be characterized as directed or targeted to any particular individual (unlike a telephone call, email, or letter). Thus, if Petitioners' "direct solicitation" rule were adopted, "by radio or television" would be effectively excised from the statutory text.

That is why in *Pinter v. Dahl*, 486 U.S. 622 (1988), this Court held that a person may be liable as a "seller" under Section 12(a)(1) if the person "passed title, or other interest in the security, to the buyer for value," *id.* at 642, or the person "successfully solicits the purchase, motivated at least in part by a desire to serve his own financial interests or those of the securities owner." *Id.* at 647. The Court's articulation of "solicitation" for Section 12(a) liability thus imposed only two requirements: that solicitation be "successful[]" and "motivated at least in part by a desire to serve his own financial interests or those of the securities owner." *Id.* The Court eschewed any requirement of privity between the buyer and seller. *Id.* at 644. Faced with the same atextual arguments Petitioners make now, the Court declined to "read §12(1) so restrictively," holding that "[a] natural reading of the statutory language would include in the statutory seller status at least some persons who urged the buyer to purchase," including "brokers and others who solicit securities purchases." *Id.* at 644, 646; *see also* 9 Louis Loss, Joel Seligman & Troy Paredes, Securities Regulation § 11.C.2(c)(i) (6th ed. 2021) (discussing "Who Is a Seller?" under Section 12(a)).

Petitioners quote no language from *Pinter* in support of their "direct solicitation" requirement. Petitioners' only explanation for this novel requirement is that "the statute only extends liability for the sale of a security that is 'purchas[ed] . . . from him.'" Pet. 24 (quoting *Pinter*, 486 U.S. at 647). But *Pinter* explains that "it is fair to say that the buyer 'purchased' the security from him" if a person who successfully solicits a purchase was motivated "to serve his own financial interests or those of the securities owner." 486 U.S. at 647. Nowhere in *Pinter* did this Court define "purchas[ed] . . . from" to require any kind of targeted or individually directed solicitation, as Petitioners propose. Instead, that language simply requires a successful solicitation made for the solicitor or securities owner's financial gain. That Petitioners' solicitation was successful and for their own financial gain is undisputed. *See* App-8, App-13.

Petitioners attempt to shore up their argument by relying on the dictionary definition of "approach." Pet. 29-30. But "*approach*" is nowhere in the text of Section 12—"*solicitation*" is. And not only did Congress expressly envision that solicitation may occur through untargeted means like radio or television advertisements, but contemporary usage of that term encompassed such means as well. *See Wildes*, 25 F.4th at 1346 (collecting cases).

Statutory purpose supports the Ninth Circuit's rule too. "[T]he clear legislative purpose" of the 1933 Act "was protection of innocent purchasers of securities." *A.C. Frost & Co. v. Coeur D'Alene Mines Corp.,* 312 U.S. 38, 43 (1941). Congress specifically intended to encompass solicitations because that "is perhaps the most critical stage of the selling transaction." *Pinter*, 486 U.S. at 646-47 (citations omitted). Promoters like Petitioners "are well positioned to control the flow of information to a potential purchase, and, in fact, such persons are the participants in the selling transaction who most often disseminate material information to investors." *Id.* As a result, "solicitation is the stage at which an investor is most likely to be injured," and the Act reflects "Congress' overriding goal of preventing this injury." *Id.*

Though the threat of injury to innocent investors is as prevalent today (if not more so) since the Act's passage almost a century ago, the means of causing such injury have evolved. Social media and other communication methods now allow a single promoter like Cardone to reach an audience of millions with the click of a button. As the Ninth Circuit recognized, "the advertisements at issue in this case—Instagram posts and YouTube videos—are the types of potentially injurious solicitations that are intended to command attention and persuade potential purchasers to invest in the Funds during the 'most critical' first stage of a selling transaction, when the buyer becomes involved." App-13 (quoting *Pinter*, 486 U.S. at 646-47). Petitioners claim that mass communications would not be categorically excluded from Section 12's reach under their rule, Pet. 33, but the "not unlike traditional contractual privity" standard they propose would do just that. Requiring some kind of targeted or "direct solicitation" would shield promoters from liability for egregious misrepresentations and omissions made in mass communications, subverting the statute's purpose.

Consistent with Section 12 and *Pinter*, the SEC has recognized that the internet may be used as a vehicle for solicitation. For instance, as early as 1995, the SEC took the position that "the use of electronic media should be at least an equal alternative to the use of paper-based media." *See* Use of Electronic Media for Delivery Purposes, Securities Act Release No. 33-7233, 60 Fed. Reg. 53458, 53459 (Oct. 13, 1995); *see also* Use of Electronic Media, Securities Act Release No. 33-7856, 65 Fed. Reg. 25843 (May 4, 2000) (guidance on the use of electronic media by issuers); Commission Guidance on the Use of Company Web Sites, Securities Act Release No. 34-58288, 73 Fed. Reg. 45862 (Aug. 7, 2008); Securities Offering Reform for Closed-End Investment Companies, 85 Fed. Reg. 33290 (June 1, 2020) (permitting online access to equal delivery for final prospectuses); 3 Louis Loss, Joel Seligman & Troy Paredes, Securities Regulation § 3.C.7(d) (6th ed. 2019) (discussing SEC's rules following Congress's authorization of electronic crowdfunding).

In addition, the SEC defines the term "written communication" for purposes of its rules relating to the Securities Act of 1933 to include "a graphic communication" (in addition to radio or television broadcast), which it defines as including "all forms of electronic media, including, but not limited to . . . Internet Web sites, substantially similar messages widely distributed (rather than individually distributed) on telephone answering or voice mail systems, computers, computer networks, and other forms of computer data compilation." 17 C.F.R.

§ 230.405.[9] The SEC's inclusion of websites and widely distributed messages as communications that can constitute solicitation further undermines Petitioners' claim that personalized or direct contact is required. *C.f. also Sec. & Exch. Comm'n v. Telegram Grp. Inc.*, 448 F. Supp. 3d 352, 380 (S.D.N.Y. 2020) (finding that SEC had shown ongoing offering of securities through scheme in which securities would be resold by initial purchasers for Section 5 violation).[10]

Petitioners' only other support for a "direct solicitation" requirement is rooted in an incorrect understanding that something akin to contractual

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[9] The SEC's recognition of online modes of solicitation is also evidenced by its authorization of electronic roadshows, *see* 17 C.F.R. § 230.433; *see also* 1 Louis Loss, Joel Seligman & Troy Paredes, Securities Regulation § 2.B.5(f) (6th ed. 2018) ("Free Writing Prospectus and Electronic Road Shows"), and other actions, such as its taking a no-action position on "an Internet trading system," *see* Spring St. Brewing Co., SEC Staff No-Action Letter, [1993-2001 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 72,201 (Apr. 17, 1996).

[10] Other courts across the country have reached similar conclusions in SEC enforcement actions. *See Sec. & Exch. Comm'n v. Kik Interactive, Inc.*, 492 F. Supp. 3d 169, 181-182 (S.D.N.Y. 2020); *Sec. & Exch. Comm'n v. NAC Found. LLC*, 512 F. Supp. 3d 988, 997 (N.D. Cal. 2021); *Sec. & Exch. Comm'n v. LBRY, Inc.*, 2022 WL 16744741, at *7 (D.N.H. Nov. 7, 2022); *Audet v. Fraser*, 605 F. Supp. 3d 372, 395-99 (D. Conn. 2022). Other cases in which the SEC has alleged violations despite lack of personalized or direct contact with the person solicited remain pending. *See, e.g.,* Complaint, *Sec. & Exch. Comm'n v. Binance Holdings Ltd.*, I:23-cv-011599 (D.D.C. 2023), ECF No. 1 (alleging defendants solicited investors using their website, blog posts, and social-media accounts); Complaint, *Sec. & Exch. Comm'n v. Coinbase*, 23 Civ. 4738 (S.D.N.Y. 2023), ECF No. 1 ¶¶ 75-77, 322, 368 (alleging defendants solicited investors using social-media websites, their websites, and Google advertisements).

privity is required under Section 12(a)(2). For instance, Petitioners cite to *McGill v. General Motors Corp.*, 231 A.D.2d 449, 450 (N.Y. App. Div. 1996), a non-securities case, to support their argument that "a broadly distributed communication bears no resemblance to 'traditional contractual privity.'" Pet. 28. But *McGill* involved a claim for negligent misrepresentation, which under New York law, requires "either actual privity of contract between the parties or a relationship so close as to approach it." *Metral v. Horn*, 213 A.D.2d 524, 526 (N.Y. App. Div. 1995) (citation omitted); *c.f. Pinter*, 486 at 644 (privity not required for Section 12(a)(2) claims). In addition, Petitioners recite inapposite hallmarks of an "offer" that may be accepted pursuant to the law of contracts, but have no application here. Pet. 29; *see also id.* at 27. When a statute defines a term, courts ordinarily follow the statutory definition. *Burgess v. United States*, 553 U.S. 124, 129-30 (2008). The statute defines "offer" as also including a "solicitation of an offer," 15 U.S.C. § 77b(a)(3), and does not require that "solicitation" to be directed to a particular investor.

C. The Ninth Circuit Correctly Held that Defendants Can Be Liable for Promotional Social-Media Posts.

The Ninth Circuit's application of its holding that "a person can solicit a purchase, within the Securities Act, by promoting the sale of a security in a mass communication," App-14, and ultimate conclusion that Petitioners are statutory sellers is well supported by precedent and the allegations.

Petitioners paint the Ninth Circuit's reference to Cardone and Cardone Capital as "significant participants" in the solicitation as "an alternative theory of liability" that is "akin to the substantial-factor test *Pinter* rejected," Pet. 27, but the Ninth Circuit did not adopt the "substantial-factor" test.

Before *Pinter*, the circuits were split over what constituted "solicitation" under Section 12, with some courts applying a substantial-factor test and some courts requiring, as Petitioners advocate, privity or something close to privity. *Id.* at 644, 648-50. In *Pinter*, the Supreme Court resolved that split by rejecting both approaches and taking a middle ground, holding that a buyer "purchased" a security from one who "successfully solicits the [securities] purchase, motivated at least in part by a desire to serve his own financial interests or those of the securities owner." *Id.* at 647. The substantial-factor test was rejected in *Pinter* because it might "expose securities professionals, such as accountants and lawyers, whose involvement is only the performance of their professional services" to liability even though a buyer does not purchase securities from such professionals. *Pinter*, 486 U.S. at 651.

But given Petitioners' overt and active sales efforts, the allegations here make this an easy case. The multitude of social-media posts and videos Cardone and Cardone Capital published extolling the benefits of investing in their equity funds and making unsupported promises leave no doubt that Petitioners are quintessential advertisers. *See* App-21-22 nn.1-2 (noting Petitioners' statements in posts and videos like "What does it take to receive $50,000 in yearly dividend income? . . . Invest $1,000,000 with Cardone

Capital"; "Unlike Santa, I pay similar distributions every single month"; "Want to double your money[?]"; and more). Grant Cardone and Cardone Capital's social-media posts are simply the latest in a long line of promoters using new technology—from radio and then to television—to solicit investments for securities. Indeed, Grant Cardone personally controlled Cardone Capital, the Funds' manager. App-8. Not only did he stand to gain from investments, but Petitioners posited Cardone as the primary spokesperson for the Funds. *See* 2-ER-106 ("our investor base will be drawn largely from Mr. Cardone's exposure on social media and on media content delivered over the Copmany's website"); 2-ER-223 (same).

Petitioners were thus considered "significant participants in the selling transaction because they disseminated material information to would-be investors" based on a specific social-media crowdsourcing strategy that Cardone himself "touted" as a cost-saving measure. App-13. The Ninth Circuit did nothing more than recognize that Petitioners functioned as sellers by engaging in social-media solicitations to procure investors for personal financial gain to themselves and the Funds. And based on these facts, there is no concern that the ordinary performance of professional duties would be cause for liability under Section 12.

Petitioners also criticize the Ninth Circuit for not requiring a "nexus" between the posts and Pino. Pet. 27. Recognizing that reliance is not required for Pino's claim under Section 12(a)(2), Petitioners claim that this nexus means some allegation that Pino "saw [Petitioners' social-media] statements." Pet. 27-28 n.3.

But ultimately Petitioners attempt to smuggle into Section 12(a) a backdoor reliance requirement through this "seen-by" test. As previously explained, the statute imposes no reliance or nexus requirement of this kind.

Regardless, Pino plainly alleged that Petitioners' social-media posts were at the heart of the Funds' solicitation strategy. The Funds made this clear through SEC filings, *see* 2-ER-106, 223, and Cardone himself, *see* 2-ER-70-71 (FAC ¶ 40). As part of this strategy, Petitioners solicited ordinary, unaccredited prospective investors like Pino on websites like Instagram and YouTube.[11] 2-ER-58-59, 69-71 (FAC ¶¶ 4, 8, 38-40). And Pino even attended one of Cardone's multiple conferences "to market the Cardone Capital equity funds" just days before investing in Fund V. 2-ER-68-69 (FAC ¶¶ 36, 37). Having deliberately employed social media to target everyday investors like Pino, Petitioners cannot now avoid liability by reading into the statute requirements that do not exist.

III. Denial of a Motion to Dismiss a Complaint That Has Since Been Superseded Is a Poor

[11] Petitioners claim the social-media posts "generally contained a disclaimer" that "until such time that the Offering Statement is qualified by the SEC, no money or consideration is being solicited," supposedly to combat Respondents' allegations that the posts were solicitations. Pet. 28. This boilerplate disclaimer does not obviate solicitation, especially as the SEC qualified the Fund V Offering Statement before any of the posts were made. 2-ER-214.

Vehicle to Address Either Question Presented.

This case is a poor vehicle and would not resolve any exceptionally important issues. The procedural posture of this case poses a serious obstacle to the Court's review of either question presented. This Court typically does not review nonfinal dispositions of cases, particularly where, as here, an order granting a motion to dismiss was reversed and the case remanded for further factual development. Moreover, the panel's holding that Pino plausibly alleged Petitioners' representations about debt obligations were false, App-83, would leave a live claim against Petitioners regardless of the outcome of the first question presented. The interlocutory nature of the decisions here "itself alone furnishe[s] sufficient ground for the denial" of the Petition. *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916).

Nor does any special circumstance warrant premature intervention here. The Petition challenges a panel decision reversing dismissal of Pino's first amended complaint, which has since been superseded by a second amended complaint. It makes little sense for the Court to wade into this dispute when the underlying motion was made to a now-superseded complaint and the relevant facts have not yet been adjudicated. Review on all issues may also be mooted if Petitioners ultimately prevail and, in any event, the lower courts have not yet addressed these questions with the benefit of a full factual record. *See* Stephen M. Shapiro & Kenneth S. Geller et al., *Supreme Court Practice* § 4.18, at 4-55 (11th ed. 2019).

Petitioners give short shrift to the procedural posture of this case and instead exaggerate the effects of the Ninth Circuit's factbound decisions. Pet. 33-38. For instance, Petitioners devote much attention to the need to "preserve[] the resources of defendants, limiting downstream effects on the American economy,"[12] noting that the "bespeaks caution doctrine and statutory seller limitation represent critical safeguards against abusive securities class actions." Pet. 33-35. But those concerns are overstated and unlikely to be exacerbated by the panel's decisions here, one of which is unpublished and nonprecedential, and both of which applied conflict-free legal standards to the specific facts of this case.

As explained above, the panel's ultimate conclusion that Pino had plausibly pled a Section 12(a) claim against Petitioners was based on the particular allegations of Petitioners' "social media engagement." App-13. Nor did the panel impose any litmus test for liability under Section 12. With respect to the bespeaks-caution doctrine, the panel observed only that reasonable minds could disagree about whether the generic offering circulars bespoke caution to the

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[12] Concerns of abusive class litigation stemmed primarily from certain Rule 10b-5 cases, *see Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 80-81 (2006), and in any event are "more appropriately addressed to Congress, which has in fact responded," *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 277 (2014). In addition, given the small number of Section 12 cases, Janeen McIntosh et al., Recent Trends in Securities Class Action Litigation: 2022 Full-Year Review, NERA Econ. Consulting 3 (Jan. 24, 2023), *available at* https://bit.ly/45gSeHD, it is unlikely the panel's decision will have a discernable, much less sweeping, economic effect.

later, specific social-media posts. App-84. And because the panel's fact-specific analysis on bespeaks caution is nonprecedential, the decision has no binding effect beyond the parties. Ninth Circuit Rule 36-3(a). Neither decision prevents courts from exercising oversight at the pleading stage to dismiss frivolous suits.

Ultimately, Petitioners' argument boils down to a disagreement with how the court below assessed the applicability of the law to the particular factual allegations before it. This Court "rarely grant[s] review where the thrust of the claim is that a lower court simply erred in applying a settled rule of law to the facts of a particular case." *Salazar-Limon v. City of Houston*, 137 S. Ct. 1277, 1278 (2017) (Alito, J., concurring in the denial of certiorari). There is no reason to make this case the exception to the rule.

CONCLUSION

The petition for a writ of certiorari respectfully should be denied.

Respectfully Submitted,

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August 22, 2023