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

REPLY BRIEF FOR PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

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This petition raises two important securities law questions that have broad ramifications for other cases, that the Ninth Circuit answered incorrectly, and that have divided lower courts.

First, the circuits are split over the bespeaks caution doctrine. Pino tries to explain away that split by defining the legal principles so broadly as to be meaningless, ascribing different results to different facts, and contending that the petition simply asks for fact-bound error correction.[1] But the Ninth Circuit's decision cuts back on the bespeaks caution doctrine even when, as here, investors were expressly warned about the risks they faced. Courts have divided over equally detailed warnings, with some concluding that they are sufficient, and the Ninth Circuit concluding that they are not. That divide over the underlying legal principles warrants review.

Second, courts have also split over when an individual or entity constitutes a statutory seller 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. Pino tries to sidestep this split too, this time by defining the legal issues so narrowly as to allow him to ignore inconvenient cases. But courts, in contrast with the Ninth Circuit's decision below, have found that a plaintiff satisfies the statutory seller element only if the defendant actively

[1] After Respondent Luis Pino passed away, his daughter, Christine Pino, filed a motion for substitution with this Court. That motion remains pending.

and directly solicited a plaintiff's investment. In expanding statutory liability to include "significant participants in the selling transaction," the Ninth Circuit's decision flies in the face of this Court's concern in *Pinter v. Dahl* that the statute not be broadly expanded beyond buyer-seller relationships. 486 U.S. 622, 642 (1988). Finally, Pino argues that reaching a different result would mean that securities laws have not adapted to evolving circumstances, but it is Congress's and not the courts' job to rewrite statutes in response to change.

Trying to evade review, Pino contends that this case is a poor vehicle because of its procedural posture. But how these legal issues are evaluated at the motion to dismiss stage—a critical stage in securities law cases—is essential, and the Ninth Circuit made it clear that neither it nor the district court would revisit these issues, which are dispositive both as to the entire case on the bespeaks caution point and as to certain defendants on the statutory seller point. Because these important questions should be answered now, not later, this Court should grant review.

ARGUMENT

I. This Court Should Grant Review To Resolve A Conflict Over The Bespeaks Caution Doctrine

Courts have split over the bespeaks caution doctrine, which protects projections and other forward-looking statements from liability when cautionary warnings and risk disclosures render those projections immaterial as a matter of law. *In re*

Worlds of Wonder Sec. Litig., 35 F.3d 1407, 1413 (9th Cir. 1994) (emphasis added) (quoting Donald C. Langevoort, *Disclosures That "Bespeak Caution,"* 49 Bus. Law 481, 482-83 (1994)). The Ninth Circuit's decision departs from these settled principles and conflicts with the decisions of other courts over both when those warnings must be issued and what they must say. Pet. 18-23.

Pino's response to this depends upon defining the legal rule so broadly as to be meaningless and then ascribing different outcomes to different facts. Notably, Pino's brief in opposition never actually grapples with the substance of the cautionary language here, even though it contends repeatedly that that language was "generic." In fact, it was anything but. Pino was expressly warned that:

- 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;
- the Funds "may never become profitable or generate any significant amount of revenues" and "potential investors have a possibility of losing their investments";
- 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;
- the Funds would finance properties and investors would be responsible for debt service payments;

- "[t]he timing and amount of distributions are the sole discretion of our Manager" and "[w]e cannot assure you that we will generate sufficient cash in order to pay distributions";
- "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.

Other courts have found these same cautionary statements that the Ninth Circuit thought too broad to be sufficiently specific. Those conflicting decisions cannot just be chalked up to factual differences when a case would come out one way in one circuit, but the opposite way in another.

Take *Grossman v. Novell, Inc.*, 120 F.3d 1112, 1116-17 (10th Cir. 1997), which held that the bespeaks caution doctrine insulated a defendant from liability even though the defendant provided cautionary language in registration statements issued well before the allegedly false statements. In reaching that result, *Grossman* relied in part on the fact that, as here, the warnings were in a formal registration statement and the challenged statements in informal press releases. *Grossman* cannot be reconciled 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.

Pino tries to distinguish *Grossman* by arguing that it is a fraud on the market case, but that does not alter the application of the bespeaks caution doctrine here. Pino contends that it does because—as Cardone has never disputed—Section 12 does not require reliance. This is the reddest of herrings. 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) (emphasis added) (footnotes omitted). It is rooted in principles of materiality—in other words, what would matter to a reasonable investor, and a reasonable investor who subscribed to one of the funds would have looked at the offering documents and other materials before deciding to subscribe. Indeed, Pino acknowledges as much in his opposition. BIO 9.[2]

The same misplaced reliance issue surfaces again when addressing the Subscription Agreement. Pino misses the point: it is not whether Pino relied on it, but whether a reasonable investor deciding whether to subscribe in the Funds would read the cautionary language before subscribing. The Ninth Circuit (and Pino) all but ignore that, which (a) mangles the bespeaks caution doctrine; (b) ignores the well-established rule that the "total mix" of information be considered; and (c) ignores *Omnicare, Inc. v. Laborers District Council Construction Industry Pension Fund*'s emphasis on the significance of more formal offering-related documents. 575 U.S. 175, 191 (2015).

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[2] Pino also suggests that the cautionary language and the challenged misstatement in *Grossman* were separated by days, not months. Not so. The cautionary language in the registration statement about business integration occurred roughly three months before the challenged misstatement. 120 F.3d at 1116.

Separately, Pino tries to distinguish the Second Circuit's decision in *Luce v. Edelstein*, 802 F.2d 49, 56 (2d Cir. 1986), by contending that the warnings there were in the same document as the challenged misstatements. But the Ninth Circuit found the warnings here inadequate for two reasons: timing and substance. The Ninth Circuit's decision conflicts with *Grossman* and others on timing, and with *Luce*, which found cautionary language materially indistinguishable from the language the panel considered below to bespeak caution, on substance. Thus, *Luce* 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*, 802 F.2d at 56 (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 ones here.

Pino does not even acknowledge some of the other cases cited in the Petition, including *P. Stolz Family Parnership L.P. v. Daum*, 355 F.3d 92, 98 (2d Cir. 2004), in which the Second Circuit found that cautionary language in a subscription agreement bespoke caution as to separate "oral representations" made by the company. 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 (quoting *Goldman v. Belden*, 754 F.2d 1059, 1068 (2d Cir. 1985))).

The fact that the Third Circuit, for its part, at one time appeared to have sided with the Ninth, just compounds the conflict, rather than curing it. *EP Medsystems, Inc. v. EchoCath, Inc.*, 235 F.3d 865, 875, 878-79 (3d Cir. 2000); *but see In re Merck & Co. Sec. Litig.*, 432 F.3d 261, 273 n.11 (3d Cir. 2005) (case under PSLRA rejecting same document requirement).

Finally, Pino contends that the Ninth Circuit's decision is "entirely consistent with the policy rationale underlying the doctrine …." BIO 10. Not so. In so arguing, Pino flips the parties' positions—Pino, not Cardone, has been the one advocating for a categorical rule. Pino has argued that the detailed cautionary statements here should be disregarded because they were not at the same time and in the same document as the challenged misstatements. Cardone, by contrast, argued that no such categorical rule should apply and that the Ninth Circuit's vague "attenuation" rule provides little guidance to lower courts, expands liability, and leaves open the question whether, if this specific language, provided before any prospective buyer can ever invest, is not sufficient, either in substance or in timing, *any* cautionary language would be.

II. This Court Should Grant Review To Resolve A Conflict Over The Statutory Seller Issue

Courts have also split over when a defendant may be liable under Section 12(a)(2), which provides that "[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, this Court has explained, "focuses on the defendant's relationship with the plaintiff-purchaser," and "[a]t the very least, … contemplates a buyer-seller relationship not unlike traditional contractual privity." *Pinter,* 486 U.S. at 642, 650, 651 (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). But the Ninth Circuit's novel test, which aligns it with the Eleventh Circuit, but against other Circuits, relied on social-media engagement alone—which Pino never alleges he saw—to extend statutory liability under this Section beyond those who affirmatively "offer" or "sell" to "significant participants in the selling transaction." App. 13. That is not consistent with the statutory language, or with this Court's prior case law.

In response, Pino does a 180. While he zooms out on the bespeaks caution doctrine, here, he zooms in, arguing that there is no split by defining the issue unduly narrowly and focusing on the facts to the exclusion of the legal principles.

First, even defined narrowly, Section 12 liability for social media posts is an important—and recurring—issue that merits this Court's attention. Contrary to Pino's assertions, the fact that this is the second petition to raise this issue in short order only underscores that this is an important issue that merits review. Indeed, courts continue to grapple with this and similar issues. Thus, for example, in *Underwood v. Coinbase Global, Inc.*, No. 21 Civ. 8353 (PAE), 2023 WL 1431965, at * 9 (S.D.N.Y. Feb. 1, 2023), *appeal docketed* (2d Cir. Feb. 9, 2023), the court found that users of online cryptocurrency trading platforms failed to allege that the company operating the platforms was a statutory seller despite the fact that it "promote[d] the sale of Tokens by providing users with descriptions of each Token and its purported value proposition, participated in direct promotions, including airdrops of free Tokens designed to increase trading volume, wr[ote] news updates on price movements of the Tokens[,] and link[ed] to stories about the Tokens published across the internet" (quotation marks omitted) (citations omitted). Neither the rule applied there nor the result can be squared with this case.

Second, properly viewed, there is a split between the Circuits that enforce this Court's requirement of something akin to privity and those, including the Ninth, that do not. *Wildes v. BitConnect International PLC*, 25 F.4th 1341 (11th Cir. 2022), 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 so doing, it rejected a distinction between broadly disseminated communications and individually targeted ones. The Ninth Circuit went even further by extending liability to any "significant participant"—a vague definition akin to the substantial-factor test this Court rejected in *Pinter*, and justifying that extension based on the Court's concern that it would lead individuals to invest without full and fair information. That cannot be squared with the language of the statute, with this Court's decision in *Pinter*, or with the decisions by other Circuits applying *Pinter*. *In re Craftmatic Sec. Litig. v. Kraftsow*, 890 F.2d 628, 636 (3d Cir. 1989), *as amended* (Jan. 30, 1990) ("[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."); *Rosenzweig v. Azurix Corp.*, 332 F.3d 854, 871 (5th Cir. 2003) (same); *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)*; 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). Pino tries to distinguish cases like *Capri v. Murphy*, 856 F.2d 473 (2d Cir. 1988), by citing to a portion of the court's decision finding the defendants' general partners liable as sellers even though they communicated with the plaintiffs through a third party. But, critically, *Capri* emphasized that the general partners prepared and circulated the prospectus, and the third party "provided no information to the investors other than what was supplied by defendants." *Id.* at 478. Here, Pino does not allege he invested through the social media posts. Instead, he reviewed (and acknowledged reviewing) the Offering Circular and acquired the investment by executing the Subscription Agreement directly with the Funds.

Third, because Pino never alleges that he actually saw any of the social media posts, the Ninth Circuit's approach stretches the statutory language (which limits liability "to the person purchasing such security from him") even further and ignores the Supreme Court's statement in *Pinter* that there must be some relationship like contractual privity between the solicitation and the buyer. Pino's argument that such an expansion on the statutory language is warranted by the risks of social media marketing is one that should be directed to Congress, not the courts.

III. This Case Presents An Excellent Vehicle For Review

Pino contends that this case is not a good vehicle for review, pointing to the fact that there is now an amended complaint, that this case arises out of a motion to dismiss, and that one part of the decision is unpublished. But that ignores the fact that the Ninth Circuit made it clear that the district court could not revisit the issues presented by its opinion. The remand, and the amended complaint, were directed to satisfying the standards this Court set forth in *Omnicare*, 575 U.S. 175. Given the Ninth Circuit's directive that the parties could not relitigate the issues decided, the Ninth Circuit will have the last word on these issues of broad importance absent this Court's intervention. That one part of that decision is unpublished is no bar to review, otherwise a vast number of decisions by appellate courts would escape review. Moreover, a decision reversing the Ninth Circuit on either or both the issues presented by this petition would be dispositive either as to the case as a whole on the bespeaks caution doctrine, or as to certain parties on the statutory seller issue. Finally, these issues are not factual, but legal, and implicate the standard of review on a motion to dismiss. That makes review at this stage more appropriate, not less.

CONCLUSION

This Court should grant review.

Respectfully submitted,

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