No. 23-1134

In the Supreme Court of the United States

MARK HABELT, INDIVIDUALLY AND ON BEHALF OF OTHERS SIMILARLY SITUATED,
PETITIONER
v.
IRHYTHM TECHNOLOGIES, INC., ET AL.,
RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes & Rules

Other Authorities

REPLY BRIEF

Respondents claim that "a raft of Article III, forfeiture, and other vehicle problems" preclude review. BIO at 2. They do not.

Consider the "major vehicle issue[]" Respondents raise: that "Habelt never mentioned Rule 10(a) before the merits panel below," thereby forfeiting his Rule 10 claim. *Id.* at 2–3. Not so. As Respondents acknowledge, standing only became an issue in this case when Respondents moved to dismiss Habelt's appeal, after Habelt had filed his opening brief with the Ninth Circuit. *Id.* at 10. In opposing that motion, Habelt's position on Rule 10 was abundantly clear: "Plaintiff is a named party in the SAC's caption. Pursuant to Rule 10(a) of the Federal Rules of Civil Procedure, the proper place to name parties is in the title of the complaint." Dkt. 22 at 4. And, furthermore, "Defendants [had] cherry pick[ed] language to invent a proposition contrary to Rule 10(a) that a complaint's caption is irrelevant in determining who the parties are, but each authority they cite supports the opposite conclusion." *Id.* at 7 (citing cases). The Ninth Circuit subsequently denied Respondents' motion, but allowed them the opportunity to "renew[]" any standing-related "arguments in the[ir] answering brief." Dkt. 24. They did—but their answering brief did not mention Rule 10. There was no reason, given that choice, for Habelt to reiterate in his reply brief (1) arguments he had already made, (2) which Respondents did not address, (3) on an issue in which the Ninth Circuit had already denied relief.

If all that were not enough, in the decision below, both the majority and dissent examined cases centering Rule 10(a) as the authority on party status. App. 9a n.2; App.

12a–13a (Bennett, J., dissenting). These were the same cases Habelt cited in response to the motion to dismiss and which he now cites as the basis of a circuit split. Such circumstances more than check the box of an issue "pressed or passed upon below." *United States v. Williams*, 504 U.S. 36, 41 (1992).

Respondents' other standing argument, on Article III redressability, is equally unavailing. The crux of their claim is that the original complaint "was superseded and became non-existent upon the filing" of the SAC, BIO at 16 (cleaned up); that "the body" of the SAC "contains no reference to Habelt," *id.* at 15; and that, as an "unidentified member[] of the class," Habelt thus lacks standing under *Warth v. Seldin*, 422 U.S. 490, 502 (1975), and *Spokeo, Inc. v. Robins*, 578 U.S. 330 (2016), *id.* at 3, 15.

But courts are not limited to the body of the operative complaint when, as here, standing is raised for the first time on appeal. *See Sierra Club v. E.P.A.*, 292 F.3d 895, 899 (D.C. Cir. 2002). Instead, Habelt need only "identify *in [the] record* evidence sufficient to support [his] standing." *Id.* (emphasis added); *Rydholm v. Equifax Info. Servs. LLC*, 44 F.4th 1105, 1108 (8th Cir. 2022). The original complaint is part of that record. And that pleading both identifies Habelt and discusses the losses he suffered from his damaged shares. These damaged shares plainly establish Article III standing, *Fleming v. Charles Schwab Corp.*, 878 F.3d 1146, 1151 (9th Cir. 2017), since they are injuries that can be "redressed by a favorable ruling," *Food Mktg. Inst. v. Argus Leader Media*, 588 U.S. 427, 433 (2019) (cleaned up).

What is more, Habelt is far from some unidentified member of the class. He was the named plaintiff in "every

caption" in every pleading in this case. App. 16a n.7 (Bennett, J., dissenting). That includes not only the original complaint and declaration he filed, but also every document filed by Respondents and every order and opinion issued by the district judge. The substantive allegations in his original complaint were, moreover, transplanted into each subsequent complaint; "the SAC encompasses all the factual allegations and legal claims raised in the original complaint, *brought by Habelt*." App. 14a (Bennett, J., dissenting) (emphasis in original). This is not, as in *Warth*, some freewheeling attempt at a second bite at the apple. It is an effort by the named plaintiff who suffered harm to "raise," safeguard, and prosecute his "legal rights," *Devlin v. Scardelletti*, 536 U.S. 1, 7 (2002)—rights that, according to the only circuit judge to weigh in, Respondents plausibly transgressed, App. 30a (Bennett, J., dissenting).

Bereft of these procedural roadblocks, this case presents two issues that have divided the circuits. On those issues, what is remarkable about the opposition is what it does not say. Respondents, for instance, do not dispute that the decision below flouts the text of Rule 10(a). Pet. at 23–25. Nor do they contest that the Ninth Circuit's approach conflicts with several other Federal Rules of Civil Procedure. *Id.* at 25–28. And they do not try to reconcile the decision below, which dismissed the named plaintiff who brought the case, from the Fifth and Eighth Circuits' understanding that "plaintiffs draft complaints," so there is little reason to think that they will misname themselves. *Abraugh v. Altimus*, 26 F.4th 298, 303 (5th Cir. 2022); *Williams v. Bradshaw*, 459 F.3d 846, 849 (8th Cir. 2006).

The opposition fares no better on non-party appellate standing. Respondents claim any difference between the circuits is "illusory." BIO at 23. But there is nothing illusory about a split acknowledged by courts, *Kimberly Regenesis, LLC v. Lee Cnty.*, 64 F.4th 1253, 1261 (11th Cir. 2023) ("Our sister circuits have adopted various tests."); commentators, Charles Alan Wright & Arthur R. Miller, 15A *Federal Practice and Procedure* § 3902.1 (3d ed.); and the United States, *see* U.S. Br. at 12, *Osage Wind, LLC v. Osage Mins. Council* (17-1237).

Respondents conclude with a litany of vehicle arguments. None hold water. In the end, each of the identified circuit splits standing alone warrants review. This case presents the Court an excellent opportunity to address both. The petition should be granted.

I. THE DECISION BELOW DEEPENS A SPLIT ON RULE 10(A).

Respondents claim there is no split over Rule 10(a) because "all circuits, including the Ninth, accord the caption non-dispositive weight in determining party status." BIO at 22. Any differences, Respondents argue, are merely instances of "judges . . . disagree[ing] over the *application* of such a standard"—which, Respondents claim, "does not warrant certiorari." *Id.* Such arguments fall flat for several reasons.

To start, the Court has long recognized that questions over the "proper application of the Federal Rules" do merit its attention. *Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 203 (1958); *accord Hickman v. Taylor*, 329 U.S. 495, 497 (1947). That is why it has time

and again "demanded clarity and strict adherence to [the] promulgated rules," reversing lower court decisions holding to the contrary. *Minority Emps. of the Tenn. Dep't of Emp. Sec., Inc. v. Tennessee*, 901 F.2d 1327, 1328–29 (6th Cir. 1990) (en banc) (citing *Schiavone v. Fortune*, 477 U.S. 21, 29–31 (1986) (FRCP 15(c)); *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 314, 318 (1988) (FRCP 3)).

Moreover, what is at stake here is not different applications of the same rule, but the embrace of different rules altogether. The decision below makes this point clear. The Ninth Circuit went far beyond acknowledging that the caption is not dispositive, emphasizing instead that "the *more important* indication . . . [is] the 'allegations in the body of the complaint.'" App. 9a (emphasis added) (quoting *Hoffman v. Halden*, 268 F.2d 280, 304 (9th Cir. 1959)). The caption, according to the panel, is "only the handle to identify" an action, thereby all but rendering Rule 10(a) superfluous. *Id.* (quoting *Hoffman*, 268 F.2d at 304). That is significantly different from the Fifth, Eighth, and Tenth Circuits, who treat the caption as highly probative (if not determinative)—just as Rule 10 instructs. *See Williams*, 459 F.3d at 849 ("While a caption is not determinative . . . it is entitled to considerable weight."); *Abraugh*, 26 F.4th at 303 (declining to look past the caption); *Trackwell v. U.S. Gov't*, 472 F.3d 1242, 1243 (10th Cir. 2007) (citing Rule 10(a) and emphasizing understanding that the caption contains the parties). The Second Circuit likewise treats Rule 10 as an important, fundamental constraint, rather than a "mere technical requirement[]" that may be breached without consequence. *Hernandez-Avila v. Averill*, 725 F.2d 25, 28 (2d Cir. 1984).

These differences matter. As the petition notes, consistent with Rule 10, most circuits do not look beyond the caption, Pet. at 12–14 (identifying Second, Fifth, and Eighth Circuit cases), or do so only in "pro se case[s] when the plaintiff names the wrong defendant . . . or when the identity of the defendants is unclear from the caption," *e.g.*, *Trackwell*, 472 F.3d at 1243–44; *Bayer v. U.S. Dep't of Treasury*, 956 F.2d 330, 334 (D.C. Cir. 1992). Here, in contrast, there was nothing "unclear from the caption." Habelt was the named plaintiff at the start of the case and remained so in every pleading after that. The court of appeals extinguished his party status anyway, relegating Rule 10(a) to the dustbin.

Tellingly, Respondents do not even try to justify the Ninth Circuit's approach or articulate any limiting principle to its erasure of Rule 10(a). Nor have they identified a single case from another circuit that bucks Habelt's characterization of how the other courts of appeals apply Rule 10. Instead, Respondents point to *United States ex rel. Eisenstein v. City of New York*, 556 U.S. 928 (2009), and treat its omission from one sentence of the opening petition as some stunning admission by Habelt. BIO at 5, 19–20, 29. It was no such thing. The petition, after all, cites *Eisenstein* twice: First for the understanding that a party is "[o]ne by or against whom a lawsuit is brought," 556 U.S. at 933 (cited and discussed at Pet. at 9); and second that "intervention is the requisite method for a nonparty to become a party to a lawsuit," Pet. at 26 (quoting 556 U.S. at 933).

True, *Eisenstein* also says that "[a] person or entity can be named in the caption of a complaint without necessarily becoming a party to the action." 556 U.S. at 935. But both the panel and Respondents take these

words out of context. In *Eisenstein*, the relevant entity—the United States—did not bring the action but nonetheless appeared in the caption, as is statutorily required for False Claims Act cases. 556 U.S. at 930, 935. Here, in contrast, Habelt unquestionably "brought" the "lawsuit" against Respondents, making him a party under *Eisenstein*'s rubric. And as a party, there was no need for him to intervene. Habelt, moreover, sought relief not under the FCA, but federal securities law, which does not require that any specific party be listed in the caption. Even so, *everyone* in this case listed Habelt as a plaintiff in the caption of *every* pleading: Habelt, PERSM, Respondents, and the district court. The Ninth Circuit's decision to sidestep that fact and excise Habelt from this case conflicts with Rule 10(a)'s text and the approach of other circuits.

II. THE DECISION BELOW DEEPENS A SPLIT ON NON-PARTY APPELLATE STANDING.

Respondents advance three arguments against review of the split over non-party appellate standing: (1) that the Ninth Circuit does actually "consider[] the non-party's substantive interest"; (2) that, even if it does not, Habelt's interest would not count under the test applied by other circuits; and (3) that, even if Habelt's interest does count, his suit should still be dismissed for lack of participation. BIO at 23–24, 28. Each argument fails.

First, the Ninth Circuit's test explicitly says nothing about a non-party's interests. Respondents concede this point, citing language from *Hilao v. Estate of Marcos*, 393 F.3d 987, 992 (9th Cir. 2004), which provides that non-parties may appeal "when (1) the appellant, though not a

party, participated in the district court proceedings, and (2) the equities of the case weigh in favor of hearing the appeal." Faced with such language, Respondents fall back on two cases—*S.E.C. v. Lincoln Thrift Association*, 577 F.2d 600 (9th Cir. 1978), and *S.E.C. v. Wencke*, 783 F.2d 829 (9th Cir. 1986)—to argue that, in those specific decisions, the court implicitly considered non-party interests by bundling them into a weighing of the equities. But that move both overreads and misreads. It overreads *Lincoln Thrift* and *Wencke* because, as Respondents acknowledge, the court in those cases *considered* the relevant non-party's interest—and *allowed* that nonparty to appeal. BIO at 24. That is exactly Habelt's argument: Had the panel examined his interests rather than sidelining them it would have reached a different result. Pet. at 22. It also misreads because in neither case did the court hold that a non-party's affected interest *must* be considered, whether as part of the equities analysis or as a standalone factor. That means that, while the Ninth Circuit might occasionally elect to consider a non-party's interest, it need not do so (and in fact did not do so here).

Second, the reasoning from courts on the other side of this split confirms that had the Ninth Circuit done so, it would have reached a different result. In the Tenth Circuit, for instance, a nonparty must "have a particularized and significant stake in the appeal" and "demonstrate cause for why he did not or could not intervene in the proceedings below." *United States v. Osage Wind, LLC*, 871 F.3d 1078, 1086 (10th Cir. 2017). Habelt's cause is straightforward: He sought relief and was a party below or, at minimum, "relied on his belief that he remained a party" since he "never . . . received notice of termination of his party status." App. 23a, 19a (Bennett, J., dissenting). Indeed, if a circuit judge

believed him to be a party, surely it was reasonable for Habelt himself to believe the same.

Official Committee of Unsecured Creditors of WorldCom, Inc. v. S.E.C., 467 F.3d 73 (2d Cir. 2006), is similarly instructive. Respondents spill considerable ink stressing that Habelt is not formally bound by the judgment. *See, e.g.*, BIO at 3, 6, 13. But that, as the Second Circuit explains, is not the end of the inquiry. Instead, "a nonparty may appeal a judgment by which it is bound" *and* "a nonparty may appeal if it has an interest affected by the . . . judgment." 467 F.3d at 78 (cleaned up). Put another way: "We have not required that a nonparty prove that it has an interest affected by the judgment; stating a plausible affected interest has been sufficient." *Id.* That bar is met when a "district court's judgment may have affected" an investor's "ability to pursue his Rule 10b-5 claims against defendants," paralleling the circumstances here. *Id.* (cleaned up). And it is met when a settlement for some investors may affect the availability of relief for others—again tracking Habelt's allegations. *See id.* at 79.

To downplay Habelt's interests, Respondents invoke two counterarguments: that any timeliness concerns are a "problem . . . of Habelt's own making" and that Habelt is not precluded from pursuing another appeal. BIO at 13–14 & n.1. On the former, Respondents cite *Plumbers, Pipefitters & MES Local Union No. 392 Pension Fund v. Fairfax Financial Holdings Ltd.*, 433 F. App'x 28 (2d Cir. 2011). But that unpublished ruling faulted "counsel's refusal or failure to file a new complaint," *id.* at 30, a far cry from this case, where Habelt had no reason to file a new complaint before dismissal, but now risks any

realistic chance at recovery in light of *China Agritech v. Resh*, 584 U.S. 732 (2018).

Respondents' preclusion arguments are similarly off-base. To be clear: Whether a judgment is preclusive is not Respondents' call. That is a decision, as Judge Bennett noted, that rests in the hands of the subsequent court. App. 23a (citing *Sonner v. Premier Nutrition Corp.*, 49 F.4th 1300, 1304 (9th Cir. 2022)); *see also Smith v. Bayer Corp.*, 564 U.S. 299, 307 (2011). And in this particular situation, it is unsettled whether judgment in a securities class action precludes subsequent claims brought by pre-certification, non-Lead Plaintiff class members. *See Metzler Asset Mgmt. GmbH v. Kingsley*, 928 F.3d 151, 157–58 (1st Cir. 2019); *cf.* Charles Alan Wright & Arthur R. Miller, 18A *Federal Practice and Procedure* § 4455.1 (3d ed.). That fact would qualify as a plausible affected interest, permitting appeal in the Second Circuit. It was not enough in the Ninth Circuit.

Finally, Respondents assertions about Habelt's alleged non-participation lack merit. There are, for one, strong arguments Habelt *did* sufficiently participate—by bringing this case in the first place, distributing notice, remaining privy to the record, and protecting his rights when it became evident PERSM would not seek appeal. Such acts would check the box in several circuits. *See Doe v. Pub. Citizen*, 749 F.3d 246, 259 (4th Cir. 2014) (being privy to the record); *Curtis v. City of Des Moines*, 995 F.2d 125, 128 (8th Cir. 1993) (filing a brief); *La Union del Pueblo Entero v. Abbott*, 93 F.4th 310, 315 (5th Cir. 2024) (same). Respondents would apparently require Habelt to do more—e.g., by filing a (superfluous) Lead Plaintiff application or re-filing his class action complaint or intervening in a suit he initiated and from which he was

never dismissed. Such wasteful litigation cannot be what Congress contemplated when it enacted the PSLRA.

More importantly, the petition outlined the different approaches taken by the various circuits. At least four—the Second, Sixth, Seventh, and Tenth Circuits—primarily or exclusively consider a nonparty's interests when assessing the ability to bring an appeal. Pet. at 19–20. If this Court were to embrace that approach, it would clear the way for Habelt's appeal, no matter his participation (or lack thereof). Such a result makes plain that a favorable decision resolving the circuit split would change the outcome of this case, rendering the action ripe for the Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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