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February 16, 2016

To: Mary Jo White, Chair
Elizabeth M. Murphy, Secretary
Charles Kwon, Office of Chief Counsel,
Division of Corporation Finance
Securities and Exchange Commission
100 F Street, NE, Washington, DC 20549-1090

From: Jason Coombs, Co-Founder and CEO
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CC: rule-comments@sec.gov

Re: File No. 4-692 <https://www.sec.gov/comments/4-692/4-692.shtml> Review of “Accredited Investor”

Report: <https://www.sec.gov/corpfin/reportspubs/special-studies/review-definition-of-accredited-investor-12-18-2015.pdf>

Re: File No. S7-06-13 <https://www.sec.gov/comments/s7-06-13/s70613.shtml> Amendments to Regulation D

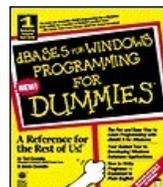
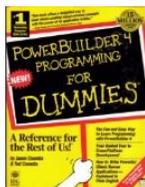
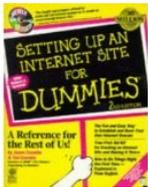
JOBS Act legislation URL <http://www.gpo.gov/fdsys/pkg/BILLS-112hr3606enr/pdf/BILLS-112hr3606enr.pdf>

This review of the “Accredited Investor” definition is extremely important. It is fundamental to the structure of the American economy, and has dramatic influence over what the American way of life is for everyone.

Considering the importance of the “Accredited Investor” definition, there have not been many comments in response to the SEC publication of the report on the review of this definition. The SEC has been tasked with this review, and possible Rulemaking to revise this regulatory definition, as part of the [Dodd-Frank Act](#).

See: <https://www.sec.gov/comments/4-692/4-692.shtml>

I appreciate the opportunity to comment on this potential Rulemaking process, and the report on the review. During the last four years my family has invested hundreds of thousands of dollars, in hard costs as well as in opportunity costs, to deeply research and comprehend why we've ended up trapped in poverty because of our decision to develop new products or new services that need to exist. I have a strong professional résumé and I have successfully raised seed capital for startups, which are still in a pre-revenue development stage.



My past professional accomplishments include co-authoring of three ...For Dummies books about computing and the Internet. Writing letters to the SEC about securities regulations, asking that unreasonable barriers to capital formation be removed just as Congress instructed when the JOBS Act was passed, was the last thing I expected to be doing with my time from 2012-2016.

The effort required, usually in the face of impossible odds up against barriers of every conceivable type including a plethora of [unknown unknowns](#), to produce revenue in brand-new and in innovative ways so that a startup can grow, create quality jobs and graduate to the public capital markets or realize an “exit” for the seed investors is sometimes called “[hustle](#)” (this with a positive connotation). I have the prerequisite or necessary “[hustle](#)” to ethically promote and to sell my securities, and I also have extensive legal experience including several years' worth of time as CEO of a publicly-traded company which formerly had registered its securities under the 1934 Exchange Act. I have the technical skills necessary to build many valuable new products. It matters to me that by participating in the economy, and by doing work during my life, that my contributions make a dent in the universe, move the needle on something, solve truly-meaningful problems, ([insert your favorite venture capital industry quip here](#))¹ and make a positive difference to the future of all

civilization, so that in extracting fossilized sunlight from the ground and combusting it into the atmosphere for my personal convenience and profit the structural problems inherent to the [Anthropocene](#) might be, in some small way, resolved so that future generations of humanity may have a better way to live that is more sustainable, providing everyone, everywhere, more happiness, freedom, health, prosperity and education.

Developing anything new involves a period of time when revenue is typically impossible. There are a few technical solutions today, including rewards crowdfunding, that enable customers to purchase products and services in advance while they are still being developed. But to reach a point in the development and testing of new ideas, or refine a product to be commercially-viable so an ethical person is able to pre-sell it with confidence ensuring that customers will not be left without the value that they tried to purchase requires an amount of seed capital investment proportional to the complexity of building the [Minimum Viable Product](#).

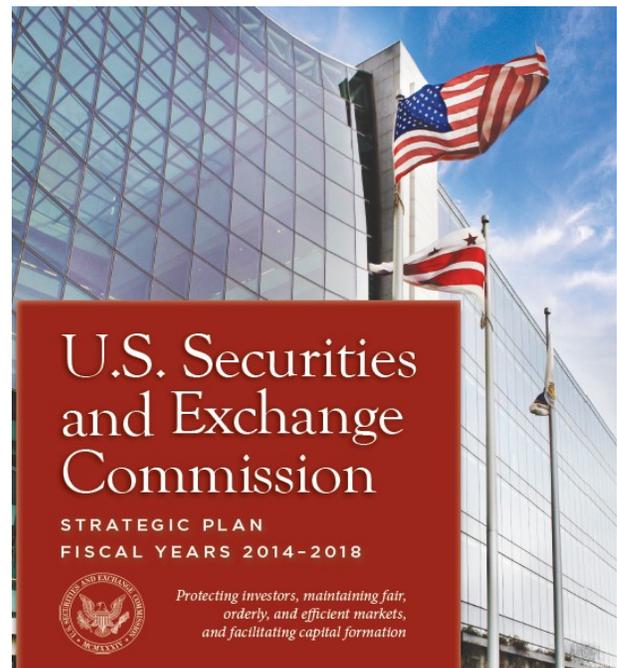
The SEC, in its review of the “Accredited Investor” definition, must take into consideration the needs of development-stage startups. It should not, in my opinion, adopt the view that “Regulation Crowdfunding” will solve all of the problems inherent to capital formation at the smallest scale possible for pre-revenue companies that need seed capital funding to develop into anything at all. I understand that it is tempting to consider this startup seed capital problem solved. Obviously, equity crowdfunding portals (when they are approved and become available for use in the second half of this year) might solve the problem but the SEC knows [there's no guarantee that raising capital in compliance with Title III of the JOBS Act](#) will be viable.

The fundamental regulatory concern of the SEC here is supposed to be three-fold: protecting the integrity of the markets, protecting investors, and facilitating capital formation. This triple mission is both mandated by Congress and formally documented and embraced by the [SEC Strategic Plan for Fiscal Years 2014-2018](#).

I believe strongly that Regulation D Rule 506(c) must be available for pre-revenue seed-stage startups to use when we generally advertise and generally solicit investors. In its existing form the “Accredited Investor” definition is a substantial impediment to this because only 10 percent of Americans qualify to invest (at most) and it is effectively impossible to reach those people with no advertising nor marketing budget, *especially outside of Silicon Valley*.

Despite my relatively-advantaged starting point, without the legal right to accept capital from people with whom I do not have a pre-existing substantive prior relationship, considering the small size of my personal social network and given that none of my friends and family qualify as “Accredited Investors” nor do they have assets sufficient to fund salaries to employees who do not generate profit for my startups, in the present pre-JOBS Act world the capital required to grow my startups faster than my own personal income plus \$100K of seed capital from my friends and family enabled has not been available to me.

Therefore, it has been necessary for my family to choose between having me earn money doing work that is unrelated to the true purpose of my startups so we can eat and maybe avoid homelessness, or make forward progress on my startups for the benefit of my investors and for my family's future prosperity from creating new wealth and new opportunity. If the SEC were achieving, minimally, its three-fold mission, there would already be approved mechanisms available for everyone, everywhere to protect themselves and each other when forming complex investment relationships that depend for their fundamental integrity on honesty and *loyalty to each other with fairness and efficiency* while economic value is produced and shared equitably.



The difference between these two forms of daily work, earning paychecks to satisfy immediate needs and political demands (including expectations of family or federal and state government regulators) compared to building products and creating new jobs inventing new technologies or growing new forms of value in the marketplace, became perfectly clear when the SEC decided during 2013 to send me a [federal subpoena](#) and to [conduct an investigation of me and my startups](#). The enforcement division of the SEC ultimately decided to send me a [closing Wells Notice](#) without taking or recommending any enforcement action of any kind. But before doing so I was told, in no uncertain terms, that the SEC considered me to be guilty, but refused to tell me of what, or why I was being targeted with a federal investigation and threatened with prison if I did not cooperate fully, voluntarily, despite the fact that I knew more about the applicable federal securities laws, rules and regulations, federal criminal procedure and my constitutional rights than the SEC attorneys did. I was informed that the SEC would only tell me what I was being accused of doing wrong only if the SEC decided to file a lawsuit against me where I would then see its allegations of wrongdoing. When asked to explain how there could possibly be any wrongdoing of any kind in my situation, based solely on my attempt to speak publicly about raising seed capital for my startups but not accepting capital from anyone other than my true friends and family, the SEC attorneys informed me that I would need to hire my own securities lawyer to explain it, because the SEC couldn't advise me they could only persecute and threaten.

Being persecuted and threatened is precisely the form of regulation that the SEC has promulgated thus far. It spreads to every corner of our economy and infuses itself into every aspect of our society, and it is wrong. Speaking publicly about raising capital by offering and selling unregistered securities has resulted in many accusations of wrongdoing against me, from influential and wealthy people across every spectrum of our nation. For example, a senior writer for Newsweek and author of “Conspiracy of Fools” an exhaustive look at how Enron came into existence and turned into a fraud, accused me of wrongdoing recently as a result of my offers of unregistered securities. See: <https://twitter.com/kurteichenwald/status/679041559979884544> and see also: <https://twitter.com/kurteichenwald/status/679038760466513921>

The SEC ensures, leading by example, that the only discussion anyone ever has about market regulation and function is the discussion of fraud, yet the SEC makes no attempt to educate us about how fraud happens or how it can be prevented. [Mark Cuban wrote a blog about this bizarre situation](#), in which the SEC refuses to explain what the rules are or why people might have violated them, and in keeping the rules impossible to comprehend it derives additional political and regulatory powers while scaring people into spending huge amounts of time and money buying protection from lawyers and others who may otherwise have nothing to do with their time. I suppose at least then the SEC would get more letters written to them by out-of-work securities lawyers. In [my past letters to the SEC in connection with JOBS Act Rulemaking](#) I have set forth strong arguments that it violates criminal racketeering statutes for the SEC to behave as it does. The SEC is criminally guilty of making illegal threats and extorting “protection money” from its victims, forcing people to pay one or more of its registered securities lawyers or else punishment and persecution will be inflicted. And with this singular mechanism of “regulation” as its past and present modus operandi the SEC tells all of us that we are probably guilty of fraud and encourages everyone to accuse everyone else of the same. It is time for this counter-productive part of American culture to end. The legacy of persecution and bias against disadvantaged demographic groups and the poor, even if it did help the American Republic amass the most wealth and power in the history of the world, is no longer considered by most people to be American ethos.

Fundamentally, the SEC is supposed to help people who are participating in markets. The SEC is supposed to help the buyers of securities buy securities safely, with careful contemplation of material information that any reasonable person would expect to have available to them in order to detect fraudulent promises offered to them by an unethical hustler or huckster. The SEC is supposed to provide buyers of securities with sound reliable mechanisms to verify the honesty and trustworthiness of the people who are offering to broker new or used investment securities. The SEC is supposed to help buyers understand the reality that in most cases there is no legal recourse economically achievable for small investors to litigate with issuers of securities, unless a class action lawsuit is possible or the extra protections of the 1934 Exchange Act are available so

that shareholder lawsuits become easier. The SEC is supposed to educate issuers so that they understand the rules and can access the markets with confidence and certainty about the costs and the risks of doing so. As it is today the SEC has done none of these things, ever, in its entire history. These failures to even attempt to satisfy its three-fold mission make it all the more damaging that the only people who have been able to form capital, create value for investors and help govern the markets have been those few who operate on a huge scale with millions of dollars of wealth acting as the lower boundary barrier to entry for everyone. Investors are told, by the “Accredited Investor” definition, that they must first have more than a million dollars of net worth, or be on course to have this amount of wealth within the next five years, in order to participate.

Issuers of securities are told that their companies must be valuable enough already, and have enough money, to pay substantial sums to be able to pitch those wealthy investors. Brokers tell startups that until we have at least \$600K in annual revenue they won't even try to help us have conversations with Accredited investors. The bottom line is the “Accredited Investor” definition currently restricts the vast majority of all securities offerings on both sides of the relationship to millionaires-only. It is unreasonable, prejudicial, un-American and counter-productive to the well-being of our nation for markets to meet the needs only of millionaires.

In my opinion, the misbehavior of the SEC over the last 80 years has been a direct result of the fact that the entirety of federal securities law is truly unconstitutional. All of it. Every statute, every rule, violates basic constitutional principles by declaring illegal the simple act of forming economic relationships by promising to create something of potential future economic value for others in return for financial support today. Many SEC publications and reports restate this unconstitutional premise as a “first principle” of the Commission's purported legal authority. The present report on review of the definition of “Accredited Investor” follows this same pattern. Here is the quote from the report, and a web hyperlink to its full text:

[REPORT ON THE REVIEW OF THE DEFINITION OF “ACCREDITED INVESTOR”](#)

Introduction

A. Background

Absent an available exemption, the Securities Act of 1933 (the “Securities Act”) requires that offers and sales of securities be registered with the Securities and Exchange Commission (the “Commission”). Registration is intended to provide investors with full and fair disclosure of material information so that they are able to make their own investment decisions.

If it were not illegal to promise investors a potential future economic benefit from an investment in new shares or debt securities without first registering these promises with the SEC, every existing SEC rule and regulation would start with a very different first principle, one that looks more like this: “KNOW ALL MEN BY THESE PRESENTS, the predominantly Caucasian male owners of the wealth of the United States hereby declare this wealth, and the material and political power that it commands, shall be withheld from anyone who does not participate voluntarily in an officially-sanctioned Wall Street marketplace by paying gatekeepers for positive ratings, analyst reports, promotional support and the preparation of audited financial statements published in a government forensic database together with Management Discussion and Analysis in a form or containing the material substance required by law.”

It is essential, in reviewing and revising the “Accredited Investor” definition, that a new first principle be formulated which levels the playing field for everyone. Not doing so, now that the JOBS Act made it legal to offer and sell unregistered securities, would continue the pattern of malpractice and political abuse of power that is the SEC today. It would mean less participation in markets as wealth continues its historic trend of concentration in fewer hands. SEC policy cannot be “markets are for the wealthy.” Nor can the SEC ignore that without a law prohibiting offers and sales of unregistered securities it becomes clear to everyone that the SEC is guilty of structural political, racial and “class war” biases.

The JOBS Act explicitly repealed the first principle of illegality for unregistered securities offerings, by introducing Regulation Crowdfunding, revising Regulation A and providing explicit federal protection to ALL general solicitation and general advertising of unregistered securities pursuant to Regulation D. There is, therefore, no longer a reason for anyone to register securities with the SEC ever again, period. There will doubtless be new securities registrations, anyway, but they will be the result of the largest companies deciding to raise hundreds of millions in new capital by selling shares to pension funds and institutional investors. Everyone else will raise capital doing the very thing that the 1933 Securities Act purportedly prohibited since the Great Depression: offering and selling unregistered securities to any member of the general public who wishes to invest. Unless the JOBS Act itself is repealed, instead.

Congress, however, recognized that in certain situations there is no practical need for registration or the public benefits from registration are too remote. Accordingly, the Securities Act contains a number of exemptions to its registration requirements and authorizes the Commission to adopt additional exemptions.

When the issuers of unregistered securities are millionaires, maybe the existing rules and regulations are already sufficient to meet their needs. There are plenty of exemptions available, and paying a few hundred thousand dollars for regulatory-compliance services has nominal impact on economic viability for the business ventures of millionaires. From the perspective of everyone else, the more the SEC is interfering with and adding costs to the business ventures of millionaires and billionaires the easier it might be to get a foothold in markets that are already owned entirely by Wall Street and big business. But regulation should be consistent and predictable, it should not depend on wealth nor political status. The same rules should apply for everyone, and they should be easy for everyone to understand. Clearly it was not the intent of Congress for the SEC to perpetuate inequality and class warfare through policy decisions biased in favor of the wealthy, and neither did Congress want the SEC to create the inverse with policies biased against the wealthy. It is time to make Accredited Investor status open to anyone.

In my opinion, the single most important policy change the SEC can effect that would eliminate bias and accomplish all three of the SEC's roles as mandated by Congress is to create and administer an Internet-based investor qualification testing program that is available to anyone, anywhere, worldwide. The “Accredited Investor” status could thus be earned by attending an accredited training course and obtaining an SEC certificate. It would then be irrelevant whether an investor comes from wealth and privilege, or is wealthy today, or even resides inside the USA – it would allow everyone to join in new investments if they wish to participate, or enable issuers to differentiate easily between people who take participation seriously and those who do not. I agree with some aspects of the existing SEC regulations insofar as they accomplish the creation of barriers that make it more difficult for people who do not and will not invest the effort to understand risks to be deceived, or be forced into participating anyway. But the SEC does absolutely nothing, presently, to make it safe and easy for everyone to understand what it looks like when new value is created by participating in the creation of new equity or debt securities. I strongly believe the SEC can and should overcome its past failures in this respect and open the markets to everyone who participates from a position of knowledge and a new open “Accredited” certification.

I am considering creating a registered funding portal under Title III of the JOBS Act, yet still I firmly believe that we, the funding portals, must be required to compete for business of issuers and investors against the fundamental freedom that each group has to **NOT USE OUR SERVICES AT ALL**. The market for equity crowdfunding simply must include the freedom for issuers to self-promote, to do the hosting of their investor relations, investor disclosures, investor onboarding and legal compliance work **THEMSELVES** if they wish to do so. In my opinion, Rule 506(c) of Regulation D is the most natural regulatory compliance pathway for this self-hosted equity crowdfunding to occur, but it doesn't work

today for startups because the Accredited Investor definition limits participants to millionaires-only. It simply is incompatible with the way that wealthy people invest today to expect any significant number of them to log in to an issuer's website or install an issuer's mobile App in order to make an investment.

Although clearly the Accredited Investor definition might remain unchanged and the wealthy investors in the marketplace might become accustomed to investing in startups in such a new way, I doubt it will ever become practical unless the SEC makes such self-promoted unregistered public offerings a formal policy position as a first principle. I strongly believe the SEC should do so, obviously, because all other paths to capital formation and all other methods of investor protection and market governance **should** perform better, with additional resources around them that make them into more mature marketplaces than my “first principles” approach in which everyone exercises their own sovereignty and their own intrinsic freedoms and except for the anti-fraud criminal statutes everyone champions “caveat emptor” loudly. But Congress and the SEC made it impossible to measure a difference in performance between such self-hosted, self-promoted unregistered public offerings and other public offerings which satisfy regulatory requirements such as the 1934 Exchange Act. Passing the 1933 Securities Act in the first place, and promulgating for 80 years what I believe to be unconstitutional prohibitions, served only to concentrate wealth and power in the hands of the few at the expense of the freedom of the many. Now the SEC has the opportunity to revise the “Accredited Investor” definition to permit investors to choose whether they will participate in self-hosted, self-promoted public offerings pursuant to Rule 506(c) and if the SEC were to do so then I strongly believe it would level the playing field and solve the core issue of unfairness that disproportionately impacts startups and everyone who is not at least a millionaire.

Fraud happens. but it doesn't happen often enough for the SEC to take other people's freedoms away “[pre-cognitively](#)” because of it.ⁱⁱ The SEC cannot continue to pretend that its only purpose is to fight fraud and to accuse people of committing it in order to compel their good behavior or honesty in the securities markets. The SEC is supposed to be protecting freedom. There is simply no reason that the Commission should be unable to develop policies and technology that fundamentally support open and transparent capital formation between startups or other entry-level issuers and the investors who care enough about startups to learn what it takes to analyze startups and provide capital to support startups. Doing so, I believe, would fundamentally alter the current perception: the mistaken belief that the SEC is a scary and unpredictable agency of federal law enforcement. With a new, more reasonable policy position that actually attempts to achieve its triple mandate I am confident the perception would change and the SEC would be far better understood and more appreciated than it is today. The change of public perception would, naturally, coincide with an end to the present reality of the SEC: the unintended reality that the SEC is a scary and unpredictable political commission that has no law enforcement powers and exists primarily to engage in political smear campaigns and to bring civil lawsuits against anyone it considers, in the subjective opinion of its staff and Commissioners, to be behaving badly.

The SEC should create a Rule to grant a startup exemption under Section 3(b)(1) for raising a limited amount of seed capital a limited number of times from a limited number of investors via Regulation D.

The “accredited investor” definition is a central component of Regulation D. It is “intended to encompass those persons whose financial sophistication and ability to sustain the risk of loss of investment or ability to fend for themselves render the protections of the Securities Act’s registration process unnecessary.” Qualifying as an accredited investor is significant because accredited investors may, under Commission rules, participate in investment opportunities that are generally not available to non-accredited investors, such as investments in private companies and offerings by hedge funds, private equity funds and venture capital funds.

D. Goals of the Accredited Investor Definition

The accredited investor definition attempts to identify those persons whose financial sophistication and ability to sustain the risk of loss of investment or ability to fend for themselves render the protections of the Securities Act's registration process unnecessary.

I disagree with this summary: the purpose of registration is not merely to protect the first buyer of the registered securities but also to ensure that a subsequent buyer who purchases the shares in a resale through a broker in secondary markets will have access to the same information a first buyer receives.

Additionally, a fundamental objective of the accredited investor definition is to create bright-line tests that allow market participants to readily determine an investor's status under the definition. The need for clarity is particularly important because an issuer relying on an exemption from registration carries the burden of proving that the exemption is available.

Certification or Verification by Financial Professionals

The United Kingdom provides that investors may be deemed to be sophisticated if they have a written certificate signed within the last 36 months by a firm confirming that it has assessed the individual as sufficiently knowledgeable to understand the risks associated with engaging in investment activity in the relevant investments

I strongly agree with the United Kingdom policy of allowing investors to obtain and keep up-to-date a certification or verification from their financial professional such as their certified public accountant. It should become part of the American definition of "Accredited Investor" for investors to be able to opt for either a private certification from a financial professional or a periodic certificate received from the SEC after an investor successfully finishes a training and certification examination created by the SEC.

See, e.g., [letter from Joseph Karwat \(Aug. 20, 2013\)](#) (suggesting that investors be permitted to invest up to five percent of their net worth plus income in start-up companies every year, regardless of income and net worth levels).

I agree with this recommendation, in principle. Everyone should automatically be eligible to respond to general solicitation and general advertising by startups seeking seed capital, if there are limitations on the issuers who qualify for seed capital. One limitation of particular importance is that the startup must not have received more than a certain amount of seed capital through such a public offering exemption previously. Limiting access to this type of exemption to a relatively low threshold should be fine, even for capital-intensive industries, because the seed capital requirements of every startup involve hard and soft costs for organization and planning moreso than business execution and capital expenditures. The difficulty of raising as little as tens of thousands of dollars, less than the administrative cost involved in even a simple Regulation A+ qualification application and far less than the cost of filing the simplest of registration statements for a brand-new startup seeking to raise only seed capital, must be reduced. In my opinion, a "seed capital" public investor exemption should be added to Regulation D in conjunction with Rule 506(c) by, for example, redefining "Accredited Investor" differently for small investments of seed capital than for larger investments and for offerings from already-operating and established firms.

In 1960 the SEC prepared "[INSTRUCTION MANUAL The Securities Act of 1933](#)" as a guide for its staff and securities law students. Although much has changed in securities regulations since 1960, it is instructive to examine the basic fact pattern of illegality for any unregistered securities offering, which

even today give rise to accusations of wrongdoing, illegal securities offerings and/or securities fraud. It is a fundamental premise (one which I firmly believe to be unconstitutional) of the 1933 Securities Act that a presumption of guilt exists any time unregistered securities are offered or sold. Qualifying for an exemption from registration depends on the totality of the facts and circumstances in each offering and federal jurisdiction over nearly all such offerings is asserted through the language of Section 5. In cases where Section 5 is not directly violated, it can still be a violation and federal jurisdiction may still be asserted if there appears to be a fact pattern suggesting an attempt to evade the 1933 Securities Act. Quoting below from the 1960 INSTRUCTION MANUAL:

I: INTRODUCTION TO SECTION 5

The prohibitions of Section 5 of the Securities Act of 1933 with respect to the offer, sale, and delivery after sale of a security relate to three different periods: (A) Before a registration statement is filed; (B) during the waiting period; and (C) after the effective date. In each period the prohibition is against the use of the mails or instrumentality of interstate commerce.

Any use of the mails is sufficient to establish jurisdiction. It need not be interstate. Ordinarily the distribution of a security will involve a use of the mails. The mailing of a confirmation will be sufficient.

In my opinion, based on analysis of the history of federal securities regulations, the 1933 Securities Act was intended primarily to regulate intermediaries such as broker-dealers. Its secondary purpose was to regulate primary securities offerings when those offerings occur on a substantial scale, even when no intermediary is involved in the transactions, but the purpose of overly-broad language like that shown above in securities law was to capture every conceivable way broker-dealers or securities underwriters might market and sell securities to members of the general public. I consider it to be axiomatic that the 1933 Securities Act is **MARKET REGULATION** that was never intended to become the invasion of privacy and unconstitutional prohibition on basic freedom that it has become in practice. The JOBS Act and a thoughtful revision to the Accredited Investor definition being considered can and should restore this original purpose of market regulation separate and distinct from **CAPITAL FORMATION** to the future practices of the securities industry, which in some respects will merely finish reforms that started decades ago to change from “principles” of prohibition as a basis of enforcement under Section 5 of the Securities Act to a “bright line test” to facilitate capital formation and marketing of primary offerings. In my opinion, the blurring of these two distinct mandates for the Commission should never have occurred in the first place. Capital formation through direct marketing of equity-oriented relationships is only a “market” under certain facts and circumstances, such as when securities industry professionals do the sales and marketing or when insiders or seed investors become “selling shareholders” during the subsequent rounds of capital raising following seed stage that seek to expand a startup's investor base.

No seed capital transaction, offered to bona fide seed investors who legitimately will become the first backers of a new startup where there is no scheme to defraud nor conspiracy to evade the registration requirements of the 1933 Securities Act should be ineligible for **CAPITAL FORMATION** through organic relationship-building and investor on-boarding or other “growth hacking” activities managed entirely by the issuers themselves. The Commission's **MARKET REGULATION** mandate must be reserved for broker-dealers, offerings involving secondary resales from selling shareholders or insiders and any similar circumstance where markets are being leveraged by issuers. Through revisions to the definition of “Accredited Investor” the improperly-prohibited rights to freedom of association, freedom from government interference, or abridgment of the rights our Founders considered to be natural rights, not rights GIVEN TO US by government but rights we inherently possess, should now be restored. Our inalienable rights do not come from a Bill of Rights nor a Constitution, they exist because we exist.ⁱⁱⁱ

In a Supreme Court decision from 1958 "[NAACP v. Alabama](#)" the court ruled "'Immunity from state scrutiny of petitioner's membership lists is here so related to the right of petitioner's members to pursue their lawful private interests privately and to associate freely with others in doing so as to come within the protection of the Fourteenth Amendment.'" This decision reinforced the constitutional principle that freedom to associate with organizations, especially to advance beliefs and ideas, is an inseparable part of the Due Process clause of the [Fourteenth Amendment](#). It should be self-evident to everyone that no power nor authority exists for any government agency nor political commission created by Congress to abridge either freedom of speech (i.e. the freedom to speak publicly to attempt to communicate with a group of people who may value the opportunity to associate with my startup) or our Due Process rights.

Why has the SEC been allowed to regulate markets, and why have the lower courts ruled in favor of the SEC in civil litigation, in cases that raise profound and clear constitutional issues such as these? The answer appears to be that nobody has challenged the SEC's misbehavior on these grounds before. It is time for the SEC to properly serve as protector of constitutional rights, defender of natural rights, first and foremost, it is time for the SEC to finally do its job facilitating capital formation not just do its job regulating markets. The present revision to the "Accredited Investor" definition is the ideal time and venue for reform of this historic failure, so that nobody is required to invest time and money to win a victory before the Supreme Court affirming that what I have set forth above is true and correct.

In my opinion, if the NAACP were to use a network of broker-dealers, placement agents, and other intermediaries to generally-solicit and generally-advertise seeking to form relationships with members who each receive a certificate of recognition for their support, and with a voting right associated with such certificate, the certificates being transferable to other owners as a form of private property which has monetary value, well then the SEC would have proper regulatory function to police membership sales. Maybe the SEC should even have reasonable power to discover, through proper court procedures, who the members are under certain circumstances because market regulation and investor protection would be at issue. But it should not be hard for anyone to agree that if the NAACP does its own sales and marketing, if relationships between the organization and its members are formed directly, even if those members do permanently own their memberships for life and enjoy such position of ownership with the right to bequeath their memberships to heirs and with the right to cast a vote on matters put to the membership for a vote and share in the net earnings of the issuing organization (therefore satisfying every test for deciding whether a "security" exists in the economic relationship), well in that case the Supreme Court opinion in NAACP v. Alabama should still hold. Under Section 2 of the Securities Act memberships are usually not securities unless the members are entitled to a share of the net profits, but I think everyone would agree that the NAACP and its members should not lose their collective nor their individual constitutional rights based solely on a decision to form capital together, unless and until that capital formation activity results in the creation of a market, or offers and sales through a marketplace with the help of broker-dealers or other intermediaries. The SEC clearly has no authority to interfere in such for-profit memberships nor can it presume an organization, its officers or directors or any member to be guilty of any offense or regulatory violation based on a securities law interpretation which, as its first principle, nullifies inalienable rights and natural laws that are the essence of the U.S. Constitution.

The government should not be allowed to access the list of members in an organization, nor to interfere with that organization's lawful relationships, unless the organization behaves in such a way as to truly necessitate intervention for investor protection or market regulation purposes. At a very fundamental level this is what the "Accredited Investor" definition is for: to determine, with a "bright line test," precisely who the group of investors are who, because of their beliefs, desires, skills or ability to fend for themselves, are permanently free from unreasonable and unconstitutional interference with or unwarranted surveillance of their private relationships. Investors who qualify as "Accredited" and who

invest directly in securities offerings that are not marketed or sold through intermediaries should, I believe, be free to remain free to enjoy the right to associate with, and materially support, organizations that do not utilize exchanges nor markets where securities are sold or resold to non-Accredited investors who need or want the extra protections such exchanges and markets provide.

When a startup founder offers and sells securities to bona fide friends and family, those offers and sales of unregistered securities were never in the first place intended to be captured by the regulatory regime promulgated from the 1933 Securities Act. However, any resale of those securities by any broker-dealer or underwriter clearly was intended to be captured by the resulting regime of market regulation. 1933 Securities Act Section 4(a)(2) expressly exempts from the Section 5 prohibition “transactions by an issuer not involving any public offering” however this language in the current 1933 Securities Act is materially different from original language in the Section 4 exemption. In the original 1933 Securities Act Section 4 the exemption for transactions not involving any public offering read as follows:

“transactions by an issuer **not with or through an underwriter** and not involving any public offering”
(*emphasis added*)

In my opinion, the present-day securities regulations in the United States are unconstitutional insofar as they have, prior to the JOBS Act, made it unlawful for people to utilize our constitutional rights. When reading original text of the 1933 Securities Act, however, it becomes more clear that the original Act may not have been unconstitutional. Our constitutional rights seem to have been stolen from us over time through revision and administrative actions by the SEC. The original Act language makes very clear, in each area where our constitutional rights have been unreasonably infringed, that the Act was not meant to infringe rights but was meant to regulate markets and public offerings with or through an underwriter. Everyone has always known the difference between broker-dealer resales of securities and the distinct unmistakable industry practice carried out carefully by broker-dealers or investment banks when new securities were being issued and sold for the first time and the firms' names were written at the bottom of the offering documents, literally making such firms collectively “underwriters” thereof. Section 4 of the 1933 Securities Act also expressly permits broker-dealers, including the underwriters of a public offering of newly-issued securities if those firms are also broker-dealers, to engage freely in securities transactions “relating to interstate commerce and the mails” where the securities in question are not registered securities and where enough time has elapsed from the date of the first offering so as to make the subsequent transactions bona fide resales of securities that were held for investment purposes by the first buyer or by the underwriter. This language is the same today as it was in 1933:

Securities Act Section 4(a)(3)(C) reads: **“transactions as to securities constituting the whole or a part of an unsold allotment to or subscription by such dealer as a participant in the distribution of such securities by the issuer or by or through an underwriter.”**

In other words, it was originally the law, the intended effect of the 1933 Securities Act, to expressly allow nationwide marketing through inter-state commerce and the mails of any and all unregistered securities, provided that the rules for unregistered public offerings were carefully followed. In order to conduct an initial public offering through a broker-dealer or by or through an underwriter the offering was, in the original 1933 Securities Act, required to be limited in geographic scale to intrastate-only. **ALL INTRASTATE PUBLIC OFFERINGS, INCLUDING OF UNREGISTERED SECURITIES, WERE ALLOWED PURSUANT TO THE ORIGINAL 1933 SECURITIES ACT, AND ANYONE WAS PERMITTED TO USE THE MAIL TO ADVERTISE AND DELIVER THE SECURITIES!** Only in later years did a “first principle” emerge in which unregistered securities became “unlawful.” The original intent of the regulation was to make unlawful reckless inter-state sales through brokers! It was not prohibited activity for issuers to self-promote and sell their unregistered securities to investors in a limited reasonable manner, not via general solicitation and not through a broker-dealer/underwriter.

Repeating here the “first principle” that is frequently asserted by the SEC in its various publications, including the report on the review of the definition of “Accredited Investor” which is at issue presently:

Absent an available exemption, the Securities Act of 1933 (the “Securities Act”) requires that offers and sales of securities be registered with the Securities and Exchange Commission (the “Commission”).

This “first principle” advanced by the SEC over the years is just wrong. It is a misunderstanding of, at best, or an intentional misrepresentation of, most likely, or part of a criminal conspiracy and ongoing racketeering corruption of, at worst, the true purpose and authority of the 1933 Securities Act. There is no “available exemption” required for anyone to enjoy the inalienable rights and natural laws of capital formation in the creation of investment relationships. The original 1933 Securities Act language made it perfectly clear that if an issuer did not attempt to offer and sell securities to non-Accredited buyers in general solicitations and through general advertising, then the issuer could use inter-state commerce and the mails for the marketing and sale of unregistered securities on the condition that no underwriter was involved in the public offering. Let me restate this again for emphasis: the original 1933 Securities Act Section 4 exempted any and all “transactions by an issuer not with or through an underwriter **AND** not involving any public offering” from the prohibitions contained in Section 5. Underwriters were, in the original 1933 Securities Act language, expressly allowed to underwrite and to help issuers promote or sell unregistered securities, even using inter-state commerce and the mails, privately but not publicly.

When this fact is recognized today, I believe the SEC will be forced to reform its entire approach to market regulation and it will have no choice but to restate its first principle. Rather than requiring that all offers and sales of securities be registered, unless an exemption is available, the truth is that the 1933 Securities Act expressly and explicitly permits all capital formation through offers and sales of unregistered securities UNLESS those securities are sold to members of the general public through an established market, through general solicitation and general advertising that is intended to target the general public to attract and transact with non-Accredited investors, or with the help of a broker-dealer or underwriter. The correct “first principle” that truthfully and accurately summarizes the prohibitions contained within the **original** 1933 Securities Act would read as follows:

The Securities Act of 1933 (the “Securities Act”) requires all offers and sales of securities to non-Accredited investors be registered with the Securities and Exchange Commission (the “Commission”) or be conducted by issuers themselves, not via any third-party or market, and without an underwriter.

The services of a broker-dealer in marketing a private placement offering, even through the use of the instruments of inter-state commerce and the mails, were never supposed to have been prohibited until and unless the securities being offered and sold were first registered. Payment of commissions to any broker-dealer who helps bring non-Accredited investors was not even prohibited, originally, provided that the broker-dealer did not utilize a market or conduct general solicitation and general advertising in the process of locating the interested investors. Delivering qualified sales leads to issuers is completely different from delivering money to issuers, and the 1933 Securities Act was not intended to prohibit a legitimate investor from discovering and forming an investment relationship directly with a legitimate issuer of unregistered securities, regardless of Accredited status. The Securities Act was meant to stop misrepresentations and bad acts by intermediaries which resulted in the sale, at unreasonably-inflated prices, of unregistered securities during the decade leading up to the 1929 crash and Great Depression. Whereas an underwriter may take possession of a block of newly-issued shares to sell them at a profit to buyers, then deliver a portion of the proceeds to the issuer, broker-dealers don't always function as underwriters and brokers are supposed to remain impartial as price is negotiated by the parties. The original Securities Act made it easy for issuers but hard for intermediaries to find buyers for securities.

Since 1933 as the Securities Act has been re-interpreted (unconstitutionally, in my opinion) and as the SEC has run amok with unconstitutional or even criminally-illegal behavior, the additional prohibitions that were in effect prior to the JOBS Act came into existence and were promulgated or codified as Rule. Now that the JOBS Act has further revised the 1933 Securities Act to explicitly return some of the improperly-removed rights, the correct “first principle” that summarizes the 1933 Securities Act is:

The Securities Act of 1933 (the “Securities Act”) requires all offers and sales of securities to non-Accredited investors be registered with the Securities and Exchange Commission (the “Commission”) or be conducted by issuers themselves, not via any third-party or market, and without an underwriter, except when the issuer uses a registered crowdfunding portal.

I urge the Commission to adopt this as its new “first principle” to replace the intentionally-misleading and factually-wrong summary that it has been advertising for so many years in order to make it appear to everyone, including to members of Congress, that the 1933 Securities Act gave the SEC more power than it ever actually gave the Commission to interfere with issuers' capital formation and relationships.

Revising the “Accredited Investor” definition, together with adopting this revised “first principle” as articulated above, creates precisely the “bright-line test” that the Commission has been searching for recently and that market participants, including potentially-vulnerable non-Accredited investors, need. Any issuer can already offer and sell any security to Accredited investors, and issuers who do their own offers and sales of unregistered securities for offerings that are not fraudulent already enjoy exemptions or **inalienable natural rights protected by the U.S. Constitution** expressly allowed in securities law. Every issuer can understand limitations on offers and sales to non-Accredited investors such as the restriction on the number of non-Accredited investors the issuer can sell to during any 12-month time period under Regulation D. [Investors can also easily understand Regulation D private placements](#). The thing that nobody can understand, because it is unconstitutional and was never intended to be unlawful under the 1933 Securities Act, is why the SEC makes allegations of wrongdoing for inconsequential violations of advertising restrictions committed by issuers themselves when offering and selling their own newly-created unregistered securities only to seed capital investors merely to form startup capital.

To tell startup founders that it is illegal to offer and sell securities without an effective registration statement, or, in practice, is treated as though illegal unless every non-Accredited investor receives nearly every protection and disclosure they would have received if a registration statement had been in effect, is to tell everyone, everywhere that the only way to start anything new is to have wealthy friends and family who are considered “Accredited Investors” so that forming equity investment relationships with them does not carry a high financial or administrative cost and furthermore creates no future risk of any SEC enforcement action against the startup or its founder or investors under any novel theory of regulatory violation. Agreements to form relationships and to share in the future wealth creation around a startup venture is simply not what Congress intended to prohibit, period, under any legal theory of illegality. In recent decades the unconstitutional interpretation of the 1933 Securities Act decimated the market that it was originally intended to protect, by substantially suppressing and materially interfering with creating equity investment relationships on a scale that is personal to small businesses and startups so that they could attract the support needed to grow and to achieve a substance sufficient to qualify for listing on a public stock exchange. In the present-day securities marketplace prior to JOBS Act Rule implementation, small businesses and startups are presumed to be guilty if they attempt to raise equity capital, even from their bona fide friends and family. As a result most small businesses and startups do not even try to raise equity capital to grow. Literally thousands, perhaps tens of thousands, of public companies would exist today that simply do not exist as a result of this. By hyper-focusing on fraud prevention via Rules and Regulations that turn everything into statutory fraud, the SEC did great harm.

Offerings of investments reserved for “Accredited Investors” only, such as those offered and sold via Rule 506(c) of Regulation D, could easily become the subject of market regulation functions, subject to facts and circumstances that determine this to be so, and will become the subject of investor protection functions of the Commission when fraud or abuse occurs. However, I strongly believe, and I advise the Commission to adopt this belief as well, that not every such Offering automatically becomes a matter of market regulation or investor protection. In particular, Offerings that raise seed capital only should be constitutionally-protected as a natural inalienable right through which human freedoms are enjoyed. The Commission should consider, as part of its final Rule 506(c) revision, including a seed capital tier of Rule 506(c) Offering which would be available only once per organization, and which could not be of an “indefinite” nor “unlimited” character, so that issuers who do not wish to tap into markets or join venture exchanges or “funding portals” to avail themselves of the benefits thereof could still self-host, and self-promote, a single seed capital public offering of securities reserved for “Accredited Investors.”

I urge the SEC to adopt, in its pending revision to Regulation D, the clear and constitutionally-valid position that issuers of unregistered securities are, as originally intended by the 1933 Securities Act, exempt from the prohibitions of Section 5 when offering and selling their own securities **provided that no underwriter or broker-dealer is used for this purpose** and furthermore issuers **do have the right to offer and to sell unregistered securities directly to non-Accredited investors**, including through general advertising and general solicitation of these investments, subject to limited offering restrictions of Regulation D. All securities sold in this manner must be restricted securities. Issuers **and** investors must comply, in due diligence, with the limitation on the number of non-Accredited investors who are allowed to buy the unregistered securities during a 12-month period. In other words, “limited offerings” self-promoted publicly **ARE** compliant with Regulation D and **ARE NOT** “public offerings” – this is recognized and codified already, but in convoluted and confusing fashion. Most often, in practice, the issuers and investors who form capital under Regulation D without the help of a broker-dealer do so in a context of voluntary violations of the spirit or even the letter of the Rule. Investors who honestly have no pre-existing substantive relationship to the issuer meet the issuer after public communications such as a pitch event that is open to the public and a relationship is formed in response to the pitch. Investors learn of an interesting company and reach out to it about investing, despite being non-Accredited. Any number of scenarios in the real world involve non-Accredited investors investing under Regulation D, and it is kept low-profile to avoid enforcement action. But that's nonsense. Issuers should be able to advertise that they are raising capital, without fear of regulatory censure, SEC threats or civil litigation. As long as the issuer is being selective and strategic in who it accepts, as long as the Offering is limited and not advertised through a market or exchange where third-parties routinely transact liquid securities, then where is the concern of fraud or abuse? What reason does the SEC have to believe it would even be difficult to regulate unregistered securities sales to non-Accredited investors in this case, compared to the present-day standard of practice in which everyone HIDES FROM THE SEC ON PURPOSE?!

Limited offering of restricted securities promoted or advertised generally but with restrictions on who can participate and careful screening by the issuer of any non-Accredited investors is not the same as a public offering, even if a limited number of non-Accredited investors are allowed by the issuer to participate. The most obvious and most common non-Accredited investors who end up allowed to participate today are friends and family or non-Accredited investors who “tick the box” and claim to be “Accredited” under Rule 506(b) but clearly the SEC should formally revise Regulation D to clarify that a limited number of investors with whom the issuer does not have a pre-existing substantive relationship can lawfully be allowed to invest in a given 12-month time period. Any reasonable regulatory steps the SEC chooses to codify in clarifying that Regulation D can include non-Accredited investors will be acceptable to me. As the SEC is preparing to implement, most likely, a qualification examination to allow sophisticated investors who understand the risks and wish to participate in unregistered securities Offerings but who are not already multimillionaires the SEC could also create,

for example, a “tick the box” method for issuer Accredited investor verification in which the investor self-identifies as non-Accredited but promises to apply for certification as Accredited and successfully obtain a certificate thereof from the SEC prior to being allowed by the issuer to receive the shares of stock they have purchased. In the event that such investor does not follow-through with the promise to obtain Accreditation, the investor will be entitled to a full refund of the capital they attempted to invest in the issuer. To my way of thinking, requiring the issuer to hold such contingent capital funds in escrow makes perfect sense and eliminates every regulatory concern possible in such circumstances. Thanks to the JOBS Act, issuers now have multiple avenues available in the capital formation toolbox when they are ready to engage in unlimited public sales of unregistered securities in which buyers are not required to obtain “Accredited Investor” certifications and in which intermediaries or crowdfunding portals help. To complete a comprehensive reform of the capital formation and unregistered investment ecosystem in our nation, pursuant to the letter and spirit of the JOBS Act and Dodd-Frank legislation, I believe the only missing piece is amending the “Accredited Investor” definition to allow anyone who is able to pass a certification exam to be “Accredited” and revising each Rule and Regulation accordingly to clearly inform issuers of their rights as issuers, including their right to generally solicit and generally advertise unregistered securities without fear, so the SEC creates a clear path to follow responsibly and ethically with respect to non-Accredited investors who do not or who will not obtain Accreditation. It can be made perfectly clear to issuers that there is something materially-different about a prospective investor who won't follow the rules for their own protection, and I believe issuers will intuitively avoid accepting non-Accredited investors whom the SEC would be concerned might need extra protections.

Considering the original intent of the language now known as Section 4(a)(2) was expressly to allow issuers to be exempt from Section 5 of the Act whenever advertising and selling unregistered securities **without broker-dealers or underwriters involved**, the Supreme Court analysis of the Section 4(a)(2) exemption should be given utmost consideration when revising the “Accredited Investor” definition.

The 1933 Securities Act [AS AMENDED THROUGH P.L. 112-106, APPROVED APRIL 5, 2012]:
<https://www.sec.gov/about/laws/sa33.pdf>

The 1933 Securities Act, as it was originally enacted in 1933:
http://sechistorical.org/collection/papers/1930/1933_05_27_Securities_Act.pdf

In S.E.C. v. Ralston Purina Co., the Supreme Court established the basic criteria for determining the availability of Section 4(a)(2). The Court held that the availability of Section 4(a)(2) should turn on whether the particular class of persons affected need the protection afforded by the Securities Act. The Court found that an offering to those who are shown to be able to fend for themselves is a transaction not involving any public offering.

In 1962, prompted by increased use of the exemption for speculative offerings to unrelated and uninformed persons, the Commission clarified limitations on the exemption's availability. The Commission stated that “[w]hether a transaction is one not involving any public offering is essentially a question of fact and necessitates a consideration of all surrounding circumstances, including such factors as the relationship between the offerees and the issuer, the nature, scope, size, type and manner of the offering.” – The Commission also noted that public advertising would be incompatible with a claim of a private offering. See: [Non-Public Offering Exemption, Release No. 33-4552](#) (Nov. 6, 1962)

Individual transactions, regardless of how they are advertised, conducted by the issuer themselves with no broker-dealers and no underwriters can and should be deemed eligible for Section 4(a)(2) exemption whenever the group of investors who choose to participate in the unregistered securities Offering are non-Accredited but promise to obtain Accreditation from the SEC as a prerequisite to receiving the shares they are attempting to purchase. This is a “bright-line test” and “contingent upon Accreditation” offerings, even those which are advertised publicly, should indeed become a thing in the future. Furthermore, any issuer who is willing to comply with the limitations imposed by a limited offering Rule, such as Rule 506(b) of Regulation D, in which the total number of non-Accredited investors is limited, or any future limited offering Rule that the SEC might enact, where the securities offered and sold are restricted securities and there are limits placed on the Offering, should obviously have every legal and regulatory protection possible in support of their legitimate capital formation effort. Being allowed to advertise “Contingent Upon Investor Accreditation by The SEC”^{iv} and “Limited Offering Available to Only 35 Non-Accredited Investor Applicants” publicly, without being accused of attempts to violate securities laws, would fundamentally restore the original intent and the constitutional validity of our federal securities regulations with respect to startup capital formation when no broker-dealer or underwriter or registered crowdfunding portal is involved in the startup's unregistered Offerings.

I strongly urge the Commission to permit such advertising, expressly, by Rule. There is no reason for the unconstitutional prohibitions that have been promulgated incorrectly from the revised Securities Act to continue to exist, now that the JOBS Act has made it clear that at least in the case of startups seeking to raise only seed capital from a limited number of investors the old Rules were totally unworkable. In the Internet era, when mass communications that still feel private and cost nothing are everywhere, it is no longer viable for the SEC or state securities regulators to criminalize public speaking about startups.

Startups simply must have a legal right, and support from the SEC, to reach out “publicly” to members of the industries and expert communities in which the founders have reputations or experience to draw from those communities the support and seed capital needed to get the startup off the ground. It makes no sense whatsoever for the SEC's Rules to restrict the supply of startup seed capital to non-Accredited investors-only as though this is what Congress intended. Even the Supreme Court confirmed that “all surrounding circumstances” must be considered before it can be found that a particular Offering was a “public offering” that Congress intended to prohibit, to not extend beyond the authority of lawmakers to regulate markets or inter-state commerce. Congress does not have the authority to prohibit a startup from attracting, even through advertising, a small number of well-informed investors who are familiar with the business of the issuer, familiar with the founders or familiar with the industry in which the new business activity will be competing for customers. I firmly believe that the Commission erred, in 1962, by presuming that public advertising necessarily means that a “public offering” has occurred. What the Commission should have concluded and opined at the time was that an offering conducted by an issuer themselves, seeking to attract investors who are sophisticated in the field of endeavor for investment, when communicated and transacted without the help of a broker-dealer or underwriter, would not be a “public offering” when the issuer creates limited offering circumstances and then advertises seeking a limited number of investors who are sophisticated in the context of the startup satisfactory to the issuer.

The Court further observed that offerings to persons who have access to the same kind of information that the Securities Act would make available in the form of a registration statement may come within the exemption.

In my opinion the Supreme Court ruling means startups are allowed to raise seed capital with public advertising. Startups often have no financial history, nothing, no prior business, no assets, zeros on every financial statement; **NINJA startups. No Income, No Job or Assets** like “sub-prime” mortgage borrowers, but investors invest anyway! An offering to people who know everything there is to know about startups may “come within the exemption”--funding NINJAs by investing in startups creates jobs!

i “The biggest start-up successes - from Henry Ford to Bill Gates to Mark Zuckerberg - were pioneered by people from solidly middle-class backgrounds. These founders were not wealthy when they began. They were hungry for success, but knew they had a solid support system to fall back on if they failed.”

by Eric Ries

ii “The Pre-Cognitive Anti-Trust Violation: How the decimation of the IPO market has hurt the economy and worse” Posted on February 4, 2016

by Mark Cuban

iii “The individual rights to freely exercise one’s religion, speak freely, publish freely, peaceably assemble, and petition the government are natural rights independent of the Constitution — just like the right to freedom of association. In a free society, any person or group of persons has the right to associate with any other person or group of persons willing to associate with him or it on the basis of any standard and for any reason.”

by Laurence M. Vance, writing for the Future of Freedom Foundation.

iv **SECURITIES AND EXCHANGE COMMISSION:**

Alternative Criteria for Qualifying As An Accredited Investor Should Be Considered

GAO-13-640: Published: Jul 18, 2013. Publicly Released: Jul 18, 2013.

<http://www.gao.gov/products/GAO-13-640>

<http://www.gao.gov/assets/660/655963.pdf>