No. 09-525

IN THE

Supreme Court of the United States

JANUS CAPITAL GROUP, INC., ET AL.,
Petitioners,

v.

FIRST DERIVATIVE TRADERS,
Respondent.

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

BRIEF OF *AMICUS CURIAE* SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION SUPPORTING PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES Page

TABLE OF AUTHORITIES—continued

STATUTES AND REGULATIONS

TABLE OF AUTHORITIES—continued

ADMINISTRATIVE DECISION

LEGISLATIVE HISTORY

TABLE OF AUTHORITIES—continued

OTHER AUTHORITIES Page

TABLE OF AUTHORITIES—continued

INTEREST OF *AMICUS CURIAE*[1]

The Securities Industry and Financial Markets Association ("SIFMA") brings together the shared interests of hundreds of securities firms, banks, and asset managers. SIFMA's mission is to support a strong financial industry, investor opportunity, capital formation, job creation, and economic growth, while building trust and confidence in the financial markets. With offices in New York and Washington, D.C., SIFMA is the U.S. regional member of the Global Financial Markets Association ("GFMA"). For more information, visit www.sifma.org.

SIFMA has a particular interest in this litigation because of the potential adverse impact on the securities industry. Respondent seeks to obtain what Congress did not provide: a private civil remedy against secondary actors under § 10(b) of the Securities Exchange Act of 1934. As this Court has recognized twice in recent years, the judicial creation of such a remedy would impose tremendous costs and have significant "ripple effects" that are detrimental to issuers and investors alike. *Cent. Bank of Denver* v. *First Interstate Bank of Denver*, 511 U.S. 164, 189 (1994); see also *Stoneridge Inv. Partners, LLC* v. *Scientific-Atlanta, Inc.*, 552 U.S. 148, 163–64 (2008) (explaining how the prospect of "extensive discovery"

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[1] Pursuant to this Court's Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus curiae* made a monetary contribution to the preparation or submission of the brief. Pursuant to Rule 37.3, *amicus curiae* states that petitioners and respondent have consented to the filing of this brief; petitioners and respondent have separately filed with the Clerk of the Court letters granting blanket consent to the filing of *amicus* briefs.

can enable "plaintiffs with weak claims to extort settlements from innocent companies"). For this reason, and as further explained below, SIFMA respectfully urges the Court to reverse.

SUMMARY OF ARGUMENT

This is the third time since 1994 that the Court has addressed the standards for imposing private civil liability under § 10(b) of the Securities Exchange Act of 1934 on a party who made no statement of its own to the public markets. It should be the last. As the Court has done before, it should reject the *ad hoc* approach taken by the court of appeals, which imposes primary liability on parties who did not make the statements at issue and were not publicly identified as the source of those statements. Instead, the Court should adopt the workable, bright-line rule that a number of circuits have developed through more than a decade of case law. Under this rule, known as the direct-attribution test, only those parties to whom a statement is publicly attributed at the time it is made may be civilly liable to purchasers or sellers on the public markets for its contents. The reasons are threefold.

First, the bright-line rule, unlike the Fourth Circuit's holding, is consistent with the language of § 10(b), which imposes liability only on those who actively "use or employ" a false statement "in connection with" a purchase or sale of securities, and with the language of Rule 10b-5(b), which holds liable only those who "make" a false or misleading statement. Both the statute and the rule are most naturally read to refer to the public act of issuing a statement under one's own name. By permitting liability for lending assistance, the Fourth Circuit's approach ignores the text of the statute and rule,

improperly expands the judicially implied private right of action, and collapses the distinction between primary and secondary liability, in conflict with this Court's precedents.

Second, a bright-line rule best satisfies the crucial goals of certainty and predictability in rules governing the securities markets and securities litigation. As this Court has repeatedly recognized, the securities laws best protect investors when judicially administrable rules provide clear guidance to issuers and the securities industry, thus lowering the costs of compliance that ultimately would otherwise be passed on to investors. The Fourth Circuit's approach, which is based on novel, case-specific presumptions and inferences that can evolve over time, would create massive uncertainty as to when secondary actors may be held primarily liable for statements they did not themselves make—uncertainty that private plaintiffs would undoubtedly exploit by bringing strike suits bearing substantial nuisance value but lacking legal merit. That approach is directly at odds with the approach Congress has taken to limit abusive securities litigation in light of the substantial costs it imposes on both companies and investors.

Third, a more expansive interpretation of § 10(b) is not necessary because Congress has provided adequate, carefully circumscribed means to hold secondary actors liable for causing, controlling, or assisting the making of false or misleading statements in public statements to the market. In so doing, Congress has often limited the parties who can sue, or permitted only the government to enforce particular provisions. Indeed, Congress has returned to this area frequently, most recently passing comprehensive legislation in 2010 that expanded the

SEC's ability to pursue secondary actors in the mutual fund industry. Expanding the § 10(b) cause of action to reach the conduct alleged here would nullify the express limitations Congress has imposed.

ARGUMENT

I. THE DECISION BELOW CONFLICTS WITH THE TEXT OF § 10(b) AND RULE 10b-5 AND THIS COURT'S PRECEDENTS.

Two cardinal principles have defined this Court's jurisprudence under § 10(b). *First,* the Court has repeatedly held that in determining "the scope of conduct prohibited by § 10(b), the text of the statute controls." *Cent. Bank*, 511 U.S. at 173; see also *id*. at 177 ("It is inconsistent with settled methodology in § 10(b) cases to extend liability beyond the scope of conduct prohibited by the statutory text."). *Second*, the Court has instructed that Congress, not the courts, must take the lead if the implied private right of action under § 10(b) is to be extended beyond its present boundaries. See *Stoneridge*, 552 U.S. at 165 ("The decision to extend the cause of action is for Congress, not for us."). The decision below violates both of these guiding principles.

1. Whether viewed as a gloss on the misrepresentation requirement or (as the lower court considered it) the reliance requirement, the Fourth Circuit's theory of liability cannot be squared with the text of § 10(b) and Rule 10b-5. Section 10(b) makes it unlawful "*[t]o use or employ*" a "manipulative or deceptive device or contrivance" in violation of SEC rules. 15 U.S.C. § 78j(b) (emphasis added). And the section of Rule 10b-5 under which respondent proceeds renders it unlawful "[t]o *make* any untrue statement of material fact" in connection

with the purchase or sale of a security. 17 C.F.R. § 240.10b-5(b) (emphasis added).

As petitioners have shown, the plain language of these provisions requires active misconduct. The defendant must "use or employ" a deceptive device and "make" a false or misleading statement. See *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 200–01, 212–13 (1976) (emphasizing that the statute's language "clearly connotes intentional misconduct"). Merely playing a supporting role does not give rise to liability.[2]

The only Janus entity that actually "made" the statements in each prospectus was the mutual fund itself, whose duty it was to file a registration statement containing the prospectus. One who merely assists with or participates in the drafting of a document issued by another does not "make [a] . . . statement" within the ordinary meaning of that phrase. Just as secretaries who draft letters for their bosses and law clerks who draft opinions for their judges do not "make" any statements of their own, an investment advisor who helps draft a prospectus for review and approval by a mutual fund does not "make" the statements contained in the prospectus.

Nor does helping disseminate a statement made by another qualify as "making" a statement. A courier, for example, does not "make" the statements in the documents he delivers. And there is no sense in which merely having a document available for

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[2] The statute does not impose any affirmative duties to act; a failure to speak may be grounds for liability only if the defendant is under a preexisting duty of disclosure that "arises from [a] specific relationship between two parties." *Cent. Bank*, 511 U.S. at 180 (citing *Chiarella* v. *United States*, 445 U.S. 222, 228 (1980)).

download on one's website constitutes "making" the statements contained in the document. Indeed, every prospectus and registration statement is posted on the SEC's website, yet it would be absurd to speak of the SEC as "making" the statements contained therein. Similarly, diversified financial services companies often host the documents of their various subsidiaries and affiliates on one website for ease of investor access, but no court has ever suggested that this practice makes the parent the guarantor of all of those statements.

2. Moreover, under § 10(b) and Rule 10b-5, the alleged misconduct must occur "in connection with the purchase or sale of any security." With this language, Congress required a nexus between the deception and the purchase or sale. "Not deception alone, but deception with respect to certain purchases or sales is necessary for a violation of statute." *Morrison* v. *Nat'l Austl. Bank*, 130 S. Ct. 2869, 2887 (2010). "Those purchase-and-sale transactions are the objects of the statute's solicitude." *Id.* at 2884.

The decision below ignores this requirement and allows suits to be brought on the basis of statements having only the most attenuated relationship with the plaintiffs' purchase or sale of securities. The foreseeable and intended recipients of the mutual fund prospectuses were fund shareholders. It is for their information that the prospectuses were prepared, and they were the ones who were legally required to receive copies of them pursuant to the provisions of the Securities Act of 1933 and the Investment Company Act of 1940.

But respondent is not an investor in the funds. It is an investor in JCG, whose securities were not described in the fund prospectuses. Respondent does not allege that it or any other member of the putative

class even received, let alone read, a copy of the prospectuses at issue. It stretches the statutory language beyond the breaking point to extend § 10(b) to someone who did not even receive the document at issue or buy the securities to which it pertains.

3. In addition to ignoring the plain language of the statute and rule, the decision below expands the private right of action beyond its present boundaries in violation of this Court's express instruction in *Stoneridge*. It does so in two ways.

First, in *Central Bank*, this Court held that "a private plaintiff may not maintain an aiding and abetting suit under § 10(b)." 511 U.S. at 191. Although Congress has since amended the statute to allow the *SEC* to pursue aiders and abettors, it has rejected invitations to create a private right of action for aiding and abetting. See, *e.g.*, *Stoneridge*, 552 U.S. at 158.

The decision below eviscerates this distinction and vastly expands the § 10(b) private right of action by imposing primary liability for conduct that constitutes, at most, mere aiding and abetting. Allegations of "participating," "helping," or "assisting" are simply ways of saying "aiding and abetting," "scheming," or "conspiring" without using those words. See *Cent. Bank*, 511 U.S. at 181, 184 ("substantial assistance" or "knowing participation"); *Shapiro* v. *Cantor*, 123 F.3d 717, 720 (2d Cir. 1997) ("Allegations of 'assisting,' 'participating in,' 'complicity in' and similar synonyms . . . all fall within the prohibitive bar of *Central Bank*.").

This Court recently rejected a similar theory in *Stoneridge*, holding that imposing primary liability on a party who "schemed" behind the scenes to cause the falsification of financial statements "would revive

in substance the implied cause of action against all aiders and abettors except those who committed no deceptive act in the process of facilitating the fraud." 552 U.S. at 162–63. Indeed, *Stoneridge* specifically rejected the notion that a secondary actor can be held liable for "providing assistance" to a company that makes a false or misleading statement. *Id*. The Court should do the same here, lest it "undermine Congress' determination that this class of defendants should be pursued by the SEC and not by private litigants." *Id*.

Second, the Fourth Circuit improperly extended the presumption of reliance to investors who did not receive the prospectus or buy the securities to which it pertains. Worse, the court did so not based on any empirical study of the markets—as in *Basic, Inc.* v. *Levinson*, 485 U.S. 224 (1988)—but on unprovable guesswork about what investors would assume. As this Court has recognized, a plaintiff may not "base its action on Rule 10b-5 . . . without having either bought or sold the securities described in the allegedly misleading prospectus." *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 727 (1975); see also *Merrill Lynch, Pierce, Fenner & Smith Inc.* v. *Dabit*, 547 U.S. 71, 84 (2006) ("[T]his Court in *Blue Chip Stamps* relied chiefly, and candidly, on 'policy considerations' in adopting that limitation.") (quoting *Blue Chip Stamps*, 421 U.S. at 737). The judicially implied presumption of reliance predates the Private Securities Litigation Reform Act of 1995 (PSLRA), see *Basic,* 485 U.S. at 241–49, and should not be further expanded without congressional action.

II. THE FOURTH CIRCUIT'S THEORY OF LIABILITY WOULD CREATE CRIPPLING UNCERTAINTY IN THE SECURITIES MARKETS.

1. This Court's strict adherence to the text of the statute and rule has long been informed by "[t]he practical consequences" of interpreting the statute expansively. *Stoneridge*, 552 U.S. at 157–64. Because the securities markets are "'an area that demands certainty and predictability,'" *Cent. Bank*, 511 U.S. at 188 (quoting *Pinter* v. *Dahl*, 486 U.S. 622, 652 (1988)), the Court has rejected tests that are "complex in formulation and unpredictable in application," *Morrison*, 130 S. Ct. at 2878. As the Court noted in *Central Bank*, the lack of clear and predictable liability rules "leads to the undesirable result of decisions 'made on an ad hoc basis, offering little predictive value' to those who provide services to participants in the securities business." 511 U.S. at 188. "'[S]uch a shifting and highly fact-oriented disposition of the issue of who may [be liable for] a damages claim for violation of Rule 10b-5' is not a 'satisfactory basis for a rule of liability imposed on the conduct of business transactions.'" *Id.*

Accordingly, this Court has repeatedly stressed the need for unambiguous, readily administrable rules to govern and constrain private securities-fraud litigation. Without such rules, the Court has admonished, private lawsuits can be employed "abusively to impose substantial costs on companies and individuals whose conduct conforms to the law." *Tellabs, Inc.* v. *Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007). "[P]laintiffs with weak claims [can] extort settlements from" companies that are innocent, but that nevertheless fear "extensive discovery and the potential for uncertainty and disruption in a

lawsuit." *Stoneridge*, 552 U.S. at 163–64; see also *Merrill Lynch*, 547 U.S. at 80–81.

The risk that such suits will force settlements is anything but fanciful. In 2008 alone, almost 100 private securities suits settled for a total value of $3.6 billion. See PriceWaterhouseCoopers, *2008 Securities Litigation Study* 18 (Grace Lamont ed. Apr. 2009). That these cases sometimes settle for substantial amounts does not mean that the lawsuits are meritorious. To the contrary, and as this Court has acknowledged, the staggering cost and disruption of the discovery process places immense pressure on companies to settle—regardless of the merits—once their motion to dismiss the suit on the pleadings has been denied. See *Blue Chip Stamps*, 421 U.S. at 741; see also *Cent. Bank*, 511 U.S. at 189 ("uncertainty [in] the governing rules" could prompt companies, "as a business judgment, to abandon substantial defenses and to pay settlements in order to avoid the expense and risk of going to trial").

2. The Fourth Circuit's novel approach invites such uncertainty and staggering costs. Unlike the well-tested direct-attribution rule, which offers a "bright line" developed in the case law for more than a decade, the lower court's decision provides no useful guidance. Instead, it offers a "case-by-case" analysis, which examines the "essence" of the complaint and asks whether, "'as a practical matter,'" unidentified "interested investors" would "infer" that the defendant "played a substantial role" in preparing or approving the content of the disclosure. Pet. App. 17a–24a.

None of these terms is defined, and none has an established meaning in § 10(b) jurisprudence.[3] But all of them would undoubtedly provide ample grist for plaintiffs' lawyers, who would vigorously test their limits in protracted and burdensome litigation. On a "case-by-case" basis, defendants would be required to fend off novel claims, reviewed under an evolving and cryptic standard, which, as this case shows, offers a wide path to discovery and few guideposts along the way. The Fourth Circuit's amorphous standard would virtually ensure that meritless complaints would survive motions to dismiss, opening the door to costly discovery and the attendant pressure to settle.

If Congress chose to impose this unworkable regime, that would be its prerogative. But Congress has taken the opposite path, seeking "to protect investors and maintain confidence in the securities markets" in response to "significant evidence" of abusive litigation practices. H.R. Rep. No. 104-369, at

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[3] The "substantial participation" standard referenced in two Ninth Circuit cases, *see Howard* v. *Everex Sys., Inc.,* 228 F.3d 1057, 1061 n.5 (9th Cir. 2000); *In re Software Toolworks Inc. Sec. Litig.,* 50 F.3d 615, 628–29 & n.3 (9th Cir. 1994), offers no more precise guidance. The defendant-auditor in *Software Toolworks* was sued over letters to the SEC that identified it as a source "and actually referred the SEC to two [audit] partners for further information," 50 F.3d at 628 n.3, and the court in *Howard* declined to apply the rule on the grounds that the statement at issue was publicly attributed to a corporate officer, *see* 228 F.3d at 1062–62. Thus, nothing in the case law distinguishes "substantial participation" from liability for aiding and abetting, which "has been interpreted to include 'participation in the editing' of information for the purpose of marketing securities." *SEC* v. *Fehn*, 97 F.3d 1276, 1293 (9th Cir. 1996). Even the SEC has recognized that the test is susceptible to "misinterpretation" because it could reach beyond primary conduct. *See* Brief for SEC as *Amicus Curiae* at 18–19, *Klein* v. *Boyd*, Nos. 97-1143, 97-1261 (3d Cir. filed Apr. 1998).

31 (1995) (Conf. Rep.). This has been a wise course. As the Court has recognized, "the increased costs incurred by professionals because of the litigation and settlement costs under 10b-5 may be passed on to their client companies, and in turn incurred by the company's investors." *Cent. Bank*, 511 U.S. at 189. As a result, extending the scope of the implied private cause of action under § 10(b) may well harm the very investors that the statute was designed to protect. Further, the increased risk of liability would drive business decisions that could likewise injure investors. See, *e.g.*, *id.* ("[N]ewer and smaller companies may find it difficult to obtain advice from professionals"). Now is not the time to change direction and, through judicial fiat, create innovative avenues for securities litigation.

III. CONGRESS HAS PROVIDED ADEQUATE EXPRESS REMEDIES FOR THE CONDUCT ALLEGED.

A clear and predictable application of § 10(b) and Rule 10b-5 does not leave private plaintiffs, or the government, without remedies. To the contrary, Congress has provided numerous remedies for the conduct alleged here—and placed limits upon those remedies for a reason. The decision below nullifies these limits and overhauls the comprehensive and reticulated scheme that Congress has enacted and repeatedly refined.

This Court's approach is "to construe statutes, not isolated provisions." *Gustafson* v. *Alloyd Co.*, 513 U.S. 561, 568 (1995). The Court has thus cabined the implied § 10(b) cause of action so that it does not render superfluous the restrictions in other provisions of the 1933 and 1934 Acts. See, *e.g.*, *Cent. Bank*, 511 U.S. at 178–79 ("[W]e use the express causes of action in the securities Acts as the primary

model for the § 10(b) action."); *id.* at 182–83; *Ernst*, 425 U.S. at 206–10; *Blue Chip Stamps*, 421 U.S. at 736. The Court has also refused to "expand the defendant class for 10b-5 actions beyond the bounds delineated for comparable express causes of action." *Cent. Bank*, 511 U.S. at 180; see also *Va. Bankshares, Inc.* v. *Sandberg*, 501 U.S. 1083, 1104 (1991).

Examination of the provisions of the 1933 and 1934 Acts shows that § 10(b) should not be extended to create private civil claims against parties who have no public role in a statement to the markets. Such a result would improperly override the limits on the express civil claims created by Congress, and undo Congress's decision that only the SEC and the Justice Department may sue such defendants. "The fact that Congress chose to impose some forms of secondary liability, but not others, indicates a deliberate congressional choice with which the courts should not interfere." *Cent. Bank*, 511 U.S. at 184. The Fourth Circuit's decision violates this principle.

Privately Enforceable Provisions

1. Section 20(a) of the 1934 Act and § 15 of the 1933 Act. In many cases, the argument for extending liability beyond the parties named in a public statement is to provide a claim against unaffiliated secondary actors such as accountants, attorneys, and investment banks. Here, the underlying thrust of respondent's claims is the notion that JCM, while a separate corporation from the Janus funds, somehow influenced them. Pet. App. 27a–31a. But Congress has provided explicit remedies for this situation under both the Securities Exchange Act of 1934 and the Securities Act of 1933. See 15 U.S.C. §§ 77o & 78t(a) (providing that "[e]very person who, directly or indirectly, controls any person liable under any provision of this chapter or of any rule or regulation

thereunder shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable, unless the controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action"). These provisions, "in marked contrast to the implied § 10 remedy . . . impose derivative liability." *Musick, Peeler & Garrett* v. *Employers Ins. of Wausau*, 508 U.S. 286, 296 (1993).

These provisions, however, do not apply in this case. Plaintiffs have not alleged that JCM "controls" the funds, which are governed by independent trustees. See 15 U.S.C. §§ 80a-15(a)-(c), 80a-24(a); see also *Jones* v. *Harris Assocs. L.P.*, 130 S. Ct. 1418, 1422–23 (2010); *Laperriere* v. *Vesta Ins. Group, Inc.*, 526 F.3d 715, 721 (11th Cir. 2008) (per curiam) ("The legislative purpose in enacting a control person liability provision was to prevent people and entities from using straw parties, subsidiaries, or other agents acting on their behalf to accomplish ends that would be forbidden directly by the securities laws."). There is no need to distort § 10(b)'s terms to duplicate the provisions of the control-person statutes, and there is certainly no basis to stretch the bounds of § 10(b) to cover terrain onto which Congress did not venture.

2. Sections 11 and 12 of the 1933 Act. Section 11 of the 1933 Act creates a claim only against enumerated defendants for misrepresentations or omissions in a registration statement for an offering of new securities. See 15 U.S.C. § 77k(a). This list includes directors of the issuer, underwriters, and those who sign or consent to be named in a registration statement. *Id.*; see also *Cent. Bank*, 511 U.S. at 179. But it does not encompass investment

advisers to a mutual fund, which are governed by the Investment Company Act of 1940 and the Investment Advisers Act of 1940. See, *e.g.*, 15 U.S.C. § 80b-6 (prohibiting fraud and other misconduct); see generally *Jones*, 130 S. Ct. 1418.

Section 12(a)(1) and (a)(2) claims are directed against anyone who "[o]ffers or sells a security . . . by means of a prospectus or oral communication" that is false or misleading, or in violation of registration requirements, and may be brought only by "the person purchasing such security from him." 15 U.S.C. § 77*l*(a)(1)–(2). The class of defendants is limited to those in privity with the plaintiff or who directly solicit the plaintiff's purchase at least in part for their own financial gain. This Court rejected extending § 12 liability to someone "'whose participation in the buy-sell [securities] transaction is a substantial factor in causing the transaction to take place.'" *Pinter* v. *Dahl*, 486 U.S. 622, 649 (1988); see *Cent. Bank*, 511 U.S. at 179. The Fourth Circuit offered no basis to ignore Congress's express limits here.

3. Section 18(a) of the 1934 Act. In § 18(a) of the 1934 Act, Congress addressed when a silent defendant should face private civil liability based on another defendant's misstatement or omission. Section 18(a) imposes liability on a defendant who "shall make *or cause to be made*" a statement that is "false or misleading with respect to any material fact" in "any application, report or document filed" pursuant to the 1934 Act. 15 U.S.C. § 78r(a). In § 10(b), by contrast Congress did not prohibit "causing" a deceptive device, but instead stopped at the defendant who actually "use[s] or employ[s]" the deceptive device in connection with a purchase or sale of securities.

Section 18(a) thus reaches a broader class of defendants than § 10(b). But it also includes a critical limitation. To preclude open-ended damages awards to the market as a whole, Congress required that the plaintiff show he actually read and relied upon the misstatement: Section 18(a) limits potential plaintiffs to "any person (not knowing that such statement was false or misleading) who, *in reliance upon such statement*, shall have purchased or sold a security at a price which was affected by such statement, for damages *caused by such reliance*." 15 U.S.C. § 78r(a) (emphases added). Because the statute expressly refers to the plaintiff's reliance on the specific statement—in addition to the requirement of an effect on the market price—it can be satisfied only by proof of individual reliance, rather than by the fraud-on-the-market presumption available under § 10(b). See, *e.g.*, *In re Suprema Specialties, Inc. Sec. Litig.*, 438 F.3d 256, 283–84 (3d Cir. 2006); *Heit* v. *Weitzen*, 402 F.2d 909, 916 (2d Cir. 1968).

The Fourth Circuit's decision would gut § 18(a). No private plaintiff would sue a secondary actor under § 18(a), which requires actual reliance, if he could sue the same defendant *without* proving actual reliance. Obviously, only Congress, not the lower courts, is allowed to abrogate statutory provisions.

4. Section 9(f) of the 1934 Act. Like § 18(a), § 9(f) of the 1934 Act reaches beyond defendants who use or employ the specified unlawful devices.[4] Sections 9(a)–(c) prohibit certain enumerated forms

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[4] Section 9(f) was formerly § 9(e) until it was renumbered under the recently enacted Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, tit. IX, sec. 929X(b), § 9, 124 Stat. 1376, 1870 (2010) (codified at 15 U.S.C. § 78i).

of market manipulation, and § 9(a)(4) prohibits false or misleading statements by a dealer, broker, "or the person selling or offering [a security] for sale" made "for the purpose of inducing the purchase or sale" of that security. 15 U.S.C. § 78i(a)–(c). Unlike § 10(b), § 9(f) creates additional express private civil liability for "[a]ny person who *willfully participates in* any act or transaction" prohibited by §§ 9(a)–(d). *Id.* § 78i(f) (emphasis added). As this Court has held, § 9(f) shows that "Congress knew of the collateral participation concept," and thus that the concept should not be implied into other civil-liability provisions. *Pinter*, 486 U.S. at 650 n.26. Nonetheless, even the class of defendants under § 9(f) does not include "one who aids or abets a violation." See *Cent. Bank*, 511 U.S. at 179.

The Fourth Circuit's approach would render important restrictions on the express § 9(f) action meaningless. For example, § 9 is limited to specified manipulative practices and a narrow class of false or misleading statements made directly between buyers and sellers of securities, see, *e.g.*, *Robbins* v. *Banner Indus.*, 285 F. Supp. 758, 761 (S.D.N.Y. 1966), for the specific "purpose of inducing the purchase or sale" of the specific security purchased or sold by the defendant, 15 U.S.C. § 78i(a)(4). Thus, unlike under § 10(b), a purchaser in the secondary market could not sue an issuer (let alone an adviser to the issuer) under § 9 over its periodic financial reports. See *Fischman* v. *Raytheon Mfg. Co.*, 188 F.2d 783, 788 (2d Cir. 1951) (§ 9(a)(4) "impose[s] restrictions somewhat like those imposed on a suit under Sec. 11 of the 1933 Act"). These limitations should not be ignored.

Government Enforced Provisions

Other provisions of the 1933 and 1934 Acts allow *only* the SEC and the Justice Department to sue for

the kind of conduct alleged here. These provisions reflect Congress's considered judgment to limit abusive securities-fraud litigation by private plaintiffs. The detrimental effect of such litigation on the competitiveness of American business was a driving concern of Congress in enacting the PSLRA and the Securities Litigation Uniform Standards Act of 1998. See H.R. Rep. No. 104-50, pt. 1, at 20 (1995) ("Fear of litigation keeps companies out of the capital markets."); 143 Cong. Rec. S10475, S10477 (daily ed. Oct. 7, 1997) ("[I]f our markets are to remain ahead of those in London, Frankfurt, Tokyo or Hong Kong, we must create uniformity and certainty.").

The threat of abusive private securities litigation is substantial. In the decade following the PSLRA, 2,465 issuers were named as defendants in securities-fraud class actions out of approximately 6,000 companies listed on the major U.S. exchanges. See Comm'n on the Regulation of U.S. Capital Mkts. in the 21st Century, *Report and Recommendations* 30 (Mar. 2007). It is for precisely these reasons that Congress has repeatedly provided broader remedies to the government than to private plaintiffs. Respondent's argument would nullify these policy choices made by Congress.

1. Section 17(a) of the 1933 Act. When Congress wanted to create broad liability for employing fraudulent "schemes" and "practices" it did so expressly. Section 17(a) of the 1933 Act, for example, makes it unlawful "to employ any device, *scheme*, or artifice to defraud, *or* . . . to *engage in* any transaction, practice, or *course of business* which operates or would operate as a fraud or deceit upon the purchaser." 15 U.S.C. § 77q(a)(1), (3) (emphasis added). Section 17(a) reaches any sale in the primary and secondary markets, including sales of open-ended

mutual funds. See *Gustafson*, 513 U.S. at 577–78; *United States* v. *Naftalin*, 441 U.S. 768, 777–78 (1979). The SEC has regularly used § 17(a) against secondary actors, see*, e.g.*, *Weiss* v. *SEC*, 468 F.3d 849, 855–56 (D.C. Cir. 2006), and against an array of fraudulent schemes, see, *e.g.*, *Brian A. Schmidt*, Rel. No. 33-8061, 2002 WL 89028, at *7–8 (Jan. 4, 2002).

But § 17(a) does *not* create a private right of action. See, *e.g.*, *Finkel* v. *Stratton Corp.*, 962 F.2d 169, 175 (2d Cir. 1992) (citing cases). Instead, § 17(a)'s sweeping prohibitions are bounded by the SEC's and the Justice Department's prosecutorial discretion, which ensures a focus on serious wrongdoing and the public interest. This is in marked contrast to the pursuit of private remedies, where the private plaintiffs' bar has a powerful economic incentive to sue and to extract nuisance settlements.

2. Other Provisions in the 1933 and 1934 Acts. Like § 17(a), other provisions of the 1933 and 1934 Acts expressly authorize the government, but not private civil plaintiffs, to pursue a variety of secondary actors. The 1934 Act grants the SEC express statutory authority to pursue registered broker-dealers and their "associated" persons who "willfully aided, abetted, counseled, commanded, induced, or procured" violations of the securities laws. 15 U.S.C. §§ 78o(b)(4)(E), 78u-2(a)(2); see also *Cent. Bank*, 511 U.S. at 183. The SEC can also sue ongoing and future violators of the securities laws "and any other person that is, was, or would be a cause of the violation, due to an act or omission the person knew or should have known would contribute to such violation." 15 U.S.C. § 78u-3(a). Similarly, the federal government can pursue those who "made or caused to be made" false statements in required filings or broker-dealer registrations. See *id.* §§ 78o(b)(4)(A),

78u-2(a)(3), 78ff(a). None of these provisions creates a private right of action.

3. The PSLRA. In the PSLRA, Congress rejected proposals to overrule *Central Bank* and expand the scope of private civil liability under § 10(b) to secondary actors. Instead, in enacting § 20(e) of the 1934 Act, 15 U.S.C. § 78t(e), Congress expressly provided that aiders and abettors may be pursued *only* in actions brought by the SEC. Thus, Congress gave the SEC, but *not* private plaintiffs, an express claim for conduct ("substantial assistance") by defendants who had no duty to disclose. This legislative decision makes "unsupportable" a reading of the § 10(b) private cause of action that transforms most aiders and abettors into primary violators. *Stoneridge*, 552 U.S. at 162–63.

4. Sarbanes-Oxley. In the Sarbanes-Oxley Act, enacted in 2002, Congress again rejected proposals to allow private civil plaintiffs to sue secondary actors under § 10(b). Members of Congress proposed "to give the victims of fraud the right to sue those who aid issuers in misleading and defrauding the public." H.R. Rep. No. 107-414, at 53–54 (2002). Congress was urged to "undo the Central Bank case and bring back aiding and abetting." *H.R. 3763 – The Corporate and Auditing Accountability, Responsibility and Transparency Act of 2002: Hearings Before the H. Comm. on Fin. Servs.*, 107th Cong. 63 (2002). It was asserted that "when a person adds substantial value to a fraudulent course of conduct—in other words, contributes in a substantive way to its success—then liability is necessary and appropriate to achieve both deterrence and compensation." *Id.* at 485–86.

Congress rejected these proposals for expanding the § 10(b) implied private cause of action. Instead, Congress empowered *the SEC* to direct to share-

holders any proceeds it obtained from the secondary actors it sued under § 20(e). 15 U.S.C. § 7246(a). From 2002 to 2006, the SEC recovered $8 billion, including from aiders and abettors, for "Fair Funds" distributions to shareholders. See SEC, *2006 Performance & Accountability Report* 23 (Nov. 2006). More recently, the SEC has arranged numerous distributions of tens or even hundreds of millions of dollars to fund investors harmed by the practice of market timing.[5]

Congress's repeated decisions not to modify any part of *Central Bank* in private civil suits is at least "entitled to a good deal of weight." *Blue Chip Stamps*, 421 U.S. at 749. "It is the federal lawmaker's prerogative . . . [to] shape the contours of . . . § 10(b) private actions." *Tellabs,* 551 U.S. at 327. Legislative acquiescence in *Central Bank* is particularly strong because Congress has held "[e]xhaustive hearings" on the issue at various times, and none of the introduced bills has passed. *Bob Jones Univ.* v. *United States*, 461 U.S. 574, 600–01 (1983).

5. Dodd-Frank. Finally, in the Dodd-Frank Act, enacted in July 2010, Congress was yet again importuned to reenact a private remedy for aiding

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[5] *See*, *e.g.*, Press Release, SEC Announces $79 Million Fair Fund Distribution in the Edward Jones Revenue Sharing Settlement (Apr. 26, 2007); Press Release, SEC Announces $30 Million Fair Fund Distribution to Investors Affected by Undisclosed Market Timing in RS Investments Mutual Funds (Apr. 25, 2008); Press Release, SEC Announces Fair Fund Distribution to Harmed Investors in Putnam Mutual Funds (Aug. 18, 2008); Press Release, SEC Announces Fair Fund Distribution to Investors Harmed by Market Timing in Franklin-Templeton Funds (Sept. 23, 2008); Press Release, SEC Announces $418 Million Fair Fund Distribution to Harmed Investors in Invesco Mutual Funds (Dec. 14, 2009).

and abetting. Such provisions were included in the original Senate version of the bill, in a stand-alone bill proposed in the Senate, and in a conference amendment proposed in the House.[6] But Congress declined to disturb the delicate balance previously struck, and instead instructed the U.S. Government Accountability Office to conduct a study of "the impact of authorizing a private right of action against any person who aids or abets another person in violation of the securities laws." This study includes "review of the role of secondary actors in companies issuance of securities," as well as a review of private securities litigation under the PSLRA and post-*Stoneridge* judicial decisions regarding secondary actors. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, tit. IX, § 929Z, 124 Stat. 1376, 1871 (2010).

Moreover, Congress once again expanded *the SEC's* authority to bring aiding-and-abetting claims. The SEC may now pursue aiders and abettors of violations of the Securities Act of 1933 and the Investment Company Act of 1940. It may also impose monetary penalties against aiders and abettors under the Investment Advisers Act of 1940. *Id.* tit. IX, sec. 929M(b), § 48, sec. 929N, § 209, sec. 929O, § 20(e), 124 Stat. at 1861–62 (codified at 15 U.S.C. §§ 80a-48, 80b-9, 78t(e)). Finally, Congress expanded

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[6] S. 1551, 111th Cong. (2009); 156 Cong. Rec. S3569, S3618 (daily ed. May 12, 2010) (statement of Sen. Specter regarding Amendment No. 3776); Discussion Draft of Restoring American Financial Stability Act of 2009, § 984 (Nov. 10, 2009); Ronald D. Orol, *Dodd Unveils Bank Reform Bill Without GOP Support*, MarketWatch, Nov. 10, 2009; Press Release, Rep. Maxine Waters, Waters Wins Big for Consumers, Homeowners, Minorities and Shareholders in Wall Street Reform and Consumer Protection Legislation (June 30, 2010).

the private remedy under § 9(f) and the prohibitions under § 10 itself (§ 10(a), governing short sales, and a new § 10(c), governing stock lending and borrowing) to cover all non-government securities rather than just exchange-traded securities. *Id.* tit. IX, § 929L, 124 Stat. at 1861 (codified at 15 U.S.C. §§ 78i, 78j).

Congress did *not*, however, provide the remedy that plaintiffs are seeking—and the Fourth Circuit provided—in this case. The message is clear. Consistent with *Central Bank* and *Stoneridge*, the decision below should be reversed.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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