No. 05-1157

In the Supreme Court of the United States

CREDIT SUISSE SECURITIES (USA) LLC, ET AL.,

Petitioners,

v.

GLEN BILLING, ET AL.,

Respondents.

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

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Whether, in a private treble damages action under the antitrust laws challenging underwriter conduct during highly regulated public offerings of securities, the standard for implying antitrust immunity is the potential for conflict with the securities laws, as this Court has held, or a specific expression of congressional intent to immunize such conduct and a showing that the SEC has power to compel the specific practices at issue, as the Second Circuit held.

RULES 24.1(b) AND 29.6 STATEMENT

In these consolidated cases, plaintiffs (respondents here) are Glen Billing, Mita Aggarwal, Tom Barnett, David Pazarella, Henry Sklanowsky, Ross Wiczer, Wayne H. Jones, Efriam Simcha, Robert H. Thomas, Robert Grovich, Binh Nguyen, Michael S. Weiss, Kenneth Shives, Demetrios Petratos, Deming Zhous, Brad Harrison, Bert Zauderer, Glenn Kerr, Hans Reihl, Heinz Wahl, Bruce J. Jiorle, Mark Sculnick, Susan Katz, Anthony Voto, Estelle L. Augustine, Don K. Burris, Rachel Schwartz, Milton Pfeiffer, Roderick Lau, Raymond Litwin, Joe Braswell, Buddy Dukeman, Anupkumar Bhasin, Anita S. Budich, Troy Brooks, Philip Warner, Carlos Reeberg, Jerry Cobb, David Federico, Farideh Sigari, Matthew Weiner, Joe Goldgrab and Local 144 Nursing Home Pension Fund.

Defendants (petitioners here) are:

Bear, Stearns & Co. Inc. The Bear Stearns Companies Inc., a publicly held corporation, is the parent company of Bear, Stearns & Co. Inc. No other publicly held corporation owns 10% or more of the stock of Bear, Stearns & Co. Inc.

Citigroup Global Markets Inc. Citigroup Global Markets Inc. (formerly known as Salomon Smith Barney Inc.) is a wholly owned subsidiary of Citigroup Financial Products Inc. (formerly known as Salomon Brothers Holding Company Inc.), which is a wholly owned subsidiary of Citigroup Global Markets Holdings Inc. (f/k/a Salomon Smith Barney Holdings Inc.), which is a wholly owned subsidiary of Citigroup Inc.

Comerica, Inc. Comerica, Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.

Credit Suisse Securities (USA) LLC (formerly named Credit Suisse First Boston LLC). Credit Suisse Securities (USA) LLC is a wholly owned subsidiary of Credit Suisse

(USA), Inc. (formerly named Credit Suisse First Boston (USA), Inc.), a public reporting company that has certain publicly traded securities and which is a wholly owned subsidiary of Credit Suisse Holdings (USA), Inc. (formerly named Credit Suisse First Boston, Inc.). Credit Suisse Holdings (USA), Inc. is a jointly owned subsidiary of Credit Suisse Group, the shares of which are publicly traded on the Swiss Stock Exchange, and Credit Suisse (formerly named Credit Suisse First Boston), which itself is a wholly owned subsidiary of Credit Suisse Group. Except as described above, Credit Suisse Securities (USA) LLC has no subsidiaries or affiliates that are publicly held, and no publicly held corporation owns 10% or more of the stock of Credit Suisse Securities (USA) LLC.

Deutsche Bank Securities Inc. Deutsche Bank Securities Inc. (formerly known as Deutsche Banc Alex. Brown Inc.) ("DBSI") has the following corporate parents: Deutsche Bank AG, Taunus Corporation, and DB U.S. Financial Markets Holding Corporation. Other than the aforementioned corporate parents, there is no publicly held corporation that owns 10% or more of DBSI's stock.

Fidelity Distributors Corp.; Fidelity Brokerage Services LLC; Fidelity Investments Institutional Services Co., Inc. Fidelity Distributors Corp. and Fidelity Investments Institutional Services Co., Inc. are direct subsidiaries of FMR Corp., a Delaware corporation that is privately held. Fidelity Brokerage Services LLC is wholly owned by Fidelity Global Brokerage Group, Inc., an entity that is, in turn, wholly owned by FMR Corp., a Delaware corporation that is privately held. In addition, other entities wholly owned by FMR Corp. have contractual relationships to distribute, administer, manage, and advise the Fidelity family of mutual funds.

Goldman, Sachs & Co. Goldman, Sachs & Co. is a subsidiary of The Goldman Sachs Group, Inc., which owns 10% or more of its partnership units. No other publicly held company owns 10% or more of the partnership units of Goldman, Sachs & Co.

The Goldman Sachs Group, Inc. The Goldman Sachs Group, Inc. has no parent corporations and no publicly held companies own 10% or more of its common stock.

Janus Capital Management LLC. Janus Capital Management LLC is owned by Janus Capital Group Inc., the shares of which are publicly traded on the New York Stock Exchange. No other publicly held company owns 10% or more of the stock of Janus Capital Management LLC.

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Morgan Stanley & Co. Incorporated. Morgan Stanley & Co. Incorporated is a wholly owned subsidiary of Morgan Stanley.

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Van Wagoner Capital Management, Inc. Van Wagoner Capital Management, Inc. has no parent corporations and no publicly held companies own 10% or more of its common stock.

Van Wagoner Funds, Inc. Van Wagoner Funds, Inc., a mutual fund entity, has no parent corporations. The following publicly held entities own 10% or more of any of its series of shares: (i) Van Wagoner Small Cap Growth Fund: Charles Schwab & Co., Inc. and National Financial Services Corp.; (ii) Van Wagoner Emerging Growth Fund: Charles Schwab & Co., Inc. and National Financial Services Corp. Charles Schwab & Co., Inc. and National Financial Services Corp. hold such shares as broker-dealers on behalf of their underlying customers. No other publicly held company owns 10% or more of the stock of Van Wagoner Funds, Inc.

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OPINIONS BELOW

The amended opinion of the court of appeals (Pet. App. 1a-71a) is reported at 426 F.3d 130. The district court's opinion (Pet. App. 72a-122a) is reported at 287 F. Supp. 2d 497.

JURISDICTION

The judgment of the court of appeals was entered on September 28, 2005. The court of appeals issued an amended opinion on October 26, 2005. Petitioners filed a timely petition for rehearing en banc on November 2, 2005, which was denied on January 12, 2006. Pet. App. 123a. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

Relevant provisions of the Sherman Act, 15 U.S.C. § 1 *et seq.*, Robinson-Patman Act, 15 U.S.C. § 13, Securities Act, 15 U.S.C. § 77a *et seq.*, and Securities Exchange Act, 15 U.S.C. § 78a *et seq.*, are reproduced at Pet. App. 208a-215a. The Securities and Exchange Commission's *Guidance Regarding Prohibited Conduct in Connection with IPO Allocations*, 70 Fed. Reg. 19672 (Apr. 13, 2005), is reproduced at Pet. App. 216a-233a.

STATEMENT

Plaintiffs allege that ten leading investment banks required purchasers in 900 initial public offerings of securities ("IPOs") to make "tie-in" stock purchases or to pay inflated commissions on unrelated trades as a quid pro quo for receiving shares in the offerings. Plaintiffs do not bring their claims under the federal securities laws. There are more than 300 pending suits that seek such relief. Instead, in an attempt to obtain treble damages not permitted by the securities laws and evade the requirements of the Private Securities Litigation Reform Act ("PSLRA"), plaintiffs filed these putative class actions under the Sherman Act and Robinson-Patman Act. Plaintiffs allege that investment banks "conspired" to impose "anticompetitive charges" on IPO buyers that inflated the price at which the IPO stocks traded in the aftermarket, and that institutional investors "bribed" the banks by paying those charges. See J.A. 10-62 (reproducing complaints).

As the United States and the SEC have observed, most of the conduct that plaintiffs challenge—including the collaboration of banks in underwriting "syndicates" and discussions among underwriters and investors to facilitate the IPO process—is permitted by the securities laws and essential to public offerings. And the SEC has undisputed authority to define unlawful tie-in arrangements and excessive commissions—conduct plaintiffs also challenge—and actively exercises that authority. The district court held that in these circumstances application of the antitrust laws to conduct closely overseen by securities regulators, who have drawn fine lines between permissible and unlawful activities in these very areas, would create both actual and potential conflict with the SEC's authority. Applying standards laid down in *Gordon* v. *New York Stock Exch.*, 422 U.S. 659 (1975), and *United States* v. *National Ass'n of Securities Dealers*, 422 U.S. 694 (1975), the court held that these conflicts created plain repugnancy between the two statutory schemes. It accordingly implied immunity to permit the securities regulatory regime to function as Congress intended and dismissed the complaints.

In rejecting the SEC's position and reversing the district court, the Second Circuit constructed a novel implied immunity test requiring evidence "that Congress clearly intended a repeal of the antitrust laws" with respect to the specific conduct at issue. Pet. App. 64a. Its ruling threatens to interfere with the exercise of regulatory authority that Congress delegated to the Commission and to chill capital-raising activities critical to the Nation's economy. The threat of treble damages antitrust liability would render virtually meaningless the nuanced distinctions drawn by expert agencies and deter conduct that securities regulators have explained is necessary to capital formation. This Court should reject plaintiffs' attempt to rewrite implied immunity doctrine and repackage securities claims as antitrust suits.

A. Collaboration Among Underwriters And Discussions With Investors About Their Aftermarket Intentions Are Central To Syndicated Public Offerings.

Plaintiffs' treble damages suits challenge conduct essential to "firm commitment" underwritings of new equity securities. In a firm commitment underwriting, a lead underwriter forms a syndicate with other investment banks to purchase the offering from the issuer and then resell it to investors. 1 LOUIS LOSS ET AL., SECURITIES REGULATION 492-494, 499-501 (4th ed. 2006). The issuer receives a specified amount of capital at a specified time and the syndicate bears "the risk of any inability to sell an issue" because it is priced too high or the public lacks interest in the offering. Pet. App. 4a. Firm commitment underwritings have been "the predominant structure for the public distribution of equities since the infancy of the securities markets" because they "spread the underwriting risk" and enable syndicates to conduct larger offerings than banks could underwrite individually. *Id.* at 86a-87a. Underwriter collaboration enhances the likelihood that an IPO will succeed by promoting "optimal distribution and visibility for the stock." Crocker, *The Initial Public Offering Process*, 955 PLI/Corp. 385, 392 (1996).

The "difficult task" of determining the appropriate size, price, and allocation of an IPO requires that underwriters gauge investor interest in the offering as accurately as possible. Pet. App. 6a. After a registration statement with an estimated price range for the offering is filed with the SEC, the underwriters and issuer hold meetings across the country with potential investors, as well as telephone and on-line conferences, to assess and generate demand. During this "road show," underwriters "build a book" by collecting non-binding "indications of interest" from investors for quantities of shares in the IPO at a range of prices. 1 LOSS ET AL., *supra*, at 509-510. Underwriters aim to build a book that contains indications of interest that exceed the number of shares offered, which enables the lead manager to choose the best investor accounts and the optimal share allocation and offering price. Crocker, *supra*, 955 PLI/Corp at 396.

The SEC recognizes the importance of book-building "in obtaining and assessing demand for an offering and in pricing the securities." *Commission Guidance Regarding Prohibited Conduct in Connection with IPO Allocations*, Release No. 34-51500, 70 Fed. Reg. 19672 (Apr. 13, 2005) ("*Allocations Release*"), Pet. App. 225a; see Br. of the United States as Amicus Curiae in Support of Certiorari 15 ("U.S. Br."). It has specified that, to gather relevant information, underwriters may lawfully discuss with a potential investor "[t]he customer's desired long-term future position in the security," the price "at which the customer might accumulate that position," and whether and at what price the investor will "hold the securities" or "sell the shares in the immediate aftermarket" (the period after the IPO is complete). Pet. App. 224a. The SEC distinguishes between these inquiries and improper statements that "immediate aftermarket buying would help [the investor] obtain allocations of hot IPOs." *Id.* at 227a.

The scope of permissible book-building inquiries reflects the SEC's understanding that underwriters and issuers have "wide latitude in allocating IPO shares." SEC, *IPOs: Why Individuals Have Difficulty Getting Shares*, http://www.sec.gov/answers/ipodiff.htm. Underwriters generally prefer investors who will hold the security in the aftermarket over investors who will "flip" the security for a short-term profit. REPORT OF SPECIAL STUDY OF SECURITIES MARKETS OF THE SECURITIES AND EXCHANGE COMMISSION, H.R. Doc. No. 88-95, Pt. 1, at 523 (Apr. 1963). Because "flipping causes stock prices to fluctuate—usually downward"—and can destabilize the market, the SEC recognizes that it is a "serious problem" that underwriters may combat. *Friedman* v. *Salomon/Smith Barney, Inc.*, 313 F.3d 796, 797-798, 801 (2d Cir. 2002) (citing SEC Release No. 34-2446); see also Carter & Dark, *Un-*

derwriter Reputation and IPOs: The Detrimental Effect of Flippers, 28 FIN. REV. 279, 282-283 (1993); 1 LOSS ET AL., *supra*, at 507-508 & n.34. The SEC accordingly permits underwriters to inquire whether a prospective IPO buyer intends to hold or flip its allocation. Pet. App. 224a.

It is also well understood that "underwriters usually offer [IPO] shares to their most valued clients." SEC, *IPOs: Why Individuals Have Difficulty Getting Shares*, *supra*; see *Department of Enforcement* v. *Invemed Assocs.*, No. CAF-030014, at 12-13 (NASD Office of Hearing Officers Mar. 3, 2006) (appeal pending) (underwriters' "lawful discretion" and "industry-wide practice" for "30 years" includes allocating "IPO shares to broker-dealers' best customers measured by their aggregate commissions"); *Amendments to Regulation M: Anti-Manipulation Rules Concerning Securities Offerings*, Release No. 34-50831, 69 Fed. Reg. 75774, 75785 (Dec. 17, 2004) (securities laws do not "prohibit a firm from allocating IPO shares to a customer because the customer has separately retained the firm for other services" for which the customer has "not paid excessive compensation"). The practice of allocating IPO shares to good customers also facilitates the collection of information about a customer's aftermarket intention to hold or flip the stock and the level of demand for the security, which informs the pricing of the offering.

B. The Complaints Seek Treble Damages Based On Conduct Essential To The Success Of IPOs.

Plaintiffs have launched an "indiscriminate assault" on this system of capital formation, challenging conduct that the SEC believes is "necessary" to the success of firm commitment underwritings. Pet. App. 91a, 153a-154a. In their "theater-wide attack on the syndicate system" (*id.* at 86a), the Billing plaintiffs find evidence of unlawful conspiracy when underwriters "regularly combined" into and "communicated and worked together" as syndicates, made agreements to manage syndicates, hosted road shows, conducted "telephone calls, meetings" and "regular communications" prior to IPOs, and "frequently communicated with one another as members" of stock exchanges and Self Regulatory Organizations ("SROs"), including the NASD and New York Stock Exchange ("NYSE"). Billing Am. Compl. ¶¶ 37-39, 45, 47, 54. These activities "are expressly permitted under the current securities regulatory regime." Pet. App. 92a; see *id.* at 154a-155a (the SEC confirms that this is all "permissible, regulated conduct"); U.S. Br. 12.

In the course of these joint activities, the Billing plaintiffs conclusorily assert, the underwriters conspired to require purchasers of IPO shares to pay "anticompetitive charges" in addition to the IPO price. Billing Am. Compl. ¶ 41. In exchange for receiving an IPO allocation, investors allegedly agreed to buy the security in the aftermarket at escalating prices (so-called "tie-in" or "laddering" arrangements), to buy the issuer's securities in subsequent offerings, or to buy other less attractive securities. *Id.* ¶ 42. This allegedly "inflate[d] the trading volume and prices of the [IPO] Securities by substantial amounts." *Id.* ¶ 8. In addition, plaintiffs claim that underwriters based allocations of IPO shares on the investor's willingness to funnel some profits from those shares to the allocating bank through payment of "non-competitively determined commissions" on purchases of unrelated securities. *Id.* ¶ 6. Plaintiffs who received IPO allocations at the issue price assert that they were injured by having to pay anticompetitive charges. Those who bought in the aftermarket say they were injured because they paid an artificially inflated market price. Billing Am. Compl. ¶¶ 6-8, 42-43, 60-61, 65, 72-73, 79; Pet. App. 17a-18a.

Based on these allegations—which defendants vigorously deny—the Billing plaintiffs seek treble damages under section 1 of the Sherman Act and state antitrust laws on behalf of a putative class of "tens of thousands" of investors who spent "many billions of dollars" on shares in 900 internet and technology companies. Plaintiffs assert that ten leading investment banks are responsible for losses that IPO and aftermarket buyers suffered in these highly speculative stocks when the "bubble" market of the late 1990s collapsed. Billing Am. Compl. ¶¶ 1, 10, 25, 27, 33.

The Pfeiffer complaint alleges that petitioners—eight of the investment banks sued in Billing along with eight of their institutional investor customers—violated the Robinson-Patman Act by engaging in "commercial bribery." Pfeiffer Compl. ¶ 6. Although the Pfeiffer suit uses a different legal label, the district court recognized that it turns on the "same conduct" that underlies the Billing plaintiffs' claims. Pet. App. 75a. Pfeiffer seeks treble damages on behalf of those who bought internet and technology stocks in IPOs or the aftermarket during the late 1990s; alleges that underwriters conditioned the allocation of shares on investors agreeing to buy additional shares in the aftermarket and to pay excessive commissions; and claims that analysts issued "buy" recommendations to drive up the price of the security in the aftermarket. Pfeiffer Compl. ¶¶ 1, 74-101, 115. As the SEC stated, "the fundamental point" of the Billing and Pfeiffer complaints "is the same." Pet. App. 128a n.1.

The conduct alleged in these two antitrust suits is the subject of more than 300 suits under the securities laws. *In re Initial Pub. Offering Sec. Litig.*, 241 F. Supp. 2d 281 (S.D.N.Y. 2003); *Miles* v. *Merrill Lynch & Co.*, 471 F.3d 24 (2d Cir. 2006). Exactly like the Billing and Pfeiffer suits, those securities actions—brought by many of the same plaintiffs' lawyers involved here—allege an industry-wide scheme characterized by tie-in agreements, payment of additional compensation to underwriters, and optimistic analyst reports. 241 F. Supp. 2d at 293-296. Unlike the Billing and Pfeiffer suits, the securities actions do not seek punitive treble damages, which are not permitted under the securities laws. 15 U.S.C. § 78bb; see also *id*. §§ 78u-4(e), 77k(e), (g).

C. Pursuant To Congressional Authority, The SEC And NASD Actively Regulate The Alleged Conduct.

1. The SEC Has Plenary Authority To Regulate IPOs.

The securities laws give the SEC "plenary authority" over the distribution of securities. Pet. App. 97a; see 3 Hunter Decl., Dist. Ct. Dkt. No. 99, Regulation Chart (describing dozens of applicable securities laws provisions). The Securities Act grants the SEC "power to regulate all aspects of the syndicate system," including "communications among underwriting participants and their customers prior to distribution," such as "roadshows, the dissemination of prospectuses, the process of book-building and solicitations of 'indications of interest.'" Pet. App. 97a, citing 15 U.S.C. §§ 77b(a)(3), 77j, 77l, 77z-2; U.S. Br. 12.

In addition, Congress in the Securities Exchange Act provided the SEC with "sweeping authority" to define manipulation and to decide when and how to prevent, restrict, or permit it. Pet. App. 99a; 15 U.S.C. § 78o(c)(2)(A), (D) (prohibiting underwriters from engaging in "fraudulent, deceptive, or manipulative" conduct and empowering the SEC to define that conduct). Section 9(a) authorizes the SEC to regulate transactions effected "for the purpose of pegging, fixing, or stabilizing the price of [a] security." *Id.* § 78i(a)(6). Section 10(b) confers broad authority to regulate "any manipulative or deceptive device or contrivance." *Id.* § 78j(b). The SEC's power extends to concerted conduct. *Id.* § 78i(a)(6) (the SEC may prohibit manipulative practices effected "with one or more other persons").

The SEC also has authority under the Exchange Act to oversee the entire "spectrum of broker-dealer conduct through its pervasive regulation of the NASD and other SROs." Pet. App. 104a. SRO rules go into effect only after the SEC finds them consistent with the requirements of the securities laws. 15 U.S.C. §§ 78o-3(b), 78s(b)(1)-(2). The NASD, as "the primary regulatory body for the broker-dealer industry, * * * closely regulates the market activities" of the defendants, including the conduct of IPOs, "subject to the stringent oversight of the SEC." Br. of the NASD as Amicus Curiae in Support of Certiorari 1-2 ("NASD Br.").

Congress vested the SEC with broad discretion to implement this comprehensive regulatory scheme. It understood that "so delicate a mechanism as the modern stock exchange cannot be regulated efficiently under a rigid statutory program," and that "considerable latitude" must be "allowed for the exercise of administrative discretion" in order "to avoid, on the one hand, unworkable 'strait-jacket' regulation and, on the other, loopholes which may be penetrated by slight variations in the method of doing business." S. REP. NO. 73-792, at 5 (1934). Stated otherwise, "[i]n a field where practices constantly vary and where practices legitimate for some purposes may be turned to illegitimate and fraudulent means, broad discretionary powers in the [SEC] have been found practically essential." H.R. REP. NO. 73-1383, at 6-7 (1934).

2. The SEC And NASD Consider Competition Along With Other Factors In Regulating IPOs.

Congress directed the SEC and SROs to weigh the impact of proposed regulations on competition in the securities industry. But unlike the antitrust laws, the "sole aim" of which "is to protect competition" (*Gordon* v. *New York Stock Exch.*, 422 U.S. 659, 689 (1975)), the securities laws require the SEC and SROs also to weigh goals that are not always served by unconstrained competition, such as investor protection, market efficiency, and capital formation. See 15 U.S.C. § 78w(a)(2) (Exchange Act requires the SEC to "consider *among other matters* the impact any [proposed] rule or regulation would have on competition"); *id.* § 78o-3(b)(9) (SEC must ensure that rules promulgated by SROs "do not impose any burden on competition *not necessary or appropriate*") (emphases added); see also *id.* § 78f(b)(5). In 1996 amendments, Congress made explicit that when the SEC "is engaged in rulemaking and is required to consider or determine whether an action is necessary or appropriate in the public interest, the Commission shall also consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation." *Id.* § 77b(b); accord *id.* § 78c(f).

Congress rejected an earlier proposal by the Justice Department to import a "competition first" policy into the securities laws. In 1975, Congress considered requiring the SEC "to adopt the least anticompetitive means of protecting investors and preserving fair and orderly markets" when examining proposed SRO rules. Release No. 34-17371, 45 Fed. Reg. 83707, 83719 (Dec. 12, 1980). Congress in the Securities Acts Amendments of 1975, Pub. L. No. 94-29, 89 Stat. 97 (1975), disapproved that "rigid standard," setting forth instead the balancing tests currently found in the Act. 45 Fed. Reg. 83719. It concluded that the "obligation to balance * * * the competitive implications of self-regulatory and [SEC] action should not be viewed as requiring the [SEC] to justify that such actions be the least anti-competitive manner of achieving a regulatory objective." S. REP. NO. 94-75, at 13 (1975). Rather, the SEC must "weigh competitive impact in reaching regulatory conclusions." *Ibid.*

3. The SEC And NASD Have Exercised Their Authority To Regulate The Alleged Conduct.

a. The SEC and NASD regulate IPOs from start to finish.

Exercising the broad authority provided by Congress, the SEC and NASD regulate all aspects of IPOs. The SEC "expressly recognizes" the importance of syndicates, which are "comprehensively and actively regulate[d]" by the NASD, "including their formation, communications among syndicate members, commission structure, allocation of securities and fee arrangements." Pet. App. 87a-88a; see *id.* at 88a-89a & n.7 (describing numerous NASD rules and interpretations regulating syndicates). Among other things, the NASD has preserved the "freedom" of underwriters to work together in underwriting "to the extent permitted by the federal securities laws" and has made clear that syndicate members may communicate with one another to "explor[e] the possibility of a purchase or sale of that security, and to negotiate for or agree to such purchase or sale." NASD Manual, IM-2110-5. Syndicate members' communications prior to distribution of an IPO, including communications with potential investors during the road show, are regulated directly by the SEC. Securities Act Rule 134, for example, governs the "building of the book" and permits underwriters to collect "indications of interest" from potential investors. 17 C.F.R. § 230.134.

"[U]nderwriter compensation and commission practices" are likewise subject to "active regulation." Pet. App. 105a-106a. As this Court found in *Gordon*, Congress intended in the Exchange Act to leave the supervision of commission rates to the SEC. 422 U.S. at 690-691. The SEC requires underwriters to disclose their "compensation and the amount of discounts and commissions to be paid to the underwriter" in connection with an IPO. 17 C.F.R. § 229.508(e); see *id.* §§ 230.461(a) & (b)(6), 240.10b-10(a)(2)(i)(B). The NASD, in turn, defines what constitutes underwriter compensation and limits the amount of compensation underwriters may receive from issuers. NASD Manual, Rule 2710. NASD rules also govern the fairness and disclosure of commissions that underwriters charge their customers and list factors that underwriters must consider in setting their compensation. See NASD Manual, IM-2440. The SEC and NASD "regularly enforc[e] violations of NASD rules concerning underwriter compensation and commissions." Pet. App. 106a n.23.

The SEC has adopted a host of regulations governing manipulative and deceptive conduct during and after public offerings. *E.g.*, 17 C.F.R. §§ 240.10b-1 to 240.10b-18; *id.* §§ 240.15c1-2 to 240.15c1-9; *id.* §§ 240.15c2-1 to 240.15c2-12. Regulation M makes it unlawful for IPO participants "to bid for, purchase, or attempt to induce any person to bid for or purchase" the IPO security before the distribution is completed, subject to exceptions for transactions and solicitations necessary to the IPO. 17 C.F.R. §§ 242.101(a) & (b)(8)-(9). Regulation M also prohibits aftermarket "stabilization" of an IPO stock "except for the purpose of preventing or retarding a decline in the market price of the security." *Id.* § 242.104(a)-(b).

b. The SEC and NASD actively regulate the conduct alleged in the complaints.

The SEC has a "well-documented history of considering the very conduct alleged in this action." Pet. App. 110a. In 1963, the SEC sent Congress a report that identified problems arising from the "hot-issue phenomenon"—including the solicitation of aftermarket purchases and underwriter compensation arrangements. SPECIAL STUDY, Pt. 1, at 520-521. The SEC specifically addressed the pre-distribution solicitation of aftermarket purchases in 1974, when it issued Proposed Rule 10b-20. Release No. 34-10636, 39 Fed. Reg. 7806 (Feb. 11, 1974). That rule would have barred underwriters from demanding payment in addition to the IPO price, including "conditioning an allocation of shares in a 'hot issue' * * * on an agreement to buy shares in another offering or in the aftermarket." SEC Div. of Market Regulation, Staff Legal Bulletin No. 10: *Prohibited Solicitations and "Tie-in" Agreements for Aftermarket Purchases* ¶ 2 n.6 (Aug. 25, 2000). The SEC withdrew proposed Rule 10b-20. Release No. 34-26182, 53 Fed. Reg. 41206 (Oct. 20, 1988). The SEC informed the courts below that it "considered, but eventually rejected, imposing bright-line rules concerning 'tie-in' arrangements and other improper aftermarket practices," "favoring instead a flexible regulatory approach under its general anti-fraud provisions." Pet. App. 112a.

The SEC again considered these issues in a 1984 report finding that certain "tie-in arrangements" may violate the Exchange Act. REPORT OF THE SEC CONCERNING THE HOT ISSUES MARKETS 37-38 (Aug. 1984). Reflecting the delicate balance that the SEC must achieve, the agency pointed out that it "maintained vigilant oversight over the hot issues markets" and had "aggressively ferreted out fraudulent conduct" while "avoiding unnecessary restrictions on first-time issuers that may stifle creativity, deny essential financing to legitimate businesses, and deter legitimate conduct." *Id.* at 81-82.

In 2000, the SEC staff addressed complaints that underwriters required customers "to buy additional shares in the aftermarket as a condition to being allocated [IPO] shares." Staff Legal Bulletin No. 10 ¶ 1. It concluded that "[t]ie-in agreements" are "prohibited by Regulation M" and "may violate the anti-manipulative provisions of the Exchange Act." *Id.* ¶ 2. In 2003, a blue-ribbon panel convened at the request of the SEC made recommendations to address allegations that underwriters allocated IPO shares based on investors' commitments to "purchase additional shares in the aftermarket" or to "pay excessive commissions on trades of unrelated securities." NYSE/NASD IPO ADVISORY COMMITTEE, REPORT AND RECOMMENDATIONS 1-2 (May 2003).

In 2005 guidance based upon this advisory committee report, the SEC made clear that whether a communication "constitutes legitimate book-building or an attempt to induce a bid or purchase in violation of Regulation M depends on the particular facts and circumstances." *Allocations Release*, *supra*, Pet. App. 225a. Observing that "obtaining and assessing information about demand for an offering during the book-building process" is not improper (*ibid.*), the SEC explained that underwriters may permissibly inquire about customers' "desired future position" in the IPO stock "in the longer term" and the "price or prices at which customers might accumulate that position," and that customers may express to underwriters their unsolicited "desire to purchase in the aftermarket." *Id.* at 227a-229a. However, underwriters may not solicit customers before completion of the IPO distribution "regarding whether and at what price and in what quantity they intend to place immediate aftermarket orders." *Id.* at 227a.[1]

In addition to this ongoing regulatory activity, the SEC and NASD both filed enforcement actions, which were all settled without an admission or denial of liability, alleging that individual underwriters violated securities laws and NASD rules by "engaging in conduct very similar, if not identical, to that alleged" here. Pet. App. 117a-118a & n.28 (citing enforcement actions involving J.P. Morgan Securities, Robertson Stephens, and Credit Suisse First Boston); see also SEC Litig. Release No. 19051 (Jan. 25, 2005), *SEC* v. *Goldman Sachs & Co.* (S.D.N.Y.); SEC Litig. Release No. 19050 (Jan. 25, 2005), *SEC* v. *Morgan Stanley & Co.* (D.D.C.). In *J.P. Morgan*, for example, the SEC alleged that the bank violated Regulation M and NASD Rule 2110 by attempting to induce IPO allocants to buy additional shares in the after-

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[1] In response to the blue-ribbon panel's report, the NASD proposed to bar underwriters from soliciting customers to buy "shares in the aftermarket as a condition to being allocated shares in the IPO." NASD Notice to Members No. 02-55, at 525 (Aug. 2002); see NASD Notice to Members No. 03-72, at 771 (Nov. 2003). The NASD elected not to pursue that proposal given commentators' concerns about the chilling effect of the rule on legitimate inquiries and suggestions that heightened NASD supervision would be more effective than a rule change. The NASD did propose a rule change barring conditioning IPO allocations on the receipt of "compensation that is excessive in relation to the services provided," which is pending before the SEC. Letter from Marc Menchel (NASD) to Katherine England (SEC) Regarding Proposed Rule Governing Allocations and Distributions of Shares in Initial Public Offerings, amend. No. 2 (Aug. 4, 2004), available at http://www.nasd.com/web/groups/rules_regs/documents/rule_filing/nasdw_010729.pdf.

The NYSE similarly proposed rule changes in response to the panel report. See Release No. 34-50896, 69 Fed. Reg. 77804 (Dec. 20, 2004) (proposed NYSE Rule 470). The SEC is in the process of considering those proposals. See http://sec.gov/rules/sro/nyse/nyse200412.shtml (collecting comments).

market. The bank consented to a final judgment that required it to pay a $25 million civil penalty and enjoined it from violating Regulation M and Rule 2110. Pet. App. 118a n.28. In other enforcement actions, the SEC and NASD alleged that underwriters exacted excessive commissions that were "profit-sharing in exchange for IPO allocations." J.A. 82 ¶¶ 68-69; see SEC Litig. Release No. 17327 (Jan. 22, 2002), *SEC* v. *Credit Suisse* (D.D.C.); *Invemed Assocs.*, *supra* (rejecting NASD charges of excessive commissions and profit sharing). None of the enforcement actions alleged collusion between any banks.

D. The SEC Informed The Lower Courts That Immunity Is Necessary Here To Avoid Disrupting Congress's Securities Regulatory Scheme.

The SEC asked the courts below to dismiss plaintiffs' antitrust claims on the ground of implied immunity. The SEC explained that "immunity is necessary" because the practices alleged lie at "the very heart of [its] regulatory authority" and permitting these antitrust suits to proceed "would disrupt the Commission's regulatory regime, as established by Congress, including particularly its ongoing regulatory efforts." Pet. App. 127a-129a. Describing its statutory authority to regulate syndicated underwritings and oversight responsibility for the NASD, the SEC observed that Congress expects it—not antitrust juries—"to determine the appropriate role for competition in the securities industry." *Id.* at 127a-136a.

The SEC explained that the repugnancy necessary for implying immunity is present even if some of the conduct alleged by plaintiffs violates the securities laws. Regulation of the offering process involves "a continual adjustment of previous rules to newly emerging or identified problems, balancing and re-balancing relevant factors to protect investors and the public interest." Pet. App. 195a. Thus, what constitutes illegal conduct may change with "future developments in the offering process" or the SEC's evolving "understanding of the public interest and investor protection." *Id.* at 191a.

Moreover, the SEC "is actively pursuing comprehensive regulatory responses" to the allegations made in plaintiffs' complaints, including an "ongoing review" of its rules and active enforcement. *Id.* at 127a-128a, 137a-139a. The SEC concluded that allowing antitrust courts and juries to substitute their views for the SEC's expertise would disrupt these regulatory efforts. *Id.* at 128a-129a, 156a-157a. Indeed, in an area that inherently raises "clos[e] questions," the "*in terrorem* effect" of "potentially crippling treble damages awards" would make antitrust concerns "the predominant considerations in the underwriting process" and "[d]eter conduct that would serve the interests of the markets and the capital formation process." *Id.* at 193a-194a, 197a.

E. The District Court Agreed With The SEC And Dismissed Plaintiffs' Treble Damages Complaints.

Reviewing this Court's decisions in *Silver* v. *New York Stock Exch.*, 373 U.S. 341 (1963), *Gordon*, and *United States* v. *National Ass'n of Securities Dealers*, 422 U.S. 694 (1975), the district court discerned "two narrowly defined situations" in which the doctrine of implied immunity applies: "first, when an agency, acting pursuant to a specific Congressional directive, actively regulates the particular conduct challenged" (as in *Gordon*), or "second, when the regulatory scheme is so pervasive that Congress must be assumed to have foresworn the paradigm of competition" (as in *NASD*). Pet. App. 80a-81a (quotation marks omitted). In either circumstance, the district court emphasized, "only where there is a 'plain repugnancy between the antitrust and regulatory provisions' will repeal be implied." *Id.* at 81a (quoting *Gordon*, 422 U.S. at 682). The court agreed with the SEC that the regulatory framework governing IPOs is "pervasive," but ultimately decided that the conduct alleged is immune "under a *Gordon* analysis" because the SEC's "sweeping" and actively exercised power to regulate the challenged conduct creates a "potential conflict with the antitrust laws" and thus the "plain repugnancy" that the immunity doctrine is designed to prevent. *Id.* at 86a, 93a.

The district court found that "much of the conduct alleged," such as the operation of syndicates, "is authorized." Pet. App. 86a. It concluded that a determination that conduct permitted by the SEC violates antitrust law would create a "direct conflict" with the securities laws and that "[t]his species of 'plain repugnancy'" would "'render nugatory the legislative provision for regulatory agency supervision.'" *Id.* at 93a. With respect to the purported "tie-in" agreements, the court held that Congress gave the SEC "broad power to regulate the conduct at issue" and that the SEC has a "well-documented history of considering the very conduct alleged in this action." *Id.* at 94a, 110a. As a result, "potential conflicts" and the necessary repugnancy "exist even between activities that are, at the current time, prohibited under both the securities and antitrust regulatory regimes." *Id.* at 94a. The court thus held that "a failure to find implied immunity would 'conflict with an overall regulatory scheme that empowers the [SEC] to allow conduct that the antitrust laws would prohibit.'" *Id.* at 119a.

F. The Second Circuit Rejected The SEC's Position And Reinstated Plaintiffs' Treble Damages Complaints.

In the only decision ever to reject the SEC's assertion that implied immunity is necessary, the Second Circuit vacated the district court's judgment. The court of appeals fashioned a fact-intensive, multi-prong test under which immunity may be implied only if "Congress contemplated the specific conflict and intended for the antitrust laws to be repealed." In applying this standard the court looked for "congressional intent" to repeal the antitrust laws with respect to the "specific" conduct at issue; agency power "to compel action prohibited by the antitrust laws"; evidence that applying the antitrust laws would "rob the SEC of some grant of discretion"; "a regulatory history" showing that the SEC once permitted the challenged conduct; and "other evidence" that "the statute implies a repeal." Pet. App. 53a-57a.

The court of appeals acknowledged that the SEC had "unquestionable jurisdiction" over the challenged conduct, but held immunity unwarranted under its new, complex set of factors. Pet. App. 64a. It found "no legislative history indicating that Congress intended to immunize" the challenged conduct, no SEC power "to force underwriters to offer tie-in agreements," no provision of the securities laws that would be "mooted" by applying the antitrust laws, no history of the SEC authorizing "tying and laddering," and "no other indication of congressional intent to repeal the antitrust laws and immunize IPO tie-in agreements." *Id.* at 64a-67a. The court of appeals also held inapplicable what it termed the "vague" pervasive regulation basis for immunity, limiting *NASD*, which applied that immunity standard, to cases challenging the conduct of SROs. Pet. App. 49a, 68a.

The court suggested that the "flexibility" of the antitrust laws "lowers the stakes" of denying implied immunity because antitrust juries may "consider" the regulatory framework when applying "the rule of reason." It declined, however, to "expound on the extent" to which this purported flexibility "would here preclude or qualify antitrust liability in the absence of implied immunity." Pet. App. 58a-60a.

G. The United States Urges Reversal Of The Second Circuit's Decision.

The SEC and Antitrust Division of the Department of Justice took opposing positions in the courts below on the question whether immunity should be implied. In this Court, however, the United States filed a brief at the petition stage on behalf of both the SEC and Department of Justice urging reversal of the Second Circuit's decision, which would "undercut critical national regulatory policies and interfere with the capital formation process." U.S. Br. 4 n.2, 19.

The United States concluded that the Second Circuit erred in holding that plaintiffs' "generalized allegations of conduct prohibited under the regulatory scheme" barred immunity. U.S. Br. 8, 12. The United States advocated a standard under which the antitrust laws are impliedly repealed with respect to conduct "authorized" by the SEC and with respect to any "activities that are directly related to and cannot practically be separated from authorized conduct." *Id.* at 10-11 (citing *NASD*, 422 U.S. at 733-734). The plain repugnancy requirement is met in such instances because "[f]ailure to recognize immunity for activities that are inextricably intertwined with permissible collaborative conduct could effectively vitiate the immunity for the authorized conduct and thus conflict with the regulatory scheme." *Id.* at 11. According to the United States, the Second Circuit erred in failing to undertake a "fact-specific inquiry" to determine whether plaintiffs' tie-in and excessive commission allegations "impermissibly rest on the complaint's more specific assertions of legitimate and immune conduct." *Id.* at 15.

SUMMARY OF ARGUMENT

I. The district court correctly found that the principles set forth in *Gordon* v. *New York Stock Exch.*, 422 U.S. 659 (1975), and *United States* v. *National Ass'n of Securities Dealers*, 422 U.S. 694 (1975), require dismissal of both the Sherman Act and Robinson-Patman Act complaints on implied immunity grounds. The *Gordon* test is satisfied because the SEC indisputably has the power to regulate all of the conduct plaintiffs challenge and has actively exercised (and continues to exercise) that authority with respect to the alleged conduct at the heart of this litigation. Pet. App. 93a-119a. And, although the district court's decision did not rest on this basis, it rightly observed that *NASD*'s "pervasive regulation" test for immunity is also satisfied here because the SEC has extensive and comprehensive authority to regulate every aspect of the IPO distribution process. *Id.* at 86a.

The repugnancy required under *Gordon* and *NASD* is clear. Much of the conduct on which the conspiracy claim rests is expressly permitted and even encouraged by the SEC. Allowing application of the antitrust laws to this activity would "'render nugatory the legislative provision for [SEC] supervision'" and risk chilling conduct vital to the Nation's economy. Pet. App. 93a (quoting *Gordon*, 422 U.S. at 691).

The same conclusion applies to the alleged conduct that the SEC does not permit—excessive commissions and laddering. Given the SEC's power to determine what constitutes reasonable brokerage commission practices and to define the boundaries between permissible indications of interest and unlawful tie-in arrangements, as well as its ongoing efforts to refine its guidance in both those areas, maintaining an antitrust action challenging such activities "poses a substantial danger that [defendants] would be subjected to duplicative and inconsistent standards." *NASD*, 422 U.S. at 735. In making distinctions between permissible and unlawful conduct, securities regulators balance goals of competition, investor protection, and capital formation, as Congress intended—an analysis that no antitrust jury applying competition-first rules would replicate. As in *Verizon Communications* v. *Law Offices of Curtis V. Trinko*, 540 U.S. 398, 406 (2004), there is in these cases a "real possibility of [antitrust] judgments conflicting with the agency's regulatory scheme."

Trinko confirms that it is bad policy to permit antitrust litigation on top of a regulatory regime that is already designed to deter anticompetitive conduct and already offers a "variety of litigation routes" (which plaintiffs are pursuing in hundreds of securities actions aimed at the same conduct alleged here). It produces no benefits that outweigh the considerable harm to the securities regulatory scheme caused by the risk of treble damages awarded by lay antitrust juries, which will produce "false condemnations" that "chill" protected conduct and "distort investment" in a critical segment of the Nation's economy. 540 U.S. at 414. None of this Court's precedents, which the Second Circuit seriously misinterpreted, is to the contrary.

II. United States capital markets are the envy of the world and have developed under a system of regulation that considers competition along with other goals, including capital formation. Permitting antitrust challenges to highly regulated underwriting practices—which necessarily involve collaborative conduct that readily lends itself to conspiracy claims—will displace Congress's scheme of expert regulation. Underwriters not only would have to conform their conduct to SEC and SRO rules, but also would have to avoid collaborative activities that arguably could subject them to the risk of enormous treble damages awards under a competition-first antitrust regime. Legitimate conduct that regulators recognize is important to capital formation, including desirable book-building and IPO allocation practices, would be deterred. And the regulatory scheme that has protected our capital markets would be thoroughly undermined, exacerbating a growing trend of securities offerings shifting overseas.

That result would be repugnant to the securities laws. In a suit brought under the securities laws challenging the conduct alleged here, plaintiffs would be limited to recovery of actual damages under Section 28 of the Securities Exchange Act. A host of additional safeguards imposed by this Court would apply, such as the rigorous proof of loss causation required in *Dura Pharm.* v. *Broudo*, 544 U.S. 336 (2005). Congress's reforms in the Private Securities Litigation Reform Act, designed to combat abuses that lead to extortionate settlements in securities suits, would impose heightened pleading standards, an automatic stay of discovery during dismissal proceedings, and procedural limits on the maintenance of class actions. To allow plaintiffs to evade all these safeguards by pleading their stock manipulation suit under the antitrust laws would foster the very litigation abuses that this Court has recognized and that Congress sought to counter.

III. It is no answer to say, as plaintiffs do, that the IPO conduct they allege should not be immune because some of it is unlawful under both the securities and antitrust laws. Immunity depends instead on a showing of active regulation of the conduct at issue or a pervasive regulatory scheme, coupled with a current or potential conflict between the antitrust and securities laws that threatens to disrupt the regulatory regime that Congress created. *Gordon*, 422 U.S. at 691; *NASD*, 422 U.S. at 733-734. This Court has found immunity in many cases over many years, although the conduct alleged may have violated the various regulatory schemes in question. *E.g.*, *Pan Am. World Airways* v. *United States*, 371 U.S. 296 (1963); *Brown* v. *Pro Football*, 518 U.S. 231 (1996).

Here, as the district court correctly determined when it applied this Court's established immunity standards, a clear actual conflict results from application of the antitrust laws to conduct the SEC permits and encourages. An equally clear potential conflict results from allowing an antitrust court to determine the boundaries of permissible and impermissible allocation and commission practices. Those boundaries—which the SEC is empowered to define and which are subject to continuous revision—depend on fact-intensive evaluations under SEC and NASD rules that draw nuanced distinctions that antitrust juries could not be counted on to apply. In addition, under the novel implied immunity test now proposed by the United States, the conduct alleged to be unlawful is "inextricably intertwined" with conduct the SEC permits, so that failure to recognize immunity for this conduct "could effectively vitiate the immunity for the authorized [activities] and thus conflict with the regulatory scheme." U.S. Br. 11.

Finally, there is no merit to the suggestion that the availability of an antitrust rule of reason analysis "lowers the stakes of any implied immunity evaluation" because the court may consider the relevant regulatory background. Pet. App. 60a. A rule of reason analysis requires a multi-step review of the procompetitive benefits and asserted justifications for the challenged conduct, often entailing extensive litigation prior to the earliest possibility of a court determination of the conduct's lawfulness and substantial uncertainty about the outcome even when there has been no antitrust violation. *E.g.*, *Geneva Pharm. Tech. Corp.* v. *Barr Labs.*, 386 F.3d 485, 506-507 (2d Cir. 2004). Even if a rule of reason analysis could take into account the concerns of the securities regulatory regime—which given the line-drawing required in these cases is improbable—it would do little to alleviate the concerns of participants in the public offering process about potential exposure to antitrust litigation and liability. For that reason, this Court in *Silver* v. *New York Stock Exch.*, 373 U.S. 341 (1963), determined whether immunity should be implied *before* discussing the rule of reason. See also U.S. Br. 7-8 ("the court of appeals' decision fails to protect defendants against the prospect of having to defend against costly antitrust litigation based on conduct that the securities laws permit, and even encourage").

ARGUMENT

I. THIS COURT'S IMPLIED IMMUNITY PRECEDENTS REQUIRE DISMISSAL OF PLAINTIFFS' TREBLE DAMAGES ANTITRUST SUITS BECAUSE THEY ARE REPUGNANT TO THE SCHEME OF SECURITIES REGULATION.

The "detailed regulatory scheme" created by the Securities Act and the Securities Exchange Act "raises the question whether the regulated entities are not shielded from antitrust scrutiny altogether by the doctrine of implied immunity." *Verizon Communications* v. *Law Offices of Curtis V. Trinko*, 540 U.S. 398, 406 (2004). This Court defined the scope of implied immunity in the securities context in *Silver* v. *New York Stock Exch.*, 373 U.S. 341 (1963), *Gordon* v. *New York Stock Exch.*, 422 U.S. 659 (1975), and *United States* v. *National Ass'n of Securities Dealers*, 422 U.S. 694 (1975). Plaintiffs' suits squarely fit the criteria set forth in those decisions, and the cost-benefit analysis this Court applied in *Trinko* confirms that immunity is necessary here.

A. *Silver*, *Gordon*, *NASD*, And *Trinko* Require Immunity For Conduct That The SEC Regulates Under A Standard That Balances Competition With Other Objectives.

In *Silver*, plaintiff brokers alleged that the New York Stock Exchange violated the antitrust laws by denying them wire connections with exchange member firms. That claim required this Court to reconcile the antitrust laws' condemnation of group boycotts with the Exchange Act, which "contemplat[es] that securities exchanges will engage in self-regulation which may well have anticompetitive effects." 373 U.S. at 349. The Court observed that although the Exchange Act obligates an exchange to formulate rules governing the conduct of its members, it did not—at that time—"give the [SEC] jurisdiction to review particular instances of enforcement of exchange rules." *Id.* at 357. Furthermore, this Court found "nothing built into the regulatory scheme which performs the antitrust function." *Id.* at 358. Given the lack of "conflict or coextensiveness of coverage [between] the agency's regulatory power" and the antitrust laws, the Court held that the suit could proceed. *Ibid.* It emphasized that "a different case" would be presented if "review of exchange self-regulation [was] provided through a vehicle other than the antitrust laws." *Id.* at 360.

That different case arose in *Gordon*, a private treble damages class action challenging the practice of fixing commission rates. After an extensive review of the legislative and regulatory history relating to commission rates in the securities industry, this Court determined that the challenged conduct was impliedly immune from antitrust scrutiny. In doing so, this Court rejected the Department of Justice's contention that immunity could be implied only where there is a "pervasive regulatory scheme," holding that immunity also applies where the SEC has been given specific regulatory authority over the activity at issue and has exercised that authority. 422 U.S. at 688-689. Congress in section 19(b) of the Exchange Act had granted the SEC "direct regulatory power over exchange rules and practices with respect to 'the fixing of reasonable rates of commission,'" and the SEC subsequently "ha[d] taken an active role in review of proposed rate changes" based not on "a simplistic notion in favor of competition" but a broader policy analysis. *Id.* at 676, 685. In addition, even though at the time of the decision fixed exchange rates were prohibited under both the securities and antitrust laws, this Court noted that Congress had provided that the SEC "may allow reintroduction of fixed rates." *Id.* at 691.

Under those circumstances, this Court concluded that immunity must be implied because of the possibility that the SEC could modify the rules governing fixed rates in the future and thus subject the defendants to conflicting standards. 422 U.S. at 691. "[P]ermitting courts throughout the country to conduct their own antitrust proceedings would conflict with," and thus be repugnant to, "the regulatory scheme." *Id.* at 690. The potential for conflict was particularly high because "the sole aim of antitrust legislation is to protect competition," but the SEC also weighs "the economic health of the investors, the exchanges, and the securities industry." *Id.* at 689.

The same day it decided *Gordon*, this Court in *NASD* confirmed that antitrust immunity must be implied not only where the SEC actively exercises specific regulatory power over the challenged conduct, but also where the regulatory scheme the SEC has established is so pervasive that there is a real potential for conflict with the antitrust laws. In *NASD* the Department of Justice alleged a vertical conspiracy among underwriters and broker-dealers to restrict the sale and fix the price of mutual fund shares in the secondary market, as well as a horizontal conspiracy among NASD members to prevent the growth of that market. 422 U.S. at 701-702.

With respect to the vertical agreements, this Court held that they were immune because section 22(f) of the Investment Company Act gave the SEC the authority to promulgate rules and regulations prohibiting restrictions on the transferability of mutual fund shares. 422 U.S. at 722. Because of that specific regulatory power, the SEC's considered decision not to prohibit the challenged agreements, and the Commission's view that its authority would "be compromised seriously" if the agreements were "deemed actionable," this Court concluded that "the antitrust laws must give way if the regulatory scheme * * * is to work." *Id*. at 729-730. The requisite repugnancy was established because "[t]here can be no reconciliation of [the SEC's] authority under § 22(f) to permit these * * * agreements with the Sherman Act's declaration that they are illegal per se." *Id*. at 729.

As for the government's allegation of a horizontal conspiracy among NASD members to prevent development of a secondary dealer market, this Court determined that "the Sherman Act ha[d] been displaced by [a] pervasive regulatory scheme." 422 U.S. at 735. This Court held that "maintenance of an antitrust action for activities so directly related to the SEC's responsibilities" was repugnant to that scheme because it "pose[d] a substantial danger that [defendants] would be subjected to duplicative and inconsistent standards." *Ibid.* Immunity was necessary "to assure that the federal agency entrusted with regulation in the public interest could carry out that responsibility free from the disruption of conflicting judgments that might be voiced by courts exercising jurisdiction under the antitrust laws." *Id.* at 734.

Trinko confirmed that under *Gordon* and *NASD* immunity is necessary when there is "the real possibility of [antitrust] judgments conflicting with the agency's regulatory scheme." 540 U.S. at 406. Although immunity was ruled out in *Trinko* by an antitrust savings clause in the Telecommunications Act, this Court endorsed a cost-benefit calculus that provides important guidance here. *Id.* at 412.

Trinko explained that when "a regulatory structure designed to deter and remedy anticompetitive harm," such as the securities laws, is in place, "the additional benefit to competition provided by antitrust enforcement" is "small." 540 U.S. at 412. In contrast, the costs of antitrust intervention are substantial. Allowing antitrust scrutiny would impose a "layer of interminable litigation, atop the variety of litigation routes already" pursued by plaintiffs. *Id*. at 414; see *Merrill Lynch* v. *Dabit*, 126 S. Ct. 1503, 1514 (2006) ("parallel class actions" under distinct legal standards are "wasteful" and "duplicative"). And the "[m]istaken inferences" and "false condemnations" that result from jury trials on regulatory issues under the antitrust laws would "chill" protected conduct and "distort investment" as businesses seek to avoid treble damages awards. *Trinko*, 540 U.S. at 414. All of these dangers are present here.

B. Defendants' Alleged Conduct Is Immune From Antitrust Scrutiny Under These Precedents.

This Court's decisions establish that defendants are entitled to implied immunity from both the Sherman Act and Robinson-Patman Act claims. There is no dispute that the SEC has direct, comprehensive authority to regulate all of the conduct challenged in the complaints and that it has actively exercised (and continues to exercise) that authority. It is likewise clear, as the SEC and NASD have confirmed, that allowing these antitrust challenges to proceed would interfere with their regulatory authority and ongoing rulemaking and enforcement efforts and disrupt the capital-raising process that scheme is designed to promote and govern. Pet. App. 127a-129a, 193a-197a; NASD Br. 9, 11. In light of this plain repugnancy and the fact that a primary (though not the exclusive) function of the securities regulatory structure is to "deter and remedy anticompetitive harm" (*Trinko*, 540 U.S. at 412), the antitrust laws must give way to enable the scheme to work as Congress intended. *NASD*, 422 U.S. at 729-730.

1. Congress gave the SEC authority to regulate the offering process, oversee the NASD's rules governing syndicates, and permit or prohibit manipulative acts in the purchase and sale of securities. Pet. App. 97a, 132a-136a; *supra*, pp. 8-15. The conduct plaintiffs allege is "among the kinds of [practices] Congress contemplated when it enacted" the securities laws. *NASD*, 422 U.S. at 721. Indeed, it falls, the SEC has said, "within the very heart of [the agency's] regulatory authority" (Pet. App. 127a), which Congress understood had to be broad and flexible. S. REP. NO. 73-792, at 5, H.R. REP. NO. 73-1383, at 6-7 (1934); see 3 Hunter Decl., Dist. Ct. Dkt. No. 99, Regulation Chart; *supra*, p. 9.

In particular, Congress authorized the SEC to regulate commission rates, permit certain price discrimination among customers, and oversee NASD rules pertaining to underwriter compensation. 15 U.S.C. §§ 78f(e), 78o-3(b)(6), 78s(b), (c); NASD Manual, Rule 2710; Pet. App. 105a-106a. Congress committed to SEC regulation every aspect of the public offering process, including book-building and the conduct of the road show. Pet. App. 97a; *supra*, pp. 10-12. And 15 U.S.C. § 78i(a)(6) authorizes some forms of "price manipulation" (Pet. App. 9a), permitting transactions "for the purpose of pegging, fixing, or stabilizing" stock prices provided they do not contravene SEC rules and regulations.[2]

There is no question that in exercising its authority the SEC performs the antitrust function. Congress required the SEC to consider "the impact any * * * rule or regulation

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[2] 15 U.S.C. § 78i(a)(6) is similar to the statute construed in *NASD*, 15 U.S.C. § 80a-22(f), which "vested in the SEC final authority to determine whether and to what extent [such transactions] should be tolerated." 422 U.S. at 729. See also 15 U.S.C. § 78j(b) (permitting the use of "any manipulative or deceptive device or contrivance" that does not violate SEC rules); *id.* §§ 78i(a)(2), 78o(c)(2)(D), 78w(a)(1) (empowering the SEC to define prohibited trading intended to raise or depress prices, as well as fraudulent, deceptive, or manipulative acts).

would have on competition." 15 U.S.C. § 78w(a)(2); see *id.* § 78o-3(b)(9). But Congress also charged the SEC to consider the protection of investors, the promotion of efficiency and capital formation, and the public interest. *Id.* §§ 77b(b), 78c(f), 78i(a)(6). Congress refused to require it to "adopt the least anticompetitive means of protecting investors and preserving fair and orderly markets." Release No. 34-17371, 45 Fed. Reg. 83707, 83719 (Dec. 19, 1980); *supra*, p. 10.

Allowing plaintiffs' treble damages suits to proceed would "render nugatory" the SEC's authority to supervise defendants' alleged conduct and determine whether and to what extent it should be permitted. *Gordon*, 422 U.S. at 691. Without immunity, the SEC explained, underwriter conduct during a syndicated IPO would be scrutinized by a lay jury under competition-first antitrust principles that do "not take into account the sensitive countervailing considerations that the securities laws, and the Commission's expert administration, are charged with weighing in the balance." Pet. App. 196a. As in *Gordon*, conflicting antitrust and SEC regulatory standards are the predictable result. 422 U.S. at 689. And the risk of treble damages ensures that antitrust standards will prevail. See Hale & Hale, *Competition or Control VI: Application of Antitrust Laws to Regulated Industries*, 111 U. PA. L. REV. 46, 54-55 (1962-1963) ("Courts have readily perceived that recovery of treble damages by private litigants could easily disrupt regulatory patterns. * * * The treble damages example is an obvious case of 'repugnancy'").

2. These dangers are acute because the SEC in fact regulates the very conduct alleged by plaintiffs. See *Gordon*, 422 U.S. at 685. Plaintiffs do not dispute that joint syndicate activities are "pervasively regulated and approved by the Commission." Pet. App. 153a-154a; see *id.* at 86a-93a. With respect to plaintiffs' allegations of laddering and inflated commissions, the SEC has engaged in expert line-drawing of the type that implied immunity is designed to accommodate. See *infra*, pp. 13-15. For decades, the SEC has vigilantly su-

pervised public offering practices in "hot" markets, including "tie-in arrangements, and manipulation of the aftermarket." HOT ISSUES MARKETS REPORT, *supra*, at 28, 37-40; see SPECIAL STUDY OF SECURITIES MARKETS, *supra*, at 487-488, 514-559; *supra*, pp. 12-13. Its Regulation M prohibits quid pro quo agreements and aftermarket stabilization except to prevent or retard a decline in price. Pet. App. 102a-104a; 17 C.F.R. §§ 242.101 & .104. Its 2005 guidance draws fine lines between legitimate allocation practices that facilitate capital formation and manipulation that violates Regulation M, recognizing that the distinction between the two "depends on the particular facts and circumstances." *Allocations Release*, Pet. App. 225a; *infra*, pp. 45-46.

With respect to commissions, the SEC requires underwriters to disclose their compensation and commissions (17 C.F.R. § 229.508(e)) and monitors NASD rules that define and limit that compensation. Pet. App. 106a-107a. The SEC has drawn careful, fact-intensive distinctions between permitted and prohibited conduct in this area as well. For example, while excessive commission payments can violate the securities laws, customers are permitted to consider in paying brokerage commissions whether the broker allocated IPO shares to the customer and the overall services provided by the broker. Release No. 34-23170, 51 Fed. Reg. 16004, 16011 (Apr. 30, 1986); see also *Invemed Assocs.*, *supra* (it is not unlawful for customers voluntarily to increase order flow and commissions to increase their chances of obtaining IPO allocations). SEC rules also allow an underwriter to "allocat[e] IPO shares to a customer because the customer has separately retained the firm for other services" for which "the customer has not paid excessive compensation." Release No. 34-50831, 69 Fed. Reg. at 75785.

The potential disruption of the regulatory regime from an overlay of antitrust litigation is all the greater because the lines drawn by the SEC are not static. See *Gordon*, 422 U.S.

at 689-691.[3] As the SEC informed the Second Circuit, its regulation of the offering process involves "continual adjustment of previous rules to newly emerging or identified problems"—a dynamic regulatory response, supported by the notice and comment rulemaking process, which is incompatible with applying the antitrust laws to the same conduct. Pet. App. 195a. This adjustment requires "balancing and rebalancing relevant factors to protect investors and the public interest," including weighing "anti-competitive effects" against "countervailing benefits" in a context where the syndicate underwriting system "inherently" raises "substantial antitrust concern." *Id.* at 191a-192a, 195a. Because single-focus antitrust laws lack this administrative flexibility, "the antitrust laws must give way." *NASD*, 422 U.S. at 729.

The SEC and NASD have power to enforce their rules (*Silver*, 373 U.S. at 357) and have done so with respect to the conduct alleged here. They investigated IPO allocation practices following the market bubble and filed and settled actions against several investment banks, alleging that the bank engaged in one or more of the practices challenged here in violation of Regulation M or NASD Conduct Rule 2110. Pet. App. 137a-138a; *supra*, pp. 14-15. The SEC also established an expert panel to make recommendations in light of allegations of tie-ins, and the SEC, NASD, and NYSE proposed rule changes following the panel's report. *Supra*, pp. 13-14 & n.1. As surely as in *Gordon*, "[i]nterposition of the antitrust laws * * * in the face of [all this] positive SEC action" would "prevent the operation of the [securities laws] as intended by Congress." 422 U.S. at 691. See AREEDA & HOVENKAMP, ANTITRUST LAW ¶ 243a, at 77 (Supp. 2006) ("When the regulatory agency actually has jurisdiction over the chal-

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[3] The SEC's authority to alter the boundaries between permissible and unlawful conduct comes not only from statutes previously discussed (at 28 & n.2), but also from the SEC's broad discretion to grant exemptions "even with respect to statutory prohibitions and requirements." Pet. App. 149a; see 15 U.S.C. §§ 77z-3, 78mm.

lenged practice and is actively taking [factors such as the vitality of the markets and economic health of regulated firms] into account, while not ignoring the impact on competition, then antitrust's own, much more myopic approach can frustrate regulatory goals").

3. In addition to meeting *Gordon*'s active regulation test, the conduct challenged here is immune from antitrust scrutiny because it is pervasively regulated by the SEC. *NASD*, 422 U.S. at 730 ("the SEC's exercise of regulatory authority" is "sufficiently pervasive to confer an implied immunity"). As the district court explained, "[t]he Securities Act provides the SEC with plenary authority to regulate [IPOs]," including the power to require registration of securities, regulate communications among underwriting participants and customers, and exercise "pervasive" oversight over the NASD's "comprehensiv[e] and activ[e] regulat[ion of] syndicates." Pet. App. 87a-88a, 97a. The Exchange Act grants the SEC "sweeping" authority to "define manipulative practices" in connection with IPOs and adopt rules to permit or proscribe such conduct. *Id.* at 99a, 134a; *supra* p. 8. It also authorizes the SEC to regulate underwriter commissions directly and by exercising "pervasive supervisory authority" over the NASD's rules. *NASD*, 422 U.S. at 733; Pet. App. 105a-107a.

Defendants do not argue, as plaintiffs and the United States have suggested, that the mere fact of general SEC jurisdiction over IPO allocation practices provides the basis for some "blanket" implied immunity from the antitrust laws. U.S. Br. 16.[4] To the contrary, as this Court made clear in both *Gordon*, 422 U.S. at 689, and *NASD*, it is the comprehensive and pervasive nature of the Commission's authority that creates the necessary repugnancy and requires the con-

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[4] The United States appears now to question whether "pervasive regulation" may provide a basis for implying immunity. U.S. Br. 15-16. That is contrary to its position in *Gordon*, see 422 U.S. at 688, and to the plain language of *Gordon*, *NASD*, and *Trinko*.

clusion "that Congress intended to lift the ban of the Sherman Act" from these activities. 422 U.S. at 733; see also *Trinko*, 540 U.S. at 406 ("a detailed regulatory scheme * * * ordinarily raises the question whether the regulated entities are not shielded from antitrust scrutiny altogether by the doctrine of implied immunity"). Under such circumstances permitting interposition of the antitrust laws "poses a substantial danger" of disrupting the regulatory scheme Congress created and subjecting industry participants to "duplicative and inconsistent standards." *NASD*, 422 U.S. at 734-735.

4. The cost-benefit analysis described in *Trinko* reinforces the conclusion that implied antitrust immunity is necessary. The securities "regulatory structure" is "designed to deter and remedy anticompetitive harm." 540 U.S. at 412. The SEC weighs competition (among other goals) in exercising its authority, issues rules such as Regulation M to deter anticompetitive conduct, and remedies such conduct through vigorous enforcement. See *Silver*, 373 U.S. at 360 (noting the importance to immunity analysis of the fact that review of the competitive impact of challenged conduct is "provided through a vehicle other than the antitrust laws"). Moreover, because the securities laws provide a private damages remedy that is "already available to and [is being] actively pursued by" many of these same plaintiffs' counsel, antitrust would provide little, if any, additional benefit to competition. *Trinko*, 540 U.S. at 412, 414.[5]

In contrast, the potential costs of permitting treble damages antitrust suits are enormous. The SEC's carefully drawn distinctions between permitted and prohibited IPO practices are not motivated solely by antitrust concerns, making them "difficult for antitrust [juries] to evaluate" and guaranteeing

[5] Immunity was not implied in *Trinko* because the Telecommunications Act contained an express antitrust savings clause. Neither 15 U.S.C. § 77p(a) nor § 78bb(a) is an antitrust savings clause, and neither provision was found to bar immunity in *Gordon* or *NASD*.

"false condemnations." *Trinko*, 540 U.S. at 414. No underwriter could risk relying on distinctions drawn by the SEC that could be overridden by a lay antitrust jury wielding a treble damages class action penalty. That is why the SEC says that such condemnations threaten to chill protected conduct "in ways that are harmful to the overall securities markets," including conduct that, in the SEC's expert judgment, is "necessary to conduct syndicated underwriting." Pet. App. 153a, 197a. Under the *Trinko* analysis, the conjectural benefits of private antitrust suits in this context are not worth their costly disadvantages.

C. The Cases Outside The Securities Industry On Which Plaintiffs Rely Do Not Defeat Immunity.

Plaintiffs seek to avoid immunity by invoking *National Gerimedical Hosp.* v. *Blue Cross*, 452 U.S. 378 (1981), *Otter Tail Power Co.* v. *United States*, 410 U.S. 366 (1973), and *United States* v. *Philadelphia Nat'l Bank*, 374 U.S. 321 (1963). The specific immunity analyses in those cases are of little relevance because they involved vastly different regulatory schemes. See *Trinko*, 540 U.S. at 411-412 (emphasizing the importance of considering the regulatory structure "of the industry at issue"); *Phonetele, Inc.* v. *AT&T*, 664 F.2d 716, 727 (9th Cir. 1981) (Kennedy, J.) ("each of the Supreme Court's [implied immunity] cases is decisively shaped by considerations of the special aspects of the regulated industry involved").

In *Philadelphia Nat'l Bank* "there was an absence of continuing [regulatory] oversight" and hence a "lack of conflict" between regulatory and antitrust standards. *Gordon*, 422 U.S. at 689 n.14. In *Otter Tail* legislative history showed that Congress "rejected a pervasive regulatory scheme" in favor of "voluntary commercial relationships" and granted the Federal Power Commission only "limited authority" over the conduct at issue. 410 U.S. at 374. *National Gerimedical* presented a still "weaker" claim of immunity, involving a "spontaneous response to the finding of [a private] advisory planning body" rendered when "the regulatory aspects of the [law] were not in place." 452 U.S. at 389-390.

Together these cases stand for the unremarkable proposition that limited regulatory authority does not require immunity where the legislative record demonstrates that Congress intended antitrust review to continue unimpeded. *Otter Tail*, 410 U.S. at 373-375 (describing Congress's "overriding policy of maintaining competition to the maximum extent possible"); *Philadelphia Nat'l Bank*, 374 U.S. at 352 (legislative history stated that the Bank Merger Act "would not affect in any way the applicability of the antitrust laws"); see *Gordon*, 422 U.S. at 689 n.14. These decisions recognize that immunity is warranted where, as here, there is no indication of congressional intent to leave the antitrust laws in place and implied repeal of those laws is "necessary" to the exercise of regulators' "authorized powers." *National Gerimedical*, 452 U.S. at 393 n.18. The SEC and SROs have authorized defendants' joint activities, engaged in regulatory line-drawing permitting some allocation and commission practices while prohibiting others, and may change their rules concerning those practices in the future. See U.S. Br. 12, 15. Under those circumstances, immunity is necessary to make the securities regulatory scheme work as Congress intended. See *National Gerimedical*, 452 U.S. at 389; *Philadelphia Nat'l Bank*, 374 U.S. at 352.

D. The Second Circuit's Freewheeling, Multi-Factor Test Is Contrary To This Court's Precedents.

In denying immunity the Second Circuit misperceived this Court's precedents. It held immunity exists only if Congress expressed an "intent to repeal the antitrust laws" either in so many words or by other clear evidence, or if there is a specific inconsistency, such as where the SEC compels the challenged activity, the antitrust laws would "moot" a provision of the securities laws, or the SEC has permitted the challenged conduct. Those miscellaneous criteria find no support in this Court's opinions.

Requiring an overt statement of legislative intent "with regard to [the] specific * * * conduct" (Pet. App. 53a) requires that Congress contemplated the specific conduct at issue and, if it did not, allows antitrust to override regulation. That is contrary to the fundamental purpose of regulation, which leaves matters not specifically foreseen by Congress to the expert agency. Implied immunity must enable a court to protect a regulatory scheme when "Congress is silent on the proper accommodation between regulation and antitrust." 1A AREEDA & HOVENKAMP ¶ 243d, at 319 (3d ed. 2006); see *Gordon,* 422 U.S. at 691. Requiring an explicit congressional statement would render implied immunity superfluous.

This Court has never limited immunity to cases where an agency may compel the challenged conduct. See *National Gerimedical*, 452 U.S. at 389 (immunity arises where agency may "authorize or require" conduct); 1A AREEDA & HOVENKAMP ¶ 243a2, at 314, ¶ 243e3, at 329 (the touchstone for immunity is an agency's "power to control" conduct and actual exercise of that power). This Court also has not limited immunity to situations where a specific "provision, sentence, phrase, or word" of the statute would be mooted by application of antitrust. Pet. App. 65a; see *NASD*, 422 U.S. at 730; 1A AREEDA & HOVENKAMP ¶ 243d, at 325 (*NASD* "invoke[d] the broad dangers of collision between antitrust and regulatory regimes rather than a narrow assessment of the challenged conduct itself"). To be sure, agency approval of conduct can suffice to establish the requisite conflict with the antitrust laws, but "[e]ven if the agency has not approved certain conduct but is aware of it and has acquiesced or has it under review, the same conflicts can arise." *Id.* ¶ 243g1, at 360; see *Gordon*, 422 U.S. at 691; *Trinko*, 540 U.S. at 412; U.S. Br. 11 (conduct inextricably intertwined with approved activity is immune). The Second Circuit's test offers regulated businesses and lower courts no useful direction. Instead, it will force participants in public offerings to avoid any conduct that an antitrust court might later construe as anticompetitive, thereby impeding, and potentially crippling, the book-building process.

II. IMPLIED IMMUNITY IS NECESSARY TO PREVENT HARM TO U.S. SECURITIES MARKETS AND TO IMPLEMENT CONGRESS'S INTENT.

A. Substituting Competition Rules Interpreted By Antitrust Juries For Expert SEC And NASD Regulation Of Public Offerings Would Seriously Threaten U.S. Capital Markets.

The plain repugnancy requirement for implied immunity is met here not only because of the threatened interference with the SEC's authority over the challenged conduct, but also because of the serious disruption of the Nation's capital markets that would result from allowing these cases to proceed. As the United States has explained, it is "of paramount importance that the capital formation process in this country not be undermined by the threat of treble damages liability" for conduct regulated by the SEC. The Second Circuit's denial of immunity plainly "fails to give adequate protection against that threat." U.S. Br. 9. Without immunity, collaborative underwriter conduct during a syndicated offering subject to detailed SEC regulation could nonetheless be deemed unreasonable by an antitrust court and punished with treble damages payable to a sprawling class of investors.

United States capital markets have flourished under SEC and SRO supervision. But as the SEC has warned, "the fear of potentially crippling treble damages awards" likely would "deter conduct that would serve the interests of the markets and the capital formation process." Pet. App. 194a; see U.S. Br. 9 ("permitting misdirected antitrust class actions to proceed could chill legitimate activity in our Nation's vitally important financial markets"); *Texas Indus.* v. *Radcliff Materials*, 451 U.S. 630, 636-637 (1981); see also Schumer & Bloomberg, *To Save New York, Learn From London*, WALL ST. J., Nov. 1, 2006, at A18 (observing that litigation risks in the U.S. have contributed to a substantial recent exodus of capital raising activities to foreign markets).

Absent immunity, the SEC's balancing of the needs of investor protection, competition, and capital formation would be "displaced," and "antitrust concerns will become the predominant considerations in the underwriting process." Pet. App. 194a. That shift would "frustrate the [SEC's] role in applying its expertise to business conduct," to the profound detriment of markets in which syndicate underwriting is the principal method of raising business capital. Hovenkamp, *Antitrust Violations in Securities Markets*, 28 J. CORP. L. 607, 632-633 (2003). The NASD likewise predicts that without immunity in these cases, "pervasive litigation" and "crippling regulatory confusion" will impair its ability to regulate "in a manner that promotes market stability and capital formation" to the detriment of "the investments of millions of Americans." NASD Br. 2, 9.

B. Permitting Securities Litigation Dressed Up In Antitrust Clothing Would Allow An End Run Around Restrictions On Private Securities Class Actions.

To permit these thinly disguised securities cases to proceed as antitrust suits would endorse an end run around every rule of pleading, proof, damages, and procedure that Congress and this Court have deemed important in private securities actions. The result would heavily burden the federal courts as plaintiffs file more and more antitrust claims, lured by treble damages and attorneys' fees awards that are not available under the securities laws and that ratchet up the pressure on defendants to submit to extortionate settlements. See KENNETH ELZINGA & WILLIAM BREIT, THE ANTITRUST PENALTIES 90-95 (1976) (the treble damages remedy can encourage strike suits); Hylton, *When Should a Case be Dismissed?* 14-15 (AEI-Brookings Jt. Center for Reg. Studies, Apr. 2006) (huge defense costs and the risk of losing at trial can turn treble damages suits into legalized blackmail); RICHARD POSNER, ANTITRUST LAW 275 (2d ed. 2001).

Congress in Section 28 of the Exchange Act made the judgment that single damages are the correct measure of damages in cases alleging “manipulative and deceptive practices” in public securities markets. 15 U.S.C. § 78bb. The Act was not intended to permit “a vengeful striking back at brokers for [investors’] losses” or huge damages awards that “destroy stock markets and business.” H.R. REP. NO. 73-1383, at 3 (1934); see S. REP. NO. 73-792, at 6, 13 (1934); *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 734 (1975). More recently, in removing securities fraud as a predicate offense in civil RICO actions, 18 U.S.C. § 1964(c), Congress concluded that it is unnecessary and “unfair to expose defendants in securities cases to the threat of treble damages” because the securities laws “provide adequate remedies for those injured by securities fraud.” H.R. CONF. REP. NO. 104-369, at 47 (1995). In limiting awards to single damages Congress understood that modern securities markets in which huge liabilities can quickly accrue are different from other forms of commerce, and that liabilities in the “indeterminate amount” produced by punitive levels of damages would create an “extreme” hazard for the industry and markets. *Blue Chip Stamps*, 421 U.S. at 748, quoting *Ultramares Corp.* v. *Touche, Niven & Co.*, 255 N.Y. 170 (1931). Congress’s damages limit on securities actions is properly one aspect of the “repugnance” analysis in suits like these that at bottom allege violations of the securities laws.

If the securities law issues underlying plaintiffs’ antitrust suits were litigated in a securities case, they would be adjudicated under a host of additional safeguards that plaintiffs seek to bypass. This Court has imposed limitations on private securities fraud actions because they present “a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general.” *Blue Chip Stamps*, 421 U.S. at 739-740. It has interpreted the securities laws to require proof of loss causation (*Dura*, 544 U.S. at 341-346) and proof of scienter rather than mere negligence (*Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185 (1976)), rejected a lax definition of materiality (*TSC Indus.* v. *Northway, Inc.*, 426 U.S. 438 (1976)), limited the definition of actionable manipulation (*Santa Fe Indus.* v. *Green*, 430 U.S. 462 (1977)), and barred aiding and abetting claims. *Central Bank* v. *First Interstate Bank*, 511 U.S. 164, 188-190 (1994). Plaintiffs seek to vault over all these safeguards simply by re-labeling their securities claims as antitrust claims.

Congress has also imposed constraints designed to curb "abuses of the class-action vehicle in litigation involving nationally traded securities," including the extraction of "extortionate settlements." *Dabit*, 126 S. Ct. at 1510-1511. The PSLRA requires specific pleading of securities fraud, limits the maintenance of class actions, and withholds discovery pending resolution of dismissal issues. 15 U.S.C. §§ 78u-4(b)(1), (2) (requiring particularized pleading), § 78u-4(a) (special procedural requirements for class actions), §§ 78u-4(b)(3), 77z-1(b) (discovery stay). And because joint and several liability coerces innocent parties to settle rather than risk liability for a disproportionate share of the damages, the PSLRA mandates proportionate liability where the defendant did not knowingly violate the securities laws. *Id.* § 78u-4(f). *Cf. Texas Indus.*, 451 U.S. at 640, 646 (liability under the antitrust laws is joint and several and contribution is generally unavailable).

When securities plaintiffs tried to avoid the PSLRA's obstacles by filing state-law class actions in state court, Congress closed that loophole by enacting the Securities Litigation Uniform Standards Act (SLUSA), which barred certain state-law class actions alleging fraud "in connection with the purchase or sale of a covered security." 15 U.S.C. § 78bb(f)(1); *Dabit*, 126 S. Ct. at 1511. When plaintiffs responded by filing state-law securities claims alleging that investors were fraudulently induced to hold—not purchase or sell—securities, this Court rejected that gambit, because a "narrow reading" of SLUSA that did not cover holder suits "would undercut the effectiveness of the [PSLRA]," contrary to Congress's clear purposes. *Id.* at 1513.

"If securities claims can simply be restructured as antitrust claims," Congress's intent in the PSLRA and SLUSA "to block abusive suits will once again be thwarted." SEC Commissioner Paul Atkins, *Remarks Before the Federalist Society* 4 (Sept. 21, 2006). "[V]irtually any practice, including fraud, deception, and misrepresentation, can be pled as an antitrust violation." AREEDA & HOVENKAMP ¶ 243a, at 76-77 (Supp. 2006). The need to prevent such evasions of protections Congress has enacted reinforces the importance of implying immunity in these cases.

III. PLAINTIFFS' ARGUMENTS AGAINST IMPLIED IMMUNITY ARE WITHOUT MERIT.

We have shown that this Court's decisions mandate implied immunity from these sprawling antitrust suits and that immunity is essential to protect the securities regulatory scheme established by Congress. The reasons plaintiffs offer for denying immunity are meritless.

A. Plaintiffs' Contention That Immunity May Not Be Implied Because The Conduct Alleged Is Unlawful Under Both The Securities And The Antitrust Laws Is Legally Erroneous.

Ignoring the fact that plaintiffs' only specific allegations concerning purportedly unlawful agreements describe conduct that is permitted under the securities laws (*e.g.*, Billing Am. Compl. ¶¶ 36-39, 44-62), plaintiffs contend that immunity cannot be implied because the complaints also contain conclusory allegations of tie-in and commission arrangements that might violate the securities laws. See U.S. Br. 14 (plaintiffs' "allegations of forbidden tie-in and laddering agreements are largely confined to * * * conclusory assertions"); Billing Am. Compl. ¶¶ 1, 4, 6-8, 41-42, 70-74. This Court's precedents do not support plaintiffs' contention, and the inquiry an antitrust jury would conduct into the legality of defendants' conduct would itself seriously undermine the securities regulatory regime.

1. This Court's precedents show that allegations of conduct prohibited by the securities laws are no bar to implied immunity.

Plaintiffs misapprehend the implied immunity doctrine, which is based on the potential for conflict or repugnance between a regulatory scheme and the antitrust laws, not on the legality under the securities laws of every activity alleged in the complaint. See *Trinko*, 540 U.S. at 406 ("a detailed regulatory *scheme* * * * ordinarily raises the question whether the regulated entities are not shielded from antitrust scrutiny"); *NASD*, 422 U.S. at 719 (immunity turns on a showing of "repugnancy between the antitrust laws and the regulatory *system*"); *Gordon*, 422 U.S. at 690 (permitting courts "to conduct their own antitrust proceedings would conflict with the regulatory *scheme* authorized by Congress") (emphases added). As the SEC has demonstrated, and the United States confirms, whether securities violations "actually occurred" is "not dispositive of the antitrust immunity issue," which is whether these suits "impair [the SEC's] ability to carry out its regulatory obligations." Pet. App. 129a n.2; see U.S. Br. 11. Rather, the critical question is whether implied repeal is necessary to make the securities laws function as Congress intended and to permit the SEC to carry out its responsibilities "free from the disruption of conflicting judgments that might be voiced by courts exercising jurisdiction under the antitrust laws." *NASD*, 422 U.S. at 734.

A potential conflict requiring immunity may exist when the antitrust laws prohibit conduct that the SEC is empowered to permit, prohibit, or otherwise regulate. See *NASD*, 422 U.S. at 729 (implying immunity where the SEC's "authority to determine whether and to what extent [challenged restrictions] should be tolerated" could not be reconciled "with the Sherman Act's declaration that they are illegal"); *Gordon*, 422 U.S. at 691 (implying immunity where Congress left "supervision of the fixing of reasonable rates of commission to the SEC," even though the fixing of commission rates would violate the Sherman Act). When a jury applying antitrust law standards might condemn conduct that the SEC closely regulates applying securities law standards, the SEC's discretion to alter the boundaries between permissible and impermissible activities (or to decide what manner of enforcement will be most effective) requires immunity to protect the regulatory scheme—even if the SEC prohibits some of the conduct at issue.

Accordingly, though at the time *Gordon* was decided fixed commission rates were prohibited under both the securities and antitrust laws, this Court implied antitrust immunity because the SEC had the power to reintroduce fixed commission rates if conditions warranted. 422 U.S. at 691. In *Trinko* this Court observed that had it not been for an antitrust savings clause the regulatory scheme created by the Telecommunications Act would have been a "good candidate for implication of antitrust immunity," even though plaintiffs alleged a clear violation by Verizon of its statutory duty "to share its network with competitors." 540 U.S. at 401, 406. The Court made that determination despite the fact that, after FCC and state investigations, Verizon had entered into a consent decree under the telecommunications laws and paid millions of dollars to the United States and competitors. *Id.* at 403-405.

Other decisions addressing diverse regulatory regimes confirm that the question whether conduct is unlawful under the regulatory scheme is not determinative of implied immunity. In *Pan Am. World Airways* v. *United States*, 371 U.S. 296 (1963), the Civil Aeronautics Board had condemned a joint ownership arrangement that limited air carrier routes and divided territories, barred a similar joint venture, and even urged the Department of Justice to challenge the arrangement. *Id.* at 298, 300 n.5, 305 & n.10. The CAB left no doubt that the arrangement was "out of harmony with the

[FAA's] statutory standards for competition." *Id.* at 311. This Court nevertheless held that an antitrust challenge to the arrangement "should have been dismissed" because whether "transactions of that character meet the standards of competition and monopoly provided by the [FAA] is peculiarly a question for the Board." *Id.* at 309, 313 & n.19. The Court in *Pan Am* reasoned that if courts were to entertain the antitrust claims, "two regimes might collide." *Id.* at 310. Only two Justices thought that "repeal of the antitrust laws by implication" was contradicted by the "abuses disclosed by the record." *Id.* at 320, 325, 328 (Brennan, J., & Warren, C.J., dissenting).

In *Brown* v. *Pro Football*, 518 U.S. 231, 235 (1996), this Court implied immunity from a private antitrust suit filed after the defendants "unilaterally implemented" a change in terms of employment. That conduct could have been characterized as a violation of federal labor laws, which allow unilateral implementation only under "carefully circumscribed conditions" (*id.* at 238)—which the dissent believed had not been satisfied. *Id.* at 256-257 (Stevens, J., dissenting). The fact that the defendants' conduct was arguably in violation of the labor laws did not bar immunity. It instead was a strong reason for "tak[ing] from antitrust courts the authority to determine * * * what is socially or economically desirable collective-bargaining policy." *Id.* at 242. See generally *Davis* v. *Scherer*, 468 U.S. 183, 194 (1984) (defendants "do not lose their qualified immunity merely because their conduct violates some statutory or administrative provision").

Plaintiffs' effort to strip immunity from any antitrust defendant who is alleged to have violated a federal regulatory standard has the law backwards. A suit that makes such an allegation raises issues that call for application of the standards of the expert agency. In the present cases, the leading treatise has observed, "permitting the antitrust challenge permits a jury to decide an issue that gave the SEC's own experts considerable difficulty." AREEDA & HOVENKAMP

¶ 243a, at 77 (Supp. 2006). That is precisely the situation in which the risk to the federal regulatory scheme from "[m]istaken inferences" and "false condemnations" resulting from an antitrust jury delving into issues that "are difficult for [it] to evaluate" is at its greatest and the case for implied immunity most compelling. *Trinko*, 540 U.S. at 414.

2. Immunity must be extended to the tie-in and excessive commissions allegations because application of the antitrust laws would conflict with the SEC's authority to define manipulation.

Contrary to plaintiffs' assertions, the danger of conflicting standards is very real here. The SEC has drawn fine lines between permissible book-building activity and unlawful tie-in agreements. *Allocations Release*, Pet. App. 216a-233a; U.S. Br. 15. Lawful book-building includes conversations between an underwriter and a potential IPO purchaser about the investor's aftermarket interest in a stock at various prices and its intention to build a long-term position rather than "flip" the stock. *Id.* at 224a, 227a-228a. The SEC recognizes that collecting such information is "an essential part of the book-building process." *Id.* at 223a; see *supra*, pp. 3-4. Statements that commitments to buy in the immediate aftermarket will result in an allocation of shares in the IPO, however, may be unlawful. Pet. App. 216a-217a.

Accordingly, under SEC guidelines communications like those alleged by plaintiffs "may or may not be permissible, depending upon the facts." Pet. App. 156a; see U.S. Br. 15 (plaintiffs' allegations "encompas[s] permissible book-building conduct between underwriters and investors that the SEC has specifically approved as important in determining the size and price of the offering as well as the allocation of shares, based on understanding long-term investor interest in and valuation of the company"). The difference between a beneficial conversation about a customer's aftermarket interest and a potentially impermissible one linking allocations to trading activity in the immediate aftermarket may turn on a few words, or no words at all, in each of tens of thousands of discussions that took place between underwriters and potential investors in the 900 IPOs at issue.

The importance of such nuanced factual distinctions confirms the need for antitrust immunity in these cases. Plaintiffs' tie-in allegations raise delicate, fact-intensive questions under the securities laws that require regulatory expertise to resolve. Immunity is necessary precisely because antitrust courts—operating outside the framework of the SEC's regulations and the safeguards that Congress and the courts have applied to securities litigation—might "impose different standards or requirements" than the SEC would impose in exercising its regulatory authority. *Gordon*, 422 U.S. at 689; see *Trinko*, 540 U.S. at 406; *Brown*, 518 U.S. at 240-242.

Allowing antitrust courts and juries to determine whether underwriters' communications with customers are lawful or unlawful would deter underwriters from making inquiries that the SEC says are "essential" to the success of an IPO. Pet. App. 223a; see U.S. Br. 9; *Brown*, 518 U.S. at 241-242 (describing the dilemma created for regulated entities when conduct permitted under the administrative scheme nevertheless "invites a later antitrust claim"). Absent immunity, the SEC has declared, its determination that book-building inquiries benefit the capital markets would be "supplanted" and its "ability to interpret, apply, and revise the governing law" based on "complex considerations of fact, law and policy" would be displaced by the need for underwriters to steer well clear of any conduct that an antitrust court could view as a basis for treble damages liability. Pet. App. 156a, 194a-196a; see NASD Br. 1, 8.

Whether a commission payment violates the securities laws is a complex question that securities regulators and antitrust courts may decide differently. The difficulty of analyzing the facts concerning commission payments and the need for securities expertise in conducting that analysis are illustrated by *Dep't of Enforcement* v. *Invemed Assocs.*, *supra*.

There, an NASD panel concluded that the securities laws do not prohibit underwriters from preferring good customers in allocating IPO shares and that customers may voluntarily increase order flow and commission payments to increase their chances of obtaining IPO allocations. After painstakingly reviewing testimony concerning particular customer relationships, customer intentions, and commission payments, as well as statistical and other expert evidence, the panel concluded that higher-than-normal commissions paid on 700 trades by customers seeking IPO allocations did not violate NASD rules and that no illicit agreements or "bribes" were involved. There is no reason to expect that a jury applying general antitrust criteria could conduct that analysis correctly.

The SEC explained below that the need to avoid "false condemnations" and "interminable litigation" under the antitrust laws would sharply influence underwriters' conduct, regardless of the judgments made by securities regulators. Pet. App. 157a, 197a; *Trinko*, 540 U.S. at 412, 414; see U.S. Br. 9; *Town of Concord* v. *Boston Edison*, 915 F.2d 17, 22 (1st Cir. 1990) (Breyer, C.J.). Judge Easterbrook has observed that case-by-case inquiry under the antitrust laws, because it is "certain to produce errors galore," forces businesses to avoid "beneficial practices that create risks of condemnation" and carries "great potential to injure the economy by misunderstanding and condemning complex practices." Easterbrook, *Ignorance and Antitrust*, in ANTITRUST, INNOVATION, AND COMPETITIVENESS 119, 127-131 (1992). That risk of injury is unnecessary when the challenged practices are already subject to close oversight by the SEC, which engages in rulemaking that permits all interested parties to comment and which balances competition with other important goals of the securities laws. See *Far East Conf.* v. *United States*, 342 U.S. 570, 574-575 (1952) (agencies are "better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure" to "ascertai[n] and interpre[t] the circumstances" and ensure "[u]niformity and consistency in the regulation of business").

3. Immunity must also be implied because plaintiffs' allegations are "inextricably intertwined" with conduct permitted under the securities laws.

We believe that the need for immunity in these cases is settled by the standards laid down by this Court in *Gordon*, *NASD*, and *Trinko*, see Part I, *supra*. But immunity is also required under the test proposed by the United States, which would imply immunity when plaintiffs allege "activities that are directly related to and cannot practically be separated from" conduct the SEC permits. U.S. Br. 11. The United States correctly observed that "[f]ailure to recognize immunity for activities that are inextricably intertwined with permissible collaborative conduct could effectively vitiate the immunity for the authorized conduct and thus conflict with the regulatory scheme." *Ibid.*

As we have described in Part III.A.2, *supra*, allowing courts and juries applying the antitrust laws to second guess the fine lines drawn by securities regulators between lawful and unlawful underwriter communications and commissions will effectively obliterate those expertly drawn distinctions, deterring conduct that the SEC and NASD have concluded is permissible and beneficial. In those circumstances there is no doubt that plaintiffs' tie-in and commission allegations are so closely related to conduct that the SEC and NASD permit that a failure to imply immunity would destroy the immunity for authorized conduct.

Furthermore, plaintiffs concede that they rely on defendants' "participation in permitted activities" to establish the inference that "they form[ed] or implement[ed] a prohibited conspiracy to inflate their charges." Pl. Supp. Br. 9. Plaintiffs have no other choice because, as the United States recognized, without their "theater-wide attack on the syndicate system" and other authorized activities, the complaint is devoid of allegations capable of establishing concerted activity. U.S. Br. 14-15. Absent those allegations, there would remain only conclusory assertions that defendants conspired (by some unspecified means) to impose anticompetitive charges on IPO allocants. Such assertions are insufficient to permit this case to proceed.[6]

B. The Possibility That A Rule Of Reason Analysis May Take Into Consideration The Securities Regulatory Background Is No Reason To Deny Implied Immunity.

The court of appeals thought that the applicability of a rule of reason analysis "lowers the stakes of any implied immunity evaluation" by "alter[ing] the antitrust analysis in an antitrust defendant's favor." Pet. App. at 58a, 60a. The suggestion that implied immunity analysis may differ if a rule of reason applies finds no support in this Court's decisions. In *Silver*, the Court recognized that a rule of reason may afford the NYSE "breathing space," but undertook that analysis only *after* determining that implied immunity was unavailable. 373 U.S. at 360-361.

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[6] Plaintiffs should not be given the opportunity to amend their pleadings, several years and two appeals after they commenced this litigation. The Billing plaintiffs previously amended their complaint, switching its focus from allegations that defendants violated securities laws to generalized allegations of collusion. Compare D. Ct. Dkt. No. 1 ¶¶ 3, 35 with J.A. 27-31 ¶¶ 44-64, 67. Given the direct applicability of *Gordon* and *NASD* to these claims, and the substantial threat this litigation poses to capital formation, the district court's dismissal with prejudice was proper. See *NASD*, 422 U.S. at 697, affirming the dismissal with prejudice at 374 F. Supp. 95, 114 (D.D.C. 1973); *Hochfelder*, 425 U.S. at 215; *Van Buskirk* v. *N.Y. Times*, 325 F.3d 87, 91-92 (2d Cir. 2003) (dismissal is with prejudice when the complaint is "not reasonably susceptible" to an interpretation that cures the legal deficiency and provides no "'indication that a valid claim might be stated'"). Plaintiffs, moreover, "never sought leave to amend" after the district court dismissed (*Mandarino* v. *Mandarino*, 2006 WL 1308076, at *2 (2d Cir. 2006)), but chose to appeal based on those pleadings. It is too late now for them to rewrite their claims. See *Kirsch* v. *Fleet Street*, 148 F.3d 149, 171 (2d Cir. 1998); *Walton* v. *Morgan Stanley & Co.*, 623 F.2d 796, 799 n.7 (2d Cir. 1980).

The court of appeals' view that a rule of reason analysis lessens the need to imply immunity also misses the fundamental point that competition is not the sole or primary objective of the securities regulatory regime. The essence of the rule of reason is to examine whether the challenged activity promotes or suppresses competition. *National Soc'y of Prof'l Eng'rs* v. *United States*, 435 U.S. 679, 688 (1978). Securities regulation, by contrast, balances competition with other important goals like market efficiency and capital formation. *Supra*, pp. 9-10. Given the SEC's broader mandate, which a rule of reason analysis would not duplicate, immunity is of "paramount importance" to avoid "undermin[ing]" the "capital formation process" and disrupting our "vitally important financial markets." U.S. Br. 9.

A rule of reason inquiry would magnify rather than ameliorate the "instability and uncertainty" that antitrust suits would inject into the securities regulatory scheme. *Brown*, 518 U.S. at 242. Even "[j]udges often lack the expert understanding of industrial market structures and behavior to determine with any confidence a practice's effect on competition." *Arizona* v. *Maricopa County Med. Soc'y*, 457 U.S. 332, 343 (1982). It is nothing short of "fantastic" to assume that a jury untrained in law or economics could effectively conduct a cost-benefit analysis in the complex circumstances of these cases. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 11 (1984); see Austin, *The Jury System at Risk from Complexity, the New Media, and Deviancy*, 73 DENV. U.L. REV. 51, 54 (1995); HOVENKAMP, ANTITRUST ENTERPRISE at 63-64. A rule of reason analysis, far from contradicting defendants' claim to immunity, *requires* implied repeal under this Court's precedents.

CONCLUSION

The judgment of the court of appeals should be reversed. The district court's judgment dismissing the complaints with prejudice should be reinstated.

Respectfully submitted.

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