No. 09-525

IN THE

Supreme Court of the United States

JANUS CAPITAL GROUP INC. AND
JANUS CAPITAL MANAGEMENT LLC,

Petitioners,

v.

FIRST DERIVATIVE TRADERS,

Respondent.

**On Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit**

REPLY BRIEF FOR PETITIONERS

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RULE 29.6 STATEMENT

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

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REPLY BRIEF FOR PETITIONERS

This Court has never held that one company may be held primarily liable for statements that appear in the prospectus of a different company with separate ownership and independent governance. The decision below, by allowing such a suit to proceed, indisputably expands the private right of action implied under Rule 10b-5. A straightforward application of *Stoneridge Investment Partners, LLC* v. *Scientific-Atlanta, Inc.*, 552 U.S. 148 (2008)—which squarely held that further extension of the private right is for Congress, not the courts—requires reversal.

Lead plaintiff and its *amici* rest their bid for affirmance on the notion that, because investment advisers exercise a degree of operational "control" over their mutual-fund clients, they should be held liable for statements in their clients' prospectuses (*e.g.*, Resp. Br. 20; U.S. Br. 10)—even though "each mutual fund is in fact its own company." Pet. App. 71a ¶ 34. Indeed, lead plaintiff and its *amici* use the word "control" more than 100 times in discussing the contractual relationship between advisers and funds. This argument cannot be reconciled with the statutorily required independence between advisers and funds.

"Control" is a classic signifier of secondary liability. And indeed, Congress has enacted a secondary-liability provision—Section 20(a) of the Exchange Act—that expressly applies to those who "control" another company that commits a primary violation. 15 U.S.C. § 78t(a). Yet lead plaintiff and its *amici* provide zero substantive discussion of Section 20(a)—undoubtedly because lead plaintiff did not (and could not) allege that petitioner Janus Capital Management LLC is a "controlling person" of the non-party Janus Funds.

The *availability* of "controlling person" liability in an appropriate case establishes that reversal would not create a securities-fraud "loophole" or a "roadmap" for violators. Resp. Br. 2, 38; *see also* note 4 and accompanying text, *infra*. Congress also authorized the SEC—but not private plaintiffs—to pursue secondary actors who provide "substantial assistance" to primary violators. 15 U.S.C. § 78t(e). Indeed, Congress very recently broadened the SEC's secondary-liability authority while again declining to confer similar authority on private plaintiffs (Pet. Br. 18), but lead plaintiff and the government have literally nothing to say about this legislation.

"The fact that Congress chose to impose some forms of secondary liability, but not others, indicates a deliberate congressional choice with which the courts should not interfere." *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 184 (1994). Every argument advanced by lead plaintiff and its *amici* founders on that bedrock principle.

I. JCM DID NOT "MAKE" THE STATEMENTS IN THE JANUS FUNDS' PROSPECTUSES

The Fourth Circuit held that JCM could be liable under Rule 10b-5(b) for "*help[ing]* draft," or "*participating* in the writing" of, the Janus Funds' prospectuses. Pet. App. 17a-18a (emphases added). This holding is so obviously wrong that lead plaintiff and its *amici* do not even try to defend it.

Lead plaintiff limply asserts only that "[t]he Fourth Circuit's statements that 'JCG and JCM helped draft' and 'participat[ed] in the preparation of the prospectuses' are fully consistent with this Court's recognition that multiple entities can make a single misstatement." Resp. Br. 32 (citation omitted). What the Court actually "recogni[zed]" is that a "complex securities fraud" may involve "multiple violators" (*Central Bank*, 511 U.S. at 191), which says nothing about whether "helpers" or "participators" may be held primarily liable for "making" statements in another company's prospectus—and the remainder of *Central Bank* makes clear that they cannot be. The government, recognizing as much, is forced to argue that the decision below should be affirmed "[n]otwithstanding the court of appeals' word choice." U.S. Br. 22.

Because the Fourth Circuit held that this case could proceed on grounds that *no one* is willing (or able) to defend before this Court, lead plaintiff is in the remarkable position of asking the Court to decide, in the first instance, whether the complaint adequately alleges that JCM "made" the challenged statements in the Janus Funds' prospectuses (Resp. Br. 11-12, 18-20)—a determination that neither the court of appeals nor the district court was able to make. Pet. App. 17a-18a, 50a n.5. Lead plaintiff's defense of its own complaint, however, is no more persuasive than the Fourth Circuit's.

A. THE COMPLAINT DOES NOT ADEQUATELY ALLEGE "MAKING"

Lead plaintiff's case rests entirely on the theory that "JCM made misstatements regarding its market-timing policy in the Janus Funds' prospectuses." Resp. Br. 11. Lead plaintiff's brief collects, in a single paragraph, *all* of the allegations in the complaint that supposedly support this theory. Resp. Br. 19;

see also U.S. Br. 22; Pet. App. 17a-18a. But these allegations, even if proved, would not allow a reasonable trier of fact to accept lead plaintiff's theory. *See Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 555 (2007).

As lead plaintiff's collection confirms, the complaint identifies just *one* allegedly false statement for which petitioners were purportedly responsible: It alleges that "Janus"—defined as both JCG and JCM, but *not* the Janus Funds—"wrote and represented *its* policy against market timers." Pet. App. 69a ¶ 31 (emphasis added). The use of the possessive pronoun "its" in this critical allegation is obviously problematic for lead plaintiff, which repeatedly replaces the pleaded "its" with an unpleaded indefinite article in its merits brief. Resp. Br. 6, 11, 19 ("'wrote and represented [a] policy against market timers'"). The government takes even greater liberties in rewriting the complaint. U.S. Br. 5-6 ("The complaint alleges that the 'policy against market timers' ... was written and represented by 'Janus'").

Lead plaintiff is forced to alter its own complaint because the prospectuses do not recite *JCM*'s policy against market timing; rather, they set forth *the Funds*' policy: "*The Fund* may refuse purchase orders … that *the Fund* believes are made on behalf of market timers." J.A. 141a (emphases added). Indeed, the only reference to JCM is in the third person: "The Fund *and its agents* may reject any purchase request …." *Ibid.* (emphasis added). The complaint nowhere alleges that JCM "wrote" *the Funds*' policy—that is, the policy that actually appears in the prospectuses—or that JCM's own policy ended up in the Janus Funds' prospectuses.

Lead plaintiff tries to cover up this pleading deficiency by even more aggressive advocacy: According to its merits brief, the complaint "alleges that JCM 'publicly issu[ed] false and misleading statements' *regarding the market-timing policy*" and "'made … a series of materially false or misleading statements about' *that policy*." Resp. Br. 19 (quoting Pet. App. 109a-110a ¶¶ 122-123) (emphases added). As evidenced by lead plaintiff's careful placement of quotation marks, however, the italicized references to the market-timing policy appear only in its brief—they are not in the complaint. The complaint itself contains only boilerplate references to "misleading statements" without further specification, thus failing the most basic requirement of notice pleading (*see Ashcroft* v. *Iqbal*, 129 S. Ct. 1937, 1949 (2009)), not to mention the particularity required by the PSLRA and Rule 9(b). *See* Pet. 11-12.

Lead plaintiff had three chances to plead an actionable claim, but the operative complaint does not adequately allege that JCM "made" the challenged statements *in the Janus Funds' prospectuses*. That is because any such allegation would be false. *See* J.A. 503a-509a (interrogatory response explaining how the Janus Funds' prospectuses were in fact prepared). The Janus Funds' prospectuses were drafted by legal counsel to the Funds, and approved by the Funds' Board of Trustees before they were filed with the SEC. *Id.* at 507a. This *undisputed* evidence destroys the (unpleaded) gloss that lead plaintiff's new counsel have tried to put on the deficient complaint.

B. LEAD PLAINTIFF CANNOT REDEFINE "MAKE" TO REACH THE ACTIVITIES OF SECONDARY ACTORS

Lead plaintiff—aided and abetted by the government—instead attempts to redefine the scope of primary liability, adopting for the first time in this litigation the SEC's post-*Central Bank* view that "the term 'make' in Rule 10b-5(b) … include[s] creating a statement or causing a statement to exist." Resp. Br. 16. But the complaint no more adequately pleads that JCM "created" the challenged statements than it does that JCM "made" them. In all events, the SEC's "creator" standard cannot be reconciled with the text of Section 10(b) or Rule 10b-5. *See PIMCO* v. *Mayer Brown LLP*, 603 F.3d 144, 155 (2d Cir. 2010) ("reject[ing] the creator standard").

1.a. Section 10(b) imposes liability only on those who "use or employ … any manipulative or deceptive device or contrivance." 15 U.S.C. § 78j(b). "Creating" a statement for someone else to use is hardly equivalent to "us[ing] or employ[ing]" it. *See Bailey* v. *United States*, 516 U.S. 137, 143 (1995) ("use" connotes "active employment").

Whatever service provider may have "created" portions of an issuer's offering document, it is the issuer—and not the service provider—that "use[s] or employ[s]" that document to sell securities. The service provider is not "us[ing] or employ[ing]" the prospectus to sell securities (or for any other purpose)—either "directly or indirectly." *Compare* Pet. Br. 37-38 & n.7 *with* U.S. Br. 16 n.7. Thus, the issuer of the securities offered by a prospectus is the only person who "makes" statements in that prospectus.

Extending liability across this bright line requires an Act of Congress. And Congress knows perfectly well how to impose liability on non-issuers—including those who assist an issuer with its offering documents—when it chooses to do so. *See* SIFMA Br. 12-23. In Section 11 of the Securities Act, for instance, Congress created a private right of action against, *inter alia*, "any person whose profession gives authority to a statement made by him, who has with his consent been named as having prepared or certified any part of the registration statement." 15 U.S.C. § 77k(a)(4). Similarly, Section 34(b) of the Investment Company Act imposes liability for "any part of any [registration statement] which is signed or certified by an accountant or auditor in his capacity as such." *Id.* § 80a-33(b). And if a secondary actor "cause[s]" misleading offering documents "to be made" (*id.* § 78r(a)), then it can be held liable under Section 18 of the Exchange Act. *See* note 1, *infra*.

Indeed, in opposing certiorari, lead plaintiff noted that Congress was "contemplating a statutory solution" to the issues presented in this very case by "allow[ing] for a private civil action against a person that provides substantial assistance in violation of [the Exchange Act]." BIO 24. That statute, however, did not pass: Congress broadened the SEC's authority to sue secondary actors, but declined (once again) to give parallel power to private plaintiffs. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 929Z, 124 Stat. 1376, 1871 (2010); *see also* Chamber Br. 11-13. In their merits briefing, lead plaintiff and its *amici* say *nothing* about this most recent Act of Congress, instead asking this Court to do just what the Legislature left undone. Their entire position thus runs counter to this Court's holding that "[t]he decision to extend the cause of action is for Congress," not the courts. *Stoneridge*, 552 U.S. at 165.

Congress *could* have enacted a provision making investment advisers—or any other service provider—guarantors of their clients' prospectuses, or it could have authorized private claims against secondary actors. It did neither. The attempt by lead plaintiff and the SEC to overturn these legislative decisions by rewriting the language of Rule 10b-5 should be rejected.

b. Nor is the SEC's "creator" standard consistent with the text of Rule 10b-5(b), which refers to "mak[ing] any untrue statement." 17 C.F.R. § 240.10b-5(b).

The government contends that "those who actually drafted the statements contained in [a written] document can naturally be described as their 'maker.'" U.S. Br. 15; *see also* Resp. Br. 28. But to "make [a] statement" is "to state" (*Webster's New International Dictionary* 1485 (2d ed. 1934)), not to draft statements for someone else. Just as the President rather than his speechwriters "makes" a speech, an unsigned editorial is "made" by the newspaper in which it is published, regardless of who drafted its content. *See* Chamber Br. 28-29. Similarly here, the Janus Funds "made" the statements in their own prospectuses regardless of whether those statements incorporated language that was originally drafted by a service provider.[1]

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[1] The term "make" appears not only in Rule 10b-5(b) but also in the Exchange Act itself: Section 18 covers those who "make or cause to be made" misleading statements. 15 U.S.C. § 78r(a). Redefining "make" per the "creator" standard would render the "cause to be made" clause superfluous. Although lead plaintiff disputes that "this [is] a case in which the defendant caused *another* person to make a misstatement" (Resp. Br. 29), the complaint alleges that JCM "caused" allegedly misleading "prospectuses to be issued for Janus mutual funds." Pet. App. 60a ¶ 6. Section 18 precisely fits lead plaintiff's theory of this case—except, of course, for its inability to plead actual reliance because it did not read the Janus Funds' prospectuses before investing in JCG stock. *See Heit* v. *Weitzen*, 402 F.2d 909, 916 (2d Cir. 1968).

The government claims that, "[i]f an issuer can 'indirectly … make' an untrue statement by using an analyst as a conduit, other persons can likewise indirectly make an untrue statement through an issuer." U.S. Br. 16. A telescope, however, doesn't work the same regardless of which end one looks through. In the "conduit" cases, the issuer remains the speaker even though it is using a third party to relay its statements to the public; the direct/indirect issue concerns only the number of steps between the issuer's mouth and the market's ears. *Cf.* 15 U.S.C. § 78t(b) (making it "unlawful … to do any act or thing … through or by means of any other person" that cannot be done directly). Similarly, the President remains the "maker" of his speech even if the audience reads about it in the newspaper. By contrast, when a third party drafts language that an issuer incorporates into its prospectus, it becomes the issuer's statement when it is subsequently communicated, directly or indirectly, from the issuer to the market.

Although lead plaintiff contends that the "creator" standard has been around for "a long period of time" (Resp. Br. 18), it is no coincidence that the SEC announced that standard in 1998—*after* this Court's decision in *Central Bank*. *See* U.S. Br. 13. Once this Court held that "those who provide services to participants in the securities business"—including "lawyer[s], accountant[s], [and] bank[ers]"—are "secondary actors" (*Central Bank*, 511 U.S. at 188, 191), the SEC tried to redefine "making" to reach those same secondary actors. *See SEC* v. *Tambone*, 597 F.3d 436, 446 (1st Cir. 2010) (en banc) ("the SEC, through the instrumentality of Rule 10b-5(b), seeks to impose primary liability on the defendants for conduct that constitutes, at most, aiding and abetting"). The

SEC's transparent effort to "create" a form of liability that Congress did not permit is inconsistent with this Court's recognition that any "decision to extend the cause of action" after the PSLRA is "for Congress." *Stoneridge*, 552 U.S. at 165.[2]

2. The SEC's redefinition of "make" is as sweeping as it is textually unsupported. In any securities offering, *dozens* of advisers—legal advisers, financial advisers, and others—may draft or revise portions of the registration statement. *See* ALAS Br. 5-6. The government's position, if accepted, would extend Rule 10b-5 "primary" liability to *all* of them—no matter how much (if any) control the adviser exercises over the issuer, how much (if at all) the misrepresentation concerns the adviser's own conduct, or how much (if at all) the adviser's role is disclosed to or otherwise known by the market.

Lead plaintiff attempts to limit the SEC's "creator" theory by claiming (incorrectly) that the statements at issue here "concern the defendant's own conduct." Resp. Br. 16. This purported limitation, which is found nowhere in Rule 10b-5 or in the SEC's own articulation of the "creator" standard, was invented by lead plaintiff for the sole purpose of narrowing the perceived (but not actual) impact of affirming the decision below. In fact, accepting the SEC's "creator" standard in this case would subject every adviser to a public company to potential Rule

[2] For this reason, the SEC's "creator" standard is "plainly erroneous" and, therefore, not entitled to deference. *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997). Moreover, it is inconsistent with Rule 10b-5 itself (*see ibid.*), and thus "[t]o defer to the [SEC]'s position would be to permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation." *Christensen* v. *Harris County*, 529 U.S. 576, 588 (2000).

10b-5 liability for statements in the company's offering materials. Although lead plaintiff insists that this concern is "unfounded" (Resp. Br. 29 n.14), the government admits otherwise: "If an outside accountant or lawyer is sufficiently involved in creating or disseminating a statement issued in its client's name, that individual may be said to have 'made' the statement … and may be subject to Rule 10b-5 liability on that basis." U.S. Br. 22. Accepting the SEC's "creator" standard would require all of those service providers to charge higher fees to offset this increased liability, which ultimately will raise costs to consumers. *See* Brunstad Br. 29-35.

The government protests that it is not seeking to expand secondary liability because, in its view, JCM's role as an investment adviser makes it "*essentially* a corporate insider" of the Janus Funds rather than a "true secondary acto[r]." U.S. Br. 17, 19 (emphasis added). Just as one cannot be "essentially" pregnant, JCM—a separate corporate entity—cannot be "essentially" a corporate insider of the Funds. *See Burks* v. *Lasker*, 441 U.S. 471, 483 (1979) (noting that Congress rejected "compulsory internalization of the management function"). In any event, the government acknowledges, in practically the same breath, that its test for liability would apply equally to those it concedes are secondary actors. U.S. Br. 22.[3]

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[3] Contrary to lead plaintiff's intimation (Resp. Br. 27), the only issues decided by this Court in *Herman & MacLean* v. *Huddleston*, 459 U.S. 375 (1983), were whether the Securities Act remedies are exclusive of a Section 10(b) claim, and (if not) what the burden of proof is for the Section 10(b) claim. *See id.* at 387, 390-91. *Huddleston* expressly declined to address

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Both lead plaintiff and the government stress that JCM had certain "managerial" responsibilities with respect to the Funds. Resp. Br. 21; U.S. Br. 9. But those responsibilities—which, as the Fourth Circuit recognized, are "detailed" in the offering materials (Pet. App. 28a)—actually confirm that JCM did not make the challenged statements in the Janus Funds' prospectuses. Lead plaintiff never comes to grips with the express disclosure that *the Funds* are responsible for "preparing … *the Funds*' prospectuses." J.A. 225a (emphasis added); *see also* Pet. Br. Add. 4a-5a. After all, Congress imposed the registration obligation on mutual funds; as "registrant[s]" they are not "nominal speaker[s]" (U.S. Br. 12) but *statutory* ones. 15 U.S.C. § 80a-8(b).

Even where the adviser handles "day-to-day" operations (Pet. App. 65a ¶ 18), the registration and offering of fund securities for sale is not operational—it is the fundamental obligation of the mutual fund as a legal entity and the central requirement (together with approval of the advisory contract) imposed by law on its Board of Trustees. 15 U.S.C. § 77f(a). The involvement of these independent actors means that the prospectuses did not "necessar[ily] or inevitabl[y]" include *anything* drafted by JCM. Resp. Br. 38 (quoting *Stoneridge*, 552 U.S. at 38)). Indeed, the Trustees, like the directors of any public company, are expressly made liable for the contents of the prospectuses under the Securities Act. 15 U.S.C. § 77k(a)(2). Any suggestion that they lacked the incentive to monitor the Funds' agents, including the investment adviser, is misdirected.

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whether Rule 10b-5 "permit[s] aider-and-abettor liability" (*id.* at 379 n.5), which *Central Bank* answered in the negative.

Like directors, certain "individual employees" have sometimes been held liable "for statements released in their companies' names." U.S. Br. 20. An issuing corporation can act only through its agents, and it is not inconsistent with the background structure of corporate law to hold individuals liable for actions they undertake on behalf (and in the name) of the corporation they serve as directors or officers. Indeed, Congress has expressly imposed liability on corporate officers who sign the registration statement. 15 U.S.C. § 77k(a)(1). Holding one corporation liable for the actions of a different corporation with separate ownership and independent governance, in contrast, *would* create unprecedented and unwarranted structural conflicts. *See*, *e.g.*, *Burks*, 441 U.S. at 479-80.

3. Lead plaintiff and its *amici* also claim the "purposes" and "goals" of the Exchange Act support expanding the private right to sweep in suits against investment advisers and other service providers. Resp. Br. 51. Because "[p]olicy considerations cannot override … the text and structure of the [Exchange] Act" (*Central Bank*, 511 U.S. at 188), these arguments are properly directed to Congress, not the Court. *See Stoneridge*, 552 U.S. at 165. That the proponents of expansion have thus far been unable to persuade the Legislature is no reason for this Court to take up the legislative mantle.

Moreover, the various policy arguments advanced in support of extending Rule 10b-5 are answered completely by the interlocking framework of the federal securities laws. *Cf. Central Bank*, 511 U.S. at 188. Neither Section 10(b) nor any other individual provision is a panacea for all allegations of wrongdoing in the business world. *See Santa Fe In-*

dus., Inc. v. Green, 430 U.S. 462, 478 (1977). Rather, Congress has developed over the past 75 years a multi-layered and nuanced approach to securities regulation and enforcement, of which Section 10(b) is only part. This reticulated regime includes both primary and secondary liability provisions to cover the range of conduct and actors that Congress has deemed appropriate.[4]

A private securities claimant bears the burden of identifying a cause of action authorized by Congress. If it cannot fit within one of the express private rights of action, then its ability to invoke the private right implied under Rule 10b-5 is limited to the scope of that right before 1995—when it was "ratified" by Congress in enacting the PSLRA. *Stoneridge*, 552 U.S. at 165. Lead plaintiff cannot find either an express private right or a pre-ratification implied private right; the Fourth Circuit's error was in stretching Rule 10b-5 rather than recognizing that the complaint was properly dismissed.

* * *

The "maker" of statements in a prospectus is the company issuing the securities offered by that prospectus—on whom the statutory obligation to pre-

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[4] The SEC asserts that its ability to pursue those who provide "substantial assistance" might not be available on the particular facts of this case. U.S. Br. 23-25. Even if that were so, the securities laws provide a host of other liability provisions under which the SEC or private plaintiffs could proceed against investment advisers. In addition to Section 18 of the Exchange Act (*see* note 1, *supra*), the 1940 Acts include several liability provisions expressly applicable to investment advisers; indeed, the SEC proceeded against JCM on the underlying facts in this case without even trying to bring a "substantial assistance"—or, for that matter, Section 10(b)—claim.

pare and file the prospectus rests. *See* 15 U.S.C. § 80a-8(b). Any other actors, including the range of advisers that assist in preparing the prospectus, are secondary actors and therefore may be held liable *only* under a statutory provision that (unlike Section 10(b)) permits secondary liability. Because JCM did not "make" the statements in the Janus Funds' prospectuses, the Fourth Circuit's decision cannot stand.

II. LEAD PLAINTIFF DID NOT "RELY" ON THE STATEMENTS IN THE JANUS FUNDS' PROSPECTUSES

The *Basic* presumption *requires* a private securities-fraud plaintiff to plead and prove "that *the defendant* made *public* misrepresentations." *Basic Inc.* v. *Levinson*, 485 U.S. 224, 248 n.27 (1988) (emphases added). Lead plaintiff and its *amici* do not deny this requirement; to the contrary, they simply ignore it. That is because it is fatal to the reliance theory accepted by the court below.

Even if JCM could be said to have "made" statements in the Janus Funds' prospectuses by "creat[ing]" them, as lead plaintiff (and the government) contend, JCM did *not* make those statements *to the public*. The public communication was entirely between the Janus Funds, as registrants of the securities offered by the prospectuses, and potential investors in those securities—a group that does *not* include lead plaintiff, which never purchased or sold any security offered by the prospectuses in which the challenged statements appear.[5]

[5] Lead plaintiff thus fails the purchaser/seller requirement, which does not allow an investor to bring a private suit under Rule 10b-5 "without having either bought or sold the securities described in the allegedly misleading prospectus." *Blue Chip*

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A. THE *BASIC* PRESUMPTION DOES NOT APPLY TO SECONDARY ACTORS

This Court has never held the *Basic* presumption applicable to anything other than "*issuers*' disclosures." 485 U.S. at 246 n.23 (emphasis added). In particular, the Court has never held that *Basic* can be applied to presume that investors in the securities of one corporation relied on statements contained in the prospectuses offering the securities of *another company*, with separate ownership and independent governance. Neither lead plaintiff nor its *amici* identify any appellate case that has *ever* presumed reliance in that scenario, and certainly not before the PSLRA "froze" the law of private Rule 10b-5 actions in 1995. *Stoneridge*, 552 U.S. at 165-66. To the contrary, this Court held in *Stoneridge* that the *Basic* presumption did *not* apply to statements made (or created) by the non-issuer suppliers. *Id.* at 166-67.

Lead plaintiff tries to avoid this by arguing that "it makes no difference … that the misstatements at issue were contained in prospectuses for the Janus Funds, rather than JCG's own prospectuses." Resp. Br. 35. That is wrong. JCG, while *an* issuer of secu-

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Stamps v. *Manor Drug Stores*, 421 U.S. 723, 727 (1975). The suggestion that this issue is not properly before the Court (Resp. Br. 47 n.20) is inconsistent with *Stoneridge*, which recognized that the "emphasis on a purchase or sale of securities does provide some insight into the deceptive acts that concerned the enacting Congress." 552 U.S. at 160. Indeed, in a decision on which lead plaintiff and its *amici* are tellingly silent, this Court recently reiterated that only "*certain* purchases or sales" can give rise to a private action. *Morrison* v. *Nat'l Australia Bank Ltd.*, 130 S. Ct. 2869, 2887 (2010) (emphasis added); *see also* SIFMA Br. 6-7.

rities, is not *the* issuer of the "securities *described in the allegedly misleading prospectus*" (*Blue Chip Stamps*, 421 U.S. at 727) (emphasis added)—the only securities that matter under *Basic*. The issuers of *those* securities were the Janus Funds, and it was the Janus Funds who spoke to the market in their own prospectuses.

Lead plaintiff insists, however, that JCM's "misstatements regarding market timing were publicly disclosed in the prospectuses," and therefore that this case is "fundamentally different" from *Stoneridge*." Resp. Br. 43, 45-46. That too is wrong. Charter's financial statements disclosed the substance of the suppliers' falsehoods—namely, that the "transactions were unrelated." 552 U.S. at 154. The only thing that was *not* disclosed was the identity of the parties on whose contracts the false financial statement rested—just as in this case the only thing that was not disclosed was the identity of the party allegedly assisting in creating the false statement.

Lead plaintiff also suggests that the reliance requirement was an afterthought or tangential consideration in this Court's prior decisions declining to extend the private right to secondary actors. Resp. Br. 44-47. Wrong again. This Court rejected aiding-and-abetting liability precisely *because* "the defendant could be liable without any showing that the plaintiff relied upon the aider and abettor's statements or actions." *Central Bank*, 511 U.S. at 180; *see also Stoneridge*, 552 U.S. at 159, 166-67. Precisely the same problem presents itself here.

Because this Court has never applied the *Basic* presumption to a non-issuer—and no court of appeals had done so before the PSLRA was enacted—

the presumption is inapplicable in cases like this one. *See Stoneridge*, 552 U.S. at 165.

B. RELIANCE CANNOT BE PRESUMED WITHOUT DIRECT ATTRIBUTION

Lead plaintiff protests that the *Basic* presumption does not "depen[d] on the market knowing the true *identity* of the person making the public misstatement." Resp. Br. 48. Of course, this is a moot point if *Basic* is limited to statements by issuers; the market *always* knows the identity of the issuer because it is identified, by statute, on the face of the registration statement or other public filing. *See* 15 U.S.C. § 77aa(a)(1); *see also* J.A. 119a.

This Court's post-*Basic* reliance cases have emphasized that the plaintiff must prove reliance on "*the defendant's*" statements or acts, not statements or acts in the abstract. *Stoneridge*, 552 U.S. at 159; *Central Bank*, 511 U.S. at 180. If the market does not know who the speaker is, this requirement cannot be satisfied. For this reason, to the extent the *Basic* presumption applies at all to non-issuers, attribution is required. *See*, *e.g.*, *PIMCO*, 603 F.3d at 148 ("Absent attribution, plaintiffs cannot show that they relied on defendants' *own* false statements …").

Lead plaintiff admits that, outside of the corporate insider context, the courts of appeals have regularly required direct attribution where the challenged statement was conveyed to the market by someone other than the named defendant. Resp. Br. 49; *see also*, *e.g.*, *Ziemba* v. *Cascade Int'l, Inc.*, 256 F.3d 1194, 1205-06 (11th Cir. 2001) (rejecting claim against law firm that allegedly played a "significant role in drafting, creating, reviewing or editing allegedly fraudulent letters or press releases"). As the Fifth Circuit recently explained, "[t]he attribution requirement … makes clear the boundary between primary violators—who are open to liability in private securities actions—and aiders and abettors, to whom the private right of action under section 10(b) does not extend." *Affco Invs. 2001 LLC* v. *Proskauer Rose, L.L.P.*, No. 09-20734, 2010 WL 4226685, at *9 & n.8 (5th Cir. Oct. 27, 2010) (expressing "concern" about "whether [the Fourth Circuit's decision below] comports with" this Court's cases).

Lead plaintiff calls the cases enforcing the attribution requirement "inapt because they all involved claims against 'secondary actors'—not issuers of the securities in which the plaintiff transacted." Resp. Br. 49. But JCM is a secondary actor with respect to the securities offered by the prospectuses containing the challenged statements; the fact that lead plaintiff did not transact in those securities makes its case weaker, not stronger. The fallacy in lead plaintiff's argument can be exposed by a simple example: Suppose a publicly traded accounting firm "created" a misstatement that was reproduced in the prospectus of one of its audit clients. In a suit by the equity investors of the accounting firm challenging the prospectus disclosure as false, the accountant is a "secondary actor" because it is not the issuer of the securities offered by the prospectus, even if it issued other securities in which the plaintiff transacted. The same is true here: JCM is a secondary actor with respect to the Janus Funds' securities even though its parent offered securities of its own—as to which there remain no allegations of misconduct. *See* Pet. Br. 22 n.3.

Lead plaintiff complains that the courts of appeals have not "explained why knowledge of an entity's true *identity* is necessary to rely on that entity's *statement*." Resp. Br. 50-51. But they have. *See* Pet. Br. 51-52 (citing *PIMCO*, 603 F.3d at 156). As the Fifth Circuit recently reiterated, "[k]nowing the identity of the speaker is essential to show reliance because a word of assurance is only as good as its giver." *Affco*, 2010 WL 4226685, at *8.

In the district court, lead plaintiff "concede[d] … that the prospectus statements were not specifically attributed to [petitioners]." Pet. App. 46a. In fact, the prospectuses were filed "[o]n behalf of" the Funds (J.A. 166a), recite "the Funds'" policy on excessive trading and refer to JCM in the third person (*id.* at 141a), and explain that the Funds are responsible for the "costs of preparing, printing and mailing the Funds' Prospectuses" (*id.* at 225a). *See also* Pet. Br. 25-26. No reasonable investor reading these documents could conclude that JCM was responsible for them; certainly nothing in them is directly attributed to JCM.

Abandoning the direct-attribution requirement, as lead plaintiff suggests, would require a fact-intensive inquiry into what "interested investors would have inferred" (Pet. App. 31a), or "what the investing public already knows" (Resp. Br. 54), in every case. Securities plaintiffs will argue that disputes regarding the "creator" of prospectus disclosures cannot be resolved on a motion to dismiss, thus subjecting secondary actors to expensive discovery and potentially forcing them to settle non-meritorious actions. ALAS Br. 16-22. The Court has repeatedly declined to so construe the securities laws. *Stoneridge*, 552 U.S. at 163-64; *see also Jones* v. *Harris Assocs. L.P.*, 130 S. Ct. 1418, 1429 n.8 (2010).

Far from allowing secondary actors to "evade" liability (Resp. Br. 2), the direct-attribution requirement ensures that non-issuers are amenable to suit only where their involvement in the alleged statements was expressly disclosed to—and thus could be processed by—the market. "Specific attribution to a reputable source also induces reliance because of the ability to hold such a party responsible should things go awry." *Affco*, 2010 WL 4226685, at *8. It thus promotes the certainty and predictability that this Court has valued in construing the private right of action.

To the extent the *Basic* presumption is applicable at all in cases against non-issuers, the direct-attribution requirement is therefore an essential component.[6]

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[6] Although lead plaintiff suggests there is "more than one way" to prove reliance (Resp. Br. 41), *Stoneridge* held that there are only *two* presumptions available to private plaintiffs: *Basic* and *Affiliated Ute Citizens of Utah* v. *United States*, 406 U.S. 128 (1972). The latter is unavailable to lead plaintiff because "JCM owed no duty to JCG shareholders" to correct statements in the Janus Funds' prospectuses. Pet. App. 52a-53a & n.7. *Basic* is thus the only presumption potentially available to lead plaintiff. Although one *amicus* suggests that this Court should create an *additional* presumption in cases against investment advisers because of their supposed "fiduciary duty to mutual fund shareholders" (CII Br. 20), the courts must "rejec[t] … new presumptions of reliance" after the PSLRA. *Malack* v. *BDO Seidman, LLP*, 617 F.3d 743, 754 (3d Cir. 2010). In any event, lead plaintiff is not a "mutual fund shareholde[r]" (CII Br. 20; *see also* U.S. Br. 31 n.14), and an investment adviser "owes fiduciary duties only to the fund"—*i.e.*, its client—"not to the fund's investors." *Goldstein* v. *SEC*, 451 F.3d 873, 881 (D.C. Cir. 2006).

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Enacting the PSLRA in 1995, "Congress accepted the [Section] 10(b) private cause of action as then defined but chose to extend it *no further*." *Stoneridge*, 552 U.S. at 166 (emphasis added). Lead plaintiff and the government cannot identify a single appellate decision that directly supports the judgment below on either "making" or "reliance," and certainly none that predates the PSLRA. *See* Pet. Br. 30. The undisputed novelty of this claim exposes it for what it is: yet another attempted end-run around *Central Bank* and *Stoneridge*. *See id.* at 41.

Reversal would restore the *status quo ante*, whereas affirmance would subject a new class of defendants to private liability. While meritorious private actions, when authorized by Congress, are unquestionably an important part of the securities-regulation regime, this Court has already held that *expansion* of the private right previously implied under Rule 10b-5 is, in this post-PSLRA world, a job "for Congress"—and for Congress alone. *Stoneridge*, 552 U.S. at 165. Fidelity to that holding does not allow the decision below to stand.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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