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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

BRIEF FOR THE NEW YORK STATE COMMON RETIREMENT FUND, NEW YORK CITY EMPLOYEES' RETIREMENT SYSTEM, BOARD OF EDUCATION RETIREMENT SYSTEM OF THE CITY OF NEW YORK, NEW YORK FIRE DEPARTMENT PENSION FUND, NEW YORK CITY POLICE PENSION FUND, AND TEACHERS' RETIREMENT SYSTEM OF THE CITY OF NEW YORK, AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICI CURIAE*[1]

This brief is filed on behalf of seven large public pension systems that serve as fiduciaries to millions of public employees who rely on them to prudently manage their retirement funds.[2] These public funds have a special responsibility to help ensure the accountability of participants in the securities markets, and therefore a strong interest in the integrity of, and eliminating fraud in, such markets.

The New York State Common Retirement Fund ("NYSCRF") holds and invests the assets of the New York State and Local Employees' Retirement System and the New York State and Local Police and Fire Retirement System. NYSCRF is one of the largest public pension funds in the United States and provides pension, disability and death benefits for New York state and local government employees and employees of certain other participating employers. As of March 31, 2010, NYSCRF had more than one million members, beneficiaries and retirees, and total net assets of approximately $132.6 billion. NYSCRF has served as lead plaintiff in numerous class actions resulting in some of the largest recoveries for shareholders in history,

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[1] This brief was not authored, in whole or in part, by counsel for either party, and no person or entity other than *amici* and their counsel made a monetary contribution to the preparation or submission of the brief.

[2] According to the US Census Bureau's 2010 Statistical Abstract, state and local retirement funds had $2.311 trillion in assets in 2008 ($1.238 trillion in corporate equities). U.S. Census Bureau, Assets of Private and Public Pension Funds (2009), available at http://www.census.gov/compendia/statab/2010/tables/10s1180.xls.

including *In re WorldCom, Inc. Sec. Litig.,* No. 02-cv-3288 (DLC) (S.D.N.Y.), with a settlement of more than $6 billion, *In re Cendant Corp. Sec. Litig.*, No. 98-cv-1664 (WHW) (D.N.J), with a settlement over $3.2 billion, and *In re McKesson Corp. HBOC, Inc.*, *Sec. Litig.*, No. C-99-20743 RMW (N.D. Cal.), with a settlement over $1 billion.

The New York City Employees' Retirement System ("NYCERS"), in existence since 1920 and one of the largest public pension funds in the United States, has a rich history of shareholder activism and *amicus* involvement in corporate governance issues. *See, e.g., New York City Employees' Ret. Sys. v. SEC*, 45 F.3d 7 (2d Cir. 1995); *New York City Employees' Ret. Sys. v. Dole Food Co.*, 969 F.2d 1430 (2d Cir. 1992); *New York City Employees' Ret. Sys. v. Am. Brands, Inc.,* 634 F. Supp. 1382 (S.D.N.Y. 1986). NYCERS is a public employee retirement system established pursuant to Section 13-102 of the Administrative Code of the City of New York that provides retirement, disability and death benefits to certain New York City employees. NYCERS has over 300,000 active and retired participants and total plan assets of over $36.7 billion.

The Board of Education Retirement System of the City of New York ("BERS") provides pension benefits to approximately 32,000 active and 14,000 retired members, comprised mainly of non-pedagogical employees of the New York City Department of Education. Its plan assets exceed $2.5 billion.

The Teachers' Retirement System of the City of New York ("TRS") provides a retirement program

for some 180,000 active and retired participants who work, or have worked, for the New York City Department of Education, New York City Charter Schools or the City University of New York. TRS's basic qualified pension plan has some $36.8 billion in assets. In addition, the System administers a Section 403(b) tax-deferred annuity program, with more than $9 billion in assets.

The New York Fire Department Pension Fund ("FDPF") is a single-employer public employee retirement system serving full-time uniformed employees of the New York City Fire Department. FDPF has approximately 11,000 active members and 17,500 retired members, including widows and beneficiaries. Its assets are approximately $6.8 billion.

The New York City Police Pension Fund ("PPF"), in existence since 1857, was the first municipal retirement system established in the United States. It initially provided lump sum benefits for New York City police officers injured in the line of duty, and expanded some twenty years later to provide half pay retirement benefits to retired officers. PPF currently administers benefits for approximately 74,000 active and retired members; the plan assets, including variable supplements funds, are approximately $21 billion.

This case presents an issue of crucial importance to public pension funds such as the *amici*. The *amici* believe that Section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act"), 15 U.S.C. § 78j(b), should be interpreted and applied in a manner that will help to promote Congress's intent to provide redress for misrepresentations and deceptive practices in the pur-

chases and sales of securities. The *amici's* overriding responsibility is to provide for the payment of benefits to their members and, in doing so, to invest for the long-term security of their millions of active and retired members. As major investors with long-term outlooks, the *amici* are vitally concerned with the proper and efficient functioning of U.S. capital markets and are concerned that investors not be harmed by fraudulent conduct.

Many state and local governments are constitutionally obligated to guarantee defined benefit retirement plans. Therefore, investment losses due to securities fraud fall directly on state and local governments, and ultimately, on taxpayers. If public pension funds are prevented from recovering money lost to securities fraud, the public will suffer.[3]

In recent years, public pension funds have become increasingly concerned about the integrity of U.S. securities markets. Scandals at Enron, WorldCom, Global Crossing, Tyco, Refco, Fannie Mae, Freddie Mac, Adelphia, Xerox, and numerous other public companies have caused hundreds of billions of dollars in losses to innocent investors. As investors who have been materially harmed by corporate fraud, the *amici* have an acute interest in ensuring that the law allows injured investors to recover from perpetrators of fraud.

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[3] From 2004 to 2007, investment earnings (as opposed to worker or government contributions) constituted between 74 and 82 percent of public pension funding. *See Notes* (Employee Benefit Research Institute) Vol. 30, No. 4, April, 2009, at 3, *available at* http://www.ebri.org/pdf/notespdf/EBRI_Notes_04-Apr09.PblcPnsPlns1.pdf. With respect to NYSCRF and the New York City Funds, for each entity's respective FY10, this percentage exceeded 90%.

Investors' ability to redress corporate wrongdoing through private actions under the Exchange Act is absolutely essential to deter improper conduct and to recoup losses caused by fraud. If the courts further impair the ability of investors such as the public pension funds on whose behalf this brief is submitted to recover losses sustained due to fraud, the results for public employees—and for the taxpayers who would ultimately be required to make up any funding shortfalls—could be disastrous.

SUMMARY OF THE ARGUMENT

By this appeal, Petitioners ask this Court to engraft onto Section 10(b) a requirement that a person who drafts a false statement and provides it to another to release into the marketplace cannot be held liable under Section 10(b) if the person who published the statement did not publicly attribute the statement to the person who wrote it.

Petitioners thereby seek to exempt from liability under Section 10(b) a wide range of persons and entities responsible for the issuance of false and misleading statements to investors. If Petitioners are successful in obtaining such a judicially-created attribution rule, the ability of investors injured by securities fraud to recover will be severely impaired. The *amici*, public pension funds on which millions of retirees depend for their pension benefits, are major investors who rely on the integrity of the securities markets. Depriving the victims of fraud of the ability to recover from the persons responsible for the false

and misleading statements would have enormous adverse consequences for the *amici*, their beneficiaries, and the taxpayers who, in part, fund the systems.

The attribution rule proposed by Petitioners is not required by the plain language of Section 10(b) and Rule 10b-5 nor by prior decisions of this Court. To the contrary, the rule is inconsistent with this Court's precedents, such as *Herman & MacLean v. Huddleston*, 459 U.S. 375, 387 n.22 (1983). Approval of such an attribution rule cannot fairly be inferred from the fact that Congress chose not to impose liability for aiding and abetting when Congress passed the Private Securities Litigation Reform Act, Pub. L. No. 104-67, 109 Stat. 737 (1995) ("PSLRA"). In so doing, Congress ratified the existing private right of action under Section 10(b), and as of that time, no court of appeals had adopted an attribution rule and one Circuit had explicitly held that substantial participation in the preparation of false statements is sufficient for a claim under Section 10(b). *See In re Software Toolworks Inc. Sec. Litig.*, 50 F.3d 615, 628 n.3 (9th Cir. 1994).

ARGUMENT

I. BECAUSE PRIVATE ENFORCEMENT OF THE FEDERAL SECURITIES LAWS IS ESSENTIAL FOR THE PROTECTION OF INVESTORS AND THE PROPER FUNCTIONING OF THE SECURITIES MARKETS, THE COURT SHOULD NOT WEAKEN SUCH ENFORCEMENT BY JUDICIAL CREATION OF BARRIERS THAT PREVENT INVESTORS FROM PURSUING VALID CLAIMS

Reversal of the decision below could deal a serious—if not fatal—blow to many meritorious securities fraud actions. At a minimum, reversal would make it far more difficult for the victims of securities fraud to recover from the perpetrators of fraud. Erecting barriers to private Rule 10b-5 cases would seriously undermine private enforcement of the federal securities law, to the detriment of investors and the proper functioning of the securities markets. And because taxpayers would ultimately bear the burden if public pension funds such as the *amici* submitting this brief cannot meet their obligations, weakened private securities enforcement could well have enormous consequences for the public.

Briefs submitted in support of Petitioners argue that weakening private securities enforcement would be a positive development for business and investors. *See, e.g.*, Brief of the Center for Audit Quality at 28-29 (suggesting it is bad for investors if auditors can be sued); Brief of the Chamber of Commerce at 2-3, 24 (suggesting securities litigation puts U.S. businesses at a competitive dis-

advantage). Both this Court and Congress, however, have recognized that just the opposite is true. Thus, as this Court stated in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71, 78 (2006), "[t]he magnitude of the federal interest in protecting the integrity and efficient operation of the market for nationally traded securities cannot be overstated." Preventing fraud in the purchase or sale of securities furthers the interests of both investors and honest businesses, because investor confidence in the integrity of the securities markets is crucial to helping businesses raise the capital that they require. *See Basic, Inc. v. Levinson*, 485 U.S. 224, 235 n.12 (1988); *see also SEC v. Zandford,* 535 U.S. 813, 819 (2002) (quoting *United States v. O'Hagan,* 521 U.S. 642, 658 (1997)) (Congress enacted the Securities Exchange Act to "'insure honest securities markets and thereby promote investor confidence' after the market crash of 1929"). Similarly, Congress also has rejected the notion that securities litigation is injurious to America's position in the global economy. *See* H.R. Rep. No. 104-369, at 31 (1995) (Conf. Rep.) ("private lawsuits promote public and global confidence in our capital markets and help to deter wrongdoing and to guarantee that corporate officers, auditors, directors, lawyers and others properly perform their jobs").

Briefs urging reversal also argue that weakening the ability of investors to sue the wrongdoers is tolerable because government enforcement by the Securities and Exchange Commission is sufficient to deter wrongdoing. *See, e.g.*, Brief of Securities Industry and Financial Markets Association at 17-21. While the SEC obviously plays an

important role in securities enforcement, this Court has "repeatedly . . . emphasized that implied private actions are . . . 'a necessary supplement to Commission action.'" *Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 310 (1985) (quoting *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 730 (1975)). SEC enforcement is not sufficient to deter wrongdoers and to compensate investors, because the SEC simply does not possess the resources to prosecute most instances of securities fraud. "Unless there is a vastly enlarged SEC, private actions inevitably must serve as an enforcement substitute for deterrence purposes, as well as their more traditional role as an avenue for appropriate compensation of victims."[4] Former SEC commissioners have noted that "[p]rivate actions are an especially important supplement to the Commission's enforcement program today because of the phenomenal growth of the securities industry during a time when the Commission's staff and budget levels have remained relatively constant."[5] As this Court has

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[4] Donald C. Langevoort, *Managing the "Expectations Gap" in Investor Protection: The SEC and the Post-Enron Reform Agenda,* 48 VILL. L. REV. 1139, 1161 (2003).

[5] Arthur Levitt, SEC Chairman, & Isaac C. Hunt, SEC Commissioner, *The Securities Litigation Uniform Standards Act of 1997: Hearing on S. 1260*, Testimony Before Senate Banking Subcommittee on Securities (Oct. 29, 1997); *see also* Eliezer M. Fich & Anil Shivdasani, *Financial Fraud, Director Reputation, And Shareholder Wealth*, 86 J. FIN. ECON. 306, 311 (2007) ("limited resources prevent the SEC from pursuing all cases"). As former SEC Chief Accountant Lynn Turner has observed, "[t]he SEC is in worse shape today than the French army was after its defeat at Waterloo." Jesse Westbrook, *Cox Quits at SEC, Leaves Schapiro to Restore Clout*, Bloomberg (Jan. 21, 2009).

recognized, private securities litigation is a valuable part of the overall enforcement regime that compensates defrauded investors, deters fraud, promotes investor confidence and facilitates the fair and efficient functioning of our capital markets. "[P]rivate securities litigation is an indispensable tool with which defrauded investors can recover their losses—a matter crucial to the integrity of domestic capital markets." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 320-21 n.4 (2007) (quoting *Dabit*, 547 U.S. at 81).

Lastly, briefs urging reversal argue that a bright-line attribution rule is needed to further the allegedly "crucial goals of certainty and predictability." Brief of Securities Industry and Financial Markets Association at 3; *see also* Brief of the Chamber of Commerce at 4. The only certainty that the attribution rule provides is that fraudsters can avoid liability if they can manage to remain anonymous. Moreover, as this Court stated in *Basic*, "ease of application alone is not an excuse for ignoring the purposes of the securities acts and Congress' policy decisions." 485 U.S. at 236. The fact is that claims under Section 10(b) involve numerous other elements, such as scienter and loss causation, that are not bright-line tests but rather require application of judgment and consideration of particular facts and circumstances. Taken to its extreme, elevating the allegedly "crucial goals of certainty and predictability" above all others would militate for abolition of the private right of action under Section 10(b). But that is a decision for Congress, and Congress has "ratified the implied right of action." *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.,* 552 U.S. 148, 165 (2008).

Reversal of the decision below would seriously impair the ability of investors to recover for fraud. Such a result would be terribly detrimental not only to public pension funds and other investors but also to legitimate businesses that participate in the capital markets.

II. CLICHÉD ASSERTIONS BY *AMICI* SUPPORTING PETITIONERS THAT PRIVATE SECURITIES LITIGATION IS ABUSIVE SHOULD NOT INFLUENCE THIS COURT'S DECISION

Briefs submitted by *amici* in support of reversal argue a need to curb private Rule 10b-5 cases because such cases are allegedly "vexatious"[6] and the "threat of abusive private securities litigation is substantial."[7] These anachronistic clichés should not prejudice this Court's decision on this appeal.

First, the rule advocated by Petitioners would not only impact securities class actions, it would also apply to non-class cases that institutional investors such as the *amici* can and do bring. Congress has recognized the constructive role that institutional investors play in securities litigation; indeed, far from criticizing them, through the PSLRA Congress sought "to increase the likelihood that institutional investors will serve as lead plaintiffs" in class cases. H.R. Rep. No. 104-369, at

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[6] Brief for Attorneys' Liability Assurance Society, Inc. at 16.

[7] Brief of Securities Industry and Financial Markets Association at 18.

34. But the attribution rule would undermine both class actions and individual actions alike.

Second, there is no need for the Court to strain to excuse from liability persons engaged in fraudulent conduct out of any concern over excessive securities litigation. The facts indicate that the PSLRA has already achieved Congress's intent to remedy perceived abuses in private securities litigation. Since 1995, the dynamics of private securities litigation, especially cases involving large investor losses, have changed radically. Institutional investors, such as the *amici* submitting this brief, have come to the fore in most such cases, seeking appointment as lead plaintiffs and negotiating lower attorneys' fees, as a percentage of recoveries, than was typical before the PSLRA. Potentially frivolous cases no longer pose the problems that previously worried courts, while meritorious cases have gained prominence in response to recent outbreaks of corporate wrongdoing. Institutional investor participation has increased recoveries substantially, the number of lawsuits filed has declined, and the dismissal rate has jumped.[8] Whatever concerns courts might once have had about abusive securities litigation, "under the PSLRA this problem may have sub-

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[8] Todd Foster, *et al.*, *Recent Trends in Shareholder Class Action Litigation: Filings Plummet, Settlements Soar*, at 2 (Jan. 2007), NERA Economic Consulting, *available at* http://www.nera.com/image/BRO_Recent_Trends_SEC1288_FINAL_0307.pdf; *see also* Cornerstone Research, *Securities Class Action Case Filings: 2009: A Year in Review* (2010) *available at* http://securities.stanford.edu/clearinghouse_research/2009_YIR/Cornerstone_Research_Filings_2009_YIR.pdf (securities class action filings decreased 24 percent in 2009 from filings in 2008).

sided." John C. Coffee, Jr., *Future of Class Actions Depends on Pending Cases*, N.Y. LAW JOURNAL, Mar. 27, 2007, at 5. Indeed, as Professor Coffee has noted, "[t]he true 'strike suit' nuisance [securities] action, filed only because it was too expensive to defend, is, in this author's judgment, a beast like the unicorn, more discussed than directly observed." John C. Coffee, Jr., *Reforming the Securities Class Action: An Essay on Deterrence and its Implementation*, 106 COLUM. L. REV. 1534, 1536 n.5 (2006).

With each day bringing new revelations as to egregious acts of securities fraud across the country, it is difficult to look at the landscape today and argue that the greatest threat to America's securities markets is abusive litigation.

III. THE DECISION BELOW SHOULD BE AFFIRMED

A. The Plain Language of Section 10(b) and Rule 10b-5 Does Not Require Attribution

The starting point in interpreting the meaning of words used in a statute or rule must be "the language itself." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 197 (1976) (quoting *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975) (Powell, J., concurring)). Section 10(b) makes it unlawful "for any person, directly or indirectly, . . . [t]o use or employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive device or contrivance." Rule 10b-5(b) makes it unlawful "[t]o ***make*** any untrue statement of a material fact . . ." (emphasis added).

There is nothing in these phrases that requires or even implies that liability depends on whether the recipient of an untrue or deceptive statement knows the identity of the person responsible for the statement. Neither the statute nor the Rule uses words such as "attribute" or "attribution."

The verb "make" means "[t]o cause to exist or happen; bring about; create." AMERICAN HERITAGE COLLEGE DICTIONARY (4th ed. 2002) at 835.[9] "Make" is thus a causation concept. Under the plain meaning of the Rule, a person who creates a statement or causes a statement to exist, by, for example, dictating its language, "make[s]" a statement.[10]

This interpretation is further supported by the fact that both § 10(b) and Rule 10b-5 forbid engaging "directly or ***indirectly***" in the prohibited conduct (emphasis added). "There is no requirement that the alleged violator ***directly*** communicate

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[9] This Court often has looked to dictionary definitions in interpreting the securities laws. *See, e.g., Schreiber v. Burlington Northern, Inc.*, 472 U.S. 1, 7 n.5 (1985); *Aaron v. SEC*, 446 U.S. 680, 696 n.13 (1980); *Hochfelder*, 425 U.S. at 199 n.20.

[10] Petitioners argue that a speechwriter does not "make" the words in a speech (Brief for Petitioners at 41), but in fact, speechwriters are commonly credited with the words they draft. *See The Axes of Bush*, THE ECONOMIST (Mar. 2, 2002) (describing speechwriter David Frum as the "author of the phrase 'axis of evil'" in President George W. Bush's state of the union address); John W. Mashek, *Bush is challenged by one of his own*, BOSTON GLOBE, at 11 (Mar. 6, 1991) (describing Peggy Noonan as "the speech writer who coined the 'read-my-lips: no-new-taxes' phrase" for President George H.W. Bush). Similarly, ghostwriters are understood to have written books—and thus made statements—even though the books may be released under another's name.

misrepresentations to [investors] for primary liability to attach." *Wright v. Ernst & Young LLP*, 152 F.3d 169, 175 (2d Cir. 1998) (emphasis added) (citation omitted). A defendant who creates a false statement but provides it to another to release into the marketplace falls squarely within § 10(b) and Rule 10b-5's prohibition against violating those provisions "indirectly."

B. An Attribution Rule Is Not Required by But Rather Is Inconsistent With Prior Rulings by This Court

In *Herman & MacLean v. Huddleston*, 459 U.S. 375, this Court recognized that those who draft false portions of a registration statement can be held liable in private Rule 10b-5 actions. At issue in *Huddleston* was whether Section 11 of the Securities Act of 1933, 15 U.S.C. § 77k, provides the exclusive remedy for false statements contained in registration statements, or whether persons relying on false registration statements could also assert claims under Section 10(b). The Court reasoned that Section 10(b) liability was necessary notwithstanding the availability of Section 11 remedies because:

> [C]ertain individuals who play a part in preparing the registration statement generally cannot be reached by a Section 11 action. These include corporate officers other than those specified in 15 U.S.C. § 77k(a), lawyers not acting as "experts," and accountants with respect to parts of a registration statement which they are not named as having prepared or certified. If . . . purchasers in registered offerings

> were required to rely solely on Section 11, they would have no recourse against such individuals even if the excluded parties engaged in fraudulent conduct while participating in the registration statement. The exempted individuals would be immune from federal liability for fraudulent conduct even though Section 10(b) extends to '***any person***' who engages in fraud in connection with a purchase or sale of securities.

Id. at 387 n.22 (emphasis added).[11]

Petitioners' assertion that an attribution rule is required by prior decisions of this Court[12] is incorrect. None of those decisions held that attribution is necessary for the plaintiff to satisfy the element of reliance. To the contrary, *Stoneridge* held that reliance may be satisfied where the defendant's "deceptive acts" were "disclosed to the investing public," or where the defendant's conduct made the issuance of false statements "necessary or inevitable." 552 U.S. at 769-70. Neither of these requirements suggests that the defendant's ***identity*** must be publicly disclosed. Similarly, in *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336 (2005), the Court described the reliance element of a Rule 10b-5 claim as a showing that the "plaintiff relied upon that misrepresentation." *Id.* at 342.

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[11] *Huddleston* was decided before *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994), but the Court recognized that the availability of aiding and abetting liability was an undecided question and therefore based its reasoning on primary liability. *See Huddleston*, 459 U.S. at 379 & n.5.

[12] Brief for Petitioners at 12.

Thus, to satisfy the element of reliance, it is only necessary to show that the allegedly false ***information*** was relied on by investors—not that it was attributed to any particular source. *See Basic Inc. v. Levinson*, 485 U.S. at 248-49; *see also In re Salomon Analyst Metromedia Litig.*, 544 F.3d 474, 481 (2d Cir. 2008) ("the premise of *Basic* is that, in an efficient market, share prices reflect 'all publicly available information, and, hence, any material misrepresentations.' It thus does not matter, for purposes of establishing entitlement to the presumption [of reliance], whether the misinformation was transmitted by an issuer, an analyst, or anyone else."). Thus, this Court's prior decisions do not mandate that false statements be publicly attributed to a defendant in order for Section 10(b) liability to attach.

C. Congressional Approval of an Attribution Rule Cannot Be Inferred From Events Relating to the Passage of the PSLRA

Petitioners note that in *Stoneridge*, this Court stated that "[i]t is appropriate for us to assume that when" the PSLRA "was enacted, Congress accepted the § 10(b) private cause of action as then defined but chose to extend it no further." *Stoneridge*, 552 U.S. at 166.[13] Petitioners, however, then draw the wrong inference from such assumption. Congress did not reject liability for unattributed drafters when it declined to impose liability on aiders and abettors in the PSLRA. When the PSLRA was enacted in December 1995, no court had adopted an attribution rule. At that time, the

[13] *See* Brief for Petitioners at 15.

leading case in this Court on the subject, *Herman & MacLean v. Huddleston*, explicitly contemplated § 10(b) liability for unattributed drafters. *See* 459 U.S. at 387 n.22, quoted *supra*. Congress could hardly have anticipated that later courts would ignore *Huddleston* and misapply *Central Bank* so as to immunize wrongdoers simply because they act anonymously. If anything, Congress expected courts to employ the "substantial participation" test developed over a year earlier in *Software Toolworks,* 50 F.3d at 628 n.3, under which substantial participation in the preparation of fraudulent statements is grounds for primary liability.

D. Construing Section 10(b) to Require Explicit Attribution as a Prerequisite to Liability Leads to Undesirable Results That Congress Could Not Have Intended

Imposition of a strict attribution rule would provide a massive loophole through which false and misleading information can be disseminated to the investing public, as long as the person preparing the false information manages to remain anonymous. This is a bizarre and undesirable consequence that Congress could not have intended.

Congress enacted the Securities Exchange Act to "'insure honest securities markets and thereby promote investor confidence.'" *SEC v. Zandford,* 535 U.S. at 819 (quoting *United States v. O'Hagan,* 521 U.S. 642, 658 (1997)). The attribution rule frustrates this strong Congressional policy. Allowing a defendant to evade liability merely by avoiding having its name mentioned as the

source of a false statement "would allow those primarily responsible for making false statements to avoid liability by remaining anonymous, and thus would place a premium on concealment and subterfuge rather than on compliance with the federal securities laws." *In re Global Crossing, Ltd. Sec. Litig.*, 322 F. Supp. 2d 319, 333 (S.D.N.Y. 2004) (internal quotation marks omitted).

Under a strict attribution rule, one who drafts a false and misleading statement and hands it to another to release to the public cannot be held liable under Section 10(b), even if he or she acts with scienter, if the person who published the statement did not publicly identify the person who wrote it. At the same time, the person who published the statement, if that person did not have scienter, also escapes liability. In this scenario, no one could be held liable under Rule 10b-5(b) for the false and misleading statement.

For example, courts have held that subsidiaries can be held liable under Section 10(b) for creating false statements that were then published by their parent corporations. *See, e.g., In re LaBranche Sec. Litig.*, 405 F. Supp. 2d 333, 351-52 (S.D.N.Y. 2005). "To hold otherwise would enable parent companies to create subsidiaries under which all of its business would be conducted and then to shield the subsidiaries from section 10(b) liability by disseminating the subsidiary's false information." *Id.* at 352; *see also City of Monroe Employees Ret. Sys. v. Bridgestone Corp.*, 399 F.3d 651, 686 n.29 (6th Cir. 2005) (Rule 10b-5 liability may be imposed on a corporation that communicates false information to a related entity, in the expectation that the latter entity will publicize that

information). If these holdings fail to survive adoption of a rule that statements must be publicly attributed to the defendant in order for liability under Section 10(b) to attach, a subsidiary "could freely disseminate false information to the market through its parent, but investors relying on that information to their detriment would be left with no remedy: an action could not be brought against the subsidiary, and the parent would escape liability because it lacked scienter. This 'would lead to a result "so bizarre" that Congress could not have intended it.'" *In re Kidder Peabody Sec. Litig.*, 10 F. Supp. 2d 398, 408 (S.D.N.Y. 1998) (quoting *Central Bank*, 511 U.S. at 188).

Another example involves companies that provide false information to security analysts, which is then presented to the investing public. There is a consensus that such companies can be held liable under Section 10(b) in these circumstances, even when that information is not publicly attributed to the company. *See Novak v. Kasaks*, 216 F.3d 300, 314 (2d Cir. 2000); *Rombach v. Chang*, 355 F.3d 164, 174 (2d Cir. 2004); *Southland Sec. Corp. v. INSpire Ins. Solutions, Inc.*, 365 F.3d 353, 373 (5th Cir. 2004); *In re Navarre Corp. Sec. Litig.*, 299 F.3d 735, 743 (8th Cir. 2002); *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1428 (3d Cir. 1997); *Cooper v. Pickett*, 137 F.3d 616 (9th Cir. 1997). If adoption of a strict attribution rule undermines these holdings, another huge loophole allowing false information to be disseminated to the investing public will have been created.

Lastly, there has previously been general agreement that if a corporate officer drafts a statement that is issued by the corporation, or supplies false information to be included in the corporation's published statements, that officer has made a statement within the meaning of Section 10(b) whether or not the information was specifically attributable to him or her. *See, e.g., Southland,* 365 F.3d at 365; *Schwartz v. Celestial Seasonings*, 124 F.3d 1246, 1254 (10th Cir. 1997). Indeed, the Second Circuit, which adopted an attribution rule in *PIMCO*, nevertheless has held that that a corporate officer can be held liable under Rule 10b-5 if the officer was "involved in the drafting, producing, reviewing and/or disseminating of the false and misleading statements." *In re Scholastic Corp. Sec. Litig.*, 252 F.3d 63, 75-76 (2d Cir. 2001). These holdings present considerations not involved in the case at bar and should not be affected by the Court's ruling in this case. To disturb this settled law would dramatically constrict Section 10(b) and allow dishonest corporate officials to escape responsibility for their conduct.

CONCLUSION

Enabling persons who create false and misleading statements to escape liability under the federal securities laws merely because their false statements are not publicly attributed to them is required neither by the words Congress used in Section 10(b) nor the Congressional intent reflected in that provision. To the contrary, adoption of an attribution requirement, with the result that a multitude of persons responsible for false and misleading statements can no longer be sued under Rule 10b-5, would run afoul of the policies that underlie Section 10(b) and would have disastrous consequences for public pension funds such as the *amici*. It is difficult enough in the current economic environment for public pension funds to generate the returns necessary to fulfill their obligations. A judicially-created barrier to recovery of losses due to fraud will only exacerbate the problem, to the detriment of the retirees who depend on pensions and the taxpayers would are ultimately obligated to finance public pension funds if there are shortfalls.

For the reasons stated herein and in the Respondent's Brief, the decision below should be affirmed.

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Respectfully submitted,

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