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 OF THE EMPLOYEES' RETIREMENT SYSTEM OF THE GOVERNMENT OF THE VIRGIN ISLANDS AS *AMICUS CURIAE* SUPPORTING RESPONDENT

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INTEREST OF *AMICUS CURIAE*[1]

The Employees' Retirement System of the Government of the Virgin Islands (GERS) was created by the Third Legislature of the Virgin Islands on June 24, 1959, by Act 479, to provide a defined-benefit pension plan for officials and employees of the Government of the Virgin Islands, to provide retirement and disability annuities, and to provide other benefits for plan participants, their dependents, and beneficiaries. It is today one of the oldest pension systems under the American flag. Originally part of the Virgin Islands Division of Personnel, GERS has since 1987 operated as an independent quasi-governmental agency of the Government of the Virgin Islands.

GERS today serves more than 7,000 retirees and pensioners, and has over 11,000 active members. Its Fund Portfolio is managed with the specific goal of growing assets to meet its long-term pension liabilities and to ensure a reliable cash flow for funding near-term pension obligations. GERS is committed to a disciplined investment strategy that focuses on long-term results.

As an institutional investor, GERS has a strong interest in enforcement of the federal securities laws' anti-fraud provisions, and in the promulgation of legal-liability rules that operate both to ensure the

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[1] The parties consented to the filing of this *amicus* brief by filing on July 16 and on August 31, 2010, blanket consents to the filing of *amicus curiae* briefs. No counsel for any party authored this brief in whole or in part. No party or its counsel made any contribution to fund the preparation or submission of this brief. No person other than the *amicus curiae* or its counsel has made a monetary contribution to the preparation or printing of this brief.

integrity of America's securities markets, and to provide relief whenever investors are victims of manipulative or deceptive conduct affecting their securities transactions.

SUMMARY OF ARGUMENT

Amicus curiae GERS endorses all that Respondent's brief says about a mutual-fund investment adviser's responsibility for any false statements that it makes concerning its own conduct and operation of the mutual funds it controls, to be included in the fund prospectuses that it in fact writes, files with the SEC, and disseminates to the public. This Court should reject the specious notion that the investment adviser's statements can be attributed only to the funds that it controls, which are themselves empty shells with no employees of their own to speak, write, or do anything.

Amicus curiae GERS seeks, however, to supplement Respondents' brief by helping to place §10(b)'s concept of "manipulative or deceptive" conduct within the context of the framing Congress' understanding of stock-market manipulation. Congress outlawed stock-market fraud and manipulation with the Securities Exchange Act of 1934, understanding that market prices may be subject to manipulation by false statements or rumors, by whomever made, and whether or not they are formally "attributed" to their authors. That understanding was reflected in legal scholarship of the time, and in the seminal decisions on market manipulation, with which §10(b)'s framers were surely familiar.

This Court holds "a §10(b) action can be brought by a purchaser or seller of '*any* security' against '*any* person' who has used '*any* manipulative or deceptive device or contrivance' in connection with the purchase or sale of a security." *Herman & MacLean v. Huddleston*, 459 U.S. 375, 382 (1983) (Court's emphasis). It should reject Petitioners' invitation to let them escape liability for their own fraudulent statements merely because they claim they spoke falsely through the mutual funds that they wholly controlled and operated rather than in their own names.

ARGUMENT

I. *Stoneridge* Does Not Foreclose Reliance on Investment Advisers' False Statements About Their Own Policies and Actions Made for Filing with the SEC and Disseminated by Them to Investors in Prospectuses of the Mutual Funds They Operate

Petitioners say that under *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 188 (2008), the concept of market reliance recognized in *Basic Inc. v. Levinson*, 485 U.S. 224 (1988), somehow precludes showing reliance on misleading statements made by investment advisers about their own policies and conduct in the prospectuses of the mutual funds that they operate, absent formal "attribution" to the particular defendant. Yet *Basic* says nothing of the sort when it holds that since market prices generally reflect *all* publicly available material information from all sources, investors are entitled to rely upon "the integrity of the market" to be free from the effects of fraud or manipulation. *Id*. at 245.

Stoneridge, moreover, dealt with a very different question – the potential liability of Charter Communications, Inc.'s wholly independent suppliers and customers, whose commercial transactions Charter accounted for improperly in its own financial statements, but that themselves "had no role in preparing or disseminating Charter's financial statements," and which *in their own* financial statements accounted properly for the transactions. *Stoneridge*, 552 U.S. at 155. Though the suppliers and customers were parties to business transactions that enabled Charter to issue false financial statements, agreeing even to backdate certain documents, "their deceptive acts were not communicated to the public." *Id*. at 159.

Section 10(b)'s "emphasis on a purchase or sale of securities," this Court observed, gave "some insight into the deceptive acts that concerned the enacting Congress," such that the "respondent's deceptive acts, which were not disclosed to the investing public, are too remote to satisfy the requirement of reliance." *Id*. at 160-61. *Stoneridge* thus holds that suppliers and customers whose business transactions were merely incidental precursors to a company's issuance of false financial statements do not themselves make those statements. It does not suggest that investment advisers who actually design, implement, and execute fraud through prospectuses of the mutual funds that they operate and control may escape liability by saying they acted in another's name, when their own deliberately deceptive conduct clearly was communicated to public markets and affected securities prices.

Here, JCM generated false statements describing its own policies and actions, placed them in prospectuses of the funds that it operated, filed them with the SEC, and disseminated them to the market. In this case, moreover, there can be no doubt that JCM's false statements affected the price of JCG stock, which fell precipitously upon disclosure of the truth. As shown below, these are precisely the kind of "deceptive acts that concerned the enacting Congress" when it framed §10(b) in 1934. *Stoneridge*, 552 U.S. at 160. It is indeed hard to fathom how §10(b) could fail to catch the deliberately deceptive conduct alleged in this case, given JCM's active involvement at every step, and the inability of its captive funds, with no employees of their own, to say or do anything at all on their own.

II. Congress Intended §10(b) as a Broad Catch-All to Reach *Any* Person Engaged in *Any* Form of Deceptive Conduct Affecting Securities Prices

Petitioners and their *amici* give lip-service to the principle that §10(b) should be interpreted according to the natural meaning of its words, giving effect to Congress' intent in enacting it to proscribe fraudulent conduct. Yet they proceed to ignore both what §10(b) by its plain terms proscribes, and what Congress manifestly intended to cover with its blanket proscription making 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." 15 U.S.C. §78j(b) (emphasis added).

This Court often has recognized that §10(b) was designed to be a "catchall" provision, proscribing all variety of fraudulent or deceptive conduct affecting securities transactions.[2] Its effective command is "'Thou shalt not devise any other cunning devices" that deceive investors or manipulate securities

[2] *See*, *e.g.*, *Herman & MacLean v. Huddleston*, 459 U.S. 375, 382 (1982) ("§10(b) is a 'catchall' antifraud provision").

prices.[3] This Court has said the provision's framers clearly intended a "'catch-all clause to prevent manipulative devices,'" both familiar and unfamiliar.[4] Thus, as this Court noted in *Superintendent of Ins. v. Bankers Life*, "'§10(b) and Rule 10b-5 prohibit *all* fraudulent schemes in connection with the purchase or sale of securities, whether the artifices employed involve a garden type variety of fraud, or present a unique form of deception. Novel or atypical methods should not provide immunity from the securities laws.'"[5]

In light of §10(b)'s manifest purpose, this Court often has held that "'the statute should be construed "not technically and restrictively, but flexibly to effectuate its remedial purposes."'"[6] This is reason enough to reject Petitioners' cramped and hypertechnical construction of the statute and rule, which would permit investment advisers controlling mutual

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[3] *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 202-03 (1976) (quoting *Hearings on H.R. 7852 and H.R. 8720 before the House Committee on Interstate and Foreign Commerce*, 73d Cong., 2d Sess., 115 (1934)).

[4] *Hochfelder*, 425 U.S. at 203; *see also Aaron v. SEC*, 446 U.S. 680, 690-91 (1980).

[5] *Superintendent of Ins. v. Bankers Life & Casualty Co.*, 404 U.S. 6, 11 n.7 (1971) (quoting *A.T. Brod & Co. v. Perlow*, 375 F.2d 393, 397 (2d Cir. 1967) (emphasis in original)).

[6] *SEC v. Zandford*, 535 U.S. 813, 819 (2002) (quoting *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 151 (1972) (quoting *SEC v. Capital Gains Research Bureau*, 375 U.S. 180, 195 (1963))); *accord*, *e.g.*, *Herman & MacLean v. Huddleston*, 459 U.S. 375, 386-87 (1982) ("we have repeatedly recognized that securities laws combating fraud should be construed 'not technically and restrictively, but flexibly to effectuate [their] remedial purposes'") (quoting *Capital Gains Research Bureau*, 375 U.S. at 195).

funds having no employees or assets of their own to make deliberately false statements in the funds' names – without facing liability under §10(b).

A. Section 10(b) Specifically Targets All Deliberately Deceptive Conduct Affecting Securities Prices

Section 10(b) has limits, of course. "Section 10(b) is aptly described as a catchall provision," this Court observed in *Central Bank*, "but what it catches must be fraud."[7] Yet an action for fraud or deceit typically lies whenever words or conduct are employed to mislead another to his or her detriment – no matter how the deception is in fact accomplished.[8] And fraud is precisely what the Respondent's complaint describes when it alleges that JCM deliberately framed false statements for dissemination to the public, thereby deliberately deceiving investors, and affecting the price at which Janus Capital Group stock traded.

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[7] *Central Bank, N.A. v. First Interstate Bank, N.A.*, 511 U.S. 164, 174 (1994) (quoting *Chiarella v. United States*, 445 U.S. 222, 234-35 (1980)).

[8] *See Stewart v. Wyoming Cattle Ranche Co.*, 128 U.S. 383, 388 (1888) ("The gist of the action is fraudulently producing a false impression upon the mind of the other party; and if this result is accomplished, it is unimportant whether the means of accomplishing it are words or acts of the defendants, or his concealment or suppression of material facts not equally within the knowledge or reach of the plaintiff."); *Pasley v. Freeman*, 3 Term. Rep. 51, 64, 100 Eng. Rep. 450, 457 (King's Bench 1789) (per Lord Kenyon, Ch. J.: "'an action upon the case for a deceit lies when a man does any deceit to the damage of another"') (quoting Lord Ch. B. John Comyns, *Digest of the Laws of England*).

Such conduct lies *at the very core* of what Congress sought to reach with §10(b)'s proscription of "any manipulative or deceptive device or contrivance." 15 U.S.C. §78j(b). For it involves both deliberate deception, framing false statements to be disseminated to the public, and a resulting manipulation of JCM's parent corporation's securities' prices, with the deliberately false statements "artificially affecting the price of [those] securities."[9]

Describing the "Necessity for Regulation" in Exchange Act §2, Congress observed that market transactions establishing securities' prices may be subject to any variety of manipulative or deceptive practices, and declared that the Exchange Act is "to insure the maintenance of fair and honest markets."[10] Section 2(2) states that "[t]he prices established and offered in such transactions are generally disseminated and quoted throughout the United States," and that they "constitute a basis for determining and establishing the prices at which securities are bought and sold."[11] "Frequently the prices of securities on such exchanges and markets are susceptible to manipulation and control," Congress added in §2(3), warranting regulations requiring both the full disclosure of truthful information by securities issuers, and also a blanket proscription of fraud and manipulation by whomever it might be practiced.[12] Section 10(b) thus makes it unlawful "for *any* person," not just securities issuers, and not just those who disclose their identities or take responsibility for their

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[9] *Ernst & Ernest v. Hochfelder*, 425 U.S. 185, 199 (1976).

[10] 15 U.S.C. §78b.

[11] 15 U.S.C. §78b(2).

[12] 15 U.S.C. §78b(3).

conduct, "directly or indirectly . . . [t]o use or employ, in connection with the purchase of *any* security . . . *any* manipulative or deceptive device or contrivance" that contravenes SEC rules. 15 U.S.C. §78j(b) (emphasis added).

The Exchange Act's legislative history confirms the understanding, expressed in §2, that "[t]he disclosure of information materially important to investors may not instantaneously be reflected in market value, but despite the intricacies of security values truth does find relatively quick acceptance on the market," provided, of course, that true information indeed is disclosed.[13] And Congress clearly intended that investors should be entitled to rely on *the integrity* of the prices thus established. *See Basic Inc. v. Levinson*, 485 U.S. 224, 240-47 (1988).[14]

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[13] H.R. Rep. No. 1383, 73d Cong., 2d Sess., at 11 (1934), *reprinted in* 5 Ellenberger & Mahar, *Legislative History of the Securities Act of 1933 and Securities Exchange Act of 1934*, Item 18.

[14] Though *Basic* does not mention it, Congress directly addressed the element of reliance with the Exchange Act's amendment inserting an express reliance requirement for certain claimants under §11 of the Securities Act of 1933, expressly specifying that "such reliance may be established without proof of the reading of the registration statement." Securities Exchange Act of 1934 §206(a), 48 Stat. 907, amending Securities Act §11(a), codified at 15 U.S.C. §77k(a), states:

> If such person acquired the security after the issuer has made generally available to its security holders an earning statement covering a period of at least twelve months beginning after the effective date of the registration statement, then the right of recovery under this subsection shall be conditioned on proof that such person acquired the security relying upon such untrue statement in the registration statement or relying upon the registration statement and not knowing of such omission, *but such reliance*

"In drafting [the Exchange] Act, Congress expressly relied on the premise that securities markets are affected by information, and enacted legislation to facilitate an investor's reliance *on the integrity of those markets*," this Court observed in *Basic*, quoting from the House Report:

> "No investor, no speculator, can safely buy and sell securities upon the exchanges without having an intelligent basis for forming his judgment as to the value of the securities he buys or sells. The idea of a free and open public market is built upon the theory that competing judgments of buyers and sellers as to the fair price of a security brings [sic] about a situation where the market price reflects as nearly as possible a just price. Just as artificial manipulation tends to upset the true function of an open market, so the hiding and secreting of important information obstructs the operation of the markets as indices of real value."[15]

Notably, the focus here is on the integrity of market prices established on the basis of *all* available material information from *all* sources. "Recent empirical studies have tended to confirm Congress' premise that the market price of shares traded on well-

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> *may be established without proof of the reading of the registration statement* by such person.

15 U.S.C. §77k(a) (emphasis added); *see also* H.R. Rep. No. 1838, 73d Cong. 2d Sess., at 41 (1934) (Conference Report), *reprinted in* 5 Ellenberger & Mahar, *Legislative History of the Securities Act of 1933 and Securities Exchange Act of 1934*, Item 20.

[15] *Basic,* 485 U.S. at 246 (emphasis added) (quoting H.R. Rep. No. 1383, at 11 [*reprinted in* 5 Ellenberger & Mahar, *Legislative History of the Securities Act of 1933 and Securities Exchange Act of 1934*, Item 18]).

developed markets reflects *all* publicly available information, and, hence, *any* material misrepresentations," whatever their source might be (and whether or not their authors take credit for them).[16] There can be little doubt, then, that the false statements that JCM placed in the fund portfolios that it framed and disseminated were reflected in the stock price of its publicly-traded parent, Janus Capital Group.

"An investor who buys or sells stock at the price set by the market," this Court concluded in *Basic*, "does so in reliance on the integrity of that price."[17] "Because most publicly available information is reflected in market price, an investor's reliance on *any* public material misrepresentations, therefore, may be presumed for purposes of a Rule 10b-5 action."[18]

B. Legal Scholarship with Which §10(b)'s Framers Were Familiar Indicated that Parties Other than a Securities Issuer May Be Liable for Misleading Statements or Conduct Affecting Securities Prices in the Open Market

Congress' understanding of stock-market fraud and manipulation doubtless was grounded in the influential scholarship of the era's greatest authority on

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[16] *Basic*, 485 U.S. at 246 (emphasis added).

[17] *Id.* at 247.

[18] *Id.* (emphasis added); *see also id.* at 246 n.24 ("For purposes of accepting the presumption of reliance in this case, we need only believe that market professionals generally consider most publicly announced material statements about companies, thereby affecting stock market prices."); *id.* at 248 n.28 (the presumption of market reliance does not depend on "any particular theory of how quickly and completely publicly available information is reflected in market price").

corporate finance and securities markets, Professor A.A. Berle of the Columbia University School of Law.[19] That scholarship supported liability of third parties.

Professor Berle's 1931 article on *Liability for Stock Market Manipulation* laid out the fundamentals of what this Court embraced in *Basic* as the "fraud on the market" theory of reliance, under which investors may rely upon stock market prices to reflect all available information, whether provided by a security's issuer, or by third parties, or even self-styled "secondary actors." Professor Berle wrote that "all markets move in a nexus of information gathered from all sources and circulated in a variety of ways, recognized and unrecognized."[20]

Thus, if a publicly traded company issues false statements affecting the price of its securities, "any purchaser in the market would seem to have an action in deceit or fraud for damage suffered therefrom."[21] But the principle, as it was understood in

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[19] *See generally* Adolph A. Berle, Jr., *Liability for Stock Market Manipulation*, 31 Colum. L. Rev. 264, 268-70 (1931); *see also* Adolph A. Berle, Jr., *Stock Market Manipulation,* 38 Colum. L. Rev. 393, 393-394, & nn.3-6, 395-97, 399-400 (1938).

[20] Berle, *Liability for Stock Market Manipulation*, 31 Colum. L. Rev. at 268.

[21] *Id*. at 268-69 (footnotes omitted). "If the X corporation states that its earnings are $13 a share when, in fact, its income statement should really show a loss, and the market estimates the value of the stock at $130 on the basis of such statement, and the investor buys at the market price, he has relied on the market situation, which in turn resulted from the false statement." *Id*. at 269-70. "Writing in 1931, Adolf Berle, probably the era's most influential commentator on corporate finance, asserted that courts had already gone much further than [is] commonly assumed to protect the stock market from fraud."

the 1930s, clearly applied to others besides securities issuers:

> In like manner, if an outsider circulates a false report as to the earnings of a particular corporation which affects the price of its stock thereby subserving his own concealed interest, relief may be had against him by any person buying or selling in the market, where it appears that the report was designed to affect the market. It may be asked if this is a variation of the common law rule that the statement must be intended to be relied upon. Obviously not; for while the maker of the false representation has not singled out a specific individual for his victim, he has tossed his squib into a crowd, one or many of whom may be hit; and this fact is, or at least should be, known to him.[22]

Though Petitioners would have this Court draw arbitrary distinctions between securities issuers and others, those distinctions obviously have no basis either in statutory text flatly proscribing manipula-

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Steve Thel, *The Original Conception of Section 10(b) of the Securities Exchange Act,* 42 Stan. L. Rev. 385, 407 n.96 (1990). In their 1932 landmark *The Modern Corporation and Private Property,* Professors Adolph A. Berle, Jr., and Gardiner C. Means restated the basics of fraud-on-the-market reliance in market-manipulation cases. *See* Aldoph A. Berle, Jr. & Gardiner C. Means, *The Modern Corporation and Private Property* 314 & n.1, 322 (New York: The MacMillan Co., 1932). Thus, "if a corporation consciously overstated its income leading to a rise in the value of the shares, a buyer on the faith of such valuation should have no greater difficulty in recovering" than would an investor to whom false statements were directly made. *Id*. at 322.

[22] Berle, *Liability for Stock Market Manipulation*, 31 Colum. L. Rev. at 269-70.

tion and deception practiced by "any person," or in the market-fraud and manipulation principles underlying that text. This Court thus emphasized in *Central Bank* that

> absence of §10(b) aiding and abetting liability does not mean that secondary actors in the securities markets are always free from liability under the securities Acts. Any person or entity, including a lawyer, accountant, or bank, who employs a manipulative device or makes a material misstatement (or omission) on which a purchaser or seller of securities relies may be liable as a primary violator under 10b-5, assuming *all* of the requirements for primary liability under Rule 10b-5 are met.

Central Bank, 511 U.S. at 191 (Court's emphasis).

"In any complex securities fraud" this Court observed, "there are likely to be multiple violators . . . ." *Id*. "In a prospectus-liability case," Petitioners counter, "the only one 'us[ing] or employ[ing] *anything* is the issuer – the company that, through the prospectus, is offering its securities for sale – and thus the issuer is the only one covered by Section 10(b)." Pet. Brf. at 37-38. Yet this is plainly false. The precedents show that many besides the issuer may be liable for false statements in offering documents – its accountants for example – provided only that they made misleading statements with the required scienter, on which investors and the market may then rely.[23]

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[23] *See, e.g.*, *Herman & MacLean v. Huddleston*, 459 U.S. 375, 381-82 (1983); *see also McGann v. Ernst & Young*, 102 F.3d 390, 397 (9th Cir. 1996); *Fine v. American Solar King*, 919 F.2d 290, 294-300 (5th Cir. 1990).

C. The Seminal Precedents on Market Manipulation, with Which §10(b)'s Framers Were Familiar, Support Liability of Non-Issuer Third Parties for Misleading Statements Even if Issued Anonymously or Attributed to Others

Petitioners nonetheless insist there can be *no reliance* unless misinformation is formally "attributed" to its authors. Yet it is far from apparent why attribution would be required before those who generate and distribute misinformation may be held accountable for deceptive conduct that clearly affected securities prices. The market-manipulation precedents with which Congress was familiar indicate that formal attribution was not needed.

When Congress outlawed "any manipulative or deceptive device or contrivance," the seminal decision on market manipulation was *Rex v. De Berenger*,[24] an English case that this Court had cited favorably when it ruled bid-rigging agreements are against public policy in *McMullen v. Hoffman*,[25] and that figured prominently in early 1930s American market-manipulation precedent,[26] which in turn has informed this Court's understanding of the manipulative devices proscribed by the Exchange Act.[27]

The defendants in *De Berenger* were convicted of criminal conspiracy for spreading false rumors on

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[24] 3 Maule & Selwyn 67, 105 Eng. Rep. 536, [1814-1823] All E.R. Rep. 513 (King's Bench 1814).

[25] 174 U.S. 639, 649 (1899).

[26] *See, e.g., United States v. Brown*, 5 F. Supp. 81, 85-88 (S.D.N.Y. 1933), *aff'd*, 79 F.2d 321 (2d Cir. 1935).

[27] *Schreiber v. Burlington Northern, Inc.*, 472 U.S. 1, 7 (1985) (quoting *Brown*, 5 F. Supp. at 85).

February 19, 1812, that Napoleon Bonaparte had died, thus "unlawfully contriving, etc. by false reports, rumours, arts, and contrivances," to induce the public to think that peace with France was imminent.[28] This caused "a great increase and rise in the government funds and government securities" of the United Kingdom – to the injury of all "who should on February 21 [1812] purchase and buy any part or parts, and share or shares of and in the public government funds."[29]

In words that this Court repeated in *McMullen*, Lord Ellenborough declared that such conduct "'strikes at the price of a vendible commodity in the market, and if it gives a fictitious price by means of false rumours it is a fraud leveled against all the public, for it is against all such as may possibly have anything to do with the funds on that day."[30] The King's Bench was unanimous in so holding.[31]

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[28] *Id.*, 3 Maule & Selwyn at 68, 105 Eng. Rep. at 537 (syllabus).

[29] *Id.*

[30] *McMullen*, 174 U.S. at 649 (*quoting De Berenger*, 3 Maule & Selwyn at 72-73, 105 Eng. Rep. at 538) (Lord Ellenborough Ch. J.)); *see also Brown*, 5 F. Supp. at 85-86 (similarly quoting *De Berenger*); *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. 173, 187-88 (1871) ("In *Rex v. De Berenger*, 3 M. & S. 67, it was held to be a conspiracy to combine to raise the public funds on a particular day by false rumors. The purpose itself, said Lord Ellenborough, is mischievous – it strikes at the price of a valuable commodity in the market, and if it gives a fictitious price by means of false rumors, it is a fraud leveled against the public, for it is against all as may possibly have anything to do with the funds on that particular day.").

[31] Justice LeBlanc agreed that the "object was to injure all those who should become purchasers on that day, and not some individuals in particular." *De Berenger*, 3 Maule & Selwyn at

Notably, the acts of fraud and manipulation in *De Berenger* were perpetrated not by any security's issuer, but by third parties – mere "secondary actors" in Petitioners' preferred lexicon. Moreover, it should be apparent that secondary actors who disseminate false rumors may well choose to attribute the misinformation they spread to some other "reliable source" rather than to themselves. Indeed, in a case like *De Berenger* itself, the more effectively the purveyors of deception concealed the fact that false information had originated with them, the more effective their fraud might be.

With *De Berenger* the seminal decision, it becomes clear that the founding paradigm of market fraud and manipulation involves misinformation generated by parties other than the securities' issuer and attributed to sources other than themselves. Petitioners' arguments for demanding limited (or no) liability for "secondary actors," and for eliminating liability absent "attribution" to the deception's authors, accordingly founder on first principles.

74, 105 Eng. Rep. at 539 (LeBlanc, J.). Justice Bayley declared that deceptive conduct affecting the prices at which securities trade "will certainly prejudice a large portion of the King's subjects who have occasion to purchase on that day," its "necessary consequence" being "to prejudice all those who become purchasers during the period of that fluctuation." *Id.*, 3 Maule & Selwyn at 75, 105 Eng. Rep. at 539 (Bayley, J.). Justice Dampier recited the charge, "that the defendants by false rumours conspired to give a temporary rise to the funds of this Kingdom, in order to deceive those persons who should purchase into the funds on a particular day," and then summed up: "The means used are wrong, they were false rumours; the object is wrong, it was to give a false value to a commodity in the public market, which was injurious to those who had to purchase." *Id.*, 3 Maule & Selwyn at 76-77, 105 Eng. Rep. at 540 (Dampier, J.).

From false rumors influencing securities' prices, it was but a step to deceptive *transactions* designed to affect market prices by creating the false appearance of active trading, an issue addressed in the 1892 Queen's Bench decision of *Scott v. Brown, Doering, McNab & Co.*,[32] which this Court cited favorably in *McMullen*,[33] and which figured prominently in the leading 1930s market-manipulation precedent *United States v. Brown*.[34]

As this Court itself observed in *Schreiber*, the "seminal English case of *Scott v. Brown, Doering, McNab & Co*., [1892] 2 Q.B. 724 (C.A.), which broke new ground in recognizing manipulation could occur without the dissemination of false statements," was one that nevertheless "placed emphasis on the presence of deception" created by the appearance of active trading in the market. *Schreiber*, 472 U.S. at 7 n.4. "As Lord Lopes stated in that case, 'I can see no substantial distinction between false rumours and false fictitious acts.'"[35] "'[Even] a speculator is entitled not to have any present fact involving the subject matter of his speculative purchase or the price thereof misrepresented by word or act.'"[36]

The concept of manipulation thus came to include not just misleading statements and rumors, as in *De*

[32] [1892] 2 Q.B. 724, 730, 61 L.J. (N.S.) 738, 741 (C.A.).

[33] 174 U.S. at 649.

[34] *Brown*, 5 F. Supp. at 87; *cf*. Berle, *Stock Market Manipulation*, 38 Colum. L. Rev. at 395-96 (discussing "the now famous case of *United States v. Brown*").

[35] *Schreiber*, 472 U.S. at 7 n.4 (quoting *Scott v. Brown*, [1892] 2 Q.B. at 730 (Lord Lopes)).

[36] *Schreiber*, 472 U.S. at 7 n.4 (quoting *Brown*, 5 F Supp. at 85) (*Schreiber's* brackets).

Berenger, but also "practices such as wash sales, matched orders, or rigged prices *that are intended to mislead investors* by artificially affecting market activity,"[37] and that Exchange Act §9 and §10(b) together proscribe.[38]

It should be apparent, again, that many market-manipulation scams outlawed by §10(b) are apt to be more effective the better their perpetrators can hide their identities. A "wash sale," for example, is an ostensible market transaction in which a security's owner has in truth merely "sold shares on the stock exchange to himself," while with "matched orders" the "conspirators shuttle stock back and forth between each other" to produce market quotations and the appearance of active trading.[39] Public disclosure of the participants' identities would disclose the transactions' character, thereby defeating the deception. "Indeed," this Court has observed, "nondisclosure is usually essential to the success of a manipulative scheme."[40]

Clearly then, one need not know the identity of those behind deceptive transactions and statements to rely on the integrity of the market prices established by the manipulative or deceptive conduct that §10(b) proscribes. Absence of formal attribution should be entirely beside the point when misinformation is deliberately transmitted to the market.

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[37] *Santa Fe Indus. v. Green*, 430 U.S. 462, 476 (1977) (emphasis added).

[38] *See* Berle, *Stock Market Manipulation*, 38 Colum. L. Rev. at 398-400.

[39] Berle, *Stock Market Manipulation*, 38 Colum. L. Rev. at 394-95.

[40] *Santa Fe*, 430 U.S. at 477.

C. Petitioners Cannot Avoid Liability for the Statements that JCM Made Through Prospectuses of the Mutual Funds It Operated

"The meaning the Court has given the term 'manipulative' is consistent with the use of the term at common law, and with its traditional dictionary definition." *Schreiber*, 472 U.S. at 7. We have seen that the seminal market-manipulation precedents, with which §10(b)'s framers were undoubtedly familiar, involved statements by third parties attributing false information to others, as in *De Berenger*, *see supra* at 15-17, and deceptive transactions where the participants' identities were necessarily concealed, as in both *Scott v. Brown* and *United States v. Brown*, *see supra* at 18-19.

The notion that reliance on *the integrity of the market*, to be free from the effects of manipulation and deceit, may exist only if those who manipulate it disclose their identities and roles, thus is one that has no sound theoretical basis. This should be fatal to Petitioners' contentions that they can face no liability for false statements that they generated and disseminated but did not "attribute" to themselves. For *the market* clearly relied on the statements.

Investors were entitled to rely upon the integrity of prices established by JCM's false statements, even though they were communicated to the market through fund prospectuses, and whether or not JCM formally took credit for them. As the Fourth Circuit rightly concluded, everyone knew that JCM, as the funds' investment adviser, was at all events responsible for generating the misleading description of its own policies and conduct. Pet. App. 16a-18a.

CONCLUSION

Petitioners offer no valid basis for escaping liability for their conduct which was designed to, and did, mislead investors and the market. The judgment of the Fourth Circuit should be affirmed.

Respectfully submitted,

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