No. 06-43

IN THE

Supreme Court of the United States

STONERIDGE INVESTMENT PARTNERS, LLC,
Petitioner,

v.

SCIENTIFIC-ATLANTA, INC. AND MOTOROLA, INC.,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR BUSINESS ROUNDTABLE AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE[1]

Business Roundtable is an association of chief executive officers of leading U.S. companies. The companies represented have $4.5 trillion in annual revenues and more than 10 million employees and comprise nearly one third of the total value of the U.S. stock market. Business Roundtable was founded in 1972 to increase the role of business execu-

[1] Pursuant to Rule 37.6 of the Rules of this Court, amicus states that no counsel for a party authored this brief in whole or in part. No person or entity, other than amicus or its members, made any monetary contribution to the preparation or submission of this brief. Petitioner has filed a letter with the Clerk of Court giving blanket consent to the filing of all amicus curiae briefs in this case. A letter of consent from respondents has been filed in the Court with this brief.

tives in public policy debates and to advance the goals of economic growth, a dynamic global economy, and a workforce capable of future competitiveness. Since its founding, Business Roundtable has conducted research, authored numerous white papers addressing a range of significant corporate matters, and lobbied Congress on such issues. It regularly files amicus curiae briefs in cases raising legal issues of significance to its members.

The question presented in this case is of great importance to Business Roundtable. The Court is asked to determine whether there is a private right of action under § 10(b) of the Securities Exchange Act of 1934 for "scheme liability." By extending the reach of liability to companies that made no misstatement (or omission) on which the plaintiffs relied, "scheme liability" would be a broad expansion of the private right of action under § 10(b). Because it is a particularly uncabined form of liability, it would increase the risk of frivolous lawsuits aimed at extracting settlements—a form of vexatious litigation against which Congress and this Court have sought to guard. The increased scope of liability and the threat of meritless suits threaten the interests of Business Roundtable, its members, and the companies that its members lead.

SUMMARY OF ARGUMENT

Neither § 10(b) of the Securities Exchange Act of 1934 nor SEC Rule 10b-5 promulgated thereunder explicitly mentions private civil liability, and this Court has often stated that neither Congress nor the Commission intended to create a right of action for private litigants. Nevertheless, decades ago, the courts implied such a right of action for material misstatements or omissions on which a plaintiff investor relied, provided that the plaintiff can establish that the misstatement or omission caused a loss. In this case, petitioner asks this Court to extend the § 10(b) private right of action to reach a new set of defendants: participants in a "scheme to defraud." Under petitioner's view, persons who themselves did not employ a deceptive device on which a plaintiff relied could be held liable if they knowingly contributed to another person's violation. This broad expansion should be rejected because it would extend liability beyond the persons and conduct covered by the text of the statute and would substantially increase the dangers of vexatious litigation.

This brief will not make all of the arguments in opposition to petitioner's proposed new form of § 10(b) liability but will instead focus on two issues.

1. The courts created the § 10(b) private right of action without any consideration, or evidence, of congressional intent to authorize private enforcement of this antifraud provision. The Court has long since acquiesced in the existence of the private right, even as it has repeated that the right of action would not be "implied" today if the question were presented now for the first time. The Court should not extend the private right into new territory without any indication that Congress has authorized or approved such an extension. In practice, this Court has repeatedly declined to expand the private right of action, stressing both its nonstatutory origins and the high potential for vexatious litigation that Rule 10b-5 actions present. Expansion of the private right of action to reach the boundless class of "scheme" participants that did not themselves engage in any deceptive device would seriously exacerbate that risk.

Petitioner's suggestion that § 10(b) be read to authorize private actions for "scheme" liability is inconsistent with the securities laws as written by Congress and prior decisions of this Court. The text of § 10(b) describes persons who engage in deceptive devices on which investors rely. But petitioner here seeks to hold liable entities that concededly did not engage in any deceptive device—*i.e.*, made no misrepresentation (by words or actions) or omission—on which petitioner relied. *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 173 (1994), rejected a similar extension of the private right of action to aiders and abettors, "conclud[ing] that the statute prohibits only the making of a material misstatement." *Id.* at 177.

Moreover, Congress, in response to *Central Bank*, made clear that it did not want to provide a § 10(b) private right of action against persons that did not themselves make misstatements or omissions on which investors relied. After *Central Bank*, the SEC and certain professional groups urged Congress to extend the § 10(b) private right of action to reach aiders and abettors. Congress refused but gave the SEC public enforcement authority against aiders and abettors. At the same time, Congress also placed additional limits on private § 10(b) suits in an effort to mitigate the risks of abusive litigation.

The "schemers" covered by petitioner's theory would include most or all of the aiders and abettors that this Court and Congress already found beyond the reach of § 10(b) and would also include a limitless range of additional persons who dealt with the person making the misstatement or omission in any way that a plaintiff can allege knowingly advanced the "scheme." Moreover, "scheme liability" as a legal concept is largely undefined; current requirements to state a cause of action under § 10(b)—including concrete allegations of materiality, reliance, and causation—would not translate to the "scheme" context, and the concept of a "scheme" is less well defined in the law than aiding and abetting. The courts would thus be required to create a new framework of requirements. In the meantime, the uncertainty as to the scope of liability would aggravate litigation abuses, increasing the pressure to settle. Congress's rejection of the request by the SEC and others to extend private liability to aiders and abettors forecloses the even broader judicial expansion sought here.

Finally, creation of private "scheme liability" would also be inconsistent with the express causes of action in the securities laws to which the Court has looked for guidance in defining the contours of the § 10(b) private right of action. In particular, each of the express causes of action carefully limits the scope of persons subject to liability and none would extend so broadly to reach those who participated in an ill-defined way in the illegal conduct at issue.

2. Petitioner and certain amici have argued that the SEC's support for "scheme liability"—as expressed in amicus briefs in other cases—should play a major role in this Court's determination of the question presented. Contrary to these suggestions, the Court does not owe deference to the SEC's amicus positions on this legal issue.

First, deference to agency views is appropriate only where Congress has not spoken to the precise question at issue. Here, Congress has made its intent clear: in the wake of *Central Bank*, Congress rejected the SEC's request to extend private liability beyond those who themselves engaged in deceptive devices on which plaintiff investors relied. Second, agency deference is predicated on the delegation of authority to the agency to interpret the statute on the point at issue. Here, Congress has plainly given no such authority to the SEC: since Congress never intended the private right of action, it certainly did not give the SEC the authority to determine its contours. And this Court has made clear that it will not infer a congressional delegation of authority to an agency to create or extend a judicial cause of action not created or extended by the statute itself.

ARGUMENT

I. THE PRIVATE RIGHT OF ACTION UNDER § 10(b) IS A JUDICIAL CREATION THAT SHOULD BE NARROWLY CONSTRUED TO REJECT "SCHEME LIABILITY"

A. The Implied Private Right Of Action Was Created Under A Practice The Court Has Since Abandoned

Petitioner asks the Court to extend the private right of action under § 10(b) of the Securities Exchange Act and Rule 10b-5 to reach participants in a "scheme to defraud," *i.e.*, persons who did not themselves employ a deceptive device on which plaintiff relied. But the private right of action under this antifraud provision is itself a judicial creation of a kind the courts would not engage in today, and for the same reasons the courts would not today create the right of action from scratch, they should not now extend it into new territory.

This Court has detailed the origins of the implied right of action under § 10(b) and Rule 10b-5. *See, e.g.*, *Herman & MacLean* v. *Huddleston*, 459 U.S. 375, 380 (1983). Neither the statute nor the Commission's rule makes any mention of actions by private parties. A district court first found an implied private right of action in 1946. *Kardon* v. *National Gypsum Co.*, 69 F. Supp. 512, 514 (E.D. Pa. 1946). Many other courts followed, and this Court ultimately endorsed the approach in *Superintendent of Ins. of N.Y.* v. *Bankers Life & Casualty Co.*, 404 U.S. 6 (1971). But the Court has repeatedly recognized that the private right of action was solely the creation of the Judicial Branch: "[W]e have made no pretense that it was Congress' design to provide the remedy afforded." *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U.S. 350, 358-359 (1991). The Court has repeatedly described the private right of action as a "'judicial oak which ha[d] grown from little more than a legislative acorn.'" *Merrill Lynch, Pierce, Fenner & Smith* v. *Dabit*, 547 U.S. 71, 126 S. Ct. 1503, 1510 (2006) (quoting *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 737 (1975)) (alteration in original); *see also Basic Inc.* v. *Levinson*, 485 U.S. 224, 231 (1988) (explaining that the Court continued the private right of action because of "legislative acquiescence and the passage of time"); *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 196 (1976) ("[T]here is no indication that Congress or the Commission, when adopting Rule 10b-5, contemplated such a remedy." (footnotes omitted)).

If the question whether to imply a private right of action under § 10(b) were to arise from scratch today, it is clear that the Court's answer would be "no," and it is inconceivable that the Court would "confirm[] with virtually no discussion … that such a right of action did exist." *Blue Chip Stamps*, 421 U.S. at 730 (citing *Superintendent of Ins.*, 404 U.S. at 13 n.9; *Affiliated Ute Citizens* v. *United States*, 406 U.S. 128, 150-154 (1972)). As Justice Scalia has put it, "[T]he contours of a Rule 10b-5 action" were initially "'implied' (*i.e.*, created) by the Court itself—a practice we have since happily abandoned[.]" *Holmes* v. *Securities Investor*

Protection Corp., 503 U.S. 258, 289 (1992) (Scalia, J., concurring in judgment) (citing *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 568-571, 575-576 (1979)).

This Court's more recent cases have consistently held that "any private right of action for violating a federal statute must ultimately rest on congressional intent to provide a private remedy." *Virginia Bankshares, Inc.* v. *Sandberg*, 501 U.S. 1083, 1102 (1991) (citing *Redington*, 442 U.S. at 575). In *Alexander* v. *Sandoval*, 532 U.S. 275 (2001), the Court found no private right of action under § 602 of Title VI of the Civil Rights Act of 1964, 78 Stat. 252, as amended, 42 U.S.C. § 2000d *et seq.*, to enforce regulations promulgated by the Department of Justice pursuant to that section. The Court said:

> Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress . . . . The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy. Statutory intent on this latter point is determinative. Without it, a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute.

Sandoval, 532 U.S. at 286-287 (citations omitted); *see also California* v. *Sierra Club*, 451 U.S. 287, 297 (1981) ("The federal judiciary will not engraft a remedy on a statute, no matter how salutary, that Congress did not intend to provide."); *Pharmaceutical Research & Mfrs. of Am.* v. *Walsh*, 538 U.S. 644, 683 (2003) (Thomas, J., concurring in judgment) ("[P]rivate parties may employ . . . an implied private right of action only if they demonstrate an 'unambiguously conferred right.'") (quoting *Gonzaga Univ.* v. *Doe*, 536 U.S. 273, 283 (2002)); *Redington*, 442 U.S. at 578 ("The ultimate question is one of congressional intent, not one of whether this Court thinks that it can improve upon the statutory scheme.").

It follows directly from this abandonment of the practice of implying rights of action Congress itself has never authorized, that the Court should not *extend* a right of action into new territory without any indication that Congress wished to go there. "Scheme liability" represents just such an extension, to persons and actions that are not mentioned in the statute.

B. While Never Abandoning The § 10(b) Implied Private Right Of Action, The Court Has Repeatedly Declined To Extend It

Prior to the Private Securities Litigation Reform Act of 1995, 15 U.S.C. § 78u-4 ("PLSRA"), "Congress . . . had no occasion to provide guidance about the elements of a private liability scheme [under § 10(b)]," *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 173 (1994), so the particular features and contours of the § 10(b) right of action had been almost entirely "of judicial creation," *Lampf*, 501 U.S. at 358. As this Court explained, "[w]e are dealing with a private right of action which has been judicially found to exist, and which will have to be judicially delimited one way or another unless and until Congress addresses the question." *Blue Chip Stamps*, 421 U.S. at 748-749. The Court has approached this task cautiously, noting that it is ultimately not the Court's, but rather "the federal lawmaker's prerogative … to allow, disallow, or shape the contours of—including the pleading and proof requirements for—§ 10(b) private actions." *Tellabs, Inc.* v. *Makor Issues & Rights, Ltd.*, 127 S. Ct. 2499 (2007).

The Court has therefore noted that "the breadth of [a] right once recognized should not, as a general matter, grow beyond the scope congressionally intended." *Sandberg*, 501 U.S. at 1102. In the context of a right of action entirely lacking a foundation in congressional intent, such as the § 10(b) private right of action, *any* expansion of the claim is necessarily beyond the scope that Congress intended. As a practical matter, of course, the courts must fill the interstices of a previously recognized right of action. *See, e.g.*, *Lampf*, 501 U.S. at 359 (selecting a statute of limitations for actions brought under § 10(b)). But when asked to endorse attempts to expand the class of persons and conduct for which judicially-implied causes of action are available, the answer must be "no."

In fact, the Court has repeatedly cabined the implied private right of action under § 10(b) since first recognizing it. *See, e.g.*, *Blue Chip Stamps*, 421 U.S. at 737 (limiting the private right to purchasers and sellers); *Ernst & Ernst*, 425 U.S. at 193 (requiring that private actions brought under Rule 10b-5 require "'scienter' . . . intent to deceive, manipulate, or defraud"); *Sandberg*, 501 U.S. at 1104-1105 (rejecting respondents' theory of causation and noting that "[t]his is not the first effort in recent years to expand the scope of an action originally inferred from the Act without conclusive guidance from Congress."); *Central Bank*, 511 U.S. at 188-189 (concluding that Rule 10b-5 does not provide a private right of action against aiders and abettors).

The Court has read the § 10(b) right of action narrowly not only because of the lack of congressional authorization but also out of concern "that litigation under Rule 10b-5 presents a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general." *Blue Chip Stamps*, 421 U.S. at 739. As the Court explained, "in this type of litigation … the mere existence of an unresolved lawsuit has settlement value to the plaintiff not only because of the possibility that he may prevail on the merits … but because of the threat of extensive discovery and disruption of normal business activities which may accompany a lawsuit which is groundless in any event, but cannot be proved so before trial[.]" *Id.* at 742-743.

These policy considerations underlie many other decisions of this Court concerning the scope of conduct actionable under § 10(b) and the elements of such claims. In holding that a Rule 10b-5 private plaintiff must allege scienter, "a mental state embracing intent to deceive, manipulate or defraud," the Court pointed to the procedural restrictions on the express civil remedies in the 1933 Act that allowed for recovery for negligent conduct and explained that "one of the purposes" of those restrictions "was to deter actions brought solely for their potential settlement value." *Ernst & Ernst*, 425 U.S. at 210 n.30. More recently, the Court explained that a private plaintiff's expansive approach to allegations of loss causation under Rule 10b-5 "would permit a plaintiff 'with a largely groundless claim to simply take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value, rather than a reasonably founded hope that the discovery process will reveal relevant evidence.'" *Dura Pharms., Inc.* v. *Broudo*, 544 U.S. 336, 347 (2005) (quoting *Blue Chip Stamps*, 421 U.S. at 741) (alteration incorporated); *see also Sandberg*, 501 U.S. at 1104-1105 (rejecting respondents' theory of causation after recalling *Blue Chip Stamps* and expressing concern about "the same threats of speculative claims"); *Piper* v. *Chris-Craft Indus., Inc.*, 430 U.S. 1, 40 (1977) ("More likely is the prospect that shareholders may be prejudiced because some tender offers may never be made if there is a possibility of massive damages claims for what courts subsequently hold to be an actionable violation."); *TSC Indus., Inc.* v. *Northway, Inc.*, 426 U.S. 438, 449 (1976) (rejecting the materiality standard petitioner urged because it was "too suggestive of mere possibilty" and might force management to make decisions out of "fear of exposing itself to substantial liability" "for insignificant omissions or misstatements").

Similar concerns animated this Court's decision in *Central Bank*. There, the Court considered petitioner's request to extend the reach of the § 10(b) private right of action to aiders and abettors. Rejecting that invitation, the Court repeated that "litigation under 10b-5 presents a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general." 511 U.S. at 189. The Court cautioned, moreover, that such litigation "requires secondary actors to expend large sums even for pretrial defense and the negotiation of settlements." *Id.*; *see also Tellabs, Inc.*, 127 S. Ct. at 2509 (explaining that "[p]rivate securities fraud actions, if not adequately contained, can be employed abusively to impose substantial cost on companies and individuals whose conduct conforms to the law").

This concern over vexatious litigation is also consistent with the Court's more limited views of private securities actions as compared to SEC enforcement actions, in which abuse is much less of a concern. In *Aaron* v. *SEC*, 446 U.S. 680 (1980), the Court addressed SEC enforcement authority under § 10(b) as well as § 17(a) of the 1933 Act. Notwithstanding that the language of § 17(a) is almost identical to that of Rule 10b-5, and the Court's conclusion that all claims under § 10(b) require an allegation of scienter, the Court determined that the SEC could premise an enforcement action under subsections § 17(a)(2) and § 17(a)(3) based on negligence. *Id.* at 697. Although the SEC may bring claims under § 17(a) based on mere negligence, the Court has refused to permit private claims under § 17(a). *See Redington*, 442 U.S. at 578.

These cases reflect the Court's conclusion that the dangers of vexatiousness inherent in § 10(b) litigation necessitate particular judicial vigilance in crafting the contours of § 10(b) liability. Petitioner's "scheme liability" would substantially increase the risk of vexatious litigation that has previously concerned this Court.

C. "Scheme Liability" Would Reach Beyond The Classes Of Persons And Conduct Covered By The Statute And Prior Decisions Of This Court

The reasons for this Court's refusal to expand the § 10(b) private cause of action that the courts created are particularly powerful here, given that "scheme liability" would expand liability beyond the classes of persons and conduct covered by the text of the statute. Section 10(b) is concerned with intentional deception of investors who rely on the deception, and the Court has recognized an implied private right of action by such investors against the deceivers on whom they relied. But when litigants have attempted to extend the reach of § 10(b) liability beyond that core—whether to negligent actors, *see Ernst & Ernst*, or to aiders and abettors, *see Central Bank*—this Court has repeatedly rejected their claims.

A "private plaintiff may not bring a 10b-5 suit against a defendant for acts not prohibited by the text of § 10(b)," *Central Bank*, 511 U.S. at 173, which makes it unlawful "[t]o use or employ, in connection with the sale of any security . . . any manipulative or deceptive device or contrivance." As this Court described in *Central Bank*, the implied private civil liability under § 10(b) for "those who commit a manipulative or deceptive act in connection with the purchase or sale of securities" has never been extended to allow suit where the plaintiff cannot "show reliance on the defendant's misstatement or omission." *Id.* at 167, 179; *see also Lampf*, 501 U.S. at 376-377 (noting that a private action under § 10(b) requires proof of a false or misleading statement, reliance, and causation).

Although petitioner has packaged its claim artfully, the type of conduct of which it complains cannot fit within the bounds of the present § 10(b) right of action. Instead, by asking this Court to extend liability to parties who "themselves made no public statements [or omissions and engaged in no expressive conduct] concerning those transactions," Pet. Br. i., and therefore to parties on whom petitioner cannot have relied, petitioner requests a judicial expansion of private liability to parties and conduct never intended by Congress. In *Central Bank*, the Court refused to recognize a similar extension after looking to "earlier cases considering conduct prohibited by § 10(b)" and "again conclud[ing] that the statute prohibits *only* the making of a material misstatement." 511 U.S. at 177 (emphasis added). The Court also explained that its "reasoning [was] confirmed by the fact that [plaintiffs'] argument would impose 10b-5 aiding and abetting liability when at least one element critical for recovery under 10b-5 is absent: reliance." *Id.* at 180. After all, a private plaintiff bringing claims for aiding and abetting under § 10(b) could not meet the requirement of demonstrating "reliance on *the defendant's* misstatement or omission to recover under 10b-5." *Id.* at 180. "Having sworn off the habit of venturing beyond Congress's intent," this Court should not accept petitioner's "invitation to have one last drink." *Sandoval*, 532 U.S. at 287.

D. Congress's Response To *Central Bank* Also Supports A Narrow Interpretation Of The Implied Private Right Of Action Under § 10(b) To Exclude "Scheme Liability"

Legislation in the wake of *Central Bank* reinforces the conclusion that the private right of action under § 10(b) should not be extended to "scheme liability." After *Central Bank*, Congress considered proposals to override that decision and expand the private right of action by adding private liability for aiding and abetting. In enacting the Private Securities Litigation Reform Act of 1995, 15 U.S.C. § 78u-4 ("PSLRA"), however, Congress rejected those proposals and chose to authorize only *SEC* enforcement against aiders and abettors and not private claims, *see id.* § 78t(e). Far from expanding the private right of action, the PSLRA and legislation that followed recognized the same concerns expressed by this Court about abusive § 10(b) litigation and took steps to restrict private suits under the statute. *See, e.g., id.* § 78u-4(b). On the question presented here, the Court need not "attempt to infer 'how the 1934 Congress would have addressed the issue had the 10b-5 action been included as an express provision in the 1934 Act.'" *Central Bank*, 511 U.S. at 178 (quoting *Musick, Peeler, & Garret* v. *Employers Ins. of Wasau*, 508 U.S. 286, 294 (1993)). Congress has confirmed that *private claims* (as opposed to civil enforcement actions by the SEC) should not extend to persons who did not themselves engage in the deception on which the plaintiff investors relied.

Following *Central Ban*k, the SEC argued to Congress that private liability under § 10(b) should be extended to aiders and abettors. Chairman Arthur Levitt testified to Congress that, in light of *Central Bank*:

> Persons who knowingly or recklessly assist the perpetration of a fraud may be insulated from liability to private parties if they act behind the scenes

> and do not themselves make statements, directly or indirectly, that are relied upon by investors. Because this is conduct that should be deterred, Congress should enact legislation to restore aiding and abetting liability in private actions.

S. Rep. No. 104-98, at 49 (1995). Groups including the North American Securities Administrators Association and the Association of the Bar of the City of New York agreed with the SEC that Congress should create private aiding and abetting liability. *See id.* The Senate Report on the PSLRA noted that when Congress chose not to add private aiding and abetting liability to the draft bill, Chairman Levitt submitted a letter "express[ing] his disappointment" that such liability was not added. *Id.* at 48.

Notwithstanding the SEC's urgings, Congress chose not to expand the scope of the private right of action under § 10(b). Congress recognized the role of private suits in complementing SEC enforcement as ensuring the "integrity and efficiency of our markets," S. Rep. No. 104-98, at 8, but the PSLRA rejected "the recommendation made by the SEC, the State securities regulators and the bar association that aiding and abetting liability be fully restored for the SEC and private litigants as well," *id.* at 48. It did so because "private aiding and abetting liability actions under Section 10(b) would be contrary to [the PSLRA's] goal of reducing meritless securities litigation." *Id.* at 8, 19.

The Senate Report recognized the coercive effects of such suits:

> The dynamics of private securities litigation create powerful incentives to settle, causing securities class actions to have a much higher settlement rate than other types of class actions. Many such actions are brought on the basis of their settlement value. The settlement value to defendants turns more on the expected costs of defense than the merits of the underlying claim.

S. Rep. No. 104-98, at 6. Even Chairman Levitt conceded that "investors and markets are being hurt by litigation excesses." *Id.* at 5.

Motivated by the same concerns about vexatious litigation that this Court has identified, *see supra* pp. 9-11, Congress took other steps in the PSLRA "to curb frivolous, lawyer-driven litigation," *Tellabs*, 127 S. Ct. at 2509. Not only did Congress refuse to extend the private right of action under § 10(b), but it also imposed several additional "requirements for securities fraud actions," 15 U.S.C. § 78u-4(b). In particular, the PSLRA imposed heightened pleading requirements for the allegations of misstatements and omissions and allegations of the required state of mind. *Id.*

The PSLRA did, however, grant enforcement authority against aiders and abettors to the SEC. S. Rep. No. 104-98, at 48. Section 20(e) of the Securities Exchange Act, 15 U.S.C. 78t(e), now provides:

> Prosecution of persons who aid and abet violations
>
> For purposes of any action brought by the Commission under paragraph (1) or (3) of section 78u(d) of this title, any person that knowingly provides substantial assistance to another person in violation of a provision of this chapter, or of any rule or regulation issued under this chapter, shall be deemed to be in violation of such provision to the same extent as the person to whom such assistance is provided.

Congress's chosen approach balances competing interests, giving the SEC but not private plaintiffs the power to act against parties who did not themselves make a material misrepresentation or omission on which investors relied, so that—in cases deemed appropriate by the expert agency—action can be taken to deter and compensate for fraudulent conduct, but there is no encouragement to private, lawyer-driven, and often meritless litigation. The PSLRA thus reflects Congress's own determination that concerns about abusive litigation outweighed the benefits of allowing private claims against aiders and abettors and that SEC enforcement is sufficient. As this Court has explained, "[t]he express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others." *Sandoval*, 532 U.S. at 290; *see also Massachusetts Mut. Life Ins. Co.* v. *Russell*, 473 U.S. 134, 147 (1985) (when "a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it" (internal quotation marks omitted)).

When Congress has revisited the issues implicated by the PSLRA, moreover, it has declined to expand the scope of the private right of action under § 10(b).[2] To the contrary, in the period since the PSLRA's enactment, legislation regarding private actions under § 10(b) has focused on shoring up the protections against vexatious litigation. *See* Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227; *Dabit*, 126 S. Ct. at 1510-1512 (detailing Congress's response through SLUSA to litigants' efforts to frustrate the goals of the PSLRA).

Allowing an expansion of private rights of action under a "scheme liability" theory would disrupt the balance that Congress has struck. Petitioner seeks the creation of a private right of action to remedy respondents' alleged acts; the acts alleged, however, do not include misstatements or omissions on which petitioner relied, but merely actions that allegedly had "the purpose and effect of furthering the fraudulent scheme." Pet. Br. 14; *see id.* at 12. The "schemers" that

[2] In 2002, Congress again considered and rejected efforts to extend the private right of action to reach aiders and abettors. Senator Shelby proposed an amendment to the bill that became the Sarbanes-Oxley Act of 2002 that would have added a "private litigation" provision stating that "persons that aid or abet violations . . . shall be deemed to be in violation of such provision to the same extent as the person to whom such assistance is provided." 148 Cong. Rec. S6584 (daily ed. July 10, 2002). No such provision appears in the Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745. *See also* H.R. Rep. No. 107-414, at 54 (2002) (minority views observing that the SEC and others had urged Congress to overturn *Central Bank*'s bar on private suits against aiders and abettors and lamenting that Congress did not "now heed these recommendations" and expand the private right of action).

petitioner's theory would reach include most if not all the aiders and abettors that Congress dealt with in a different manner, plus an unbounded set of other persons who dealt with the primary violator in any way that a plaintiff can allege furthered the fraudulent scheme.

To the extent that the "scheme liability" alleged in this case can be distinguished at all from the aiding and abetting liability rejected in *Central Bank*, it poses even more serious dangers of vexatious litigation. "Aiding and abetting" is at least a legal category with a long history and extensive statutory and common law definitions in various contexts. *See, e.g., Central Bank*, 511 U.S. at 180-183 (describing history of aiding and abetting liability). "Scheme liability" would, presumably, potentially reach anyone who dealt in any pertinent way with the person who is alleged to have engaged in the fraud, a much wider range of potential defendants. Since defendants are jointly and severally liable, *see* 15 U.S.C. § 78u-4(f)(2), the plaintiff can threaten any person with an assertable connection to the "scheme" with the massive damages often involved in securities fraud cases.

Moreover, the scope of "scheme liability," like the aiding and abetting liability at issue in *Central Bank*, is "unclear, in an area that demands certainty and predictability." *Central Bank*, 511 U.S. at 188 (internal quotation marks omitted). A "scheme liability" theory would be untethered to the accepted elements of § 10(b) actions—particularly reliance, loss causation, and materiality. The courts would need to develop a whole new body of law to determine how Rule 10b-5 will work with respect to individuals and entities, such as suppliers, lenders, and professional advisers, with even simple and peripheral relationships with the entity making the misstatements or omissions. In the meantime, market participants will have inadequate guidance regarding the legality of a variety of conduct. "[S]uch a shifting and highly fact-oriented disposition of the issue of who may [be liable for] a damages claim for violation of Rule 10b-5 is not a satisfactory basis for a rule of liability imposed on the conduct of business transactions." *Id.* (internal quotation marks omitted) (alterations in original). And this sort of amorphous liability threat and disproportionate exposure will not only aggravate the dangers of vexatious litigation but also cannot help but distort business relations.

The PSLRA's particular steps to deter vexatious private suits are also inconsistent with a private "scheme liability" theory. Key among the constraints placed on private suits were heightened pleading requirements in § 78u-4(b)(1) for claims involving "misleading statements and omissions." A complaint must "specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement or omission is made on information and belief, the complaint shall state with particularity all facts on which that belief is formed." 15 U.S.C. § 78u-4(b)(1). A suit based on "scheme liability," however, would evade these requirements. The defendant may, as in this case, never have deceived anyone with whom it dealt, and never have made any statement or omission on which any relevant investor relied. Accordingly, these additional requirements—Congress's chosen protections against frivolous suits—would have no deterrent effect on such suits.[3] Permitting private suits based on "scheme liability" would circumvent protections against abuse established by the PSLRA while greatly expanding the scope of potential defendants.

E. The Statutory Limitations On The Express Causes Of Action In The Securities Laws Support A Narrow Reading Of The Implied Right Of Action Under § 10(b) That Does Not Extend To "Scheme Liability"

As part of its analysis of the scope of private rights of action under § 10(b), this Court has considered "the express causes of action in the securities Acts as the primary model

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[3] The pleading requirements of Fed. R. Civ. P. 9(b), including the requirement to plead fraud with particularity, would apply to "scheme" liability claims, but as the Conference Report on the PSLRA recognized, "[t]he Rule has not prevented abuse of the securities laws by private litigants." H.R. Conf. Rep. No. 104-369, at 41 (1995).

for the 10(b) action," on the theory that "[h]ad the 73rd Congress enacted a private § 10(b) right of action, it likely would have designed it in a manner similar to the other private rights of action in the Securities Acts." *Central Bank*, 511 U.S. at 178. Using that mode of analysis and recognizing the care with which Congress delineated the express causes of action, this Court has repeatedly refused to expand implied rights of action in a way that would effectively override the limits on the express remedies. *See, e.g.*, *id.*; *Ernst & Ernst*, 425 U.S. at 200-201; *Lampf*, 501 U.S. at 359-360. After all, it would be "anomalous to impute to Congress an intention in effect to expand the defendant class for 10b-5 actions beyond the bounds delineated for comparable express causes of action." *Central Bank*, 511 U.S. at 180. An analysis of the express causes of action confirms that the private right of action under § 10(b) should not be extended to "scheme liability."

It is apparent from the careful crafting of the express causes of action that the 1933 and 1934 Congresses did not intend to give investors wide open private rights of action against indirect participants in an alleged fraud. The express causes of action each strictly cabins the scope of potential defendants or the unlawful conduct, and some of the express causes of action do both. For example, only persons who sign the registration statement, express an expert opinion on the statement, or served as a director of the issuer or underwriter in the offering may be liable under Section 11 of the 1933 Act. 15 U.S.C. § 77k. Likewise, Section 12(2) of the 1933 Act extends liability only to persons who utilize a false or misleading prospectus to "offer[] or sell[] a security." *Id.* § 77*l*. In *Pinter* v. *Dahl*, 486 U.S. 622 (1988), the Court found no textual basis or "congressional intent to incorporate tort law doctrines," *id.* at 652, and rejected arguments that parties should be liable "whose participation in the buy-sell transaction is a substantial factor in causing the transaction to take place," *id.* at 649 (footnote and citation omitted). The Court also refused to extend the reach of the statute to "persons who 'participate in soliciting the purchase.'" *Id.* at 651 n.27. Similarly, persons are liable under Section 18 of the 1934 Act only if the plaintiff actually relied on the person's false statements in documents filed with the Commission. Significantly, Section 18 also reaches only persons "who shall make or cause to be made" a false or misleading statement in an SEC filing.

The petitioner in this case has requested an expansion of the § 10(b) implied right of action to a nebulous category of conduct and an undefined class of parties. Just as this Court rejected the invitation in *Pinter* to extend liability to a indirect participants, it should refuse to endorse petitioner's theory of "scheme liability," which would render liable actors only obliquely connected to allegedly fraudulent schemes. This Court should continue to take guidance from the approach that Congress chose of precisely delineating the scope of the express causes of action under the federal securities laws.

II. THE SEC LACKS AUTHORITY TO DETERMINE THAT THERE IS A PRIVATE RIGHT OF ACTION FOR "SCHEME LIABILITY"

The Petition for a Writ of Certiorari and Amici Former SEC Commissioners make much of the SEC's support, expressed in other courts, for a private right of action for "scheme liability," implying a major role for the SEC in assessing the scope of the § 10(b) private right of action. *See* Pet. 23-24; Br. of Former SEC Comm'rs 2, 6-7. Contrary to this suggestion, the SEC's views on private rights of action for "scheme liability" are due no deference from this Court.

First, the SEC's requests for judicial extension of the private right of action to "scheme liability" run contrary to Congress's judgments on the matter. In the legislation following *Central Bank*, Congress considered and rejected SEC proposals to extend private rights of action beyond claims of misstatements and omissions on which a plaintiff relied to actions that merely had the goal and effect of advancing the fraudulent scheme. Accordingly, the SEC's expressions of support for private "scheme liability" are contrary to a clear congressional determination. Second, regardless of the particulars of the SEC's views, the SEC is not entitled to deference on this question because Congress has not delegated authority to the SEC to resolve questions concerning the existence or scope of private rights of action under § 10(b).

A. SEC Support For An Extension Of The § 10(b) Private Right Of Action Is Contrary To Congressional Intent

In amicus briefs filed in other courts, the SEC has supported the expansion of the § 10(b) private right of action to include "scheme liability." Br. of Amicus Curiae the Securities Exchange Commission 16, *Simpson* v. *AOL Time Warner Inc.*, 452 F.3d 1040 (9th Cir. 2006) (No. 04-55665) (SEC *Simpson* Amicus Br.); *see also* Reply Br. of Amicus Curiae the Securities Exchange Commission 5, *Simpson* v. *AOL Time Warner Inc.*, 452 F.3d 1040 (9th Cir. 2006) (No. 04-55665) (SEC *Simpson* Amicus Reply). The SEC opined that private liability should apply to "[a]ny person who directly or indirectly engages in a manipulative or deceptive act as part of a scheme to defraud." SEC *Simpson* Amicus Br. 16. The Commission's proposed test transparently "include[d] conduct beyond the making of false statements or misleading omissions" and contemplated that "[t]he reliance element should be viewed as satisfied whenever a plaintiff relies on a material deception flowing from a deceptive act, even though the conduct of other participants in the scheme may have been a subsequent link in the causal chain leading to the plaintiff's securities transaction." *Id.* at 8. The Court need not defer to the SEC's views.

The familiar two-part test of *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), provides that a court must first ask whether "Congress has directly spoken to the precise question at issue" and, if not, whether the agency's view "is based on a permissible construction of the statute." *Id.* at 842-843. The SEC's views in *Simpson,* however, do not satisfy the first step of the *Chevron* analysis.

Under *Chevron* step one, Congress has "directly spoken to the question at issue." As the SEC itself and Congress both acknowledged, in enacting the PSLRA Congress rejected the SEC's efforts to extend private liability beyond those making misstatements and omissions on which a plaintiff relied to include aiders and abettors. *See supra* pp. 13-15. In the PSLRA and ensuing legislation, Congress has focused on limiting private suits not expanding them; the limits placed on private suits, moreover, operate on the assumption that such suits are limited to claims of misstatements or omissions on which the plaintiff relied. *See supra* p. 18.

When applying the first step of the *Chevron* analysis, this Court has looked to the "plain language of the statute," *HUD* v. *Rucker*, 535 U.S. 125, 130 (2002), and has also considered the broader context of Congress's legislation in the area, *see, e.g.*, *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160-161 (2000) (rejecting the FDA's view that it had the authority to regulate tobacco on the ground that it required a "strained" reading of the statute and would "ignore the plain implication of Congress's tobacco-specific legislation"). When the 1934 Act is coupled with Congress's more recent legislation, "the intent of Congress is clear"—to limit private rights of action to persons making the misstatements or omissions on which the plaintiff relied.

"Scheme liability," like aiding and abetting, does not involve misstatements or omissions on which the plaintiff relied. Rather, it concerns actions that had "the purpose and effect of furthering the fraudulent scheme." Pet. Br. 14; *id.* at 12. As noted above, the "schemers" would include most if not all the aiders and abettors that Congress has already determined should not be subject to § 10(b) private liability, plus a potentially limitless group of additional persons who acted with the primary violator in a way that a plaintiff might argue advanced the "scheme." Congress's rejection of the SEC's request to extend private liability to aiders and abettors must therefore foreclose any deference to the SEC's efforts to obtain in the courts even broader private enforcement than the aiding and abetting cause of action that Congress would not provide.[4]

B. Principles Of Deference To Administrative Agencies Do Not Apply To The Question Whether To Extend The § 10(b) Private Right Of Action To "Scheme Liability"

The SEC's views on the question whether to extend the § 10(b) private right of action to "scheme liability" are not due any deference under traditional administrative law principles for an additional reason: *Chevron* provides deference to an agency's reasonable interpretation of a statute, but only where Congress has delegated authority to the agency to interpret the statute. "A precondition to deference under *Chevron* is a congressional delegation of administrative authority." *Adams Fruit Co.* v. *Barrett*, 494 U.S. 638, 649 (1990).

There is plainly no express delegation of authority to the SEC on the present issue. *See supra* pp. 5-8; *cf. Lampf*, 501 U.S. at 359 ("[W]e have made no pretense that it was Congress' design to provide the remedy afforded."). Nor can there be any implicit delegation of authority on this question. While administrative law recognizes that Congress can delegate authority to an agency implicitly as well as explic-

[4] These arguments based on congressional intent should not be discounted as resting on congressional inaction. Congress did act upon the question of liability for aiding and abetting, giving the SEC enforcement authority but declining to give private litigants a complementary right of action. *Cf. Sandoval*, 532 U.S. at 290 ("The express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others."). Given *Central Bank* and the purposes of the PSLRA, moreover, Congress plainly did not decline to create private liability for aiding and abetting because it deemed such liability already fairly included in the statute. In any event, although this Court has cautioned against reliance on congressional inaction in discerning Congress's intent, it has nonetheless cited "legislative acquiescence" in cases concerning the private right of action under § 10(b). *See, e.g., Basic Inc.*, 485 U.S. at 230-231 (1988); *Central Bank,* 511 U.S. at 186-187.

itly,[5] this Court has made clear that it will not infer Congress's delegation of authority to an agency, such as the SEC, to create or extend a judicial cause of action not created or extended by the statute itself, at least where such delegation is not Congress's own discernible intent. *See, e.g.*, *Piper*, 430 U.S. at 41 n.27, 43 (1977) (explaining that "administrative deference" was inappropriate on the question of the availability of a private right of action under § 14(e) of the Securities Exchange Act because the SEC's "presumed 'expertise' in the securities-law field is of limited value when the narrow legal issue is one peculiarly reserved for judicial resolution"); *Adams Fruit*, 494 U.S. at 649-650 (rejecting *Chevron* deference to agency views on the availability of a private right of action under the Migrant and Seasonal Agricultural Worker Protection Act (AWPA), 29 U.S.C. §§ 1801 *et seq*., on the ground that "[n]o such delegation regarding AWPA's enforcement provisions is evident in the statute").[6]

Even where the agency has been authorized to administer the statute, the Court will not infer a delegation of authority over questions regarding the existence of a private right of action. *See, e.g., Adams Fruit*, 494 U.S. at 649 (observing that Congress "expressly mandated a role for the Department of Labor in administering the statute … [but] [t]his delegation, … does not empower the Secretary to regulate the scope of the judicial power.")[7]

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[5] *See, e.g.*, *United States* v. *Mead Corp.*, 533 U.S. 218, 229 (2001).

[6] *See also Sandoval*, 532 U.S. at 291 (rejecting agency efforts to create a private right of action under § 602 of the Civil Rights Act by regulation and noting that it "is most certainly incorrect to say that language in a regulation can conjure up a private cause of action that has not been authorized by Congress [because] [a]gencies may play the sorcerer's apprentice but not the sorcerer himself."); *Redington*, 442 at 577 n.18 ("SIPC and the Trustee also appear to suggest that the rules adopted under § 17(a) can themselves provide the source of an implied damages remedy even if § 17(a) itself cannot. It suffices to say, however, that the language of the statute and not the rules must control." (citations omitted)).

[7] Lower courts have followed the Supreme Court's lead and declined to defer to agency positions on questions regarding private rights of ac-

In resolving the various questions regarding private actions under § 10(b), this Court has consistently held that the judiciary has the responsibility for defining the contours of the right of action, *see, e.g., Musick*, 508 U.S. at 292-293 ("[t]he federal courts have accepted and exercised the principal responsibility for the continuing elaboration of the scope of the 10b-5 right and the definition of the duties it imposes"), and demonstrated that it will not defer to the SEC on questions regarding private rights of action under § 10(b). In *Blue Chip Stamps*, 421 U.S. at 738, 743, 746 n.10, for example, the Court emphasized the "judicial role of interpreting" the implied private right of action under § 10(b), and held that the cause of action under § 10(b) was limited to "purchasers" or "sellers" of securities. In so holding, the Court acknowledged that "a great majority of the many commentators on the issue" including the SEC (in an amicus brief), supported a more expansive private liability scheme. The Court described the SEC's views but treated them no differently from the other commentators' opinions, not according the SEC's position any particular deference.

Likewise, in *Ernst & Ernst*, 425 U.S. at 193, 197-198, 207-208, the Court acknowledged the SEC's arguments in an amicus brief in support of permitting a private right of ac-

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tion or to permit agencies to manufacture causes of action. In *Murphy Exploration & Production Co.* v. *Department of Interior*, 252 F.3d 473 (D.C. Cir. 2001), the D.C. Circuit determined that "*Chevron* deference was inappropriate" on the question of what may trigger a statute of limitations on a judicial remedy provided by Congress. *Id.* at 478. The court explained that a "principal reason" for the lack of deference is that the statutory provisions establishing the remedy "do not grant powers to agencies": "Unless the agency is the recipient of congressionally delegated power, there is no reason to defer to its interpretations of the statute that does the delegating." *Id.* at 478-479. The court further remarked that "administrative agencies have no particular expertise" in questions of the scope of judicial authority over private claims. *Id.* at 479; *see also Iverson* v. *City of Boston*, 452 F.3d 94, 100 (1st Cir. 2006) (rejecting the suggestion that an agency regulation may give rise to a private right of action and observing that "the power to create a private cause of action, like the power to create a positive federal law itself, lies exclusively with Congress").

tion under § 10(b) "in the absence of any allegation of 'scienter,'" but rejected the arguments without any suggestion that it might defer to the SEC view. *See also Central Bank*, 511 U.S. at 188-191 (dismissing SEC arguments in support of an implied private right of action over aiding and abetting without discussion of any deference due); *Lampf*, 501 U.S. at 361 (rejecting SEC view regarding statute of limitations for private right of action).[8]

The Court has explicitly rejected deference to the SEC on questions concerning the existence of private rights of action under parallel provisions of the securities laws. In *Piper*, 430 U.S. at 43, the Court declined to create an implied right of action for tender offerors under § 14(e) of the Securities Exchange Act. In so doing, the Court rejected the SEC's support for this right of action, finding that the SEC's view was due no deference: "[T]he narrow legal issue is one peculiarly reserved for judicial resolution, namely whether a cause of action should be implied by judicial interpretation in favor of a particular class of litigants." *Id.* at 41 n.27; *see also id.* ("[I]n our prior cases relating to implied causes of action, the Court has understandably not invoked the 'administrative deference' rule, even when the SEC supported the result reached in the particular case."); *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11, 23 (1979) (re-

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[8] This is not to suggest that the Court never affords the SEC's views deference on questions concerning § 10(b) or Rule 10b-5. For example, in *Basic Inc.*, 485 U.S. 224, the Court addressed the materiality requirement of Rule 10b-5. There, the Court explained the SEC's view and stated: "The SEC's insights are helpful, and we accord them due deference." *Id.* at 239 n.16. *Basic* did not address the proposition that the Court determines the existence of private rights of action. Section 10(b) makes certain acts unlawful only to the extent that they violate SEC rules and regulations. Giving "due deference" to "helpful" SEC views on questions of the meaning of certain terms in the Commission's own rules, as the Court did in *Basic*, is not the same as deferring on the question whether there is a private right of action available under the statute; as explained in *Sandoval*, the regulation itself cannot give rise to a cause of action not created by Congress.

jecting SEC views on whether a private right of action should be implied under the Investment Advisers Act).

CONCLUSION

For these reasons, the decision below should be affirmed.

Respectfully submitted.

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