No. 09-525

In the Supreme Court of the United States

JANUS CAPITAL GROUP, INC., ET AL., PETITIONERS

v.

FIRST DERIVATIVE TRADERS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether an investment adviser to a mutual fund "made" misleading statements for purposes of liability under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b), by participating in the drafting and dissemination of misleading prospectuses of mutual funds it managed.

2. Whether misleading statements in a mutual fund's prospectuses must be explicitly attributed to the mutual fund's investment adviser in order to establish the reliance element of a private Section 10(b) action against the adviser.

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INTEREST OF THE UNITED STATES

This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

1. This case is a private action filed pursuant to Section 10(b) of the Securities Exchange Act of 1934 (Exchange Act), 15 U.S.C. 78j(b), and Rule 10b-5, 17 C.F.R. 240.10b-5. Section 10(b) makes it "unlawful for any person, directly or indirectly, * * * [t]o use or employ, in connection with the purchase or sale of any security * * *, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [Securities and Exchange] Commission may pre-

scribe." 15 U.S.C. 78j(b). Pursuant to its Section 10(b) rulemaking authority, the Securities and Exchange Commission (Commission or SEC) has promulgated Rule 10b-5, which makes it "unlawful for any person, directly or indirectly, * * * [t]o make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made * * * not misleading, * * * in connection with the purchase or sale of any security." 17 C.F.R. 240.10b-5(b).

The Commission is authorized to bring civil enforcement actions to prevent and punish violations of Section 10(b). See 15 U.S.C. 78u(d)(1) (suits for injunctive relief); 15 U.S.C. 78u(d)(3)(A) (suits for civil penalties). This Court has also inferred the existence of a private right of action from "the words of the statute and its implementing regulation." *Stoneridge Inv. Partners, LLC.* v. *Scientific-Atlanta, Inc.*, 552 U.S. 148, 157 (2008). As the Court has elaborated:

> In a typical § 10(b) private action a plaintiff must prove (1) a material misrepresentation or omission by the defendant; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation.

Ibid. (citing *Dura Pharms., Inc.* v. *Broudo*, 544 U.S. 336, 341-342 (2005)). With respect to the reliance element, this Court has held that a rebuttable presumption of reliance can be supported by the fraud-on-the-market theory, under which the market price of a stock reflects "most publicly available information," including "any public material misrepresentations." *Basic Inc.* v.

Levinson, 485 U.S. 224, 242, 247 (1988); see *Stoneridge*, 552 U.S. at 159.

2. Petitioner Janus Capital Group Inc. (JCG) is a publicly traded asset management firm that sponsors a family of mutual funds known as the Janus Funds. Petitioner Janus Capital Management LLC (JCM), a wholly-owned subsidiary of JCG, is the investment adviser to the Janus Funds. Pet. ii; Pet. App. 59a.

Respondent, the lead plaintiff in this putative class action, alleges that JCG and JCM violated Section 10(b) and Rule 10b-5 because the prospectuses of several of the Janus Funds "created the misleading impression that [JCG and JCM] would implement measures to curb market timing in the Janus Funds," when in fact "secret arrangements with several hedge funds" permitted "market timing transactions,"[1] to the alleged detriment of long-term investors in the Funds. Pet. App. 60a-61a. The suit is brought on behalf of shareholders of JCG. *Id.* at 59a. The complaint alleges that class members purchased shares of JCG's stock at inflated prices between 2000 and the public revelation in 2003 of the market-timing arrangements, after which many investors withdrew from the Janus Funds and the price of JCG's stock fell. *Id.* at 59a, 62a-63a.

The operative complaint alleges that JCM, in its capacity as investment adviser to the Janus Funds, is "responsible for the day-to-day management of [the] investment portfolio and other business affairs of the funds." Pet. App. 65a. Thus, although "each mutual fund is in fact its own company," the complaint alleges that "as a practical matter the management company runs it." *Id.*

[1] The term "market timing" refers to "the practice of rapidly trading in and out of a mutual fund to take advantage of inefficiencies in the way the fund values its shares." Pet. App. 5a-6a.

at 71a. The complaint alleges that prospectuses for several of the Janus Funds stated that the Funds were not intended for market timing and that measures had been put in place to deter such activities. *Id.* at 72a-80a. The complaint alleges that the "policy against market timers" common to all of those Funds was written and represented by "Janus" (referring collectively to JCG and JCM). *Id.* at 59a, 69a. The complaint also alleges that JCM disseminated the Funds' prospectuses to potential investors, and that JCG made the most recent prospectus for each of the Funds available on its website. *Id.* at 71a-72a.

3. The district court granted petitioners' motion to dismiss the complaint. Pet. App. 42a-53a. With respect to petitioner JCG, the court concluded that the complaint contained no allegations that JCG "actually made or prepared the prospectuses, let alone that any statements contained therein were directly attributable to it." *Id.* at 46a. With respect to petitioner JCM, the district court did not determine "whether JCM made the alleged misstatements," *id.* at 50a n.5, because it held that a mutual fund's investment adviser owes no duty to the shareholders of its parent company when those shareholders have not purchased shares of the mutual fund. *Id.* at 49a-53a.

4. The court of appeals reversed. Pet. App. 1a-41a. As relevant here, the court held that respondent had adequately alleged that (a) petitioners had "made" the allegedly misleading statements, (b) the statements at issue were properly "attributable" to petitioner JCM, and (c) respondent had adequately pleaded a claim of control-person liability against petitioner JCG.

a. The court of appeals held that respondent's complaint adequately alleged that petitioners had made the

statements in the prospectuses. Recognizing that "a plaintiff must plead with particularity" under Rule 9(b) of the Federal Rules of Civil Procedure, the court summarized respondent's allegations as follows:

> Specifically, the complaint alleges that [petitioners] "wrote and represented [their] policy against market timers," and "publicly issued false and misleading statements." The complaint also alleges that [petitioners] "represented that [their] mutual funds were designed to be long-term investments for 'buy and hold' investors and were therefore favored investment vehicles for retirement plans." According to the complaint, [petitioners] made these representations by "caus[ing] mutual fund prospectuses to be issued for Janus mutual funds and ma[king] them available to the investing public," through filings with the SEC and dissemination on a joint Janus website.

Pet. App. 17a-18a (some brackets in original; quoting passages now reprinted at Pet. App. 69a, 109a, 60a, and 60a, respectively). The court concluded that those "statements, taken together, allege that JCG and JCM, by participating in the writing and dissemination of the prospectuses, *made* the misleading statements contained in the documents." *Id.* at 18a.

b. The court of appeals observed that the plaintiff in a private Section 10(b) suit "must allege that it relied on the defendant's false or misleading statement." Pet. App. 15a. The court stated that, to establish reliance under a fraud-on-the-market rationale, a plaintiff must show that the defendant made "a misrepresentation that is public and is attributable to the defendant." *Id.* at 18a. The court further stated that other courts of ap-

peals had "diverged over the degree of attribution required to plead reliance." *Id.* at 19a. The court described the Second and Eleventh Circuits as concluding that "reliance under § 10(b) * * * requires direct attribution of the allegedly misleading statement to the defendant." *Id.* at 20a; see *id.* at 20a-21a. By contrast, it described the Ninth Circuit as having held that, even without "public attribution," a primary violation could be established on the basis of "substantial participation or intricate involvement in preparing the misleading statement." *Id.* at 22a.

Recognizing that this case "arises in the limited context of fraud-on-the-market," the court of appeals declined to "establish an attribution standard for all reliance inquiries." Pet. App. 23a. For purposes of "fraud-on-the-market reliance," however, it held that "the public attribution element of the reliance inquiry" could be established by proving "that interested investors * * * would attribute the allegedly misleading statement to the defendant." *Id.* at 23a, 24a. The court of appeals discussed cases involving corporate officers, *id.* at 24a-27a, and stated that it was necessary to "analyze[] the precise relationship between the defendant and the entity or analyst issuing the allegedly misleading statement in order to determine whether the statement was attributable to the defendant," *id.* at 27a.

Applying that mode of analysis, the court of appeals found respondent's allegations sufficient to establish that the misleading statements were attributable to JCM. Pet. App. 27a-31a. The court emphasized respondent's allegations that JCM, as the investment adviser to the Janus Funds, is responsible for "day-to-day management" and, "as a practical matter," runs each of the Janus Funds. *Id.* at 27a. The court noted that "JCM is

listed as investment adviser to the funds in the prospectuses and the statements of additional information for each of the Janus Funds, and its duties are detailed in these documents." *Id.* at 28a. Under these circumstances, the court "conclude[d], at the Rule 12(b)(6) stage, that * * * interested investors would infer that JCM played a role in preparing or approving the content of the Janus fund prospectuses, particularly the content pertaining to the funds' policies affecting the purchase or sale of shares." *Id.* at 31a.

c. The court of appeals held that the allegations against JCM's parent company, JCG, were insufficient to state a claim of primary liability under Section 10(b) because JCG was not the investment adviser and therefore was not "well known to be intimately involved in the day-to-day operations of the mutual funds." Pet. App. 32a. The court acknowledged that "JCG, like JCM, played a role in the dissemination of the fund prospectuses on the Janus website," but found that this limited role was insufficient to cause interested investors to "believe JCG had prepared or approved the Janus fund prospectuses." *Ibid.*[2] The court concluded, however, that respondent had adequately pleaded a claim of control-person liability against JCG under Section 20(a) of the Exchange Act, 15 U.S.C. 78t(a). Pet. App. 36a-40a.[3]

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[2] In a concurring opinion, Judge Shedd disagreed with that aspect of the court's opinion. In his view, a reasonable investor would have attributed statements in the prospectuses to JCG as well as JCM, in light of respondent's allegation that JCG had published them on its website. Pet. App. 40a-41a.

[3] Petitioners do not challenge that aspect of the court of appeals' decision (except to the extent it assumes there is a valid Section 10(b) claim against JCM).

DISCUSSION

Neither of the questions presented warrants this Court's review. As the court of appeals correctly held, respondent's complaint adequately alleged both that JCM had made false and misleading statements, and that respondent and other members of the putative class had relied to their detriment on those statements. The Fourth Circuit's decision does not conflict with decisions of this Court or any other court of appeals. Although petitioners characterize JCM as a mere "service provider" to the Janus Funds, respondent's complaint alleged that JCM was responsible for the Funds' day-to-day management, and that allegation is consistent with standard practice in the mutual-fund industry. The cases on which petitioners rely, by contrast, involved efforts to impose Section 10(b) liability on corporate "outsiders" (*e.g.*, outside accounting firms or law firms) for false statements made by their issuer clients.

A. The Allegations In Respondent's Complaint Are Sufficient To Withstand A Motion To Dismiss

1. The court of appeals properly took account of the unique and close relationship between a mutual fund and its investment adviser

Petitioners contend (Pet. 11) that JCM was "merely a service provider" to the Janus Funds. Petitioners emphasize (Pet. 2, 11) that the various funds are "separate legal entities that are not owned" by JCM and have "separate boards of trustees and separate legal counsel." Petitioners argue on that basis (Pet. 8, 9) that they cannot be held liable for the allegedly misleading statements in this case because those statements were made by "another," "different" company rather than by petitioners themselves.

Petitioners' argument is inconsistent with the allegations in respondent's complaint (which must be taken as true at this stage of the case), and it misapprehends the relationship that generally exists between a mutual fund and its adviser. Respondent's complaint alleges that JCM, in its role as the investment adviser to the Janus Funds, "is responsible for the day-to-day management of * * * [the] business affairs of the funds." Pet. App. 65a. The complaint further alleges that "[w]hile each mutual fund is in fact its own company, as a practical matter the management company runs it." *Id.* at 71a.

The relationship between JCM and the Janus Funds that is described in respondent's complaint accords with usual industry practice. Unlike more typical "service provider[s] * * * such as an accountant, a lawyer, or a bank" (Pet. Reply Br. 10), an investment adviser's unique and close relationship with the fund makes it essentially a corporate insider. As the Commission has explained: "[T]he term 'investment adviser' is to some extent a misnomer" because "[t]he so-called 'adviser' is no mere consultant. He is the fund's manager. Hence the investment adviser almost always controls the fund." *In re Steadman Sec. Corp.*, 46 S.E.C. 896, 920 n.81 (1977) (*Steadman*) (citations omitted); see *Short Selling in Connection with a Public Offering*, 72 Fed. Reg. 45,100 n.71 (2007) (quoting *Steadman*). In *Steadman*, the Commission concluded that, because an investment adviser "manages the fund's affairs" and "is normally the only audible voice in day-to-day management," an investment adviser's status as such "is normally enough" to rebut a statutory presumption that a person who owns less than 25% of a company's voting securities does not control that company. 46 S.E.C. at 920 n.81.

Like the Commission, courts have recognized the control that an investment adviser typically exercises over a mutual fund. This Court recently observed that it is "typical" for an investment adviser to "create[] the mutual fund," "select[] the fund's directors, manage[] the fund's investments, and provide[] other services" to the fund. *Jones* v. *Harris Assocs. L.P.*, 130 S. Ct. 1418, 1422 (2010). That description is consistent with the Court's statement more than 25 years ago that a mutual fund "is typically created and managed by a pre-existing external organization known as an investment adviser," which "generally supervises the daily operation of the fund." *Daily Income Fund, Inc.* v. *Fox*, 464 U.S. 523, 536 (1984).[4] See also *Burks* v. *Lasker*, 441 U.S. 471, 480-481 (1979) ("Most funds are formed, sold, and managed by external organizations, [called 'investment advisers,'] that are separately owned and operated. . . . The advisers select the funds' investments and operate their businesses.") (brackets in original) (quoting S. Rep. No. 184, 91st Cong., 1st Sess. 5 (1969)). And the Second Circuit has explained that the "management structure" of mutual funds "contrasts sharply with that of a typical corporation" because "[c]ontrol of a mutual fund * * * lies largely in the hands of the investment adviser, an external business entity." *Tannenbaum* v. *Zeller*, 552 F.2d 402, 405, cert. denied, 434 U.S. 934 (1977).

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[4] Consistent with the understanding of industry practice reflected in the Commission's decision in *Steadman*, the brief for the SEC in *Daily Income Fund* stated (at 10) that "the adviser of an investment company typically exercises at least as much control over the company as internal management does in other corporations."

2. Respondent's complaint adequately alleges that JCM made misrepresentations in the Funds' prospectuses

a. Even if it is not the issuer itself, a defendant who has participated to a sufficient degree in the drafting or dissemination of misleading statements can be primarily liable under Section 10(b). Thus, when a person, acting alone or with others, creates a misrepresentation or causes it to be made, that person can be liable as a primary violator—assuming that the person acts with scienter, which must be pleaded "with particularity," 15 U.S.C. 78u-4(b)(2).

Respondent alleges that petitioners "wrote and represented [their] policy against market timers," Pet. App. 69a; that they "publicly issu[ed] false and misleading statements" regarding that policy, *id.* at 109a; that petitioners "represented that [their] mutual funds were designed to be long-term investments for 'buy and hold' investors," *id.* at 60a; and that petitioners "caused mutual fund prospectuses to be issued for Janus mutual funds and made them available to the investing public, which created the misleading impression that [petitioners] would implement measures to curb market timing in the Janus Funds," *ibid.* As the court of appeals correctly explained, "[t]hese statements, taken together, allege that [petitioners], by participating in the writing and dissemination of the prospectuses, *made* the misleading statements contained in the documents." *Id.* at 18a.[5]

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[5] Courts have recognized that individual employees or officers can be liable under Section 10(b) for having "made" statements that were issued in the name of the company rather than of the employees themselves. See, *e.g.*, *McConville* v. *United States SEC*, 465 F.3d 780, 786-787 (7th Cir. 2006) (corporate official who had "substantial involvement in drafting the financial statements" in company's SEC filing can be

In determining the adequacy of respondent's complaint, the allegations regarding petitioners' responsibility for the specific documents at issue should be read in light of respondent's allegations that JCM exercised general management control over the Funds. Because the typical outside service provider (such as a law firm or accountant) is not responsible for the "day-to-day management" (Pet. App. 59a, 65a) of the clients it advises, a claim that the outside provider "made" a statement issued in the company's name might require more particularized factual allegations regarding the provider's role in the statement's drafting and dissemination. In this case, however, respondent's complaint adequately alleged that JCM controlled the drafting and dissemination of the misleading prospectuses as one aspect of its general control over the Funds' affairs.

b. The court of appeals described respondent's complaint as alleging that petitioners "*helped* draft the misleading prospectuses" and "*participat[ed]* in the writing and dissemination of" those documents. Pet. App. 17a, 18a (emphases added). Petitioners contend (Pet. 11-13) that, by treating those allegations as sufficient, the

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primarily liable under Section 10(b), even though "she did not sign or physically file the" document), cert. denied, 552 U.S. 811 (2007); *In re Scholastic Corp. Sec. Litig.*, 252 F.3d 63, 75-76 (2d Cir.) (corporate official could be primarily liable for corporation's false statements, notwithstanding his contention that misrepresentations were not "attributable to him," because he "was involved in the drafting, producing, reviewing and/or disseminating of the false and misleading statements issued by" corporation), cert. denied, 534 U.S. 1071 (2001); cf. *SEC* v. *Wolfson*, 539 F.3d 1249, 1251, 1261 (10th Cir. 2008) (non-employee consultant who "played a significant role within the company" could be held liable under Section 10(b) for misstatements in SEC filings that he prepared, even though they "were issued in [the company's] name" and he "did not sign, certify, or physically file" them).

Fourth Circuit disregarded this Court's holding that "[t]he § 10(b) implied private right of action does not extend to aiders and abettors." *Stoneridge Inv. Partners, LLC.* v. *Scientific-Atlanta, Inc.*, 552 U.S. 148, 158 (2008); see *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 191 (1994). That argument is misconceived. To be sure, not *every* form of assistance to an unlawful securities fraud will constitute a primary violation. But the mere fact that a particular defendant requires the help of others to consummate a fraud does not preclude the imposition of primary liability. See *ibid.* (explaining that "[i]n any complex securities fraud * * * there are likely to be multiple [primary] violators").

Neither *Central Bank* nor *Stoneridge* addresses the question presented here—*i.e.*, whether primary liability in a private Section 10(b) suit may be imposed on a defendant who, through the exercise of day-to-day management control over another entity, causes false or misleading statements to be issued in that entity's name. The Court in *Central Bank* held that there is no implied private right of action against a party who merely aids and abets a violation of Section 10(b). See 511 U.S. at 191. The Court explained, however, that "[a]ny person or entity, including a lawyer, accountant, or bank, who * * * makes a material misstatement (or omission)" may be liable as a primary violator. *Ibid.* Although the primary violators identified by the Court include those who "make[]" a misstatement, the Court did not further explain what that term means.

In *Stoneridge*, the Court considered whether the element of reliance, which is required in private actions (though not in suits brought by the Commission), had been adequately pleaded. 552 U.S. at 159. Although the

Court reiterated that aiders and abettors are not subject to Section 10(b) liability in private suits, *id.* at 158, it did not define what it means to "make" a statement. In particular, because the defendants in *Stoneridege* "had no role in preparing or disseminating" the allegedly false financial statements, *id.* at 155, the Court had no occasion to decide what type or degree of participation in the drafting or dissemination of such statements would be necessary to support primary liability.

3. Respondent's complaint adequately alleges that members of the putative class relied to their detriment on the alleged false statements

Petitioners contend (Pet. 14-15) that, even if JCM "made" misleading statements in the prospectuses, JCM cannot be held liable because those statements were not "directly attributed" to it. Petitioners argue (Pet. 15-17) that direct attribution is necessary to establish the reliance element of a private Section 10(b) action. The court of appeals agreed with petitioners that, to be actionable under a fraud-on-the-market theory, a misrepresentation must be both "public" and "attributable to the defendant." Pet. App. 18a. The court concluded, however, that respondent had satisfied the attribution requirement because, "given the publicly disclosed responsibilities of JCM, interested investors would infer that JCM played a role in preparing or approving the content of the Janus fund prospectuses." *Id.* at 31a. Although the court erred in holding that attribution was required in the circumstances of this case, the court was correct in holding that any attribution requirement was satisfied.

a. Contrary to the court of appeals' conclusion, respondent's ability to proceed under a fraud-on-the-

market theory does not depend on proof that the Janus Fund prospectuses were publicly attributed to JCM at the time they were issued. To establish the elements of a private Section 10(b) cause of action, a private plaintiff must show, *inter alia*, that it relied on the misstatement in question. Under the fraud-on-the-market theory, "reliance is presumed when the statements at issue become public," because it can then "be assumed that an investor who buys or sells stock at the market price relies upon the statement." *Stoneridge*, 552 U.S. at 159.

Neither this Court's articulations of the fraud-on-the-market theory nor the theory's underlying rationale supports a categorical requirement that the alleged false statement must have been attributed to the defendant when it was issued.[6] To be sure, circumstances may occasionally arise in which the likelihood that investors would rely on a particular public statement, and thus the reasonableness of applying the fraud-on-the-market presumption, will depend on the perceived identity of the speaker. In this case, however, the alleged false statements regarding the Janus Funds' policies against

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[6] The Court in *Central Bank* viewed private Section 10(b) suits based on an aiding-and-abetting theory as inconsistent with the requirement that private plaintiffs "must show reliance on the defendant's misstatement or omission." 511 U.S. at 180. A plaintiff may rely on a defendant's statements, however, without knowing that they were made by the defendant. Suppose, for example, that a seller of worthless stock disseminates a document that purports to be a favorable appraisal of the stock by an anonymous industry observer, but that in fact has been drafted by the seller himself. A purchaser of such stock could pursue a private Section 10(b) action against the seller by showing (*inter alia*) that the seller "made" (*i.e.*, drafted) the deceptive document, and that the plaintiff relied on the misrepresentations, even though the essence of the fraud was to prevent contemporaneous attribution to the defendant.

market timing appeared in the Funds' own prospectuses. There is no reason to suppose that the investing public's willingness to rely on those statements would have depended on whether the public attributed those statements to JCM or solely to the Funds' own employees.[7]

b. Even assuming, arguendo, that the reliance element of a private Section 10(b) action includes a "public attribution" component (Pet. App. 23a), the court of appeals correctly held that any such requirement was satisfied in this case. As noted above (see pp. 9-10, *supra*), a mutual fund's investment adviser typically exercises control over the fund that is at least equivalent to that exercised by internal management in other corporations. Because the investing public is aware of that relationship, investors would naturally infer that statements in a fund's prospectus bear the imprimatur of the fund's manager. Requiring such statements to be formally attributed to the investment adviser would allow advisers to avoid Section 10(b) liability simply by declining to state explicitly what the investing public already knows. Given the complaint's allegations that JCM performed the "day-to-day management" functions typically associated with investment advisers (Pet. App. 59a, 65a), the court of appeals correctly concluded that reasonable

[7] Contemporaneous attribution may also be relevant to proving that a particular entity "made" an alleged misstatement. Thus, even if an entity's role in drafting misleading documents is otherwise insufficient to support primary liability, the entity may properly be said to "make" the false statements if it authorizes the documents to be circulated under its own name. In this case, however, JCM's role in the drafting and dissemination of the Funds' prospectuses was sufficient to support primary liability even though the prospectuses were not expressly attributed to it.

investors would have attributed to JCM the prospectuses' statements about market timing.

c. Petitioners contend (Pet. 18-19) that the court of appeals' attribution analysis conflicts with this Court's decision in *Stoneridge*. Unlike petitioners, however, the defendants in *Stoneridge* had "no role in preparing or disseminating [the issuer's false] financial statements." 552 U.S. at 155. The Court explained that the defendants' "deceptive acts were not communicated to the public," and that the plaintiff could not "show reliance upon any of [the defendants'] actions except in an indirect chain that [the Court found] too remote for liability." *Id*. at 159. Here, in contrast, the court of appeals correctly held that, "given the publicly disclosed responsibilities of JCM, interested investors would infer that JCM played a role in preparing or approving the content of the Janus fund prospectuses." Pet. App. 31a. *Stoneridge* does not support petitioners' contention that a defendant that drafts and disseminates a false and misleading document, and whose responsibility for the document is reasonably ascertainable by the investing public, is nevertheless shielded from a private Section 10(b) suit if the document is not *expressly* attributed to it.

B. The Decision Below Does Not Conflict With Decisions Of Other Circuits

1. With respect to the first question presented—whether respondent's complaint adequately alleged that JCM had made misrepresentations in the Janus Funds' prospectuses—petitioners contend (Pet. 13-14) that the decision below conflicts with decisions from the Fifth, Sixth, and Eighth Circuits. Petitioners' reliance on those decisions is misplaced.

Each of the cases petitioners cite dealt with secondary actors that, unlike JCM, did not manage an issuer and had no role in preparing or disseminating the relevant misrepresentations. In the cited Fifth and Eighth Circuit cases, the defendants allegedly participated in transactions that caused issuers' financial statements to be misleading. See *Regents of the Univ. of Cal.* v. *Credit Suisse First Boston (USA), Inc.*, 482 F.3d 372, 377, 386 (5th Cir. 2007), cert. denied, 552 U.S. 1170 (2008); *In re Charter Commc'ns, Inc. Sec. Litig.*, 443 F.3d 987, 989-990 (8th Cir. 2006), aff'd in part *sub nom. Stoneridge Inv. Partners, LLC.* v. *Scientific-Atlanta, Inc.*, 552 U.S. 148 (2008). In neither of those cases, however, were the defendants alleged to have played a role in the drafting of the misstatements. In *Charter Communications*, the Eighth Circuit noted the plaintiffs' failure to allege that outside vendors had "played any role in preparing or disseminating the fraudulent financial statements." *Id.* at 990. Similarly, in *Fidel* v. *Farley*, 392 F.3d 220 (2004), the Sixth Circuit held that an auditor was not liable for misstatements that involved "unaudited" financial data when the auditor "did not assist in the preparation or presentation of this financial information, nor did it ever express an opinion about it." *Id.* at 235.

Here, by contrast, respondent "allege[s] that JCG and JCM, by participating in the writing and dissemination of the prospectuses, *made* the misleading statements contained in the documents." Pet. App. 18a. The court of appeals' treatment of respondent's allegations as sufficient does not conflict with any of the decisions on which petitioners rely.[8]

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[8] In *SEC* v. *Tambone*, 597 F.3d 436 (2010), the en banc First Circuit recently construed the phrase "make [a] statement" in Rule 10b-

2. With respect to the second question presented, petitioners contend (Pet. 15-17; Pet. Reply Br. 1) that three circuits—the Second, Tenth, and Eleventh—have held that "direct attribution" is a prerequisite to a finding of reliance in a private Section 10(b) action. Petitioners further argue (*id.* at 5) that the Fourth Circuit's rejection of such a requirement was "outcome-determinative in this case." In fact, however, none of the decisions on which petitioners rely requires attribution when the defendant is a corporate insider rather than a secondary actor (such as an auditor or a law firm).

The Second Circuit's views on attribution are most thoroughly expressed in a decision issued last month. See *Pacific Inv. Mgmt. Co. LLC* v. *Mayer Brown LLP*, No. 09-1619-cv, 2010 WL 1659230 (Apr. 27, 2010) (*PIMCO*). In *PIMCO*, the Second Circuit surveyed its prior cases, *id.* at *5-*10, and concluded "that a secondary actor can be held liable in a private damages action brought pursuant to Rule 10b-5(b) only for false statements attributed to the secondary-actor defendant at the time of dissemination." *Id.* at *1. The court applied its attribution requirement to a claim against an outside law firm that had allegedly participated in the creation

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5(b). The court rejected the Commission's argument that the defendants, who knowingly or recklessly used misleading prospectuses to offer and sell securities but who did not themselves create the misleading statements, could be primarily liable under Section 10(b). In rejecting that argument, the court found that, as used in Rule 10b-5(b), the word "make" should be given its "ordinary meaning," which includes to "create" or "cause." *Id.* at 442-443. The decision below is consistent with *Tambone* because respondent's complaint alleges not only that JCM disseminated misleading prospectuses, but also that it participated in the drafting of the prospectuses and wrote and represented (or at least approved of) the Janus Funds' purported policy against market timing. Pet. App. 17a-18a, 31a.

of false statements, and the court expressly limited its requirement to suits against "secondary actor[s]"—a term that it defined as "refer[ring] to lawyers * * *, accountants, or other parties who are not employed by the issuing firm whose securities are the subject of allegations of fraud." *Id.* at *1 n.1. The court noted that investors may "rely on the role corporate executives play in issuing public statements even in the absence of explicit attribution," and it cautioned that its holding did not extend to "claims against corporate insiders." *Id.* at *10 n.6. The Second Circuit's rationale for requiring that a statement be publicly attributed to typical secondary actors was that investors "are more likely to credit the accuracy of" an issuer's statements when those statements have been given the "imprimatur" of a "supposedly impartial assessment" by "a well-known national law or accounting firm." *Id.* at *9.

Contrary to petitioners' claim that this issue is "outcome-determinative" (Pet. Reply Br. 5), neither the facts underlying the Second Circuit's decisions nor its rationale for them indicates that its attribution requirement would apply to a mutual fund's investment adviser. As with corporate executives, investors "rely on the role" of a mutual fund's investment adviser. *PIMCO*, 2010 WL 1659230, at *10 n.6. Similarly, an investment adviser's involvement in an issuer's statements is far more like that of a corporate officer than that of "a well-known national law or accounting firm" giving its "supposedly impartial assessment." *Id.* at *9. There is consequently no reason to conclude that the Second Circuit would apply an attribution requirement to a claim against an investment adviser, especially when that court has not imposed such a requirement on claims against corporate officers. See *id.* at *7 (citing cases).

The other Second and Eleventh Circuit decisions cited by petitioners also involved traditional outside service providers like law firms and accounting firms. See *Lattanzio* v. *Deloitte & Touche LLP*, 476 F.3d 147, 153 (2d Cir. 2007) ("[T]o state a § 10(b) claim against an issuer's accountant, a plaintiff must allege a misstatement that is attributed to the accountant 'at the time of its dissemination.'"); *Ziemba* v. *Cascade Int'l, Inc.*, 256 F.3d 1194, 1205 (11th Cir. 2001) ("In order for a secondary actor, such as a law firm or accounting firm, to be primarily liable," the alleged misstatement "must have been publicly attributable to the defendant."); *Wright* v. *Ernst & Young LLP*, 152 F.3d 169, 174-175 (2d Cir. 1998) (requiring misrepresentation in the issuer's press release to be attributed to the defendant auditor), cert. denied, 525 U.S. 1104 (1999). And while petitioners contend (Pet. 17; Pet. Reply Br. 6) that the Tenth Circuit has also recognized an attribution requirement, the court in the cited case stated: "We have never adopted an attribution requirement in a private securities case." *SEC* v. *Wolfson*, 539 F.3d 1249, 1259 (10th Cir. 2008).[9]

In this case, the court of appeals agreed (incorrectly, in our view) with petitioners that contemporaneous "attribution" of the prospectuses to petitioners was essential to respondent's Section 10(b) claim. Pet. App. 18a. In holding that respondent had adequately alleged such

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[9] Similarly, neither of the Ninth Circuit cases in the minority of petitioners' purported split (Pet. 17-18) rejected an attribution requirement. See *Howard* v. *Everex Sys., Inc.*, 228 F.3d 1057, 1061-1063 (2000) (finding CEO could be primarily liable for misrepresentations in a filing that was attributed to him); *In re Software Toolworks Inc. Sec. Litig.*, 50 F.3d 615, 628-629 (1994) (reversing summary judgment for accounting firm without discussing attribution), cert. denied, 516 U.S. 907 (1995).

attribution, the court emphasized the unique relationship between a mutual fund and its investment adviser and the resulting expectation that "interested investors would infer that JCM played a role in preparing or approving the content of the Janus fund prospectuses." *Id.* at 31a. Because no other court of appeals has reached a different result with respect to investment advisers or similar corporate insiders, there is no circuit conflict that could be resolved by reviewing the decision below.[10]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[10] In a concurring opinion in *PIMCO*, Judge Parker suggested that this Court or the en banc Second Circuit might wish to "clarify" whether attribution is necessary. 2010 WL 1659230, at *14. It would be difficult to use *this* case to clarify how any attribution requirement would apply to the circumstances that the courts of appeals have generally addressed, because investment advisers are materially unlike outside service providers such as law firms and accounting firms.