No. 12-1118

In the Supreme Court of the United States

JOSEPH F. APUZZO, PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

ANNE K. SMALL
General Counsel
MICHAEL A. CONLEY
Deputy General Counsel
JACOB H. STILLMAN
Solicitor
JOHN W. AVERY
Deputy Solicitor
Securities And Exchange Commission
Washington, D.C. 20549

QUESTION PRESENTED

Whether, in order to satisfy the "substantial assistance" requirement for aiding-and-abetting liability under Section 20(e) of the Securities Exchange Act of 1934, 15 U.S.C. 78t(e) (2006), the Securities and Exchange Commission must allege and prove that the defendant's conduct was a "proximate cause" of the primary violation.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-25a) is reported at 689 F.3d 204. The opinion of the district court (Pet. App. 29a-59a) is reported at 758 F. Supp. 2d 136.

JURISDICTION

The judgment of the court of appeals was entered on August 8, 2012. A petition for rehearing was denied on November 13, 2012 (Pet. App. 26a). On January 18, 2013, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including March 13, 2013, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The Securities and Exchange Commission (SEC or Commission) brought this civil law enforcement action against petitioner. The SEC alleged that, as the chief financial officer (CFO) of Terex Corporation (Terex), petitioner had aided and abetted securities law violations that were committed by United Rentals, Inc. (URI) (a company with which Terex did business), and Michael J. Nolan (URI's CFO), by actively participating with URI and Nolan in a scheme to falsely improve URI's financial results. See Pet. App. 2a, 4a, 13a n.7. The district court dismissed the complaint for failure to state a claim. *Id.* at 29a-59a. The court of appeals reversed and remanded. *Id.* at 1a-25a.

1. The Securities Exchange Act of 1934 (Exchange Act), 15 U.S.C. 78a *et seq.*, provides that, "[w]henever it shall appear to the Commission that any person is engaged or is about to engage in acts or practices constituting a violation" of the Exchange Act or the SEC's "rules or regulations thereunder," the SEC may bring a civil action "to enjoin such acts or practices." 15 U.S.C. 78u(d)(1). Section 20(e) of the Exchange Act, 15 U.S.C. 78t(e) (2006), authorizes the Commission to bring civil enforcement actions against persons who aid and abet primary violations of the Exchange Act. At the time of the conduct at issue here, Section 20(e) provided that "any person that knowingly provides substantial assistance to another person in violation of a provision of 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." *Ibid.*[1]

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[1] In 2010, Congress amended Section 20(e) to provide that liability for aiding and abetting may be imposed on persons who act "know-

2. a. In 2007, the Commission brought this civil enforcement action against petitioner, alleging that he had aided and abetted securities fraud by participating in a fraudulent accounting scheme involving two companies, Terex and URI, between 2000 and 2002. At the time of the alleged misconduct, petitioner was CFO of Terex, a construction equipment manufacturer. URI is one of the largest equipment rental companies in the world; Nolan was its CFO. Pet. App. 4a.

The Commission's complaint alleged that in late December 2000, and again in late December 2001, URI and Nolan, with petitioner's assistance, had committed primary violations of the securities laws by carrying out two fraudulent "sale-leaseback" transactions designed to allow URI to recognize revenue prematurely and to inflate the profit generated from URI's sales. In each transaction, URI sold used equipment to General Electric Credit Corporation (GECC), a financing corporation, and leased the equipment back for a short period. In order to obtain GECC's participation in these transactions, URI arranged, through petitioner, for Terex to enter into an agreement with GECC, under which Terex would resell the equipment for GECC at the end of the lease periods. URI and Terex also agreed that Terex would provide a residual value guarantee to GECC. That guarantee provided that, after resale, GECC would receive no less than 96% of the purchase price that GECC had paid URI for the used equipment. Pet. App. 4a-11a.

Petitioner negotiated with Nolan to settle upon the terms under which Terex would take part in the scheme. In return for Terex's participation, URI agreed to peti-

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ingly or recklessly." Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 929*O*, 124 Stat. 1862.

tioner's conditions that URI indemnify Terex for any losses Terex incurred from the residual value guarantee, and that URI make substantial purchases of new equipment from Terex to improve Terex's year-end sales. Petitioner signed the agreements between Terex and URI that memorialized these terms. Pet. App. 4a-8a.

Petitioner was aware that, if URI's indemnification payments were disclosed, URI's auditors would object to URI recognizing any revenue from the sale-leaseback transactions. Petitioner therefore executed various agreements that disguised URI's indemnification payments as undisclosed "premiums" on the prices of new equipment. SEC C.A. Br. 10. Once it was clear how much URI owed to Terex under the indemnification arrangement, petitioner and Nolan signed another agreement that disguised the indemnification payment as a "prepayment" on URI's purchase of additional equipment. Pet. App. 9a. Petitioner also knowingly approved inflated invoices from Terex that were designed to conceal URI's indemnification payments to Terex. *Id.* at 5a.

b. Petitioner moved to dismiss the complaint. Petitioner contended that the Commission had failed to allege, as required under Section 20(e), that petitioner had knowledge of the primary violations by URI and Nolan and that he had substantially assisted in those violations. Pet. App. 13a, 44a.

The district court held that the Commission had sufficiently alleged petitioner's knowledge but had failed to allege substantial assistance. Pet. App. 45a. In particular, the district court held that, although "the complaint contains factual allegations which taken as true support a conclusion that there was a 'but for' causal relationship

between [petitioner's] conduct and the primary violation," the allegations did not "support a conclusion that [petitioner's] conduct proximately caused the primary violation." *Id.* at 57a. The court observed that Nolan, not petitioner, had initiated negotiations concerning Terex's participation in the fraud; that Nolan, as URI's CFO, had been directly responsible for Nolan's and URI's misleading statements; and that petitioner had not personally created the form of the URI-Terex-GECC transactions. *Id.* at 57a-59a.

3. The court of appeals reversed and remanded. Pet. App. 1a-25a. The court agreed with the Commission that the substantial-assistance element of aiding and abetting does not require the Commission to demonstrate that the assistance proximately caused—*i.e.*, was the "direct cause" of—the primary violation. *Id.* at 15a, 17a. The court explained that, under petitioner's view of proximate causation, "many if not most aiders and abettors would escape all liability * * * since, almost by definition, the activities of an aider and abettor are rarely the direct cause of the injury brought about by the fraud, however much they may contribute to the success of the scheme." *Id.* at 17a. The court further explained that, although its previous decisions had occasionally described proximate cause as a required component of aiding and abetting, they had done so primarily in actions brought by private plaintiffs, in which the plaintiff must prove that his injury is proximately caused by the defendant's fraud. See *id.* at 15a ("'Proximate cause' is the language of private tort actions."). In an SEC enforcement action, the court stated, "there is no requirement that the government prove injury." *Ibid.*

In clarifying the standard for substantial assistance, the court "dr[e]w guidance" from criminal law and adopted Judge Learned Hand's characterization of the conduct necessary to constitute aiding and abetting. Pet. App. 14a. That standard, the court observed, had been applied in prior securities-fraud cases and is "likely the clearest definition possible." *Id.* at 14a-15a & n.9. Accordingly, the court held that "to satisfy the 'substantial assistance' component of aiding and abetting, the SEC must show that the defendant 'in some sort associate[d] himself with the venture, that he participate[d] in it as in something that he wishe[d] to bring about, [and] that he [sought] by his action to make it succeed.'" *Id.* at 3a (quoting *United States* v. *Peoni*, 100 F.2d 401, 402 (2d Cir. 1938) (brackets in original)).

Applying that test, the court held that the SEC's complaint had adequately alleged that petitioner had provided substantial assistance "in the achievement of the primary violation." Pet. App. 13a; see *id.* at 18a-25a. The court explained that the complaint alleged that petitioner "agreed to participate in the [sale-leaseback] transactions; negotiated the details of those transactions, through which he extracted certain agreements from URI in exchange for Terex's participation; approved and signed separate agreements with GECC and URI, which he knew were designed to hide URI's continuing risks and financial obligations relating to the sale-leaseback transactions * * * ; and approved or knew about the issuance of Terex's inflated invoices, which he also knew were designed to further the fraud." *Id.* at 18a-19a (footnote omitted). In addition, the court stated, "the Complaint here alleges, in detail, a very high degree of knowledge of the fraud on [petitioner's] part," which indicated that petitioner's actions were

intended to facilitate the fraud. *Id.* at 20a. The court therefore concluded that the complaint sufficiently alleged that petitioner had provided substantial assistance.

ARGUMENT

Petitioner argues (Pet. 13-35) that, in order to satisfy the substantial-assistance element of aiding and abetting under Section 20(e) of the Exchange Act, the Commission must allege and prove that the defendant proximately caused the primary securities-law violation. The court of appeals correctly rejected that argument. Although two other courts of appeals have stated, in passing, that proximate cause is an aspect of substantial assistance, that disagreement does not warrant this Court's review because those courts did not engage in any extended analysis of the issue and may reconsider their views in an appropriate case.

1. Petitioner does not contend that, as a matter of ordinary English usage, a person can render "substantial assistance" to a particular undertaking only if he is the proximate cause of that undertaking's ultimate success. Rather, petitioner's challenge to the court of appeals' decision is based primarily on his argument (Pet. 13-18) that, when Congress enacted Section 20(e), it ratified a well-established understanding that an aider and abettor must be the proximate cause of the primary violation. Petitioner did not raise that argument below, and the court of appeals accordingly did not consider it. See Pet. C.A. Br. 14-20; Pet. App. 12a-18a. This case would therefore be an unsuitable vehicle to consider the question. See *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005).

In any event, petitioner's argument lacks merit. Before Section 20(e) was enacted, courts very rarely treat-

ed proximate causation as a prerequisite to aiding-and-abetting liability, and only a few decisions even mentioned such a requirement. Those occasional references fall far short of the consistent and widespread practice that would be necessary to support the inference that Congress adopted a proximate-cause requirement in Section 20(e).

a. The three-part test for aiding-and-abetting liability that Congress later codified in Section 20(e) was first set forth by the Third Circuit in *Landy* v. *FDIC*, 486 F.2d 139 (1973), cert. denied, 416 U.S. 960 (1974), and thereafter uniformly adopted by other courts of appeals. See, *e.g.*, *Schatz* v. *Rosenberg*, 943 F.2d 485, 495 (4th Cir. 1991), cert. denied, 503 U.S. 936 (1992); *Cleary* v. *Perfectune Inc.*, 700 F.2d 774, 777 (1st Cir. 1983), abrogated on other grounds by *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994); *IIT* v. *Cornfeld*, 619 F.2d 909, 922 (2d Cir. 1980), abrogated on other grounds by *Morrison* v. *National Australia Bank Ltd.*, 130 S. Ct. 2869 (2010). Under *Landy*'s test, which the court drew from the Restatement of Torts, liability for aiding and abetting required a showing of (1) the existence of a securities law violation by the primary party; (2) knowledge of this violation on the part of the aider and abettor; and (3) substantial assistance by the aider and abettor in the achievement of the primary violation. 486 F.2d at 162-163 (citing Restatement (First) of Torts § 876(b) (1939)).

The *Landy* court did not suggest that the substantial-assistance prong of that three-part test required the defendant to have proximately caused the primary violation. 486 F.2d at 163-164. Rather, in elaborating on the meaning of "substantial assistance," the Third Circuit drew on two sources: the Restatement of Torts and the

criminal-law doctrine of aiding and abetting. *Ibid.* Neither requires proximate cause.

The court in *Landy* first explained that, although "[t]he Restatement does not define with specificity the concept of 'substantial assistance,'" Section 436 of the Restatement stated that "[i]f the encouragement or assistance is a substantial factor in causing the resulting tort, the one giving it is himself a tortfeasor and is responsible for the consequences of the other's act." 486 F.2d at 163 (citing Restatement (First) of Torts § 436 (1939)). Contrary to petitioner's contention (Pet. 15-16), *Landy*'s endorsement of the Restatement's "substantial factor" formulation does not indicate that the Third Circuit implicitly adopted a proximate-cause requirement. The Restatement did not equate the "substantial factor" test with proximate cause, as petitioner argues (Pet. 16), but instead with causation in fact. See Restatement (Second) of Torts Appendix § 433 (1966), at 129 (reprinting Reporter's Note that appeared in the 1948 Supplement to the First Restatement, which stated that "the 'substantial factor' element deals with causation in fact"); W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 41, at 267 (5th ed. 1984) (explaining that "[t]he defendant's conduct is a cause of the event if it was a material element and a substantial factor in bringing it about," even if the conduct in question was not the sole but-for cause of the injury); *id.* § 42, at 278 ("[T]he 1948 revision of the Restatement limited [the substantial factor test] very definitely to cause in fact alone."). Thus, as the Third Circuit in *Landy* explained, the Restatement indicates that the "substantial assistance" prong of aiding and abetting requires that the defendant's assistance have been a cause of the tort, and that the assistance have been more than minor or

incidental. 486 F.2d at 163 (quoting Restatement's considerations relevant to determining whether assistance is "substantial," including the amount of assistance, the defendant's presence or absence at the time of the tort, his relation to the primary tortfeasor, and his state of mind). But neither the Restatement nor the opinion in *Landy* explicitly or implicitly required proximate cause.

The court in *Landy* also relied on criminal law to give content to the "substantial assistance" requirement, explaining that "[t]he concept of aiding and abetting applied in the criminal law context is also instructive." 486 F.2d 163. The court relied on the standard, first used by Judge Learned Hand, that the Second Circuit adopted in the decision below: "[i]n order to aid and abet another to commit a crime it is necessary that a defendant 'in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed.'" *Ibid.* (quoting *Nye & Nissen* v. *United States*, 336 U.S. 613, 619 (1949), which adopted Learned Hand's language). Applying that standard, the court concluded that the defendants had not substantially assisted the primary violation because the assistance was not given for the purpose of aiding the fraud. *Id.* at 164.

b. Before 1995, when Congress codified aiding-and-abetting liability in Section 20(e), courts routinely upheld the sufficiency of allegations or evidence of substantial assistance without suggesting that proximately causing the primary violation was a prerequisite to liability. See, *e.g.*, *Levine* v. *Diamanthuset, Inc.*, 950 F.2d 1478, 1484-1485 (9th Cir. 1991); *Fine* v. *American Solar King Corp.*, 919 F.2d 290, 300-301 (5th Cir. 1990) (finding material issue of fact as to substantial assistance

where defendant issued a misleading opinion, without mentioning proximate cause), cert. dismissed, 502 U.S. 976 (1991); *Roberts* v. *Peat, Marwick, Mitchell & Co.*, 857 F.2d 646, 652-653 (9th Cir. 1988) (finding allegations sufficient to allege substantial assistance, without mentioning proximate cause, where investors alleged that accounting firm aided partnership's fraud by knowingly approving misleading opinions), cert. denied, 493 U.S. 1002 (1989); *Woods* v. *Barnett Bank of Ft. Lauderdale*, 765 F.2d 1004, 1012-1013 (11th Cir. 1985) (rejecting argument that evidence of causation was insufficient, stating that "[s]ubstantiality is based upon all the circumstances surrounding the transaction in question" and that the defendant's assistance was "a causal factor in the perpetration of the fraud"); *Harmsen* v. *Smith*, 693 F.2d 932, 943 (9th Cir. 1982), cert. denied, 464 U.S. 822 (1983). Numerous other decisions held that particular allegations or evidence of substantial assistance was insufficient, without mentioning any proximate-cause requirement. See, *e.g.*, *Abbott* v. *Equity Grp., Inc.*, 2 F.3d 613, 623 (5th Cir. 1993), cert. denied, 510 U.S. 1177 (1994); *First Interstate Bank of Denver, N.A.* v. *Pring*, 969 F.2d 891, 899-900 (10th Cir. 1992), cert. granted in part, 508 U.S. 959 (1993), and rev'd on other grounds by *Central Bank of Denver, supra*; *Schatz*, 943 F.2d at 497; *Crawford* v. *Glenns, Inc.*, 876 F.2d 507, 510 n.1 (5th Cir. 1989).

Of the many decisions applying *Landy*'s test for aiding-and-abetting liability, only six decisions in the Second and Eighth Circuits mentioned proximate cause, and they used the concept in varying ways. Three decisions appear to have required that the substantial assistance have proximately caused the *private plaintiff's losses*; thus, they did not apply the rule that petitioner

seeks, *i.e.*, that the abetting conduct have proximately caused the primary violation. See *Edwards & Hanly* v. *Wells Fargo Secs. Clearance Corp.*, 602 F.2d 478, 484 (2d Cir. 1979) (examining whether abetting "activities [were] the proximate cause of [the plaintiff's] loss"), cert. denied, 444 U.S. 1045 (1980); *Armstrong* v. *McAlpin*, 699 F.2d 79, 92 (2d Cir. 1983) (conduct must be "proximate cause of the churning and the fund's resultant losses"); *Bloor* v. *Carro, Spanbock, Londin, Rodman & Fass*, 754 F.2d 57, 62 (2d Cir. 1985). These decisions may have been applying the general rule that, in a private securities-fraud action for damages, the plaintiff must demonstrate that its losses were proximately caused by the fraud. See *Dura Pharms., Inc.* v. *Broudo*, 544 U.S. 336, 346 (2005). One decision appears to have treated substantial assistance and proximate cause as separate elements. See *FDIC* v. *First Interstate Bank of Des Moines, N.A.*, 885 F.2d 423, 429-430 (8th Cir. 1989). Finally, only two decisions stated the proposition that petitioner contends was well-established, *i.e.*, that the abettor's assistance must have proximately caused the primary violation.[1] See *K&S P'ship* v. *Continental Bank, N.A.*, 952 F.2d 971, 979 (8th Cir. 1991), cert. denied, 505 U.S. 1205 (1992); *Metge* v. *Baehler*, 762 F.2d 621, 624 (8th Cir. 1985), cert. denied, 474 U.S. 1057, 1072 (1986).

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[1] Contrary to petitioner's argument (Pet. 16), the Seventh Circuit did not require proximate cause in *Robin* v. *Arthur Young & Co.*, 915 F.2d 1120 (1990), cert. denied, 499 U.S. 923 (1991). Rather, the court held that Arthur Young's behavior (which consisted of knowingly permitting its report to be used in a prospectus that was misleading in other respects) was insufficiently "manipulative" to support liability, even if the inclusion of the report had enabled the prospectus to be released to the public and therefore caused the "plaintiffs' loss." *Id.* at 1125.

c. In 1995, Congress enacted Section 20(e) in response to this Court's decision in *Central Bank of Denver*, 511 U.S. at 191, which had held that there is no aiding-and-abetting liability in private actions under Section 10(b) of the Exchange Act. Section 20(e) authorized the Commission to pursue a cause of action under the Exchange Act against aiders and abettors of fraudulent conduct. See *SEC* v. *Fehn*, 97 F.3d 1276, 1283-1284 (9th Cir.), cert. denied, 522 U.S. 813 (1996). In providing that an aider and abettor is anyone who "knowingly provides substantial assistance to another person in violation of a provision of this chapter," Congress codified the three-part test for aiding and abetting liability that had been uniformly adopted in the courts of appeals. *Id.* at 1288.

Petitioner contends (Pet. 14-18) that, although Section 20(e) does not expressly require proximate cause, Congress codified an understanding among the lower courts that the "substantial assistance" prong of the prior judicially-crafted three-part test required a showing of proximate cause. Contrary to petitioner's contention, however, no established (or even prevalent) understanding to that effect existed when Section 20(e) was enacted. Section 20(e) therefore cannot be understood to adopt such a requirement.

2. a. The court of appeals correctly held that Section 20(e)'s substantial-assistance element does not require a showing that the abettor's actions proximately caused the primary violation. Section 20(e) did not codify any such requirement, and as the court explained, the proximate-cause requirement that petitioner advocates would be inconsistent with the statutory framework. Pet. App. 15a-18a.

Under the proximate-cause standard that petitioner urges, a defendant's assistance is not "substantial" unless the defendant's actions are the "direct cause" of the fraud. Pet. C.A. Br. 19. In the court below, petitioner argued that the fraudulent actions of Nolan, one of the primary violators, were an intervening cause of the fraud that vitiated petitioner's liability. *Id.* at 19, 25, 26 (arguing that Nolan "actively misrepresented the details of the transactions to URI's auditors; these actions substantially caused the fraud, not anything done by [petitioner]"). The court of appeals correctly rejected that contention, observing that "almost by definition," an aider and abettor's actions are "rarely the direct cause" of the violation, as the primary violators will ordinarily take the final actions necessary to consummate the fraud. Pet. App. 17a. If petitioner's proposed proximate-cause requirement were imposed, "many if not most aiders and abettors would escape all liability." *Ibid.* That result would be inconsistent with Congress's intent to permit the Commission to bring enforcement actions against not only those who make fraudulent misrepresentations themselves—and thus commit primary violations—but also against those who knowingly provide substantial assistance to primary violators.

When prior Second Circuit decisions had mentioned a proximate-cause requirement, they had required that the abetting conduct proximately cause the plaintiff's *injuries*. See Pet. App. 15a-17a; pp. 11-12, *supra*. To carry that requirement forward to SEC enforcement actions would "ignore[] the difference between an SEC enforcement action and a private suit for damages." Pet. App. 15a. Although injury and loss causation are elements of private securities-fraud suits, *Dura Pharms.*, 544 U.S. at 345-346, they are not elements of

Commission enforcement actions because "the purpose of such actions is [to provide] deterrence," not to redress an injury suffered as a result of the defendant's fraud.[2] Pet. App. 15a; see, *e.g.*, *Gebhart* v. *SEC*, 595 F.3d 1034, 1040 n.8 (9th Cir.), cert. denied, 130 S. Ct. 3485 (2010); *SEC* v. *Pirate Investor LLC*, 580 F.3d 233, 239 n.10 (4th Cir. 2009) (per curiam), cert. denied, 130 S. Ct. 3506 (2010).

b. Having rejected petitioner's proposed proximate-cause requirement, the court of appeals adopted Judge Hand's description of the conduct necessary to constitute aiding and abetting. The court held that "to satisfy the 'substantial assistance' component of aiding and abetting, the SEC must show that the defendant 'in some sort associate[d] himself with the venture, that he participate[d] in it as in something that he wishe[d] to bring about, [and] that he [sought] by his action to make it succeed.'" Pet. App. 3a, 13a-14a (quoting *United States* v. *Peoni*, 100 F.2d 401, 402 (2d Cir. 1938) (brackets in original)); see *Nye & Nissen*, 336 U.S. at 619 (adopting Hand standard for criminal aiding and abetting). Petitioner contends (Pet. 23-34) that the court of appeals departed from the established understanding of "substantial assistance" and expanded the reach of aiding-and-abetting liability. Petitioner is incorrect.

By its terms, Section 20(e)'s "substantial assistance" element requires a qualitative inquiry into whether the defendant's assistance played a sufficient role in facilitating the fraud to warrant treating him as someone who

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[2] The court of appeals therefore explained that, although the Second Circuit had stated without analysis that proximate cause was required in a prior suit brought by the Commission, see *SEC* v. *DiBella*, 587 F.3d 553, 566 (2d Cir. 2009), that passing reference was incorrect. Pet. App. 16a-17a.

violated the securities laws. 15 U.S.C. 78t(e) (2006). The Second Circuit's standard appropriately requires that the defendant have actively participated in the scheme and sought to bring about its goals. A defendant who actively works to help perpetrate a fraud, knowing that he is doing so, provides substantial assistance and acts in a manner that justifies treating him as someone who violated the securities laws. Conversely, it is insufficient under the Second Circuit's test for the defendant to have been a mere bystander, absent a duty to act, or to have provided minimal assistance. See Pet. App. 20a-24a (explaining that petitioner did not merely take routine, ministerial actions without intending to facilitate the fraud, and that "[i]f the allegations were merely that [petitioner] failed to report the fraud, that would present an entirely different case"); see also, *e.g.*, *Zoelsch* v. *Arthur Andersen & Co.*, 824 F.2d 27, 35-36 (D.C. Cir. 1987) (applying Judge Hand's standard in concluding that "passive failure to disclose," absent a duty to act, was not substantial assistance and could not support aiding-and-abetting liability for securities fraud), abrogated on other grounds by *Morrison*, *supra*.

As this Court has recognized, Judge Hand's test has the same basic thrust as the Restatement's "substantial factor in causing the tort" test for aiding and abetting, under which a court determines whether the assistance was substantial based on considerations such as the amount of assistance, the defendant's relation to the primary tortfeasor, and his state of mind.[3] See *Central*

[3] Petitioner takes issue (Pet. 12) with the court of appeals' statement that, "when evaluating whether [petitioner] rendered substantial assistance, we must consider his high degree of actual knowledge of the primary violation." Pet. App. 19a. The court's analysis was consistent, however, both with the Restatement's consideration of

Bank, 511 U.S. at 181 ("The Restatement of Torts [§ 876(b)], under a concert of action principle, accepts a doctrine with rough similarity to criminal aiding and abetting."). Indeed, the Third Circuit in *Landy* drew on both the Restatement's and Judge Hand's standards in elaborating on the meaning of "substantial assistance." 486 F.3d at 162-164. Similarly, other courts of appeals have used Judge Hand's standard to evaluate substantial assistance in securities fraud aiding-and-abetting cases. See *Zoelsch*, 824 F.2d at 35-36 (D.C. Cir.); *SEC* v. *Coffey*, 493 F.2d 1304, 1316 (6th Cir. 1974) ("Aiding and abetting has been defined by courts considering securities law cases with reference to both the Restatement of Torts, § 876 (1939), and the criminal law, 18 U.S.C. § 2 (1969)."), cert. denied, 420 U.S. 908 (1975). And the Second Circuit itself has previously used Judge Hand's standard to elaborate on the substantial-assistance requirement. See *Cornfeld*, 619 F.2d at 925, 927 (Friendly, J.) (while certain defendants provided substantial assistance because they, "in Judge Hand's language, associate[d] themselves with the venture, participated in it as something they wished to bring about, and sought by their action to make it succeed," other defendants' mere inaction was insufficient under Judge Hand's standard).

Petitioner is therefore wrong in arguing (Pet. 24-29) that, in adopting Judge Hand's standard, the Second Circuit expanded liability for aiding and abetting securi-

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state of mind in the context of evaluating the defendant's assistance, and with prevailing practice among the courts of appeals. See, *e.g.*, *Stokes* v. *Lokken*, 644 F.2d 779, 784 (8th Cir. 1981) ("where there is a minimal showing of substantial assistance, a greater showing of scienter is required"); *Cornfeld*, 619 F.2d at 922 ("there may be a nexus between the degree of scienter and the requirement that the alleged aider and abettor render 'substantial assistance'").

ties fraud. The courts have sometimes described the substantial-assistance analysis in terms of the Restatement, and sometimes in terms of Judge Hand's standard, but they have consistently conducted fact-specific inquiries into whether the defendant's assistance meaningfully facilitated the fraud. Cf. *Central Bank*, 511 U.S. at 181. The Second Circuit's use of Judge Hand's formulation to describe the substantial-assistance inquiry therefore does not depart from the approach long used by the lower courts.

Finally, petitioner contends (Pet. 23-24) that the court of appeals erred in adopting Judge Hand's standard because the text of the criminal aiding-and-abetting statute, 18 U.S.C. 2, differs from the text of Section 20(e). The criminal aiding-and-abetting statute provides that whoever "aids, [or] abets" a criminal offense is punishable as a principal, without defining the conduct that constitutes aiding and abetting. See 18 U.S.C. 2(a). This Court subsequently adopted Judge Hand's standard to determine when conduct constitutes criminal aiding and abetting. *Nye & Nissen*, 336 U.S. at 619.

When Congress enacted Section 20(e) in response to *Central Bank*, it chose not to simply create a Commission cause of action for "aiding and abetting," but instead to define aiding and abetting using the three-part test—requiring a primary violation, knowledge, and substantial assistance—that the courts of appeals had developed in securities-fraud cases. That language indicates that Congress intended to adopt the pre-*Central Bank* standard for aiding and abetting securities fraud. See *Fehn*, 97 F.3d at 1288. It does not suggest that Congress intended Section 20(e) to state a higher standard than criminal aiding and abetting, or that Congress viewed Section 20(e) as incompatible with Judge Hand's

standard. Such an inference would be especially unwarranted in light of *Central Bank*'s then-recent observation that the civil aiding-and-abetting doctrine that had been applied in statutory securities cases was roughly similar to criminal aiding and abetting.[4] 511 U.S. at 181; see *Landy*, 486 F.2d at 162-164.

c. The court of appeals correctly held that the allegations in the SEC's complaint were sufficient to state a claim of substantial assistance under Section 20(e). The Commission's complaint alleged that petitioner was responsible for Terex's participation in the fraudulent scheme, which in turn enabled Nolan and URI to undertake the fraudulent sale-leaseback transactions. Petitioner decided that Terex should participate in order to obtain the advantageous opportunity to sell equipment to URI, and petitioner negotiated terms favorable to Terex. Petitioner approved and signed agreements with URI that he knew were designed to conceal the true nature of URI's sale-leaseback transactions, and he approved inflated equipment invoices. SEC C.A. Br. 24-26; Pet. App. 18a-19a. With respect to a second, similar transaction, petitioner "took on more of a supervisory

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[4] Petitioner suggests (Pet. 28) that Congress has "adopted the expansive criminal standard for civil aiding-and-abetting liability" in some statutes, including Section 209(d) of the Investment Advisers Act of 1940, 15 U.S.C. 80b-9(d), which, like the criminal statute, simply prohibits "aiding" and "abetting." But courts have not discerned any material difference between Section 209(d)'s unadorned language and the definition of aiding and abetting set forth in Section 20(e). Rather, courts in Section 209(d) cases have applied the same three-part test used by the courts in securities-fraud cases under the Exchange Act and now codified in Section 20(e), including the requirement that the assistance be substantial. See, *e.g.*, *Monetta Fin. Servs., Inc.* v. *SEC*, 390 F.3d 952, 956 (7th Cir. 2004); *SEC* v. *Steadman*, 967 F.2d 636, 647 (D.C. Cir. 1992).

role," in which he "retained ultimate control over the transaction, negotiated its key terms with Nolan and URI, [and] approved the agreements," all with knowledge of the fraud. Pet. App. 18a n.12. In sum, rather than acting as a bystander or providing minimal assistance, petitioner is alleged to have played a significant, active role in the fraudulent transactions for the purpose of assisting Nolan and URI in consummating the fraud. The complaint thus sufficiently alleges that petitioner "associated himself with the venture, participated in it as something that he wished to bring about, and sought by his action to make it succeed"—in other words, that he provided substantial assistance that facilitated the fraud. *Id.* at 18a.

3. Although courts have occasionally referred to a proximate-cause requirement in discussing substantial assistance, there is no conflict among the courts of appeals that warrants this Court's review.

As discussed above, see pp. 11-12, *supra*, the Eighth Circuit suggested, more than 20 years ago and before Section 20(e) was enacted, that an aider and abettor of securities fraud must have proximately caused the violation. See *K&S P'ship*, 952 F.2d at 979; *Metge*, 762 F.2d at 624. Those decisions concerned suits by private parties, and the court's analysis therefore may have been influenced by the rule that private securities-fraud plaintiffs must allege injury caused by the defendant's conduct. See p. 12, *supra*. Section 20(e), by contrast, was drafted specifically for suits brought by the Commission, which is not required to allege or prove injury to itself or to any private party in order to establish a violation. In any event, those Eighth Circuit decisions did not contain extensive analysis, and they did not take into account all of the considerations on which the Se-

cond Circuit relied. And, particularly because those prior decisions predated the enactment of Section 20(e), the Eighth Circuit may reconsider its earlier approach in light of the decision below if and when the Eighth Circuit is called upon to construe Section 20(e) itself.

In *SEC* v. *Tambone*, 550 F.3d 106, 145 (2008), reinstated in relevant part on reh'g, 597 F.3d 436 (2010), the First Circuit stated in passing that the defendants had rendered substantial assistance because "[b]y distributing the prospectuses written by [the primary violator], the [aiders and abettors] communicated the false statements to the investing public, thereby *causing* Columbia Advisors' primary violation of Rule 10b-5." *Ibid.* (emphasis added). The court cited *Metge* as support for that proposition, noting in a parenthetical that *Metge* had required proximate cause. *Ibid.* The court did not otherwise mention or discuss proximate cause.

The court's opinion in *Tambone* is best read as holding that proof of proximate cause is ordinarily *sufficient* to establish substantial assistance under Section 20(e), not that it is necessary. In any event, *Tambone* (like *Metge*) contained little analysis of the question, and the court did not explicitly hold that proximate cause is required. If the question is squarely presented in a future First Circuit case, the court therefore will be free to determine, after consideration of all the relevant arguments, whether proximate cause is an essential element for aiding and abetting a securities-fraud violation.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

ANNE K. SMALL
General Counsel
MICHAEL A. CONLEY
Deputy General Counsel
JACOB H. STILLMAN
Solicitor
JOHN W. AVERY
Deputy Solicitor
Securities And Exchange Commission

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