No. 17-1077

In the Supreme Court of the United States

FRANCIS V. LORENZO, PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION

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

BRIEF FOR THE RESPONDENT

ROBERT B. STEBBINS
General Counsel
MICHAEL A. CONLEY
Solicitor
DOMINICK V. FREDA
Assistant General Counsel
MARTIN V. TOTARO
Senior Counsel
Securities and Exchange Commission
Washington, D.C. 20549

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
MALCOLM L. STEWART
Deputy Solicitor General
CHRISTOPHER G. MICHEL
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether, in an enforcement proceeding brought by the Securities and Exchange Commission, a person who knowingly disseminates false or misleading statements in connection with a securities transaction can be found to have violated Section 17(a)(1) of the Securities Act of 1933, 15 U.S.C. 77q(a)(1) (2006); Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b) (2006); and Rule 10b-5(a) and (c), 17 C.F.R. 240.10b-5(a) and (c), even if the person does not "make" false or misleading statements within the meaning of Rule 10b-5(b), 17 C.F.R. 240.10b-5(b).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-50) is reported at 872 F.3d 578. The opinion and order of the Securities and Exchange Commission (Pet. App. 51-95, 96-97) are reported at 111 SEC Docket 1761 and are available at 2015 WL 1927763. The initial decision of the administrative law judge (Pet. App. 98-121) is reported at 107 SEC Docket 5934 and is available at 2013 WL 6858820.

JURISDICTION

The judgment of the court of appeals was entered on September 29, 2017. On December 19, 2017, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including January 26, 2018, and the petition was filed on that date. The petition was granted on June 18, 2018. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Pertinent statutory and regulatory provisions are reproduced in the appendix to this brief. App., *infra*, 1a-3a.

STATEMENT

1. In the wake of—and in response to—the 1929 stock market crash, Congress passed the Securities Act of 1933, ch. 38, Tit. I, 48 Stat. 74 (15 U.S.C. 77a *et seq.*), which was "the first experiment in federal regulation of the securities industry," *SEC* v. *Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 198 (1963). With the Securities Act, Congress sought to "provide full and fair disclosure of the character of securities sold in interstate and foreign commerce and through the mails, and to prevent frauds in the sale thereof. "48 Stat. 74. The Securities Act "embodies a flexible rather than a static principle, one that is capable of adaptation to meet the countless and variable schemes devised by those who seek the use of the money of others on the promise of profits." *SEC* v. *W. J. Howey Co.*, 328 U.S. 293, 299 (1946).

The following year, Congress passed the Securities Exchange Act of 1934, ch. 404, 48 Stat. 881 (15 U.S.C. 78a *et seq.*). The Exchange Act "provide[d] for the regulation of securities exchanges and of over-the-counter markets operating in interstate and foreign commerce and through the mails" and sought "to prevent inequitable and unfair practices on such exchanges and markets." *Ibid.* Those reforms helped to ensure "the maintenance of fair and honest markets in [securities] transactions," § 2, 48 Stat. 882, and to "achieve a high standard of business ethics in the securities industry," *SEC* v. *Zandford*, 535 U.S. 813, 819 (2002) (citation omitted).

Both the Securities Act and the Exchange Act contain antifraud provisions that are at issue in this case. Section 17(a) of the Securities Act makes it

> unlawful for any person in the offer or sale of any securities * * * by the use of any means or instruments of transportation or communication in interstate commerce or by use of the mails, directly or indirectly—
>
> (1) to employ any device, scheme, or artifice to defraud, or
>
> (2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or
>
> (3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

15 U.S.C. 77q(a) (2006).[1]

Section 10(b) of the Exchange Act makes it "unlawful for any person * * * [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 prescribe." 15 U.S.C. 78j(b). That provision "was designed as a

[1] Unless otherwise indicated, all citations to the United States Code refer to the 2006 version, which was the law in force at the time of petitioner's conduct. Subsequent amendments are immaterial to the issues in this case.

catch-all clause to prevent fraudulent practices." *Chiarella* v. *United States*, 445 U.S. 222, 226 (1980). In 1942, the Securities and Exchange Commission (SEC or Commission) adopted Rule 10b-5 to implement Section 10(b). See 7 Fed. Reg. 3804 (May 22, 1942).

Rule 10b-5 provides that:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce * * *
>
> (a) To employ any device, scheme, or artifice to defraud,
>
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,
>
> in connection with the purchase or sale of any security.

17 C.F.R. 240.10b-5.

2. Petitioner worked as the director of investment banking at Charles Vista, LLC, a registered broker-dealer that petitioner described as "'a small boiler room'" where representatives "engaged in high-pressure sales tactics" and "seemed to be 'stretching the truth.'" Pet. App. 53-54. During the relevant period, petitioner's only client was Waste2Energy Holdings, Inc. (W2E), a startup seeking to develop a "gasification" technology that could generate electricity from solid waste. *Id.* at 3. W2E's technology "never materialized,"

and the company "sought to escape financial ruin" by offering up to $15 million in convertible debentures—debt secured by the company's potential future earning power rather than by its existing assets. *Ibid.* Charles Vista served as the placement agent for W2E's debenture offering. *Id.* at 3-4.

Petitioner knew that W2E's technology "didn't really work," and that the company's financial condition "was horrible." Pet. App. 55. In June 2009, petitioner referred to W2E's intellectual property as a "dead asset." J.A. 197. On October 1, 2009, W2E submitted SEC filings stating that the company's gasification technology and related assets that it had previously valued at more than $10 million had "no value," and that its total assets amounted to $660,408. Pet. App. 4 (citation omitted). Petitioner "acknowledged that he read the amended" filing on October 1, although "'probably not as closely as [he] should have.'" *Id.* at 10 (citation omitted; brackets omitted). In an email that petitioner received on October 5, W2E's chief financial officer explained that W2E had written off "all of [its] intangible assets" due to its "assessment of the value of what those asset[s] are worth today." *Id.* at 4-5 (citation omitted; brackets in original). Petitioner acknowledged that, by October 2009, he viewed offering W2E's debentures as a "toxic convertible debt spiral." *Id.* at 9 (citation omitted).

Despite knowing about W2E's dire financial condition and prospects, petitioner continued to seek investors for W2E's debenture offering, from which petitioner stood to gain 7%-9% of any funds he raised. Pet. App. 9, 56. On October 14, 2009—two weeks after W2E's filing writing off almost all of its assets—petitioner sent two emails to prospective investors, with the subject line "W2E Debenture Deal Points." *Id.* at

59. The emails stated that "the Investment Banking division of Charles Vista ha[d] summarized several key points of" the W2E debenture offering, including "3 layers of protection: (I) [W2E] has over $10 mm in confirmed assets[;] (II) [W2E] has purchase orders and" letters of intent "for over $43 mm in orders[;] (III) Charles Vista has agreed to raise additional monies to repay these Debenture holders (if necessary)." *Id.* at 107 (emphasis omitted). One email stated that petitioner had sent it "[a]t the request of Gregg Lorenzo," the owner of Charles Vista (who is not related to petitioner). *Id.* at 5 (brackets in original); see *id.* at 3. The other email stated that it had been sent "[a]t the request of" a Charles Vista broker and Gregg Lorenzo. *Ibid.* (brackets in original). Petitioner signed both messages with his name and title as "Vice President—Investment Banking," and the emails stated that potential investors should contact him if they had any questions. *Ibid.*; see *id.* at 107-108 (reproducing full text of email).

Petitioner later offered inconsistent accounts of the creation of the emails. At one point, he stated that he did not "recall" discussing "either of the e-mails or the subject matter of the e-mails at all with Gregg Lorenzo." J.A. 249. At another point, he claimed that "Gregg Lorenzo asked [him] to send" the emails to potential investors. J.A. 350. Petitioner also said that he thought he had "authored" the emails that were then "approved by" Gregg Lorenzo and a compliance officer, while at the same time asserting that all three men had "authored" the emails. J.A. 247; see J.A. 302.

Petitioner testified that, before he sent his emails, he was aware "that the $10 million asset had been written off." J.A. 240. Petitioner also conceded that, by September 2009—before he sent the emails—he did not believe that W2E had $43 million in purchase orders and letters of intent, instead testifying that "I didn't think anything was going to come through." J.A. 262. Petitioner further acknowledged that it was misleading to state that Charles Vista had agreed to financially back the debenture holders. J.A. 268-269, 275.

3. a. On February 15, 2013, the Commission instituted administrative and cease-and-desist proceedings against petitioner, Gregg Lorenzo, and Charles Vista. Pet. App. 5. The Commission charged each with violating multiple antifraud provisions: Section 17(a)(1) of the Securities Act, 15 U.S.C. 77q(a)(1); Section 10(b) of the Securities Exchange Act, 15 U.S.C. 78j(b); and Securities Exchange Act Rule 10b-5, 17 C.F.R. 240.10b-5. Pet. App. 5. Gregg Lorenzo and Charles Vista settled the charges against them. *Id.* at 5-6.

Petitioner contested the charges before an SEC administrative law judge (ALJ). After a hearing, the ALJ found that petitioner "knew the truth about W2E's parlous financial condition" when he sent the two emails, which contained representations "staggering" in their "falsity." Pet. App. 108, 113. In describing the scienter element of the relevant antifraud provisions, the ALJ stated that "[r]ecklessness can satisfy the scienter requirement." *Id.* at 111. The ALJ credited petitioner's testimony that petitioner had "sent the emails without even thinking" about the contents. *Id.* at 109. The ALJ concluded, however, that petitioner "was reckless—although he knew that W2E was in terrible financial shape, he sent the emails without thinking." *Id.* at 113. The ALJ explained that, if petitioner had "taken a minute to read the text," he "would have realized that it was false and misleading and that W2E was not worth anything near what was being represented to potential investors." *Ibid.* The ALJ found that petitioner had "willfully" violated each of the charged provisions "by his material misrepresentations and omissions concerning W2E in the emails." *Id.* at 114.

b. Petitioner sought review before the Commission. The SEC determined that petitioner had violated Rule 10b-5(b) by knowingly making materially false and misleading statements in the two emails that he had sent to prospective investors. Pet. App. 76; see *id.* at 73-76. The Commission also concluded that petitioner had independently violated Section 17(a)(1), Section 10(b), and Rule 10b-5(a) and (c) by knowingly sending "materially misleading language from his own email account to prospective investors." *Id.* at 77. The Commission explained that petitioner's "role in producing and sending the emails constituted employing a deceptive 'device,' 'act,' or 'artifice to defraud' for purposes of liability under" those provisions, "[i]ndependently of whether" petitioner's "involvement in the emails amounted to 'making' the misstatements for purposes of Rule 10b-5(b)." *Ibid.*

In the course of its analysis, the SEC addressed "the question of scienter—namely, whether [petitioner] knew or must have known that his emails were materially misleading." Pet. App. 68. The Commission concluded that this "standard is met here." *Ibid.* The Commission rejected, as "implausible," petitioner's assertion that he had sent the emails without giving them significant thought, instead finding that petitioner "was well aware that the emails falsely represented crucial facts about W2E and its debenture offering." *Id.* at 73. The Commission further stated that, "if [petitioner] did send the emails without 'think[ing] about it one way or the other,' as he claims, such a dismissive attitude toward investors' interests would * * * still constitute acting with extreme recklessness." *Ibid.* (second set of brackets in original).

As sanctions, the Commission imposed a cease-and-desist order, a $15,000 civil penalty, and a lifetime bar from the securities industry. Pet. App. 79.

4. Petitioner filed a petition for review in the court of appeals, challenging the Commission's liability determination and its imposition of an industry-wide bar and a $15,000 civil penalty. Pet. App. 7. The court granted the petition in part, vacated the challenged sanctions, and remanded for further proceedings. *Id.* at 36-37.

The court of appeals first held that substantial evidence supported the Commission's determination that the statements in the emails were false or misleading and that petitioner had acted with the requisite scienter. Pet. App. 7-14, 27-31. With respect to scienter, the court observed that, "[u]nlike in his arguments before the ALJ and Commission, [petitioner], in [the court of appeals], d[id] not take the position that he simply passed along statements supplied by Gregg Lorenzo without thinking about them." *Id.* at 28; see *id.* at 22. Rather, the court explained, petitioner had argued in the court that he had lacked scienter because he had believed the emails to be true—an argument that presumed that petitioner was familiar with the emails' content at the time he sent them. *Id.* at 28-30.

The court of appeals next held that petitioner had not violated Rule 10b-5(b) because he did not "make" the misleading statements in the emails. Pet. App. 15. Rather, the court concluded, the "maker" of those statements was petitioner's boss, Gregg Lorenzo. *Id.* at 16. The court of appeals relied on this Court's holding in

Janus Capital Group, Inc. v. *First Derivative Traders*, 564 U.S. 135, 142 (2011), that a person "make[s]" a statement under Rule 10b-5(b) only if he has "ultimate authority over the statement, including its content and whether and how to communicate it." Pet. App. 15. The court concluded that Gregg Lorenzo had "ultimate authority" over the statements in the emails, and that he was therefore "the maker" of the statements for purposes of Rule 10b-5(b). *Id*. at 19 (citation omitted).

The court of appeals further held, however, that petitioner had violated Section 17(a)(1), Section 10(b), and Rule 10b-5(a) and (c). Pet. App. 20-22. The court explained that those provisions, unlike Rule 10b-5(b), do not require that a violator "make" a false statement. *Id.* at 20 (citation omitted). Rather, those provisions prohibit the use of a fraudulent "device," "practice," or "scheme." *Id.* at 20-21 (citations omitted).

The court of appeals held that petitioner's conduct—which included "produc[ing] email messages containing three false statements about a pending offering, sen[ding] the messages directly to potential investors, and encourag[ing] them to contact him personally with any questions"—"fits comfortably within the ordinary understanding of" those prohibitions. Pet. App. 21. The court noted that petitioner had "present[ed] no argument that his actions fail to satisfy the statutory and regulatory language" of Section 17(a)(1), Section 10(b), and Rule 10b-5(a) and (c). *Id.* at 22. The court concluded that, although "[petitioner] was not the 'maker' of the false statements because he lacked ultimate authority over them," he had "'engaged' in a fraudulent 'act' and 'employed' a fraudulent 'device' when, with knowledge of the statements' falsity and an intent to deceive, he sent the statements to potential investors carrying his stamp of approval as investment banking director." *Id.* at 34.

The court of appeals declined "to reach the merits" of petitioner's challenge to the sanctions. Pet. App. 35. Because the court had "no assurance that the Commission would have imposed the same level of penalties in the absence of its finding of liability for making false statements under Rule 10b-5(b)," it vacated the sanctions that the Commission had previously imposed, and it remanded to the agency for further proceedings. *Ibid.*

Judge Kavanaugh dissented. Pet. App. 37-40. He would have vacated the Commission's finding that petitioner had violated Section 17(a)(1), Section 10(b), and Rule 10b-5(a) and (c). *Id.* at 49-50. In his view, liability under those provisions "must be based on conduct that goes beyond a defendant's role in preparing mere misstatements or omissions made by others." *Id.* at 46.

SUMMARY OF ARGUMENT

By knowingly sending emails to investors containing false financial information designed to induce the purchase of securities in his client's company, petitioner engaged in a paradigmatic "device, scheme, or artifice to defraud" and an "act, practice, or course of business which operates as a fraud." 15 U.S.C. 77q(a)(1); 17 C.F.R. 240.10b-5(a) and (c). Under a straightforward interpretation of the statutory and regulatory text, petitioner is liable under Section 17(a)(1) and Rule 10b-5(a) and (c). This Court's longstanding construction of federal fraud laws further underscores that petitioner's conduct falls squarely within the charged provisions.

Petitioner makes no sustained effort to dispute that knowingly sending email messages containing false statements about an issuer's financial health and prospects directly to potential investors is the type of deceptive conduct encompassed by the plain text of Section 17(a)(1) and Rule 10b-5(a) and (c). Instead, he attempts to relitigate the facts regarding his knowledge of the emails' contents. Petitioner's argument in the court of appeals assumed that he had sent the emails with knowledge of their contents. In any event, petitioner offers no basis for disturbing the Commission's factual finding that petitioner sent the emails with the requisite scienter. And petitioner's effort to confine Section 17(a)(1) and Rule 10b-5(a) and (c) to only the particular forms of fraud involved in certain prior decisions has no foundation in the text of the relevant provisions or the prior decisions themselves.

Petitioner's principal contention is that he cannot be liable for disseminating deceptive information to investors under Section 17(a)(1) and Rule 10b-5(a) and (c) because he is not liable for "mak[ing]" misstatements under Rule 10b-5(b). Petitioner's argument relies heavily on this Court's decision in *Janus Capital Group, Inc.* v. *First Derivative Traders*, 564 U.S. 135 (2011), which held that the "maker of a statement" under Rule 10b-5(b) "is the person or entity with ultimate authority over the statement." *Id.* at 142. But in interpreting the term "make" in Rule 10b-5(b), *Janus* did not purport to alter the scope of Section 17(a)(1), Rule 10b-5(a), or Rule 10b-5(c), which do not include that term. Nor is there any logical inconsistency in concluding that the sender of a material misstatement is liable for securities fraud under Section 17(a)(1) and Rule 10b-5(a) and (c) even if he is not the maker of that misstatement for purposes of Rule 10b-5(b). To the contrary, the common law, the Commission, lower courts, and this Court have long upheld the imposition of liability for fraudulent conduct that involves misstatements even in the absence of liability for making those misstatements.

Petitioner's contention that imposing liability under Section 17(a)(1) and Rule 10b-5(a) and (c) will eliminate the distinction between primary liability and secondary liability articulated by this Court in *Central Bank of Denver, N. A.* v. *First Interstate Bank of Denver, N. A.*, 511 U.S. 164 (1994), and *Stoneridge Investment Partners, LLC* v. *Scientific-Atlanta, Inc.*, 552 U.S. 148 (2008), is misguided for similar reasons. *Central Bank* and *Stoneridge* held that private civil liability under Section 10(b) does not extend to those who aid and abet a primary violator without engaging in any manipulative or deceptive conduct of their own. That principle is not implicated here, because petitioner himself committed deceptive conduct by personally disseminating misstatements directly to potential investors. Treating petitioner as a primary violator enforces the plain meaning of the relevant provisions while preserving the distinction between primary and secondary liability.

No other principle of interpretation supports a departure from the statutory and regulatory text. Petitioner briefly invokes the canon against redundancy, but this Court has repeatedly explained that Congress and the Commission wrote the securities laws to be mutually reinforcing, not mutually exclusive. It is accordingly well accepted that the respective provisions of Section 17(a) and Rule 10b-5 contain some permissible overlap. In any event, the court of appeals concluded that petitioner did *not* violate Rule 10b-5(b) in this case.

Concluding that his conduct instead violated Section 17(a)(1) and Rule 10b-5(a) and (c) would not create any redundancy with Rule 10b-5(b).

Petitioner predicts an onslaught of meritless private suits against defendants who would otherwise be secondary actors insulated from private suits. But Congress has created ample safeguards against meritless private suits in the Private Securities Litigation Reform Act of 1995 (PSLRA), Pub. L. No. 104-67, 109 Stat. 737. Among other requirements, private plaintiffs must satisfy heightened pleading requirements and show reliance on the defendants' misconduct, as well as demonstrating economic loss and loss causation. Interpreting Section 17(a) and Rule 10b-5(a) and (c) according to their plain meaning in this Commission enforcement action would not change any of those requirements.

By contrast, adopting petitioner's theory would significantly undermine enforcement of the securities laws by categorically precluding primary liability in any case involving a misstatement that the defendant himself did not "make." And if the "maker" of the false statement was not primarily liable—because he had acted without scienter, for example—a person who disseminated the statement with fraudulent intent would not be subject to aiding-and-abetting liability either. There is no basis in the text, structure, history, or purpose of the securities laws to create such a loophole. The Court should enforce the plain meaning of Section 17(a) and Rule 10b-5(a) and (c), and uphold the Commission's finding that petitioner is liable for fraud.

ARGUMENT

PETITIONER'S CONDUCT FALLS SQUARELY WITHIN THE CHARGED PROHIBITIONS ON SECURITIES FRAUD

A. Petitioner's Conduct Falls Within The Plain Meaning Of Section 17(a)(1) And Rule 10b-5(a) and (c)

1. "[S]tatutory text controls the definition of conduct covered by" the antifraud provisions of the federal securities laws. *Central Bank of Denver, N. A.* v. *First Interstate Bank of Denver, N. A.*, 511 U.S. 164, 175 (1994); see *Morrison* v. *National Austl. Bank Ltd.*, 561 U.S. 247, 261 n.5 (2010). Thus, "the starting point in every case involving" the scope of securities fraud "is the language" of the statute. *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 197 (1976) (brackets and citation omitted). When "the terms of a statute [are] unambiguous, judicial inquiry is complete." *Rubin* v. *United States*, 449 U.S. 424, 430 (1981). The "language of [the] statute controls." *Hochfelder*, 425 U.S. at 201.

Here, the controlling language comes from two statutes and one rule. Section 17(a)(1) of the Securities Act makes it unlawful "to employ any device, scheme, or artifice to defraud" in offering or selling a security. 15 U.S.C. 77q(a)(1). Section 10(b) of the Exchange Act makes it unlawful to "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 Commission may prescribe." 15 U.S.C. 78j(b).

Rule 10b-5, which implements Section 10(b), imposes three prohibitions "in connection with the purchase or sale of any security." 17 C.F.R. 240.10b-5. Rule 10b-5(a) prohibits "employ[ing] any device, scheme, or artifice to defraud." 17 C.F.R. 240.10b-5(a). Rule 10b-5(b) prohibits "mak[ing] any untrue statement of a material fact" or "omit[ting] to state a material fact." 17 C.F.R. 240.10b-5(b). And Rule 10b-5(c) prohibits "engag[ing] in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person." 17 C.F.R. 240.10b-5(c).

As the court of appeals correctly held (Pet. App. 20-21), petitioner's knowing dissemination of false information about his client's financial prospects directly to potential investors "fits comfortably within the ordinary understanding of" a "device, scheme, or artifice to defraud" prohibited by the identical language of Section 17(a)(1) and Rule 10b-5(a). 15 U.S.C. 77q(a)(1); 17 C.F.R. 240.10b-5(a). Indeed, petitioner's effort to induce investors to part with their money based on false financial premises is a paradigmatic example of "the type of fraudulent behavior which was meant to be forbidden by the statute and the rule." *SEC* v. *National Sec., Inc.*, 393 U.S. 453, 467 (1969); see, *e.g.*, *Superintendent of Ins. of N.Y.* v. *Bankers Life & Cas. Co.*, 404 U.S. 6, 8-9 (1971) (finding Rule 10b-5 violation where party to a securities transaction was "duped" by false information about corporate assets, which in fact "had been depleted").

Petitioner's dissemination of false information to induce investment also fits comfortably within the dictionary definition of "device, scheme, or artifice to defraud" in Section 17(a)(1) and Rule 10b-5(a). 15 U.S.C. 77q(a)(1); 17 C.F.R. 240.10b-5(a). For purposes of those provisions, a "device" is simply "[t]hat which is devised, or formed by design." *Aaron* v. *SEC*, 446 U.S. 680, 696 n.13 (1980) (quoting *Webster's New International Dictionary* 713 (reprint 1942) (2d ed. 1934) (*Webster's*) (brackets in original). A "scheme" is a "project" or "plan or program of something to be done." *Ibid.* (quoting *Webster's* 2234). And an "artifice" is "an artful stratagem or trick." *Ibid.* (quoting *Webster's* 157). Although those definitions may present difficult questions at the margins, petitioner's attempt to deceive investors into backing W2E by sending an email dramatically overstating the company's assets, pending orders, and ability to repay falls within the heartland of "device, scheme, or artifice to defraud."

The relevant history of those terms further demonstrates that petitioner's conduct is covered by Section 17(a)(1) and Rule 10b-5(a). The Senate Report accompanying the Exchange Act identified "the dissemination of false information" as an example of a "device[ ]" that is "subjected to regulation by the Commission," and it equated the "devices" prohibited by Section 10(b) with "manipulative or deceptive practices." S. Rep. No. 792, 73d Cong., 2d Sess. 8-9, 18 (1934). Moreover, even before Congress enacted the securities laws, this Court construed federal fraud statutes prohibiting any "scheme or artifice to defraud" to cover the inducement of financial payment through false "representations as to the past or present, or suggestions and promises as to the future." *Durland* v. *United States*, 161 U.S. 306, 313 (1896); see *Bettman* v. *United States*, 224 F. 819, 824-825 (6th Cir.), cert. denied, 239 U.S. 642 (1915); *Wilson* v. *United States*, 190 F. 427, 432 (2d Cir. 1911); see also *United States* v. *Maze*, 414 U.S. 395, 406 (1974) (noting that, before the enactment of the securities laws, "most criminal prosecutions for fraudulent securities transactions were brought under the" mail fraud statute) (citation omitted).

For the same reasons, petitioner's attempt to induce investment falls squarely within the ordinary meaning of Rule 10b-5(c), which prohibits "engag[ing] in any act, practice, or course of business which operates or would operate as a fraud." 17 C.F.R. 240.10b-5(c). Attempting to induce investment by sending a message falsely representing a company's financial condition plainly constitutes an "act" or "practice" that "operate[s] as a fraud" on the recipient. *Ibid.*; see, *e.g.*, *Bankers Life*, 404 U.S. at 9 (describing plan to secure investment based on false asset reports as "an 'act' or 'practice' within the meaning of Rule 10b-5").

2. In the court of appeals, petitioner "present[ed] no argument that his actions fail[ed] to satisfy the statutory and regulatory language." Pet. App. 22. Indeed, he did not "examine—or even reference—the text of those provisions in arguing that they should be deemed not to apply to his conduct." *Ibid.* Likewise, petitioner makes no meaningful effort in this Court to explain how the conduct in which he was found to have engaged—knowingly sending emails containing false statements about an issuer's financial health and prospects directly to potential investors—could be thought to fall outside the terms of Section 17(a)(1) and Rule 10b-5(a) and (c). Petitioner's amici similarly disregard the text of those provisions, going so far as to urge that "the different words of the subparts will not assist in resolving this case." Law Professors Amicus Br. 21; but see, *e.g.*, *United States* v. *Naftalin*, 441 U.S. 768, 773-774 (1979) (distinguishing subparts of Section 17(a)); *Affiliated Ute Citizens* v. *United States*, 406 U.S. 128, 152-153 (1972) (distinguishing subparts of Rule 10b-5).

In arguing that his conduct fell outside the coverage of Section 17(a)(1) and Rule 10b-5(a) and (c), petitioner instead challenges the factual premises on which the Commission and the court of appeals decided this case.

He contends (Pet. Br. 26-27) that he "didn't draft or read" the emails, and that his "ministerial" conduct in sending them "is not in itself deceptive." But those assertions squarely contradict petitioner's position in the court of appeals. There, he argued that "at the time the email was sent," he "*believed the statements to be true*," and therefore "did not act with scienter." Pet. App. 28 (brackets and citation omitted); see *id.* at 28-29 (explaining petitioner's argument that he had a "*good faith belief in the veracity of the statements*") (citation omitted). Petitioner could not have believed the statements to be true, as he argued to the court of appeals, if he did not read them, as he argues to this Court. See *id.* at 29 ("[A] person cannot have 'believed statements to be true' at the time he sent them, or possessed a 'good faith belief in their veracity,' if he had given no thought to their content.").

Given petitioner's position below that the substance of the email was accurate, the court of appeals decided the case "on the understanding that" petitioner, "having taken stock of the emails' content and having formed the requisite intent to deceive, conveyed materially false information to prospective investors about a pending securities offering backed by the weight of his office as director of investment banking." Pet. App. 22. This Court should decide the case on the same understanding. See *Wharf (Holdings) Ltd.* v. *United Int'l Holdings, Inc.*, 532 U.S. 588, 593-594 (2001).

Even if petitioner had preserved his current scienter argument below, this Court is not "a court for correction of errors in fact finding." *Exxon Co., U. S. A.* v. *Sofec, Inc.*, 517 U.S. 830, 841 (1996) (citation omitted). And to the extent the Court reviews factual issues, the Commission's findings "if supported by substantial evidence, are conclusive." 15 U.S.C. 78y(a)(4). Petitioner offers no basis for setting aside, under that substantial-evidence standard, the Commission's determination that he was aware of the emails' content at the time he sent them. See Pet. App. 53. And if that determination is treated as controlling, petitioner's intentional dissemination of financial information he knew was false in an attempt to induce investment plainly constitutes a "device, scheme, or artifice to defraud" and an "act, practice, or course of business which operates * * * as a fraud" under Section 17(a)(1) and Rule 10b-5(a) and (c). 15 U.S.C. 77q(a)(1); 17 C.F.R. 240.10b-5(a) and (c).

3. Aside from his factual challenge, petitioner contends that he "did not violate *either* Section 10(b) *or* Section 17(a)(1) because he did not 'use' or 'employ' a manipulative, deceptive or fraudulent device or scheme." Pet. Br. 48.

To the extent petitioner contends that he did not "use" or "employ" any prohibited form of fraud because he was "merely copying and pasting an email from his boss," that contention is foreclosed by his argument below that he believed the emails' content to be true. Pet. Br. 54; see *Wharf*, 532 U.S. at 594. Indeed, the court of appeals observed that, if petitioner not made such a factual concession, he "might attempt to argue that he cannot be considered to have 'employed' any fraudulent device or artifice, or 'engaged' in any fraudulent or deceitful act." Pet. App. 22. But the court declined to consider that argument—the argument petitioner repeats here—because petitioner "d[id] not challenge" the Commission's factual finding that he was aware of the emails' content. *Ibid.*

To the extent petitioner contends that he did not employ a "manipulative, deceptive or fraudulent device or scheme," his position lacks merit. Pet. Br. 48. As explained above, sending a message designed to induce investment based on false financial information is a quintessential deceptive device. Petitioner contends that this Court's decision in *Chiarella* v. *United States*, 445 U.S. 222 (1980), limits the definition of "deception" to "the making of a misrepresentation" or "an omission or nondisclosure coupled with a duty to speak." Pet. Br. 51. *Chiarella*, however, did not purport to describe the entire universe of prohibited conduct; this Court simply explained that "[w]hen an allegation of fraud is based upon nondisclosure, there can be no fraud absent a duty to speak." 445 U.S. at 235. Because petitioner was not found liable on a nondisclosure theory, his reliance on *Chiarella* is misplaced.

Petitioner's reliance on *Santa Fe Industries, Inc.* v. *Green*, 430 U.S. 462 (1977), is similarly misplaced. There, this Court rejected a theory of liability based on "a breach of fiduciary duty by majority stockholders, without any deception, misrepresentation, or nondisclosure." *Id.* at 476. That holding has no relevance here because petitioner's liability is not based on a fiduciary-breach theory. Likewise, the definition of "manipulation" articulated in *Santa Fe Industries* has no bearing on this case, because petitioner was not charged with "practices, such as wash sales, matched orders, or rigged prices, that are intended to mislead investors by artificially affecting market activity." *Ibid.*; see Pet. Br. 18 ("Here, there is no allegation that Petitioner engaged in manipulative trading practices.").

In short, the plain meaning of the statutory and regulatory provisions "resolves the case." *Central Bank*, 511 U.S. at 177. To the extent petitioner and his amici seek to confine liability to particular "categories" of conduct that are untethered to the relevant text, Pet. Br. 51; see Sec. Indus. & Fin. Markets Ass'n (SIFMA) & Chamber of Commerce Amici Br. 9-11, they seek to add a "gloss to the operative language of the statute quite different from its commonly accepted meaning," *Hochfelder*, 425 U.S. at 199. This Court has repeatedly rejected such efforts in previous cases involving the antifraud provisions. See *ibid.*; see also *Central Bank*, 511 U.S. at 173-174. The Court should similarly apply the text of the relevant provisions here.

B. Petitioner Is Liable For Fraudulent Conduct Under Section 17(a)(1) And Rule 10b-5(a) and (c) Even Though He Did Not "Make" Misstatements Under Rule 10b-5(b)

Petitioner's principal contention (Pet. Br. 26-34) is that he cannot be liable for disseminating deceptive information to investors under Section 17(a)(1) and Rule 10b-5(a) and (c) because he is not liable for "mak[ing]" misstatements under Rule 10b-5(b). That position is misguided. Nothing in the relevant antifraud provisions —or in this Court's precedents interpreting them— precludes the imposition of liability for fraudulent conduct *involving* misstatements under Section 17(a)(1) and Rule 10b-5(a) and (c), even if the defendant is not liable for *making* those misstatements under Rule 10b-5(b). To the contrary, the Commission, lower courts, and this Court have long upheld the imposition of liability under Section 17(a)(1) and Rule 10b-5(a) and (c) for fraudulent conduct that involves misstatements, even in the absence of liability for making misstatements under Rule 10b-5(b).

1. Petitioner relies heavily on this Court's decision in *Janus Capital Group, Inc.* v. *First Derivative Traders*,

564 U.S. 135 (2011), which interpreted Rule 10b-5(b). See *id.* at 141. As relevant here, Rule 10b-5(b) provides that it is unlawful to "make any untrue statement of a material fact" in connection with a securities transaction. 17 C.F.R. 240.10b-5(b). *Janus* involved a private action against an investment-fund adviser that allegedly *drafted* misstatements in prospectuses that were *issued* by a different mutual-fund entity. See 564 U.S. at 147-148. The question before the Court was whether the adviser who had allegedly drafted the misstatements had "made" those misstatements for purposes of Rule 10b-5(b). *Id.* at 141.

The Court concluded that the adviser could not be held liable under Rule 10b-5(b) because the adviser did not "make" the alleged misstatements in the prospectuses. *Janus*, 564 U.S. at 146. Rather, the Court explained, "the maker of a statement" for purposes of Rule 10b-5 "is the person or entity with ultimate authority over the statement." *Id.* at 142. The Court analogized to "the relationship between a speechwriter and a speaker." *Id.* at 143. "Even when a speechwriter drafts a speech, the content is entirely within the control of the person who delivers it. And it is the speaker who takes credit—or blame—for what is ultimately said." *Ibid.* Applying that rule, the Court concluded that the mutual fund had ultimate authority over the statements in the prospectuses, and therefore only the fund—not the investment adviser who had drafted the statements—could be liable for "mak[ing]" misstatements under Rule 10b-5(b). *Id.* at 146-147.

The Court in *Janus* also relied on its prior decisions in *Central Bank* and *Stoneridge Investment Partners, LLC* v. *Scientific-Atlanta, Inc.*, 552 U.S. 148 (2008). See *Janus*, 564 U.S. at 142-146. In both of those cases (discussed further below in Section C), the Court declined to extend primary liability to secondary actors who did not directly deceive investors, but rather played a behind-the-scenes role in facilitating the fraud. See *Stoneridge*, 552 U.S. at 152-153 (declining to extend liability to customers and suppliers who facilitated the primary actor's fraud); *Central Bank*, 511 U.S. at 167-168 (declining to extend liability to bank that played supporting role in fraud). The *Janus* Court concluded that there was "no reason to treat participating in the drafting of a false statement differently from engaging in deceptive transactions, when each is merely an undisclosed act preceding the decision of an independent entity to make a public statement." 564 U.S. at 145.

Applying *Janus*, the court of appeals here concluded that petitioner did not "mak[e]" the false statements in the emails sent to investors for purposes of Rule 10b-5(b) because Gregg Lorenzo, rather than petitioner, "retained ultimate authority" over the emails' contents. Pet. App. 16-17; see *id.* at 19 ("Under the Supreme Court's decision in *Janus*," petitioner "cannot be considered to have been 'the maker' of the statements in question for purposes of Rule 10b-5(b).").

Petitioner seeks to extend the finding that he did not "make" misstatements for purposes of Rule 10b-5(b) into a conclusion that he did not violate *any* provision of Rule 10b-5 or Section 17(a)(1). Pet. Br. 26-28. The court of appeals correctly rejected that attempted bootstrapping, see Pet. App. 22-27, and this Court should too. The *Janus* Court had no occasion to address, and did not address, the scope of Rule 10b-5(a), Rule 10b-5(c), or Section 17(a). The district court in the underlying litigation dismissed claims brought under Rule 10b-5(a) and (c), and the court of appeals did not address that holding. See *In re Mutual Funds Inv. Litig.*, 487 F. Supp. 2d 618, 622 (D. Md. 2007), rev'd, 566 F.3d 111 (4th Cir. 2009), rev'd, 564 U.S. 135 (2011). In this Court, the *Janus* petitioners emphasized that the only issue presented for review involved the scope of Rule 10b-5(b). See Pet. Br. at 40 n.8, *Janus*, *supra* (No. 09-525). The *Janus* petitioners' counsel stated at oral argument that "[t]here is no 10b-5(a) claim in this case. This is only a 10b-5(b) 'making' claim." 12/7/10 Tr. at 5, *Janus, supra* (No. 09-525). And this Court's opinion did not even cite, let alone interpret, Rule 10b-5(a), Rule 10b-5(c), or Section 17(a)(1).

The *Janus* Court's construction of the term "make" in Rule 10b-5(b), moreover, has no necessary implications for the scope of other antifraud provisions that do not use that word. See *U.S. SEC* v. *Big Apple Consulting USA, Inc.*, 783 F.3d 786, 797 (11th Cir. 2015) (stating that, because *Janus*'s reasoning is based on the text of Rule 10b-5(b), its holding "does not apply" beyond that subsection) (citation omitted); *SEC* v. *Monterosso*, 756 F.3d 1326, 1334 (11th Cir. 2014) (per curiam) (similar); *SEC* v. *Pentagon Capital Mgmt. PLC*, 725 F.3d 279, 287 (2d Cir. 2013) (similar). To the contrary, extending *Janus*'s construction of the term "make" in Rule 10b-5(b) to provisions that do not include that term would contravene the presumption that "differences in language * * * convey differences in meaning." *Henson* v. *Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1723 (2017). Imposing this Court's interpretation of Rule 10b-5(b) on other provisions would be especially inappropriate in light of this Court's decisions emphasizing that the subparts of Section 17(a) and Rule 10b-5 are each "meant to cover additional kinds of illegalities." *Naftalin*, 441 U.S. at 774; see *Affiliated Ute*, 406 U.S. at 152-153.

As explained above, petitioner's dissemination of messages containing false financial information constitutes a paradigmatic "device, scheme, or artifice to defraud" under Section 17(a)(1) and Rule 10b-5(a) and an "act, practice, or course of business which operates" as a fraud under Rule 10b-5(c). 15 U.S.C. 77q(a)(1); 17 C.F.R. 240.10b-5(a) and (c). That remains true even though petitioner did not "make" a misstatement for purposes of Rule 10b-5(b). Unlike the defendants in *Janus* and in earlier similar cases, moreover, petitioner did not play an "undisclosed," behind-the-scenes role as a preliminary actor. Pet. App. 24. He sent the messages "directly" to the prospective investors "from his account and under his name." *Ibid.* Imposing liability on petitioner under those circumstances is fully consistent with *Janus*.

2. Imposing liability on petitioner for fraudulent conduct even though he did not make a misstatement is also consistent with deeply rooted understandings of securities fraud as interpreted by the Commission, lower courts, and this Court.

When interpreting the antifraud provisions of the federal securities laws, this Court has looked to the common law while "eschew[ing] rigid common-law barriers." *Bateman Eichler, Hill Richards, Inc.* v. *Berner*, 472 U.S. 299, 310 (1985). That approach reflects the recognition that "an important purpose of the federal securities statutes was to rectify perceived deficiencies in the available common-law protections by establishing higher standards of conduct in the securities industry." *Herman & MacLean* v. *Huddleston*, 459 U.S. 375, 389

(1983). It therefore "is well known that the federal securities laws provide broader fraud protection than the common law, having been enacted in response to the common law's perceived failure at stamping out fraud in the securities markets." *MBIA Ins. Corp.* v. *Royal Indem. Co.*, 426 F.3d 204, 218 (3d Cir. 2005) (Alito, J.). *A fortiori*, if petitioner's conduct would have exposed him to liability under the common law, it is covered by the federal antifraud provisions.

Petitioner's willful dissemination of material misstatements to potential investors would have constituted actionable fraud at common law, even though the misstatements that petitioner disseminated were made by Gregg Lorenzo. In particular, under the "common law offense of obtaining property by false pretenses," a defendant who engaged in deceitful or fraudulent conduct could be held liable even if he did not personally make the false representation that defrauded the plaintiff. *In re Dennis J. Malouf*, Securities Act Release No. 10115, at 10, 2016 WL 4035575 (July 27, 2016) (*Malouf*, Release No. 10115), corrected by Securities Act Release No. 10207, 2016 WL 4761084 (Sept. 13, 2016); see 1 Melville M. Bigelow, *A Treatise on the Law of Fraud on its Civil Side* 247 (1888) (explaining that liability for fraud exists "where a man has conspired with others to cheat and defraud the plaintiff in the sale of certain property, by fraudulent concealments and misrepresentations * * * even where he has not himself made any of the misrepresentations").[2]

[2] See also, *e.g.*, *Zuckerman* v. *Cochran*, 158 So. 324, 326 (Ala. 1934) (plaintiff stated a claim in an action for deceit in the purchase of real estate where the defendant had participated in "a fraudulent scheme" even though the plaintiff was duped by misrepresentations

Early practice under the federal securities-fraud laws supports the view that cases involving misstatements may be brought under Section 17(a)(1) and Rule 10b-5(a) or (c). During the period between Section 17(a)'s enactment and Rule 10b-5's promulgation, the Commission did not interpret the statute's subsections as mutually exclusive. See, *e.g.*, *In re Arthur Hays & Co.*, 5 S.E.C. 271, 1939 WL 36375 (July 10, 1939) (finding violations of Sections 17(a)(2) and (3) based on the same misconduct of fraudulently inducing a party to purchase stock); *In re Foreman & Co., Inc.*, 3 S.E.C. 132, 1938 WL 34031 (Feb. 2, 1938) (not distinguishing between Section 17(a)'s subsections). After adopting Rule 10b-5, the Commission did not typically distinguish between subsections in finding violations of the Rule, see, *e.g.*, *In re Ward La France Truck Corp.*, 13 S.E.C. 373, 1943 WL 29807 (May 20, 1943), and when it did, the Commission did not view the subsections as mutually exclusive, see also *In re R. D. Bayly & Co. 727 W. 7th St. Los Angeles*, 19 S.E.C. 773, 1945 WL 26109 (July 14, 1945) (finding violations of provisions that would be renumbered as Rule 10b-5(b) and (c), based on the same material misrepresentations and misleading omissions).

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of a different participant in the scheme); *Cheney* v. *Powell*, 15 S.E. 750, 751 (Ga. 1892) ("One who makes willfully false representations, to be fraudulently used by another as an inducement to a third person to enter into a contract with the party repeating them, is as much guilty of a deceit as the latter, and is equally liable to the party deceived."); *Bank of Commerce & Trust Co.* v. *Schooner*, 160 N.E. 790, 792 (Mass. 1928) (imposing liability on a defendant who had participated in a "scheme to defraud" by engaging in deceptive conduct that led to a plaintiff being induced to lend "large sums of money upon worthless securities," even though the representations to the plaintiff were made by another).

That does not mean the text of the provisions did not matter, but instead that the provisions' coverage overlapped. In a seminal early decision, the Commission described the provisions in Rule 10b-5 and Section 17(a) as "mutually supporting rather than mutually exclusive." *In re Cady, Roberts & Co.*, 40 S.E.C. 907, 913, 1961 WL 60638 (Nov. 8, 1961); see, *e.g.*, *Chiarella*, 445 U.S. at 228 (relying on *In re Cady, Roberts*). Early judicial interpretations reflected the same approach.[3]

This Court's precedents reinforce the conclusion that liability for frauds involving misstatements can be imposed under provisions other than Rule 10b-5(b). In *Affiliated Ute*, the Court held that two defendants who had "devised a plan and induced" certain sellers of stock "to dispose of their shares" without knowing material facts about the value of the stock had engaged in "a 'course of business' or a 'device, scheme, or artifice' that operated as a fraud" on others. 406 U.S. at 153 (citation omitted). The Court reached that conclusion even

[3] See *Speed* v. *Transamerica Corp.*, 99 F. Supp. 808, 829 (D. Del. 1951) (breach of duty of disclosure "can be viewed as a violation of all three subparagraphs"); *Kardon* v. *National Gypsum Co.*, 73 F. Supp. 798, 800 (E.D. Pa. 1947); (three subsections violated through failure "to disclose a fact coming to [directors' and officers'] knowledge by reason of their position, which would materially affect the judgment of the other party to the transaction"); *Charles Hughes & Co.* v. *SEC*, 139 F.2d 434, 436 (2d Cir. 1943) ("Although the Commission has neglected to make any finding" addressing whether petitioner made "false statements of material fact," "we need not remand for a specific finding resolving this conflict, for we feel that petitioner's mark-up policy operated as a fraud and deceit upon the purchasers, as well as constituting an omission to state a material fact" under Section 17(a).), cert. denied, 321 U.S. 786 (1944).

though the "defendants may have made no positive representation or recommendation" to some of the plaintiffs, and even though the fraudulent scheme also involved "a misstatement of a material fact" made by others regarding "the prevailing market price of the * * * shares" of stock at issue. *Id.* at 152-153. The Court stated that, while Rule 10b-5(b) "specifies the making of an untrue statement of a material fact and the omission to state a material fact," the "first and third subparagraphs" of Rule 10b-5 "are not so restricted." *Id.* at 150-153.

Similarly in *Chadbourne & Parke LLP* v. *Troice*, 134 S. Ct. 1058 (2014), the Court recently indicated that false statements may form the basis for liability under Rule 10b-5(a). The Court described Rule 10b-5 as "forbid[ding] the use of any 'device, scheme, or artifice to defraud' (*including* the making of 'any untrue statement of a material fact' or any similar 'omi[ssion]') 'in connection with the purchase or sale of any security.'" *Id.* at 1063 (emphasis added; citation omitted; brackets in original). The Court thus characterized the making of a false statement to obtain money or property as a type of "device, scheme, or artifice to defraud," not as a separate category of conduct.

Those decisions reinforce the conclusion that claims involving false statements may proceed under Rule 10b-5(a) and (c) (as well as Section 17(a)(1)). Petitioner's theory—that fraud claims in any way involving false statements can proceed only under Rule 10b-5(b) (or Section 17(a)(2)) and only against the maker of the misstatements—would require a radical departure from those principles and decisions.

C. Imposing Liability For Petitioner's Active Deception Preserves The Distinction Between Primary And Secondary Liability

Petitioner further contends (Pet. Br. 35-44) that imposing liability for his conduct under Section 17(a)(1) and Rule 10b-5(a) and (c) would eliminate the distinction between primary and secondary liability that this Court emphasized in *Central Bank* and *Stoneridge*. That argument lacks merit. Because petitioner's *own* conduct in disseminating false financial information to investors constituted a "device, scheme, or artifice to defraud" and an "act, practice, or course of business which operates" as a fraud, he is *primarily* liable for violating Section 17(a)(1) and Rule 10b-5(a) and (c). 15 U.S.C. 77q(a)(1); 17 C.F.R. 240.10b-5(a) and (c). That conclusion does not affect the balance between primary and secondary liability announced in *Central Bank* and *Stoneridge*.

1. The question in *Central Bank* was "whether private civil liability under § 10(b) extends as well to those who do not engage in the manipulative or deceptive practice, but who aid and abet the violation." 511 U.S. at 167. The Court declined to extend aiding-and-abetting liability to those circumstances. The Court emphasized the importance of the reliance element in private Rule 10b-5 suits, stating that if it "allow[ed] the aiding and abetting action proposed in this case, the defendant could be liable without any showing that the plaintiff relied upon the aider and abettor's statements or actions." *Id.* at 180. The Court clarified, however, that "[a]ny person or entity" who violates Rule 10b-5 "may be liable as a *primary* violator under 10b-5, assuming all of the requirements for primary liability under Rule 10b-5 are met." *Id.* at 191 (emphasis added and omitted).

The decision below and the SEC's general approach to cases of this nature are consistent with the *Central Bank* framework. Under the SEC's view, defendants whose conduct violates Section 17(a) or Rule 10b-5 are primarily liable, while "[d]efendants who merely obtain or transmit legitimate documents knowing that they would later be falsified in order to misstate a company's financial condition would not be primarily liable under Rule 10b-5(a) and (c), but could be" secondarily liable "for aiding and abetting." *Malouf*, Release No. 10115, at 16 n.61. Those defendants would be aiders and abettors "provid[ing] substantial assistance to another person" who was violating an antifraud provision, and therefore would be subject to an enforcement action by the Commission, 15 U.S.C. 78t(e), but they would not be employing a device, scheme, or artifice to defraud or engaging in an act, practice, or course of business which operates or would operate as a fraud or deceit. They consequently could not be held primarily liable for violating Section 17(a)(1) or Rule 10b-5(a) or (c).

"Similarly, defendants who engage in legitimate, rather than sham, transactions generally would *not* be primarily liable under Rule 10b-5(a) and (c), even if they knew or intended that another party would manipulate the transaction to effectuate a fraud." *Malouf*, Release No. 10115, at 16 n.61 (emphasis added; citation and internal quotation marks omitted). And defendants "who have no fiduciary duty of disclosure but who are aware of a fraud and have the potential to benefit from it but take no action to stop it also would be aiders and abettors of a Rule 10b-5 violation rather than primary violators themselves." *Ibid.* In those scenarios, "because their own conduct was not deceptive" but the defendants knowingly provided substantial assistance to another person committing fraud, "the defendants are aiders and abettors rather than primary violators." *Ibid.*

The decision below does not render aiding-and-abetting liability "almost indistinguishable" from primary liability, nor does it create a "backdoor" route to imposing primary liability on those who do "no more than provide substantial assistance to another person." Pet. Br. 37, 44-45. Petitioner was found primarily liable for his *own fraudulent conduct*—his "active 'role in producing and sending'" material misstatements with deceptive intent, and for thereby "employing a deceptive 'device,' 'act,' or 'artifice to defraud.'" Pet. App. 21 (citation omitted). He "effectively vouched for the emails' contents and put his reputation on the line by listing his personal phone number and inviting the recipients to 'call with any questions.'" *Id.* at 24 (citation omitted). Because petitioner himself engaged in deceptive acts, and his conduct satisfied "all of the requirements for primary liability" under the antifraud provisions, he is a primary rather than a secondary violator. *Central Bank*, 511 U.S. at 191 (emphasis omitted).

2. Imposing liability on petitioner for his own fraudulent conduct is equally consistent with *Stoneridge*. The Court in *Stoneridge* addressed whether, in a private action brought by investors under Section 10(b), customers and suppliers could be liable for "agree[ing] to arrangements that allowed the investors' company to mislead its auditor and issue a misleading financial statement affecting the stock price." 552 U.S. at 152-153. The Court emphasized that "[c]onduct itself can be deceptive," and a "course of conduct" may "include[] both oral and written statements." *Id.* at 158. The Court

held, however, that the private plaintiffs could not prevail because the customers' and suppliers' "acts or statements were not relied upon by the investors." *Id.* at 159.

That basis for rejecting liability is inapposite here. The Commission is not required to prove reliance in its own enforcement actions. See *SEC* v. *Morgan Keegan & Co.*, 678 F.3d 1233, 1244 (11th Cir. 2012) (per curiam) (collecting authorities). And petitioner's conduct was clearly intended to engender reliance on the part of the investors who received the emails. Unlike the defendants in *Stoneridge*, who did not interact directly with the investors and whose actions "did not have the requisite proximate relation to the investors' harm," 552 U.S. at 158-159, petitioner himself sent the false emails to investors and placed his imprimatur on their contents by telling investors to direct any questions to him. Imposing liability for petitioner's own "course of conduct" is fully consistent with *Stoneridge*. *Id.* at 158.

D. No Canon Of Construction Supports Departing From The Text, History, And Purpose Of The Charged Antifraud Provisions

Petitioner briefly contends (Pet. Br. 29) that subjecting him to liability under Section 17(a)(1) and Rule 10b-5(a) and (c), but not under Rule 10b-5(b), would violate the canon against redundancy, because "all claims for false statements could be brought as fraudulent scheme claims, and, vice-versa." That position is misguided. As the Commission has explained, it "would be arbitrary to read th[e] terms" of Section 17(a)(1) and Rule 10b-5(a) and (c) "as excluding the making, drafting, or devising of a misstatement or omission" simply because Rule 10b-5(b) specifically penalizes the makers of misstatements. *Malouf*, Release No. 10115, at 15.

1. It is "hardly a novel proposition" that different provisions of the securities laws "'prohibit some of the same conduct.'" *Huddleston*, 459 U.S. at 383 (citation omitted). Some measure of overlap was an "understandable" result of the fact that "[t]he Securities Act of 1933 was the first experiment in federal regulation of the securities industry." *SEC* v. *Capital Gains Research Bureau*, 375 U.S. 180, 197-199 (1963). Section 17(a) was thus intentionally crafted to "include both a general proscription against fraudulent and deceptive practices and, out of an abundance of caution, a specific proscription against" nondisclosure under Section 17(a)(2), even though "a specific proscription against nondisclosure" was "surplusage." *Id.* at 198-199. "Each succeeding prohibition" of Section 17(a) "is meant to cover additional kinds of illegalities—not to narrow the reach of the prior sections." *Naftalin*, 441 U.S. at 774.

This Court and lower courts have accordingly read the subsections of Section 17(a) as mutually reinforcing rather than mutually exclusive. See *Naftalin*, 441 U.S. at 774; *United States* v. *Yeaman*, 194 F.3d 442, 453 (3d Cir. 1999) ("While each category [of Section 17(a)] has its own parameters, they are largely overlapping categories and all fall within the traditional understanding of the concept of fraud. Most conduct that falls within one is likely to satisfy another as well.") (citation omitted); cf. *United States* v. *Swanson*, 360 F.3d 1155, 1162 (10th Cir. 2004) ("Although largely overlapping, a scheme to defraud, and a scheme to obtain money by means of false or fraudulent pretenses, representations, or promises, are separate offenses." (quoting *United States* v. *Cronic*, 900 F.2d 1511, 1513 (10th Cir. 1990) (brackets omitted)). The Commission adopted the same approach in drafting Rule 10b-5, which borrows much of its language from Section 17(a). See pp. 15-16, *supra*.

If the Commission had intended to avoid any redundancy between Rule 10b-5 and Section 17(a), it would not have incorporated substantial portions of the statute's language into the text of the Rule. Nor would it have applied the rule to "the purchase or sale of any security," 17 C.F.R. 240.10b-5, when Section 17(a) already applied to "the offer or sale of any securities," 15 U.S.C. 77q(a). The Commission's concern with stamping out all forms of fraud, rather than avoiding any possible redundancies, is thus apparent from the text of Rule 10b-5 itself. Cf. *Ki Se Lee* v. *Ashcroft*, 368 F.3d 218, 227 (3d Cir. 2004) (Alito, J., dissenting) ("[E]ven if the drafters [of 26 U.S.C. 7201, the federal tax-evasion statute] could not think of an evasion case that did not involve fraudulent or deceitful conduct, the drafters might not have trusted their ability to anticipate every possible variety of evasion case and might have added" a potentially redundant subsection "just to be sure that no evasion case fell outside the definition.").

In any event, although the Commission's longstanding view is that Section 17(a)(1) and Rule 10b-5(a) and (c) do not categorically "exclud[e] the making, drafting, or devising of a misstatement or omission," *Malouf*, Release No. 10115, at 15 (emphasis omitted), the court of appeals held that petitioner did not "make" the false statements at issue here, Pet. App. 15. This case therefore does not directly present the question whether a person who "makes" a misstatement, and therefore is potentially liable under Rule 10b-5(b), may be liable under Rule 10b-5(a) or (c) and/or Section 17(a) as well. Instead, the Court need only decide whether conduct otherwise encompassed by those provisions—here, the knowing dissemination of false statements to obtain money from investors—is categorically excluded from primary liability under all of those provisions merely because the false statements were "made" by another.

2. Petitioner likewise derives no benefit from the rule of lenity. The rule of lenity "only applies if, after considering text, structure, history, and purpose, there remains a 'grievous ambiguity or uncertainty in the statute,'" *Barber* v. *Thomas*, 560 U.S. 474, 488 (2010) (quoting *Muscarello* v. *United States*, 524 U.S. 125, 139 (1998)), such that "the equipoise of competing reasons cannot otherwise be resolved," *Johnson* v. *United States*, 529 U.S. 694, 713 n.13 (2000). No such circumstance exists here. As explained above, relevant text, structure, history, and purpose all demonstrate that Congress and the Commission intended the antifraud provisions at issue here to be mutually reinforcing rather than mutually exclusive. See p. 35, *supra*. Thus, even if the Court finds the statute and regulation not to be "crystalline," it can still "make far more than 'a guess as to what Congress'" and the Commission intended, which prevents the rule of lenity from "apply[ing] in [petitioner's] favor." *DePierre* v. *United States*, 564 U.S. 70, 88 (2011) (citation omitted).

E. Petitioner's Policy Arguments Provide No Sound Basis For Reversing The Court Of Appeals' Judgment

Petitioner contends (Br. 17-18, 28) that the decision below will allow meritless private suits against defendants who would otherwise be secondary actors insulated from liability in private securities-fraud suits. Under the court of appeals' decision, however, a defendant will not be primarily liable under the antifraud provisions at issue here unless his own conduct is deceptive. A defendant will be liable only if "each of the elements or preconditions for liability" under Rule 10b-5 has been satisfied. *Stoneridge*, 552 U.S. at 158. And unlike the Commission, private plaintiffs cannot prevail unless they demonstrate reliance on the defendant's own misconduct, see *Morgan Keegan* 678 F.3d at 1244 (collecting authorities), as well as economic loss and loss causation, see *Dura Pharms., Inc.* v. *Broudo*, 544 U.S. 336, 341-342 (2005).

The PSLRA affords additional protections to defendants in private securities-fraud suits. The PSLRA (which does not apply to actions brought by the Commission) requires that, "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). The plain text of the PSLRA thus encompasses any "statement or omission" that is alleged to have played a role in a violation of the securities laws. It does not distinguish between statements or omissions that are prohibited by Rule 10b-5(b) and statements or omissions that constitute (or are used to carry out) a deceptive device, act, or artifice to defraud under Rule 10b-5(a) or (c). *Ibid.* There is accordingly no need to exclude false-statement claims from Rule 10b-5(a) and (c) to prevent evasion of the PSLRA.

In addition to establishing those heightened pleading requirements, the PSLRA sets "limits on damages and attorney's fees, a 'safe harbor' for certain kinds of statements, restrictions on the selection of lead plaintiffs in securities class actions, sanctions for frivolous litigation, and stays of discovery pending motions to dismiss." *Halliburton Co.* v. *Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2413 (2014). "Congress later fortified the PSLRA by enacting the Securities Litigation Uniform Standards Act of 1998, 112 Stat. 3227, which curtailed plaintiffs' ability to evade the PSLRA's limitations on federal securities-fraud litigation by bringing class-action suits under state rather than federal law." *Amgen Inc.* v. *Connecticut Ret. Plans & Trust Funds*, 568 U.S. 455, 476 (2013). Those additional requirements provide further assurance that interpreting Rule 10b-5 according to its terms will not encourage meritless private suits.

Adoption of petitioner's approach would create a significant loophole in the federal securities laws. The conduct in which petitioner engaged—using false statements to obtain money from investors —is a paradigmatic form of fraud. Under petitioner's theory, however, knowing dissemination of such false statements could not form the basis for primary liability if the false statements were "made" by a third party. And if the maker of the statement acted without scienter, neither the maker nor the disseminator could be subjected to either primary or secondary liability. See 15 U.S.C. 78t(e) (providing that, in specified circumstances, a person who aids or abets a securities-law violation "shall be deemed to be in violation of such provision to the same extent as the person to whom such assistance is provided"). That approach would subvert the efforts of Congress and the Commission to fashion a comprehensive scheme that outlaws all forms of securities fraud.

Petitioner argues (Pet. Br. 57) that "any decision to expand liability to new classes of defendants should be left to Congress." But the conduct in which petitioner was found to have engaged has long been treated as actionably fraudulent, both under the federal securities laws and under their common-law antecedents. A clear statement by this Court reiterating that the antifraud provisions at issue here should be interpreted according to their plain text would promote rather than undermine certainty and predictability.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General
MALCOLM L. STEWART
Deputy Solicitor General
CHRISTOPHER G. MICHEL
Assistant to the Solicitor General

ROBERT B. STEBBINS
General Counsel
MICHAEL A. CONLEY
Solicitor
DOMINICK V. FREDA
Assistant General Counsel
MARTIN V. TOTARO
Senior Counsel
Securities and Exchange Commission

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APPENDIX

1. 15 U.S.C. 77q(a) (2006) provides:

Fraudulent interstate transactions

(a) Use of interstate commerce for purpose of fraud or deceit

It shall be unlawful for any person in the offer or sale of any securities or any security-based swap agreement (as defined in section 206B of the Gramm-Leach-Bliley Act) by the use of any means or instruments of transportation or communication in interstate commerce or by use of the mails, directly or indirectly—

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

2. 15 U.S.C. 78j (2006) provides in pertinent part:

Manipulative and deceptive devices

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

* * * * *

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, or any securities-based swap agreement (as defined in section 206B of the Gramm-Leach-Bliley Act), any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

* * * * *

3. 15 U.S.C. 78u-4(b)(1) provides:

Private securities litigation

(b) Requirements for securities fraud actions

(1) Misleading statements and omissions

In any private action arising under this chapter in which the plaintiff alleges that the defendant—

(A) made an untrue statement of a material fact; or

(B) omitted to state a material fact necessary in order to make the statements made, in the light of the circumstances in which they were made, not misleading;

the complaint shall 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

4. 17 C.F.R. 240.10b-5 provides:

Employment of manipulative and deceptive devices.

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security.