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IN THE SUPREME COURT OF THE UNITED STATES

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

Petitioners : No. 09-525

v. :

FIRST DERIVATIVE TRADERS :

- - - - - x

Washington, D.C.

Tuesday, December 7, 2010

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:01 a.m.

APPEARANCES:

MARK A. PERRY, ESQ., Washington, D.C.; on behalf of Petitioners.

DAVID C. FREDERICK, ESQ., Washington, D.C.; on behalf of Respondent.

CURTIS E. GANNON, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae, supporting Respondent.

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P R O C E E D I N G S

(10:01 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 09-525, Janus Capital Group v. First Derivative Traders.

Mr. Perry.

ORAL ARGUMENT OF MARK A. PERRY
ON BEHALF OF THE PETITIONERS

MR. PERRY: Mr. Chief Justice, and may it please the Court:

Affirming the judgment below would authorize private securities fraud class actions against every service provider that participates in the drafting of a public company's prospectus. It is, therefore, nothing less than a frontal assault on this Court's decisions in Central Bank and Stoneridge.

In those cases, Your Honors, this Court held that service providers may not be sued primarily in private class actions and left that matter for Congress to resolve. And Congress did respond, not once, not twice, but three times, to those decisions.

First, in the PSLRA, the Congress authorized a Federal action, a government action, only against aiders and abettors, leaving the question of private class actions for this Court's resolution.

1 JUSTICE SOTOMAYOR: Counsel, is -- who's the
2 violator alleged here? Not in the complaint, but in the
3 briefs? As I read the briefs, they claim that Janus
4 itself did not make the false statement, that the two
5 appellants did, that they are the actual speakers
6 because they were talking about their activities, and
7 they used Janus as a conduit to deceive the market.
8 That's, I think, what they're alleging.

9 MR. PERRY: Justice Sotomayor, the
10 challenged statements appear in the prospectuses for the
11 Janus Funds, separate legal entities not parties to this
12 lawsuit.

13 JUSTICE SOTOMAYOR: So how do we sustain the
14 intermediary cases when the company, through market
15 analysts, divulges misleading statements? We don't talk
16 about the market analysts' falsity; we talk about the
17 company's falsity, because the market analysts didn't
18 have scienter.

19 MR. PERRY: Your Honor, the company --
20 excuse me -- the conduit or analyst cases fall under two
21 categories, neither of which is met here.

22 First, they are a scheme between the
23 company -- orchestrated by the company to distribute its
24 information through the analysts to the market, and they
25 are brought under 10b-5(a) as scheme cases. That is

1 most of the analyst cases. There is no 10b-5(a) claim
2 in this case. This is only a 10b-5(b) "making" claim.

3 Second, those few cases, the analyst cases,
4 that are brought under (b) involve an omission; that is,
5 the company has failed to correct a statement made by an
6 analyst where there is a duty to do so. There is no
7 omission claim in this case because there is no duty --

8 JUSTICE SOTOMAYOR: But what's the
9 difference between an omission or a commission if a
10 company purposely divulges a falsehood to an analyst,
11 knowing it's going to be distributed in toto? So who's
12 making the false statement, the analyst or the company?

13 MR. PERRY: Your Honor, the company makes
14 the statement to the market. Under Basic, the analyst
15 is the market. It is the ears of the market that takes
16 information --

17 JUSTICE SOTOMAYOR: So why isn't -- why
18 aren't the two appellants, on their theory, on -- we can
19 talk about whether the complaint does or does not
20 adequately allege their theory. That's a different
21 issue. I accept that.

22 But under their theory, why isn't the
23 appellants the primary violator, not even a secondary?
24 Because they -- they claim, I think -- and I'm going to
25 find out from them -- that Janus had no scienter, that

1 it didn't make the false statements, that all of this
2 was done in secret by the appellants, so they were the
3 only violator.

4 MR. PERRY: Your Honor, the analyst cases,
5 the issuer speaks to the market directly. Here, there
6 is an intervening legal entity, the Janus Funds.
7 Scienter or no scienter, that is a separate
8 corporation --

9 JUSTICE SOTOMAYOR: Do you mean to say to me
10 that puppets become a legal defense for someone who
11 intentionally manipulates the market information?

12 MR. PERRY: Justice Sotomayor, the Congress
13 has drafted two statutes that deal with puppets.
14 Section 20(b), which these plaintiffs have not invoked,
15 makes it unlawful for one party to do indirectly what it
16 would not be permitted to do directly. That's the
17 puppet statute, the ventriloquist dummy statute.

18 JUSTICE SOTOMAYOR: That's the control
19 person statute?

20 MR. PERRY: No. There's also 20(a), which
21 is the control person statute, also not invoked by these
22 plaintiffs.

23 Those are forms of secondary liability, Your
24 Honor. In fact, the Court's questions go to the
25 distinction between primary and secondary liability.

1 JUSTICE SOTOMAYOR: But I -- but if Janus
2 had no scienter, if its board of directors did not know
3 that the statements were false, they had no way of
4 knowing, because as I understand the complaint -- and
5 this is alleged -- the deal was secret. So Janus itself
6 could not be a primary violator. Who is?

7 MR. PERRY: Justice Sotomayor, our position
8 is nobody had scienter, and every adjudicator to look at
9 these facts -- Judge Motz in the district court, the ALJ
10 of the SEC -- has found that there was no scienter
11 anywhere up and down the line. So the fact that
12 somebody didn't have scienter doesn't answer the problem
13 here. The question --

14 JUSTICE GINSBURG: Well, somebody deviated
15 from what was the announced policy, that there was to be
16 no market timers investing in this -- in these Janus
17 funds. Somebody made the decision that certain hedge
18 funds would be allowed to engage in that activity. Who
19 was that somebody?

20 MR. PERRY: The adviser personnel made the
21 determination, Justice Ginsburg, that the policy was
22 discretionary, that when it said we may refuse trades,
23 the funds may refuse trades, that there are --
24 discretion --

25 JUSTICE GINSBURG: Well, the statement

1 that's alleged to have been -- the conduct that is
2 alleged to have been in opposition to the announced
3 policy, that is attributable squarely to -- what you --
4 this is the entity you called JCM?

5 MR. PERRY: That's correct, Your Honor --

6 JUSTICE GINSBURG: So it made the decision
7 that violated the policy?

8 MR. PERRY: That's correct, Your Honor. And
9 the SEC --

10 JUSTICE GINSBURG: Nonetheless, it's not a
11 primary actor?

12 MR. PERRY: Not as to these plaintiffs, Your
13 Honor. The SEC --

14 JUSTICE KENNEDY: But can -- can we discuss
15 the case, and -- and perhaps you don't think so. Can't
16 we discuss this case, must we not discuss this case, on
17 the theory that JCM's scienter, JCM's knowledge of a
18 false statement, is a given in the case?

19 Now, maybe you'll be able to prove
20 otherwise. You say that they're not liable anyway.

21 MR. PERRY: Justice Kennedy, you're exactly
22 right. That is the theory pleaded in the complaint.

23 JUSTICE KENNEDY: And it seems to me that's
24 what the argument here is mostly about.

25 MR. PERRY: And the question that is before

1 this Court, we would submit, is whether, scienter or no
2 scienter, JCM can be held liable for the statements in
3 another company's prospectus. This Court has never
4 held --

5 JUSTICE SOTOMAYOR: Even though there was no
6 scheme with another actor? Even though it was the only
7 violator, which is a --

8 MR. PERRY: No --

9 JUSTICE SOTOMAYOR: -- fair reading of the
10 complaint.

11 MR. PERRY: They chose not to bring a scheme
12 case. And remember, there is a second set of investors
13 here: the fund investors. The SEC brought an action,
14 secured \$100 million on behalf of them. There was a
15 series of private litigation that has been resolved,
16 brought by those investors.

17 These investors did not purchase the
18 securities offered by the -- the prospectus they
19 challenge. And, again, there's a fundamental disconnect
20 between the defendant in the case and the challenged
21 misstatements.

22 JUSTICE KENNEDY: But, once again -- once
23 again, if the complainants in the case, the plaintiffs
24 in the case -- hypothetical case, not this case,
25 hypothetical case -- were injured shareholders in the

1 fund, I take it you say still they could not sue JCM?

2 MR. PERRY: Your Honor, for different
3 reasons. They can sue JCM for -- for an omission,
4 because there's a duty that runs from JCM to the funds.
5 That was the theory advanced in that separate lawsuit
6 accepted by the district court, which has since been
7 resolved.

8 They can't -- these plaintiffs can't bring
9 an omission case, because there's no duty that runs from
10 JCM out to the JCG shareholders. The district court
11 held that. They didn't appeal that to the Fourth
12 Circuit. They didn't present that in their cert
13 petition. So they can't bring that omissions case.

14 Any wrongdoing in this case -- Justice
15 Ginsburg, to finish my answer to your question, the
16 policy says funds are not intended for market timing.
17 The adviser allowed 12 traders to trade frequently. The
18 only wrongdoing, if there is any wrongdoing, was the
19 failure of the adviser to disclose to the trustees the
20 deviation from the policy. That is a State law breach
21 of contract. It may be a breach of fiduciary duty.

22 JUSTICE KAGAN: Well, Mr. Perry, who wrote
23 the relevant statements?

24 MR. PERRY: Your Honor, the funds made the
25 statements to the public. They were drafted --

1 JUSTICE KAGAN: I understand that they were
2 in the fund's prospectus, but who wrote them?

3 MR. PERRY: They were drafted by lawyers for
4 the funds, lawyers representing the funds.

5 JUSTICE KAGAN: Who paid those lawyers?

6 MR. PERRY: The adviser paid the lawyers'
7 salaries.

8 JUSTICE KAGAN: So JCM paid the lawyers?

9 MR. PERRY: Correct, Your Honor.

10 JUSTICE KAGAN: And so it was JCM's lawyers
11 who wrote the prospectus, including the relevant
12 statements here, the asserted misrepresentations?

13 MR. PERRY: I -- I disagree with that,
14 Justice Kagan. They don't allege that in the complaint,
15 and the facts show that the lawyers, when --

16 JUSTICE KAGAN: Well, suppose the complaint
17 had alleged that. Suppose the complaint had simply
18 said: JCM's lawyers authored the relevant statements in
19 the prospectus.

20 MR. PERRY: One would have to --

21 JUSTICE KAGAN: Would that be enough to
22 survive a motion to dismiss?

23 MR. PERRY: No, Your Honor. One would have
24 to further look at who those lawyers were representing.
25 The truth in the real world is --

1 JUSTICE KAGAN: They're paid by JCM.

2 MR. PERRY: Every prospectus is written by
3 lawyers, Justice Kagan. Lawyers write prospectuses.

4 JUSTICE KAGAN: These are in-house counsel
5 for the investment adviser.

6 MR. PERRY: In-house counsel, outside
7 counsel, once they draft materials and present them to
8 their client, it becomes the client's statement when
9 adopted by the client.

10 The board of trustees of the funds has to
11 review every policy, is responsible for every policy
12 drafted by inside counsel, outside counsel, consultants.
13 It's not unusual for companies to retain outside service
14 providers to provide any number of policies: Employment
15 policies, investment policies, everything else.

16 JUSTICE GINSBURG: Mr. Perry, you -- you
17 said that it was the fund's lawyers who drafted the
18 prospectus, but, in fact, it was JCM's lawyers, the
19 lawyers -- they were in-house lawyers for JCM. And they
20 served -- and they served the funds in doing this
21 prospectus, but they were on the payroll of JCM, and
22 they were JCM's legal department.

23 MR. PERRY: Your Honor, like all lawyers,
24 they wear multiple hats. I represent multiple clients.
25 These lawyers represent multiple clients.

1 JUSTICE GINSBURG: I thought they were
2 in-house lawyers?

3 MR. PERRY: They are in-house lawyers at
4 JCM, but they also represent the funds, and the SEC has
5 specifically recognized in the context of investment
6 companies that where an adviser counsel is representing
7 the funds, his client or her client, for those purposes,
8 is the funds. And here, these lawyers are very careful
9 to separate who their -- their clients are for various
10 purposes.

11 JUSTICE KENNEDY: Well, let's say that JCM's
12 principal officers and managers wrote the statement.
13 You still say there's no liability?

14 MR. PERRY: Absolutely, Justice Kennedy,
15 because when the statement is adopted by the issuer, it
16 becomes the issuer's statement. Only an issuer can make
17 the statement --

18 JUSTICE KENNEDY: Yes. It's not
19 attributable, at least publicly, to JCM.

20 MR. PERRY: That's --

21 JUSTICE KENNEDY: Is there an alternate
22 theory that JCM is really the day-to-day managers in
23 day-to-day active control of the fund, and, therefore,
24 it should be chargeable as if it and the fund are the
25 same for purposes of making the statement?

1 MR. PERRY: Your Honor --

2 JUSTICE KENNEDY: And we would say that
3 that's different from, say, an outside law firm or an
4 auditor?

5 MR. PERRY: Your Honor, the word "control"
6 appears more than a hundred times in the briefs on the
7 plaintiff's side of this case in this Court, and the
8 Congress has dealt with control. Section 20(a) provides
9 a separate cause of action against those who control
10 another entity.

11 JUSTICE SOTOMAYOR: Except that I, as I read
12 your brief -- and you can correct me if I'm wrong -- you
13 were arguing that because there was an independent board
14 of directors, presumably because there are two
15 corporate -- different corporate funds -- two different
16 corporate forms, that there couldn't be control person
17 liability under 20(a). You seem -- that -- I thought,
18 reading your brief, that's what you were alleging.

19 So you can't have your cake and eat it, too.
20 Either the independence of the board makes no difference
21 or it does. So which is your position?

22 MR. PERRY: Our position, Your Honor, is
23 that the Congress has dealt with the situation where you
24 have two separate companies, and to make a claim against
25 the second company, you have to prove control. Whether

1 or not they could in this case, none of us knows,
2 because they never brought that claim. They
3 represented to the district court --

4 JUSTICE SOTOMAYOR: Under what theory would
5 you defend an allegation that the investment manager who
6 had control over the everyday affairs of the company,
7 drafted or helped draft the prospectus, hired the
8 lawyers who helped draft it, wouldn't be a control
9 person? How would you defend that?

10 MR. PERRY: Your Honor, the investment
11 company, the mutual funds, are separately owned,
12 separately governed.

13 JUSTICE SOTOMAYOR: Exactly. So you --
14 you're -- if they can't be control persons because
15 they're separate companies, then how do they escape
16 being primary violators?

17 MR. PERRY: Well, Your Honor, then -- then
18 we're just saying that the investment adviser is a
19 service provider like every other service provider.
20 They are like the --

21 JUSTICE SOTOMAYOR: But it's not in this
22 case, because the allegation is that it -- not the
23 company, that it chose to deceive the market.

24 MR. PERRY: Your Honor, with respect, the
25 allegation is that the adviser wrote a certain policy,

1 but the very document cited for that in the complaint
2 says that the trustees are responsible for the policies
3 of the funds. The trustees, when they adopt them, it
4 becomes the corporate policies of them. I mean, on the
5 plaintiff's --

6 JUSTICE KAGAN: Mr. Perry, does the fund
7 have employees?

8 MR. PERRY: Yes, Your Honor. The fund
9 has --

10 JUSTICE KAGAN: Who are the fund's
11 employees?

12 MR. PERRY: Are the officers of the fund,
13 the chief executive officer, the chief financial
14 officer --

15 JUSTICE KAGAN: And are all of those people
16 also employees of JCM?

17 MR. PERRY: Not the president, Your Honor,
18 but the others are joint -- serve in joint capacities.

19 JUSTICE KAGAN: And could you just run
20 through a little bit how one of these prospectuses
21 gets -- gets issued eventually? The JCM lawyers start
22 the process by drafting, and then what happens?

23 MR. PERRY: The lawyers representing the
24 trusts, both in-house and external, draft the underlying
25 document --

1 JUSTICE KAGAN: Well, here, I believe that
2 there was a statement in your interrogatories that it's
3 JCM's lawyers, in-house lawyers, who drafted the
4 relevant statement.

5 MR. PERRY: The particular prospectus,
6 answered in that prospectus. That's exactly right.

7 JUSTICE KAGAN: And then what happens?

8 MR. PERRY: They are presented to the board
9 of trustees, which holds a meeting. The board of
10 trustees is -- the funds are represented by outside
11 counsel, and the independent trustees are represented by
12 outside counsel.

13 JUSTICE KAGAN: And was there any change to
14 these statements made by the board of trustees?

15 MR. PERRY: These particular statements?

16 JUSTICE KAGAN: Yes.

17 MR. PERRY: Yes, Your Honor. There were
18 changes to the market timing policy throughout the class
19 period. In fact, earlier in the class period, there was
20 an express disclosure that market timing might be
21 permitted pursuant to a -- a written contract. That was
22 revised later.

23 The trustees asked multiple questions. They
24 were back and forth with their lawyers. Outside counsel
25 was always involved, and there are other consultants

1 involved periodically as well. The --

2 CHIEF JUSTICE ROBERTS: Do the outside
3 counsel you're talking about represent the fund only?

4 MR. PERRY: There's two separate sets of
5 outside counsel. One law firm represents only the fund.
6 It does not represent the adviser; only represents the
7 funds, Your Honor. There's a second law firm in this
8 case that represents the independent trustees.

9 Six of the seven trustees determined that to
10 secure their independence, because the chairman of the
11 board at that time was an interested person under the
12 statute, they have a separate law firm. There are two
13 law firms that have nothing to do with the adviser.

14 JUSTICE GINSBURG: But the law firm that --
15 the lawyers who drafted the prospectus were in-house
16 counsel for JCM on JCM's payroll.

17 MR. PERRY: They were paid by JCM, and at
18 the time they drafted, they were representing the funds,
19 again, as allowed by the SEC, as disclosed in the
20 documents --

21 JUSTICE GINSBURG: But they weren't the
22 independent outside lawyers who were representing the
23 board or the funds; they were the in-house counsel?

24 MR. PERRY: Those outside counsel reviewed
25 every policy. In fact, if you look at the --

1 JUSTICE GINSBURG: I guess my question was
2 simply: The drafters of the prospectus were the
3 in-house counsel for JCM?

4 MR. PERRY: The -- the paragraph being
5 challenged in this case, that's correct, Your Honor.
6 The interrogatory response doesn't speak more broadly
7 than that, but I agree with that.

8 CHIEF JUSTICE ROBERTS: I suppose if the
9 lawyers for the trust did an inadequate job of reviewing
10 the JCM drafts, they would be subject to a malpractice
11 action by the trust?

12 MR. PERRY: Correct, Your Honor. And then
13 the trust, of course, has contractual and other rights
14 against the adviser that it has enforced, you know, in
15 this very case. The trustees made a claim against the
16 adviser for all of this underlying conduct.

17 JUSTICE BREYER: What -- what happens if the
18 president of the oil company, knowing that the statement
19 is false, says: We have discovered 42 trillion barrels
20 of oil in Yucatan. He writes it on a piece of paper; he
21 gives it to the board of trustees; they think it's true
22 and they issue it. Joe Smith buys stock and later loses
23 money.

24 Can Joe Smith sue the president of Yucatan,
25 of the oil company, for having made an untrue statement

1 of material fact?

2 MR. PERRY: If he's an authorized agent of
3 the same company that issued the statement?

4 JUSTICE BREYER: What he is, is he didn't
5 issue it. What he did was he gave it to the board of
6 trustees, who issued it.

7 MR. PERRY: If the board of trustees of his
8 company, so that the statement --

9 JUSTICE BREYER: He's the president of the
10 company.

11 MR. PERRY: And -- and the distinction here,
12 Justice Breyer, is --

13 JUSTICE BREYER: No, no. I'm asking what
14 happens. Is there recovery?

15 MR. PERRY: If he is an authorized agent, he
16 may be sued as --

17 JUSTICE BREYER: He is running the business,
18 the daily affairs, of the company. Of course, the
19 president of a company is an authorized agent of the
20 company, and so, yes.

21 MR. PERRY: He may be subject to liability,
22 then --

23 JUSTICE BREYER: Now, if he's subject to
24 liability, why isn't your firm -- your client, subject
25 to liability, who, after all, run every affair of the

1 fund?

2 MR. PERRY: Your Honor, they run the
3 management of the fund. The investment operations --

4 JUSTICE BREYER: Yes, that's what a
5 president does. The president of a company manages the
6 company.

7 MR. PERRY: And where --

8 JUSTICE BREYER: And if the president is
9 liable, why isn't the group of people who do everything
10 for the company --

11 MR. PERRY: Because, Your Honor --

12 JUSTICE BREYER: -- why aren't they liable?

13 MR. PERRY: -- the corporate form has
14 meaning in the Federal law and in State law, and
15 where --

16 JUSTICE BREYER: No, you have to explain it
17 to me more. I'm not being difficult. I understand this
18 less well than you think I do --

19 (Laughter.)

20 JUSTICE BREYER: -- and I want to know.
21 That's an obvious, naive question, and I'd like an
22 answer that anyone could understand.

23 MR. PERRY: The answer is, Your Honor:
24 These funds are managed -- "governed," excuse me, is a
25 better word -- by the trustees. That is disclosed in

1 these documents. In fact, the documents say -- it's at
2 page 258a of the Joint Appendix -- the trustees are
3 responsible for all the policies.

4 They have outsourced, if you will, certain
5 functions, operational functions: Which stock to buy,
6 which stock to sell, which transfer agent to hire.
7 Those are functions that could be kept in house or could
8 be outsourced.

9 JUSTICE BREYER: I get it. In other words,
10 you're saying, on the papers here, it's -- it's the
11 trustees that manage everything.

12 MR. PERRY: That govern everything.

13 JUSTICE BREYER: That govern everything, and
14 these are like helpers?

15 MR. PERRY: Well, they're -- they're --

16 JUSTICE BREYER: They do a lot as helpers.
17 Now, let me suggest to you, if that's one possible
18 distinction, what about this distinction: That the
19 managers of a fund, even though they are outsourced
20 people brought in, are liable as principals, not aiders
21 or abettors, if -- following criminal law here -- if --
22 they are principals if they get the false statement to
23 the public through a conduit, the conduit being an
24 entity or person that is unaware of the falsity of the
25 statement.

1 That's LaFave on criminal law. What is --
2 what about that?

3 MR. PERRY: Three answers. First, that's
4 dealt with in section 20(b), which is the ventriloquist
5 dummy statute that these plaintiffs didn't invoke.

6 Second, the Congress looked at this very
7 question in 1938 and 1939, when there were proposals to
8 merge the management, the adviser function, with the
9 funds, to make them one unitary entity. And in the
10 Investment Company Act of 1940 and the Investment
11 Advisers Act of 1940, the Congress elected not do that.

12 As this Court has recognized, it chose not
13 to require compulsory internalization of the management
14 function. It allowed this separate entity. And,
15 therefore, when you have separate companies, under State
16 law -- again, my client is a Delaware limited liability
17 corporation. The funds are Massachusetts business
18 trusts. They have nothing in common. There's no joint
19 ownership, no joint governance --

20 JUSTICE SOTOMAYOR: You're --

21 CHIEF JUSTICE ROBERTS: Could you --

22 JUSTICE SOTOMAYOR: You're not suggesting,
23 are you, that they did this for purposes of protecting
24 your client from a lawsuit?

25 MR. PERRY: Absolutely not, Your Honor.

1 JUSTICE SOTOMAYOR: When it -- no, they did
2 it for a business reason, that having separate entities
3 was economically more useful for the market, correct?

4 MR. PERRY: And every fund, or virtually
5 every fund in -- in the United States, is set up this
6 way.

7 JUSTICE SOTOMAYOR: All right.

8 MR. PERRY: And, again --

9 JUSTICE SOTOMAYOR: So -- but that doesn't
10 answer Justice Breyer's question, now.

11 MR. PERRY: My third --

12 JUSTICE SOTOMAYOR: Assuming that they
13 didn't do it for that reason, what does it mean?

14 MR. PERRY: My -- my third answer is that
15 extensive regulatory involvement in the two Acts enacted
16 in 1940 specifically to regulate this industry, the
17 Congress never made the decision to hold the adviser
18 liable for the fund's conduct.

19 In fact, no statute says that, and the SEC
20 has never taken that position. There is no case cited
21 in any of the briefs -- they have 234 pages, 138 cases.
22 Not one holds an investment adviser liable for
23 statements of the fund's prospectuses. When the --

24 JUSTICE KENNEDY: Just -- just to clarify
25 Justice Breyer's hypothetical. In your -- in the

1 hypothetical you gave where the president gives an
2 innocent board of directors false information and the
3 prospectus goes out, is the company liable because their
4 agent -- is the company liable under 10b-5?

5 MR. PERRY: The company may be sued under
6 10b-5. It has got to meet all the elements --

7 JUSTICE KENNEDY: Yes.

8 MR. PERRY: -- but, yes, if it's an
9 authorized agent making a statement on behalf of the
10 company. But proving --

11 JUSTICE KENNEDY: So what you're saying is
12 that the -- the agency relation that the president of
13 the company holds is different than the agency
14 relation that JCM holds?

15 MR. PERRY: Absolutely right, Your Honor,
16 and that's a distinction --

17 JUSTICE KENNEDY: Why is that?

18 MR. PERRY: It's grounded in State law, and
19 it differs between one company and two companies. Where
20 Congress has looked at issuers, for example --

21 JUSTICE KENNEDY: Well, but --

22 JUSTICE SCALIA: Is -- is JCM an agent? Are
23 you acknowledging that they're an agent of -- of the
24 fund?

25 MR. PERRY: You know, for certain purposes,

1 Justice Scalia, they are an agent.

2 JUSTICE SCALIA: What -- what purposes are
3 that? For purposes of -- at issue here?

4 MR. PERRY: No, Your Honor, for -- not for
5 drafting a prospectus. For carrying out the investment
6 function. They are laid out in the contract --

7 JUSTICE SCALIA: Yes. Okay.

8 MR. PERRY: It's attached as an appendix to
9 our brief -- which sets forth the things that JCM is an
10 agent for investment operations, not an agent
11 specifically for registering the fund's securities for
12 sales, complying with the Federal securities laws,
13 preparing and issuing the prospectus. All those things,
14 by contract --

15 JUSTICE KENNEDY: So even though they did
16 those things, they acted in excess of their authority?

17 MR. PERRY: They did not do those things,
18 Your Honor.

19 JUSTICE KENNEDY: But that's the allegation.

20 MR. PERRY: No, it's not the allegation.

21 JUSTICE KENNEDY: Well, suppose it were
22 proven that they did do those things. Suppose it were
23 proven that they did 100 percent of the prospectus work.
24 The only thing that the fund did was to mail it.

25 MR. PERRY: I don't know how to respond to

1 that, Justice Kennedy, since it's so far beyond what
2 they could possibly prove here. What happened here --

3 JUSTICE GINSBURG: Well, this case -- this
4 case went off on -- in the district court, it was -- was
5 it 12(b)(6)?

6 MR. PERRY: Yes, Your Honor.

7 JUSTICE GINSBURG: Okay. And all that the
8 Fourth Circuit said is it goes beyond; it has to go
9 further. And the -- the impression that I got from the
10 Fourth Circuit's opinion is -- and it could be reduced
11 to a very simple statement. They say: JCM was in the
12 driver's seat. It was running the show. And if that
13 can be proved, they thought that they would have a good
14 case under --

15 MR. PERRY: And, Your Honor, no court, no
16 case from this Court or any court of appeals has ever
17 held that the driver's seat exception to Central Bank
18 exists. And that is an expansion.

19 The second issue in the case, of course,
20 which is attribution: Even if there's making by JCM,
21 none of these statements were attributed to JCM. The
22 prospectus is very clear that --

23 JUSTICE GINSBURG: But that was -- I mean,
24 before you started out with a statement that sounded
25 like the sky is falling because lawyers would no longer

1 be safe, banks would no longer be safe, but the Fourth
2 Circuit was -- was a much narrower view. Its view was
3 this -- JCM was the manager. It was controlling
4 everything.

5 MR. PERRY: Justice Ginsburg, the Fourth
6 Circuit's view was the manager helps the funds. That --
7 nobody even defends the Fourth Circuit's ruling. The
8 Government now comes in with a theory that they admit,
9 on page 22 of the Government's brief, does apply to
10 every lawyer, every accountant, every --

11 JUSTICE SCALIA: I thought that the question
12 on which we granted cert was very clear: whether the
13 Fourth Circuit erred in concluding that a service
14 provider can be held primarily liable in a private
15 securities fraud action for, quote, "helping," close
16 quote, or, quote, "participating in," close quote,
17 another company's misstatements.

18 Now, is -- is that an accurate description
19 of the Court's holding? It was not objected to by the
20 Respondent here.

21 MR. PERRY: Absolutely, Justice Scalia. And
22 that question can only be --

23 JUSTICE SCALIA: And that's what I thought
24 we granted. We weren't talking about control here.
25 That was not the issue, I thought.

1 MR. PERRY: We agree with the Court. The
2 question presented can only be answered one way: The
3 court of appeals erred.

4 If I may reserve my remaining time.

5 CHIEF JUSTICE ROBERTS: Thank you, counsel.
6 Mr. Frederick.

7 ORAL ARGUMENT OF DAVID C. FREDERICK

8 ON BEHALF OF THE RESPONDENT

9 MR. FREDERICK: Thank you, Mr. Chief
10 Justice, and may it please the Court:

11 JUSTICE SCALIA: Mr. Frederick, is that an
12 accurate description of -- of the question before us?

13 MR. FREDERICK: I don't think it is, Justice
14 Scalia.

15 JUSTICE SCALIA: Why didn't you object to it
16 in -- in your -- in your opposition?

17 MR. FREDERICK: We -- we did object, in the
18 sense that we described the complaint's allegations as
19 JCM writing and preparing and being responsible for the
20 prospectus. And the question of --

21 JUSTICE SCALIA: I don't -- but we -- we
22 don't reevaluate facts. We -- we review the holding of
23 a lower court.

24 Now, was this an accurate description of the
25 holding of the Fourth Circuit? And if it wasn't, why

1 didn't you say that in your brief in opposition?

2 MR. FREDERICK: We did say it in our brief
3 in opposition, Justice Scalia, and the Solicitor
4 General, when you called for the views of the Solicitor
5 General, also said in the invitation brief that this
6 case was not an appropriate vehicle for deciding just
7 simply "help" and "participate," because what the Fourth
8 Circuit was saying in other parts of its opinion was
9 that JCM was responsible for the prospectuses in all
10 their various aspects: in writing, preparing, et
11 cetera. And so we --

12 CHIEF JUSTICE ROBERTS: How can -- I'm
13 sorry. Please --

14 MR. FREDERICK: So we would submit that for
15 the reasons we stated in our opposition and we've stated
16 in our red brief, as the case comes to this Court on
17 reviewing a motion to dismiss of a complaint's
18 well-pleaded allegations -- and I can go through the
19 complaint's allegations, if you like, that explain how
20 JCM wrote and prepared the prospectus and the policies
21 for the funds and then implemented them falsely -- we
22 would submit this case is not about service providers,
23 but it is about Janus Capital Management being the
24 primary violator. They were the ones who had the motive
25 to lie, they had the incentive to lie, and they did lie.

1 JUSTICE SCALIA: Did they make --

2 JUSTICE SOTOMAYOR: I'm sorry. Who was --

3 JUSTICE SCALIA: -- the statements? Isn't

4 that the statutory text that we're dealing with?

5 MR. FREDERICK: Yes, they did.

6 JUSTICE SCALIA: They did make the

7 statements?

8 MR. FREDERICK: Yes, they composed and

9 created --

10 JUSTICE SCALIA: It didn't go out under

11 their name.

12 MR. FREDERICK: It did in --

13 JUSTICE SCALIA: If someone writes a speech

14 for me, one can say he drafted the speech, but I make

15 the speech.

16 MR. FREDERICK: Justice Scalia, we address

17 the definition of "make" under the SEC's interpretation,

18 which is entitled to deference, as being to create or to

19 compose or to accept as one's own.

20 JUSTICE SCALIA: That -- that's not what --

21 it depends on the context of "make." If you're talking

22 about making heaven and earth, yes, that means to

23 create, but if you're talking about making a

24 representation, that means presenting the representation

25 to someone, not -- not drafting it for someone else to

1 make.

2 MR. FREDERICK: In the prospectus, there is
3 a section on management that explains that Janus Capital
4 Management engages in the day-to-day functions. There
5 are no employees of Janus Funds themselves. All of this
6 is outsourced management --

7 CHIEF JUSTICE ROBERTS: Except -- except
8 when they review material going in the prospectus.

9 MR. FREDERICK: But that --

10 CHIEF JUSTICE ROBERTS: Then they have
11 independent representation by outside counsel.

12 MR. FREDERICK: Right. What they don't
13 have, Mr. Chief Justice, and where the falsity is here,
14 is the ability of any of those outsiders to determine
15 whether or not implementing the policy will be done
16 fraudulently, and that's where the culpability is here.
17 JCM runs these funds, and although the statement might
18 get accepted by the board of trustees --

19 CHIEF JUSTICE ROBERTS: I don't
20 understand -- I don't understand your answer. The
21 outside counsel reviews what the policy is going to be.

22 MR. FREDERICK: Yes.

23 CHIEF JUSTICE ROBERTS: Our question is the
24 validity of that statement, whether that's deceptive in
25 the prospectus. That seems to me to be an entirely

1 different question. I understood your theory of the
2 case to be that JCM is liable, basically, because they
3 put it in the prospectus.

4 MR. FREDERICK: And what they did was to
5 falsely represent what they would do with that
6 statement. I would direct the Court to paragraph 5.

7 CHIEF JUSTICE ROBERTS: Well, that's the
8 question, I guess, that -- your response seems to beg
9 the question -- is that they falsely represented. The
10 issue is whether or not something happened between their
11 drafting and its appearance in the prospectus that makes
12 it appropriate to say that that's a statement of the
13 trust rather than a statement of JCM.

14 MR. FREDERICK: It is a statement of both,
15 in the sense that the fund is attracting investors, but
16 the fund is managed and controlled by the investment
17 manager; here, JCM. If --

18 JUSTICE SCALIA: But if JCM falsely
19 represented what it would do, it made that false
20 representation to the fund, and the fund, as has been
21 acknowledged, would have a cause of action against JCM.

22 MR. FREDERICK: No --

23 JUSTICE SCALIA: But that's not what's going
24 on here.

25 MR. FREDERICK: No. In fact, paragraph 5 of

1 the complaint says that Janus is representing that its
2 mutual funds -- Janus Capital Management, its mutual
3 funds -- were designed to be long-term investments. It
4 then says in paragraph 6: As recognized in the
5 prospectuses, JCM purported market timing policy was
6 designed to protect long-term investors.

7 So, if you read the prospectus and you read
8 the complaint, it is absolutely clear what Janus Capital
9 Management is telling all the mutual fund investors of
10 the world: If you invest in Janus, we will protect your
11 long-term investments.

12 JUSTICE SCALIA: What isn't clear from all
13 of those things is that -- is that JCM made any
14 representation to the public. The representation was
15 made in the prospectus issued by the fund, not by JCM.

16 Now, the fund may have a cause of action
17 against JCM, but what's crucial here is whether --
18 whether you can establish that it is JCM who made the
19 representation to the public --

20 MR. FREDERICK: And we --

21 JUSTICE SCALIA: -- and I don't see how you
22 can get there. You might proceed under the control
23 provision, but -- but not by saying that they made the
24 representation.

25 MR. FREDERICK: Justice Scalia, they wrote

1 the prospectus. They're in --

2 JUSTICE SCALIA: That's fine. Just like
3 writing a speech for somebody.

4 MR. FREDERICK: And when they issued the
5 prospectus, they used their address and represented to
6 the public that they --

7 CHIEF JUSTICE ROBERTS: I'm sorry to
8 interrupt, but it seems be an important -- when they
9 issued the prospectus --

10 MR. FREDERICK: Sorry.

11 CHIEF JUSTICE ROBERTS: Who issued the
12 prospectus?

13 MR. FREDERICK: JCM filed it and
14 disseminated it on its Web site, and all investors in
15 the Janus Funds knew to -- knew to make inquiries to the
16 manager if they had any question about the funds.

17 JUSTICE SCALIA: If I carry a letter over
18 and file it on behalf of some principal, does it become
19 my letter? Have I made that representation? Sure, they
20 filed it. What does that prove?

21 MR. FREDERICK: Because it's --

22 JUSTICE SCALIA: As you say, they have no
23 other agents, unless the trustees themselves were going
24 to walk over and file it. JCM was functioning in that
25 capacity as an employee of the fund in the filing. They

1 didn't file it on their own behalf.

2 MR. FREDERICK: Yes, they did.

3 JUSTICE SCALIA: On their own behalf?

4 MR. FREDERICK: Absolutely. They created
5 the fund, Justice Scalia. That's how mutual funds work.
6 Managers create them, they lure investors to them, they
7 get money by having a percentage of assets under
8 management.

9 CHIEF JUSTICE ROBERTS: And the SEC has
10 recognized that they remain two separate entities,
11 despite this interconnected relationship.

12 MR. FREDERICK: Certainly, but there are
13 many cases -- in fact, I don't think it's ever been
14 disputed in the courts of appeals that if one company
15 outsources its management function and those outsourced
16 managers make lies on behalf of the company --

17 CHIEF JUSTICE ROBERTS: The one -- the one
18 activity --

19 MR. FREDERICK: -- they are also liable
20 under section 10b-5.

21 CHIEF JUSTICE ROBERTS: The one activity
22 that we know they did not outsource was review of the
23 materials submitted by JCM. They had independent
24 counsel that conducted that review.

25 Would it have been a breach of the trustees'

1 fiduciary obligations to the fund investors under common
2 law -- I forget where this is incorporated -- to
3 rubber-stamp what they get from somebody on the outside,
4 not to have independent counsel review what they're
5 going to say in their prospectus?

6 MR. FREDERICK: Mr. Chief Justice, my answer
7 to your question is: That's actually a very difficult
8 question under fiduciary duty law, because here the
9 fiduciaries have been duped themselves.

10 They, when they got the wording of the
11 prospectus and the policy that JCM was purporting to
12 implement -- JCM didn't tell the board that there are 12
13 secret deals with hedge funds, pursuant to which we're
14 going to make money by attracting long-term investors
15 and --

16 CHIEF JUSTICE ROBERTS: Well, it seems to
17 me --

18 MR. FREDERICK: -- make money with
19 short-term market timers.

20 CHIEF JUSTICE ROBERTS: Isn't -- isn't that,
21 again, what has been conceded: That there may well be
22 an action from the fund represented by their trustees
23 against --

24 JUSTICE SCALIA: Common-law suit for duping.

25 MR. FREDERICK: Justice Scalia, in no

1 instance that I'm aware of where a mutual fund
2 investment adviser is a publicly traded company would
3 that cause of action run on behalf of the manager's
4 shareholders. What we're talking about here is a
5 company with a product, and they lie about the product.
6 And in that instance, it's no different from the Vioxx
7 case last year with Merck or the difference from the
8 cold remedy case you are going to hear argument in next
9 term.

10 The mutual funds happen to be the product of
11 the company. They make misstatements about the product,
12 and that --

13 JUSTICE ALITO: Well, suppose this case
14 didn't involve a mutual fund. Suppose it involved a
15 corporation with thousands of employees, and the
16 prospectus is drafted by outside counsel. It's adopted
17 by the directors of the company without changing a word.

18 Now, would that case come out the same? And
19 if not, what would -- what exactly would you have us say
20 to distinguish the two?

21 MR. FREDERICK: Well, the outside lawyers, I
22 think, are distinguishable in a number of different
23 ways. One is that they are reacting on information
24 provided by the company. That information is typically
25 not subject to an independent investigation by outside

1 counsel to determine the truth or veracity of that
2 information.

3 JUSTICE ALITO: Well, what if it's alleged
4 they knew exactly what was going on?

5 MR. FREDERICK: If there is scienter, where
6 the lawyers knowingly act in a way that helps or that
7 contributes to that fraud, they may well be subject as
8 aiders and abettors. It depends on whether you can
9 establish that the lawyers have met all of the elements.
10 I mean, you'd have to show reliance. You'd have to show
11 lost causation. You'd have to show the primary
12 violation of the part of the lawyers.

13 JUSTICE ALITO: They would be liable as
14 aiders and abettors? I thought there wasn't aiding and
15 abetting liability.

16 MR. FREDERICK: Sorry. The SEC would be
17 able to proceed against the lawyers for aiding and
18 abetting. Whether or not there would be a private
19 action would depend on whether the lawyers -- it could
20 be pleaded under the heightened pleading requirements
21 that they had met all of the elements of the 10b-5
22 claim. I would submit that's extremely difficult.

23 JUSTICE BREYER: What is it that -- I'm
24 unclear on this. That's why I use the oil company
25 example. Plain, ordinary -- the top executives in the

1 oil company write the false statement. They give it to
2 a board that doesn't know it's false, and the board puts
3 it out in its name.

4 Now, it seems to me it ought to be clear at
5 this point in securities law whether those -- the
6 president and vice president are or are not liable under
7 this 10-b, the (B) part.

8 MR. FREDERICK: Yes, and we cited those
9 cases --

10 JUSTICE BREYER: And they are liable.

11 MR. FREDERICK: -- I believe at page 37.

12 JUSTICE BREYER: You're saying they are
13 liable?

14 MR. FREDERICK: At page --

15 JUSTICE BREYER: All right. Then their
16 response to that is: This is not like the president of
17 the oil company, and the reason that it's not is
18 something to do with the nature of the -- the obligation
19 that runs between the managers and the fund, which is
20 somehow different between -- you understand it better
21 than I.

22 Can you say what it is and what you think
23 your response is?

24 MR. FREDERICK: Yes. What I will say is
25 that they don't have a principal distinction between

1 those two situations. Simply having a contract to
2 outsource management where those management functions of
3 the company are resulting in false statements issued by
4 the company shouldn't make --

5 JUSTICE BREYER: All right. So you're
6 saying -- you're saying it shouldn't matter that if they
7 issued -- it's worse if they run the whole company than
8 if they're just the president?

9 MR. FREDERICK: That's correct.

10 JUSTICE BREYER: All right. Now, at that
11 point, we get into a problem, and the problem is how do
12 we distinguish an aider or abettor from a principal?

13 MR. FREDERICK: An --

14 JUSTICE BREYER: At that point, I am
15 uncertain indeed, and that's why I put out this for
16 comment, this suggestion that you follow criminal law
17 here and say at least they're a principal if they have a
18 high position, they participate in it, they do all these
19 things you say, and the entity that they're fooling in
20 the first instance is simply a conduit, and, therefore,
21 you cannot say it's a scheme, because this other part of
22 the scheme wasn't part of it.

23 MR. FREDERICK: Well, to be a primary
24 violator, you have to have met all of the elements of
25 the cause of action.

1 JUSTICE BREYER: Yes.

2 MR. FREDERICK: To be an aider and abettor
3 for enforcement purposes --

4 JUSTICE BREYER: Yes.

5 MR. FREDERICK: -- SEC purposes, you simply
6 have to provide substantial assistance to one who is a
7 primary violator.

8 JUSTICE BREYER: What's the difference
9 between substantial assistance and -- and doing it?

10 MR. FREDERICK: You would not have to make
11 the statement. You would do something to assist the
12 person making the statement.

13 JUSTICE SCALIA: Mr. Frederick, I thought we
14 had held -- I was sure we had held that there is no
15 aiding and abetting liability --

16 MR. FREDERICK: Yes. I'm -- I'm not
17 saying --

18 JUSTICE SCALIA: -- under the provision
19 we're discussing here.

20 JUSTICE BREYER: There's a distinction. You
21 want to say what the distinction is. So I would --
22 consistent with the view there is no aiding and abetting
23 liability, you still would win your case.

24 MR. FREDERICK: That's correct, because
25 there is no primary violator under JCM's view of the

1 facts here. They are the primary violator under our
2 view of the facts here, because they met all of the
3 elements of the 10b-5 action, and they had a motive do
4 it, and they made --

5 JUSTICE SOTOMAYOR: Is your claim premised
6 on Janus being duped or not? If Janus was not duped, if
7 its board knew and JCM was doing the activity with
8 either the consent or acquiescence of the board, would
9 you have a claim here?

10 MR. FREDERICK: We would. It would be
11 somewhat different because we would plead multiple
12 violators, as the Court in Central Bank and in
13 Stoneridge --

14 JUSTICE SOTOMAYOR: Then go back to Justice
15 Breyer's question, because I can see when there's one
16 primary violator who uses another entity as a dupe or as
17 a puppet, but I can't, and I don't know how to,
18 distinguish what you're proposing from aiding and
19 abetting. There has to be something to differentiate
20 the two. So what is it?

21 MR. FREDERICK: It's the failure on the part
22 of the person who would not have met all of the elements
23 of the 10b-5 claim. You have to have someone -- you --
24 two people, okay? Both of them have to have satisfied
25 all the elements of a 10b-5 claim to be primary

1 violators. If there is one element that is not
2 satisfied with respect to that person, that person is
3 only an aider and abettor and not subject to private
4 remedies under section 10(b). They would be subject to
5 aiding and abetting liability under the SEC's
6 enforcement --

7 JUSTICE ALITO: But the distinction you're
8 drawing is between making the statement and assisting in
9 making the statement. Isn't that -- isn't that what you
10 just said?

11 MR. FREDERICK: Well, no, in the sense that
12 we believe, and we assert in the complaint and the
13 complaint is adequately pleaded, is that JCM made the
14 statements. Now, to be --

15 JUSTICE ALITO: Yes, and aiding and abetting
16 is assisting in making these statements as if -- as in
17 something you want to take place, right?

18 MR. FREDERICK: Yes.

19 JUSTICE ALITO: But what is the difference,
20 the distinction in -- in this context? Now, one
21 possible distinction is who formally makes it, in whose
22 name is it made, but that's obviously not your -- your
23 position. So, what -- what is it to distinguish a
24 principal here from an aider and abettor?

25 MR. FREDERICK: Who has substantive control

1 over the content of the message. That kind of
2 substantive control, as -- as the Court in the Utah Ten
3 Commandments case pointed out, the government can have
4 speech attributed to it on the basis of it putting up a
5 monument on public land. There can be multiple speakers
6 with respect to one message, and the question of how
7 much substantive control you attribute to a particular
8 speaker, we believe, is the appropriate way to view --

9 JUSTICE SCALIA: Do you deny that the fund
10 had substantive control? Couldn't the fund have stopped
11 this statement from being placed in its prospectus?
12 Didn't it have outside lawyers who advised it whether it
13 should allow this statement to be included in its
14 prospectus? How can you say that they -- they didn't
15 have control?

16 MR. FREDERICK: Well, they did not have a
17 knowledge of the falsity of these statements.

18 JUSTICE SCALIA: Well, that may mean that
19 they're duped, but it doesn't mean that they don't have
20 control. They had control, but you say they -- they
21 were duped. But that's quite a different theory from
22 saying that they had control --

23 MR. FREDERICK: They --

24 JUSTICE SCALIA: -- that they didn't have
25 control.

1 MR. FREDERICK: No, Justice Scalia, they
2 didn't have substantive control over the content of the
3 message, because if they did, they would not have
4 allowed these false statements to have been issued. And
5 that's the whole point -- that's the theory here. JCM
6 was luring long-term investors with the promise if you
7 park your money with the Janus Funds, it will be safe
8 in -- from the kinds of market timing problems. They
9 were then secretly going out and luring money from the
10 hedge funds to allow them to make short trades --

11 JUSTICE KENNEDY: But there was -- there is
12 nothing in the record to indicate that that statement
13 was attributed to JCM.

14 MR. FREDERICK: The public understood it
15 that way.

16 JUSTICE KENNEDY: You can -- you can play
17 with the words "make" as you choose, but do we take the
18 case on the assumption that you can show that it was
19 attributed to JCM? I -- I see nothing in -- in the
20 record that would justify that.

21 MR. FREDERICK: Well, JA 275a, Justice --
22 Justice Kennedy -- excuse me -- says that Janus Capital
23 Management reserved the Janus name for itself and that
24 it --

25 JUSTICE GINSBURG: What did -- how did it

1 reserve that? You said twice in your brief that Janus
2 is a name to which JCM reserves the right. How did it
3 reserve the right?

4 MR. FREDERICK: It said -- and this is at
5 page 275a -- if for some reason Janus Capital
6 Management's contract is terminated, the funds can no
7 longer use the Janus name. They were intending to
8 trademark and get the name out there to attract
9 investors to the investment adviser's method of
10 investing. And it was that type of usage that brought
11 all of this together. The fund and the management, they
12 are in function essentially one entity. The fact that
13 they have contractually outsourced the management
14 function should not alleviate the securities fraud that
15 is alleged here.

16 JUSTICE KAGAN: Mr. Frederick, a substantial
17 part of the power of your argument comes from this
18 notion, as Justice Ginsburg said, that JCM was in the
19 driver's seat, that JCM had control, that they were --
20 Janus was at most an alter ego of JCM and maybe
21 something more, that it was just a creature of JCM. But
22 the securities legislation seems to deal with that in
23 section 20. And your case is not brought under section
24 20 and, because of the relationship between mutual funds
25 and their investment advisers, presumably could not be

1 brought under section 20.

2 So, why should we think relevant the kind of
3 controlled relationship that you're talking about?

4 MR. FREDERICK: Because you don't want to
5 create a road map for other people to commit fraud,
6 Justice Kagan, and that's what their theory does. What
7 their theory does is it says, if we set up shell
8 companies or if we dupe people to make statements, we
9 can commit securities fraud with impunity, because we
10 won't be held liable to having made the statement, even
11 though we wrote it, we had substantive control over it,
12 et cetera.

13 CHIEF JUSTICE ROBERTS: Except -- except to
14 the SEC, right? Because they can pursue it under aiding
15 and abetting. It's kind of a big --

16 MR. FREDERICK: Well --

17 CHIEF JUSTICE ROBERTS: -- problem if you're
18 trying to say we're safe from actions for security
19 fraud.

20 MR. FREDERICK: Well, Chief Justice Roberts,
21 this Court on numerous occasions has said that the
22 private securities action is a complement to the
23 enforcement efforts of the SEC, and in this instance,
24 the shareholders of the investment manager --

25 CHIEF JUSTICE ROBERTS: Well, I know, but

1 you were just responding by saying the problem is that
2 this will give people a road map. But they're going to
3 hit a pretty big bump in the road when the SEC brings an
4 action against them, including potential criminal
5 actions.

6 MR. FREDERICK: But, no, the problem,
7 Mr. Chief Justice, is that under their construction of
8 the facts, there's no primary violator. Mr. Perry said
9 this morning --

10 CHIEF JUSTICE ROBERTS: The SEC --

11 MR. FREDERICK: -- there's no primary
12 violator. And so, if there's no primary violator, there
13 can be no control person and there can be no aiding and
14 abetting.

15 CHIEF JUSTICE ROBERTS: Thank you,
16 Mr. Frederick.

17 Mr. Gannon.

18 ORAL ARGUMENT OF CURTIS E. GANNON,
19 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,
20 SUPPORTING RESPONDENT

21 MR. GANNON: Mr. Chief Justice, and may it
22 please the Court:

23 JUSTICE SOTOMAYOR: Counsel, could you start
24 by taking your brief and distilling it down to three
25 sentences? Define what a primary violator is, what a

1 secondary violator is who aids and abets, and who a
2 control person is? And then tell me how that definition
3 would exclude lawyers, auditors, investment -- general
4 investment advisers, et cetera.

5 I've read your brief, but I've been trying
6 to distill it down to three sentences. So try to do
7 that for me.

8 MR. GANNON: A primary violator must be
9 somebody who has actually committed all the elements of
10 a 10b-5 cause of action --

11 JUSTICE SOTOMAYOR: Give me an example of
12 that. What do you see as all of the elements?

13 MR. GANNON: Well, the elements for the
14 private cause of action are the ones that this Court has
15 repeated. They're -- were cited on page --

16 JUSTICE SOTOMAYOR: I understand. But --

17 MR. GANNON: In -- in this case the key one
18 that we're talking about is that you would need to be an
19 actual maker of the statement, and -- and --

20 JUSTICE SOTOMAYOR: And that becomes -- how
21 is that different from aiding and abetting the making of
22 a statement?

23 MR. GANNON: It -- we think that somebody
24 can make a statement if they create the statement, and
25 the statute and the rule both expressly apply to those

1 who make statements directly --

2 JUSTICE SOTOMAYOR: But that's every

3 lawyer --

4 MR. GANNON -- or indirectly.

5 JUSTICE SOTOMAYOR: -- who writes the false
6 statement knowing it's false. So, are you saying that
7 every lawyer who writes the statement knowing it's false
8 is a primary violator?

9 MR. GANNON: Scierter is another element,
10 and so a lawyer who just reviews the policy, JCM in this
11 case -- when JCM submitted false statements to the
12 funds, if the funds were unaware, this is where Mr.
13 Frederick concluded for the Chief Justice that if
14 there -- if the person who actually releases the
15 statement to the world has been duped and doesn't have
16 scierter, then there is -- they are not going to be --

17 CHIEF JUSTICE ROBERTS: So, just to get --

18 MR. GANNON: -- a primary violator.

19 CHIEF JUSTICE ROBERTS: -- to get back, so
20 you are conceding that if you lose this case, you will
21 be unable to bring any aiding and abetting case in a
22 situation such as this?

23 MR. GANNON: Under sections 20 -- it depends
24 on what the situation --

25 CHIEF JUSTICE ROBERTS: It seems like a yes

1 or no question.

2 MR. GANNON: Yes, if the situation here is
3 one in which the funds ultimately cannot be proved to
4 have scienter. If they did not know about the falsity
5 of the statements in the prospectuses that they released
6 to the public, then there would not be a primary
7 violator. Under section 20(e) for aiding and abetting
8 liability, the Commission can bring an aiding and
9 abetting claim against somebody who provides substantial
10 assistance, recklessly or knowingly -- recklessly or
11 knowingly provides substantial assistance to a primary
12 violator, but the Court has repeatedly made clear that a
13 primary violator needs to have violated all of the
14 elements of a 10b-5 cause of action, which includes --

15 JUSTICE ALITO: I'm still not clear what
16 your distinction is between making the statement and
17 aiding and abetting in the making of the statement.
18 Now --

19 MR. GANNON: If it --

20 JUSTICE ALITO: -- could you explain that?

21 MR. GANNON: Well, I think that --

22 JUSTICE ALITO: Is it necessary that the
23 person in whose -- the entity in whose name the
24 statement is made is an empty shell? It's simply a
25 puppet that's controlled by somebody else? Is that --

1 is that necessary or does it go beyond that?

2 MR. GANNON: No, I don't think that that's
3 necessary. If -- the position -- the position that the
4 Commission has taken is that somebody who makes a
5 statement, if he writes the statement or provides the
6 false information that's used to construct the statement
7 or allows the statement to be attributed to him. And we
8 think that that's a reasonable construction of the term
9 "make," because the statute and the rule both apply to
10 persons who make the statement directly or indirectly.
11 And so, they could be using a conduit, whether the
12 conduit is witting or unwitting. They would be a
13 primary violator if they had --

14 JUSTICE SCALIA: I don't think that's a
15 reasonable interpretation of -- of make a statement
16 indirectly. I mean, you can make it indirectly by not
17 issuing it yourself but having somebody else make it in
18 your name.

19 MR. GANNON: Well, if --

20 JUSTICE SCALIA: But I would not say that
21 I'm making a speech indirectly if I have drafted the
22 speech.

23 MR. GANNON: Well, but if the --

24 JUSTICE SCALIA: The person for whom I
25 drafted the speech is making the speech.

1 MR. GANNON: Well, that may be true in the
2 case of a speech, Justice Scalia, but in a classic
3 boiler-room situation, where somebody has written the
4 scripts for salespersons to -- to use in order to make
5 calls to sell stocks, the person who actually writes the
6 scripts may never speak the words to a customer, he may
7 never have his own name spoken on the phone, and,
8 therefore, the statements have not been attributed to
9 him --

10 JUSTICE BREYER: He may just be some poor
11 associate, his first day at work. The law firm sent him
12 over there, and there he got stuck down in the boiler
13 room. And somebody said why don't you write something
14 that will get everybody to sell things, and -- and why
15 don't you say we're a thousand tons of oil instead of
16 only a ton? There he is. He writes it out. You think
17 he's liable?

18 MR. GANNON: If he writes it out and he
19 doesn't know, he obviously isn't liable --

20 JUSTICE BREYER: No, no, he knows. He
21 knows.

22 MR. GANNON: -- because he doesn't have
23 scienter.

24 JUSTICE BREYER: At some level he knows: I
25 shouldn't be saying they found a thousand tons of oil

1 when they only found 50. Okay? And four people told
2 him to go do something like that, but he's the guy who
3 wrote it. I'd say he didn't behave well, but I don't
4 think he's the principal.

5 MR. GANNON: In that instance, because he
6 was acting specifically at the direction of superiors --

7 JUSTICE BREYER: They didn't say what words
8 to write.

9 MR. GANNON: But they --

10 JUSTICE BREYER: They gave him the general
11 idea, and then he did it. He created the words, to use
12 your phrase. When you say "creating the words," he's a
13 great writer.

14 MR. GANNON: It -- we do, on page 22,
15 acknowledge that somebody needs to be sufficiently
16 involved in the creation or dissemination of the
17 statement in order to be -- in order to be deemed its
18 maker or its author. And so, it's --

19 JUSTICE BREYER: Ah, now we have
20 "sufficiently involved." Once we're into sufficiently
21 involved, we're back into what is sufficient to make the
22 person the principal rather than the aider and the
23 abettor, and apparently creating or writing the
24 statement is not clear whether it is or is not
25 sufficient. So we're back into the problem.

1 MR. GANNON: In this instance, there's no
2 doubt that the manager of the funds was not a mere
3 adviser. They bought into --

4 JUSTICE BREYER: I'm interested in your
5 test. I'm interested in your test, not the --

6 MR. GANNON: Well, the -- the test does
7 acknowledge that -- that if there is not sufficient
8 control over the content of the -- the message and the
9 dissemination of it, that somebody may be more in an
10 advisory capacity. That might be the instance with lots
11 of outside law firms when they're acting at the specific
12 direction of counsel. That's not the situation of --

13 JUSTICE GINSBURG: In that connection, Mr.
14 Gannon, would you answer the -- the statement that Mr.
15 Perry made that the Government had, in fact, conceded
16 that this theory would spread not only to the -- to the
17 investment adviser so closely linked to funds but to
18 every lawyer, every accountant, every bank.

19 MR. GANNON: Well --

20 JUSTICE GINSBURG: He said that you said
21 that on page something here.

22 MR. GANNON: We said that -- he was
23 referring to the statement on page 22 of the
24 Government's brief, referring to the need for the -- for
25 the author to be sufficiently involved in creating or

1 disseminating the statement. And I think it's very
2 important to recognize that scienter is an important
3 limiting -- limiting principle for the 10b-5 cause of
4 action to be brought by a private --

5 JUSTICE SCALIA: Well, that will always be
6 charged. It's the simplest thing in the world to charge
7 scienter.

8 MR. GANNON: It would be --

9 JUSTICE SCALIA: And you've bought yourself
10 a big lawsuit.

11 MR. GANNON: It's not simple, Justice
12 Scalia, in light of the PSLRA, which requires it to be
13 alleged with particularity. There need to be facts
14 sufficient to give rise to a strong inference that the
15 defendant acted with scienter. And -- and there are
16 penalties beyond Rule 11 that are -- that are imposed if
17 the -- if the plaintiff is -- is mistaken in doing so.

18 JUSTICE KENNEDY: You think attribution to
19 the actor is not necessary for the actor's liability for
20 a statement?

21 MR. GANNON: That's correct. We think that
22 -- and any other rule would immunize falsely attributed
23 or anonymous statements. And if the whole purpose of a
24 fraud was to convince somebody that this statement came
25 from Warren Buffett, so that I could turn a quick buck

1 before the market realized that it wasn't actually from
2 Warren Buffett, the fact that it was not attributed to
3 me would not change the fact that I had made the
4 statement and that the market had relied upon it.

5 The truth is that reasonable investors --
6 and that's the test for purposes of reliance -- can rely
7 on anonymous and falsely attributed statements. In this
8 instance, there's no reason to doubt that an investor
9 would have relied on statements in the prospectus about
10 the fund's purported anti-market timing and excessive
11 trading policies. And so, we think that there -- in
12 general, there doesn't need to be an attribution
13 requirement, but in this instance, it's quite clear that
14 a reasonable investor could have relied on
15 these statements in the prospectus.

16 JUSTICE SOTOMAYOR: Counsel, could you have
17 -- you just admitted if there -- if the company was
18 duped, you couldn't have aiding and abetting liability.
19 Could you impose a 20(a) or 20(b) control person
20 liability?

21 MR. GANNON: The control person liability
22 also needs to have a primary violator under the terms of
23 20(a).

24 JUSTICE KAGAN: Mr. Gannon, suppose that we
25 think that this test that the SEC is using and that you

1 recite on page 13 is really pretty broad and that it
2 might apply to a range of factual situations that are
3 not before us. Is there a way to confine our holding
4 just to the mutual fund situation, and if there is, how
5 would you do that?

6 MR. GANNON: Well, I think the easiest way
7 would be to analogize it to the cases involving
8 corporate employees. As Petitioners acknowledge, there
9 are cases where a corporate employee drafts a statement
10 that's issued in the company's name. In this instance,
11 the investment adviser is management for the company,
12 and the fact that they happen to be management by virtue
13 of contract rather than just the internal arrangements
14 of the corporation shouldn't change that arrangement.

15 It -- it's also the case that if the Court
16 were -- were looking for a way to narrow its holding, it
17 could do so by talking about the elements of the 10b-5
18 cause of action, which -- which would apply only to
19 private suits and -- and not to enforcement actions
20 brought by the Commission or by the Department of
21 Justice.

22 JUSTICE KENNEDY: Your point is that --

23 JUSTICE SCALIA: Well, it should change
24 that, because Congress has made it very clear that
25 investment advisers are not to be treated like

1 employees. You -- you want us to undo a clear
2 distinction that Congress has made.

3 MR. GANNON: Well, the -- the statute says
4 that if somebody -- any person makes the false statement
5 directly or indirectly -- and in this instance, the SEC
6 sought -- got a cease-and-desist order that's reprinted
7 at -- on page 407 in the joint appendix that was
8 predicated on a provision of the Investment Company Act,
9 section 34(b), that -- that tracks 10(b) and makes it
10 unlawful for any person to make any untrue statement of
11 material facts. And the Commission believed that they
12 were chargeable with that violation.

13 CHIEF JUSTICE ROBERTS: Thank you, Mr.
14 Gannon.

15 Mr. Perry, you have 4 minutes remaining.

16 REBUTTAL ARGUMENT OF MARK A. PERRY

17 ON BEHALF OF THE PETITIONERS

18 MR. PERRY: Justice Kennedy, in response to
19 your attribution question, Mr. Gannon said something
20 about falsely attributed or anonymous statements. We
21 have neither here. We have a correctly attributed, non-
22 anonymous prospectus that under Federal law says, on the
23 first page of the document, who it's attributed to, the
24 Janus Funds, who have their own trustees.

25 Justice Ginsburg, who is in the driver's

1 seat? Page 258a of the joint appendix, quote: "The
2 trustees are responsible for major decisions relating to
3 each fund's objectives, policies, and techniques. The
4 trustees also supervise the operations of the fund by
5 their officers and review the investment decisions of
6 the officers."

7 There is no misdirection here about who's in
8 charge. The trustees are in charge.

9 JUSTICE GINSBURG: But the -- the whole
10 arrangement was made possible by JCM. JCM wants
11 long-term investors, so it puts this provision in the
12 prospectus. The board of directors have no reason to
13 believe that JCM is dissembling and it's going to go out
14 and seek hedge funds.

15 MR. PERRY: If it is a dupe case, Justice
16 Ginsburg and Justice Sotomayor, it's dealt with by
17 20(b), which Justice -- Mr. Gannon did not answer.
18 You'll notice 20(b) does not require a primary
19 violation. It allows the Commission to proceed directly
20 against any person who acts indirectly where it can't
21 act directly. So 20(b) answers this problem.

22 The Commission also -- the 34(b) of the
23 Investment Company Act is broader. There's also section
24 206 and 215 of the Investment Advisers Act, which
25 regulate the conduct of investment advisers.

1 Congress has dealt in a very reticulated
2 way, and all of the questions today I would submit show
3 the absence of bright lines being proposed by my friends
4 on this side of the table. They can't articulate the
5 distinction between primary and secondary, between
6 principal and agent, between aiders and abettors and
7 anyone else.

8 This is an area that needs bright lines. It
9 needs to be resolved on motions to dismiss. Scierter
10 can't be resolved on a motion to dismiss. And the
11 Congress, in the Dodd-Frank act, which the plaintiffs
12 said, in their opposition in this Court to this
13 certiorari petition, was going to solve the problem by
14 enacting a new statute -- turns out Congress didn't
15 enact that statute.

16 Instead, Congress referred this issue to the
17 General Accounting Office, to the Comptroller General,
18 and said take a year, take all the resources of the
19 Federal Government, study the problem of the distinction
20 between companies that issue securities on the one hand,
21 -- the funds here -- and those who provide services on
22 the other hand -- the adviser here. And tell us, come
23 back to the Congress and tell us whether we need to
24 solve the problem. If the government --

25 JUSTICE ALITO: Well, just to sum up, if

1 there are -- if investors in a mutual fund are duped by
2 a false statement that is made in fact, is written by --
3 by the management company and issued by the fund without
4 knowledge of its falsity, is there any place they can
5 get -- look to for relief?

6 MR. PERRY: The investors in the mutual
7 fund, Justice Alito --

8 JUSTICE ALITO: In the mutual fund, yes.

9 MR. PERRY: -- got \$100 million through the
10 SEC action and resolved all the civil litigation.
11 They're a separate class of investors, a whole different
12 set of securities laws problems, because they were the
13 recipients of the prospectus that offered these
14 securities and that contained the false statements.
15 These plaintiffs' fundamental problem -- they didn't
16 purchase or sell the securities that were offered by the
17 prospectus they complain about. They can't find any
18 false statements in anything --

19 JUSTICE KAGAN: Mr. Perry, on the
20 allegations of this complaint, these plaintiffs were
21 harmed by the misrepresentations, the alleged
22 misrepresentations from JCM to the fund. So if the fund
23 was duped, would these shareholders, JCM's shareholders,
24 have any relief?

25 MR. PERRY: These shareholders -- JCG's

1 shareholders have no relief. And, Justice Kagan, I
2 would point out in the 70 years since the Investment
3 Company Act was enacted and the modern mutual fund
4 industry was built, I'm not aware of any case -- and
5 they certainly haven't cited one -- in which the
6 investors in the parent company have ever recovered a
7 dime in an SEC action, in a private action, or
8 otherwise, for statements in the funds' prospectuses.

9 There is a -- there is a line between
10 corporate entities, and the liability runs up different
11 channels. This is a totally novel, unprecedented theory
12 that they're presenting.

13 JUSTICE GINSBURG: What was the theory of --
14 of the fund shareholders? You said the fund
15 shareholders recovered -- there was a settlement.

16 MR. PERRY: Right.

17 JUSTICE GINSBURG: What -- what was that
18 action?

19 MR. PERRY: Their theory was that there was
20 an omission. The adviser owned a duty to the fund. The
21 statements were correctly made, Justice Ginsburg. There
22 was no market timing. When the -- when the adviser
23 later allowed certain traders in, it owed a duty to
24 correct those statements in the prospectuses to the
25 fund. That was the liability theory of the investors.

1 These plaintiffs can't pursue that liability
2 theory because the duty doesn't run the other way. It
3 doesn't run from JCM to JCG's investors. That's the law
4 of this case. And, therefore, they can't bring an
5 omissions case; they have to bring an affirmative
6 misstatements case for statements that were not directed
7 to this group of investors.

8 CHIEF JUSTICE ROBERTS: Thank you,
9 Mr. Perry.

10 The case is submitted.

11 (Whereupon, at 11:02 a.m., the case in the
12 above-entitled matter was submitted.)

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