

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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FRANCIS V. LORENZO,)
)
Petitioner,)
)
v.) No. 17-1077
SECURITIES AND EXCHANGE COMMISSION,)
)
Respondent.)
- - - - -

Pages: 1 through 58
Place: Washington, D.C.
Date: December 3, 2018

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SECURITIES AND EXCHANGE COMMISSION,)

Respondent.)

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Washington, D.C.

Monday, December 3, 2018

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:12 a.m.

APPEARANCES:

ROBERT HEIM, ESQ., New York, New York; on behalf of the Petitioner.

CHRISTOPHER G. MICHEL, Assistant to the Solicitor General, Department of Justice, Washington, D.C.; pro hac vice; on behalf of the Respondent.

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1 P R O C E E D I N G S

2 (11:12 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument next in Case 17-1077, Lorenzo versus
5 the Securities and Exchange Commission.

6 Mr. Heim.

7 ORAL ARGUMENT OF ROBERT HEIM

8 ON BEHALF OF THE PETITIONER

9 MR. HEIM: Mr. Chief Justice, and may
10 it please the Court:

11 In Janus Capital, this Court held that
12 only the maker of a misstatement can be held
13 liable for that misstatement under Section
14 10(b) and Rule 10b-5(b). The court below
15 correctly held that Petitioner, Frank Lorenzo,
16 was not the maker of the statements that are at
17 issue in the two emails in this case.

18 However, the court below erred when it
19 held that Lorenzo could nevertheless be liable
20 for those very same misstatements under a
21 theory that, by producing and sending those
22 statements, he engaged in a deceptive act,
23 artifice to defraud, or practice, for purposes
24 of liability under Section 10(b), Rule 10b-5(a)
25 and (c) and Section 17(a)(1).

1 For three reasons Lorenzo's actions do
2 not support liability.

3 First, permitting liability under Rule
4 10b-5(a) and (c) and 17(a) would allow
5 plaintiffs to sidestep this Court's holding in
6 Janus and the limitations that were placed on
7 misstatement liability. And it would allow
8 plaintiffs to creatively relabel their
9 inadequate misstatement claims as claims for
10 deceptive devices and acts.

11 The result is contrary to Janus and
12 would render Rule 10b-5(b) a nullity.

13 Second --

14 JUSTICE SOTOMAYOR: Excuse me, Janus
15 was a private cause of action, correct?

16 MR. HEIM: Yes, Your Honor, it was --

17 JUSTICE SOTOMAYOR: Under 10b-5?

18 MR. HEIM: Yes, Your Honor, under
19 10b-5(b).

20 JUSTICE SOTOMAYOR: I -- I understand
21 what Janus said, but I don't know how it
22 squares with 17(a). And you swept 17(a) in.

23 10b-5 uses the phrase "to make" any
24 untrue statement. But 17(a) says to obtain
25 money or property by means of any -- of any

1 untrue statement of a material fact. That
2 seems dramatically different to me. 17(a) is a
3 government provision, meaning only the
4 government can sue under 17(a). Why should we
5 be treating the two identically? I don't know
6 that anywhere in your brief you explain that.

7 I know that we've had -- made general
8 statements that the two inform each other, but
9 certainly not on this critical point, because
10 Janus was based explicitly on the "making"
11 language of 10b-5(b).

12 MR. HEIM: That's true, Your Honor.
13 The -- the subsection that you quoted is
14 actually from Section 17(a), subsection (2),
15 which is not -- was not charged by the SEC and
16 which Mr. Lorenzo was not accused of violating.

17 And we agree that subsection (2) may
18 be a better way for the SEC to proceed if
19 they're going to try to hold Petitioner liable
20 as a primary violator, because it -- it almost
21 fits very closely here because that's the
22 equivalent of Rule 10b-5(b).

23 JUSTICE KAGAN: But the same point can
24 be made, Mr. Heim, with respect to 10b-5(a) and
25 (c) and also with respect to 17(a)(1) and (3),

1 right? That the idea is -- is, look, Janus was
2 a decision that -- it was a very textual
3 decision. Its -- it interpreted the word
4 "make." Its -- it had lots of examples from
5 real life about who makes statements and who
6 doesn't make statements.

7 And neither (a) or (c) in 10b-5 has
8 the same language in it.

9 MR. HEIM: Well, Justice Kagan,
10 10b-5(b) only addresses misstatements. The
11 other categories in 10b-5(a) and 10b-5(c) are
12 really conduct-based language. They get to
13 acts and -- and practices and courses of
14 business.

15 And our view is that (a) and (c) cover
16 quite a different type of fraud.

17 JUSTICE KAGAN: So you think that (a)
18 and (c) are sort of any -- everything except
19 misrepresentations or omissions? Is that your
20 position?

21 MR. HEIM: We -- that is essentially
22 our position. We don't dispute that there can
23 be cases where -- where you have both
24 misstatements and deceptive conduct. But, as
25 Desai said, in the circuit court of appeals, is

1 that the judiciary's always recognized a
2 difference between deceptive conduct and
3 deceptive statements.

4 JUSTICE KAGAN: So take this case.
5 Mr. Lorenzo here sent false financial
6 information to potential investors. He was --
7 when he did that, he was the head of the
8 investment banking division. And he sent this
9 false financial information.

10 And you concede -- in your yellow
11 brief, you conceded quite a few times that he
12 did so with an intent to defraud. So he -- he
13 sent -- he presses send, and -- and an email is
14 sent that contains false financial information.

15 And I'm looking -- for example, I'm
16 looking at the language of 10b-5(c). Do you
17 think he has not engaged in an act which
18 operates as a fraud?

19 MR. HEIM: We do, Your Honor, for
20 several reasons. One --

21 JUSTICE KAGAN: We do what? We?

22 MR. HEIM: We do not think that he
23 engaged in any conduct that violated 10b-5(c)
24 because, in order for 10b-5(b) to have any
25 meaning, it --

1 JUSTICE KAGAN: I guess I'm wondering,
2 just take -- I understand that argument, and
3 it's, I think, a serious argument.

4 But pretend that 10b-5(b) was not in
5 the statute for just a second, and you're
6 entitled to come back to it, but just pretend
7 it wasn't in the statute. Is the behavior that
8 was charged here and that you've conceded was
9 done with an intent to deceive, is that
10 engaging in an act that would operate as a
11 fraud?

12 MR. HEIM: No -- no, Your Honor, for a
13 couple of different reasons. One, the Congress
14 has set up a statutory scheme for what
15 constitutes aiding and abetting liability, and
16 one of the key distinguishing features between
17 primary liability and aiding and abetting is
18 the concept of substantial assistance to a
19 primary violator.

20 In this case, Mr. Lorenzo just sent an
21 email at the direction of his boss with content
22 that was provided by his boss to the
23 recipients.

24 JUSTICE GINSBURG: I tell you, all the
25 content -- I mean, the email begins with a

1 summary. It says the banking -- investment
2 banking division is summarizing key points of
3 the debenture offer. And then there's the part
4 that allegedly was cut and paste.

5 But it starts out with a reference to
6 what the investment banking division is doing.
7 And it's signed by the head of -- head of that
8 division. It -- so -- so it's not simply
9 conveying what the boss told Lorenzo to send.
10 The whole thing wasn't cut and paste, just a
11 portion of it. Isn't that so?

12 MR. HEIM: Well, Justice Ginsburg, the
13 court below found that there was sufficient
14 attribution in this email to Gregg Lorenzo
15 because it does start off by saying that it's
16 being sent at the request of Gregg Lorenzo.

17 And the record -- and the D.C.
18 Circuit, after looking at the Commission's
19 findings, found that Gregg -- Frank Lorenzo was
20 not the maker of the statements in the email.
21 And one of the reasons for that finding was
22 because it was attributed at the start of the
23 email to -- to Gregg Lorenzo.

24 JUSTICE SOTOMAYOR: But -- but do we
25 have a --

1 JUSTICE KAGAN: Mr. Heim, if I
2 understand your position, it's irrespective of
3 that fact. In other words, suppose that
4 Mr. Lorenzo had made the email -- had -- had --
5 had come up with the email himself.

6 If I understand your position, you
7 would say, well, it's still not part of
8 10b-5(c) because that's a misrepresentation,
9 and misrepresentations can only be charged
10 under 10b-5(b). Isn't that what you would say?
11 I thought that that was what you just told me.

12 MR. HEIM: Well, no. That's slightly
13 different than our hypothetical because the
14 question is really whether Rule 10b-5(b)
15 misstatements can be a part of other
16 subsections. And in that particular instance,
17 if Mr. Lorenzo had drafted the email, there's
18 certain other conduct, and our position is
19 that, in order to be held liable for 10b-5(a)
20 and (c), Mr. Lorenzo would have to have engaged
21 in something in addition to just mere
22 misstatements.

23 JUSTICE ALITO: Did he make a
24 misstatement? Did he personally make a
25 misstatement? I think -- I thought your answer

1 was no, he did not make a misstatement.

2 MR. HEIM: No, he didn't, and that was
3 what the D.C. Circuit found.

4 JUSTICE ALITO: Okay. So then why
5 doesn't it fall within (c)? Why does your rule
6 that if it's a misstatement it can't fall
7 within anything other than (b) help you, when
8 you argue that he didn't make a misstatement,
9 he did something else? So why doesn't it fall
10 within (c)?

11 MR. HEIM: Because Mr. Lorenzo didn't
12 engage in any additional deceptive conduct
13 other than making -- once he was deemed to be
14 not the maker of the statement, our view is,
15 consistent with the majority of circuits that
16 have considered this question, is that some
17 other inherent deceptive conduct would have to
18 be engaged in by Mr. Lorenzo.

19 JUSTICE ALITO: Well, just take the
20 language of (c). Why doesn't his conduct fall
21 squarely within the language of (c)?

22 MR. HEIM: Well, because (c) talks
23 about conduct. It's a type of fraud that's
24 categorically different than merely
25 misstatements or omissions.

1 JUSTICE ALITO: Well, you -- you say
2 (c) can't include any verbal conduct? It has
3 to be something else? I don't quite know how
4 you're going to engage in a fraud without --
5 without saying some words.

6 MR. HEIM: No, Your Honor, that's not
7 our position. There can be cases where there's
8 both conduct and misstatements, which (c) would
9 cover.

10 Our position is, when you have a case
11 like this one, when there's only misstatements
12 and no deceptive conduct, that in order to
13 allow a plaintiff to repackage those claims as
14 claims under (a) and (c), would render 10b-5(b)
15 meaningless.

16 And, also, the D.C. Circuit set the
17 bar very low. If sending an email that was
18 prepared by somebody else constitutes enough of
19 an action to constitute primary liability, it
20 would really leave no room for any sort of
21 aiding and abetting liability. It would
22 convert anybody that, perhaps, gives some sort
23 of substantial assistance to a primary
24 violator.

25 JUSTICE SOTOMAYOR: I have a problem

1 with --

2 JUSTICE ALITO: Well, I don't see why
3 you need to get into aiding and abetting. He's
4 -- he's a principal under (c). He did the --
5 he did the act that is described in (c). It's
6 not necessary to -- to -- to -- to ask, all
7 right, somebody -- he didn't do the act that is
8 described in (c), but he aided and abetted
9 somebody else who did the act.

10 MR. HEIM: Well, there's an important
11 distinction to be drawn there because the
12 concept of primary liability really ties into
13 an active -- the statute and the regulation
14 discusses concepts of using and employing,
15 which implies a certain level of active
16 conduct.

17 Here, in this case, we have two emails
18 that were sent moments apart, and the content
19 was essentially prepared by his boss, Gregg
20 Lorenzo.

21 JUSTICE GINSBURG: I'd like to go back
22 to my question on that point. I'm looking at
23 the Petitioner's Appendix 107. It sets out one
24 of the two emails. And then there's a portion
25 that's underlined, and I thought that that is

1 what came from the boss, but the first part, it
2 does say at the request of, but it says the
3 investment banking division, of which Lorenzo
4 is the head, has summarized key points about
5 the debenture offering.

6 MR. HEIM: Well, no, Your Honor. The
7 -- the record in the holding below was that the
8 email as a whole came from the boss, Gregg
9 Lorenzo, not from Petitioner, and that the
10 Petitioner, Frank Lorenzo, was instructed by
11 Gregg Lorenzo to send the email out to clients
12 that were clients of his boss.

13 JUSTICE SOTOMAYOR: I'm sorry, I'm
14 having --

15 JUSTICE KAGAN: If I could --

16 JUSTICE SOTOMAYOR: -- I'm having a
17 problem from the beginning. Once you concede,
18 which I think you did, that you're not
19 challenging that your client acted with an
20 intent to deceive or defraud, that you aren't
21 challenging the D.C. Circuit's conclusion to
22 that effect? Is that correct?

23 MR. HEIM: Yes, Your Honor.

24 JUSTICE SOTOMAYOR: I don't
25 understand, once you concede that mental state,

1 and he has the act of putting together the
2 email and encouraging customers to call him
3 with questions, not to call his boss with
4 questions, how could that standing alone give
5 away your case?

6 MR. HEIM: Well, Your Honor --

7 JUSTICE SOTOMAYOR: I mean, that --
8 that makes him both the maker of a false
9 statement, whether his boss shared it or not,
10 and I know the courts below thought
11 differently, but it's also engaging in an act,
12 practice, or course of conduct which operates
13 or would operate as a fraud or deceit upon any
14 person.

15 Whether he was a maker or not, he was
16 encouraging the customers to call him directly
17 about buying or -- buying what was being
18 offered.

19 MR. HEIM: Well, Justice Sotomayor, I
20 think you're tying into what our position is
21 with respect to what more would be necessary to
22 convert over Mr. Lorenzo into a primary
23 violator, because, if those customers had, in
24 fact, called Frank Lorenzo, which they didn't,
25 and he would then have repeated the statements

1 or he would have engaged in some other type of
2 deceptive conduct, but merely producing and
3 sending the emails is such a low bar that the
4 D.C. Circuit said for --

5 JUSTICE KAGAN: But, Mr. Heim, we've
6 made very clear in Central Bank that this idea
7 of primary and secondary, if your actions fit
8 within the language of the particular provision
9 of the statute that you're charged on, then
10 you're a primary violator of that provision.
11 Right?

12 And even if, given some other
13 language, you wouldn't be, or given, you know,
14 some more common -- you know, some -- some
15 other understanding of what it means, if you
16 fit within the language and you violate that
17 language, you're a primary violator. That's
18 what we said in Central Bank.

19 And I guess the import of these
20 questions is he fit within that language. He
21 engaged in an act that operated as a fraud.

22 MR. HEIM: Well, Justice Kagan, our
23 view is that you can't take that language in --
24 in a vacuum. You have to consider it in the
25 context of the statutory framework that

1 Congress has put into place for aiding and
2 abetting liability because, if you were to find
3 that Frank Lorenzo engaged in a primary
4 violation here, it would undermine Congress's
5 statutory intent for setting up in Section --
6 Section 20 of the Exchange Act exactly who is
7 an aider and abetter. And the key distinction
8 is somebody who provides substantial
9 assistance.

10 Perhaps here the SEC --

11 JUSTICE KAGAN: Well, because -- that
12 is useful because there are some people who
13 don't fall within the language of the statute
14 and, nonetheless, can be charged as an aider
15 and abetter under Section 20, if the SEC does
16 it, if it's not a private action.

17 But what we said in Central Bank is,
18 look, if you do the thing that's -- that is
19 described in a particular subsection of this
20 statute or of the -- or of 10b-5, the rule that
21 implements it, then you're a primary violator
22 as to that subsection.

23 MR. HEIM: Our view is that Mr.
24 Lorenzo did not engage in conduct sufficient to
25 form a violation of 10b-5(c), for instance.

1 When -- when you look at the case law, it has a
2 much higher standard for what constitutes
3 violations of those provisions.

4 So, in order for Mr. Lorenzo to have
5 become a primary violator, he would have had to
6 engage in more active misconduct. If he, for
7 instance, would have set up a phony purchase
8 order to substantiate one of the points of the
9 email, if he were to go onto the Internet and
10 produce content under phony aliases, these are
11 all --

12 JUSTICE KAGAN: Well, those would have
13 been bad too, but I guess I just don't get why
14 the act that he did engage in is not an act
15 that operates as a fraud?

16 MR. HEIM: Well, for two reasons, Your
17 Honor. One, sending the email does not rise to
18 the level of using or employing a fraudulent
19 device under our view. And number two --

20 JUSTICE KAGAN: Well, that's -- you're
21 quoting me (a) and I was using the language of
22 (c), although, honestly, one could just as well
23 use the language of (a) because we've said that
24 a -- a fraudulent device is just a scheme to
25 defraud.

1 MR. HEIM: Well, Your Honor, it -- it
2 has a certain level of -- of intentionality
3 behind it in terms of Mr. Lorenzo. So sending
4 an email in and of itself would not, in our
5 view, raise -- rise to the level of employing
6 or using a deceptive device.

7 And, you know, an additional related
8 point to that is that this Court's holdings in
9 Central Bank, Santa Fe, and other cases confine
10 Rule 10b-5(b) to the boundaries of Section
11 10(b). So, in other words, Rule 10b-5 cannot
12 go beyond the boundaries of Section 10(b) in
13 terms of proscribing fraudulent conduct.

14 And that line of cases says, in order
15 for conduct to be fraudulent, it has to be
16 either deceptive or manipulative. And the
17 Chiarella case stands for the proposition that,
18 unless there's a misstatement or an omission or
19 some sort of manipulative trading, that those
20 are essentially the three categories of fraud
21 that are proscribed by Section 10(b).

22 JUSTICE KAGAN: I have to say I think
23 that that works against you, that principle,
24 because, you're right, that all of 10b-5 is
25 coming off of 10(b), which refers only to

1 manipulative or deceptive devices or
2 contrivances, but it's well understood that
3 misrepresentations or omissions are
4 manipulative or deceptive devices or
5 contrivances, and just those misrepresentations
6 alone.

7 I mean, if -- if some of your
8 arguments were correct, if you took them to
9 their logical extent, you would have to say
10 that misrepresentations and omissions don't
11 fall within that language of 10(b).

12 MR. HEIM: Well, Justice Kagan, that's
13 when you get into the importance of the Janus
14 decision because, once Frank Lorenzo is
15 determined not to be the maker of those
16 misstatements, in our view, it takes him out of
17 the category of misstatements and --

18 JUSTICE KAGAN: I understand, but your
19 argument would also take out the makers of
20 those misstatements.

21 MR. HEIM: Not necessarily because the
22 makers of the misstatements would have primary
23 liability. We're not contesting that here.
24 And it's not one of the issues that -- that's
25 at issue.

1 Our view is that, once Mr. Lorenzo is
2 deemed not to be the maker of the misstatement,
3 the Court then would look to see, well, is
4 there an omission, which there isn't here. Is
5 there manipulative trading being done?

6 CHIEF JUSTICE ROBERTS: Well, but I
7 thought -- I thought you said just a short
8 while ago that simply sending an email is -- is
9 -- is not enough.

10 MR. HEIM: Yes, Mr. Chief Justice.

11 CHIEF JUSTICE ROBERTS: So then you --
12 your distinction depends solely on the content
13 of the email? In other words, it's -- it gets
14 down to the basic question of whether or not
15 Frank Lorenzo was involved at all in the
16 drafting?

17 So, for you -- for you to prevail, we
18 have to understand him as -- as, I guess he
19 argued at one point, not even reading the
20 email?

21 MR. HEIM: No, Mr. Chief Justice.
22 That -- I don't think, in order for us to
23 prevail, you have to make that finding.

24 Our position is that the Court should
25 establish the test that Mr. Lorenzo's conduct

1 has to be something that's inherently
2 deceptive, and that would be sufficient to push
3 him over the line from being somebody who is
4 not the maker of the misstatement but could
5 still somehow be held liable under Rules
6 10b-5(a) and (c).

7 JUSTICE BREYER: So why wasn't it -- I
8 mean, I -- I thought he sent his email around
9 to people and said this company, which he knew
10 was worthless from their filing, has \$10
11 million in assets, which he knew wasn't true,
12 and also had \$43 million other to -- to back it
13 up, which he knew wasn't true, and his defense
14 was, well, I only sent it because my boss told
15 me, his -- the other Lorenzo.

16 And so, fine, then he's not the maker.
17 But it seems pretty bad. I mean, he'd been
18 working with this company for quite a long time
19 and these investors. And so what is it that
20 makes this just aiding and abetting? Maybe he
21 didn't make the statement, but he was sure a
22 big deal participant.

23 MR. HEIM: Yes, Justice Breyer. And
24 -- and to be clear, Mr. Lorenzo acknowledged in
25 the record at the trial that he made a mistake.

1 And under our position, Mr. Lorenzo would not
2 get off scot-free. There's very stringent
3 remedies against aiders and abettors, as well
4 as, as referenced before, Section 17(a)(2),
5 which is not at issue here, would seem to
6 perhaps fit much better because it's a -- it's
7 a subsection that deals with obtaining money or
8 property under false statements.

9 And that doesn't raise the same Janus
10 issues. And that doesn't raise the
11 distinctions --

12 JUSTICE SOTOMAYOR: I'm -- that's what
13 I'm having trouble with. Whether 17(a)(2) was
14 charged or not is irrelevant, because the way
15 17(a) is structured, it's not controlled by
16 Janus at all.

17 MR. HEIM: Well --

18 JUSTICE SOTOMAYOR: Because it doesn't
19 talk about making statements. It talks about
20 obtaining money or property by statements.
21 There's no reason why we should limit, under
22 Janus or otherwise, limit (3) from -- or
23 17(a)(1) or (3) from taking their natural
24 meaning. If you make a materially false
25 statement intentionally, which you've conceded

1 he did, then he engaged in a transaction,
2 practice, or course of business which operated
3 or would operate as a fraud.

4 MR. HEIM: Well, Justice Sotomayor,
5 just to be clear, our position, as was the D.C.
6 Circuit, was that Mr. Lorenzo was not the maker
7 of -- of these statements.

8 JUSTICE SOTOMAYOR: He wasn't the
9 maker --

10 MR. HEIM: Right.

11 JUSTICE SOTOMAYOR: -- but he had the
12 scienter.

13 MR. HEIM: He had the scienter, but
14 that's --

15 JUSTICE SOTOMAYOR: And you're not
16 disputing that.

17 MR. HEIM: Correct, but that's not the
18 test in terms of whether he would fall into one
19 category or the other. And this Court, in U.S.
20 versus Naftalin, was addressing Section 17(a)
21 and its different subsections, and it said that
22 each subsection prohibits a different type of
23 conduct. And in order to give meaning to each
24 of the different subsections, it just cannot be
25 read in such a way to say that every claim, for

1 instance, for misstatements, could easily be
2 brought under 17(a)(1) or 17(a)(3).

3 JUSTICE KAGAN: Well, you -- you're
4 suggesting that because (b) refers specifically
5 to misrepresentations, that those
6 misrepresentations do not fall within (a) or
7 (c). But I guess, to understand that view of
8 the Act, which is everything prohibits
9 something different, you would have to, for
10 example, think that (a) and (c) are mutually
11 exclusive.

12 What's the difference between (a) and
13 (c)?

14 MR. HEIM: (a) and (c), Your Honor,
15 are closer together. They both deal with
16 fraud. They both deal with deceptive conduct.

17 The -- the Court doesn't have to reach
18 the issue as to whether or not there's a
19 difference between (a) and (c) --

20 JUSTICE KAGAN: Well, no, but we have
21 to understand what the statute is about.
22 You're presenting one view of the statute,
23 which is that each of these -- or the rule,
24 which -- which is that each of these different
25 sections is -- is apart from each -- is apart

1 from the rest, that each prohibits a different
2 thing from the -- and I guess I'm suggesting a
3 different view of the statute, which -- which
4 is -- which (a) and (c) make pretty clear, that
5 these are very overlapping. One overlaps the
6 other overlaps the other. They're all meant to
7 essentially address the same thing.

8 This is a kind of belt-and-suspenders
9 statute, where it's like we're going to find
10 every possible way to say this thing in order
11 to make sure that fraudulent acts are covered.

12 MR. HEIM: Well, Justice Kagan, we
13 don't dispute that there could be some overlap
14 between the different subsections. But here,
15 in order to sustain the D.C. Circuit, it would
16 really be a wholesale elimination of one of the
17 subsections, which is Rule 10b-5(b).

18 And that would be contrary to the --
19 to the holding of *Corley versus United States*,
20 where the Court is -- is -- the purpose is to
21 find meaning for each of the different
22 subsections and not read it in a way that would
23 make one of them redundant.

24 JUSTICE KAGAN: But then I'm going to
25 ask you again, what's the difference in meaning

1 between (a) and (c)?

2 MR. HEIM: Well, the -- they both deal
3 with conduct. And I don't know if there is a
4 real meaningful difference between (a) and (c)
5 because they both have very similar language
6 between the two. But I think the Court can --
7 as -- as the lower courts have, they can
8 consider (a) and (c) as one type of fraud,
9 which is conduct-based because the conduct --
10 the language is very similar, the plain
11 language of (a) and (c). And the courts below,
12 in the majority opinions that we cite, do treat
13 (a) and (c) as very similar on one hand and
14 then (b) as distinct.

15 And the majority position is -- is
16 that plaintiffs should not just be allowed to
17 repackage inadequate 10b-5(b) claims, which are
18 just the misstatement claims, and say that
19 those misstatements, standing alone, can
20 somehow be enough to satisfy the language of
21 (a) and (c), which is a conduct-based fraud.

22 And if the Court was to uphold that
23 view, it would render 10b-5(b) meaningless and
24 I think also, by implication, Section 17(a)(2),
25 which 10b-5(b) was drawn on. So there's a lot

1 of problems with sustaining the court's opinion
2 below with regards to that.

3 JUSTICE GINSBURG: Can I ask you just
4 some basic questions? The -- there's no doubt,
5 is there, that at the time this email was sent,
6 Lorenzo knew full well that the company was
7 worthless?

8 MR. HEIM: Well, we -- we did not
9 challenge the scienter finding, which was also
10 conceivably, and as set out there, a
11 recklessness finding. Mr. Lorenzo testified he
12 did not see the disclosures in the earlier SEC
13 filings.

14 But we're not contesting scienter,
15 which could be recklessness.

16 JUSTICE GINSBURG: And the record is a
17 little confusing. At one point, the ALJ says
18 he didn't even look at the email. At another
19 point, he himself testified that he authored
20 the emails.

21 MR. HEIM: Well, the -- the -- well,
22 there is inconsistencies in the record, but,
23 overall, the -- the import of the testimony
24 taken together was such that it was Gregg
25 Lorenzo that was the -- the creator of the

1 email and the maker of the statements. And the
2 SEC has not challenged that -- that holding
3 either on -- in their case.

4 And I would like to reserve the rest
5 of my time for rebuttal if it's okay with the
6 Court.

7 CHIEF JUSTICE ROBERTS: Thank you,
8 counsel.

9 Mr. Michel.

10 ORAL ARGUMENT OF CHRISTOPHER G. MICHEL
11 ON BEHALF OF THE RESPONDENT

12 MR. MICHEL: Mr. Chief Justice, and
13 may it please the Court:

14 Petitioner's decision to send emails
15 that grossly misrepresented the financial
16 prospects of his client and to give illusory
17 promises designed to deceive investors into
18 backing a business that he knew was failing
19 constitute a quintessential securities fraud.
20 His conduct falls within the plain text and the
21 common-sense meaning of Section 17(a) of the
22 Securities Act, Section 10(b) of the Exchange
23 Act, and subsections (a) and (c) of Rule 10b-5.

24 JUSTICE SOTOMAYOR: Why didn't you
25 charge --

1 CHIEF JUSTICE ROBERTS: It sounds like
2 the --

3 JUSTICE SOTOMAYOR: I'm sorry.

4 CHIEF JUSTICE ROBERTS: It sounds like
5 the argument your -- your client made in Janus
6 that was rejected by this Court.

7 MR. MICHEL: Well, Mr. Chief Justice,
8 in Janus, the provision at issue was 10b-5(b).
9 And the government is no longer pressing a
10 10b-5(b) charge in this case.

11 The -- the Janus opinion, from start
12 to finish, is very clear that it's interpreting
13 the term "make" in Rule 10b-5.

14 JUSTICE GINSBURG: But the essential
15 argument on the other side is that the argument
16 you're now pressing is just an end run about
17 Janus. It would render Janus essentially
18 inconsequential. All you do is repackage what
19 would have been a 10b charge under 17 or
20 10b-5(a) and (c).

21 MR. MICHEL: Well, Your Honor, a
22 couple of points in response to that.

23 First of all, Janus will still have
24 significant meaning, especially in private
25 actions, because Janus limits the number --

1 limits who can come within 10b-5(b). And the
2 Janus opinion was careful to -- to distinguish
3 between aiders and abettors who are sort of
4 background actors, the speech writer example is
5 the one that the Court gave, preparatory actors
6 who aren't themselves employing a device under
7 (a) or engaging in an act under (c) but are
8 instead merely supporting that.

9 So our contention is not that everyone
10 who has some involvement in a statement will
11 somehow become primarily liable under (a) and
12 (c) and Section 17(a). As Justice Kagan said,
13 Central Bank was very clear that the test for
14 primary liability is simply that the defendant
15 has to satisfy all the elements of the statute.
16 And in -- and Central Bank says expressly that
17 even if somebody is a secondary actor in some
18 colloquial sense, like a lawyer or an
19 accountant, that person can still be primarily
20 liable under the securities laws if that person
21 satisfies all of the statutory requirements, as
22 Petitioner did here and as I don't take him to
23 seriously contest.

24 His argument seems to be that
25 subsection (b) of 10b-5 has some sort of field

1 preemptive effect in that it serves as the sole
2 vehicle for bringing claims -- securities fraud
3 claims involving statements.

4 JUSTICE GORSUCH: Counsel, that's not
5 how I understand the argument. And as I
6 understand the argument, it goes something like
7 this, and it proceeds in about five or six
8 steps, I think.

9 First, Central Bank says we've got to
10 look at the statute. The rule is nice, but
11 let's look at the statute. So we look at the
12 statute, and it prohibits manipulative or
13 deceptive devices essentially.

14 Well, no manipulation is alleged here,
15 just deception. Are we on the same page so
16 far?

17 MR. MICHEL: Yes, Justice Gorsuch.

18 JUSTICE KAGAN: Okay. All right.
19 Deception, I think of fraud.

20 JUSTICE KAGAN: Well, are you?
21 Because there's another statute --

22 JUSTICE GORSUCH: Well, if I -- if I
23 --

24 JUSTICE KAGAN: -- too, which is
25 Section 17.

1 MR. MICHEL: That's true. I took
2 Justice Gorsuch to be referring to 10b-5.

3 JUSTICE GORSUCH: I'm just talking
4 about 10(b) -- 10(b) at the moment. We can get
5 to 17 in a minute. All right. But -- so we're
6 -- so we're on the same page.

7 And when we talk about deception or
8 fraud, we have mens rea and actus reus. You
9 say I'm not contesting mens rea, just actus
10 reus. Okay, fine.

11 When we get to actus reus, no omission
12 is alleged, just an action. You could -- you
13 could have an actus reus of fraud by act or
14 omission, only act's charged here. And the
15 only act seems to be this statement issued to
16 potential investors, and we have a finding from
17 the D.C. Circuit that it wasn't made, that act
18 wasn't made, that statement wasn't made by this
19 defendant.

20 Now we could maybe overturn that, I
21 suppose, and you could argue that. But, if you
22 didn't make the act a fraud that's alleged,
23 then doesn't that necessarily imply he
24 substantially assisted if anything? I think
25 that's the argument.

1 MR. MICHEL: So I think it was maybe
2 around step four that I disagreed with you, and
3 that is I think you said that he didn't make
4 the act. But I do think it's important to
5 distinguish, to your point on the text of the
6 statute and the rule, what the D.C. Circuit
7 found was that he didn't make the statement,
8 and, therefore, he didn't fall within the text
9 of 10b-5(b).

10 JUSTICE GORSUCH: But the only act of
11 fraud, you have to have an act that deceives
12 someone else. And the only thing that deceived
13 anybody allegedly here were these emails,
14 right?

15 MR. MICHEL: That's -- that's --

16 JUSTICE GORSUCH: And he didn't -- and
17 he didn't make them.

18 MR. MICHEL: That's -- well, the D.C.
19 -- the ALJ found and the D.C. Circuit affirmed
20 that he did personally produce and send these
21 emails.

22 JUSTICE GORSUCH: Well, are -- are you
23 challenging that? I understood the government
24 to say we're not challenging the D.C. Circuit's
25 holding that he didn't make the statements.

1 MR. MICHEL: We're not -- we are not
2 challenging the finding that he didn't --

3 JUSTICE GORSUCH: Okay.

4 MR. MICHEL: -- make the statements.
5 But we -- we -- but the D.C. Circuit also
6 determined, upholding the ALJ, that he did do
7 the act. And if you look at the language of
8 (c), Rule 10b-5(c), he engaged in the act of
9 sending the emails.

10 And I do want to make clear that this
11 is not simply retransmitting the statement. He
12 sent the emails on behalf of the investment
13 banking division, which is exactly what his
14 boss calculated would make the statements more
15 misleading.

16 JUSTICE GORSUCH: The actus -- I think
17 where we're getting stuck, and then I'll --
18 I'll stop, I promise, is that the actus reus
19 for fraud is the act of actually deceiving
20 another person. And the only thing that could
21 have done that here would have been the
22 transmission of the emails to other persons,
23 right?

24 MR. MICHEL: I -- I agree.

25 JUSTICE GORSUCH: Okay.

1 MR. MICHEL: But I think the
2 transmission of it --

3 JUSTICE GORSUCH: We agree -- we agree
4 on that.

5 MR. MICHEL: Yes --

6 JUSTICE GORSUCH: Okay.

7 MR. MICHEL: -- but the transmission
8 of -- the statement in the abstract, you know,
9 does -- does nothing. It was the transmission
10 of the email, which is an act.

11 I think, if you look at the ordinary
12 meaning of "act," it would include sending an
13 email or the ordinary meaning of the verb
14 "employ" in 10b-5(a).

15 JUSTICE GORSUCH: But the act -- the
16 relevant act for fraud, again, though, is the
17 act of deceiving another.

18 MR. MICHEL: And -- yes. And this
19 email was extraordinarily deceptive, as was
20 commented earlier. There were -- there were
21 three gross mischaracterizations of the company
22 under the representation that they would
23 provide different layers of protection.

24 JUSTICE SOTOMAYOR: Just so I
25 understand the SG's position on this issue, do

1 you believe that Janus controls 17(a)(2)? You
2 didn't charge it or it wasn't charged here. I
3 don't know if it was -- it wasn't likely you
4 personally, but are -- are you taking -- is the
5 SG's office taking the position that Janus
6 controls 17(a)(2)?

7 MR. MICHEL: No, that's not the SG
8 office's position. It's not the Commission's
9 position. It wasn't charged in this case,
10 you're right, Your Honor, but we would not say
11 that it controls.

12 JUSTICE SOTOMAYOR: Do you know why?

13 MR. MICHEL: I don't actually know
14 exactly why (a)(2) wasn't -- 17(a)(2) wasn't
15 charged in this case, but the reason we
16 wouldn't take that position is that the verb
17 "make" is not in 17(a)(2), and that is
18 critically the word that the Court was
19 interpreting in Janus.

20 I -- on that point, I do want to make
21 clear that Janus was self-consciously a
22 decision only about 10b-5(b). I think it was
23 the second question in the oral argument in
24 that case from Justice Sotomayor was why isn't
25 there an (a) claim, a scheme claim in this

1 case? And petitioner's response was not that
2 his clients wouldn't have been liable under
3 that theory. It was that that simply hadn't
4 arisen in the case.

5 So Janus was clearly just deciding the
6 meaning of (b), which I do think goes to the
7 real flaw in Petitioner's argument, which is,
8 again, that subsection (b) somehow restricts
9 the meaning of (a) and (c) in Rule 10b-5 and
10 also somehow restricts the meaning of
11 subsection (a) of a completely different
12 statute, the Securities Act of 1933.

13 And I do think it's a quite
14 extraordinary argument to say that the
15 Commission could, by adopting a rule in 1942,
16 change the meaning of a statute that was
17 enacted by the Congress and signed by the
18 President in 1933.

19 In fact, you know, this Court has
20 repeatedly rejected that kind of field
21 preemption or exclusive remedy argument in the
22 securities laws, most prominently in the
23 Affiliated Ute case, where the Court says quite
24 literally even though petitioner is not -- or
25 the securities seller in that case is not

1 liable under (b), he is liable under (a) and
2 (c) because those provisions are not so
3 restricted.

4 Another good example is the Herman and
5 MacLean case that we cite in our brief. There,
6 petitioner was -- the defendant was found
7 liable under Rule 10b-5 for misstatements or
8 omissions in a registration statement, even
9 though Section 11 of the Securities Act
10 applies expressly to misstatements in
11 registration statements.

12 And the Court in a quite extended
13 discussion said we're not going to apply a
14 theory of displacement. We're not going to
15 apply a theory of exclusive remedies.

16 In fact, both of the two statutes, the
17 Securities Act and the Exchange Act, have
18 clauses that say they're not the exclusive
19 remedies for securities laws.

20 JUSTICE BREYER: What does "fraud"
21 mean, other than trying -- doing something
22 to -- to create in the mind of the hearer or
23 recipient a false belief that is material?

24 MR. MICHEL: I -- I think that's a
25 good -- I think that's a good description of

1 it.

2 JUSTICE BREYER: Well, that's Black's
3 Law Dictionary. It's good enough. And, fine.

4 (Laughter.)

5 JUSTICE BREYER: If that's what it is,
6 if that's what it is, there could be two ways
7 of doing it. One, you make the statement
8 yourself. Two, you're part of a group where
9 someone else makes the statement, but you play
10 a pretty important role.

11 Indeed, you might be the boss of the
12 group, in which case you're not an aider or
13 abetter. So, if you're not the maker, but you
14 do, in fact, give rise to, perhaps as the boss,
15 the false misrepresentation, wouldn't that be
16 covered by (a) and (c)?

17 MR. MICHEL: Yes.

18 JUSTICE BREYER: Okay. I know that's
19 your position.

20 (Laughter.)

21 MR. MICHEL: Yes.

22 JUSTICE BREYER: But I just wondered
23 why this isn't fairly simple, because now what
24 we did in Janus is we took a category of things
25 which we thought the maker had made the false

1 representation, and we thought, no, he wasn't
2 the maker, but, still, he might be the big boss
3 of a group of people who, in fact, took actions
4 or made statements to cause the false
5 representation to arise in the mind of the
6 listener. I thought perhaps you would agree.

7 MR. MICHEL: I -- I do. I do agree.
8 I do agree, Justice Breyer.

9 JUSTICE BREYER: And that, it seemed
10 to me, is your basic argument.

11 MR. MICHEL: That's correct. And, you
12 know, we recognize there was a close decision
13 in Janus, but I think Janus is ultimately a
14 helpful decision for the Commission.

15 JUSTICE BREYER: I was thinking about
16 it that way, but I dissented in Janus. And so
17 I don't want to be --

18 (Laughter.)

19 JUSTICE BREYER: -- I don't want to be
20 --

21 MR. MICHEL: Well, I actually think --

22 JUSTICE BREYER: I don't want it to be
23 oversimplified.

24 MR. MICHEL: Right. No, I think, you
25 know, one quite simple explanation for Janus is

1 that the Court simply followed the text of the
2 rule, and that's precisely -- and there was
3 dispute about it, but everybody agreed that you
4 were going to interpret the text of the rule.

5 And we believe, if you interpret the
6 text of the rule here, it is quite clear, and
7 -- and Petitioner is almost conceding, I think,
8 that his conduct falls within the meaning of
9 (a) and (c).

10 It's only this argument that (b)
11 somehow restricts or supersedes or preempts a
12 charge under (a) and (c) of Rule 10(b).

13 CHIEF JUSTICE ROBERTS: Well, no, the
14 argument is if you read (a) and (c) the way you
15 do, Janus is a dead letter, right? I mean, in
16 -- in the reply brief, the Petitioner says you
17 never suggest any situation to which Janus
18 would apply, if your reading of 10b-5 prevails.

19 MR. MICHEL: Mr. Chief Justice, that
20 -- we disagree with that. I mean, if you had
21 somebody --

22 CHIEF JUSTICE ROBERTS: Well, let's
23 hear if you -- go ahead.

24 MR. MICHEL: Well, perhaps we didn't
25 suggest it in -- in our brief, but, you know,

1 if you had somebody who was far back in the
2 chain of drafting copy, you know, for example,
3 a marketing director who drafted copy that was
4 itself not deceptive but that that person knew
5 would then be used in a fraud or you had a
6 speech writer who drafted something that was
7 not wrong but he knew was later going to be
8 used in a fraud, that person in our view would
9 be an aider and abetter.

10 That would not be a primary violation,
11 for the important reason that Rule 10b -- that
12 Section 10(b) itself requires a deceptive act.

13 And simply submitting material that
14 you know is later going to be used fraudulently
15 would give you the -- the requisite mens rea
16 for substantial assistance but not for a
17 violation of 10b-5(b) itself.

18 And Janus will be the critical case in
19 those scenarios between primary liability and
20 secondary liability. And that's, of course,
21 essential in a private action because there is
22 no cause of action after Central Bank for
23 aiding and abetting in a private action.

24 And Janus will be the difference
25 between liability and no liability for people

1 in that situation. Now I do --

2 JUSTICE BREYER: I think the Chief
3 Justice is thinking of someone who does --
4 prior to Janus, would have made a statement,
5 and now that seemed to be excluded in Janus.

6 MR. MICHEL: So the -- I mean --

7 JUSTICE BREYER: And -- and now we
8 have a way of making, for that set of people,
9 Janus irrelevant because the aiding and
10 abetting argument you just made would have
11 existed pre-Janus or ante-Janus.

12 One possible attitude is to say: So
13 much the better. But that perhaps would be the
14 dissenters' attitude.

15 (Laughter.)

16 JUSTICE BREYER: And so -- so -- so
17 -- so what is the answer to the Chief Justice's
18 question, which was raised by your opponents,
19 that it still has life and, in fact, makes a
20 difference even for people who before and
21 after, maybe in the private context, what is --
22 what is --

23 MR. MICHEL: May -- well, let me try
24 to be clear. Before Janus, there would have
25 been an argument that somebody far back in the

1 chain of -- of making a statement was a maker
2 of the statement under -- and was primarily
3 liable under 10b-5(b). That means there could
4 have been a private action against that
5 defendant.

6 After Janus, that argument is no
7 longer available with respect to people far
8 back in the chain who didn't commit one of the
9 -- who don't fall within (a) or (c) as primary
10 violators.

11 Now we think that's not this case
12 because Petitioner does fall within (a) and
13 (c). But --

14 CHIEF JUSTICE ROBERTS: Your -- so the
15 SEC would argue that somebody that prepared one
16 of these documents that's -- contains
17 fraudulent material or -- or knew that it would
18 be used in a fraud, in other words, you would
19 say, oh, don't worry about that, that person's
20 not a maker, he's not going to be liable
21 because of Janus?

22 MR. MICHEL: Before Janus, we would
23 have said he was a maker. But we accept Janus.
24 And now we would say that that person is an
25 aider and abetter who could be pursued by the

1 Commission. That's -- that's the Malouf
2 decision that we've cited in -- in our brief.

3 Now I do want to make the point that
4 aiding and abetting liability will not always
5 be available. And so it's tempting to say that
6 that's always a fallback for the Commission.
7 First of all, of course, it's not available at
8 all in a private right of action, which is one
9 of the principal ways in which victims of fraud
10 can recover money.

11 But it's also not available even in a
12 Commission action unless there's a primary
13 violation. You have to find the primary
14 violator. And that distinguishes this from
15 typical criminal aiding and abetting under 18
16 U.S.C. 2.

17 So you can easily hypothesize a
18 situation in which somebody who makes the
19 statement, perhaps a high-up corporate
20 executive or a board of directors, lacks the
21 scienter required for primary liability because
22 they don't know what's going on with the
23 details of the financial reports; they're
24 trusting the lower-down people to do that.

25 And the Commission can't pursue them

1 for a primary violation because they lack
2 scienter. And then the Commission can't pursue
3 the aider and abetter because there's no
4 primary violator.

5 And that would, we submit, tear a big
6 loophole in securities fraud law, and that
7 would be a very damaging result for the
8 Commission that I don't think Congress intended
9 and that I don't think is within the ordinary
10 meaning of the text here.

11 My -- my friend said a couple of times
12 that -- tried to draw a distinction between
13 conduct and statements. And -- and as some of
14 the questioning suggests, I just don't think
15 that holds up. To start with, the Stoneridge
16 opinion expressly says that the petitioner's
17 course of conduct included both oral and
18 written statements. So this Court has made
19 clear that conduct can include statements.

20 And -- and in addition, Section 10(b)
21 itself, which --

22 JUSTICE KAGAN: I think he was saying
23 something to the effect of, if it's only
24 statements, it can't be conduct.

25 MR. MICHEL: Yeah, I -- I don't think

1 that can work either. And I -- I think it was
2 you, Justice Kagan, who suggested this. As my
3 friend said, everything in 10b-5 has to come --
4 has to emanate from 10(b). And the only two
5 nouns that are at issue in 10(b) are "devices"
6 and "contrivances."

7 Now Section 10(a) includes "device" --
8 or Rule 10b-5(a) includes "devices," which I
9 take him to -- to concede is conduct. So,
10 unless his position is that all statements are
11 contrivances and covered by 10(b) for that
12 reason, I think he's conceded --

13 JUSTICE GORSUCH: Well, counsel --

14 MR. MICHEL: -- that statements are
15 devices under 10(b).

16 JUSTICE GORSUCH: -- I think what I'm
17 -- what I heard at any rate -- and we can --
18 it's an interesting question what the argument
19 is, but I had understood it that, all right,
20 one can create a false impression in the mind
21 of another through conduct or through
22 statements. All right?

23 Here, the only thing that was alleged
24 to create a false impression in the mind of
25 others was this statement and that that's the

1 problem you have. If the only false act, the
2 only actus reus, was a statement and he didn't
3 make it, then what?

4 MR. MICHEL: Well, I think he -- he
5 didn't make the statement, we -- the D.C.
6 Circuit found, but he still employed the device
7 to defraud or engaged in --

8 JUSTICE GORSUCH: He sure helped. I
9 mean, there's no doubt about it. He did a lot
10 to help. But he didn't engage in any
11 independent conduct that created a false
12 impression in the mind of the other, other than
13 disseminate the false statement that did that.

14 MR. MICHEL: Well, I -- I guess I -- I
15 might quibble with the last point, that -- the
16 "other than" is quite important. You know, he
17 sent the email that --

18 JUSTICE GORSUCH: Oh, for sure. Oh,
19 for sure. And -- and you -- you've -- you've
20 penalized him heavily and are going to be able
21 to on anybody's account, but we're trying to
22 draw a line here between primary and secondary.
23 And that's -- that's where I'm stuck.

24 MR. MICHEL: Well, on the facts of
25 this case, Your Honor, there is no secondary

1 liability charge. So, if -- if the Court were
2 to reverse, he would not be punished at all.

3 JUSTICE GORSUCH: We're not worried
4 about just this case, are we, counsel?

5 MR. MICHEL: I -- I did want to make
6 that one point.

7 JUSTICE GORSUCH: You've made the
8 point, but you -- you concede we've got bigger
9 fish to fry than that, right?

10 MR. MICHEL: Right. I -- I agree with
11 that and I -- I do think you'll see sort of
12 higher stakes and more sophisticated frauds,
13 but I don't think you're likely to see a sort
14 of more egregious fraud than this, where
15 Petitioner, in addition to transmitting the
16 statement that was made by Gregg Lorenzo, sent
17 it as the head of the investment banking
18 division. He asked -- he offered to follow up
19 with questions. He signed it under his own
20 name.

21 JUSTICE GORSUCH: You've got lots of
22 mens rea, I grant you. Okay? And -- but --

23 MR. MICHEL: Those are acts.

24 JUSTICE GORSUCH: Oh, those are acts.
25 They are indeed acts. But, if the act that

1 created the deception in the mind of another
2 wasn't any conduct, it was a statement, then
3 what, is the question?

4 MR. MICHEL: I suppose the answer to
5 that is that sending an email is conduct.

6 JUSTICE KAGAN: Yeah, it took acts to
7 get to those minds, right?

8 MR. MICHEL: Absolutely, and the act
9 it took in particular was sending the email,
10 sending the two emails, without which these
11 investors never would have been deceived. I --
12 I do very strongly think that the act was what
13 led to the deception.

14 JUSTICE GORSUCH: It helped the
15 deception, but the deceptive -- the thing that
16 caused the deception in the mind of the other,
17 to get back to Justice Breyer's quotation from
18 Black's, was the statement in the email, the --
19 the erroneous facts transmitted to investors in
20 the email, right? That's it? There's not --

21 JUSTICE KAGAN: No, it can't cause the
22 deception unless it gets to those readers.

23 MR. MICHEL: I -- I agree with that.
24 I mean, I suppose another way to think of it is
25 if Petitioner had -- if Petitioner had called

1 up the investors on the phone and said, you
2 know, I hope you just got the email that I
3 sent, this is not my statement, you know, I
4 didn't make it, Gregg Lorenzo made it, but,
5 boy, you really want to look at it because it's
6 a great investment opportunity, and if you have
7 any questions, let me know. The investment
8 banking division is the one sending this --

9 CHIEF JUSTICE ROBERTS: When you said
10 -- when you said -- just to clarify, when you
11 said, "I agree with that," were you agreeing
12 with Justice Gorsuch or Justice Kagan?

13 (Laughter.)

14 MR. MICHEL: I think it was Justice
15 Kagan.

16 CHIEF JUSTICE ROBERTS: Okay.

17 JUSTICE BREYER: Is there a
18 distinction between conduct and statement?

19 MR. MICHEL: Well --

20 JUSTICE BREYER: Okay.

21 MR. MICHEL: No.

22 JUSTICE BREYER: What did you just
23 state?

24 MR. MICHEL: Yes.

25 (Laughter.)

1 JUSTICE BREYER: You know, I mean,
2 don't we make statements all the time through
3 conduct?

4 MR. MICHEL: Yes, of course.

5 JUSTICE BREYER: Thank you. I --
6 since it was a favorable question, I thought
7 you might be --

8 (Laughter.)

9 MR. MICHEL: And, you know, I -- I
10 think it runs in both directions. The -- the
11 Court has said -- you know, in --- in criminal
12 law cases, the Court has said that not every
13 crime that, you know, involves some sort of
14 speech, you know, necessarily raises a First
15 Amendment concern. I think it's a -- it's a
16 well grounded principle that conduct does
17 include statements.

18 I -- I suppose a final point, as we're
19 sort of searching for meaning for (b), I do
20 think the Court has, you know, reiterated on
21 many occasions that even a provision that seems
22 redundant or that doesn't add anything to the
23 substantive scope of the law can still serve a
24 valuable purpose by clarifying or by -- by
25 marking out what the heartland of the -- of the

1 violation is.

2 And here, if you look at the history
3 of the securities laws, Rule 10b-5 came about
4 nine years after the Securities Act, which had
5 changed the common-law rule and brought
6 disclosure and statements to the fore as a --
7 as a responsibility for those issuing and
8 trading in securities.

9 So it makes sense that Rule 10b-5(b)
10 would -- would mark out statements as a
11 particular area of concern and would say, if
12 you can show that somebody made a statement,
13 then you've shown liability under 10b-5.

14 But I don't think that that in any way
15 forecloses liability under (a) and (c). And as
16 I said earlier, the Affiliated Ute case, I
17 think, is -- is squarely on point and says
18 somebody can be liable under (a) and (c) even
19 if they're not liable under (b).

20 Justice Alito's opinion, which we
21 cited at page 36 of our brief, in the Lee case
22 from the Third Circuit, I think is helpful on
23 this point too. In that case, there was a
24 statute that covered both crimes of deceit on
25 the one hand and tax evasion on the other hand.

1 And Justice Alito's opinion explained
2 that a tax crime that was not evasion but still
3 involved deceit would be covered by that
4 statute because the enumeration of tax evasion
5 didn't preempt the field or didn't serve as the
6 exclusive vehicle for all tax-related claims.
7 And I think the same analysis applies here.

8 The statement -- the enumeration of
9 statements in Rule 10b-5(b) does not preempt or
10 foreclose acts of conduct that fall within the
11 text of the statute.

12 If there are no further questions,
13 we'd ask the Court to affirm.

14 CHIEF JUSTICE ROBERTS: Thank you,
15 counsel.

16 Four minutes, Mr. Heim.

17 REBUTTAL ARGUMENT OF ROBERT HEIM

18 ON BEHALF OF THE PETITIONER

19 MR. HEIM: Thank you.

20 My friend argues that their plain
21 language of the rule and the statute covers Mr.
22 Lorenzo's conduct. Yet, in the briefs that the
23 SEC has submitted, they haven't cited any cases
24 that cover simply sending an email out on
25 behalf of another would qualify for primary

1 liability.

2 Secondly, the loophole hypothetical
3 that was discussed as well, and the concerns
4 about hindering the SEC's enforcement program,
5 are really unfounded here because the SEC, in
6 addition to having aiding and abetting
7 liability, also has 17(a)(2), which covers
8 specifically a situation where a person uses a
9 false statement to obtain money or property.

10 So that, the 17(a)(2), it's our
11 position, covers the concerns that the Court
12 raised in situations where perhaps there's a
13 big boss that's --

14 JUSTICE GINSBURG: Are you saying --
15 saying 17(a)(2) covers this case? Are you
16 saying that Lorenzo used this statement to
17 obtain money or property?

18 MR. HEIM: No, I think if that -- if
19 that had been charged, Mr. Lorenzo would have
20 arguments and defenses to 17(a)(2), but the
21 charge would have been a closer fit to what the
22 conduct is here and it would not have raised
23 the serious issues with regards to undermining
24 Congress's statutory framework with regards to
25 aiding and abet -- aiding and abetting and the

1 requirement to have substantial assistance,
2 because, as Justice Gorsuch noted, Mr. Lorenzo
3 did not engage in an inherently deceptive act.
4 Sending an email is not inherently deceptive.

5 And our position, consistent with the
6 circuit court majority, is that the act, in
7 order to take Mr. Lorenzo out of the category
8 of misstatements and into the category of (a)
9 and (c), has to be something that's inherently
10 deceptive. And it -- otherwise, it's just a
11 matter -- it's a very low bar.

12 JUSTICE GINSBURG: Why isn't it
13 inherently deceptive to tell a succession of
14 untruths?

15 MR. HEIM: The act is the sending of
16 the email. And the -- the conduct that
17 occurred here with Gregg Lorenzo is the actual
18 maker of the statement.

19 So Frank Lorenzo is essentially a
20 conduit. He's somebody that's transmitting
21 statements, you know, with scienter in this
22 case on behalf of another. But, at the same
23 time, simply sending an email is not enough to
24 transform Frank Lorenzo into a primary violator
25 from, perhaps, somebody who gave substantial

1 assistance.

2 And, furthermore, the language of the
3 statutes and the rules have a clear distinction
4 between statements and -- and conduct. And
5 here, in order to transition Mr. Lorenzo out of
6 that subsection (b) realm and into (a) and (c)
7 and even into 17(a)(1), there has to be some
8 inherently deceptive conduct, such as creating
9 a phony purchase order or a phony contract with
10 Charles Vista to raise capital. Those are the
11 sorts of serious conduct that Congress had in
12 mind when they established the distinctions
13 between primary and secondary liability.

14 And if there are no further questions.

15 CHIEF JUSTICE ROBERTS: Thank you,
16 counsel. The case is submitted.

17 (Whereupon, at 12:04 p.m., the case
18 was submitted.)

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