No. 18-____

IN THE
Supreme Court of the United States

BATS GLOBAL MARKETS, INC., ET AL.,

Petitioners,

v.

CITY OF PROVIDENCE, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994), this Court held that the Securities Exchange Act does not authorize private litigants to bring claims for aiding and abetting securities fraud. And in *Santa Fe Industries, Inc.* v. *Green*, 430 U.S. 462 (1977), the Court identified the types of manipulative acts, such as "wash sales" and "rigged prices," that can meet the manipulative-act element of a market-manipulation claim. *Id.* at 476. The Second Circuit contravened both of those precedents below. Plaintiffs attempted to plead a market-manipulation claim by alleging that the defendant securities exchanges sold products and services that high-frequency traders used to gain a supposedly unfair advantage over other traders. According to the court of appeals, plaintiffs evaded the aiding-and-abetting bar by pleading that the exchanges were "co-participants" in a fraudulent scheme who profited from that scheme and validly pleaded a manipulative act despite making no allegation that defendants engaged in any trading activity, much less the type of sham trades that typify a market-manipulation claim.

The questions presented are:

1. Whether a private plaintiff states a valid securities-fraud claim by pleading that the defendant enabled a third party to commit the acts that caused the allegedly fraudulent harm, where the primary violator undisputedly exercised an independent choice to commit those acts.

2. Whether a plaintiff states a claim for market manipulation where it is undisputed that the defendant did not engage in any trading activity.

PARTIES TO THE PROCEEDINGS BELOW

Bats Global Markets, Inc., n/k/a Cboe Bats, LLC, Chicago Stock Exchange, Inc., Direct Edge ECN, LLC, NYSE Arca, Inc., NASDAQ OMX BX, Inc., n/k/a Nasdaq BX, Inc., New York Stock Exchange LLC, and The Nasdaq Stock Market LLC were the defendants in the district court and the appellees in the court of appeals.

City of Providence, Rhode Island, Employees' Retirement System of the Government of the Virgin Islands, Plumbers and Pipefitters National Pension Fund, and State-Boston Retirement System were the plaintiffs in the district court and the appellants in the court of appeals.

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, NASDAQ OMX BX, Inc., n/k/a Nasdaq BX, Inc. and The Nasdaq Stock Market LLC are wholly owned by Nasdaq, Inc., a publicly traded corporation. Borse Dubai Limited and Investor AB each own 10% or more of the stock of Nasdaq, Inc.

NYSE Arca, Inc., New York Stock Exchange LLC, and Chicago Stock Exchange, Inc. are indirect, wholly owned subsidiaries of Intercontinental Exchange, Inc. Intercontinental Exchange, Inc. has no parent corporation, and as of the date hereof, no publicly held company owns 10% or more of its stock.

Cboe Bats, LLC is the successor (by merger) to Bats Global Markets, Inc. Direct Edge ECN, LLC was dissolved on December 17, 2015, and Cboe Bats, LLC will assume any liability of Direct Edge ECN, LLC in connection with this litigation. Cboe Bats, LLC is wholly owned by Cboe Global Markets, Inc., a publicly traded corporation. T. Rowe Price Associates, Inc. and The Vanguard Group, Inc. each own 10% or more of the stock of Cboe Global Markets, Inc.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties to the Proceedings Below	ii
Corporate Disclosure Statement	iii
Opinions Below	1
Statement of Jurisdiction	2
Statutory and Regulatory Provisions Involved	2
Preliminary Statement	3
Statement	4
I. Background	4
II. Proceedings Below	5
A. Proceedings in the district court	5
B. The court of appeals' decision	8
Reasons for Granting the Petition	9
I. The Circuits Are Now Divided Over How To Enforce This Court's Bar On Private Aiding-And-Abetting Claims	9
A. This Court's decisions prohibit aiding-and-abetting liability in private securities lawsuits	10
B. The circuits prohibit claims for substantially participating in or enabling a fraud	12
C. The Second Circuit's creation of "co-participant" liability directly conflicts with this Court's and other circuits' holdings	15

TABLE OF CONTENTS—Continued

		Page
II.	The Second Circuit's Decision Deepens Existing Disagreement On The Manipulative-Act Element Of A Market-Manipulation Claim	20
	A. The Third Circuit defines manipulation as the injection of inaccurate price information into the market	22
	B. The D.C. Circuit imposes liability when legitimate trading activity is combined with improper intent	23
	C. The Second Circuit's approach conflicts with those of both the Third and D.C. Circuits	25
III.	The Questions Presented Are Important And Arise In A Clean Vehicle	28
	A. The questions presented are important	28
	B. The Second Circuit's outsized influence on securities law heightens the need for review	30
	C. This case presents a clean vehicle	31
IV.	At A Minimum, The Court Should Hold The Petition For The Decision In *Lorenzo* v. *SEC*	33
Conclusion		34
Appendix A - Second Circuit Opinion (Dec. 19, 2017)		1a
Appendix B - Second Circuit Order Denying Panel Rehearing and Rehearing En Banc (Mar. 13, 2018)		30a

TABLE OF CONTENTS—Continued

Page

Appendix C - District Court Opinion and Order (Aug. 26, 2015) 32a

Appendix D - Second Consolidated Amended Complaint (Nov. 24, 2014) 89a

TABLE OF AUTHORITIES

Page

CASES

Affco Invs. 2001, L.L.C. v. *Proskauer Rose, L.L.P.*, 625 F.3d 185 (5th Cir. 2010) 14, 19, 20

Amgen, Inc. v. *Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455 (2013) 13

ATSI Commc'ns, Inc. v. *Shaar Fund, Ltd.*, 493 F.3d 87 (2d Cir. 2007) 4

Basic, Inc. v. *Levinson*, 485 U.S. 224 (1988) 28

Blue Chip Stamps v. *Manor Drug Stores*, 421 U.S. 723 (1975) 31

Cent. Bank of Denver, N.A. v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994) ..... *passim*

Chadbourne & Parke LLP v. *Troice*, 134 S. Ct. 1058 (2014) 10, 33

CP Stone Fort Holdings, LLC v. *John*, No. 16 C 4991, 2016 WL 5934096 (N.D. Ill. Oct. 11, 2016) 29

Ernst & Ernst v. *Hochfelder*, 425 U.S. 185 (1976) 21

Foss v. *Bear, Stearns & Co.*, 394 F.3d 540 (7th Cir. 2005) 15, 19, 20

GFL Advantage Fund, Ltd. v. *Colkitt*, 272 F.3d 189 (3d Cir. 2001) 21, 22, 23, 25, 26, 27, 32

In re DVI, Inc. Sec. Litig., 639 F.3d 623 (3d Cir. 2011) 12, 13, 18, 20

TABLE OF AUTHORITIES—Continued

Page

In re Galectin Therapeutics, Inc. Sec. Litig.,
843 F.3d 1257 (11th Cir. 2016) 21

Janus Capital Grp., Inc. v. *First Derivative Traders*,
564 U.S. 135 (2011) 5, 9, 12, 17, 18, 28, 33

Koch v. *SEC*,
793 F.3d 147 (D.C. Cir. 2015) 24, 25, 26

Lorenzo v. *SEC*,
872 F.3d 578 (D.C. Cir. 2017) 33, 34

Markowski v. *SEC*,
274 F.3d 525 (D.C. Cir. 2001) 22, 23, 24, 26

Matrixx Initiatives, Inc. v. *Siracusano*,
563 U.S. 27 (2011) 27, 28, 33

Morrison v. *Nat'l Austl. Bank Ltd.*,
561 U.S. 247 (2010) 31

Regents of Univ. of Cal. v. *Credit Suisse First Boston (USA), Inc.*,
482 F.3d 372 (5th Cir. 2007) 14, 18, 19, 20

Santa Fe Indus., Inc. v. *Green*,
430 U.S. 462 (1977) 8, 21, 22, 26, 29

SEC v. *Masri*,
523 F. Supp. 2d 361 (S.D.N.Y. 2007) 29

Stoneridge Inv. Partners, LLC v. *Scientific-Atlanta, Inc.*,
552 U.S. 148 (2008) 9, 10, 11, 12, 13, 17, 28, 33

Superintendent of Ins. of N.Y. v. *Bankers Life & Cas. Co.*,
404 U.S. 6 (1971) 10

TABLE OF AUTHORITIES—Continued

Page

Ziemba v. *Cascade Int'l, Inc.*, 256 F.3d 1194 (11th Cir. 2001) 14, 15, 19, 20

Zoelsch v. *Arthur Andersen & Co.*, 824 F.2d 27 (D.C. Cir. 1987) 31

STATUTES AND REGULATION

15 U.S.C. § 78i 26

15 U.S.C. § 78j ..... *passim*

15 U.S.C. § 78t 5, 11

28 U.S.C. § 1254 2

17 C.F.R. § 240.10b-5 ..... *passim*

MISCELLANEOUS

Breyer, The Court and the World (2015) 31

Cornerstone Research, Securities Class Action Filings: 2017 Year in Review (2018) 30

Fischel & Ross, *Should the Law Prohibit "Manipulation" in Financial Markets?*, 105 Harv. L. Rev. 503 (1991) 29

Fox et al., *Stock Market Manipulation and Its Regulation*, 35 Yale J. on Reg. 67 (2018) 21, 22, 29

S. Rep. No. 104-98 (1995) 31

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OPINIONS BELOW

The court of appeals' opinion (App., *infra*, 1a-29a) is reported at 878 F.3d 36. The order denying panel rehearing and rehearing en banc (App., *infra*, 30a-31a) is unreported. The district court's opinion (App., *infra*, 32a-88a) is reported at 126 F. Supp. 3d 342.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was filed on December 19, 2017. The court denied a timely petition for rehearing or rehearing en banc on March 13, 2018. On May 29, 2018, Justice Ginsburg extended the time to file a petition for a writ of certiorari until August 10, 2018. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 10(b) of the Securities Exchange Act of 1934 (the Exchange Act) provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange * * * [t]o use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, or any securities-based swap agreement any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

15 U.S.C. § 78j(b) (footnote omitted).

SEC Rule 10b-5 provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
>
> (a) To employ any device, scheme, or artifice to defraud,
>
> (b) To make any untrue statement of a material fact or to omit to state a material fact neces-

sary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

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

in connection with the purchase or sale of any security.

17 C.F.R. § 240.10b-5.

PRELIMINARY STATEMENT

The decision below creates one circuit split and deepens another, both concerning important issues of securities law.

This Court has long prohibited private securities-fraud plaintiffs from asserting aiding-and-abetting claims. See *Cent. Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 177 (1994). At least four circuits have applied that prohibition to dismiss claims against defendants that substantially participated in a fraudulent scheme by enabling the primary violator to commit acts that harmed plaintiffs. Those courts hold that liability may not be imposed on a defendant where another actor retained independent, ultimate authority to commit the acts that harmed plaintiffs. In the decision below, the Second Circuit created a theory of "co-participant" liability that directly conflicts with these rulings. Under the Second Circuit's unprecedented rule, an actor that sells products or services that a third party uses to allegedly manipulate a market can be held liable for violating Rule 10b-5, even when it was the third party's actions that directly and independently caused the alleged harm. The Second Circuit's approach erases the "clean line[s]" this Court has drawn between primary and aiding-and-abetting claims, and impermissibly expands the "narrow" implied cause of action under § 10(b).

The decision below also exacerbates an existing split regarding the standard for pleading a manipulative act under § 10(b). The Third Circuit defines manipulation as the injection of inaccurate information into a market, such as through sham trades. In contrast, the D.C. Circuit requires only legitimate trading activity combined with manipulative intent. The Second Circuit split with both these courts: It found the manipulative-act element met based on non-trading conduct that did not inject any information about any security into any market, much less inaccurate information. No circuit has adopted so capacious a definition of "market manipulation."

The need for certiorari is especially urgent because of the Second Circuit's outsized influence in securities law. The Court should grant review and restore certainty and stability regarding these critical securities-law issues.

STATEMENT

I. BACKGROUND

Section 10(b) of the Exchange Act prohibits employing "any manipulative or deceptive device or contrivance" "in connection with the purchase or sale of any security." 15 U.S.C. § 78j(b). SEC Rule 10b-5 further specifies that it is unlawful both "[t]o employ any device, scheme, or artifice to defraud" and "[t]o engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person." 17 C.F.R. § 240.10b-5(a), (c). To state a market-manipulation claim under § 10(b), a plaintiff must plead "(1) manipulative acts; (2) damage; (3) caused by reliance on an assumption of an efficient market free of manipulation; (4) scienter; (5) in connection with the purchase or sale of securities; (6) furthered by the defendant's use of the mails or any facility of a national securities exchange." *ATSI Commc'ns, Inc.* v. *Shaar Fund, Ltd.*, 493 F.3d 87, 101 (2d Cir. 2007).

This Court has permitted private lawsuits under

§ 10(b) against only "primary violators"—*i.e.*, "the person[s] or entit[ies] with ultimate authority over a statement" or manipulative act, *Janus Capital Group, Inc.* v. *First Derivative Traders*, 564 U.S. 135, 143 n.6 (2011)—and has barred such claims against "aider[s] and abettor[s]." *Cent. Bank*, 511 U.S. at 191. However, the SEC may pursue aiders and abettors under 15 U.S.C. § 78t(e).

II. PROCEEDINGS BELOW

A. Proceedings in the district court

1. In 2014, respondent investors filed this putative class action of unprecedented scope—covering *all* purchasers and sellers of *any* stock since 2009 on *any* of the major U.S. stock exchanges—against high-frequency trading (HFT) firms and the petitioner Exchanges. Respondents allege that "the Exchanges violated [§ 10(b)] by engaging in a manipulative scheme in which they enabled HFT firms to exploit ordinary investors trading on the Exchanges." App., *infra*, 44a.[1]

Specifically, respondents allege that "the exchanges created three products and services for 'favored' HFT firms—proprietary data feeds, co-location services, and complex order types—to provide these firms with more data at a faster rate than the investing public." *Id.* at 7a. Although there is no allegation that the Exchanges engaged in any trading activity, HFT firms' use of these products and services allegedly "greatly disadvantaged" respondents and "resulted in their bids and orders not being filled at the best available prices." *Id.* at 8a, 22a;

[1] Although originally named as defendants, the HFT firms were voluntarily dismissed by respondents and are no longer parties to this lawsuit. Compare C.A. App. at 24-25 (listing the defendants in the original complaint), with *id.* at 40 (listing the defendants in the amended complaint).

see also *id.* at 96a (alleging that the Exchanges "enable[d]" the HFT firms' market manipulation).

"As regulated entities, [the Exchanges] are subject to SEC oversight and must comply with the securities laws as well as the [E]xchanges' own rules." *Id.* at 5a. That oversight covers the products and services that underpin the manipulation allegations. *Id.* at 7a-11a. The Exchanges' offering of each of those products and services is subject to SEC approval. *Ibid.*

Proprietary data feeds "include more detailed information regarding trading activity" than is found in consolidated data feeds. *Id.* at 7a-8a. Although anyone can purchase proprietary feeds, respondents allege that they are "cost prohibitive for ordinary investors" and thus have the effect that "HFT firms [that purchase proprietary feeds] receive more information at a faster rate and so are able [to] trade on information earlier." *Id.* at 8a.

Co-location services entail the Exchanges' "rent[ing] space to investors to allow them to place their computer servers in close physical proximity to the exchanges' systems." *Id.* at 9a. This reduces "the amount of time that elapses between when a signal is sent to trade a stock and a trading venue's receipt of that signal." *Ibid.* Respondents allege that co-location services "are cost-prohibitive for most ordinary investors." *Ibid.* Respondents also claim that because HFT firms' business models "involve[] frequent buying and selling in short periods of time," co-location is "especially attractive to [them]." *Ibid.*

Respondents' allegations also focus on the way that the Exchanges operate the markets in which securities trades take place by facilitating the interactions of orders between market participants. For example, a simple order type is an order to a broker to buy a stock at the prevailing market price. *Id.* at 41a. A complex order type,

by contrast, may cause different scenarios to occur after the order is submitted. *Ibid.* One complex order type, for instance, allegedly "allows traders to place orders that remain hidden from the ordinary bid-and-offer listings on an individual exchange until a stock reaches a particular price, at which point the hidden orders emerge and jump the queue ahead of other investors' orders." *Id.* at 10a. Respondents allege that such complex order types "benefit HFT firms at the[ir] expense." *Ibid.*

2. The district court granted the Exchanges' motion to dismiss, holding that respondents' "Section 10(b) claims fail as a matter of law for at least two reasons." *Id.* at 59a.

One independent ground for dismissal was based on this Court's prohibition against aiding-and-abetting liability in private securities-fraud lawsuits. The district court noted the black-letter law that "Section 10(b)'s 'proscription does not include giving aid to a person who commits a manipulative or deceptive act.'" *Id.* at 61a (quoting *Cent. Bank*, 511 U.S. at 177). It then analyzed respondents' allegations, concluding that they consisted of claims that "the Exchange[s'] actions *merely enabled* an HFT firm to execute a transaction, and it was the transaction itself that caused the allegedly artificial effect on the market." *Ibid.* (emphasis added). Thus, "the most that the Complaint[] can be said to allege is that the Exchanges aided and abetted the HFT firms' manipulation of the market price." *Ibid.* Because such claims are prohibited under *Central Bank*, the district court dismissed the complaint. *Ibid.*

The district court's other independent ground for dismissal concerned the manipulative-act element of a § 10(b) market-manipulation claim. Respondents could not satisfy that element because they "fail[ed] to allege any manipulative acts on the part of the Exchanges." *Id.*

at 59a. Manipulation, the court explained, "refers generally to practices, such as wash sales, matched orders, or rigged prices, that are intended to mislead investors by artificially affecting market activity." *Ibid.* (quoting *Santa Fe Indus., Inc.* v. *Green*, 430 U.S. 462, 476 (1977)). Accordingly, "[a] manipulative act is * * * any act—as opposed to a statement—that has such an 'artificial' effect on the price of a security." *Id.* at 60a. Respondents' allegations did not meet that standard because they "fail[ed] to explain how merely enabling a party to react more quickly to information can constitute a manipulative act, at least where the services at issue are publicly known and available to any customer willing to pay." *Id.* at 61a.

B. The court of appeals' decision

The Second Circuit vacated the dismissal and remanded for further proceedings. *Id.* at 4a. On the aiding-and-abetting issue, the court acknowledged that the Exchanges' conduct consisted of "s[elling] products and services" and that "[i]t is true that if the HFT firms had not used these products and services, [respondents] could not have suffered their alleged harm." *Id.* at 26a-27a. But the court nevertheless concluded that the prohibition on aiding-and-abetting claims did not apply because "the exchanges were co-participants with HFT firms in the manipulative scheme and profited by that scheme" through "payments for those products and services and * * * fees generated by the HFT firms' substantially increased trading volume on their exchange." *Id.* at 27a.

The court also held that respondents pleaded the manipulative-act element. Again, the court acknowledged that the Exchanges' conduct consisted of "creat[ing] products and services." *Id.* at 22a. But, in its view, those actions constituted manipulation because respondents alleged that HFT firms used those products and services "to access market data at a faster rate, obtain non-public

information, and take priority over ordinary investors' trades." *Ibid.* The court also faulted the Exchanges for "fail[ing] to disclose the full impact that such products and services would have on market activity." *Ibid.* In other words, although "the [E]xchanges may have told ordinary investors about the *existence* of proprietary data feeds and co-location services, * * * the exchanges did not publicly disclose the full range or *cumulative effect* that such services would have on the market." *Id.* at 24a (second emphasis added).[2] Ultimately, the Second Circuit held that respondents "have sufficiently pled that the exchanges misled investors by artificially affecting market activity." *Id.* at 25a.[3]

REASONS FOR GRANTING THE PETITION

The decision below implicates two circuit splits on important issues of securities law. The Court should grant review to restore the aiding-and-abetting prohibition and resolve the festering split on market-manipulation claims.

I. THE CIRCUITS ARE NOW DIVIDED OVER HOW TO ENFORCE THIS COURT'S BAR ON PRIVATE AIDING-AND-ABETTING CLAIMS

This Court has long recognized that private plaintiffs cannot assert claims for aiding-and-abetting violations of § 10(b). It announced that rule over 24 years ago and has reinforced it at every opportunity. See *Janus Capital Grp., Inc.* v. *First Derivative Traders*, 564 U.S. 135, 141-148 (2011); *Stoneridge Inv. Partners, LLC* v. *Scientific-Atlanta, Inc.*, 552 U.S. 148, 152-167 (2008); *Cent. Bank*,

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[2] Respondents did not attempt to plead a misstatement claim against the Exchanges. Rather, they attempted to use the alleged failures to disclose to support their market-manipulation claim.

[3] The Second Circuit also addressed jurisdictional and immunity issues, but those matters are not raised in this petition. App., *infra*, 12a-20a.

511 U.S. at 177, 191. Until now, the courts of appeals have uniformly applied that rule to bar private securities-fraud claims for a wide variety of aiding-and-abetting conduct, including various forms of assisting or substantially participating in fraudulent schemes.

The decision below shatters this consensus. The Second Circuit adopted a theory of "co-participant" liability that permits private securities-fraud claims against actors whose alleged misdeeds were merely to enable and profit from a primary violator's fraudulent acts. App., *infra*, 26a-28a. That directly conflicts with this Court's and other circuits' holdings, which consistently disallow liability where the defendant enabled, substantially participated in, and profited from a fraudulent scheme.

A. This Court's decisions prohibit aiding-and-abetting liability in private securities lawsuits

Although § 10(b) does not explicitly create a private right of action, this Court has implied one from its text. See *Superintendent of Ins. of N.Y.* v. *Bankers Life & Cas. Co.*, 404 U.S. 6, 13 n.9 (1971). The Court has, however, vigilantly policed the boundaries of that private action, emphasizing the "narrow dimensions [the Court] must give to a right of action Congress did not authorize when it first enacted the statute and did not expand when it revisited the law." *Stoneridge*, 552 U.S. at 167.

In *Central Bank*, the Court held that § 10(b) imposes liability only on "primary violators" but does not reach "aider[s] and abettor[s]." 511 U.S. at 191. Since *Central Bank*, the law has been clear that "a private plaintiff may not maintain an aiding and abetting suit under § 10(b)." *Ibid.*; see *Chadbourne & Parke LLP* v. *Troice*, 134 S. Ct. 1058, 1071 (2014) ("Section 10(b) does not create a private right of action for investors vis-à-vis 'secondary actors' or 'aiders and abettors' of securities fraud." (quoting *Stoneridge*, 552 U.S. at 152, 155)). Although Congress

later "amended the securities laws to provide for limited coverage of aiders and abettors," it "authorized [such claims only] in actions brought by the SEC" and left intact this Court's prohibition against private aiding-and-abetting claims. *Stoneridge*, 552 U.S. at 162 (citing 15 U.S.C. § 78t(e)).

Time and again, the Court has refused "to extend [private § 10(b)] liability beyond the scope of conduct prohibited by the statutory text," each time illustrating the scope of secondary conduct that falls outside of § 10(b)'s limited private right of action. *Cent. Bank*, 511 U.S. at 177. In *Stoneridge*, the Court confronted whether "an injured investor may rely upon § 10(b) to recover from a party that neither makes a public misstatement nor violates a duty to disclose but does participate in a scheme to violate § 10(b)." 552 U.S. at 156. Investors in a cable company had sued the company's suppliers for engaging in sham transactions with the company so that it could "fool its auditor into approving a financial statement showing it met projected revenue and operating cashflow numbers." *Id.* at 154. Although the Court acknowledged that the company's choice to commit fraud may have been "a natural and expected consequence of [the suppliers'] deceptive acts," it recognized that ultimately "[i]t was [the cable company], not [the suppliers], that misled its auditor and filed fraudulent financial statements; nothing [the suppliers] did made it necessary or inevitable for [the cable company] to record the transactions as it did." *Id.* at 160-161. That principle exposed the defect in the investors' "scheme" theory of primary liability: It would impermissibly "revive in substance the implied cause of action against all aiders and abettors" because it would extend to all actors who—like the suppliers—"commit[] a deceptive act in the process of providing assistance" to a fraudfeasor. *Id.* at 162-163. The Court therefore reinforced *Central Bank*'s strict bar on aiding-

and-abetting claims, declaring that the "§ 10(b) private right should not be extended beyond its present boundaries." *Id.* at 165.

The Court maintained that bright-line prohibition in *Janus*. The Court held that Rule 10b-5 liability for misleading statements in prospectuses could not extend to a mutual fund's investment adviser that had "significantly" "participat[ed] in the writing and dissemination of the prospectuses." *Janus*, 564 U.S. at 141, 148. "Although [the investment adviser], like a speechwriter, may have assisted [the mutual fund] with crafting * * * the prospectuses," the mutual fund maintained "ultimate control" over their contents. *Id.* at 148. Thus, as in *Stoneridge*, the adviser's actions did not make it "necessary or inevitable" that any falsehood will be contained in the statement. *Id.* at 144 (quoting *Stoneridge*, 552 U.S. at 161). Emphasizing the "narrow scope that we must give the implied private right of action," the Court refused to "expand liability beyond the person or entity that ultimately has authority over a false statement." *Ibid.* After all, "[i]f persons or entities without control over the content of a statement could be considered primary violators who 'made' the statement, then aiders and abettors would be almost nonexistent." *Id.* at 143.

B. The circuits prohibit claims for substantially participating in or enabling a fraud

Central Bank, *Stoneridge*, and *Janus* delivered a clear message to the circuit courts. The Third, Fifth, Seventh, and Eleventh Circuits have all faithfully applied this Court's prohibition on private aiding-and-abetting lawsuits to bar claims against a variety of actors that substantially participated in schemes to enable primary actors to commit securities fraud.

1. The Third Circuit followed this Court's lead in *In re DVI, Inc. Securities Litigation*, 639 F.3d 623 (3d Cir.

2011), *partially abrogated on other grounds by Amgen, Inc.* v. *Connecticut Retirement Plans & Trust Funds*, 568 U.S. 455, 465 (2013). The issue was "whether a law firm can be held primarily liable for participating in a scheme to defraud even though its role in the scheme was not publicly disclosed." *Id.* at 647 n.32. The scheme was "designed to artificially inflate the price of [a company's] securities" by "concealing cash shortages by overstating revenues, assets, and earnings, and understating liabilities and expenses." *Id.* at 628. The law firm "assisted [the company] in its scheme by drafting fraudulent financial reports[,] * * * conspiring with other defendants to hide material information about the company's financial condition, and deflecting inquiries from the SEC." *Id.* at 628-629. The investor plaintiffs argued that the law firm's "involvement in the alleged scheme was substantial enough to create primary liability." *Id.* at 643.

The Third Circuit disagreed, explaining that it made no difference that the law firm may have been "more involved in the preparation of financial statements than the" suppliers in *Stoneridge*. *Id.* at 647. The dispositive point remained, as in *Stoneridge*, that it was the company's—not the law firm's—independent choice to commit the fraud:

> [N]o alleged act by [the law firm] made it necessary for [the company] to file the misleading 10-Q. Even assuming [the law firm] developed the workaround to avoid disclosure of [the company]'s material weaknesses, and [the company] would have issued a truthful 10-Q if the law firm did not present this alternative, it was still [the company], not [the law firm], that filed it.

Ibid. The Third Circuit thus rejected the plaintiffs' attempt to impose Rule 10b-5 liability based on substantial participation that enabled a primary actor's fraudulent

scheme.

2. In *Regents of University of California* v. *Credit Suisse First Boston (USA), Inc.*, 482 F.3d 372 (5th Cir. 2007), the Fifth Circuit reached the same conclusion. There, plaintiffs alleged that investment banks "entered into partnerships and transactions that allowed [a company] to take liabilities off of its books temporarily and to book revenue from the transactions when it was actually incurring debt." *Id.* at 377. "[T]hese transactions [thus] * * * allowed [the company] to misstate its financial condition." *Ibid.* The court agreed that "[the company] committed fraud by misstating its accounts." *Id.* at 386. But it reasoned that the "banks only aided and abetted that fraud by engaging in transactions to make it more plausible." *Ibid.* Recognizing that under *Central Bank*, "[s]ection 10(b) does not give rise to aiding and abetting liability," the court concluded that "[t]he banks' participation in the transactions, regardless of the purpose or effect of those transactions, did not give rise to primary liability under § 10(b)." *Id.* at 386, 390; see also *Affco Invs. 2001, L.L.C.* v. *Proskauer Rose, L.L.P.*, 625 F.3d 185, 195 (5th Cir. 2010) (despite a law firm's "intimate involvement in the [fraudulent] tax scheme," it was nonetheless a secondary actor providing support services for the primary violator).

3. The Seventh and Eleventh Circuits have rejected similar attempts to circumvent the aiding-and-abetting bar. In *Ziemba* v. *Cascade International, Inc.*, 256 F.3d 1194 (11th Cir. 2001), the underlying fraud occurred when a company "materially misrepresented its assets, profits, and revenues and had issued millions of unauthorized shares of stock." *Id.* at 1198. Investors sued a law firm that played a "significant role in drafting, creating, reviewing or editing allegedly fraudulent letters or press releases" and an accounting firm that "'substantially participated' in the [company's] fraud by allowing [it]

to omit [a subsidiary's] poor financial results from its own." *Id.* at 1205, 1207. The Eleventh Circuit rejected those claims as mere aiding and abetting, holding that "[i]n light of *Central Bank*," allegations of "substantial participation" in the fraud are "not enough to state a claim under § 10(b)." *Id.* at 1207.

In *Foss* v. *Bear, Stearns & Co.*, 394 F.3d 540 (7th Cir. 2005), the administrator of an estate committed securities fraud when he discovered "some securities [the decedent kept] in safe deposit boxes" and then engaged in a scheme to secretly transfer those securities to himself. *Id.* at 541. After the fraud was revealed, the new administrator sued a bank executive who had "helped [the previous administrator] bilk the court, heirs, and revenue officials" by enabling the transfer. *Ibid.* The court rejected § 10(b) liability, reasoning that "[the bank executive] was at worst [the administrator]'s henchman, and there is no securities-law liability in private litigation for aiding and abetting." *Id.* at 542.

C. The Second Circuit's creation of "co-participant" liability directly conflicts with this Court's and other circuits' holdings

1. In the decision below, the Second Circuit flouted the holdings of this Court and broke with its sister circuits by holding that plaintiffs may evade the bar on aiding-and-abetting liability by pleading that a defendant acted as a "co-participant" in the primary violator's fraud. This holding directly conflicts with the circuit opinions discussed above, which uniformly hold that even substantial participation in a fraud is insufficient where the primary violator made an independent choice to commit fraud.

The Second Circuit began by noting the prohibition against private claims "for aiding and abetting under § 10(b)." App., *infra*, 26a. It next acknowledged that it

was the HFT firms' use of the products and services the Exchanges offered—rather than offering the products and services themselves—that caused the alleged fraudulent harm: "It is true that if the HFT firms had not used these products and services, the plaintiffs could not have suffered their alleged harm." *Ibid.* But the Second Circuit did not follow those premises to the conclusion mandated by this Court's precedents. Rather than rejecting liability against the Exchanges as mere aiders and abettors that allegedly "enable[d]" the HFT firms' independent choice to manipulate the markets, *id.* at 96a, the court created a novel form of primary liability.

It did so by labeling the Exchanges as "co-participants" in the HFT firms' scheme. *Id.* at 27a. Then the court defended that designation by pointing out that the Exchanges made a profit in selling products and services to the HFT firms: "The exchanges sold products and services during the class period that favored HFT firms and, in return, the exchanges received hundreds of millions of dollars in payments for those products and services and in fees generated by the HFT firms' substantially increased trading volume on their exchanges." *Ibid.* That economic gain, in the Second Circuit's view, rendered the Exchanges liable as "co-participants" with the HFT firms in the manipulative scheme. *Ibid.*; see also *id.* at 28a ("We think that such allegations sufficiently plead that the exchanges committed manipulative acts and participated in a fraudulent scheme in violation of the Exchange Act and Rule 10b-5.").

2. The Second Circuit's holding—that "co-participa[tion]" combined with economic gain overcomes the aiding-and-abetting bar—flagrantly contravenes this Court's precedent. The Court has squarely held that even substantial participation in a fraudulent scheme constitutes non-actionable aiding and abetting where a primary violator exercises ultimate authority to commit

the fraudulent act that causes harm. This Court declined to impose liability in *Stoneridge* for precisely that reason, noting that although the fraud may have been "a natural and expected consequence of [the suppliers'] deceptive acts," "[i]t was [the cable company], not [the suppliers], that misled its auditor and filed fraudulent financial statements; * * * nothing [the suppliers] did made it necessary or inevitable for [the cable company] to record the transactions as it did." 552 U.S. 160-161. *Janus* reinforced this point: "Although [the investment adviser], like a speechwriter, may have assisted [the mutual fund] with crafting * * * the [fraudulent] prospectuses," "ultimate control" over their contents resided with the mutual fund. 564 U.S. at 148. That reasoning compels the same no-liability result here because, as the Second Circuit acknowledged, it was the HFT firms' independent decision to use the Exchanges' products and services as they did that allegedly caused the fraudulent harm. App., *infra*, 26a ("It is true that if the HFT firms had not used these products and services, the plaintiffs could not have suffered their alleged harm."). Yet the Second Circuit impermissibly extended the "narrow scope" of § 10(b) liability, *Janus*, 564 U.S. at 144, by stretching primary liability far beyond where this Court and other circuits have been willing to go—exceeding the strictly circumscribed bounds of this *implied* cause of action.

Moreover, the Exchanges allegedly "co-participa[ted]" to a lesser degree than the aiders and abettors in *Stoneridge* and *Janus*. The Exchanges' alleged conduct falls within the core of classic aiding and abetting—selling primary violators the products and services that they used to cause allegedly fraudulent harm. App., *infra*, 26a-28a. Contrast that with the suppliers in *Stoneridge* that fabricated sham transactions, complete with false documentation, 552 U.S. at 154, or the investment adviser in *Janus* that was "significantly involved" in crafting the

fraudulent prospectuses, 564 U.S. at 148. The secondary actors in those cases are analogous to trusted accomplices who help a burglar plan and execute a heist, whereas the Exchanges more closely resemble the store that sold him the crowbar he used. If the former is not sufficient to overcome the aiding-and-abetting prohibition, then the latter surely cannot be. Indeed, by adopting a test based on "co-participation" rather than "substantial participation," the Second Circuit arguably created potential liability even broader than the aiding-and-abetting claims this Court rejected decades ago.

Finally, this Court has never suggested that a plaintiff may circumvent the aiding-and-abetting prohibition merely by pleading that the secondary actor profited from his acts. In fact, this Court first recognized the prohibition in the context of an aider and abettor who was acting as a paid indenture trustee for a series of bond issues. See *Central Bank*, 511 U.S. at 167.

3. The decision below also directly conflicts with the circuit cases discussed above. The Exchanges' "co-participa[tion]" would not convert their alleged aiding and abetting into primary liability in the Third, Fifth, Seventh, and Eleventh Circuits. The Second Circuit's co-participant theory is irreconcilable with sister-circuit holdings that even substantial participation in a scheme does not convert aiding and abetting into actionable securities fraud:

- The Third Circuit rejected liability against the law firm in *DVI* that "draft[ed] fraudulent financial reports * * * [and] conspir[ed] with other defendants to hide material information about the company's financial condition." 639 F.3d at 628-629.
- The Fifth Circuit rejected liability against the banks in *Credit Suisse* that "entered into part-

nerships and transactions that allowed" a company to misstate its financials and create an "illusion of revenue." 482 F.3d at 377.

- The Fifth Circuit rejected liability against the law firm in *Affco* that worked "to promote, sell, and support the [fraudulent] tax strategies." 625 F.3d at 195.
- The Eleventh Circuit rejected liability against the accounting firm in *Ziemba* that enabled a company's fraud "by allowing [it] to omit [a subsidiary's] poor financial results from its own," and the law firm that played "a significant role in drafting, creating, reviewing or editing allegedly fraudulent letters or press releases." 256 F.3d at 1202-1203, 1207.
- The Seventh Circuit rejected liability against the bank executive in *Foss* who served as the administrator's "henchman" and "helped [him] bilk the court, heirs, and revenue officials." 394 F.3d at 542.

The aiders and abettors in those cases were "intimate[ly] involve[d]" with allegedly fraudulent conduct, *Affco*, 625 F.3d at 195, played "significant role[s]," and provided "substantial assistance," *Ziemba*, 256 F.3d at 1202-1203, 1205. The Exchanges, in contrast, merely engaged in arms-length transactions to sell products and services to buyers, including (but not limited to) unaffiliated HFT firms who allegedly used them to manipulate the markets. See App., *infra*, 26a-28a. If the aiding-and-abetting prohibition bars liability for the much more extensive conduct in the other circuit cases, then it would also defeat claims premised on the Exchanges' lesser involvement. Conversely, all of the claims rejected by the other circuits would be viable under the Second Circuit's "co-participant" approach.

The fact that an aider and abettor profited from its conduct would make no difference in the other circuits. The banks in *Credit Suisse* "profit[ed] by helping [a company] maintain th[e] illusion [of revenue]." 482 F.3d at 377. The law firms, accounting firm, and bank executive in *DVI*, *Affco*, *Ziemba*, and *Foss* presumably were paid for the services that facilitated the frauds. That is unsurprising because the prospect of economic gain is the typical motivation for aiding-and-abetting conduct.

As under this Court's cases, the HFT firms' independent decisions to commit the allegedly manipulative acts would have defeated the claims against the Exchanges in the other circuits. The Third Circuit's opinion in *DVI*, for example, is irreconcilable with the Second Circuit's approach. As in *DVI*, "no alleged act by [the Exchanges] made it necessary for [the HFT firms] to [engage in the manipulative transactions]. * * * Even assuming * * * [that the HFT firms] would [not have manipulated the market] if [the Exchanges] did not [offer the products and services], it was still [the HFT firms], not [the Exchanges], that [made the manipulative trades]." 639 F.3d at 647; see also *Credit Suisse*, 482 F.3d at 386 (explaining that it was "[the company that] committed fraud by misstating its accounts," while "banks only * * * ma[de] [the fraud] more plausible"). The decision below departed from that consensus, exposing the Exchanges to liability for publicly offering products and services despite acknowledging that "[i]t is true that if the HFT firms had not used these products and services, [respondents] could not have suffered their alleged harm." App., *infra*, 26a.

II. THE SECOND CIRCUIT'S DECISION DEEPENS EXISTING DISAGREEMENT ON THE MANIPULATIVE-ACT ELEMENT OF A MARKET-MANIPULATION CLAIM

The decision below warrants review for a second, independent reason. It deepens an acknowledged circuit

split on what is necessary to satisfy the manipulative-act element of a market-manipulation claim. This Court has long recognized that "manipulative" is "virtually a term of art when used in connection with securities markets." *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 199 (1976). It refers to "intentional or willful conduct designed to deceive or defraud investors by controlling or artificially affecting the price of securities." *Ibid.* Manipulative practices are those "such as wash sales, matched orders, or rigged prices"—all of which give only the illusion of free-market buying and selling by actual market participants. *Santa Fe*, 430 U.S. at 476. Such practices "are intended to mislead investors by artificially affecting market activity." *Ibid.*

A "sharp circuit split" emerged over the conduct required to allege "manipulation," and it has remained unresolved for over 15 years. See Fox et al., *Stock Market Manipulation and Its Regulation*, 35 Yale J. on Reg. 67, 118 (2018) (hereinafter, "Fox"). The split centers on whether, under *Santa Fe*, "open market manipulation, without an additional act that is unlawful by itself, is ever prohibited under Section 10(b)." *Ibid.*

The Eleventh Circuit has summarized in dicta one side of the split: "[E]ngag[ing] in any kind of simulated market activity or transactions designed to 'create an unnatural and unwarranted appearance of market activity' * * * is required to constitute market manipulation." *In re Galectin Therapeutics, Inc. Sec. Litig.*, 843 F.3d 1257, 1273 (11th Cir. 2016)) (quoting *Santa Fe*, 430 U.S. at 476-477)). The Third Circuit agrees with this approach, holding that manipulation requires the "inject[ion] [of] inaccurate information into the marketplace." *GFL Advantage Fund, Ltd.* v. *Colkitt*, 272 F.3d 189, 204 (3d Cir. 2001). Under this view, real "trading behavior on its own cannot constitute a manipulation; some additional unlawful act is necessary as well," such as the variety of

sham trades listed in *Santa Fe*. Fox at 119.

The D.C. Circuit "h[as] come to the opposite conclusion," holding that the manipulative-act element can be satisfied by legitimate trading activity "'solely because of the actor's purpose' when that purpose was improper, without necessitating any further unlawful act." *Id.* at 119, 122 (quoting *Markowski* v. *SEC*, 274 F.3d 525, 529 (D.C. Cir. 2001)).

The decision below departed from both tests established by other circuits. Indeed, it expanded liability beyond even the D.C. Circuit's more liberal approach, permitting a manipulation claim to proceed despite recognizing that the Exchanges engaged in no trading activity whatsoever.

A. The Third Circuit defines manipulation as the injection of inaccurate price information into the market

The Third Circuit holds that only the injection of inaccurate price information constitutes manipulation. In *Colkitt*, the Third Circuit rejected attempts to satisfy the manipulative-act element by combining legitimate market activity with an intent to manipulate. There, a lender loaned money to an investor under two notes that gave the lender the option to demand part of the repayment in shares of the investor's stock in two companies. *Colkitt*, 272 F.3d at 195. The lender then began "short selling [the two companies'] stock." *Ibid.* The investor claimed that this constituted manipulation under § 10(b) because the lender sold "shares short in an effort to depress the prices of the stocks * * * so that [the investor] would be forced to exchange more shares to retire the same amount of debt." *Id.* at 197, 202-203.

The court framed the key question as "whether [a plaintiff] must demonstrate that [a defendant] injected inaccurate information into the marketplace or created a

false impression of market activity" in order to satisfy the manipulative-act element of a market-manipulation claim. *Id.* at 204. The investor argued that "he is not required to present evidence that '[the lender] injected affirmative misinformation into the market,' but only needs to demonstrate that '[the lender's] short trades were made for the undisclosed *purpose* of *artificially* depressing share prices.'" *Ibid.* (first emphasis added).

The Third Circuit disagreed. It ruled that regardless of the alleged manipulator's intent, a plaintiff must "establish that the alleged manipulator injected 'inaccurate information' into the market or created a false impression of market activity" "by purposely making false statements or by employing illegitimate, deceptive trading techniques." *Id.* at 204-205. Applying that rule, the Third Circuit held that because "short selling is lawful," the investor had to show that the lender "engaged in some other type of deceptive behavior in conjunction with its short selling that either injected inaccurate information into the marketplace or created artificial demand for the securities." *Id.* at 211. Because he did not do so, the court concluded that his "claim of market manipulation must fail." *Id.* at 212.

B. The D.C. Circuit imposes liability when legitimate trading activity is combined with improper intent

The D.C. Circuit rejects the Third Circuit's rule that a defendant must engage in illegitimate market activity that "either inject[s] inaccurate information into the marketplace or create[s] artificial demand for the securities." *Id.* at 211. It instead allows manipulation claims based on legitimate market activity coupled with an intent to manipulate.

The D.C. Circuit so held in *Markowski* v. *SEC*, 274 F.3d 525 (D.C. Cir. 2001). Defendants were the CEO of a

securities dealer and its trader. *Id.* at 527. The dealer underwrote an initial public offering and then supported the price of the securities by "maintain[ing] high bid prices" and "absorb[ing] all unwanted securities into inventory." *Ibid.* The CEO and the trader argued that because all the "bids and trades in th[at] case were 'real'—they involved real customers, real transactions, and real money—the trades [could] not be classified as an unlawful manipulation." *Id.* at 528.

The court recognized that this case was different from "classic schemes using fraudulent devices such as 'wash sales' * * * to give a false appearance of sales and market interest." *Ibid.* And it acknowledged that if "[l]egality * * * depend[s] entirely on whether the investor's intent was an investment purpose or solely to affect the price of [the] security," then "[i]t may be hard to separate a manipulative investor from one who is simply * * * a true believer" because "[b]oth may amass huge inventories and place high bids" despite "scant objective [supporting] data." *Ibid.* (internal quotation marks omitted).

Despite these "practical concerns," the D.C. Circuit held that lawful market activity that injects no inaccurate price information "can be illegal solely because of the actor's purpose." *Id.* at 529. Accordingly, although the defendants' conduct did not "give a false appearance of sales and market interest," it constituted a manipulative act because their intent was "solely to affect the price of [the] security." *Id.* at 528.

Time has only hardened the D.C. Circuit's views. It went even further in *Koch* v. *SEC*, 793 F.3d 147 (D.C. Cir. 2015), holding that trading activity need not actually affect the price of a security to constitute manipulation: "[*S*]*uccessful* market manipulation is not equivalent to *intent* to manipulate the market. And intent—not success—is all that must accompany manipulative conduct to

prove a violation of the Exchange Act and its implementing regulations." *Id.* at 153-154 (citation omitted). The D.C. Circuit has thus firmly rejected the Third Circuit's rule that a manipulative act requires the "inject[ion] [of] inaccurate information into the marketplace or creat[ion] [of] artificial demand for the securities." *Colkitt*, 272 F.3d at 211.

C. The Second Circuit's approach conflicts with those of both the Third and D.C. Circuits

1. In the decision below, the Second Circuit split with both the Third and D.C. Circuits. The court acknowledged that the Exchanges merely "created products and services"; it did not assert that any Exchange directly manipulated stock prices or even engaged in any trading activity. Instead, the court observed that the HFT firms used the Exchanges' products and services "to access market data at a faster rate, obtain non-public information, and take priority over ordinary investors' trades." App., *infra*, 22a. It also faulted the Exchanges for "fail[ing] to disclose the full impact that such products and services would have on market activity." *Ibid.* In other words, although "the [E]xchanges may have told ordinary investors about the *existence* of proprietary data feeds and co-location services, * * * the exchanges did not publicly disclose the full range or *cumulative effect* that such services would have on the market." *Id.* at 24a (second emphasis added). These components comprised the reasoning supporting the Second Circuit's conclusion that "the plaintiffs have sufficiently pled that the exchanges misled investors by artificially affecting market activity." *Id.* at 25a.

Consider, in contrast, how this case would have proceeded under the Third Circuit's rule. The Exchanges' conduct—"creat[ing] products and services," *id.* at 22a—would not meet the Third Circuit's manipulation test for

two separate reasons. First, the Exchanges' creation and offering of products and services, taken alone, did not inject *any* price information, much less "inject *inaccurate* information into the marketplace." *Colkitt*, 272 F.3d at 211 (emphasis added). It was "the use of" those products and services by HFT firms that allegedly affected prices. App., *infra*, 22a-23a. Second, even the HFT firms' "use of" those products and services did not "inject inaccurate information into the marketplace." *Colkitt*, 272 F.3d at 211. Respondents do not allege that HFT firms engaged in wash sales or other "fictitious transactions"; instead, the HFT firms' trades involved "real customers, real transactions, and real money." *Markowski*, 274 F.3d at 528.

The difference between the two approaches is plain. The Third Circuit requires the "inject[ion] [of] inaccurate information into the marketplace" through sham transactions or other direct manipulation of the stock prices. *Colkitt*, 272 F.3d at 211. The Second Circuit, along with the D.C. Circuit, does not.

The Second Circuit then went even further than the D.C. Circuit and disregarded the Exchange Act and this Court's precedents, all of which require that the defendant at least engaged in some form of trading activity. See 15 U.S.C. § 78i(a) (proscribing various categories of trading activity and "false or misleading" statements made "for the purpose of inducing" trading activity); *Santa Fe*, 430 U.S. at 476 (Manipulation "refers generally to practices, such as wash sales, matched orders, or rigged prices, that are intended to mislead investors by artificially affecting market activity."). The Second Circuit found that respondents properly pleaded the manipulative-act element despite no allegation that any Exchange made any trade in any security. Even the D.C. Circuit recognizes that pleading a manipulative act requires some allegation of trading activity. See *Koch*, 793 F.3d at 156

(drawing a clear line between "those who make statements" and "those who employ manipulative practices").

2. The Second Circuit supported its conclusion that respondents properly pleaded the manipulative-act element with the statement that the Exchanges failed to disclose the "full impact" and "cumulative effect" of their products and services. App., *infra*, 22a, 24a. But that does not reconcile its approach with that of the Third Circuit. It only highlights the far-reaching nature of the Second Circuit's holding. Even assuming such disclosures were required, the Exchanges' alleged omissions did not inject any price information into any market—and thus would not qualify as manipulative conduct under the Third Circuit's rule. Indeed, the Third Circuit rejected the similar argument that legitimate trades "made for the *undisclosed purpose* of *artificially* depressing share prices" qualified as manipulation. *Colkitt*, 272 F.3d at 204 (first emphasis added).

Moreover, the Exchanges' disclosure duties plainly do not require predictions about the "full impact" and "cumulative effect" of the ways in which third parties might use, or misuse, the Exchanges' products. That would set up an absurd system of virtually boundless disclosure obligations, whereby each Exchange must formulate and then disclose predictions regarding the potential effects of every new product or service it offers, a requirement found nowhere in the Exchange Act. Indeed, no court has ever suggested that failing to disclose the potential effects of disclosed products or services could satisfy the manipulative-act element of a § 10(b) claim.

To the contrary, even when considering misrepresentation or omission claims, this Court has held that "§ 10(b) and Rule 10b-5(b) do not create an affirmative duty to disclose any and all material information." *Matrixx Initiatives, Inc.* v. *Siracusano*, 563 U.S. 27, 44

(2011). "Disclosure is required under these provisions only when necessary 'to make * * * statements made, in the light of the circumstances under which they were made, not misleading.'" *Id.* at 44-45 (quoting 17 C.F.R. § 240.10b-5(b)). "Silence, absent a duty to disclose, is not misleading under Rule 10b-5." *Basic, Inc.* v. *Levinson*, 485 U.S. 224, 239 n.17 (1988). The Second Circuit did not attempt to square its new disclosure obligations with these rules or identify any other source for them. Thus, the Second Circuit's acceptance of a sweeping non-disclosure theory as a means to prove market manipulation goes further than both the Third and D.C. Circuits.

III. The Questions Presented Are Important And Arise In A Clean Vehicle

A. The questions presented are important

1. If allowed to stand, the Second Circuit's new category of "co-participant" liability will provide a ready roadmap for circumventing this Court's decisions prohibiting private aiding-and-abetting liability under § 10(b). Plaintiffs will need only to characterize conduct as "co-participat[ion]" to avoid the aiding-and-abetting bar. Such semantics will expose a wide range of secondary actors such as law firms, accounting firms, and investment banks to expansive § 10(b) liability for allegedly enabling other actors to commit securities fraud. This Court has recognized the importance of "draw[ing] a clean line between" "those who are primarily liable (and thus may be pursued in private suits) and those who are secondarily liable (and thus may not be pursued in private suits)." *Janus*, 564 U.S. at 143 n.6. The Second Circuit's approach erased that line. The Court has granted certiorari three times—in *Central Bank*, *Stoneridge*, and *Janus*—to clarify these boundaries and reinforce the strict limits on this judicially created cause of action. It should do so again here.

2. The market-manipulation issue is important as well. The academic literature has long noted that "manipulative trades are extremely difficult, perhaps impossible, to identify." Fischel & Ross, *Should the Law Prohibit "Manipulation" in Financial Markets?*, 105 Harv. L. Rev. 503, 519 (1991). Yet this Court has largely left that task to the lower courts; its last major discussion regarding the definition of manipulation came more than 40 years ago. See *Santa Fe*, 430 U.S. at 476. Operating without this Court's guidance, lower courts have developed "a legal framework that lacks precision, cogency, and consistency of application." Fox at 71. "The associated confusion as to what constitutes illegal manipulation produces unpredictable and disparate outcomes for cases with similar facts." *Ibid.*; see *id.* at 118-122 (discussing examples of such outcomes). Indeed, district courts on the front lines of these cases have bemoaned the chaotic landscape surrounding what constitutes a manipulative act. See, *e.g.*, *CP Stone Fort Holdings, LLC* v. *John*, No. 16 C 4991, 2016 WL 5934096, at *4-6 (N.D. Ill. Oct. 11, 2016) (remarking that "[t]he propriety of maintaining a manipulation claim" in cases where the market "activity is not expressly prohibited[] is not fully settled"); *SEC* v. *Masri*, 523 F. Supp. 2d 361, 366-372 (S.D.N.Y. 2007) (surveying circuit split on definition of manipulation).

Participants in the securities industry need to be able to distinguish between legitimate trading activity and unlawful manipulation. The Third Circuit's rule permits such assessments by focusing on objective conduct and limiting manipulation to the injection of inaccurate information into the market. By rejecting that bright-line rule in favor of a looser standard that focuses on malleable factors, the Second and D.C. Circuits have introduced unpredictability into the securities industry. Whereas under the Third Circuit's rule an actor engaging in real trading activity can be confident its conduct will not later

be deemed manipulation, the Second and D.C. Circuits' approaches offer no such certainty because even legitimate trading activity (and, in the Second Circuit's case, no trading activity at all) can be deemed manipulative when paired after the fact with allegations of alleged wrongful intent. And if failing to make and disclose predictions about how third parties may act constitutes manipulation—as the Second Circuit now holds—then the only confident prediction is one of expansive liability for market manipulation. Because this state of affairs risks chilling legitimate market activity, the Court should grant review and bring clarity to this important aspect of the securities laws.

B. The Second Circuit's outsized influence on securities law heightens the need for review

The decision below is far more significant than a typical case in which a court of appeals disregards this Court's precedents and breaks with its sister circuits. This is the *Second* Circuit speaking about *securities* law. The Second Circuit dwarfs all others in the sheer volume of securities class actions filed in its district courts. Cornerstone Research, Securities Class Action Filings: 2017 Year in Review, at 34 (2018).[4] Last year, it accounted for over a third of such filings nationwide. *Ibid.* Moreover, a disproportionate number of the Nation's leading securities exchanges, investment banks, law firms, and accounting firms—among the entities most vulnerable to a weakened aiding-and-abetting bar—are headquartered within its jurisdiction. For those likely targets of the coming wave of § 10(b) claims for aiding-and-abetting conduct in the Second Circuit, the decision below will be the law of the land for all practical purposes. This Court must intervene if it wishes its robust and longstanding

[4] https://www.cornerstone.com/Publications/Reports/Securities-Class-Action-Filings-2017-YIR.

aiding-and-abetting prohibition and manipulative-act standard to remain the norm, rather than the exception, in securities-fraud cases.

Moreover, it is unlikely that other circuits will ignore a significant Second Circuit decision on securities law. "[T]he legal community has long thought that the Second Circuit * * * understood securities law and securities markets especially well." Breyer, The Court and the World 115 (2015); see also *Morrison* v. *Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 276 (2010) (Stevens, J., concurring in judgment) (referring to the Second Circuit as "the Mother Court of securities law") (quoting *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 762 (1975) (Blackmun, J., dissenting)). Congress likewise has recognized the Second Circuit as "the leading circuit in th[e] area" of securities litigation. S. Rep. No. 104-98, at 7 (1995). This reputation, as the Court has noted, causes other circuits to "defer[] to the Second Circuit because of its 'preeminence in the field of securities law,'" even when they might otherwise be "tempted to" disagree. *Morrison*, 561 U.S. at 260 (quoting *Zoelsch* v. *Arthur Andersen & Co.*, 824 F.2d 27, 32 (D.C. Cir. 1987) (Bork, J.)).

Many circuits may be "tempted to" disagree with the Second Circuit's rollback of the aiding-and-abetting bar and weakening of the manipulative-act element. *Ibid.* But in the face of silence from this Court, they may "defer[] to the Second Circuit" as the generally recognized expert in securities law. *Ibid.* Only by granting review can this Court prevent the pernicious consequences of the decision below from spreading to other circuits.

C. This case presents a clean vehicle

This case is a clean vehicle for resolving the questions presented. Each presents an independent basis for reversal.

The first question presents a choice between two dis-

tinct visions of the prohibition on aiding-and-abetting liability. Under the Second Circuit's approach, the Exchanges are subject to primary liability for offering products and services that HFT firms allegedly used to harm investors. Under the law that prevailed before the decision below, the Exchanges would fall within the core of the prohibition against aiding-and-abetting liability in private securities-fraud lawsuits. A return to that legal regime would thus mandate reversal of the Second Circuit's ruling and affirmance of the district court's dismissal.

The second question offers a similarly stark choice. If the Third Circuit is correct that the manipulative-act element of a § 10(b) market-manipulation claim requires allegations that the alleged manipulator "inject[ed] inaccurate information into the marketplace," then the decision below must be reversed. *Colkitt*, 272 F.3d at 211. Reversal would also be required under the D.C. Circuit's approach to market manipulation, because that approach requires trading activity. Only if the Second Circuit correctly held that neither the injection of inaccurate information nor trading activity is required could its holding on this point survive review. If, however, the Second Circuit's manipulative-act holding is erroneous, then reversal is required.

Nor would further proceedings better enable the Court to resolve these issues. Because the questions presented turn on the legal sufficiency of respondents' allegations, they are properly addressed in a challenge to the complaint. The purpose of a motion to dismiss is to halt proceedings at the earliest possible stage when the complaint is deficient. Further proceedings can generate nothing that might lead to a better understanding of the adequacy of the complaint's allegations. This Court has frequently granted certiorari at the motion-to-dismiss stage to establish pleading standards in securities ac-

tions. See, *e.g.*, *Chadbourne & Parke LLP*, 134 S. Ct. 1058; *Janus*, 564 U.S. 135; *Matrixx Initiatives, Inc.*, 563 U.S. 27; *Stoneridge*, 552 U.S. 148. It should do so again here.

IV. At a Minimum, The Court Should Hold The Petition For The Decision In *Lorenzo* v. *SEC*

This Court recently granted certiorari in *Lorenzo* v. *SEC*, No. 17-1077. The question presented there is: "whether a misstatement claim that does not meet the elements set forth in *Janus* can be repackaged and pursued as a fraudulent scheme claim." Pet. at i, *Lorenzo* v. *SEC*, No. 17-1077. *Lorenzo* does not directly present either question presented in this petition, nor does this petition directly present a question regarding the repackaging of a misstatement claim as a scheme-liability claim. Certiorari is warranted here because this petition affords the Court the unique opportunity to directly confront the line between primary and secondary liability and the elements of a claim for market manipulation.

Although the questions presented in *Lorenzo* and this case do not facially overlap, both the *Lorenzo* petition and the D.C. Circuit opinions in that case prominently discuss the distinction between primary and secondary liability, and that principle might feature in this Court's decision. See Pet. at 5, 25-28, 31-32, *Lorenzo* v. *SEC*, No. 17-1077; *Lorenzo* v. *SEC*, 872 F.3d 578, 594-595 (D.C. Cir. 2017); *id.* at 600-602 (Kavanaugh, J., dissenting). Thus, review of this case alongside *Lorenzo* would allow the Court to comprehensively resolve the confusion surrounding primary and secondary liability.

To the extent the Court declines to immediately grant review of this petition, petitioners request that it be held pending the decision in *Lorenzo*. At that time, the Court's *Lorenzo* ruling may warrant granting the petition, vacating the judgment below, and remanding for the

court of appeals to reconsider its decision in light of *Lorenzo*. Or the Court's *Lorenzo* decision may not address the issues presented here, thus clarifying the need for review.

CONCLUSION

The Court should grant the petition for a writ of certiorari, or in the alternative, hold it for *Lorenzo*.

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