No. 24-1106

IN THE

Supreme Court of the United States

JOSEPH MONA,

Petitioner,

v.

MICROBOT MEDICAL, INC.,

Respondent.

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

BRIEF *AMICUS CURIAE* OF THE FREEDOM AND JUSTICE FOUNDATION IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Page

Cases

Cited Authorities

Cited Authorities

Page

Statutes, Rules and Regulations

Other Authorities

INTEREST OF THE *AMICUS CURIAE*[1]

The Freedom And Justice Foundation is a Section 501(c)(3) entity whose purpose is to promote and defend freedom and justice. It is hard to think of a greater injustice than seeing an innocent shareholder of a publicly traded corporation who has not caused it any harm and who has no relationship to it, being ordered to make a windfall payment to it. Not only is that contrary to the express purpose of Section 16(b) of the Securities Exchange Act of 1934, i.e., "preventing the unfair use of [insider] information which may have been obtained by [an investor] by reason of his relationship to [a corporation],"[2] it is contrary to this Court's long-standing disdain for "a law that takes property from A. and gives it to B." *Calder v. Bull, 3 Dall.* 386, 388 (1798) (Chase, J.). Nor can any statute "change innocence into guilt." *Id.*

1. The parties have been notified of the filing of this brief at least 10 days prior to the deadline. No counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the Amicus Curiae made a monetary contribution to its preparation or submission.

2. If, as in this case, no inside information existed at the time of the so called "short-swing" trades, then suing a shareholder to compel disgorgement of his profits cannot possibly deter the use of inside information.

INTRODUCTION AND SUMMARY OF ARGUMENT

In practice, Section 16(b) rarely has to do with preventing insider trading. Instead, it has become a source of income for a group of entrepreneurial lawyers whose goal is to generate "common benefit" fees by filing "gotcha" lawsuits against unsuspecting and faultless investors without alleging the existence, let alone the misuse, of any inside information. In their authoritative textbook, Professors Jennings, Marsh, and Coffee succinctly summed up how Section 16(b) operates in practice: "Judging solely from the facts stated in the opinions in the decided cases, the function of Section 16(b) would appear to be to impose unjust liability upon entirely innocent persons." Richard W. Jennings, Harold Marsh, Jr., and John C. Coffee, Jr., *Securities Regulation: Cases And Materials* (7th Ed. 1992). The result in this case confirms that assessment.

In *Donoghue v. Bulldog Investors Gen. P'ship*, 696 F.3d 170 (2d Cir. 2012), cert. denied, 569 U.S. 994 (2013) ("*Donoghue*"), the Second Circuit Court of Appeals held that every corporation bringing an action to enforce Section 16(b) has Article III standing without the need to allege any facts about how it has actually been harmed by the defendant. *Donoghue* circularly "reasoned" that Section 16(b)(i) "effectively makes [all] 10% beneficial owners fiduciaries . . . at least to the extent of making all short-swing transactions [i.e., trades made within a six month period] by such persons in the issuer's stock 'breaches of trust,'" (ii) "confer[s] upon [the corporation] an enforceable legal right to expect [such beneficial owners] to refrain from engaging in any short-swing trading in

its stock, [and] (iii) [provides that the] deprivation of this right establishes Article III standing." (internal quotation marks and citations omitted). In *Packer v. Raging Capital Mgmt.*, 105 F.4th 46 (2d Cir. 2024) ("*Packer*"), issued after *Spokeo, Inc. v. Robins*, 578 U.S. 330 (2016) ("*Spokeo*") and *TransUnion v. Ramirez*, 594 U.S. 413 (2021) ("*TransUnion*") clarified the distinction between an injury-in-fact and an injury-in-law, the Second Circuit held that nothing in either of those cases undermined *Donoghue*'s rationale and that consequently, "*Donoghue* remains good law."

More specifically, *Packer* affirmed *Donoghue*'s contention that every Section 16(b) plaintiff meets the injury-in-fact requirement for Article III standing without the need to assert a real world particularized injury arising from the defendant's alleged violation of the statute. It is difficult to see *Packer*'s fallacious reasoning as other than contrary to this Court's rejection of the proposition that "a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right." (*Spokeo* and *TransUnion*).

In this case, *Packer*'s manifestly incorrect holding was mechanically applied to impoverish a senior citizen who did nothing wrong and harmed no one. The result is an appalling instance of reverse Robin Hood justice that this Court should rectify.

ARGUMENT

I. THE SECOND CIRCUIT WAS WILLFULLY BLIND TO PREVIOUS AUTHORITATIVE FINDINGS THAT A SECTION 16(b) VIOLATION CAUSES NO HARM TO THE ISSUER.

Prior to *Packer*, many courts, including those within the Second Circuit, and other authorities had observed that an issuer suffers no concrete harm solely from the short-swing trading proscribed by Section 16(b). Rather than confront the views of these disinterested authorities, the *Packer* panel was willfully blind to them, even to the point of denying, without explanation, a motion to file an amicus brief that supplied the following citations:

- "The recovery under the statute smacks more of being in the nature of a penalty paid for having engaged in a forbidden transaction than of being compensation for an injury inflicted. For it is difficult to detail any certain injury to a corporation from the fact of active trading in its shares. . . ." Kenneth L. Yourd, *Trading in Securities by Directors, Officers and Stockholders: Section 16 of The Securities Exchange Act*, Michigan Law Review, Vol. 38, No.2 (December 1939).

- "[T]he sum recovered [was] for a penalty payable to the corporation." *Smolowe v. Delendo Corp.*, 136 F.2d 231 (2d Cir. 1943).

- "We see no reason for not giving the statutory language its natural meaning, as to the money here in question. It was, to be sure, a 'windfall' to the

plaintiff." *Park & Tilford Distillers Corp. v. United States*, 107 F. Supp. 941 (Court of Claims 1952).

- "In the present instance . . . the Section 16 (b) recovery was not a restitution to make the issuer whole for a loss of corporate profits, or even of corporate capital; it was a pure windfall. . . ." *General American Investors Co., Inc. v. Commissioner*, 19 T.C. 581 (1952), affirmed 211 F.2d 522 (2d Cir. 1954), affirmed 348 U.S. 434 (1955).

- "It has been pointed out that in a larger sense any 16(b) award to the corporation is essentially a windfall, since the corporation has suffered no harm for which it is being recompensed." *Blau v. Rayette-Faberge, Inc.*, 389 F.2d 469 (2d Cir. 1968).

- "[T]he absence of corporate damage is not a factor in assessing § 16(b) liability. Oftentimes the corporation will suffer no measurable damage or may even be an unwilling beneficiary of these profits." *Champion Home Builders Co. v. Jeffress*, 490_F.2d 611 (6th Cir. 1974).

- "[E]very § 16(b) recovery may be deemed to partake of windfall. . . ." *Am. Standard, Inc. v. Crane Co.*, 410 F.2d 1043 (2d Cir. 1974).

- "From the corporation's standpoint, there is rarely direct harm resulting from the insider's sale or purchase. . . ." Donald C. Langevoort, *Insider Trading and the Fiduciary Principle: A Post-Chiarella Restatement,* California Law Review, Vol. 70, No. 1 (Jan. 1982).

- "The only people who were injured if General Cinema has, in fact, done something improper are the former shareholders of Old Heublein who sold their stock to General Cinema during the period when General Cinema made its open-market purchases." *Heublein, Inc. v. General Cinema Corp.*, 559 F. Supp. 692 (S.D.N.Y. 1983).

- "Recovery under the Section aids not the persons injured—those who bought from or sold to the insider—but the corporation which suffered no injury." Louis Loss and Joel Seligman, *Securities Regulation* at 2319 (3d ed. 1990).

- "Section 16(b) exists to remedy harms suffered by the general investing public, not harms suffered by issuing corporations." *Simmonds v. Credit Suisse Sec. (USA) LLC*, 638 F.3d 1072, 1095-97 (9th Cir. 2011).

II. *DONOGHUE* AND *PACKER* FLAGRANTLY DISREGARD THIS COURT'S OPINIONS REGARDING ARTICLE III STANDING.

In this instance, it is undisputed that (1) the petitioner had no relationship to, or communications with, the respondent corporation prior to making any trades, (2) no material non-public information existed at the time of such trades, and (3) the petitioner did not allege such trades to have caused it any actual harm. How then could the Second Circuit determine that the respondent had Article III standing? The answer is that it ignored these troublesome facts and robotically applied *Packer* and *Donoghue* which "categorically held that short-swing trading in an issuer's

stock by a 10% beneficial owner in violation of Section 16(b) of the Securities Exchange Act causes injury to the issuer sufficient for constitutional standing." How so, given *TransUnion*'s holding that "Article III standing requires a concrete injury even in the context of a statutory violation?" The answer is a combination of seemingly willful disregard of this Court's Article III standing precedents, the concoction of a non-existent fiduciary duty, and the fallacious transformation of a supposed breach of that imaginary duty into an injury-in-fact. As a result,, *Packer* scrapped a requirement to allege facts supporting an injury-in-fact for Section 16(b) plaintiffs and effectively created an exception to *TransUnion*'s plenary admonition that "standing is not dispensed in gross."

First, *Packer* embraced *Donoghue*'s baseless claim that Section 16(b) "created" a fiduciary duty that every 10% shareholder of a corporation owes to it, despite nothing in the text or its legislative history to support that contention.[3] Considering that hundreds or thousands of Section 16(b) cases have been brought since the first one in 1943, it is telling that the Second Circuit has been unable to point to a single pre-*Donoghue* case in which such a fiduciary duty was alleged, let alone proven or even recognized by any court. To put it bluntly, a statute is not a Rorschach inkblot test for judges. Something in the text should provide support for a judicial interpretation. See

3. Notably, the SEC, in exempting directors and officers from certain provisions of Section 16, did not discern in the statute an implied fiduciary duty for shareholders. *Securities and Exchange Commission, Release No. 34-37260, fn. 42* (May 31, 1996) ("Officers and directors owe certain fiduciary duties to a corporation . . . , which act as an independent constraint on self-dealing [but they] may not extend to ten percent holders.")

Whitman v. Am. Trucking Ass'n., 531 U.S. 457 (2001)) ("Congress does not hide elephants in mouseholes.")

From this spurious premise, *Packer* took readers on what would be merely an amusing path of circular reasoning if it did not have such disastrous economic and emotional effects on innocent investors like the petitioner: "The concrete injury that confers standing on Packer is, as we recognized [sic] in *Donoghue*, 'the breach by a statutory insider of a fiduciary duty owed to the issuer not to engage in and profit from any short-swing trading of its stock.'" In other words, because, according to the Second Circuit, there is no such thing as a harmless breach of fiduciary duty, every violation of Section 16(b) constitutes a particularized concrete injury sufficient to establish Article III standing. This Court does not need an amicus brief to see through such nonsense. Labeling a violation of a statute as a breach of fiduciary duty does not obviate the need to allege an actual injury caused by the alleged breach.

TransUnion directed courts to determine "whether plaintiffs have identified a close historical or common-law analogue for their asserted injury." No plaintiff in *Donoghue, Packer,* or this case attempted to do that. In each instance, the plaintiff simply said, "The defendant violated Section 16(b) so pay up." Rather than faithfully heed this Court's directive in *TransUnion*, the Second Circuit ignored these failings. In *Packer*, it attempted to finesse the lack of real world injury problem by asserting that "[i]n *Donoghue*, we had identified such an analogue for a Section 16(b) injury: breach of fiduciary duty [and therefore] nothing in *TransUnion* undermines *Donoghue*. . . ." However, as anyone that has a law

degree should know, a breach of fiduciary duty—even a questionable fiduciary duty—is a cause of action, not an asserted injury. Rather, an injury-in-fact or "damages" is an element to be proved in an action alleging a breach of fiduciary duty. If, as here, the plaintiff has alleged no damages, such an action is properly dismissed for inadequate pleading. To eliminate any doubt, in *Thole v. U.S. Bank N.A.*, 140 S. Ct. 1615 (2020) ("*Thole*") a majority of this Court rejected the argument that a breach of fiduciary duty *per se* constitutes an injury-in-fact.[4] Although the defendant in *Packer* argued that *Donoghue* was irreconcilable with *Thole*, the panel in *Packer* chose to ignore *Thole* in crafting its opinion.

It is difficult to attribute *Packer*'s fallacious conflation of a cause of action with an injury and its refusal to address any contrary citations to an honest difference of opinion or mere error. One can only speculate as to why the Second Circuit would claim to faithfully abide by this Court's direction in issuing opinions that, to this observer,

4. In a dissenting opinion in *Thole*, Justice Sotomayor argued that "a breach of fiduciary duty is a cognizable injury, regardless whether that breach caused financial harm. . . ." However, she recently authored a unanimous opinion in a breach of fiduciary case in which she seemingly backed off from her earlier stance, favorably citing *Thole*'s majority opinion. *Cunningham v. Cornell University*, 604 U.S. — (S.Ct. 2025) ("District courts must also, consistent with Article III standing, dismiss suits that allege a prohibited transaction occurred **but fail to identify an injury**. *Cf. Thole v. U.S. Bank N. A.*, 590 U.S. 538, 544 (2020) (explaining that "'Article III standing requires a concrete injury even in the context of a statutory violation'" and affirming the dismissal of an ERISA claim because "plaintiffs . . . failed to plausibly and clearly allege a concrete injury" (quoting *Spokeo, Inc. v. Robins*, 578 U.S. 330, 341 (2016)).") (Emphasis added.)

are glaringly defiant of it. Perhaps it is concerned about criticism for having allowed the unfettered prosecution of so many "no injury" Section 16(b) lawsuits to extract money from innocent shareholders for so many years. See *Foremost-McKesson v. Provident Securities*, 423 U.S. 232 (1976). ("It is inappropriate to reach the harsh result of imposing § 16 (b)'s liability without fault. . . .). Also, see *Gollust v. Mendell*, 501 U.S. 115, 126 (1991) ("Art. III's requirement remains: the plaintiff still must allege a distinct and palpable injury to himself.")

CONCLUSION

Since President Trump arrived on the political scene, Americans have become used to hearing concerns about a possible "constitutional crisis" whereby the executive branch refuses to comply with a court order. It is uncertain how that debate will play out. This petition concerns another type of constitutional crisis, that of a circuit court issuing a decision that flagrantly disregards this Court's precedents. Specifically, in the guise of faithfully adhering to *Spokeo* and *TransUnion*, the Second Circuit appears to have willfully defied them. While in *Thole* this Court said, "There is no ERISA exception to Article III," the Second Circuit has held Section 16(b) to be just such an exception. While Section 16(b) may be an obscure statute to the general public, it has become an instrument of unquestionable injustice as a result of the Second Circuit's failure to dismiss "no injury" lawsuits brought to enforce it. To be blunt, *Packer* and the present case applying *Packer* constitute a slap in the face to this Court that should not be permitted to stand. Rather, it should treat *Packer* as a "broken window" in the federal judiciary and fix it lest it encourage other courts to disregard its

holdings regarding the requirement to assert an injury-in-fact. Therefore, the petition should be granted.

Respectfully submitted,

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