No. 25-391

IN THE

Supreme Court of the United States

CITIGROUP, INC., PETITIONER

v.

OTTO CANDIES, LLC, ET AL.,

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

BRIEF OF WASHINGTON LEGAL FOUNDATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Reform Act bars a civil-RICO claim based on conduct that is actionable as securities fraud by another potential plaintiff, even if the particular RICO plaintiff could not bring a securities-fraud claim.

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INTEREST OF THE AMICUS CURIAE[1]

The Washington Legal Foundation ("WLF") is a nonprofit, public-interest law firm and policy center with supporters nationwide. Founded in 1977, WLF promotes free enterprise, individual rights, limited government, and the rule of law. To that end, WLF often appears as amicus curiae in key disputes over the proper scope of the federal securities laws. *See, e.g.*, *Slack Techs., LLC v. Pirani*, 598 U.S. 759 (2023); *Goldman Sachs Grp., Inc. v. Ark. Tchr. Ret. Sys.*, 594 U.S. 113 (2021). WLF also participates in cases construing the scope of civil liability under RICO.[2] *See, e.g.*, *RJR Nabisco, Inc. v. European Cmty.*, 579 U.S. 325 (2016); *Bridge v. Phx. Bond & Indem. Co.*, 553 U.S. 639 (2008).

INTRODUCTION AND SUMMARY OF ARGUMENT

The Private Securities Litigation Reform Act, 15 U.S.C. § 78u-4 (the "Reform Act" or "PSLRA"), is a bulwark in a series of legislative and judicial efforts to stem the tide of abusive private securities claims. The Reform Act provision at issue here—a prohibition against civil-RICO claims based on conduct that is actionable as securities fraud ("PSLRA bar")—is designed to prevent plaintiffs from transmogrifying

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[1] No counsel for a party who authored this brief in whole or in part, and no person other than counsel made any monetary contribution intended to fund the preparation or submission of this brief. Counsel of WLF provided all parties with written notice of WLF's intent to file this brief.

[2] Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 et seq. ("RICO").

private securities claims into treble-damages RICO claims. The Eleventh Circuit's holding effectively erases the PSLRA bar from the Reform Act and invites a surge of securities claims dressed as RICO claims. This Court should grant Citigroup's petition and reverse the decision below.

In 1995, Congress enacted the Reform Act to target abuses in securities class-action litigation, including "nuisance filings, targeting of deep-pocket defendants, vexatious discovery requests, and manipulation by class-action lawyers of the clients whom they purportedly represent [that] had become rampant." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71, 81 (2006) (citation modified). "While acknowledging that private securities litigation was an indispensable tool with which defrauded investors can recover their losses, the House Conference Report accompanying [the Reform Act] identified ways in which the class-action device was being used to injure the entire U.S. economy." *Id.* (citation modified).

The Reform Act contains varied provisions to protect companies from this vexatious form of litigation. The centerpieces are heightened pleading standards and a safe harbor for forward-looking statements to weed out more claims on motions to dismiss, and a stay of discovery pending the outcome of a motion to dismiss. Through the PSLRA bar, Congress sought to eliminate efforts to circumvent these new requirements. Allowing RICO claims in such cases would resurrect the very abuses the Reform Act was designed to eliminate.

The Eleventh Circuit's decision undermines Congress's statutory structure and purpose to limit abusive litigation in the securities arena. By allowing plaintiffs to pursue civil-RICO claims based on conduct that could be actionable as securities fraud—even if a given plaintiff could not bring a securities claim themselves—the decision invites a flood of litigation that Congress explicitly sought to prevent. This interpretation not only dilutes the PSLRA bar but also threatens to destabilize decades of precedent that narrowly construe the private right of action under Section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act").

This Court should grant certiorari to reaffirm the integrity of the PSLRA bar and ensure that its protections are not eroded by judicial revision. The decision below not only conflicts with the statutory text and legislative history but also diverges from the settled holdings of other circuits that have narrowly construed the private right of action in securities class actions. Clarity from this Court is essential to preserve uniformity in the application of federal law and to prevent the proliferation of barred securities fraud claims masquerading as RICO claims.

ARGUMENT

I. The Eleventh Circuit's Decision Threatens Established Limitations on Private Rights of Action in Securities Class Actions.

a. Section 10(b)'s Implied Private Cause of Action Is Narrowly Construed.

Nothing in the Eleventh Circuit's decision warrants departing from this Court's cases construing Section 10(b) narrowly. In 1975, the Court adopted a purchaser-seller rule and held that mere holders of securities cannot bring a securities claim under the judicially inferred Section 10(b) private right of action. *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 731–49 (1975). In 1976, the Court held that a private cause of action under Section 10(b) and Rule 10b-5 requires "scienter"—an intent to deceive, manipulate, or defraud. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 (1976). In 1977, the Court observed that the "language of § 10(b) gives no indication that Congress meant to prohibit any conduct not involving manipulation or deception." *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 473 (1977). In 1980, the Court held that a duty to disclose under Section 10(b) does not arise from the mere possession of nonpublic market information. *Chiarella v. United States*, 445 U.S. 222, 235 (1980). Later, in 1994, the Court held that private suits against aiders and abettors cannot be brought under Section 10(b). *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 177

(1994). In 2010, noting that "there is no affirmative indication in the Exchange Act that § 10(b) applies extraterritorially," the Court held that it does not. *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 265 (2010). And recently in 2024, the Court held that pure omissions are not actionable under Rule 10b-5(b). *Macquarie Infrastructure Corp. v. Moab Partners, L.P.*, 601 U.S. 257, 266 (2024).

At every step, this Court has consistently construed Section 10(b) narrowly, even when its decisions meant that private plaintiffs (as distinct from the SEC) would not be able to turn to the securities laws for relief. The Court has been unwilling to extend Section 10(b) beyond its statutory text and beyond congressional intent.

There is no inherent unfairness to potential plaintiffs if this Court decides, as it must, that the Reform Act bars plaintiffs, regardless of standing, from bringing a civil-RICO claim based on conduct that is actionable as securities fraud. If a plaintiff meets the requirements for suit under Section 10(b), it can proceed. But if a plaintiff's claims are not permitted under the statute, the plaintiff should not be able to circumvent this Court's Section 10(b) jurisprudence and turn to RICO instead. If any unfairness exists, it would be the unfairness to potential defendants who now must defend against an action seeking treble damages that otherwise would have been impossible for that plaintiff to bring under Section 10(b).

As Justice Sotomayor once stated in another context, "[w]hen I see a bird that walks like a duck,

swims like a duck, and quacks like a duck, I call that bird a duck." *Garland v. Cargill*, 602 U.S. 406, 430 (2024) (Sotomayor, J., dissenting). Here too, if conduct could be actionable as securities fraud by some potential plaintiff, then it should be treated as potential securities fraud. But if an action cannot be brought under that statute as interpreted by this Court, then that particular plaintiff simply may not have a claim. Taking an impermissible securities fraud claim and calling it by another name only seeks to threaten decades of precedent and the well-settled confines of Section 10(b) cases.

b. Congress Purposefully Left Some Participants in the Securities Market Unable to Seek Redress Through Private Litigation.

The Reform Act contains several changes to federal securities class actions based on fraud allegations, including, among other things, a heightened pleading standard (15 U.S.C. § 78u-4(b)); an automatic stay of discovery during the pendency of a motion to dismiss (15 U.S.C. § 78u-4(b)(3)(B)); a safe harbor for forward-looking statements (15 U.S.C. § 78u-5(c)(1)); and a cap on damages under the Exchange Act (15 U.S.C. § 78u-4(e)(1)).

President Clinton was "[unwilling] to sign legislation that will have the effect of closing the courthouse door on investors who have legitimate claims. Those who are the victims of fraud should have recourse in our courts." 141 CONG. REC. H15214-06 (daily ed. Dec. 20, 1995) (message from the President of the United States). In his view, it was

"not appropriate to erect procedural barriers that will keep wrongly injured persons from having their day in court." *Id.*

The President opposed the Reform Act's heightened pleading standard, which requires plaintiffs to "specify each statement alleged to have been misleading [and] the reason or reasons why the statement is misleading," 15 U.S.C. § 78u-4(b)(1), and "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind," *id.* § 78u-4(b)(2)(B). For him, this new pleading requirement was "a higher barrier to bringing suit than any now existing-one so high that even the most aggrieved investors with the most painful losses may get tossed out of court before they have a chance to prove their case." 141 CONG. REC. H15214-06 (daily ed. Dec. 20, 1995) (message from the President of the United States).

President Clinton similarly opposed attempts to weaken the cautionary language required in the "safe harbor" created for forward-looking statements as "the end result may be that investors find their legitimate claims unfairly dismissed." *See id.* The safe harbor imposes a limitation on the types of statements that would be actionable. Misstatements are not actionable if: (1) they were immaterial; (2) they were accompanied by meaningful cautionary language; or (3) the defendant(s) lacked actual knowledge of their falsity when made. *See* 15 U.S.C. § 78u-5. This imposed yet another pleading hurdle for defrauded investors when initiating a suit.

Congress ultimately enacted the Reform Act over President Clinton's objections (and veto). Critically, Congress did not adopt proposed language in the Reform Act that would have restored liability for aiding and abetting securities fraud. *See* 141 CONG. REC. S17991-02 (daily ed. Dec. 5, 1995) (statement of Sen. Joe Biden). Instead, Section 104 of the Reform Act directed prosecution of aiders and abettors by the SEC. *See* 15 U.S.C. § 78t(e). As discussed above, this Court has consistently taken a "careful approach" when determining the scope of the Section 10(b) private right of action. *See Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 150 (2008). "It is appropriate for the Court to assume that when PSLRA § 104 was enacted, Congress accepted the § 10(b) private right as then defined but chose to extend it no further." *Id.* Thus, although Congress specifically declined to authorize private actions against aiders and abettors, the Eleventh Circuit now allows these claims to go forward under RICO, threatening the comprehensive tapestry limiting certain private securities suits.

To avoid the requirements in the Reform Act, securities class action plaintiffs brought claims involving securities traded on national exchanges in state court. To prevent this frustration of the objectives of the Reform Act, Congress enacted the Securities Litigation Uniform Standards Act, 15 U.S.C. § 78bb ("SLUSA").

SLUSA provides that no covered class action may be brought under state law by a private party alleging, among other things, "a misrepresentation or omission of a material fact in connection with the

purchase or sale of a covered security." *Id.* § 78bb(f)(1)(A). If such a class action is brought in state court, it may be removed to federal court and dismissed on preemption grounds. *Id.* §§ 77p(b)–(c); *Id.* §§ 78bb(f)(1)–(2).

This Court considered the scope of SLUSA in *Dabit*. 547 U.S. 71. There, this Court held that SLUSA's preemption of state securities suits encompasses claims by plaintiffs alleged to have held (rather than sold) securities in reliance on a misrepresentation. Respondent argued that the "in connection with the purchase or sale" language "must be read narrowly to encompass (and therefore pre-empt) only those actions in which the purchaser-seller requirement of *Blue Chip Stamps* is met." *Id.* at 84. Rather than adopt that narrow reading, this Court rejected a conclusion "that an alleged fraud is 'in connection with' a purchase or sale of securities only when the plaintiff himself was defrauded into purchasing or selling particular securities." *Id.* at 85. Instead, "it is enough that the fraud alleged 'coincide' with a securities transaction—whether by the plaintiff or by someone else." *Id.* In other words, SLUSA's preemption of state suits must be broad enough to accomplish Congress's purpose.

This Court also reasoned that Congress's use of Section 10(b) "in connection with the purchase or sale" requirement in SLUSA suggested its intent to give the language its settled judicial interpretation.

> Congress can hardly have been unaware of the broad construction adopted by both this Court and the SEC when it imported the key

> phrase—"in connection with the purchase or sale"—into SLUSA's core provision. And when judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its . . . judicial interpretations as well.

Id. at 85 (citation modified).

Congress enacted the Reform Act and SLUSA for many of the same policy considerations that anchored the *Blue Chip Stamps* decision. Permitting holder-plaintiffs to proceed "would give rise to wasteful, duplicative litigation." *Id.* at 86. "A narrow reading of the statute would undercut the effectiveness of the 1995 Reform Act and thus run contrary to SLUSA's stated purpose, viz., to prevent certain State private securities class action lawsuits alleging fraud from being used to frustrate the objectives of [SLUSA]." *Id.* (citation modified).

c. Congress Intended for the Reform Act to Correct the Misapplication of RICO to Securities Fraud Cases.

The Reform Act's legislative history supports a broad and sweeping interpretation of the PSLRA bar to civil-RICO claims. The Reform Act's intent was to "eliminate securities fraud as a predicate offense in a civil RICO action." H.R. REP. NO. 104-369, at 47 (1995) (Conf. Rep.); *see also* Private Securities Litigation Reform Act of 1994, Pub. L. No. 104-67, 109 Stat. 737; S. REP. NO. 104-98, at 19 (1995) (Conf. Rep.).

Representative Christopher Cox proposed prohibiting the use of RICO in securities fraud cases. Among the arguments in support of his amendment, he stated:

> Our economy's health depends on the efficient operation of America's capital markets. We must continue to balance the provisions of adequate remedies for injured investors and the imposition of excessive penalties on all participants in our capital markets. The treble damage blunderbuss of RICO undermines this balance and imposes exorbitant litigation costs, impedes the raising of capital and ultimately puts these costs on the shoulders of consumers and emerging innovative companies.

141 CONG. REC. H2721 (daily ed. Mar. 7, 1995) (statement of Rep. Christopher Cox).

Representative Cox then decried private plaintiffs' bypassing "the carefully crafted liability provisions of the securities laws." *Id.* "Because many claims that could be asserted as securities laws claims can also be characterized as mail or wire fraud, and because mail and wire fraud are also predicates for civil RICO liability, Plaintiffs' attorneys have a devastating, potent, and readily available alternative for bringing actions under RICO instead of under our securities laws." *Id.*

Finally, Representative Cox explained that plaintiffs should not be able to strong-arm businesses into settlements with the threat of treble damages for securities law violations.

> But what we do not want to see is for our carefully crafted Federal securities laws to be shunted aside and instead for people to be able to use a statute never intended to apply in these civil cases in this way so that they can get treble damages, something not provided for in our securities laws, so that they can get discovery going all the way back 10 years to show a pattern which is part of RICO, not part of the securities laws, and in short so they can gin up settlements where a settlement is not in order.

Id.

Against this backdrop, Congress included a narrow carve-out to the broad bar on the use of civil RICO—the bar "does not apply to an action against any person that is criminally convicted in connection with the fraud." 18 U.S.C. § 1964(c). While the congressional record lacks any substantive discussion of this "conviction exception," comments by then-Senator Joe Biden are illustrative of the expansive coverage of the RICO bar. Indeed, Senator Biden criticized numerous provisions of the Reform Act that he described as "anti-investor," including the safe harbor provision, the failure to restore aiding and abetting liability in private causes of action, and the elimination of the application of civil RICO generally. *See* 141 CONG. REC. S17991-02 (daily ed. Dec. 5, 1995) (statement of Sen. Joe Biden). It would be strange to think that Senator Biden would denounce the unavailability of a private right of action against aiders and abettors under the securities laws if he

understood that the RICO bar would not apply to such claims.

In apparent recognition of the sweeping nature of the bar, Senator Biden offered an amendment that would have allowed RICO claims in a securities fraud civil case *if at least one person* in the civil case had been criminally convicted. In his remarks, he lamented that this amendment had been limited to permit RICO to be used against only the person who was criminally convicted. *See id.* This legislative history confirms that if Congress wanted to exempt certain actors or claims from the RICO bar, it could have done so. Instead, it devised a very narrow exception that would not undercut the goal of divorcing RICO claims from securities fraud litigation.

Indeed, when examining the "conviction exception," the lower courts have almost uniformly concluded that it should also be construed as narrowly as possible. *See Krear v. Malek*, 961 F. Supp. 1065, 1076 (E.D. Mich. 1997); *In re Enron Corp. Sec. Deriv. & ERISA Litig.*, 284 F. Supp. 2d 511, 623 (S.D. Tex. 2003) (agreeing with the court in *Krear* that only plaintiffs who have been found criminally defrauded by the RICO defendant may make use of the exception); *Kaplan v. S.A.C. Cap. Advisors, L.P.*, 104 F. Supp. 3d 384, 389 (S.D.N.Y. 2015) (agreeing with *Krear* that only named victims can rely on the conviction exception).

The court in *Krear* found that the conviction exception would otherwise swallow the rule if "plaintiffs who were not found to have been criminally

defrauded would be allowed to 'bootstrap' their RICO claims to the claims of those plaintiffs who were found to have been criminally defrauded." 961 F. Supp. at 1076. It would undermine the goals of the Reform Act and would undercut the scope of the PSLRA bar if a plaintiff could bring a claim under RICO when a defendant's plea did not extend to defrauding that particular plaintiff. Moreover, *Krear* considered the concern that construing the conviction exception so narrowly would leave some legitimate victims of a defendant's securities fraud without recourse. *See id.* at 1077. While it may seem "inequitable" to allow only specifically named securities fraud victims to assert RICO claims, courts "must presume that Congress was sufficiently familiar with the criminal prosecution process, including plea bargaining, so that it understood that a defendant who may have defrauded many plaintiffs could be convicted of defrauding only certain of those plaintiffs." *Id.*

The consistent narrowing of the conviction exception stands in stark contrast to the Eleventh Circuit's decision to decline to "weaponize the PSLRA bar" by allowing the bondholders' claims to proceed here. Pet.App.56. Given the purpose and design of the PSLRA bar, this Court should foreclose this circumvention of congressional intent.

II. Claims That Do Not Satisfy the Reform Act's Pleading Standard Could Be Resurrected as RICO Claims.

a. The Eleventh Circuit's Decision to Allow Holders of Investments to Bring a RICO Action Circumvents the Rationale of *Blue Chip Stamps*.

In *Blue Chip Stamps*, this Court outlined three classes of potential plaintiffs that are barred from a private right of action under Section 10(b)—potential purchasers who decide not to purchase; actual shareholders who decide not to sell; and shareholders, creditors, and others who suffer a loss in the value of their investment due to corporate or insider activities in connection with the purchase or sale of securities which violate Rule 10b-5. 421 U.S. at 737–38.

In reaching its holding, this Court acknowledged that the purchaser-seller rule prevents some deserving plaintiffs from recovering damages caused by violations of Rule 10b-5. *Id.* at 738. As the Court noted, litigation under Rule 10b-5 "presents a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general." *Id.* at 739. The Court acknowledged that even a complaint that by objective standards may have very little chance of success at trial still has a disproportionate settlement value. *Id.* at 740. And the very pendency of the lawsuit may frustrate or delay the defendant's normal business operations, which are wholly unrelated to the lawsuit. *Id.*

Further, the potential for possible abuse of discovery may, as the Court noted, exist in this type

of case under Rule 10b-5 to a greater extent than in other types of litigation due to the prospect of extensive depositions of the defendant's officers and associates and extensive discovery of business documents. *Id.* at 741.

The Court acknowledged that the "very real risk" in permitting those who are mere holders of securities to sue under Rule 10b-5 is that the "the door will be open to recovery of substantial damages on the part of one who offers only his own testimony to prove that he ever consulted a prospectus of the issuer, that he paid any attention to it, or that the representations contained in it damaged him." *Id.* at 746. "In the absence of the [purchaser-seller rule], bystanders to the securities marketing process could await developments on the sidelines without risk, claiming that inaccuracies in disclosure caused nonselling in a falling market and that unduly pessimistic predictions by the issuer followed by a rising market caused them to allow retrospectively golden opportunities to pass." *Id.* at 747.

Yet all these risks the Court highlighted would become a reality if the Eleventh Circuit's decision is left in place. Holders of securities can now re-cast their claims under RICO, seek treble damages, and disrupt businesses with vexatious litigation and extensive discovery. The very risks the Court sought to prevent with the purchaser-seller rule would come to fruition, just under a different statute. The Court should not allow those who under *Blue Chip Stamps* cannot sue under Rule 10b-5 to take advantage of a judicially created loophole in the law—inconsistent with the statutory text of the Reform Act and

congressional intent—and bring their claims under RICO instead.

b. The Eleventh Circuit's Decision Would Permit RICO Suits Against Aiders and Abettors.

This Court has also concluded that private suits against aiders and abettors cannot be brought under the securities laws. *Cent. Bank of Denver*, 511 U.S. at 177. Yet again, the Eleventh Circuit's decision would allow plaintiffs who could not bring their claims under Section 10(b) for the reasons laid out in *Central Bank of Denver* to find a new home in RICO.

In *Central Bank of Denver*, the Court reasoned that the text of the Exchange Act does not itself reach those who aid and abet a Section 10(b) violation. "To be sure," this Court stated, "aiding and abetting a wrongdoer ought to be actionable in certain circumstances. The issue, however, is not whether imposing private civil liability on aiders and abettors is good policy but whether aiding and abetting is covered by the statute." *Id.* (citation modified). This Court concluded that the statute prohibits only the making of a material misstatement or omission, or the commission of a manipulative act. *Id.*

In so holding, this Court observed that "[s]econdary liability for aiders and abettors exacts costs that may disserve the goals of fair dealing and efficiency in the securities markets." *Id.* at 188. The rules for determining aiding and abetting liability are unclear in an area that demands certainty and predictability. *Id.* This would yield decisions made on an ad hoc basis, which offer little predictive value to

those who provide services to public companies. *Id.* "Because of the uncertainty of the governing rules, entities subject to secondary liability as aiders and abettors may find it prudent and necessary, as a business judgment, to abandon substantial defenses and to pay settlements in order to avoid the expense and risk of going to trial." *Id.* at 189.

Citing *Blue Chip Stamps*, this Court again recognized that litigation under Rule 10b-5 presents a danger of vexatiousness that can have "ripple effects." *Id.* "For example, newer and smaller companies may find it difficult to obtain advice from professionals." *Id.* A professional may fear that a newer or smaller company may not survive and that the company's failure would lead to securities litigation against the professional. *Id.* And the increased litigation costs and attorneys' fees arising from Rule 10b-5 litigation may be passed on to their client companies, and in turn to the company's investors who are the intended beneficiaries of the statute. *Id.*

Under the Eleventh Circuit's reasoning, plaintiffs whose claims against aiders and abettors would be barred under Section 10(b) can now bypass the statutory text and bring them under RICO instead. The "ripple effects" this Court sought to avoid, including excessive litigation costs that will be absorbed ultimately by investors, would become a reality. This Court should not permit the Eleventh Circuit to upset the well-established and well-reasoned holdings in *Blue Chip Stamps* and *Central Bank of Denver*.

c. The Eleventh Circuit's Decision Creates a Loophole to Avoid the Reform Act's Heightened Pleading Requirements.

The Eleventh Circuit's circumvention of the PSLRA bar would permit plaintiffs to recast securities claims that would otherwise fail the heightened pleading requirements of securities law as civil treble-damages RICO claims instead.

To prevent meritless securities class actions, the Reform Act imposes heightened requirements for pleading that a challenged statement was false or misleading, and that it was made with intent to defraud (scienter). Congress specified that the district court "shall . . . dismiss the complaint" on a motion to dismiss if it does not meet the Reform Act's heightened pleading standard. 15 U.S.C. § 78u-4(b)(3)(A).

Consistent with this intent, this Court issued two important decisions construing the Securities Act of 1933, the Exchange Act, and the Reform Act—as requiring lesser courts to consider the *full factual context* in evaluating allegations of falsity and scienter. In *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308 (2007), this Court considered what it means for a plaintiff to plead a "strong inference" of scienter, and concluded that this inquiry is "inherently comparative" and requires courts to consider not only the complaint but also documents incorporated by reference and matters of judicial notice. *Id.* at 322–23. This analysis, the Court held, requires courts to "consider plausible, nonculpable

explanations for the defendant's conduct, as well as inferences favoring the plaintiff"—a significant departure from the usual rule that courts draw all reasonable inferences in favor of the plaintiff at the pleading stage. *Id.* at 324.

In *Omnicare Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 575 U.S. 175 (2015), this Court reached a similar conclusion about the element of falsity. This too requires courts to consider not only the full statement being challenged and the context in which it was made, but also other statements made by the company and other publicly available information, including industry customs and practices. *Id.* at 190. Coupled with *Tellabs*' inference-weighing mandate, *Omnicare* creates a sterner test for plaintiffs to establish a claim for relief in a securities case.

Here, the Eleventh Circuit acknowledges that "if the alleged misconduct were actionable under the federal securities laws, Citigroup would secure two victories for the price of one: plaintiffs' RICO allegations would fail, and the even higher pleading standards of the PSLRA would apply to the plaintiffs' other claims." Pet.App.56 at n.23. Yet that is the very result Congress intended with the Reform Act, and that this Court intended with *Tellabs* and *Omnicare*. The Eleventh Circuit, however, allowed plaintiffs to simply side-step the requirement that "a plaintiff can no longer plead the requisite scienter element generally, as he previously could under Rule 9(b)." Pet.App.15. Since "plaintiffs here do not bring securities-fraud claims," the court found "these requirements are inapplicable." *Id.*

Instead, plaintiffs contend that petitioner "formed a RICO enterprise for two common purposes, mirroring their general fraud allegations: (1) to defraud Pemex, and (2) to fraudulently induce the plaintiffs to invest, or maintain their investments, in OSA." Pet.App.54. Under the RICO statute, a plaintiff "need not show, either as an element of its claim or as a prerequisite to establishing proximate causation, that it relied on the defendant's alleged misrepresentation." *Id.* Thus, the Eleventh Circuit created an incentive for plaintiffs to creatively frame deficient securities claims as RICO claims to avoid heightened pleading requirements. That perverse incentive will persist unless this Court intervenes.

III. Review Is Warranted Because Civil RICO Is Uniquely Prone to Abuse.

Although Congress enacted RICO as a novel tool for combating organized crime, civil RICO is rarely used for that purpose. Instead, most civil-RICO suits target ordinary business activities that would not fit most people's definition of "racketeering." And because courts have consistently construed RICO's text so broadly, civil-RICO claims now arise in disputes that Congress did not intend for the statute to cover.

RICO's allure for private plaintiffs and their attorneys is not hard to grasp. RICO applies not only to individuals but also to corporations, and it promises treble damages and full recovery of costs, including attorneys' fees, to prevailing plaintiffs. *See Sedima v. Imrex Co., Inc.*, 473 U.S. 479, 504 (1985) (Marshall, J., dissenting); HR, *Time to Reform RICO*,

THE CHRISTIAN SCIENCE MONITOR (Feb. 12, 1986), https://perma.cc/TXY5-ETNW ("RICO is out of control not only because it is so easy to claim grounds for a suit, but because the appeal of treble damages plus legal fees has proved irresistible for plaintiffs and their lawyers."). And RICO's liberal venue provision, which allows for suit in any district in which the defendant "resides, is found, has an agent, or transacts his affairs," 18 U.S.C. § 1965(a), allows a civil-RICO plaintiff to effectively shop for a forum of plaintiff's choosing.

In criminal settings, RICO's proclivity for abuse is at least constrained by prosecutorial discretion. But RICO's civil remedy is constrained by no such discretion. No wonder, then, that civil RICO is seen as "the litigation equivalent of a thermonuclear device." *Miranda v. Ponce Fed. Bank*, 948 F.2d 41, 44 (1st Cir. 1991), *abrogated on other grounds by United States v. Velazquez-Fontanez*, 6 F.4th 205, 213 n.2 (1st Cir. 2021). Given the statute's remarkable breadth and generous remedies—and given how easily a motivated plaintiffs' attorney can bring everyday business activities under its ambit—civil RICO is an invitation for *in terrorem* suits.

"Once a clever lawyer can characterize an opponent's actions as constituting one or two of the myriad of predicate acts, it takes little imagination to deem those actions RICO violations." Robert K. Rasmussen, *Introductory Remarks & a Comment on Civil RICO's Remedial Provisions*, 43 VAND. L. REV. 623, 626 (1990). Civil-RICO plaintiffs (and their attorneys) can leverage the disastrous public-relations impact of RICO's title to force settlements

from firms that, understandably, fear the loss of goodwill and reputation that would accompany news of alleged "racketeering" activity. Simply put, the "danger of vexatiousness" is high in civil-RICO suits. *Int'l Data Bank, Ltd. v. Zepkin*, 812 F.2d 149, 153 (4th Cir. 1987) (quoting *Blue Chip Stamps*, 421 U.S. at 739).

RICO's private cause of action has remained unusually prone to abuse. Data suggests that private plaintiffs routinely file RICO lawsuits for alleged "racketeering" that federal prosecutors see no legal basis to pursue. Between 2001 and 2006, for example, plaintiffs brought "an average of 759 civil RICO claims" each year. Nicholas L. Nybo, *A Three-Ring Circus: The Exploitation of Civil RICO, How Treble Damages Caused It, & Whether Rule 11 Can Remedy the Abuse*, 18 ROGER WILLIAMS U.L. REV. 19, 24 (2013). Yet during that same stretch, "a paltry average of 212 criminal RICO cases were referred to the United States Attorney's Office." *Id.* Another study found that, of all RICO cases decided by federal appellate courts between 1999 and 2001, 78% were civil and only 22% were criminal. Pamela H. Bucy, *Private Justice*, 76 S. CAL. L. REV. 1, 22 & n.111 (2002).

Judges and legal scholars alike have routinely criticized civil RICO's overly expansive reach for giving "many ordinary civil cases" an "entrée to federal court." Anne B. Poulin, *RICO: Something for Everyone*, 35 VILL. L. REV. 853, 857 (1990); *see Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 471–72 (2006) (Thomas, J., dissenting) ("Judicial sentiment that civil RICO's evolution is undesirable is widespread.");

William H. Rehnquist, *Remarks of the Chief Justice*, 21 ST. MARY'S L.J. 5, 13 (1989) (inviting "amendments to civil RICO to limit its scope to the sort of wrongs that are connected to organized crime, or have some other reason for being in federal court").

In short, allowing the decision below to stand will invite further RICO litigation into the federal courts that does not belong there. Allowing private securities plaintiffs to build civil-RICO claims on allegations of securities fraud would not only erode the PSLRA's bar against such claims, thwarting congressional intent, but also amplify the burden on the federal courts, imposing higher litigation costs on public companies by forcing them into coercive settlements.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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