No. 25-391

IN THE

Supreme Court of the United States

CITIGROUP, INC.,

Petitioner,

v.

OTTO CANDIES, LLC, ET AL.,

Respondents.

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

OPPOSITION TO CITIGROUP'S PETITION FOR A WRIT OF CERTIORARI

DAVID M. COOPER
QUINN EMANUEL URQUHART & SULLIVAN, LLP
295 5th Ave., 9th Fl.
New York, NY 10016
(212) 849-7000

DEREK L. SHAFFER
Counsel of Record
JUAN P. MORILLO
DAVID H. NEEDHAM
QUINN EMANUEL URQUHART & SULLIVAN, LLP
1300 I St. NW, 9th Fl.
Washington, DC 20005
(202) 538-8000
derekshaffer@quinnemanuel.com

Counsel for Respondents

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WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

QUESTION PRESENTED

Did the Eleventh Circuit correctly decline to apply the Private Securities Litigation Reform Act (PSLRA) bar on certain RICO claims, under 18 U.S.C. § 1964(c), where "the plaintiff bondholders who merely held their investments … because of the fraud cannot sue under the securities laws" and "the allegations have little to do with securities fraud in the first place"?

RULE 29.6 DISCLOSURE STATEMENT

Respondents certify that:

Adar Macro Fund Ltd. (now Noble Eagle International Ltd.) has no parent corporation, and no publicly-held company owns 10% or more of Noble Eagle International Ltd.;

Ashmore Emerging Markets Debt and Currency Fund Limited (now Ashmore Strategic Partners Limited), Ashmore Emerging Markets High Yield Plus Fund Limited, Ashmore Emerging Markets Tri Asset Fund Limited, Ashmore SICAV in respect of Ashmore SICAV Emerging Markets Corporate Debt Fund, Ashmore SICAV in respect of Ashmore SICAV Emerging Markets Debt Fund, and Ashmore SICAV in respect of Ashmore SICAV Emerging Markets High Yield Corporate Debt Fund (collectively, "Ashmore") has no parent corporation, and no publicly-held company owns 10% or more of Ashmore;

Coastline Maritime Pte. Ltd. ("Coastline") and Marfield Ltd. Inc. ("Marfield") are subsidiaries of Coastline Group Inc., Shanara Maritime International, S.A. ("Shanara") is a subsidiary of Caballo Marango S.A. which is a subsidiary of Coastline Group Inc., and no publicly-held company owns 10% or more of Coastline, Marfield, or Shanara;

Coöperatieve Rabobank U.A. ("Rabobank") has no parent corporation, and no publicly-held company owns 10% or more of Rabobank;

Copernico Capital Partners (Bermuda) Ltd. ("Copernico") is a subsidiary of Veriluna Investments, and no publicly-held company owns 10% or more of Copernico;

Gulf Investments and Services Ltd. ("Gulf") has no parent corporation, and no publicly-held company owns 10% or more of Gulf;

Halani International Ltd. ("Halani") has no parent corporation, and no publicly-held company owns 10% or more of Halani;

HBK Investments L.P. and HBK Master Fund L.P. (together, "HBK") has no parent corporation, and no publicly-held company owns 10% or more of HBK;[1]

Máquinas Diesel S.A. de C.V. ("MADISA") is a subsidiary of Grupo Máquinas Diesel, S.A. de C.V., and no publicly-held company owns 10% or more of MADISA;

Moneda Deuda Latinoamericana Fondo de Inversion (now Moneda LatAm High Yield Credit Fund PLC), Moneda Latin American Corporate Debt (also on behalf of Moneda International Inc.), Moneda Renta CLP Fondo de Inversion, and Padstow Financial Corp. (collectively, the "Moneda Funds") have no parent corporation, Moneda S.A. Administradora General de Fondos ("Moneda S.A.") is a subsidiary of Moneda Asset Management S.A., and no publicly-held company owns 10% or more of the Moneda Funds or Moneda S.A.;

Nordic Trustee AS is a wholly-owned subsidiary of Nordic Trustee Holding AS, and no publicly-held company owns 10% or more of Nordic Trustee AS;

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[1] HBK also represents the interests and pursues the claims of former plaintiffs ICE Canyon LLC and ICE 1: EM CLO Limited. *See* Order Granting Unopposed Motion to Substitute Party, *Otto Candies, LLC v. Citigroup Inc.*, No. 23-13152 (11th Cir. Apr. 22, 2024).

Otto Candies, LLC is a subsidiary of Otto Candies Holdings, LLC, and no publicly-held company owns 10% or more of Otto Candies, LLC;

Shipyard De Hoop B.V. is a subsidiary of Stichting Administratiekantoor Shipyard De Hoop B.V., Hoop Lobith International B.V. (now Scheepswerf De Hoop B.V.) is a subsidiary of Shipyard De Hoop B.V., and no publicly-held company owns 10% or more of Shipyard De Hoop B.V. or Scheepswerf De Hoop B.V.; and

Waypoint Asset Management LLC ("Waypoint") has no parent corporation, and no publicly-held company owns 10% or more of Waypoint.

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INTRODUCTION

This Court should deny Citigroup's petition for a writ of certiorari because it does not implicate the Question Presented. The Questioned Presented is "whether the PSLRA 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." Pet. i. Thus, the express premise of the Question Presented is that *another* potential plaintiff could bring an action based on the specific conduct at issue.

Yet the Eleventh Circuit's decision (Grant, J., joined by Jill Pryor and Branch, JJ.) does not suggest that any other plaintiff could bring a claim. Accordingly, there is no decision to review allowing a RICO claim "even if the particular RICO plaintiff could not bring a securities-fraud claim." And this Court should not decide in the first instance the case-specific question whether another plaintiff could bring a securities fraud claim based on the conduct at issue here.

The Eleventh Circuit's holding rests on the unexceptional rationale that it "decline[d] Citigroup's invitation to weaponize the PSLRA bar at the pleading stage in a case where the allegations have little to do with securities fraud in the first place." Pet. App. 56a. While Citigroup challenges this rationale, it does so on case-specific grounds that require heavy lifting outside the Question Presented. *See* Pet. 18-19.

In fact, there is no basis to find that any other private plaintiff could bring a securities fraud claim based on the conduct here. Because this case remains at the pleading stage, the allegations of the Complaint control; there is no allegation to the effect that *any* person purchased or sold securities in reliance on the fraudulent misstatements. Even Citigroup does not claim that private plaintiffs *actually* could bring a securities fraud claim here—only that "Banamex's alleged misstatements *might* have been actionable by a private party who bought or sold securities in reliance on those statements." Pet. 17 (emphasis added). Tellingly, Citigroup does not purport to identify such a "private party" because nothing indicates one exists.

Given the ostensible absence of any private plaintiff who could bring a securities fraud claim, Citigroup's essential premise is ultimately that the SEC supposedly could do so. Citigroup did not make this

argument below, however, and it is therefore waived. Citigroup presents no argument as to why this Court should forgive the waiver and decide in the first instance whether the SEC could bring a securities fraud claim that would bar Plaintiffs' RICO claim. Nor is there any circuit split (or even a single circuit precedent) on whether the theoretical possibility of an SEC action alone suffices to trigger the PSLRA bar. There is no good reason why this Court should grant review over this *sui generis*, unraised issue.

Even putting aside the lack of any argument below regarding whether the SEC could bring a claim, and the disconnect between the decision below and the Question Presented, this case would be an especially poor vehicle to address the Question Presented. In a typical securities fraud case, the plaintiffs challenge public statements for publicly traded securities. Even if the plaintiffs lack a viable claim, it may be straightforward to identify plaintiffs who do have such a claim based on the very same statements (combined with a fraud-on-the-market theory of reliance). Here, in contrast, the case involves bonds in a small, private market, where each Plaintiff alleged specific misstatements made to itself. Therefore, atypical considerations in this case complicate the inquiry into whether anyone else could bring a claim based upon the specific conduct underlying Plaintiff's RICO claim. Moreover, this case is at an interlocutory stage, with further briefing on the RICO claims still pending before the district court—and positioned potentially to moot the Question Presented here.

Finally, Citigroup's arguments also fail on the merits. The text, context, and legislative history of 18 U.S.C. § 1964(c) all belie Citigroup's assertion that Congress intended to preclude RICO claims simply

because someone else could have brought a securities fraud claim. At a minimum, there is no basis to extend this interpretation to SEC claims, and in particular the strained, anomalous SEC claim hypothesized here, which would not be based on fraud in the purchase or sale of a security.

In sum, Citigroup cannot persuasively shoehorn the unique facts of this case into the Question Presented, while ignoring the stated basis for the Eleventh Circuit's decision. The Petition should be denied.

STATEMENT OF THE CASE

A. Factual Background

1. This case concerns Citigroup's role in a massive fraud involving Oceanografía S.A. de C.V. ("OSA"), once the largest oil-services company in Latin America, which cost Plaintiffs over one billion dollars.

In 2008, Citigroup established a cash-advance facility for OSA based on services it was to provide to Petróleos Mexicanos ("Pemex"), Mexico's state-owned oil and gas company. Third Amended Complaint, *Otto Candies, LLC v. Citigroup Inc.*, No. 16-cv-20725 (S.D. Fla. Feb. 25, 2022), Dkt. 187 ("Complaint") ¶¶ 3, 73. Under the facility, Citigroup would advance payments allegedly due to OSA based on Pemex work orders, then collect those amounts directly from Pemex. *Id.* ¶¶ 4, 82. Citigroup retained a hefty portion of these Pemex payments as interest for the cash advances. *Id.* ¶ 115. The more OSA requested in cash advances from the facility, the more money Citigroup made through interest payments. *Id.* ¶ 118.

From 2008 to 2014, Citigroup advanced over $3 billion to OSA. *Id.* ¶¶ 73-74. In return, Citigroup collected tens of millions of dollars in interest every

year. *Id.* ¶¶ 12, 113. Taking advantage of the potential to increase its profits from the cash-advance facility, Citigroup conspired with OSA to orchestrate a fraud whereby (1) OSA submitted false documentation in support of the cash advances to Citigroup; (2) Citigroup knowingly approved the false documentation; (3) OSA received funds to which it was not entitled; and (4) Citigroup earned interest on the illicit funds. *Id.* ¶¶ 5, 109-45. Citigroup also managed and supervised employees of its Mexican subsidiary Banamex, which had responsibilities relating to the facility and reported to Citigroup. *Id.* ¶¶ 3, 80-81, 148-49.

To facilitate the fraud, Citigroup wrongfully (1) increased its cash advances to OSA by nearly six times from 2009 to 2012 to nearly half a billion dollars, even though OSA's revenue increased by less than half that rate (*id.* ¶ 119); (2) entered into a secret agreement with OSA whereby Citigroup gave OSA responsibility for validating its own documents (*id.* ¶¶ 6, 105-07); (3) violated Citigroup's own internal policies for approving OSA's requests, including by authorizing cash advances that exceeded the value of OSA's contracts with Pemex by more than $200 million (*id.* ¶¶ 137-40); and (4) misclassified the facility as essentially risk-free and subject to less scrutiny because Citigroup was repaid by Pemex, a government monopoly (*id.* ¶¶ 116-17).

2. Plaintiffs are 14 groups of shipping companies, a bank, and bondholders who lost over $1 billion in transactions with OSA. *Id.* ¶¶ 16-35, 37-47. For instance, Otto Candies, LLC is a Louisiana-based vessel building and leasing company that lost $120 million in unpaid charter fees and 21 vessels worth hundreds of millions of dollars. *Id.* ¶¶ 20, 1289. Plaintiffs alleged fraudulent misrepresentations and

omissions that Citigroup and/or OSA made to each Plaintiff regarding OSA's finances. *Id.* ¶¶ 8-11, 378-1708. Citigroup and/or OSA made these misrepresentations and omissions to Plaintiffs, either verbally or in writing, including through in-person meetings, telephone calls, e-mails, and written materials. *Id.*

3. In early 2014, the Mexican government uncovered the cash-advance fraud after an unrelated audit revealed irregularities in OSA's contracts with Pemex. *Id.* ¶¶ 15, 162-63. Shortly thereafter, the Mexican Attorney General's Office seized OSA and put the company into restructuring proceedings. *Id.* ¶ 177. Following discovery of the fraud, Citigroup was forced to launch an internal investigation. *Id.* ¶ 165. Citigroup's investigation report acknowledged that it had issued approximately $430 million in fraudulent cash advances. *Id.* ¶ 166. Because the scope of Citigroup's review was temporally limited, and did not include all of the cash advances to OSA, the actual value of the fraudulent cash advances is likely greater. *Id.* ¶¶ 166, 171.

Citigroup's CEO, Michael Corbat, publicly acknowledged that, based on the bank's investigation, at least one of Citigroup's employees was directly involved in the fraudulent cash-advance scheme. *Id.* ¶¶ 7, 172. Corbat also announced that Citigroup had fired 12 employees, including "four Managing Directors" (two being "business heads in Mexico"), and expected to discipline more for their involvement in the fraud. *Id.* The Mexican criminal and regulatory authorities likewise concluded that 10 Citigroup employees were criminally involved in the scheme. *Id.* ¶¶ 7, 176-77. U.S. authorities, including the Securities and Exchange Commission and the Department of Justice, also investigated Citigroup's role in the fraud. *Id.* ¶¶ 183-

87. The SEC settled its investigation with an order directing Citigroup to pay a $4.75 million fine, specifically for failures in its controls and reporting over the cash-advance facility. *In re Citigroup Inc.*, Exchange Act Release No. 83858, 2018 WL 3913653, at *9 (Aug. 16, 2018). The SEC Order did not discuss OSA's bond offerings or securities violations.

B. Procedural Background

1. In 2016, Plaintiffs sued Citigroup for its role in OSA's collapse. In 2018, the district court granted Citigroup's motion to dismiss on *forum non conveniens* grounds. Pet. App. 170a-171a. In 2020, the Eleventh Circuit reversed and remanded. Pet. App. 110a-152a. It held (*inter alia*) that the district court had failed to give proper deference to the domestic Plaintiffs' choice of forum, Pet. App. 132a, and that Citigroup's factual assertions had erroneously "misconstru[ed] the complaint" and "contradict[ed] the plaintiffs' allegations," Pet. App. 139a.

Plaintiffs filed a second amended complaint, and Citigroup again moved to dismiss. In 2021, the district court granted the motion, holding that the complaint did not "meet the heightened pleading standard for fraud," and allowed Plaintiffs leave to amend. Pet. App. 10a. Plaintiffs then filed the operative Complaint, which raises seven claims, including for common-law fraud, aiding and abetting fraud, vicarious liability, and RICO violations. After Citigroup again moved to dismiss, the district court in 2023 again granted dismissal of all seven counts. Pet. App. 107a-108a. The district court did not reach the PSLRA question at issue in this Petition. *See* Pet. App. 87a n.5.

2. In 2025, the Eleventh Circuit again reversed and remanded. Pet. App. 77a. With respect to Plaintiffs' claims for common law fraud and aiding and abetting fraud, the Eleventh Circuit held that the district court had applied the wrong pleading standard. Pet. App. 13a-15a. Properly reviewed, Plaintiffs alleged a "mosaic of fraud" that the district court nonetheless "ignored" through its "oversight;" the court below did "not see how the plaintiffs could have pleaded their fraud claims with greater specificity." Pet. App. 35a, 46a-47a. The Eleventh Circuit also reversed the dismissal of the vicarious liability and conspiracy claims, holding (*inter alia*) that the district court "failed to engage with the totality of the plaintiffs' allegations, ignored certain claims altogether, and flipped the presumption at the pleading stage on its head by reading inferences and uncertainties against the plaintiffs." Pet. App. 63a. Citigroup does not contest any of these rulings.

With respect to Plaintiffs' RICO claim, the Eleventh Circuit remanded to the district court to determine whether Plaintiffs pleaded the RICO elements under the correct legal standards. Pet. App. 55a.

As to the PSLRA, the Eleventh Circuit held that several Plaintiffs leased vessels or loaned money to OSA; because their claims did not involve securities fraud, they were not barred by the PSLRA. Pet. App. 56a. Citigroup does not challenge that holding. Pet. 10 n.1 ("Only the bondholders' RICO claims are at issue in this petition.").

With respect to the bondholder Plaintiffs, the entirety of the Eleventh Circuit's reasoning is as follows:

> Citigroup also hits a snag with the plaintiff bondholders. Citigroup acknowledges the

> Supreme Court's conclusion that "holding" an investment—maintaining one's stake in company X—does not offer grounds to sue under the federal securities laws. *See* 17 C.F.R. § 240.10b-5; *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 735-36, 95 S. Ct. 1917, 44 L. Ed. 2d 539 (1975). So the plaintiff bondholders who merely held their investments in OSA because of the fraud cannot sue under the securities laws. It's unclear, then, why the PSLRA would foreclose these claims. We decline Citigroup's invitation to weaponize the PSLRA bar at the pleading stage in a case where the allegations have little to do with securities fraud in the first place.

Pet. App. 56a.

Finally, the Eleventh Circuit also held that Plaintiffs pleaded "ample circumstantial evidence" of a RICO conspiracy. Pet. App. 65a. Even if Plaintiffs' substantive RICO claim might not be viable, the Eleventh Circuit noted that their RICO conspiracy claim could independently survive through their allegations of an agreement between Citigroup and OSA to commit predicate acts of wire fraud. Pet. App. 68a-69a. Citigroup does not challenge the reversal of the dismissal of the RICO conspiracy claim. In particular, Citigroup neither argued below nor argues here that the PSLRA bar applies to the RICO conspiracy claim.

REASONS FOR DENYING THE PETITION

As discussed below, this Court should deny the Petition for several reasons. *First*, the Question Presented is not implicated here because the decision below did not suggest another plaintiff could bring a securities fraud claim, and, indeed, no such plaintiff exists. *Second*, Citigroup waived any argument based on the SEC's supposed ability to bring a fraud claim, and, regardless, this issue does not warrant review. *Third*, this case is a poor vehicle to address the Question Presented for the additional reasons that the case does not involve a typical fraud on the market and that this case is in an interlocutory posture, with the RICO claim itself subject to further briefing and a dismissal motion still pending in the district court. *Finally*, on the merits, Citigroup misinterprets the statutory language in arguing that the PSLRA bar applies so long as any person or entity in the world could theoretically bring a securities fraud claim.

I. THIS CASE DOES NOT IMPLICATE THE QUESTION PRESENTED

The premise of Citigroup's Petition is that the Eleventh Circuit departed from other circuit courts in holding that a RICO claim could proceed even if another potential plaintiff has a securities fraud claim based on the same conduct. Pet. i. But no such holding was rendered by the Eleventh Circuit, which never so much as suggested that any other plaintiff could bring a securities fraud claim here. Nor is there any indication that any hypothetical plaintiff could in fact bring a securities fraud claim based on the conduct underlying Plaintiffs' RICO claim. As such, the Question Presented does not emerge from the decision below or even, for that matter, the instant facts.

A. The Eleventh Circuit Decision Does Not Suggest That Anyone Can Bring A Securities Fraud Claim

The Eleventh Circuit's reasoning does not implicate the Question Presented or any supposed circuit split. The Eleventh Circuit rejected application of the PSLRA bar on the express ground that "the plaintiff bondholders who merely held their investments in OSA because of the fraud cannot sue under the securities laws" and "the allegations have little to do with securities fraud in the first place." Pet. App. 56a. In doing so, the court did not state that someone other than Plaintiffs could have brought a securities fraud claim here. Nor did the court decide whether the RICO bar would be inapplicable in the event that other plaintiffs could have brought a securities fraud claim. In other words, the Question Presented was not passed on or otherwise posed by the decision below.

To the extent Citigroup means to fault the Eleventh Circuit for not mentioning other plaintiffs, that too would be groundless. Citigroup did not identify any such other plaintiff below. Indeed, Citigroup did not even make clear whether its argument contemplated the prospect of other (unidentified) plaintiffs. Instead, Citigroup's argument took a different tack, focusing on the notion that *Plaintiffs themselves* could have brought a securities claim, albeit under different circumstances. *See* Brief of Defendant-Appellee at 32-35, *Otto Candies, LLC v. Citigroup Inc.*, No. 23-13152 (11th Cir. Dec. 6, 2023). Despite pressing that argument below, Citigroup does not raise it here. Because Citigroup itself did not mention below any other plaintiff who could bring a securities fraud claim, the Eleventh Circuit had no occasion to grapple with one. As a result, there was no ruling below on

whether such other plaintiff exists, let alone how that might affect application of the PSLRA.

B. No Private Person Can Bring A Securities Fraud Claim Based On Citigroup's Misstatements To Plaintiffs

Even if this Court were to consider the issue in the first instance, no actionable securities fraud claim is ostensibly available here for any private plaintiff. Tellingly, Citigroup does not identify a single person in the world who can bring a securities fraud claim based on the conduct at issue here. Nor does Citigroup even claim that such a person actually exists. Instead, Citigroup posits that "Banamex's alleged misstatements *might* have been actionable by a private party who bought or sold securities in reliance on those statements." Pet. 17 (emphasis added). But the statute does not speak in terms of whether an alleged securities fraud "might have been" actionable—rather, it is directed to whether the alleged fraud "would have been actionable." 18 U.S.C. § 1964(c).

Moreover, there is no basis to believe that a securities fraud claim here even might have been actionable. All of the claims based on fraudulent misstatements concern misstatements made specifically to Plaintiffs. *See supra* at 5-6. These misstatements came in face-to-face conversations, emails, phone calls, and presentations. *See id.* Each Plaintiff alleged the specific misstatements that it heard or saw. *See id.*

Another private plaintiff could not rely upon these misstatements—as made directly *to Plaintiffs*—to bring a securities fraud claim. The PSLRA bar applies where a plaintiff "rel[ies] upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962."

18 U.S.C. § 1964(c). The conduct relevant to the PSLRA bar, then, is only the conduct upon which the plaintiff relies. Here, Plaintiffs rely upon the misstatements specifically made to them. Plaintiffs do not rely upon misstatements made to other potential plaintiffs. Given that each Plaintiff is relying only on the misstatements made to itself, other plaintiffs would not have any actionable securities claim based on those misstatements.

Citigroup does not identify any particular misstatement that would form the basis for a securities fraud claim. Nor could Citigroup do so because, as discussed above, the Complaint does not allege public statements or a fraud on the market. Citigroup points to allegations that discuss misstatements animated by an intent "to induce investors to purchase or retain the 2008 and 2013 bonds," Pet. 17 (quotation marks omitted), but neither the Complaint nor Citigroup suggests that anyone actually purchased in reliance on these misstatements. Rather, the misstatements Citigroup cites were ones (a) directed at Plaintiff Moneda, which did not purchase (but rather held) bonds, Compl. ¶¶ 1768-69; (b) shared with OSA, which engaged in the fraud but did not purchase bonds, *id.* ¶ 1778; (c) directed at "potential" (not actual) bond purchasers, *id.* ¶ 1741; and (d) directed at Plaintiff Nordic Trustee, which served as trustee but did not purchase bonds, *id.* ¶ 1770. In short, the Complaint does not allege that anyone heard or read the misstatements and purchased bonds in reliance thereon.

Thus, Citigroup's theory would ultimately have to be that other, similar misstatements seen or read by others qualified as the same conduct upon which Plaintiffs rely for their RICO claim. But that cannot fly at this stage: Citigroup has not advanced this

argument in the Petition, the Eleventh Circuit did not address this argument below, and there is no reason to entertain it now. Even assuming other misstatements could be considered, there would still be a question whether anyone purchased or sold securities in reliance on the misstatements. Notably, this case does not involve publicly traded securities that necessarily are bought and sold constantly, and for which there is often a presumption of reliance under *Basic Inc. v. Levinson*, 485 U.S. 224, 245-47 (1988). This case distinctively involves privately traded bonds with a limited market; in this case, different from the typical securities case, there is no way of knowing (and certainly not at the pleading stage) whether anyone but Plaintiffs actually relied on Citigroup's misstatements.

Nothing in the Complaint establishes the existence of actionable securities fraud claims by others. Citigroup's premise, therefore, is that a court must go outside the complaint to decide the viability of another plaintiff's securities fraud claim. As the Eleventh Circuit noted, however, "[w]e decline Citigroup's invitation to weaponize the PSLRA bar at the pleading stage." Pet. App. 56a. Citigroup criticizes this aspect of the Eleventh Circuit's decision, *see* Pet. 18-19, but black-letter law forbids going outside the pleadings at the instant motion-to-dismiss stage. *See, e.g.*, Fed. R. Civ. P. 12(d) ("If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56."). Nor must Plaintiffs preempt the application of the PSLRA bar in order to plead a valid claim. *See, e.g.*, *Gomez v. Toledo*, 446 U.S. 635, 640 (1980) (the plaintiff has no "obligation to anticipate" an affirmative defense in its complaint); *cf. Gilmore v. Gilmore*, 503 F. App'x 97, 99 (2d Cir. 2012) (unpublished) (assuming

arguendo, as the parties had, that the PSLRA bar provides an affirmative defense). Much as Citigroup may desire a novel, contrary rule, there is no legal basis for such a rule,[1] and it by no means warrants this Court's review.

II. CITIGROUP'S ARGUMENT THAT THE SEC COULD BRING A CLAIM IS WAIVED AND DOES NOT WARRANT THIS COURT'S REVIEW

Unable to say whether any private plaintiff has an actionable securities fraud claim, Citigroup relies principally on the notion that the SEC could bring such a claim. As discussed below, however, this argument is waived and cannot justify this Court's review.

A. Citigroup Did Not Raise Below And The Eleventh Circuit Did Not Address Whether The SEC Could Bring A Claim Here

Citigroup failed to raise below the argument that the SEC could bring a claim and that the PSLRA bar is triggered for that reason. Before the Eleventh Circuit, Citigroup did not mention whether the SEC could bring a claim. *See* Brief of Defendant-Appellee at 32-35, *Otto Candies, LLC v. Citigroup Inc.*, No. 23-13152 (11th Cir. Dec. 6, 2023). Accordingly, the Eleventh Circuit did not consider whether the SEC could bring a claim here. Having failed to make this argument or otherwise obtain a ruling on it, Citigroup

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[1] The only two cases Citigroup cites on this point have nothing to do with the PSLRA bar on RICO claims. *See* Pet. 19 (citing *Smallen v. The Western Union Co.*, 950 F.3d 1297 (10th Cir. 2020), and *GSC Partners CDO Fund v. Washington*, 368 F.3d 228 (3d Cir. 2004)).

waived it. *See, e.g.*, *Sprietsma v. Mercury Marine*, 537 U.S. 51, 56 n.4 (2002) ("Because this argument was not raised below, it is waived.").[2]

Even if the argument were not waived, Citigroup's failure to raise this issue below would weigh heavily against granting review. *See, e.g.*, *TRW Inc. v. Andrews*, 534 U.S. 19, 34 (2001) ("We do not reach this issue because it was not raised or briefed below."); *Youakim v. Miller*, 425 U.S. 231, 234 (1976) ("Ordinarily, this Court does not decide questions not raised or resolved in the lower court."). As discussed *infra* at 23-25, it is highly questionable, both factually and legally, whether the SEC could bring a claim here and whether such a claim would implicate the PSLRA bar. Suffice it to note there is no reason why this Court should consider these complex, case-specific issues in the first instance.

B. There Is No Circuit Split Regarding Whether The Supposed Ability Of The SEC To Bring A Claim Suffices To Invoke The PSLRA Bar

There is no circuit split specifically over whether the SEC's theoretical ability to bring a claim triggers the PSLRA bar, and Citigroup does not contend otherwise. All of the cases Citigroup cites concern whether

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[2] The only mention of the SEC in the briefing or decision below was that the SEC settled an investigation with an order directing Citigroup to pay a $4.75 million fine for failures in its controls and reporting. *See In re Citigroup Inc.*, Exchange Act Release No. 83858, 2018 WL 3913653, at *9 (Aug. 16, 2018). This order facially has nothing to do with fraud in the purchase or sale of securities. It also bears noting that, contrary to Citigroup's suggestion, Pet. 24-25, the size of the fine says nothing about the damages Citigroup should face for the misconduct directed to Plaintiffs, which caused them to lose over $1 billion.

private plaintiffs can bring securities fraud claims.[3] None of these cases mentions whether the SEC could pursue an action for the conduct upon which the plaintiffs relied. That is, no circuit conflict exists over whether the PSLRA bar applies where the SEC can bring a claim but no private plaintiff can. Setting aside the lack of a circuit split, the apparent paucity of case law on this issue confirms it is unworthy of this Court's review.

III. THIS CASE IS A POOR VEHICLE TO ADDRESS THE PSLRA BAR

In addition to the lack of any ruling below on the Question Presented and the waiver of the SEC argument, this case is a singularly poor vehicle to address the scope of the PSLRA bar.

First, the factual scenario here is unusual and confounding. As discussed *supra* at 12-13, this case

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[3] *See Lerner v. Colman*, 26 F.4th 71, 78 (1st Cir. 2022) ("Lerner's alleged schemes … could have formed the basis for securities fraud actions by proper plaintiffs, though all parties agree that Lerner herself would not have had standing to bring those actions because she was not injured by those schemes."); *MLSMK Inv. Co. v. JP Morgan Chase & Co.*, 651 F.3d 268, 277-78 & n.11 (2d Cir. 2011) (holding that the RICO bar applied even if the particular plaintiffs could not bring a claim against the particular defendant); *Bixler v. Foster*, 596 F.3d 751, 760 (10th Cir. 2010) ("Plaintiffs contend that the PSLRA exception to RICO does not apply because their claims did not involve the purchase or sale of securities," but "their allegations … describe a 'purchase' and 'sale' of securities."); *Howard v. Am. Online Inc.*, 208 F.3d 741, 749 (9th Cir. 2000) ("Plaintiffs do not dispute that their securities fraud claims could be brought by a plaintiff with proper standing."); *Bald Eagle Area Sch. Dist. v. Keystone Fin., Inc.*, 189 F.3d 321, 329 (3d Cir. 1999) (plaintiffs "concede that some of the conduct alleged as predicate offenses of mail, wire, and bank fraud does constitute securities fraud").

involves particular misstatements made to particular Plaintiffs, thereby raising fact-specific questions concerning the ability of non-plaintiffs to bring a fraud claim based on the conduct alleged in the Complaint. In contrast, the mine run of cases concerning potential securities fraud involve public statements that defrauded everyone in the market. In that context, it may be relatively straightforward to determine whether and to what extent other potential plaintiffs could bring a securities fraud claim. Here, however, the question is much more fraught. Especially considering that the Eleventh Circuit did not resolve this question below, and this Court would have to resolve it in the first instance before reaching the Question Presented, the unusual facts here caution strongly against review.

Second, the interlocutory posture of this case also weighs against granting certiorari here. Citigroup suggests that the interlocutory posture does not matter. Pet. 27. But Citigroup neglects to mention that it is currently challenging the RICO claims on *other grounds* (on which the Eleventh Circuit remanded) in the district court. Specifically, the district court is considering whether to dismiss the RICO claims based on the supposed lack of domestic injury. *See* Citigroup's Notice of Intervening Case Law With Respect To Issues Remanded, *Otto Candies, LLC v. Citigroup Inc.*, No. 16-cv-20725 (S.D. Fla. Aug. 20, 2025), Dkt. 225. While Plaintiffs have opposed the dismissal of the RICO claims, the district court could dismiss the claims in whole or in part, thereby mooting this Petition. Citigroup also fails to consider the fact that the early stage of this litigation complicates resolution of the Question Presented. As discussed *supra* at 14, the allegations are controlling, while Citigroup is bidding to summon facts outside the Complaint in arguing that non-plaintiffs would be positioned to

bring a securities fraud claim for the misconduct at issue. By any fair measure, the review Citigroup seeks would be more straightforward and better informed if it proceeded after final judgment, rather than on an interlocutory basis.

IV. ON THE MERITS, CITIGROUP ERRS IN ASSERTING THAT THE PSLRA BAR APPLIES WHENEVER ANYONE CAN BRING A SECURITIES FRAUD CLAIM

As discussed above, there is no allegation, evidence, or ruling below suggesting that any would-be plaintiff could bring a securities fraud claim here. Regardless, even if Citigroup's premise were true, Citigroup is wrong on the merits of the Question Presented.

A. The PSLRA's Plain Language And Context Show No Intent To Cover A Securities Fraud Claim By Anyone

"We start, as always, with the language of the statute." *Williams v. Taylor*, 529 U.S. 420, 431 (2000). This particular statute states that "no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962." 18 U.S.C. § 1964(c). According to Citigroup, "actionable" means "actionable" by anyone, but this interpretation ignores the structure of the sentence. The subject of the sentence is the "person." That is who may not "rely upon" the conduct. That is who is trying to "establish a violation of section 1962." And that is the person for whom the conduct cannot be "actionable as fraud in the purchase or sale of securities."

Section 1964(c) does not suggest that it is changing the subject mid-sentence or that "actionable" means

theoretically actionable by someone somewhere in the world. Citigroup argues that the passive voice means that there is no specific actor, Pet. 12-13, but its cited cases concern specific actions separate from the actions of the particular person at issue. *See Dean v. United States*, 556 U.S. 568, 572 (2009) (interpreting statute that discusses person who carries or possesses a firearm, and the additional punishment if "the firearm is discharged"). In any event, this Court recently recognized: "It is true, of course, that context can confine a passive-voice sentence to a likely set of actors." *Bartenwerfer v. Buckley*, 598 U.S. 69, 76 (2023) (citing *E. I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 128-29 (1977)). For several reasons, the context here shows that Congress did not use "actionable" to refer to a securities law claim being brought by people other than the plaintiffs bringing the RICO claim.

First, the statute does not simply use the passive voice; it uses the past conditional perfect tense, *i.e.*, "would have been." The import of this tense is that there could have been but was not an action. This concept finds purchase and makes sense only as applied to the particular plaintiffs themselves. When considering people other than the plaintiffs, it is always possible that those people already did or might later bring a securities fraud claim. If Congress wanted to cover those scenarios, it would have said "is actionable," not "would have been actionable." The latter makes sense only as applied to the plaintiffs because they in fact brought a RICO claim and the operative question is whether they could have brought a securities fraud claim instead.

Second, Citigroup's overbroad interpretation would bar RICO claims even where the plaintiff could not possibly bring a securities fraud claim. The principle

behind Section 1964(c) is that, if a person has an actionable securities fraud claim, then he does not also need to bring a RICO claim based on the same conduct. This is reflected in the legislative history that Citigroup itself relies upon. *See* Pet. 14. As noted in the Conference Report, Congress'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* S. Rep. No. 104-98, at 19 (1995) (same).[4] Where, as here, the plaintiff undisputedly never could have brought a securities fraud claim, securities fraud is not serving as a predicate offense for a RICO claim. Under Citigroup's interpretation, however, a plaintiff can be denied any claim at all simply because someone else might have a securities-fraud claim. But it is implausible to attribute Congressional intent to extinguish a RICO claim—even when all of the elements of RICO are satisfied—

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[4] A district court further observed that the legislative history is clear on this point: "Despite the competing factions within the legislative process, at the very least, both sides of the aisle appeared to find agreement in the SEC's view that Congress should '[e]liminat[e] the overlap between private remedies under RICO and the Federal securities laws.' Clearly, the purpose of the PSLRA was not to leave legitimate victims without *any* remedy, but rather to find the *appropriate* statutory remedy depending upon the circumstance, i.e., either a private RICO suit, a private securities fraud suit, or, a public suit brought on behalf of victims by the SEC (in the case of offenders aiding and abetting securities fraud)." *Menzies v. Seyfarth Shaw LLP*, 197 F. Supp. 3d 1076, 1113 (N.D. Ill. 2016), *aff'd in part on other grounds*, 943 F.3d 328 (7th Cir. 2019) (quoting Securities Litigation Reform Proposals S. 240, S. 667, and H.R. 1058: Hearings Before the Subcomm. on Securities of the S. Comm. on Banking, Housing, and Urban Affairs, 104th Cong. 232 (1995) (statement of Arthur Levitt, Chairman, SEC)) (brackets and emphasis in original; citation omitted).

for a plaintiff lacking the ability to bring a securities fraud claim.

Citigroup's contrary argument erroneously relies on *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71 (2006). *See* Pet. 16. In *Dabit*, the statute concerned whether the plaintiff "alleg[ed]" a misrepresentation in connection with a security, not whether there would have been an "actionable" claim. *Compare* 15 U.S.C. § 78bb(f)(1)(A), *with* 18 U.S.C. § 1964(c). The plaintiffs were bringing a securities fraud claim (under state law), and the question was whether they could bring this claim as a class action. 547 U.S. at 87 ("SLUSA [the Securities Litigation Uniform Standards Act] does not actually pre-empt any state cause of action. It simply denies plaintiffs the right to use the class-action device to vindicate certain claims."). Here, in contrast, Plaintiffs are not bringing a securities fraud claim, and the question is whether the supposed ability of others to bring such a claim bars Plaintiffs' RICO claims. Different considerations apply in these different cases. To bar RICO claims based on securities-law claims the plaintiffs did not and could not bring would be quite different from disallowing a class action based on the securities-law claims specific plaintiffs chose to bring.

Third, Citigroup's theory would put courts in the extraordinarily difficult position of attempting to discern whether non-parties would have a viable securities fraud claim. Under Citigroup's conception, the court would have to examine the facts surrounding the potential claims of every potential plaintiff to determine whether there is one actionable securities fraud claim. While this might be simple enough in some cases, in many others it effectively would require canvassing the world and then conducting mini-trials

on third-party claims that have not actually been brought in any court (and which the third parties may have no interest in bringing). Citigroup does not identify any other statutory scheme that requires courts to hypothesize unbrought third-party claims in order to adjudicate whether the claims in the litigation can proceed in the first instance. The courts should not presume that Congress intended such an unwieldy scheme just because it included the word "actionable" in the statute.

B. The PSLRA's Plain Language And Context Show No Intent To Cover A Securities Fraud Claim By The SEC

Even assuming that the "actionable" language in 18 U.S.C. § 1964(c) applied to other private plaintiffs, it does not apply to the SEC. The statute refers to a "person" bringing a claim. Thus, when discussing whether a claim is actionable, it naturally is referring to the same category of potential plaintiffs bringing an action. Even Citigroup's interpretation relies on the word "person." *See* Pet. 13 ("the PSLRA bar provides that '*no person*'—whether a viable securities plaintiff or anyone else—may rely upon securities-fraud conduct") (emphasis in original). The SEC is not a "person" within the meaning of this statute. *See* 18 U.S.C. § 1961 ("As used in this chapter— … 'person' includes any individual or entity capable of holding a legal or beneficial interest in property."). Accordingly, there is no statutory basis to import a government actor into the PSLRA bar.

Indeed, there is nothing in the securities laws that suggests the ability of the government to bring a claim should bar private plaintiffs from doing so. Nor would such an approach be logical. The government has its own reasons, in its discretion, for choosing whether to

bring a claim. There is no reason why the theoretical prospect that the government could have brought a claim should bar a private plaintiff from doing so.

C. Any SEC Claim Here Would Not Be A Claim In The Purchase Or Sale Of Securities

Even if an SEC claim theoretically could fall within 18 U.S.C. § 1964(c), any such claim would not so qualify here. Under Citigroup's theory, the question is whether the SEC can bring a claim "for fraud in the purchase or sale of securities." 18 U.S.C. § 1964(c). Citigroup equates this language with Section 10(b), Pet. 15-16, but ignores a critical distinction between the two. Unlike the provision here, Section 10(b) concerns fraud "*in connection with* the purchase or sale of any security." 15 U.S.C. § 78bb(f)(1)(A) (emphasis added). Indeed, this Court frequently has recognized the breadth of the "in connection with" language. *See, e.g.*, *Mont v. United States*, 139 S. Ct. 1826, 1832 (2019) ("The Court has often recognized that 'in connection with' can bear a 'broad interpretation.'" (quoting *Dabit*, 547 U.S. at 85)). Interpreting that language, this Court held that the purchaser-seller rule did not apply to the SEC. *See Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 751 n.14 (1975) (citing *SEC v. Nat'l Sec., Inc.*, 393 U.S. 453, 467 n.9 (1969)). Notably, Congress did *not* include Section 10(b)'s broad, "in connection with" language in 18 U.S.C. § 1964(c).

This point also further distinguishes *Dabit*, which Citigroup relies upon for the PSLRA bar's supposed adoption of Section 10(b). *See* Pet. 13. The statute in *Dabit* concerned "a misrepresentation or omission of a material fact *in connection with* the purchase or sale of a covered security." 15 U.S.C. § 78bb(f)(1)(A) (emphasis added). This Court thus concluded: "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." 547 U.S. at 85. Just as this Court gave meaning to Congress's adoption of "in connection with," it should give meaning to the exclusion of that phrase from 18 U.S.C. § 1964(c). Thus, the fraud must not just be "in connection with," but "in" the purchase or sale of a security.

Here, there was no fraud in the purchase or sale of a security because (as discussed above) the Complaint does not identify any such purchase or sale. Thus, regardless of whether the SEC could bring *a* claim, it could not bring a claim in the purchase or sale of securities, leaving the PSLRA bar categorically inapplicable here.

CONCLUSION

Citigroup's petition for a writ of certiorari should be denied.

Respectfully submitted,

DAVID M. COOPER
QUINN EMANUEL URQUHART
& SULLIVAN, LLP
295 5th Ave., 9th Fl.
New York, NY 10016
(212) 849-7000

DEREK L. SHAFFER
Counsel of Record
JUAN P. MORILLO
DAVID H. NEEDHAM
QUINN EMANUEL URQUHART
& SULLIVAN, LLP
1300 I St. NW, 9th Fl.
Washington, DC 20005
(202) 538-8000
derekshaffer@
quinnemanuel.com

Counsel for Respondents

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