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

REPLY BRIEF FOR PETITIONER

ADAM S. HAKKI
JOHN GUELI
MICHAEL MITCHELL
ALLEN OVERY SHEARMAN STERLING US LLP
599 Lexington Avenue
New York, NY 10022
(212) 848-4000

JEFFREY B. WALL
Counsel of Record
MORGAN L. RATNER
SULLIVAN & CROMWELL LLP
1700 New York Avenue NW
Suite 700
Washington, DC 20006
(202) 956-7660
wallj@sullcrom.com

ROBERT A. FLATOW
SULLIVAN & CROMWELL LLP
125 Broad Street
New York, NY 10004
(212) 558-4000

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rule

In the Supreme Court of the United States

No. 25-391

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

REPLY BRIEF FOR PETITIONER

The question presented here is how to interpret a statutory provision that bars a RICO plaintiff from "rely[ing] upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish" a RICO violation. 18 U.S.C. § 1964(c). The best answer is that Section 1964(c) applies if *anyone*—whether another private plaintiff or the SEC—would have a securities claim based on the alleged conduct. The court of appeals instead wrongly held that Section 1964(c) turns on whether the *particular plaintiff* bringing the RICO suit would have a viable alternative securities suit.

Respondents mostly try to avoid this Court's review by dividing the straightforward question presented into two. They rewrite it (at 11-17) to ask

(i) whether another private plaintiff could have sued, and (ii) separately, whether the SEC could have sued. Subdividing the single question allows them to try to manufacture a vehicle problem and sidestep a clear circuit split. On rewritten question (i), they say that no other private plaintiff could have sued here. And on rewritten question (ii), they say that courts of appeals have not focused on the SEC's role, and Citigroup did not focus on it below.

All of that misses the point. Citigroup has consistently argued in the district court, before the Eleventh Circuit panel, before the en banc Eleventh Circuit, and now in this Court that the key to applying the PSLRA bar is whether the defendant's "conduct" is actionable as securities fraud—regardless of whether this particular plaintiff has a private right of action under the securities laws. The court of appeals clearly held that the PSLRA bar applies only if the particular RICO plaintiff has "grounds to sue under the federal securities laws"; and because the bondholder-plaintiffs held securities rather than purchasing them, the court vacated dismissal of their RICO claims. Pet. App. 56a. That is wrong, it is the subject of a circuit split, and it defeats the operation of the PSLRA bar and Congress's intended division of RICO and securities claims. This Court should grant review.

I. THE DECISION BELOW IS WRONG.

Respondents offer a limited defense (at 19-23) of the Eleventh Circuit's actual reasoning. But they cannot overcome Section 1964(c)'s plain text, which turns on whether a defendant's "conduct" would be "actionable" as securities fraud. Here, the conduct

that the bondholder-plaintiffs allege would indeed be actionable under the securities laws.

A. The PSLRA Bar Focuses On Conduct.

Respondents, like the court below, interpret (at 11-15) the PSLRA bar to apply only if a particular RICO plaintiff could sue for securities fraud. That interpretation cannot be reconciled with the plain text or with Congress's apparent objectives.

1. For starters, respondents have little response to Citigroup's textual points. In particular, as Citigroup explained (Pet. 12-13), the statute's passive-voice reference to conduct that "would have been actionable as fraud in the purchase or sale of securities" means conduct actionable by anyone. Respondents note (at 20) that context "can confine a passive-voice sentence to a likely set of actors," but it is a long leap from there to the conclusion that "actionable as securities fraud" means "actionable as securities fraud *by the RICO plaintiff*." This Court "ordinarily resist[s] reading words . . . into a statute that do not appear on its face." *Dean* v. *United States*, 556 U.S. 568, 572 (2009) (citation omitted). Indeed, the case respondents cite to argue that passive-voice sentences sometimes impliedly refer to a particular actor ultimately rejected that view there. *Bartenwerfer* v. *Buckley*, 598 U.S. 69, 76 (2023).

If sentences like the PSLRA bar impliedly confine the passive voice to a particular set of actors, there would be little left of the rule that the passive voice "usual[ly]" indicates "'agnosticism' toward the relevant actor." *Bartenwerfer*, 598 U.S. at 76; *see Dean* v. *United States*, 556 U.S. at 572. For example, no one would think that the sentence "no person may sell

goods that have previously been stolen" is a prohibition that applies to goods stolen only by the would-be seller. Section 1964(c)'s structure is comparable.

2. Respondents next offer (at 19-23) two competing textual arguments. Neither works.

First, respondents contend (at 23) that even if the PSLRA bar applies when another *private* plaintiff could bring suit, it does not apply when only the SEC could sue because the SEC is not a "person." Even assuming respondents' premise that the SEC is not a "person," the conclusion does not follow. It rests on the same flawed assumption that the person barred from bringing the RICO suit must be (at least in some sense) the person who could have sued in the first place. But the statute does not say that conduct must have been actionable as securities fraud "by a person." Instead, the PSLRA bar bans reliance on "conduct" actionable by *anyone*, whether a "person" or otherwise.

Second, respondents contend (at 20) that the verb tense "would have been" can "make[] sense only as applied to" claims actionable by "the particular plaintiffs themselves." On respondents' view, Congress would have said "is" actionable had it meant to endorse Citigroup's position. But banning RICO claims based only on conduct that "is" actionable as securities fraud would materially change the statute. Such language would mean that the statute applies only to claims *currently* actionable as securities fraud, bizarrely allowing claims time-barred under the securities laws to be brought under RICO. Congress wanted to preclude RICO claims based on securities fraud actionable by anyone at any time, and the language it used is up to the task.

3. Moving on from the text, respondents assert (at 20-22) that "it is implausible to attribute Congressional intent to extinguish a RICO claim . . . for a plaintiff lacking the ability to bring a securities fraud claim." Not at all. It makes perfect sense that Congress cracked down on the overextension of RICO by keeping securities-focused claims within the ambit of the securities laws, no matter which particular entity might enforce those securities laws. Indeed, it would be far stranger to think that the only securities-focused claims that Congress teed up for RICO treble damages are those where a plaintiff's claim is too attenuated to support a private right of action under Section 10(b). Put differently, Congress could not have intended that "the PSLRA bar prevents plaintiffs with legitimate securities-law claims from using RICO, yet permits the most abusive and vexatious litigants to pursue RICO's favorable remedies." SIFMA Br. 17; *see* WLF Br. 2-3; *Merrill Lynch, Pierce, Fenner & Smith Inc.* v. *Dabit*, 547 U.S. 71, 81 (2006) (Congress enacted the PSLRA to "curb . . . abuses" of private securities litigation).

4. Finally, respondents briefly invoke administrability concerns. They contend (at 22-23) that it would be difficult for courts to determine when a nonparty could bring a securities-fraud suit. This is not a real concern. A court need only evaluate a complaint to see whether it asserts securities fraud, including material misrepresentations or omissions with respect to the securities markets; such fraud is actionable by *some* plaintiff, including the SEC. The court need not assess whether any specific hypothetical plaintiff could have brought or won its securities case. And respondents cite no decision decrying line-drawing

difficulties in any of the several courts that apply a textually faithful reading of the PSLRA bar.

B. The Conduct Alleged Here Would Have Been Actionable As Securities Fraud.

Alternatively, respondents contend (at 12-15, 24-25) that, even under the correct reading of the text, Citigroup's alleged conduct here would not have been actionable as securities fraud. That is wrong too.

1. Respondents argue (at 12-15) that Citigroup cannot identify "public statements" or a "fraud on the market" because their complaint alleges neither. And they speculate (at 13) that because the alleged misstatements were made to individual parties rather than publicly, "Citigroup's theory would ultimately have to" hinge on "other, similar misstatements seen or read by others." It does not. There is no public-statement requirement under Section 10(b). What matters is whether the complaint alleges securities fraud, not how many people were supposed victims.

As respondents concede (at 13), their complaint alleges misstatements that induced bondholders to hold their bonds. Their complaint also alleges that the supposed misstatements induced some investors to buy bonds. *See* Compl. ¶¶ 408, 512, 563, 567, 687, 767, 894-895. Alleged misstatements that cause investment decisions in securities are garden-variety securities fraud under Section 10(b) and Rule 10b-5. Respondents do not deny that such conduct falls within the securities laws and the SEC's purview, no matter how many private plaintiffs (if any) could sue.[*]

---

[*] That the conduct alleged here implicates the federal securities laws should be obvious from the face of the complaint. But if

2. Respondents next contend (at 24-25) that a defendant's conduct relating to holders would not be actionable "in the purchase or sale of securities" within the meaning of the PSLRA bar. 18 U.S.C. § 1964(c). There is no doubt that the securities laws encompass misstatements designed to cause somebody to hold a security, and that the SEC could bring such a holder-focused action under Rule 10b-5. *See Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 751 n.14 (1975); *see also* Pet. 15-17. But on respondents' view, that is because actions under Rule 10b-5 need only be "*in connection with* the purchase or sale of any security," a supposedly looser standard than the one used in the PSLRA bar. 17 C.F.R. § 240.10b-5 (emphasis added); *see* 15 U.S.C. § 78j(b). That distinction is not plausible here.

As a matter of text, respondents read too much into too little. The PSLRA bar is plainly shorthand for Section 10(b) and Rule 10b-5. It uses the phrase "fraud in the purchase or sale of securities" instead of copying the entire description in Section 10(b) and Rule 10b-5 of employing devices, making materially misleading statements or omissions, and engaging in fraudulent acts in connection with the purchase or sale of any security. This Court has recognized that Congress, like ordinary speakers, sometimes uses "shorthand." *Exxon Corp.* v. *Hunt*, 475 U.S. 355, 369 (1986).

Nor have this Court's decisions indicated that the "in connection with" prepositional phrase is essential

---

the Court has concerns about whether securities laws reach that conduct, it should request the views of the Solicitor General.

to cover all securities-related conduct. This Court did not rely on those words at all in devising the *Blue Chip Stamps* rule that only the SEC, and not private persons, could bring an action based on holding securities. *See Blue Chip Stamps*, 421 U.S. at 737. And in *Dabit*, which evaluated the scope of a statute that preempted state-court securities-fraud litigation, the Court observed that the preemption clause's copying of "in connection with" suggests that it has the same scope as Rule 10b-5. 547 U.S. at 85-86. The Court did not hold, and had no occasion to consider, whether clear shorthand would do the same. *Dabit* also relied heavily on Congress's obvious intent to reach conduct generally regulated by the securities laws. *Id.* The Court explained that holder suits "pose a special risk of vexatious litigation," and "[i]t would be odd, to say the least," if "that particularly troublesome subset of class actions" were exempt from federal preemption. *Id.* at 86. The same is true of the PSLRA bar.

Respondents' distinction of the PSLRA bar from Section 10(b)'s "in connection with" language would also prove far too much. If the PSLRA bar does not refer to all conduct actionable under Section 10(b) and Rule 10b-5, it would not apply even in some cases where the RICO plaintiff itself could have brought a securities claim instead. A court would be forced to ask whether a particular Section 10(b) claim is "*in* the purchase or sale of securities" (in which case the PSLRA bar applies) or merely "in connection with" the purchase or sale of securities (in which case the PSLRA bar does not). There is no imaginable reason why Congress would have created such a gap.

II. THE ELEVENTH CIRCUIT'S DECISION CREATES A CLEAR CIRCUIT SPLIT ON AN IMPORTANT QUESTION.

This case warrants this Court's immediate attention, no matter the brevity—and perhaps especially because of the brevity—of the court's reasoning below. There is a circuit split on the question presented, and that question is important to securities defendants and to the administration of RICO. Respondents barely engage with either point.

A. There is a clear split of authority regarding whether a particular RICO plaintiff must be able to bring an action for securities fraud to trigger the PSLRA bar. As Citigroup has explained, the First, Second, and Ninth Circuits have all endorsed conduct-focused readings of Section 1964(c). Pet. 20-22; *see MLSMK Inv. Co.* v. *JP Morgan Chase & Co.*, 651 F.3d 268, 277 (2d Cir. 2011); *Lerner* v. *Colman*, 26 F.4th 71, 78 (1st Cir. 2022); *Howard* v. *America Online Inc.*, 208 F.3d 741, 749 (9th Cir. 2000). In particular, the two busiest courts of appeals for securities suits have adopted rules contradicting the Eleventh Circuit's. *See MLSMK Inv. Co.*, 651 F.3d at 277; *Howard*, 208 F.3d at 749. Respondents do not dispute that circuit split. They state only (at 16-17) that the cases on the long side of the split involved securities claims that other private plaintiffs, not the SEC, could have brought. That is irrelevant. On the actual question presented, the key is that those courts looked to the conduct alleged rather than the specific RICO plaintiff's ability to sue. The Eleventh Circuit asks a different question than everybody else. *See* SIFMA Br. 3-5; 20-23 (discussing split); WLF Br. 3 (same).

B. Respondents do, by contrast, dispute the importance of the decision below. They mention (at 17) an "apparent paucity of case law" on the issue of "whether the PSLRA bar applies" if "no private plaintiff" can file suit but "the SEC can bring a claim." Yet again, respondents' argument rests on their tortured conception of the question presented. There is no paucity of case law on whether the PSLRA bar looks to plaintiffs or conduct, as respondents seem to recognize in a footnote (at 17 n.3).

Citigroup and its amici have catalogued the numerous ways in which the decision below upsets the interactions between securities law and RICO, including with respect to aiding-and-abetting claims, holder claims, and time-barred claims. *See* Pet. 25-26; SIFMA Br. 14-15; WLF Br. 17-18. The Eleventh Circuit's error is all the more important because of "RICO's nationwide venue provisions," which mean that virtually any business could face treble damages and other RICO remedies in the Eleventh Circuit from "repackage[d] securities fraud allegations." SIMFA Br. 5; *see* 18 U.S.C. § 1965(a). To all of those concerns, respondents say nothing.

III. THIS CASE IS AN EXCELLENT VEHICLE.

This case presents a pure question of law that the court of appeals squarely decided and then declined to reconsider en banc. The answer to that question may determine more than a billion dollars of claims in this suit. This case remains an excellent vehicle.

A. This Court should have no concerns about forfeiture. Respondents repeatedly assert (at 2-3, 10, 15-16) that Citigroup somehow forfeited an argument that the PSLRA bar applies because the SEC could

bring a suit. Again, this forfeiture argument depends on an odd slicing-and-dicing of Citigroup's petition. *See Yee* v. *City of Escondido*, 503 U.S. 519, 534 (1992) ("Once a . . . claim is properly presented, a party can make any argument in support of that claim.").

In any event, even a cursory look at the briefs below should allay any forfeiture concerns. Citigroup's advocacy in this Court reflects its consistent position throughout this litigation. Its motion to dismiss explained that the PSLRA bar is "concerned with the nature of the conduct alleged" and applies "regardless whether the [RICO] plaintiff would be able to bring a securities fraud claim against the defendant." Mot. 11, *Otto Candies, LLC* v. *Citigroup, Inc.*, No. 1:16-cv-20725-DPG (S.D. Fla. May 10, 2022), Dkt. No. 190; *see id.* at 11-13. Citigroup's court of appeals brief likewise argued that, even though plaintiffs cannot assert "holder" claims under federal law, the PSLRA bar "is focused on the 'conduct' alleged, not on whether the RICO plaintiff could sue under the securities laws." Pet. C.A. Br. 33; *see id.* at 33-35. Respondents countered that the PSLRA bar does not "prevent a RICO claim where a plaintiff has no alternative of a securities claim." Resp. C.A. Reply Br. 22. After the panel accepted respondents' view, Pet. App. 56a, Citigroup renewed its arguments in a petition for rehearing en banc. It observed that "holder" claims are actionable as securities fraud by the SEC, and that the panel "asked the wrong question" when it evaluated only whether respondents themselves could bring a securities claim. C.A. Pet. 10-11. Citigroup now presses the same arguments in this Court.

B. Respondents next contend (at 17-19) that this case is a bad vehicle because "the factual scenario

here is unusual and confounding." They emphasize that Citigroup allegedly made "particular misstatements" to "particular [p]laintiffs," rather than publicly. But it is hard to see how that muddies up the question presented. Citigroup need not prove that other potential private plaintiffs heard the statements to contend that they were actionable under the securities laws, including by the SEC. Whether the pool of victims of alleged securities fraud is broad or limited does not save the flawed reasoning in the decision below.

C. Finally, respondents emphasize (at 18-19) that this case is interlocutory. True enough. But as Citigroup already explained (Pet. 26-27), this petition presents a pure question of law that is unaffected by any further factual developments in the proceedings below. Citigroup of course hopes that it will ultimately prevail on alternative grounds. But respondents never square their demand to await a final judgment with the PSLRA's animating purpose: to weed out meritless cases with substantial settlement value at the pleading stage.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ADAM S. HAKKI
JOHN GUELI
MICHAEL MITCHELL
ALLEN OVERY SHEARMAN STERLING US LLP
599 Lexington Avenue
New York, NY 10022
(212) 848-4000

JEFFREY B. WALL
Counsel of Record
MORGAN L. RATNER
SULLIVAN & CROMWELL LLP
1700 New York Avenue NW
Suite 700
Washington, DC 20006
(202) 956-7660
wallj@sullcrom.com

ROBERT A. FLATOW
SULLIVAN & CROMWELL LLP
125 Broad Street
New York, NY 10004
(212) 558-4000

Counsel for Citigroup, Inc.

DECEMBER 19, 2025