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IN THE SUPREME COURT OF THE UNITED STATES

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JANUS CAPITAL GROUP, INC., ET AL., :

Petitioners : No. 09-525

v. :

FIRST DERIVATIVE TRADERS :

- - - - - x

Washington, D.C.

Tuesday, December 7, 2010

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:01 a.m.

APPEARANCES:

MARK A. PERRY, ESQ., Washington, D.C.; on behalf of Petitioners.

DAVID C. FREDERICK, ESQ., Washington, D.C.; on behalf of Respondent.

CURTIS E. GANNON, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae, supporting Respondent.

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P R O C E E D I N G S

(10:01 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument first this morning in Case 09-525, Janus Capital Group v. First Derivative Traders.

Mr. Perry.

ORAL ARGUMENT OF MARK A. PERRY

ON BEHALF OF THE PETITIONERS

MR. PERRY: Mr. Chief Justice, and may it please the Court:

Affirming the judgment below would authorize private securities fraud class actions against every service provider that participates in the drafting of a public company's prospectus. It is therefore nothing less than a frontal assault on this Court's decisions in Central Bank and Stoneridge.

In those cases, Your Honors, this Court held that service providers may not be sued primarily in private class actions and left that matter for Congress to resolve. And Congress did respond, not once, not twice, but three times, to those decisions.

First, in the PSLRA, the Congress authorized a Federal action, a government action, only against aiders and abettors, leaving the question of private class actions for this Court's resolution.

1 JUSTICE SOTOMAYOR: Counsel, is -- who is
2 the violator alleged here? Not in the complaint, but in
3 the briefs? As I read the briefs, they claim that Janus
4 itself did not make the false statement, that the two
5 appellants did, that they are the actual speakers
6 because they were talking about their activities, and
7 they used Janus as a conduit to deceive the market.
8 That's, I think, what they're alleging.

9 MR. PERRY: Justice Sotomayor, the challenge
10 statements appear in the prospectuses for the Janus
11 Funds, separate legal entities not parties to this
12 lawsuit.

13 JUSTICE SOTOMAYOR: So how do we sustain the
14 intermediary cases when the company, through market
15 analysts, divulges misleading statements? We don't talk
16 about the market analysts' falsity; we talk about the
17 company's falsity, because the market analysts didn't
18 have scienter.

19 MR. PERRY: Your Honor, the company --
20 excuse me -- the conduit or analyst cases fall under two
21 categories, neither of which is met here.

22 First, they are a scheme between the
23 company -- orchestrated by the company to distribute its
24 information through the analysts to the market, and they
25 are brought under 10b-5(a) as scheme cases. That is

1 most of the analyst cases. There is no 10b-5(a) claim
2 in this case. This is only a 10b-5(b)-making claim.

3 Second, those few cases, the analyst cases
4 that are brought under (b), involve an admission; that
5 is, the company has failed to correct a statement made
6 by an analyst where there is a duty to do so. There is
7 no omission claim in this case because there is no
8 duty --

9 JUSTICE SOTOMAYOR: Well, what's the
10 difference between an omission or a commission if a
11 company purposely divulges a falsehood to an analyst,
12 knowing it's going to be distributed and told? So who
13 is making the false statement, the analyst or the
14 company?

15 MR. PERRY: Your Honor, the company makes
16 the statement to the market. Under basic, the analyst
17 is the market. It is the ears of the market that takes
18 the information.

19 JUSTICE SOTOMAYOR: So why isn't -- why
20 aren't the two appellants, on their theory, on -- we can
21 talk about whether the complaint does or does not
22 adequately allege their theory. That's a different
23 issue. I accept that.

24 But under their theory, why isn't the
25 appellants the primary violator, not even a secondary?

1 Because they -- they claim, I think -- and I'm going to
2 find out from them -- that Janus had no scienter, that
3 it didn't make the false statements, that all of this
4 was done in secret by the appellants, so they were the
5 only violator.

6 MR. PERRY: Your Honor, the analyst cases,
7 the issuer speaks to the market directly. Here, there
8 is an intervening legal entity, the Janus Funds.
9 Scienter or no scienter, that is a separate
10 corporation --

11 JUSTICE SOTOMAYOR: Do you mean to say to me
12 that puppets become a legal defense for someone who
13 intentionally manipulates the market information?

14 MR. PERRY: Justice Sotomayor, the Congress
15 has drafted two statutes that deal with puppets.
16 Section 20(b), which these plaintiffs have not invoked,
17 makes it unlawful for one party to do indirectly what it
18 would not be permitted to do directly. That's the
19 puppet statute, the ventriloquist dummy statute.

20 JUSTICE SOTOMAYOR: That's the control
21 person statute?

22 MR. PERRY: No. There is also 20(a), which
23 is the control person statute, also not invoked by these
24 plaintiffs.

25 Those are forms of secondary liability, Your

1 Honor. In fact, the Court's questions go to the
2 distinction between primary and secondary liability.

3 JUSTICE SOTOMAYOR: But I -- but if Janus
4 had no scienter, if its board of directors did not know
5 that the statements were false, they had no way of
6 knowing, because as I understand the complaint, and this
7 is alleged, the deal was secret. So Janus itself could
8 not be a primary violator. Who is?

9 MR. PERRY: Justice Sotomayor, our position
10 is nobody had scienter, and every adjudicator to look at
11 these facts -- Judge Mott in the district court, the ALJ
12 of the SEC, has found that there was no scienter
13 anywhere up and down the line. So the fact that
14 somebody didn't have scienter doesn't answer the problem
15 here. The question --

16 JUSTICE GINSBURG: Well, somebody deviated
17 from what was the announced policy -- that there was to
18 be no market timers investing in this -- in these Janus
19 Funds. Somebody made the decision that certain hedge
20 funds would be allowed to engage in that activity. Who
21 was that somebody?

22 MR. PERRY: The advisor personnel made the
23 determination, Justice Ginsburg, that the policy was
24 discretionary, that when it said we may refuse trades,
25 the Funds may refuse trades, that there are

1 discretion --

2 JUSTICE GINSBURG: Well, the statement
3 that's alleged to have been -- the conduct that is
4 alleged to have been in opposition to the announced
5 policy, that is attributable squarely to -- this is the
6 entity called JCM?

7 MR. PERRY: That's correct, Your Honor.

8 JUSTICE GINSBURG: So it made the decision
9 that violated the policy?

10 MR. PERRY: That's correct, Your Honor. And
11 the SEC --

12 JUSTICE GINSBURG: Nonetheless, it's not a
13 primary actor?

14 MR. PERRY: Not as to these plaintiffs, Your
15 Honor.

16 JUSTICE KENNEDY: But can -- can -- can we
17 discuss the case, and -- and -- and perhaps you don't
18 think so. Can't we discuss this case, must we not
19 discuss this case, on the theory that JCM's scienter,
20 JCM's knowledge of a false statement, is a given in the
21 case?

22 Now, maybe you'll be able to prove
23 otherwise. You say that they're not liable anyway.

24 MR. PERRY: Justice Kennedy, you're exactly
25 right. That is the theory pleaded in the complaint.

1 JUSTICE KENNEDY: And it seems to me that's
2 what the argument here is mostly about.

3 MR. PERRY: And the question that is before
4 this Court, we would submit, is whether, scienter or no
5 scienter, JCM can be held liable for the statements in
6 another company's prospectus. This Court has never
7 held --

8 JUSTICE SOTOMAYOR: Even though there was no
9 scheme with another actor? Even though it was the only
10 violator, which is a fair reading of the complaint?

11 MR. PERRY: They chose not to bring a scheme
12 case. And remember, there is a second set of investors
13 here: The fund investors. The SEC brought an action,
14 secured \$100 million on behalf of them. There was a
15 series of private litigation that has been resolved,
16 brought by those investors.

17 These investors did not purchase the
18 securities offered by the -- the prospectus they
19 challenge. And again, there's a fundamental disconnect
20 between the defendant in the case and the challenge --

21 JUSTICE KENNEDY: But once again -- once
22 again, if the complainants in the case, the plaintiffs
23 in the case -- hypothetical case, not this case,
24 hypothetical case -- were injured shareholders the Fund,
25 I take it you say still they could not sue JCM?

1 MR. PERRY: Your Honor, for different
2 reasons. They can sue JCM for -- for an omission,
3 because there's a duty that runs from JCM the Fund.
4 That was the theory advanced in that separate lawsuit
5 accepted by the district court, which has since been
6 resolved.

7 They can't -- these plaintiffs can't bring
8 an omission case, because there is no duty that runs
9 from JCM out to the JCG shareholders. The district
10 court held that. They didn't appeal that to the Fourth
11 Circuit. They didn't present that in their cert
12 petition. So they can't bring that omissions case.

13 Any wrongdoing in this case -- Justice
14 Ginsburg, to finish my answer to your question, the
15 policy says funds are not intended for market timing.
16 The advisor allowed 12 traders to trade frequently. The
17 only wrongdoing, if there is any wrongdoing, was the
18 failure of the advisor to disclose to the trustees the
19 deviation from the policy. That is a State law breach
20 of contract. It may be a breach of fiduciary duty.

21 JUSTICE KAGAN: Well, Mr. Perry, who wrote
22 the relevant statements?

23 MR. PERRY: Your Honor, the Fund made the
24 statements to the public. They were drafted --

25 JUSTICE KAGAN: I understand that they were

1 in the Fund's prospectus, but who wrote them?

2 MR. PERRY: They were drafted by lawyers for
3 the Fund, lawyers representing the Fund.

4 JUSTICE KAGAN: Who paid those lawyers?

5 MR. PERRY: The advisor paid the lawyers'
6 salaries.

7 JUSTICE KAGAN: So JCM paid the lawyers?

8 MR. PERRY: Correct, Your Honor.

9 JUSTICE KAGAN: And so it was JCM's lawyers
10 who wrote the prospectus, including the relevant
11 statements here, the asserted misrepresentations?

12 MR. PERRY: I -- I disagree with that,
13 Justice Kagan. They don't allege that in the complaint,
14 and the facts show that the lawyers --

15 JUSTICE KAGAN: Well, suppose the complaint
16 had alleged that. Suppose the complaint had simply
17 said: JCM's lawyers authored the relevant statements in
18 the prospectus.

19 MR. PERRY: One would have to --

20 JUSTICE KAGAN: Would that be enough to
21 survive a motion to dismiss?

22 MR. PERRY: No, Your Honor. One would have
23 to further look at who those lawyers were representing.
24 The truth in the real world is --

25 JUSTICE KAGAN: They're paid by JCM.

1 MR. PERRY: Every prospectus is written by
2 lawyers, Justice Kagan. Lawyers write prospectuses.

3 JUSTICE KAGAN: These are in-house counsel
4 for the investment advisor.

5 MR. PERRY: In-house counsel, outside
6 counsel, once they draft materials and present them to
7 their client, it becomes the client's statement when
8 adopted by the client.

9 The board of trustees the Funds has to
10 review every policy, is responsible for every policy
11 drafted, by inside counsel, outside counsel,
12 consultants. It's not unusual for companies to retain
13 outside service providers to provide any number of
14 policies: Employment policies, investment policies,
15 anything else.

16 JUSTICE GINSBURG: Mr. Perry, you -- you
17 said that it was the Fund's lawyers who drafted the
18 prospectus, but in fact, it was JCM's lawyers, the
19 lawyers -- they were in-house lawyers for JCM. And they
20 served -- served the Fund in doing this prospectus, but
21 they were on the payroll of JCM, and they were JCM's
22 legal department.

23 MR. PERRY: Your Honor, like all lawyers,
24 they wear multiple hats. I represent multiple clients.
25 These lawyers represent multiple clients.

1 JUSTICE GINSBURG: I thought they were
2 in-house lawyers?

3 MR. PERRY: They are in-house lawyers at
4 JCM, but they also represent the Funds, and the SEC has
5 specifically recognized in the context of investment
6 companies that where an advisor counsel is representing
7 the Funds, his client or her client, for those purposes,
8 is the Funds. And here, these lawyers are very careful
9 to separate who their -- their clients are for various
10 purposes.

11 JUSTICE KENNEDY: Well, let's say that JCM's
12 principal officers and managers wrote the statement.
13 You still say there's nobody?

14 MR. PERRY: Absolutely, Justice Kennedy,
15 because when the statement is adopted by the issuer, it
16 becomes the issuer's statement. Only an issuer can make
17 the statement.

18 JUSTICE KENNEDY: Yes. It's not
19 attributable, at least publicly, to JCM.

20 MR. PERRY: That's --

21 JUSTICE KENNEDY: Is there an alternate
22 theory that JCM is really the day-to-day managers in
23 day-to-day active control of the Fund, and therefore, it
24 should be chargeable as if it and the Fund are the same
25 for purposes of making the statement?

1 MR. PERRY: Your Honor --

2 JUSTICE KENNEDY: And we would say that
3 that's different from, say, an outside law firm or an
4 auditor?

5 MR. PERRY: Your Honor, the word "control"
6 appears more than a hundred times in the briefs on the
7 plaintiff's side of this case in this Court, and the
8 Congress has dealt with control. Section 20(a) provides
9 a separate cause of action against those who control
10 another entity.

11 JUSTICE SOTOMAYOR: Except that I, as I read
12 your brief, and you can correct me if I'm wrong, you
13 were arguing that since there was an independent board
14 of directors, presumably because there are two
15 corporate -- different corporate funds -- two different
16 corporate forms, that there couldn't be control person
17 liability under 20(a). You seem that -- I thought,
18 reading your brief, that's what you were alleging.

19 So you can't have your cake and eat it, too.
20 Either the independence of the board makes no difference
21 or it does, so which is your position?

22 MR. PERRY: Our position, Your Honor, is
23 that the Congress has dealt with the situation where you
24 have two separate companies and to make a claim against
25 the second company, you have to prove control. Whether

1 or not they could in this case, none of us knows,
2 because they never brought that claim. They
3 represented to the district court --

4 JUSTICE SOTOMAYOR: Under what theory would
5 you defend an allegation that the investment manager who
6 had control over the everyday affairs of the company,
7 drafted or helped draft the prospectus, hired the
8 lawyers who helped draft it, wouldn't be a control
9 person? How would you defend that?

10 MR. PERRY: Your Honor, the investment
11 company, the mutual funds, are separately owned,
12 separately governed.

13 JUSTICE SOTOMAYOR: Exactly. So you --
14 you're -- if they can't be control persons because
15 they're separate companies, then how do they escape
16 being primary violators?

17 MR. PERRY: Well, Your Honor, then -- then
18 we're just saying that the investment advisor is a
19 service provider like every other service provider.
20 They are like the --

21 JUSTICE SOTOMAYOR: But it's not in this
22 case, because the allegation is that it -- not the
23 company, that it chose to deceive the market.

24 MR. PERRY: Your Honor, with respect, the
25 allegation is that the advisor wrote a certain policy,

1 but the very document cited for that in the complaint
2 says that the trustees are responsible for the policies
3 of the funds. The trustees, when they adopt them, it
4 becomes the corporate policies of them. I mean, on the
5 plaintiff's --

6 JUSTICE KAGAN: Mr. Perry, does the Fund
7 have employees?

8 MR. PERRY: Yes, Your Honor. The Fund
9 has --

10 JUSTICE KAGAN: Who are the Fund's
11 employees?

12 MR. PERRY: Are the officers of the Fund,
13 the chief executive officer, the chief financial
14 officer --

15 JUSTICE KAGAN: Are all of the employees
16 also employees of JCM?

17 MR. PERRY: Not the president, Your Honor,
18 but the others are joint -- serve in joint capacities.

19 JUSTICE KAGAN: And could you just run
20 through a little bit how one of these prospectuses
21 gets -- gets issues eventually? The JCM lawyers start
22 the process by drafting, and then what happens?

23 MR. PERRY: The lawyers representing the
24 trusts, both in-house and external, draft the underlying
25 document --

1 JUSTICE KAGAN: Well, here, I believe there
2 was a statement in your interrogatories that it's JCM's
3 lawyers, in-house lawyers, who drafted the relevant
4 statement.

5 MR. PERRY: The particular prospectus,
6 answered in that prospectus. That's exactly right.

7 JUSTICE KAGAN: And then what happens?

8 MR. PERRY: They are presented to the board
9 of trustees, which holds a meeting. The board of
10 trustees is -- the Funds are represented by outside
11 counsel and the independent trustees are represented by
12 outside counsel.

13 JUSTICE KAGAN: Was there any change to
14 these statements made by the board of trustees?

15 MR. PERRY: These particular statements?

16 JUSTICE KAGAN: Yes.

17 MR. PERRY: Yes, Your Honor. There were
18 changes to the market timing policy throughout the class
19 period. In fact, earlier in the class period there was
20 a disclosure that market timing might be permitted
21 pursuant to a -- a written contract. That was revised
22 later.

23 The trustees asked multiple questions. They
24 were back and forth with their lawyers. Outside counsel
25 was always involved, and there were other consultants

1 involved periodically as well.

2 CHIEF JUSTICE ROBERTS: Does the outside
3 counsel you're talking about represent the Fund only?

4 MR. PERRY: There is two separate sets of
5 outside counsel. One law firm represents only the Fund.
6 It does not represent the advisor; only represents the
7 Funds, Your Honor. There's a second law firm in this
8 case that represents the independent trustees.

9 Six of the seven trustees determined that to
10 secure their independence, because the chairman of the
11 board at that time was an interested person under the
12 statute, they have a separate law firm. There are two
13 law firms that have nothing to do with the advisors.

14 JUSTICE GINSBURG: But the law firm that --
15 the lawyers who drafted the prospectus were in-house
16 counsel for JCM on JCM's payroll?

17 MR. PERRY: They were paid by JCM, and at
18 the time they drafted, they were representing the Funds,
19 again, as allowed by the SEC, as disclosed in the
20 documents --

21 JUSTICE GINSBURG: But they weren't the
22 independent outside lawyers who were representing the
23 board or the Fund; they were the in-house counsel?

24 MR. PERRY: Those outside counsel reviewed
25 every policy. In fact, if you look at the --

1 JUSTICE GINSBURG: I guess my question was
2 simply: The drafters of the prospectus were the
3 in-house counsel for JCM?

4 MR. PERRY: The -- the paragraph being
5 challenged in this case, that's correct, Your Honor.
6 The interrogatory response doesn't speak more broadly
7 than that, but I agree with that.

8 CHIEF JUSTICE ROBERTS: I suppose if the
9 lawyers for the trust did an inadequate job of reviewing
10 the JCM drafts, they would be subject to a malpractice
11 action by the trust?

12 MR. PERRY: Correct, Your Honor. And then
13 the trust, of course, has contractual and other rights
14 against the advisor that it has enforced, you know, in
15 this very case. The trustees made a claim against the
16 advisor for all of this underlying conduct. Except --

17 JUSTICE BREYER: What happens if the
18 president of the oil company, knowing that the statement
19 is false, says: We have discovered 42 trillion barrels
20 of oil in Yucatan. He writes it on a piece of paper; he
21 gives it to the board of trustees; they think it's true
22 and they issue it. Joe Smith buys stock and later loses
23 money.

24 Can Joe Smith sue the president of Yucatan,
25 of the oil company, for having made an untrue statement

1 of material fact?

2 MR. PERRY: If he's an authorized agent of
3 the same company that issued the statement?

4 JUSTICE BREYER: What he is -- he didn't
5 issue it. What he did was he gave it to the board of
6 trustees, who issued it.

7 MR. PERRY: If the board of trustees of his
8 company, so that the statement --

9 JUSTICE BREYER: He's the president of the
10 company.

11 MR. PERRY: And the distinction here,
12 Justice Breyer, is --

13 JUSTICE BREYER: No, no. I'm asking what
14 happens. Is there recovery?

15 MR. PERRY: If he is an authorized agent, he
16 may be sued as --

17 JUSTICE BREYER: He is running the business,
18 the daily affairs, of the company. Of course the
19 president of a company is an authorized agent of the
20 company, and so, yes.

21 MR. PERRY: He may be subject to liability,
22 then.

23 JUSTICE BREYER: Now, if he is subject to
24 liability, why isn't your firm, your client, subject to
25 liability, who, after all, run every affair of the Fund?

1 MR. PERRY: Your Honor, they run the
2 management of the Fund. The investment of --

3 JUSTICE BREYER: Yes, that's what a
4 president does. The president of a company manages the
5 company. And if the president is liable, why isn't the
6 group of people who do everything for the company -- why
7 aren't they liable?

8 MR. PERRY: Because the corporate form has
9 meaning in the Federal law and in State law, and
10 where --

11 JUSTICE BREYER: No, you have to explain it
12 to me more.

13 I'm not being difficult. I understand this
14 less well than you think I do, and I want to know.
15 That's an obvious, naive question, and I would like an
16 answer that anyone could understand.

17 MR. PERRY: The answer is, Your Honor:
18 These funds are managed -- governed, excuse me, is a
19 better word -- by the trustees. That is disclosed in
20 these documents. In fact, the documents say -- it's at
21 page 258A of the Joint Appendix -- the trustees are
22 responsible for all the policies.

23 They have outsourced, if you will, certain
24 functions, operational functions: Which stock to buy,
25 which stock to sell, which transfer agent to hire.

1 Those are functions that could be kept in house, but
2 could be --

3 JUSTICE BREYER: I get it. In other words,
4 you're saying on the papers here, it's -- it's the
5 trustees that manage everything.

6 MR. PERRY: That govern everything.

7 JUSTICE BREYER: That govern everything, and
8 these are like helpers?

9 MR. PERRY: Well, they're -- they're --

10 JUSTICE BREYER: They do a lot as helpers.

11 Now, let me suggest to you, if that's one possible
12 distinction, what about this distinction: That the
13 managers of a Fund, even though they are outsourced
14 people brought in, are liable as principals, not aiders
15 or abettors, if -- following criminal law here, if --
16 they are principals if they get the false statement to
17 the public through a conduit, the conduit being an
18 entity or person that is unaware of the falsity of the
19 statement?

20 That's LaFave on criminal law. What is --
21 what about that?

22 MR. PERRY: Three answers. First, as dealt
23 with in section 20(b), which is the ventriloquist dummy
24 statute that these plaintiffs didn't invoke.

25 Second, the Congress looked at this very

1 question in 1938 and 1939, when there were proposals to
2 merge the management, the advisor function, with the
3 funds, to make them one unitary entity. In the
4 Investment Company Act of 1940 and the Investment
5 Advisors Act of 1940 the Congress elected not do that.

6 As this Court has recognized, it chose not
7 to require compulsorily internalization of the
8 management function. It allowed this separate entity.
9 And therefore, when you have separate companies, under
10 State law -- again, my client is a Delaware limited
11 liability corporation. The Funds are Massachusetts
12 business trusts. They have nothing in common. There's
13 no joint ownership, no joint governance --

14 CHIEF JUSTICE ROBERTS: Could you --

15 JUSTICE SOTOMAYOR: You're -- you're not
16 suggesting, are you, that they did this for purposes of
17 protecting your client from lawsuit?

18 MR. PERRY: Absolutely not.

19 JUSTICE SOTOMAYOR: When it -- no, they did
20 it for a business reason, that having separate entities
21 was economically more useful for the market, correct?

22 MR. PERRY: And every fund, or virtually
23 every fund in -- in the United States, is set up this
24 way. And again --

25 JUSTICE SOTOMAYOR: So -- but that doesn't

1 answer Justice Breyer's question, now.

2 MR. PERRY: My third --

3 JUSTICE SOTOMAYOR: Assuming that they
4 didn't do it for that reason, what does it mean?

5 MR. PERRY: My third answer is that
6 extensive regulatory involvement in the two acts enacted
7 in 1940 specifically to regulate this industry, that
8 Congress never made the decision to hold the advisor
9 liable for the Fund's conduct.

10 In fact, no statute says that, and the SEC
11 has never taken that position. There is no case cited
12 in any of the briefs -- they have 234 pages, 138 cases.
13 Not one holds an investment advisor liable for
14 statements of the fund's prospectuses.

15 JUSTICE KENNEDY: Just -- just to clarify
16 Justice Breyer's hypothetical. In your -- in the
17 hypothetical you gave where the president gives an
18 innocent board of directors false information and the
19 prospectus goes out, is the company liable because their
20 agent -- is the company liable under 10b-5?

21 MR. PERRY: The company may be sued under
22 10b-5. It has got to meet all the elements.

23 JUSTICE KENNEDY: Yes.

24 MR. PERRY: But yes, it is an authorized
25 agent making a statement on behalf of the company.

1 JUSTICE KENNEDY: So what you're saying is
2 that the -- the agency relation that the president of
3 the company holds is different than the agency
4 relation that JCM holds?

5 MR. PERRY: Absolutely right, Your Honor,
6 and that's a distinction --

7 JUSTICE KENNEDY: Why is that?

8 MR. PERRY: It's grounded in State law, and
9 it differs between one company and two companies. Where
10 Congress has looked at issuers, for example --

11 JUSTICE SCALIA: Well, but is JCM an agent?
12 Are you acknowledging that they're an agent of -- of the
13 Fund?

14 MR. PERRY: You know, for certain purposes,
15 Justice Scalia, they are an agent.

16 JUSTICE SCALIA: What -- what purposes are
17 that? For purposes of -- at issue here?

18 MR. PERRY: No, Your Honor, for -- not for
19 drafting a prospectus. For carrying out the investment
20 function. They are laid out in the contract --

21 JUSTICE SCALIA: Okay --

22 MR. PERRY: It's attached as an appendix to
23 our brief, which sets forth the things that JCM is an
24 agent for investment operations, not an agent
25 specifically for registering the Fund's securities for

1 sales, complying with the Federal securities laws,
2 preparing and issuing the prospectus. All those things,
3 by contrast --

4 JUSTICE KENNEDY: So even though they did
5 those things, they acted in excess of their authority?

6 MR. PERRY: They did not do those things,
7 Your Honor.

8 JUSTICE KENNEDY: But that's the allegation.

9 MR. PERRY: No, it's not the allegation.

10 JUSTICE KENNEDY: Well, suppose it were
11 proved that they did do those things. Suppose it were
12 proven that they did 100 percent of prospectus work.
13 The only thing that the Fund did was to mail it.

14 MR. PERRY: I don't know how to respond to
15 that, Justice Kennedy, since it's so far beyond what
16 they could possibly prove here. What happened here --

17 JUSTICE GINSBURG: Well, this case -- this
18 case went off on -- in the district court, it was -- was
19 it 12b-6?

20 MR. PERRY: Yes, Your Honor.

21 JUSTICE GINSBURG: Okay. And all that the
22 Fourth Circuit said is, it goes beyond; it has to go
23 further. And the -- the impression that I got from the
24 Fourth Circuit's opinion is -- and it could be reduced
25 to a very simple statement. They say: JCM was in the

1 driver's seat. It was running the show. And if that
2 can be proved, they thought that they would have a good
3 case under --

4 MR. PERRY: And, Your Honor, no court, no
5 case from this Court or any court of appeals has ever
6 held that the driver's seat exception, the central bank,
7 exists. And that is an expansion.

8 The second issue in the case, of course,
9 which is attribution: Even if there is making by JCM,
10 none of these statements were attributed to JCM. The
11 prospectus is very clear that at issue --

12 JUSTICE GINSBURG: But that was -- I mean,
13 before you started out with statements that sounded like
14 the sky is falling because lawyers would no longer be
15 safe, banks would no longer be safe -- but the Fourth
16 Circuit was -- was a much narrower view. Its view was,
17 this -- JCM was the manager. It was controlling
18 everything.

19 MR. PERRY: Justice Ginsburg, the Fourth
20 Circuit's view was the manager helps the Fund. That --
21 nobody even defends the Fourth Circuit's ruling. The
22 government now comes in with a theory that they admit,
23 on page 22 of the government's brief, does apply to
24 every lawyer, every accountant, every --

25 JUSTICE SCALIA: I thought that the question

1 on which we granted cert was very clear: whether the
2 Fourth Circuit erred in concluding that a service
3 provider can be held primarily liable in the private
4 securities fraud action for, quote, "helping," close
5 quote, or, quote, "participating in," close quote,
6 another company's misstatements.

7 Now, is -- is that an accurate description
8 of the Court's holding? It was not objected to by the
9 Respondent here.

10 MR. PERRY: Absolutely, Justice Scalia. And
11 that question can only be --

12 JUSTICE SCALIA: And that's what I thought
13 we granted. We weren't talking about control here.
14 That -- that was not the issue, I thought.

15 MR. PERRY: We agree with the Court. The
16 question presented can only be answered one way: The
17 court of appeals erred.

18 If I may reserve my remaining time.

19 CHIEF JUSTICE ROBERTS: Thank you, Counsel.
20 Mr. Frederick.

21 ORAL ARGUMENT OF DAVID C. FREDERICK
22 ON BEHALF OF THE RESPONDENT

23 MR. FREDERICK: Thank you, Mr. Chief
24 Justice, and may it please the Court.

25 JUSTICE SCALIA: Mr. Frederick, is that an

1 accurate description of -- of the question before us?

2 MR. FREDERICK: I don't think it is, Justice
3 Scalia.

4 JUSTICE SCALIA: Why didn't you object to it
5 in -- in your -- in your opposition?

6 MR. FREDERICK: We did object, in the sense
7 that we described the complaint's allegations as JCM
8 writing and preparing and being responsible for the
9 prospectus. And the question of --

10 JUSTICE SCALIA: I don't -- but we -- we
11 don't reevaluate facts. We -- we review the holding of
12 a lower court.

13 Now, was this an accurate description of the
14 holding of the Fourth Circuit? And if it wasn't, why
15 didn't you say that in your brief in opposition?

16 MR. FREDERICK: We did say it in our brief
17 in opposition, Justice Scalia, and the Solicitor
18 General, when you called for the views of the Solicitor
19 General, also said in the invitation brief that this
20 case was not an appropriate vehicle for deciding just
21 simply "help" and "participate," because what the Fourth
22 Circuit was saying in other parts of its opinion was
23 that JCM was responsible for the prospectuses in all
24 their various aspects: In writing, preparing, et
25 cetera. And so we --

1 CHIEF JUSTICE ROBERTS: How can -- I'm
2 sorry. Please --

3 MR. FREDERICK: So we would submit that for
4 the reasons we stated in our opposition and we stated in
5 our red brief, as the case comes to this Court on
6 reviewing a motion to dismiss of a complaint's
7 well-pleaded allegations -- and I can go through the
8 complaint's allegations if you like that explain how JCM
9 wrote and prepared the prospectus and the policies for
10 the Fund and then implemented them falsely -- we would
11 submit this case is not about service providers, but it
12 is about Janus Capital Management being the primary
13 violator. They were the ones who had the motive to lie,
14 they had the incentive to lie, and they did lie.

15 JUSTICE SCALIA: Did they make the
16 statements? Isn't that the statutory text that we're
17 dealing with?

18 MR. FREDERICK: Yes, they did.

19 JUSTICE SCALIA: They did make the
20 statements?

21 MR. FREDERICK: Yes, they composed and
22 created --

23 JUSTICE SCALIA: It didn't go out under
24 their name.

25 MR. FREDERICK: It did, in --

1 JUSTICE SCALIA: If someone writes a speech
2 for me, one can say he drafted the speech, but I make
3 the speech.

4 MR. FREDERICK: Justice Scalia, we address
5 the definition of "make" under the SEC's interpretation,
6 which is entitled to deference, as to being to create or
7 to compose or to accept as one's own.

8 JUSTICE SCALIA: That's not what -- it
9 depends on the context of "make." If you're talking
10 about making heaven and earth, yes, that means to
11 create, but if you're talking about making a
12 representation, that means presenting the representation
13 to someone, not -- not drafting it for someone else to
14 make.

15 MR. FREDERICK: In the prospectus, there is
16 a section on management that explains that Janus Capital
17 Management engages in the day-to-day functions. There
18 are no employees of Janus Funds themselves. All of this
19 is outsourced management --

20 CHIEF JUSTICE ROBERTS: Except -- except
21 when they review material going in the prospectus.

22 MR. FREDERICK: But that --

23 CHIEF JUSTICE ROBERTS: Then they have
24 independent representation by outside counsel.

25 MR. FREDERICK: Right. What they don't

1 have, Mr. Chief Justice, and where the falsity is here,
2 is the ability of any of those outsiders to determine
3 whether or not implementing the policy will be done
4 fraudulently, and that's where the culpability is here.
5 JCM runs these funds, and although the statement might
6 get accepted by the board of trustees --

7 CHIEF JUSTICE ROBERTS: I don't
8 understand -- I don't understand your answer. The
9 outside counsel reviews what the policy is going to be?

10 MR. FREDERICK: Yes.

11 CHIEF JUSTICE ROBERTS: Our question is the
12 validity of that statement, whether that's deceptive in
13 the prospectus. That seems to me to be an entirely
14 different question. I understood your theory of the
15 case to be that JCM is liable, basically, because they
16 put it in the prospectus.

17 MR. FREDERICK: And what they did was to
18 falsely represent what they would do with that
19 statement. I would direct the Court to paragraph 5.

20 CHIEF JUSTICE ROBERTS: Well, that's the
21 question, I guess, that -- your response seems to beg
22 the question -- is that they falsely represented. The
23 issue is whether or not something happened between their
24 drafting and its appearance in the prospectus. That
25 makes it appropriate to say that that's a statement of

1 the trust rather than a statement of JCM.

2 MR. FREDERICK: It is a statement of both,
3 in the sense that the Fund is attracting investors, but
4 the Fund is managed and controlled by the investment
5 manager; here, JCM.

6 JUSTICE SCALIA: But if JCM falsely
7 represented what it would do, it made that false
8 representation to the Fund, and the Fund, as has been
9 acknowledged, would have a cause of action against JCM.

10 MR. FREDERICK: No --

11 JUSTICE SCALIA: But that's not what's going
12 on here.

13 MR. FREDERICK: No. In fact, paragraph 5 of
14 the complaint says Janus is representing that its mutual
15 funds -- Janus Capital Management, its mutual funds --
16 were designed to be long-term investments. It then says
17 in paragraph 6: "As recognized in the prospectuses, JCM
18 purported market timing policy was designed to protect
19 long-term investors."

20 So if you read the prospectus and you read
21 the complaint, it is absolutely clear what Janus Capital
22 Management is telling all the mutual fund investors of
23 the world: If you invest in Janus, we will protect your
24 long-term investments.

25 JUSTICE SCALIA: What isn't clear from all

1 of those things is that JCM made any representation to
2 the public. The representation was made in the
3 prospectus issued by the Fund, not by JCM.

4 Now, the Fund may have a cause of action
5 against JCM, but what's crucial here is whether --
6 whether you can establish that it is JCM who made the
7 representation to the public, and I don't see how you
8 can get there. You might proceed under the control
9 provision, but not by saying that they made the
10 representation.

11 MR. FREDERICK: Justice Scalia, they wrote
12 the prospectus. They're --

13 JUSTICE SCALIA: That's fine. Just like
14 writing a speech for somebody.

15 MR. FREDERICK: And when they issued the
16 prospectus, they used their address and represented to
17 the public that they --

18 CHIEF JUSTICE ROBERTS: I'm sorry to
19 interrupt, but it seems be an important -- when they
20 issued the prospectus? Who issued the prospectus?

21 MR. FREDERICK: Sorry. JCM filed it and
22 disseminated it on its website, and all investors in the
23 Janus Funds knew to -- knew to make inquiries to the
24 manager if they had any question about the Funds.

25 JUSTICE SCALIA: If I carry a letter over

1 and file it on behalf of some principal, does it become
2 my letter? Have I made that representation? Sure, they
3 filed it. What does that prove?

4 MR. FREDERICK: Because it's --

5 JUSTICE SCALIA: As you say, they have no
6 other agents, unless the trustees themselves were going
7 to walk over and file it. JCM was functioning in that
8 capacity as an employee of the Fund in the filing. They
9 didn't file it on their own behalf.

10 MR. FREDERICK: Yes, they did.

11 JUSTICE SCALIA: On their own behalf?

12 MR. FREDERICK: Absolutely. They created
13 the fund, Justice Scalia. That's how mutual funds work.
14 Managers create them, they lure investors to them, they
15 get money by having a percentage of assets under
16 management.

17 CHIEF JUSTICE ROBERTS: And the SEC has
18 recognized that they remain two separate entities,
19 despite the interconnected relationship.

20 MR. FREDERICK: Certainly, but there are
21 many cases -- in fact, I don't think it's ever been
22 disputed in the courts of appeals that if one company
23 outsources its management function and those outsourced
24 managers make lies on behalf of the company, they are
25 also --

1 CHIEF JUSTICE ROBERTS: The one activity --
2 one activity that we know they did not outsource was
3 review of the materials submitted by JCM. They had
4 independent counsel that conducted that review.

5 Would it have been a breach of the trustees'
6 fiduciary obligations to the fund investors under common
7 law -- I forget where this is incorporated -- to
8 rubberstamp what they get from somebody on the outside,
9 not to have independent counsel review what they're
10 going to say in their prospectus?

11 MR. FREDERICK: Mr. Chief Justice, my answer
12 to your question is: That's actually a very difficult
13 question under fiduciary duty law, because here, the
14 fiduciaries have been duped themselves.

15 They, when they got the wording of the
16 prospectus and the policy that JCM was purporting to
17 implement -- JCM didn't tell the Board that there are 12
18 secret deals with hedge funds, pursuant to which we're
19 going to make money by attracting long-term investors
20 and make money with short-term market climbers --

21 CHIEF JUSTICE ROBERTS: Isn't that, again,
22 what has been conceded: That there may well be an
23 action from the Fund represented by their trustees
24 against --

25 JUSTICE SCALIA: Common lawsuit for duping.

1 MR. FREDERICK: Justice Scalia, in no
2 instance that I'm aware of where a mutual fund
3 investment advisor is a publicly traded company would
4 that cause of action run on behalf of the managers
5 shareholders. What we're talking about here is a
6 company with a product, and they lie about the product.
7 And in that instance, it's no different from the Vioxx
8 case last year with Merck or the difference from the
9 cold remedy case you are going to hear argument in next
10 term.

11 The mutual funds happen to be the product of
12 the company. They make misstatements about the
13 product --

14 JUSTICE ALITO: Suppose this case didn't
15 involve a mutual fund. Suppose it involved a
16 corporation with thousands of employees and the
17 prospectus is drafted by outside counsel. It's adopted
18 by the directors of the company without changing a word.

19 Now, would that case come out the same? And
20 if not, what would -- what exactly would you have us say
21 to distinguish the two?

22 MR. FREDERICK: Well, the outside lawyers, I
23 think, are distinguishable in a number of different
24 ways. One is that they are reacting on information
25 provided by the company. That information is typically

1 not subject to an independent investigation by outside
2 counsel to determine the truth or veracity of the
3 information.

4 JUSTICE ALITO: What if it's alleged they
5 knew exactly what was going on?

6 MR. FREDERICK: If there is scienter, where
7 the lawyers knowingly act in a way that helps or that
8 contributes to that fraud, they may well be subject as
9 aiders and abettors. It depends on whether you can
10 establish that the lawyers have met all of the elements.
11 I mean, you would have to show reliance. You would have
12 to show lost causation. You would have to show the
13 primary violation of the party --

14 JUSTICE ALITO: And what are aiders and
15 abettors? I thought there wasn't aiding and abetting.

16 MR. FREDERICK: Sorry. The SEC would be
17 able to proceed against the lawyers for aiding and
18 abetting. Whether or not there would be a private
19 action would depend on whether the lawyers -- it could
20 be pleaded under the heightened pleading requirements
21 that they had met all of the elements of the 10b-5
22 claim. I would submit that's extremely difficult.

23 JUSTICE BREYER: What is it that -- I'm
24 unclear on this. That's why I use the oil company
25 example. Plain, ordinary -- the top executives in the

1 oil company write the false statement. They give it to
2 a board that doesn't know it's false, and the board puts
3 it out in its name.

4 Now, it seems to me it ought to be clear at
5 this point in securities law whether those -- the
6 president and the vice president are or are not liable
7 under this 10-b, the (b) part.

8 MR. FREDERICK: Yes, and we cited those
9 cases --

10 JUSTICE BREYER: And they are liable.

11 MR. FREDERICK: -- i believe at page 37.

12 JUSTICE BREYER: You're saying they are
13 liable? All right. Then their response to that is:
14 This is not like the president of the oil company, and
15 the reason that it's not is something to do with the
16 nature of the obligation that runs between the managers
17 and the Fund, which is somehow different between -- you
18 understand it better than I.

19 Can you say what it is and what you think
20 your response is?

21 MR. FREDERICK: Yes. What I will say is
22 that they don't have a principal distinction between
23 those two situations. Simply having a contract to
24 outsource management where those management functions of
25 the company are resulting in false statements issued by

1 the company shouldn't make --

2 JUSTICE BREYER: All right. So you're
3 saying -- you're saying it shouldn't matter that -- if
4 they issued worse if they run the whole company than if
5 they're just the president?

6 MR. FREDERICK: That's correct.

7 JUSTICE BREYER: All right. Now, at that
8 point, we get into a problem, and the problem is how do
9 we distinguish an aider or abettor from the principal?
10 At that point I am uncertain indeed, and that's why I
11 put out this for comment, this suggestion that you
12 follow criminal law here and say at least they are a
13 principal if they have a high position, they participate
14 in it, they do all these things you say, and the entity
15 they're fooling in the first instance is simply a
16 conduit, and therefore, you cannot say it's a scheme,
17 because the other part of the scheme wasn't part of it.

18 MR. FREDERICK: Well, to be a primary
19 violator, you have to have met all the elements of the
20 cause of action.

21 JUSTICE BREYER: Yes.

22 MR. FREDERICK: To be an aider and abettor
23 for SEC enforcement purposes, you simply have to provide
24 substantial assistance to one who is a primary violator.

25 JUSTICE BREYER: What's the difference

1 between substantial assistance and doing it?

2 MR. FREDERICK: You would not have to make
3 the statement. You would do something to assist the
4 person making the statement.

5 JUSTICE SCALIA: Mr. Frederick, I thought we
6 had held -- I was sure we had held that there is no
7 aiding and abetting liability --

8 MR. FREDERICK: Yes. I'm -- I'm not
9 saying --

10 JUSTICE SCALIA: -- under the provision
11 we're discussing here.

12 JUSTICE BREYER: There's a distinction. You
13 want to say what the distinction is. So I would say,
14 consistent with the view, there is no aiding and
15 abetting liability. You still would win your case?

16 MR. FREDERICK: That's correct, because
17 there is no primary violator under JCM's view of the
18 facts here. They are the primary violator under our
19 view of the facts here, because they met all of the
20 elements of the 10b-5 action, and they had a motive to
21 do it, and they made --

22 JUSTICE SOTOMAYOR: Is your claim premised
23 on Janus being duped or not? If Janus was not duped, if
24 its board knew and JCM was doing the activity with
25 either the consent or acquiescence of the board, would

1 you have a claim here?

2 MR. FREDERICK: We would. It would be
3 somewhat different because we would plead multiple
4 violators as the court and central bank and from
5 which --

6 JUSTICE SOTOMAYOR: Then go back to Justice
7 Breyer's question, because I can see when there's one
8 primary violator who uses another entity as a dupe or as
9 a puppet, but I can't, and I don't know how to
10 distinguish what you're proposing, from aiding and
11 abetting. There has to be something to differentiate
12 the two, so what is it?

13 MR. FREDERICK: It's the failure on the part
14 of the person who would not have met all of the elements
15 of the 10b-5 claim. You have to have someone -- you
16 have two people, okay? Both of them have to have
17 satisfied all the elements of a 10b-5 claim to be
18 primary violators. If there is one element that is not
19 satisfied with respect to that person, that person is
20 only an aider and abettor and not subject to private
21 remedies under Section 10(b). They would be subject to
22 aiding and abetting liability under the SEC.

23 JUSTICE ALITO: The distinction you're
24 drawing is between making the statement and assisting in
25 making the statement. Isn't that what you just said?

1 MR. FREDERICK: Well, no, in the sense that
2 we believe, and we assert in the complaint and the
3 complaint is adequately pleaded, is that JCM made the
4 statements. Now --

5 JUSTICE ALITO: Yes, aiding and abetting is
6 assisting in making these statements as if -- as in
7 something you want to take place, right?

8 MR. FREDERICK: Yes.

9 JUSTICE ALITO: What is the difference, the
10 distinction in -- in this context? One possible
11 distinction is who formally makes it, in whose name is
12 it made, but that's obviously not your -- your position.
13 So what is it to distinguish a principal here from an
14 aider and abettor?

15 MR. FREDERICK: Who has substantive control
16 over the content of the message. That kind of
17 substantive control, as -- as the Court in the Utah Ten
18 Commandments case pointed out, the government can have
19 speech attributed to it on the basis of it putting up a
20 monument on public land. There can be multiple speakers
21 with respect to one message, and the question of how
22 much substantive control you attribute to a particular
23 speaker we believe is the appropriate way to view --

24 JUSTICE SCALIA: Do you deny that the Fund
25 had substantive control? Couldn't the Fund have stopped

1 this statement from being placed in its prospectus?
2 Didn't it have outside lawyers who advised it whether it
3 should allow this statement to be included in its
4 prospectus? How can you say that they -- they didn't
5 have control?

6 MR. FREDERICK: Well, they did not have a
7 knowledge of the falsity.

8 JUSTICE SCALIA: Well, that may mean that
9 they're duped, but it doesn't mean that they don't have
10 control. They had control, but you say they -- they
11 were duped, but that's quite a different theory from
12 saying that they had control -- that they didn't have
13 control.

14 MR. FREDERICK: No, Justice Scalia, they
15 didn't have substantive control over the content of the
16 message, because if they did, they would not have
17 allowed these false statements to have been issued. And
18 that's the whole point -- that's the theory here, JCM
19 was luring long-term investors with the promise, if you
20 park your money with the Janus Funds, it will be safe
21 in -- from the kinds of market timing problems. They
22 were then secretly going out and luring money from the
23 hedge funds for then --

24 JUSTICE KENNEDY: But there is -- there is
25 nothing in the record to indicate that that statement

1 was attributed to JCM?

2 MR. FREDERICK: The public understood it
3 that way.

4 JUSTICE KENNEDY: You can -- you can play
5 with the words, "make" as you choose, but do we take the
6 case on the assumption that you can show it was
7 attributed to JCM? I -- I see nothing in -- in the
8 record that would justify that.

9 MR. FREDERICK: Well, JA 275A, Justice --
10 Justice Kennedy -- excuse me -- says that Janus Capital
11 Management reserved the Janus name for itself.

12 JUSTICE GINSBURG: How did it reserve that?
13 You said twice in your brief that Janus is a name to
14 which JCM reserves the right. How did it reserve the
15 right?

16 MR. FREDERICK: It said, and this is at
17 page 275A, if for some reason Janus Capital Management's
18 contract is terminated, the Funds can no longer use the
19 Janus name. They were intending to trademark and get
20 the name out there to attract investors to the
21 investment advisor's method of investing. And it was
22 that type of usage that brought all of this together.
23 The Fund and the management, they are in function
24 essentially one entity. The fact that they have
25 contractually outsourced the management function should

1 not alleviate the securities fraud that is alleged here.

2 JUSTICE KAGAN: Mr. Frederick, a substantial
3 part of the power of your argument comes from this
4 notion that, as Justice Ginsburg said, that JCM was in
5 the driver's seat, that JCM had control, that they
6 were -- Janus was at most an alter ego of JCM and maybe
7 something more, that it was just a creature of JCM. But
8 the securities legislation seems to deal with that in
9 section 20. And your case is not brought under section
10 20, and because of the relationship between mutual funds
11 and their investment advisors, presumably could not be
12 brought under section 20.

13 So, why should we think relevant the kind of
14 controlled relationship that you're talking about?

15 MR. FREDERICK: Because you don't want to
16 create a road map for other people to commit fraud,
17 Justice Kagan, and that's what their theory does. What
18 their theory does is it says is we set up shell
19 companies or if we dupe people to make statements, we
20 can commit securities fraud with impunity, because we
21 won't be held liable to having made the statement, even
22 though we wrote it, we had substantive control over it,
23 et cetera.

24 CHIEF JUSTICE ROBERTS: Except, except to
25 the SEC, right? Because they can pursue it under aiding

1 and abetting. It's kind of a big --

2 MR. FREDERICK: Well --

3 CHIEF JUSTICE ROBERTS: -- problem if you're
4 trying to say we're safe from the actions for security
5 fraud.

6 MR. FREDERICK: Well, Chief Justice Roberts,
7 this Court on numerous occasions has said that the
8 private securities action is a complement to the
9 enforcement efforts of the SEC, and in this instance,
10 the shareholders of the investment --

11 CHIEF JUSTICE ROBERTS: Well, I know, but
12 you were just responding by saying the problem is that
13 this will give people a road map. But they're going to
14 hit a pretty big bump in the road when the SEC brings an
15 action against them, including potential criminal
16 actions.

17 MR. FREDERICK: But, no, the problem,
18 Mr. Chief Justice, is that under their construction of
19 the facts there's no primary violator. Mr. Perry said
20 this morning --

21 CHIEF JUSTICE ROBERTS: The SEC --

22 MR. FREDERICK: -- there's no primary
23 violator. And, so, if there's no primary violator,
24 there can be no controlled person and there can be no
25 aiding and abetting.

1 CHIEF JUSTICE ROBERTS: Thank you,
2 Mr. Frederick.

3 Mr. Gannon.

4 ORAL ARGUMENT OF CURTIS E. GANNON,
5 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,
6 SUPPORTING RESPONDENT

7 MR. GANNON: Mr. Chief Justice, and may it
8 please the Court:

9 JUSTICE SOTOMAYOR: Counsel, could you start
10 by taking your brief and distilling it down to three
11 sentences? Define what a primary violator is, what a
12 secondary violator is who aids and abets, and who a
13 control person is? And then tell me how that definition
14 would exclude lawyers, auditors, investment -- general
15 investment advisors, et cetera.

16 I've read your brief, but I've been trying
17 to distill it down to three sentences. So try to do
18 that for me.

19 MR. GANNON: A primary violator must be
20 somebody who has actually committed all the elements of
21 a 10b-5 --

22 JUSTICE SOTOMAYOR: Give me an example of
23 that. What do you see as all of the elements?

24 MR. GANNON: Well, the elements for the
25 private cause of action are the ones that this Court has

1 repeated. They are --

2 JUSTICE SOTOMAYOR: I understand. But --

3 MR. GANNON: In this case the key one we're
4 talking about is you would need to be an actual maker of
5 the statement, and -- and --

6 JUSTICE SOTOMAYOR: And that becomes -- how
7 is that different from aiding and abetting the making of
8 a statement?

9 MR. GANNON: It -- we think that somebody
10 can make a statement if they create the statement, and
11 the statute and the rule both expressly apply to those
12 who make statements directly --

13 JUSTICE SOTOMAYOR: But that's every
14 lawyer --

15 MR. GANNON -- or indirectly.

16 JUSTICE SOTOMAYOR: -- who writes the false
17 statement knowing it's false. So, are you saying every
18 lawyer who writes the statement knowing that it's false
19 is a primary --

20 MR. GANNON: Scierter is another element,
21 and so a lawyer who just reviews the policy, JCM in this
22 case, when JCM submitted false statements to the funds,
23 if the funds were unaware, this is where Mr. Frederick
24 concluded for the Chief Justice that if there -- if the
25 person who actually releases the statement to the world

1 has been duped and doesn't have scienter, then there
2 is -- they are not going to be --

3 CHIEF JUSTICE ROBERTS: So, just to get --

4 MR. GANNON: A primary violator.

5 CHIEF JUSTICE ROBERTS: -- to get back, so
6 you are conceding that if you lose this case, you will
7 be unable to bring any aiding and abetting case in a
8 situation such as this?

9 MR. GANNON: Under sections 20 -- it depends
10 on what the situation --

11 CHIEF JUSTICE ROBERTS: It seems like a yes
12 or no question.

13 MR. GANNON: Yes, if the situation here is
14 one in which the Funds ultimately cannot be proved to
15 have scienter. If they did not know about the falsity
16 of the statements in the prospectuses that they released
17 to the public, then there would not be a primary
18 violator. Under section 20(e) for aiding and abetting
19 liability, the Commission can bring an aiding and
20 abetting claim against somebody who provides substantial
21 assistance, recklessly or knowingly -- recklessly or
22 knowingly provides substantial assistance to a primary
23 violator, but the Court has repeatedly made clear that a
24 primary violator needs to have violated all of the
25 elements of a 10b-5 cause of action which includes --

1 JUSTICE ALITO: I'm still not clear what
2 your distinction is between making the statement and
3 aiding and abetting in the making of the statement.
4 Now, could you explain that for me?

5 MR. GANNON: Well, I think that --

6 JUSTICE ALITO: Is it necessary that the
7 person in whose -- the entity in whose name the
8 statement is made is an empty shell, it's simply a
9 puppet that's controlled by somebody else? Is that --
10 is that necessary or does it go beyond that?

11 MR. GANNON: No, I don't think that that's
12 necessary. If the position -- the position that the
13 Commission has taken is that somebody who makes a
14 statement, if he writes the statement or provides the
15 false information that's used to construct the statement
16 or allows the statement to be attributed to him, and we
17 think that that's a reasonable construction of the term
18 "make," because the statute and the rule both apply to
19 persons who make the statement directly or indirectly.
20 And, so, they could be using a conduit, whether the
21 conduit is witting or unwitting, they would be a primary
22 violator if they had --

23 JUSTICE SCALIA: I don't think that's a
24 reasonable interpretation of -- of -- of make a
25 statement indirectly. I mean, you can make it

1 indirectly by not issuing it yourself but having
2 somebody else make it in your name.

3 MR. GANNON: Well, if --

4 JUSTICE SCALIA: But I would not say I'm
5 making a speech indirectly if I have drafted the speech.

6 MR. GANNON: Well, but if --

7 JUSTICE SCALIA: The person for whom I
8 drafted the speech is making the speech.

9 MR. GANNON: Well, that may be true in the
10 case of a speech, Justice Scalia, but in a classic
11 boiler room situation, where somebody has written the
12 scripts for salespersons to -- to use in order to make
13 calls to sell stocks, the person who actually writes the
14 scripts may never speak the words to a customer, he may
15 never have his own name spoken on the phone, and
16 therefore, the statements have not been attributed to
17 him --

18 JUSTICE BREYER: He may just be some poor
19 associate, his first day at work. The law firm sent him
20 there and he got stuck down in the boiler room. And
21 somebody said, why don't you write something that will
22 get everybody to sell things, and -- and why don't you
23 say we're a thousand tons of oil instead of only a ton.
24 In -- he writes it out. You think he's liable?

25 MR. GANNON: If he writes it out and he

1 doesn't know, he obviously isn't liable --

2 JUSTICE BREYER: No, no, at some level he
3 knows, "I shouldn't be saying they found 1,000 tons of
4 oil when they only found 50," okay? And four people
5 told him to go do something like that, but he's the guy
6 who wrote it. I would say he didn't behave well, but I
7 don't think he's the principal.

8 MR. GANNON: In that instance, because he
9 was acting specifically at the direction of superiors --

10 JUSTICE BREYER: They didn't say what words
11 to write.

12 MR. GANNON: They gave --

13 JUSTICE BREYER: They gave him the general
14 idea, and then he did it. He created the words, to use
15 your phrase; when you say creating the words, he's a
16 great writer.

17 MR. GANNON: It -- we do, on page 22,
18 acknowledge that somebody needs to be sufficiently
19 involved in the creation or dissemination of the
20 statement in order to be -- in order to be deemed its
21 maker or its author.

22 JUSTICE BREYER: Ah, now we have
23 "sufficiently involved." Once we're into sufficiently
24 involved, we're back into what is sufficient to make the
25 person the principal rather than the aider and the

1 abettor, and apparently creating or writing the
2 statement is not clear whether it is or is not
3 sufficient. So we're back into the problem.

4 MR. GANNON: In this instance there's no
5 doubt that the manager of the funds was not a mere
6 advisor. They bodily --

7 JUSTICE BREYER: I'm interested in your
8 test. I'm interested in your test, not the --

9 MR. GANNON: Well, the -- the test does
10 acknowledge that -- that if there is not sufficient
11 control over the content of the -- the message and the
12 dissemination of it that somebody may be more in an
13 advisory capacity. That might be the instance with lots
14 of outside law firms when they're acting at the specific
15 direction of counsel. That's not the situation of --

16 JUSTICE GINSBURG: In that connection, just
17 again, would you answer the -- the statement that Mr.
18 Perry made that the government had, in fact conceded
19 that this theory would spread, not only to -- to the
20 investment advisor so closely linked to funds but to
21 every lawyer, every accountant, every bank.

22 MR. GANNON: Well --

23 JUSTICE GINSBURG: You said you said that on
24 page something here.

25 MR. GANNON: We said that -- he was

1 referring to the statement on page 22 of the
2 government's brief, referring to the need -- for the --
3 for the author to be sufficiently involved in creating
4 or disseminating the statement. And I think it's very
5 important to recognize that scienter is an important
6 limiting -- limiting principle for the 10b-5 cause of
7 action.

8 JUSTICE SCALIA: Well, that will always be
9 charged. It's the simplest thing in the world to charge
10 scienter.

11 MR. GANNON: It would be --

12 JUSTICE SCALIA: And you've bought yourself
13 a big lawsuit.

14 MR. GANNON: It's not simple, Justice
15 Scalia, in light of the PSLRA, there requires it to be
16 alleged with particularity; there need to be facts
17 sufficient to give rise to a strong inference that the
18 defendant acted with scienter, and -- and there are
19 penalties beyond rule 11 that are -- that are imposed if
20 the -- if the plaintiff is -- is mistaken in doing so.

21 JUSTICE KENNEDY: You think attribution to
22 the actor is not necessary for the actor's liability for
23 his statement?

24 MR. GANNON: That's correct. We think that
25 -- and any other rule would immunize falsely attributed

1 or anonymous statements. And if the whole purpose of a
2 fraud was to convince somebody that this statement came
3 from Warren Buffet, so that I could turn a quick buck
4 before the market realized that it wasn't actually from
5 Warren Buffett, the fact that it was not attributed to
6 me would not change the fact that I had made the
7 statement and that the market had relied upon it.

8 The truth is that reasonable investors, and
9 that's the test for purposes of reliance, can rely on
10 anonymous and falsely attributed statements. In this
11 instance there's no reason to doubt that an investor
12 would have relied on statements in the prospectus about
13 the fund's purported antimarket timing and excessive
14 trading policies. And so we think that there -- in
15 general there doesn't need to be an attribution
16 requirement, but in this instance it's quite clear that
17 a reasonable investor could have relied on these --
18 prospectus.

19 JUSTICE SOTOMAYOR: Counsel, could you have
20 -- you just admitted if there -- if the company was
21 duped, you couldn't have aiding and abetting liability.
22 Could you impose a 20(b) or 20(b) control person
23 liability?

24 MR. GANNON: The control person liability
25 also needs to have a primary violator under the terms of

1 20(a).

2 JUSTICE KAGAN: Mr. Gannon, suppose that we
3 think that the test that the SEC is using and you recite
4 on page 13 is really pretty broad and that it might
5 apply to a range of factual situations that are not
6 before us. Is there a way to confine our holding just
7 to the mutual fund situation, and if there is, how would
8 you do that?

9 MR. GANNON: Well, I think the easiest way
10 would be to analogize it to the cases involving
11 corporate employees. As Petitioners acknowledge, there
12 are cases where a corporate employee drafts a statement
13 that's issued in the company's name. In this instance
14 the investment advisor is management for the company,
15 and the fact that they happen to be management by virtue
16 of contract rather than just the internal arrangements
17 of the corporation shouldn't change that arrangement.

18 It -- it's also the case that if the Court
19 were -- were looking for a way to narrow its holding, it
20 could do so by talking about the elements of the 10b-5
21 cause of action, which -- which would apply only to
22 private suits and -- and not to enforcement actions
23 brought by the Commission or by the Department of
24 Justice.

25 JUSTICE KENNEDY: Your point is that --

1 JUSTICE SCALIA: Well, it should change
2 that, because Congress has made it very clear that
3 investment advisors are not to be treated like
4 employees. You -- you want us to undo a clear
5 distinction that Congress has made.

6 MR. GANNON: Well, the -- that statute says
7 that somebody -- any person makes the false statement
8 directly or indirectly, and in this instance the SEC
9 sought -- got a cease and desist order that's reprinted
10 at -- on page 407 in the joint appendix that was
11 predicated on a provision of the Investment Company Act,
12 section 34b, that -- that tracks 10b and makes it
13 unlawful for any person to make any untrue statement of
14 material facts; and the Commission believes that they
15 were chargeable with that violation.

16 CHIEF JUSTICE ROBERTS: Thank you, Mr.
17 Gannon.

18 Mr. Perry, you have 4 minutes remaining.

19 REBUTTAL ARGUMENT OF MARK A. PERRY

20 ON BEHALF OF THE PETITIONERS

21 MR. PERRY: Justice Kennedy, in response to
22 your attribution question, Mr. Gannon said something
23 about falsely attributed or anonymous statements. We
24 have neither here. We have a correctly attributed,
25 nonanonymous prospectus that under Federal law says on

1 the first page of the document who it's attributed to,
2 the Janus Funds, who have their own trustees.

3 Justice Ginsburg, who is in the driver's
4 seat? Page 258a of the joint appendix, quote: "The
5 trustees are responsible for major decisions relating to
6 each Fund's objectives, policies and techniques. The
7 trustees also supervise the operations of the Fund by
8 their officers and review the investment decisions of
9 the officers." There is no misdirection here about who
10 is in charge. The trustees are in charge.

11 JUSTICE GINSBURG: But the -- the whole
12 arrangement was made possible by JCM. JCM wants
13 long-term investors, so it puts this provision in the
14 prospectus. The board of directors have no reason to
15 believe that JCM is disassembling and it's going to go out
16 and seek hedge funds.

17 MR. PERRY: If it is a dupe case, Justice
18 Ginsburg and Justice Sotomayor, it's dealt with by
19 20(b), which justice -- Mr. Gannon did not answer. You
20 notice 20(b) does not require a primary violation. It
21 allows the Commission to proceed directly against any
22 person who acts indirectly where it can't act directly.
23 So 20(b) answers this problem. The Commission also --
24 the 34b of the Investment Company Act is broader.
25 There's also section 206 and 215 of the Investment

1 Advisors Act which regulate the conduct of investment
2 advisors. Congress has dealt in a very reticulated way,
3 and all of the questions today I would submit show the
4 absence of bright lines being proposed by my friends on
5 this side of the table. They can't articulate the
6 difference between primary and secondary, between
7 principal and agent, between aiders and abettors and
8 anything else.

9 This is an area that needs bright lines, it
10 needs to be resolved on motions to dismiss. Scierter
11 can't be resolved on a motion to dismiss. And the
12 Congress, in the Dodd-Frank act, which the plaintiffs
13 said in their opposition in this Court to this
14 certiorari petition, was going to solve the problem by
15 enacting a statute -- turns out Congress didn't enact
16 that statute.

17 Instead, Congress referred this issue to the
18 General Accounting Office, to the Controller General,
19 and said take a year, take all the resources of the
20 Federal Government, study the problem of the distinction
21 between companies that issue securities on the one hand,
22 -- the funds here -- and those who provide services on
23 the other hand -- the advisor here. And tell us, come
24 back to the Congress and tell us whether we need to
25 solve the problem. If the government --

1 JUSTICE ALITO: Well, just to sum up, if
2 there are -- if investors in a mutual fund are duped by
3 a false statement that is made in fact, is written by --
4 by the management company and issued by the fund without
5 knowledge of its falsity, is there anyplace they can
6 get -- look to for relief?

7 MR. PERRY: The investors in the mutual
8 fund, Justice Alito --

9 JUSTICE ALITO: In the mutual fund, yes.

10 MR. PERRY: -- got \$100 million through the
11 SEC action and resolved all the civil litigation.
12 They're a separate class of investors, whole different
13 set of securities laws problems, because they were the
14 recipients of the prospectus that offered these
15 securities and that contained the false statements.
16 These plaintiffs' foundation problem, they didn't
17 purchase or sell the securities that were offered by the
18 prospectus they complain about. They can't find any
19 false statements --

20 JUSTICE KAGAN: Mr. Perry, on the
21 allegations of this complaint, these plaintiffs were
22 harmed by the misrepresentations, the alleged
23 misrepresentations from JCM to the fund. So if the Fund
24 was duped, would these shareholders, JCM's shareholders,
25 have any relief?

1 MR. PERRY: These shareholders -- JCG's
2 shareholders have no relief. And Justice Kagan, I would
3 point out in the 70 years since the Investment Company
4 Act was enacted and the modern mutual fund industry was
5 built, I'm not aware of any case -- and they certainly
6 haven't cited one -- in which the investors in the
7 parent company have ever recovered a dime in an SEC
8 action, a private action or otherwise, for statements in
9 the fund's prospectuses.

10 There is a -- there is a line between
11 corporate entities, and the liability runs up different
12 channels. This is a totally novel, unprecedented theory
13 that they're presenting.

14 JUSTICE GINSBURG: What was the theory of --
15 of the fund shareholders? You said the fund
16 shareholders recovered during the settlement.

17 MR. PERRY: Right.

18 JUSTICE GINSBURG: What -- what was that
19 act?

20 MR. PERRY: Their theory was that there was
21 an omission, that the advisor owned a duty to the Fund.
22 The statements were correctly made, Justice Ginsburg.
23 There was no market timing. When the advisor later
24 allowed certain traders in, it owed a duty to correct
25 the statements to the Fund. That was the liability

1 theory of the investors.

2 These plaintiffs can't pursue that liability
3 theory because the duty doesn't run the other way, it
4 doesn't run from JCM to JCG's investors, that's the law
5 in this case. Therefore, they can't bring an omissions
6 case, they have to bring an affirmative misstatements
7 case for statements that were not directed to this group
8 of investors.

9 CHIEF JUSTICE ROBERTS: Thank you,
10 Mr. Perry. The case is submitted.

11 (Whereupon, at 11:02 a.m., the case in the
12 above-entitled matter was submitted.)

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