No. 09-___

IN THE

Supreme Court of the United States

JANUS CAPITAL GROUP INC. AND
JANUS CAPITAL MANAGEMENT LLC,

Petitioners,

v.

FIRST DERIVATIVE TRADERS,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

There is no aiding-and-abetting liability in private actions brought under Section 10(b) of the Securities Exchange Act of 1934. *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994). Thus, a service provider who provides assistance to a company that makes a public misstatement cannot be held liable in a private securities-fraud action. *Stoneridge Inv. Partners, LLC* v. *Scientific-Atlanta, Inc.*, 128 S. Ct. 761 (2008). In the decision below, however, the Fourth Circuit held that an investment adviser who allegedly "*helped* draft the misleading prospectuses" of a different company, "by *participating* in the writing and dissemination of [those] prospectuses," can be held liable in a private action "even if the statement on its face is *not* directly attributed to the [adviser]." App., *infra*, 17a–18a, 24a (emphases added). The questions presented are:

1. Whether the Fourth Circuit erred in concluding—in direct conflict with decisions of the Fifth, Sixth, and Eighth Circuits—that a service provider can be held primarily liable in a private securities-fraud action for "help[ing]" or "participating in" another company's misstatements.

2. Whether the Fourth Circuit erred in concluding—in direct conflict with decisions of the Second, Tenth, and Eleventh Circuits—that a service provider can be held primarily liable in a private securities-fraud action for statements that were not directly and contemporaneously attributed to the service provider.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

In addition to the parties named in the caption, Craig Wiggins was a plaintiff in the district court. Mark B. Whiston, Loren M. Starr, and Gregory A. Frost were defendants in the district court.

The parent company of petitioner Janus Capital Management LLC is petitioner Janus Capital Group Inc. (formerly known as Stilwell Securities Laws Financial, Incorporated), a publicly traded corporation. There is no other publicly held corporation that owns 10 percent or more of the stock of either petitioner.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Janus Capital Group Inc. and Janus Capital Management LLC respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a–41a) is reported at 566 F.3d 111. The opinion of the district court (App., *infra*, 42a–53a) is reported at 487 F. Supp. 2d 618.

JURISDICTION

The judgment of the court of appeals was entered on May 7, 2009. A timely petition for rehearing was denied on June 2, 2009. App., *infra*, 56a–57a. The Chief Justice extended the time in which to file a petition for a writ of certiorari to and including October 30, 2009. *See* No. 09A95. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and Rule 10b-5 promulgated thereunder, 17 C.F.R. § 240.10b-5, are reproduced in the Appendix, *infra*, at 118a-119a.

STATEMENT

The district court dismissed the second amended complaint in this securities-fraud action because it did not adequately plead that the defendants had "made" the misstatements in issue. The Fourth Circuit reversed, holding that a service provider who allegedly "*helped* draft the misleading prospectuses" of a different company can be held primarily liable in a private securities-fraud action "even if the statement on its face is *not* directly attributed to the defendant." App., *infra*, 17a, 24a (emphases added).

1. Defendant Janus Capital Group Inc. (JCG) is a publicly traded financial services company; defendant Janus Capital Management LLC (JCM) is a subsidiary of JCG that provides investment advisory and administrative services to the Janus family of mutual funds (Janus Funds). App., *infra*, 5a.

The Janus Funds—which were not defendants in the district court and did not participate in the appeal—are separate legal entities that are not owned by JCG or JCM. Each individual fund (for example, the Janus Mercury Fund) is a series of a business trust, and each series is a registered investment company under the Investment Company Act of 1940. *See In re Mut. Funds Inv. Litig.*, 519 F. Supp. 2d 580, 588–89 & n.11 (D. Md. 2007). The Funds are governed by a board of trustees that must meet statutory standards of independence from the investment adviser. *See Burks* v. *Lasker*, 441 U.S. 471, 482 (1979).

Federal law requires mutual funds (investment companies) to "register the securities that they issue and offer to the public," and "[i]nvestment companies making a continuous public offering of their securities must file their sales literature with the SEC." 3 T. Frankel & A.T. Schwing, *The Regulation of Money Managers: Mutual Funds and Advisers* (2d ed.) § 24.02[A], at 24-34. The obligation to prepare and file the prospectus and other offering materials is imposed on the mutual fund (as registrant and issuer), *not* the investment adviser. 15 U.S.C. § 80a-24(a).

2. Lead plaintiff First Derivative Traders traded shares of JCG common stock between 2000 and 2003. App., *infra*, 5a. Although lead plaintiff never invested in the Janus Funds, its "suit alleges that JCG's stock price was artificially inflated as a result of misleading statements in prospectuses issued by … the 'Janus Funds.'" Pl. C.A. Br. 4. "The prospectuses for a number of the individual Janus funds stated that the funds had policies of discouraging market timing and that the funds engaged in measures to deter such behavior." App., *infra*, 5a. "The complaint alleges that the statements in the prospectuses regarding market timing were misleading because JCG and JCM have subsequently admitted that they 'had, for years, entered into secret arrangements to allow several hedge funds to engage in market timing transactions in various Janus Funds.'" *Id.* at 8a–9a (quoting *id.* at 72a ¶ 38).

The market timing issue came to light on September 3, 2003, when the New York Attorney General charged a hedge fund with improper trading in certain Janus (and other) mutual funds. App., *infra*, 9a. "[A]ccording to the complaint, the Attorney General's accusations caused 'a crisis of confidence among [JCG] common stock investors,' resulting in a twenty-three percent decrease in the value of JCG common stock." *Id.* at 11a (quoting *id.* at 62a–63a ¶ 10). Shortly thereafter, lead plaintiff sued JCG and JCM for securities fraud under Section 10(b) and Rule 10b-5.

3. The district court dismissed the second amended complaint. It emphasized that the complaint "contains no allegations that JCG actually made or prepared the prospectuses, let alone that any statements contained therein were directly at-

tributable to it." App., *infra*, 46a. Indeed, the court noted, lead plaintiff "concede[d] as much, arguing that '[t]he fact that the prospectus statements were not specifically attributed to defendants does not warrant dismissal.'" *Ibid.* (quoting Pl.'s Mem. Opp'n Defs.' Mot. Dismiss at 28) (second alteration in original).

The district court rejected lead plaintiff's argument that JCG could be held liable "'[w]hether or not [it] drafted the misleading prospectuses'" based on allegations that it had been "'actively involved in the dissemination of the misrepresentations with knowledge that the statements were false and misleading.'" App., *infra*, 46a (quoting Pl.'s Mem. Opp'n Defs.' Mot. Dismiss at 31) (first alteration in original). To the contrary, the court explained, "[o]ther courts have simply rejected the proposition that dissemination of a misleading document is tantamount to making a misstatement for securities fraud purposes." *Id.* at 47a. Accordingly, the district court concluded that "plaintiffs have not alleged facts sufficient to support their conclusory averment that JCG made a material misstatement or omission." *Id.* at 48a.

The district court found it unnecessary to "decide whether JCM made the alleged misstatements upon which plaintiffs rely" because "a mutual fund investment adviser that allegedly made representations to mutual fund shareholders cannot be liable under section 10(b) to its parent's shareholders who purchased no mutual fund shares." App., *infra*, 50a n.5, 53a.

4. The Fourth Circuit reversed. It recognized that the critical issue was whether lead plaintiff (and other investors in JCG common stock) had ade-

quately pleaded *reliance* on the alleged misstatements in the prospectuses for the Janus Funds. App., *infra*, 15a–17a. Although lead plaintiff had not purchased the securities offered by those prospectuses, it sought to invoke the "fraud-on-the-market" presumption of reliance, which requires (among other things) proof that the defendant "made public misrepresentations." *Basic Inc.* v. *Levinson*, 485 U.S. 224, 248 n.27 (1988). As the Fourth Circuit explained, "JCM and JCG press two distinct aspects of this pleading requirement, arguing that plaintiffs do not adequately allege either (1) that defendants made the statements in the prospectuses or (2) that the statements in the prospectuses were sufficiently publicly attributable to defendants to hold them responsible." App., *infra*, 17a.

The Fourth Circuit first ruled that "although the individual fund prospectuses are unattributed on their face, the clear essence of plaintiffs' complaint is that JCG and JCM *helped* draft the misleading prospectuses." App., *infra*, 17a (emphasis added). The Fourth Circuit then quoted the allegations in the operative complaint:

> Specifically, the complaint alleges that defendants "wrote and represented [their] policy against market timers," [App., *infra*, 69a ¶ 31], and "publicly issued false and misleading statements," [*id.* at 109a ¶ 122]. The complaint also alleges that defendants "represented that [their] mutual funds were designed to be long-term investments for 'buy and hold' investors and were therefore favored investment vehicles for retirement plans." [*Id.* at 60a ¶ 5]. According to the complaint, defendants made these represen-

> tations by "caus[ing] mutual fund prospectuses to be issued for Janus mutual funds and ma[king] them available to the investing public," [*id.* at 60a ¶ 6], through filings with the SEC and dissemination on a joint Janus website.

App., *infra*, 17a–18a. The Fourth Circuit concluded that "[t]hese statements, taken together, allege that JCG and JCM, by *participating* in the writing and dissemination of the prospectuses, *made* the misleading statements contained in the documents." *Id.* at 18a (first emphasis added). The sole "authority" cited by the Fourth Circuit was a district court opinion decided before *Stoneridge Investment Partners, LLC* v. *Scientific-Atlanta, Inc.*, 128 S. Ct. 761 (2008).

The Fourth Circuit next considered "whether these statements were sufficiently attributable to JCG and JCM." App., *infra*, 18a–19a. As the Fourth Circuit recognized, attribution is a prerequisite to the fraud-on-the-market presumption of reliance: "This requirement is necessary to ensure that the misleading information 'is reflected in the market price of the security.'" *Id.* at 18a (quoting *Stoneridge*, 128 S. Ct. at 769). The Fourth Circuit also acknowledged that "[t]he courts of appeal have diverged over the degree of attribution required to plead reliance." *Id.* at 19a. The Second and Eleventh Circuits require direct attribution. *Wright* v. *Ernst & Young LLP*, 152 F.3d 169, 175 (2d Cir. 1998); *Ziemba* v. *Cascade Int'l, Inc.*, 256 F.3d 1194, 1205 (11th Cir. 2001). The Tenth Circuit has agreed, albeit in *dicta*. *See SEC* v. *Wolfson*, 539 F.3d 1249, 1258–60 (10th Cir. 2008). "The Ninth Circuit, in contrast, has concluded that public attribution is not required to plead reliance; substantial participation or intricate involvement in preparing the misleading statement is sufficient to state a primary violation of § 10(b)." App., *infra*, 22a (citing *In re Software Toolworks Inc. Sec. Litig.*, 50 F.3d 615, 628–29 & n.3 (9th Cir. 1994), and *Howard* v. *Everex Sys., Inc.*, 228 F.3d 1057, 1061 n.5 (9th Cir. 2000)).

The Fourth Circuit rejected the majority rule, which requires direct attribution, and adopted the Ninth Circuit's "substantial participation" test:

> [F]or the public attribution element of the reliance inquiry, we hold that a plaintiff seeking to rely on the fraud-on-the-market presumption must ultimately prove that interested investors (and therefore the market at large) would attribute the allegedly misleading statement to the defendant. At the complaint stage a plaintiff can plead fraud-on-the-market reliance by alleging facts from which a court could plausibly infer that interested investors would have known that the defendant was responsible for the statement at the time it was made, *even if the statement on its face is not directly attributed to the defendant.*

App., *infra*, 23a–24a (emphasis added; citations omitted). The Fourth Circuit went on to hold that its newly announced standard was satisfied because "interested investors would have inferred that if JCM had not itself written the policies in the Janus fund prospectuses regarding market timing, it must at least have approved these statements." *Id.* at 31a. (Although the Fourth Circuit concluded that "plaintiffs' allegations of attribution ... are insufficient to reach JCG," *id.* at 32a, it held that JCG could be held liable for JCM's conduct on a "control person" theory, *id.* at 38a–40a.)

The Fourth Circuit then devoted a single sentence to reconciling its holding with this Court's decision in *Stoneridge*: "While *Stoneridge* makes clear that the fraud-on-the-market presumption does not apply to transactions that are not publicly disclosed, the holding in *Stoneridge* has no application to a situation in which the allegedly misleading statements are indisputably public and the inquiry is focused solely on whether the investing public would have attributed a particular statement to a particular defendant." App., *infra*, 32a.

REASONS FOR GRANTING THE PETITION

The Fourth Circuit held that a service provider who allegedly "*helped* draft the misleading prospectuses" of a different company can be held primarily liable in a private securities-fraud action "even if the statement on its face is *not* directly attributed to the defendant." App., *infra*, 17a, 24a (emphases added). Both aspects of this holding raise significant questions of national importance that warrant attention by this Court.

First, by allowing this action to proceed against a defendant that did not itself make any misstatements, but only "helped" draft another company's statements, the Fourth Circuit's decision directly contravenes this Court's repeated pronouncements that Rule 10b-5 does not authorize a private right of action for aiding-and-abetting (*i.e.*, "helping") securities fraud. *Stoneridge Inv. Partners, LLC* v. *Scientific-Atlanta, Inc.*, 128 S. Ct. 761, 768–69 (2008); *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 191–92 (1994). The Fourth Circuit's holding that a service provider may be held primarily liable for "*participating* in the writing and dissemination of the prospectuses" of a different company (App., *infra*, 18a (emphasis added)) also brings the Fourth Circuit into conflict with several of its sister circuits. *See Regents* v. *CSFB*, 482 F.3d 372, 390 (5th Cir. 2007) ("The banks' participation in the transactions ... did not give rise to primary liability under § 10(b)"); *see also Fidel* v. *Farley*, 392 F.3d 220, 235 (6th Cir. 2004); *In re Charter Commc'ns, Inc. Sec. Litig.*, 443 F.3d 987, 992 (8th Cir. 2006), *aff'd sub nom. Stoneridge*, 128 S. Ct. 761. The Fourth Circuit failed to address this conflict.

Second, the Fourth Circuit's decision exacerbates an existing conflict among federal appellate courts on whether a statement must be directly attributed to a non-speaking defendant, such as a service provider to the issuer, for private liability to attach. *See* App., *infra*, 19a ("The courts of appeal have diverged over the degree of attribution required to plead reliance"). Most circuits require direct attribution as a prerequisite to invoking the fraud-on-the-market presumption of reliance. *Wright* v. *Ernst & Young LLP*, 152 F.3d 169, 175 (2d Cir. 1998); *Ziemba* v. *Cascade Int'l, Inc.*, 256 F.3d 1194, 1205 (11th Cir. 2001); *see also SEC* v. *Wolfson*, 539 F.3d 1249, 1258–60 (10th Cir. 2008). The Fourth Circuit, however, rejected this majority rule in favor of the Ninth Circuit's "substantial participation" test. *See In re Software Toolworks Inc. Sec. Litig.*, 50 F.3d 615, 628 n.3 (9th Cir. 1994). That test is irreconcilable with *Stoneridge*.

I. THE COURTS OF APPEALS ARE DIVIDED ON BOTH QUESTIONS PRESENTED

The Fourth Circuit's holding that JCM can be held liable in a private securities class action for "helping" another company to draft statements that were *not* contemporaneously attributed to JCM warrants this Court's review in two respects. *First*, by holding that it is not necessary for a service provider to have itself made the misstatement at issue, the Fourth Circuit's decision authorizes secondary liability in a manner that directly conflicts with prior decisions of this Court and other courts of appeals. *Second*, by holding that a service provider can be held liable for a statement that was not directly attributed to it, the Fourth Circuit erroneously adopted the minority side of a 3–2 circuit split.

A. THE FOURTH CIRCUIT CREATED A CIRCUIT SPLIT BY HOLDING THAT "PARTICIPATION" SUFFICES FOR PRIMARY LIABILITY

This Court held in *Stoneridge* that, because private Rule 10b-5 liability does not reach aiding and abetting, a service provider cannot be held liable for "providing assistance" to a company that makes a false statement. 128 S. Ct. at 771. The courts of appeals have similarly rejected liability for service providers who did not themselves make any misstatements. *Regents*, 482 F.3d at 390; *Fidel*, 392 F.3d at 235; *Charter Commc'ns*, 443 F.3d at 992. The Fourth Circuit ran afoul of *Stoneridge* and created a split with other courts of appeals by allowing claims against JCM to proceed on the theory that JCM "helped" the Janus Funds make misstatements. App., *infra*, 17a.

1. Lead plaintiff's securities-fraud suit is premised entirely on certain statements contained in the prospectuses for the Janus Funds. *See* App., *infra*, 8a ("The complaint alleges that the statements in the prospectuses regarding market timing were misleading ..."). Those statements, however, were

made *by the Janus Funds*—separate legal entities, with separate boards of trustees and separate legal counsel. The prospectuses and statements of additional information (SAI) make clear that the Janus Funds—*not* JCM (nor JCG)—bear the "costs of *preparing*, printing and mailing the *Funds'* Prospectuses and SAI to current shareholders." C.A. App. 366 (emphases added); *see also id.* at 393. SEC Form N-1A explains that the offering materials are filed "on behalf of" the Janus Funds, and that the purpose of the filing is to "update the financial information of the Trust [*i.e.*, the Funds]." *Id.* at 342. (The Fourth Circuit's statement that "the individual fund prospectuses are unattributed on their face," App., *infra*, 17a, is therefore as inexplicable as it is incorrect.)

JCM, which is merely a service provider to the Funds, *did not make the statements in the Funds' prospectuses*. JCM does not own the Funds, nor does it issue or distribute the securities offered by the Funds' prospectuses. As the prospectuses themselves make clear, JCM "serves as investment adviser to each Fund." C.A. App. 394. The SAI spells out in more detail the services that JCM provides, including "advice and recommendation regarding the Funds' investments" and "management and administrative services necessary for the operation of the Funds." *Id.* at 366. As just noted, however, these services do *not* include "preparing, printing and mailing the Funds' Prospectuses and SAI." *Ibid.*

2. Lead plaintiff did not allege, and the Fourth Circuit did not find, that JCM *actually made* any of the statements in issue. Rather, the Fourth Circuit concluded that "JCM *helped draft* the misleading prospectuses." App., *infra*, 17a (emphasis added).

Even assuming that the operative complaint adequately pleads *any* JCM involvement in drafting the prospectuses (*but see Ashcroft* v. *Iqbal*, 129 S. Ct. 1937, 1949–50 (2009)), the Fourth Circuit's holding that JCM can be held liable for "helping" another company make a misstatement is flatly inconsistent with this Court's precedent.

"The § 10(b) implied private right of action does not extend to aiders and abettors." *Stoneridge*, 128 S. Ct. at 769; *see also Central Bank*, 511 U.S. at 191–92. "Aid" means to help or assist. *Webster's New International Dictionary* 53 (2d ed. 1955). Imposing liability on JCM for "helping" the Janus Funds to draft their prospectuses is nothing other than aiding-and-abetting liability. Congress has authorized the SEC to prosecute aiders and abettors, but it made the deliberate decision to withhold similar authority from private securities plaintiffs; in *Stoneridge*, the Court held that this congressional determination must be respected. 128 S. Ct. at 768. The Court specifically rejected the notion that a service provider can be held liable for "providing assistance" to a company that makes a false statement. *Id.* at 771. That is all JCM is alleged to have done here.

The Fourth Circuit's decision contravenes *Stoneridge* by allowing claims against service providers who did not make misstatements but merely "helped" others who did. App., *infra*, 17a. This Court has expressly held that service providers—including investment advisers—may not be held liable for securities fraud unless they *themselves* satisfy each of the elements for primary liability. *Stoneridge*, 128 S. Ct. at 769 ("The conduct of a secondary actor must satisfy each of the elements or preconditions for liability").

The Fourth Circuit said, however, that by "*participating* in the writing and dissemination of the prospectuses," JCM "*made* the misleading statements contained in the documents." App., *infra*, 18a (first emphasis added). The Fourth Circuit erred as a matter of law in equating "participating" with "making." Rule 10b-5(b), of course, speaks only to "mak[ing]." 17 C.F.R. § 240.10b-5(b). "Participating"—like "facilitating," "helping," "assisting," and similar verbs—is a signifier of *secondary* action. Primary liability under Rule 10b-5 does not extend to such conduct, but reaches only "a material misrepresentation or omission *by the defendant*." *Stoneridge*, 128 S. Ct. at 768 (emphasis added).

3. The sole "authority" cited by the Fourth Circuit was a pre-*Stoneridge* district court case, App., *infra*, 18a (citing *In re Global Crossing, Ltd. Sec. Litig.*, 322 F. Supp. 2d 319, 334 (S.D.N.Y. 2004)), which was wrong for the same reasons the Fourth Circuit decision is wrong. And, of course, district court decisions are not precedents. *See Harzewski* v. *Guidant Corp.*, 489 F.3d 799, 806 (7th Cir. 2007). The Fourth Circuit failed to acknowledge the substantial body of *appellate* authority on this issue, all of which points in the other direction.

In *Regents*, for instance, the Fifth Circuit rejected liability for banks that had allegedly entered into transactions that allowed Enron to misstate its financial position. 482 F.3d at 390. The court reasoned that these service-provider defendants "at most aided and abetted Enron's deceit by making its misrepresentations more plausible," which was insufficient for primary liability because the banks did not themselves make any misrepresentations. *Ibid.* ("The banks' participation in the transactions, regardless of the purpose or effect of those transactions, did not give rise to primary liability under § 10(b)").

Similarly, in *Fidel*, the Sixth Circuit affirmed the dismissal of a suit claiming that Ernst & Young had committed securities fraud by allowing one of its auditing clients to include unaudited financial results in the client's registration statement. 392 F.3d at 235. The Sixth Circuit rejected liability because "Ernst & Young itself did not make a material misstatement or omission with regard to the unaudited financials." *Ibid.*

Indeed, in the decision that led to *Stoneridge*, the Eighth Circuit rejected an attempt to hold two equipment vendors liable for entering into contracts with a cable company that, the plaintiffs alleged, permitted the cable company to inflate its financial results. *Charter Commc'ns*, 443 F.3d at 992. The Eighth Circuit rejected liability because the defendants "did not issue any misstatement." *Ibid.*

The holding below that JCM could be held liable under Rule 10b-5 for "helping" the Janus Funds make misstatements, even though JCM did not itself make those misstatements, brings the Fourth Circuit into conflict with its sister circuits, as well as with *Stoneridge* itself. This Court's review is warranted to bring the Fourth Circuit's jurisprudence back into line with the rest of the federal judiciary.

B. THE FOURTH CIRCUIT EXACERBATED AN EXISTING CIRCUIT SPLIT BY HOLDING THAT "DIRECT ATTRIBUTION" IS NOT REQUIRED

Even if JCM could be said to have "made" the statements in the Janus Funds' prospectuses, those statements concededly were not directly attributed to JCM. Before the Fourth Circuit's decision in this case, the federal courts of appeals had split on the question whether a service provider's involvement in a misstatement must be directly attributed as a prerequisite to a finding of reliance and, hence, liability. *See* App., *infra*, 19a ("The courts of appeal have diverged over the degree of attribution required to plead reliance"). The Fourth Circuit opted to join the minority side of this circuit split, resulting in a 3–2 disagreement among the courts of appeals that warrants this Court's attention.

1. In private securities-fraud suits, unlike SEC enforcement actions, the plaintiff must plead with particularity that it "reli[ed] upon the misrepresentation or omission." *Stoneridge*, 128 S. Ct. at 768 (citing *Dura Pharms., Inc.* v. *Broudo*, 544 U.S. 336, 341–42 (2005)); *see also Tellabs, Inc.* v. *Makor Issues & Rights, Ltd.*, 551 U.S. 308, 310 (2007). Such suits can proceed as class actions only if reliance is *presumed*, because in the absence of such a presumption common questions do not predominate. *See Basic Inc.* v. *Levinson*, 485 U.S. 224, 242 (1988); *see also, e.g.*, *Gunnells* v. *Healthplan Servs., Inc.*, 348 F.3d 417, 435 (4th Cir. 2003). This Court has held that reliance may be presumed under a "fraud-on-the-market" theory where the defendant made a public misstatement regarding a security that trades in an efficient market. *See Basic*, 485 U.S. at 248–50.

In *Wright* v. *Ernst & Young*, the Second Circuit held that "a secondary actor cannot incur primary liability under the [Exchange] Act for a statement not attributed to that actor at the time of its dissemination." 152 F.3d at 175; *see ibid.* ("the misrepresentation must be attributed to that specific actor at the time of public dissemination"). The Second Circuit reasoned that failing to require attribution would "circumvent the reliance requirements of the [Exchange] Act, as '[r]eliance only on misrepresentations made by others cannot itself form the basis of liability.'" *Ibid.* (quoting *Anixter* v. *Home-Stake Prod. Co.*, 77 F.3d 1215, 1225 (10th Cir. 1996)). *Wright* therefore concluded that an auditor could not be held liable for public statements by its client because, as in this case, the company "did not attribute" those statements to the auditor. *Ibid.*; *see also, e.g.*, *Lattanzio* v. *Deloitte & Touche LLP*, 476 F.3d 147, 155 (2d Cir. 2007) ("a party can incur liability only if a misstatement is attributed to it at the time of dissemination").

The Second Circuit's subsequent decision in *Lattanzio* dispels the Fourth Circuit's speculation that *Wright* does not require the statement to be "attributed on its face to the defendant" if "the investing public would infer [it] was drafted or approved by the defendant." App., *infra*, 21a. "Unless the public's understanding [that the statement was approved by the service provider] is *based on the [service provider]'s articulated statement*, the source for that understanding—whether it be a regulation, an accounting practice, or something else—does not matter." *Lattanzio*, 476 F.3d at 155 (emphasis added).

The Eleventh Circuit has similarly held that a defendant may be primarily liable under Rule 10b-5 only if the alleged misrepresentation was "publicly attributable to the defendant." *Ziemba*, 256 F.3d at 1205. In *Ziemba*, the plaintiffs sued a law firm for its "significant role in drafting, creating, reviewing or editing allegedly fraudulent letters or press releases" issued by a public company. *Ibid.* (internal quotation marks omitted). The Eleventh Circuit upheld the dismissal of the suit because "no misrepresentations attributable to [the law firm] were ever made to Plaintiffs." *Ibid.*

Although the Tenth Circuit initially staked out what it characterized as a middle ground, *see Anixter*, 77 F.3d at 1225–26, it has more recently (*i.e.*, since *Stoneridge* was decided) expressed approval of the *Wright-Ziemba* majority rule. *See Wolfson*, 539 F.3d at 1258–60 ("the attribution requirement ... stems directly from the need for private litigants to prove reliance on an alleged fraud to succeed on a private cause of action" (emphases omitted)).*

In contrast to this majority rule, the Ninth Circuit has concluded that private Rule 10b-5 liability may be imposed on a defendant that merely "played a significant role in drafting and editing" the misleading statement. *Software Toolworks*, 50 F.3d at 628 n.3. According to the Ninth Circuit, "substantial participation or intricate involvement in the preparation of fraudulent statements is grounds for primary liability even though that participation might

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* In *SEC* v. *Tambone*, a panel of the First Circuit likewise expressed its agreement with the majority rule. 550 F.3d 106, 137–40 (1st Cir. 2008). Like *Wolfson*, *Tambone* was an SEC enforcement action, in which reliance is not an element, but the panel nonetheless recognized (albeit in *dicta*) that "public attribution ... is necessary in a *private* action." *Id.* at 139 (emphasis added). The First Circuit has subsequently agreed to rehear *Tambone en banc*, and the panel opinion has been withdrawn. *SEC* v. *Tambone*, 573 F.3d 54, 55 (1st Cir. 2009). Because reliance is not at issue in *Tambone*, however, the case does not present the *en banc* First Circuit with a choice between the competing approaches "over the degree of attribution required to plead reliance." App., *infra*, 19a.

not lead to the actor's actual making of the statements." *Howard* v. *Everex Sys., Inc.*, 228 F.3d 1057, 1061 n.5 (9th Cir. 2000).

2. Faced with this express and acknowledged conflict among the circuits, the Fourth Circuit rejected the majority rule and adopted the Ninth Circuit's "substantial participation" standard. App., *infra*, 23a–24a. The choice between these two standards was outcome-determinative in this case. It is undisputed that the statements in the Janus Funds' prospectuses were *not* directly attributed to JCM; accordingly, the dismissal would have to be affirmed under the majority rule. Only by adopting the minority rule, which does not require direct attribution, was the Fourth Circuit able to reverse the dismissal.

Not only did this decision exacerbate an existing circuit split, the Fourth Circuit chose the wrong side of the debate by adopting a standard that is inconsistent with this Court's decision in *Stoneridge*. As this Court explained, if a particular defendant's deceptive acts are "not disclosed to the investing public," they "are too remote to satisfy the requirement of reliance." 128 S. Ct. at 770. This requirement of actual public disclosure leaves no room for a "substantial participation" standard.

The Fourth Circuit tried to dispense with *Stoneridge* in a single curt sentence: "[T]he holding in *Stoneridge* has no application to a situation in which the allegedly misleading statements are indisputably public and the inquiry is focused solely on whether the investing public would have attributed a particular statement to a particular defendant." App., *infra*, 32a. But the statements in *Stoneridge*—the issuer's financial results—*were* publicly disclosed; the question was whether the service provider whose involvement was not disclosed could be held liable for those statements. 128 S. Ct. at 767. This Court's "no" answer applies equally here, where whatever involvement JCM may have had in the Janus Funds' public statements was never publicly disclosed.

The issue in this case arises whenever a service provider—an accountant, a banker, a lawyer, or (as here) an investment adviser—is sued in a private Rule 10b-5 action on the basis of public statements made by a public company client of the service provider. These lawsuits often threaten massive liability. *Stoneridge*, 128 S. Ct. at 772. If the courts of appeals diverge on when secondary actors may be sued, securities plaintiffs will migrate to those courts that enable them to ensnare the greatest number of deep-pocket defendants. To prevent the Fourth and Ninth Circuits from becoming the forums of choice for overbroad securities lawsuits against service providers, this Court should grant review and resolve the 3–2 split deepened by the Fourth Circuit's decision below.

II. Both Questions Presented Are Important To Investors And The Securities Markets.

If allowed to stand, the Fourth Circuit's resolution of both questions presented would upset the securities and financial markets by exposing secondary actors to unpredictable and potentially massive liability for the misconduct of others. The Fourth Circuit's decision offers no clear rule regarding how substantially a service provider must "participat[e] in the writing and dissemination" of a false statement before it will be deemed to have "made" that statement. App., *infra*, 18a. Nor, having abandoned the direct attribution requirement, does the Fourth Circuit provide any meaningful guidance about when "interested investors ... would attribute" an unattributed but "allegedly misleading statement to the defendant." *Id.* at 23a.

The uncertainty created by the Fourth Circuit's decision is harmful to individual investors and the securities markets generally. *See, e.g.*, R.K. Winter, *Paying Lawyers, Empowering Prosecutors, and Protecting Managers: Raising the Cost of Capital in America*, 42 Duke L.J. 945, 962 (1993) ("Overbreadth and uncertainty deter beneficial conduct and breed costly litigation"). As this Court has warned, "uncertainty and excessive litigation can have ripple effects." *Central Bank*, 511 U.S. at 189. The Fourth Circuit's decision promises many such ripple effects, at a time when the markets are already beset with volatility.

First, the holding will lead to more claims against secondary participants in the securities markets based on allegations that the performance of their roles equates to the making of actionable misstatements. Opening the door to these claims would frustrate Congress's decision to bar private aiding-and-abetting claims. Congress enacted the Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737, "to protect investors and maintain confidence in our capital markets" in response to "significant evidence" of abusive litigation practices. H.R. Rep. No. 104-369, at 31 (1995) (Conf. Rep.). The abuses that prompted Congress to enact these reforms included "the targeting of deep pocket defendants, including accountants, underwriters, and individuals who may be covered by insurance, without regard to their actual culpability." *Ibid.* Following this Court's decision in *Central Bank*, lawmakers deliberated over the merits of allowing private aiding-and-abetting claims:

> The Committee considered testimony endorsing the result in *Central Bank* and testimony seeking to overturn this decision. The Committee believes that amending the 1934 Act to provide explicitly for private aiding and abetting liability actions under Section 10(b) would be contrary to S. 240's goal of reducing meritless securities litigation.

S. Rep. No. 104-98, at 19 (1995). Thus, Congress decided to forbid private plaintiffs from asserting aiding-and-abetting claims, while authorizing the SEC to pursue them. *See ibid.*; 15 U.S.C. § 78t(e). The Fourth Circuit's holding invites private plaintiffs to resurrect aiding-and-abetting liability through the simple artifice of pleading "substantial participation" liability. This would frustrate Congress's judgment.

Second, uncertainty over Section 10(b) and Rule 10b-5 liability would lead service-provider defendants "to abandon substantial defenses and to pay settlements in order to avoid the expense and risk of going to trial." *Central Bank*, 511 U.S. at 189. Congress was responding, in part, to this very concern when it reformed the securities laws in 1995 and again in 1998. *See* H.R. Rep. No. 105-803, at 13 (1998) (Conf. Rep.) (explaining that "the legislation is designed" to reduce "'strike' suits" filed "to extract a sizeable settlement from companies that are forced to settle, regardless of the lack of merits of the suit"); H.R. Rep. No. 104-369, at 31 (1995) (Conf. Rep.) (explaining that the reforms were prompted, in part, by "the abuse of the discovery process to impose costs so burdensome that it is often economical for the victimized party to settle").

Third, "the increased costs incurred by professionals because of the litigation and settlement costs under 10b-5 may be passed on to their client companies, and in turn incurred by the company's investors." *Central Bank*, 511 U.S. at 189. Thus, "extending the reach of civil liability under Section 10(b) might, in fact, harm investors, the intended beneficiaries of the statute." I.J. Sugarman, *Lawyers & Accountants Liability After* Central Bank, 1998 A.B.A. Sec. Litig. & Arbitration G-79, at *G-79; L. Zingales, *et al.*, Committee on Capital Markets Regulation, *Interim Report of Committee on Capital Markets Regulation*, at x (Nov. 30, 2006) (reporting that an "important factor" contributing to the "loss of U.S. public market competitiveness compared to global public markets" is the "growth of U.S. regulatory compliance costs and liability risks compared to other developed and respected market centers").

Fourth, the risk of increased liability would drive business decisions that could ultimately harm investors. Industries that are frequently targeted for litigation or that are subject to complex rules governing service providers might find that high-quality services are unavailable or, at a minimum, more costly. In addition, "newer and smaller companies may find it difficult to obtain advice from professionals." *Central Bank*, 511 U.S. at 189. Service providers "may fear that a newer or smaller company may not survive and that business failure would generate securities litigation against the professional, among others." *Ibid.* A reduction in the availability of these services would undermine both the reliability of the securities markets and investors' confidence, contrary to "[t]he overriding purpose of our Nation's securities laws." H.R. Rep. No. 104-369, at 31 (1995) (Conf. Rep.).

* * *

This Court held in *Stoneridge* that private liability under Section 10(b) and Rule 10b-5 is appropriate for "secondary actors" only when they "commit primary violations." 128 S. Ct. 773–74. The Fourth Circuit's decision contravenes that holding, and significantly deepens the split among the circuits on both questions presented, by authorizing private lawsuits in which service providers (such as auditors, lawyers, bankers, and investment advisers) may be held primarily liable for participating in others' misstatements, regardless of whether those misstatements were attributed to the defendant. The uncertainty and excessive litigation that this decision would generate for secondary actors "disserve the goals of fair dealing and efficiency in the securities markets" (*Central Bank*, 511 U.S. at 188) and warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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