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No. 09-1176

In the Supreme Court of the United States

PIRATE INVESTOR LLC, ET AL., PETITIONERS

v.

SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioners violated Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b), and Rule 10b-5, 17 C.F.R. 240.10b-5, by falsely claiming to have inside information bearing on the value of a publicly-traded stock.

2. Whether a district court's factual findings in a securities-fraud case are subject to the heightened procedural protections applicable to defamation claims against public figures.

3. Whether the district court violated the First Amendment by entering an injunction against future violations of Section 10(b) and Rule 10b-5.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-51a) is reported at 580 F.3d 233. The opinion of the district court (Pet. App. 52a-105a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 15, 2009. A petition for rehearing was denied on November 13, 2009 (Pet. App. 151a-152a). On February 3, 2010, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including March 11, 2010. On March 3, 2010, the Chief Justice further extended the time to March 26, 2010, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Pirate Investor LLC (Pirate) publishes investment newsletters and provides its subscribers with an e-mail service called the "Blast." Pet. App. 5a. Petitioner Frank Porter Stansberry is Pirate's editor-in-chief. *Ibid.*

In April 2002, Stansberry learned of a company called USEC, Inc. Pet. App. 6a. USEC enriches uranium and is the executive agent for the United States under a 1993 disarmament pact between the United States and Russia. *Ibid.* As part of that agreement, known as "Megatons to Megawatts," Russia sells uranium formerly used in Soviet nuclear warheads to the United States for use as fuel in nuclear power plants. *Ibid.* The pact requires USEC and its Russian corporate counterpart to periodically renegotiate the uranium's price, subject to agreement by both governments. *Ibid.* After a pricing agreement expired in 2001, the two companies negotiated a new agreement in February 2002. *Ibid.* As of May 2, 2002, however, neither government had approved the new agreement, so it had not gone into effect. *Ibid.*

On May 2, 2002, after learning of the pricing agreement, Stansberry called Steven Wingfield, USEC's Director of Investor Relations. Pet. App. 6a-7a. The call lasted approximately one hour. *Id.* at 54a-55a. The district court subsequently found that "[t]here was, during the conference call, no communication from Wingfield to Stansberry providing 'insider information' regarding USEC." *Id.* at 55a. "In particular, Wingfield did not tell Stansberry that the * * * pricing agreement would be approved on May 22 or tell him to watch the stock on that date." *Ibid.*; see *id.* at 10a.

2. Following his conversation with Wingfield, Stansberry prepared an e-mail with the subject line "DOUBLE YOUR MONEY ON MAY 22ND WITH THIS *SUPER INSIDER* TIP." Pet. App. 157a; see *id.* at 7a. The e-mail offered to sell for $1000 an investment report that would identify the name of a company whose stock price was poised to increase. *Id.* at 169a. The e-mail, in which Stansberry used the name "Jay McDaniel," said that McDaniel had "insider information" obtained from a "senior company executive" of the undisclosed company about "the details of a major international agreement between the United States and Russia that will create more than $2.5 billion in profits" for the company. *Id.* at 157a-158a, 169a. According to the e-mail, a "high-level corporate executive—someone definitely in a position to know—passed along the details," including "the precise day the deal would be announced." *Id.* at 158a.

The e-mail stated that, based on the company source, the "deal will close on May 22nd." Pet. App. 157a. The e-mail also predicted that on May 22 shares in the stock, then trading at $7 per share, "should more than DOUBLE, as the new agreement with the Russians will mean fat profits through the year 2013." *Id.* at 157a, 158a. Writing as "McDaniel," Stansberry stated: "I can guarantee you (and Porter Stansberry has agreed to vouch for me and stand behind my guarantee) that everything I've told you here about the company is true and accurate." *Id.* at 165a.

On the evening of May 13, 2002, Stansberry sent the e-mail to the Pirate Investor Blast Database, a list of e-mail addresses of subscribers to Pirate products. Pet. App. 9a. More than 100 of the recipients paid $1000 to receive the "Special Report" that identified USEC as the company referenced in the "Super Insider Tip" e-mail. *Id.* at 8a, 9a n.7, 170a, 177a. The Report, which Stansberry also signed as "Jay McDaniel," stated that USEC had reached an agreement with its Russian partner, that the United States and Russian governments needed to approve the agreement, and that "uncertainty about when this deal would be approved has led to the company's stock trading in limbo—and at very cheap prices—since early 2000." *Id.* at 177a, 179a. Stansberry wrote in the Report that a "USEC senior executive ha[d] assured [him] that the new Russian agreement will be approved prior to the upcoming Bush-Putin summit. In fact, he said '*watch the stock on May 22nd.*'" *Id.* at 177a. The Special Report reiterated that all USEC needed was for "politicians to sign off on the deal," and it stated that, "according to my source, [that approval] will happen—finally—on May 22." *Id.* at 178a (emphasis omitted).

In the five months before Stansberry sent his original e-mail solicitation, the trading volume of USEC common stock averaged approximately 189,000 shares a day. Pet. App. 57a. In the ten days after the e-mail was sent, trading volume averaged 3.3 million shares a day. *Ibid.* The stock price also increased, and "the district court determined [the increase] was the result of purchases by early recipients of the solicitation and special report." *Id.* at 26a. Starting on May 17, Stansberry sent out new versions of the original e-mail to a larger group of recipients. *Ibid.*; see *id.* at 56a. In those later versions, Stansberry included references to the stock's new price ($9) and "pointed out that the stock in question 'has jumped this week and looks poised to go much higher.'" *Id.* at 26a.

More than 800,000 individuals received the solicitation e-mail, and investors purchased 1217 copies of the USEC Special Report. Pet. App. 9a. Those purchases resulted in net proceeds of $1,005,000, of which Pirate received $626,500. *Ibid.*

3. No announcement of the approval of the pricing agreement was made on May 22, 2002. The price of USEC stock fell that day from $9.54 to $8.20 a share. Pet. App. 57a-58a. Approval of the agreement was ultimately announced on June 19, 2002. *Id.* at 10a.

4. On April 18, 2003, the Securities and Exchange Commission (SEC or Commission) filed a complaint against petitioners, alleging that they had violated Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b), and Rule 10b-5, 17 C.F.R. 240.10b-5.[1] Pet. App. 10a, 58a. After a bench trial, the district court held that petitioners had violated Section 10(b) and Rule 10b-5 by falsely claiming that a company insider had provided the information in the "Super Insider Tip" e-mail and the USEC Special Report regarding the precise date of approval of the pricing agreement. *Id.* at 52a-105a. The district court required petitioners to disgorge the profits they had received from their fraudulent conduct, *id.* at 112a, imposed a civil penalty of

[1] Section 10(b) makes it "unlawful for any person, directly or indirectly, * * * [t]o use or employ, in connection with the purchase or sale of any security * * * , any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe." 15 U.S.C. 78j(b). Pursuant to its Section 10(b) rulemaking authority, the SEC has promulgated Rule 10b-5, which makes it "unlawful for any person, directly or indirectly, * * * [t]o make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made * * * not misleading, * * * in connection with the purchase or sale of any security." 17 C.F.R. 240.10b-5(b).

$120,000 on each petitioner, *id.* at 113a, and entered an injunction that prohibited petitioners from engaging in further violations of Section 10(b) and Rule 10b-5, *id.* at 115a-116a.

5. The court of appeals affirmed. Pet. App. 1a-51a. The court first rejected petitioners' contention that "their conduct did not constitute a violation of [Section] 10(b)." Pet. App. 11a. The court explained that, "[i]n a civil enforcement action under [Section] 10(b), the SEC must establish that the defendant (1) made a false statement or omission (2) of material fact (3) with scienter (4) in connection with the purchase or sale of securities." *Ibid.* (internal quotation marks and citation omitted).

The court of appeals found that each of these elements was satisfied in this case. First, Stansberry's statement that a company insider had told him that the Russian agreement would be announced on May 22 was false. Pet. App. 12a. "The district court found that Wingfield never told Stansberry that approval of the pricing agreement would be announced on May 22," and petitioners did not challenge that finding on appeal. *Ibid.*; see *id.* at 10a n.8. Second, the false statement was material because a "reasonable investor would treat a particular stock recommendation differently depending on whether or not the recommender was acting on inside information." *Id.* at 14a-15a. Third, the court of appeals affirmed the district court's finding of scienter because "Stansberry was in a position to know whether or not his statements were true." *Id.* at 20a. "As other courts have recognized, the fact that a defendant publishes statements when in possession of facts suggesting that the statements are false is 'classic evidence of scienter.'" *Ibid.* (quoting *Aldridge* v. *A.T. Cross Corp.*, 284 F.3d 72, 83 (1st Cir. 2002)). Fourth, the fraud occurred "in connection with" the purchase of securities because "securities purchases were necessary to complete [petitioners'] fraudulent scheme," petitioners had "made their representations with the intent to induce securities transactions," and petitioners had "directed the misrepresentations to investors that they knew were likely to rely on them." *Id.* at 41a.

The court of appeals also rejected petitioners' contention "that the district court should have found that the Super Insider Tip E-mail and USEC Special Report were entitled to the heightened protections for expression that the Supreme Court recognized in *New York Times* v. *Sullivan*," a defamation case involving a public figure. Pet. App. 48a-49a. The court held that the Commission did not have to prove by clear and convincing evidence that petitioners had made their misrepresentations with actual malice because punishing fraud "simply does not violate the First Amendment." *Id.* at 49a. The court of appeals also rejected petitioners' First Amendment challenge to the injunction against future fraudulent conduct, explaining that "[t]he injunction does not constitute an unlawful prior restraint because it only enjoins [petitioners] from engaging in securities fraud, which * * * is unprotected speech." *Id.* at 50a. The court declined to address petitioners' contention "that the injunction is a disfavored 'obey the law' injunction" because petitioners had raised that argument for the first time in their reply brief. *Id.* at 50a n.23.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court, another federal court of appeals, or (as petitioners assert) the Maryland Court of Appeals. Contrary to petitioners' contention, their fraud was "in connection with the purchase * * * of [a] security." 17 C.F.R. 240.10b-5(b). The natural and foreseeable result of petitioners' fraudulent misrepresentations was to induce recipients of those misrepresentations to purchase USEC stock, and the occurrence of such purchases directly furthered petitioners' fraudulent scheme. Petitioners are also wrong in arguing that fraud actions are subject to the heightened substantive and procedural protections that apply to limited categories of cases of special First Amendment sensitivity. In any event, this case would be a poor vehicle for review of petitioners' claim of entitlement to these protections since petitioners actually received many of them.

1. The court of appeals correctly held that petitioners' misrepresentations were "in connection with" the purchase or sale of a security. The court based that holding on its determination that petitioners had made their knowingly false statements "with the intent to induce securities transactions" and had directed the misrepresentations "to investors that they knew were likely to rely on them." Pet. App. 41a. The court further explained that purchases of USEC stock by early recipients of the Special Report facilitated petitioners' ongoing fraud by causing the stock's price to rise, an increase that petitioners touted in their subsequent e-mail solicitations. *Id.* at 26a-27a. The court of appeals' determination that petitioners' false statements were made "in connection with" the purchase of a security turned on the particular circumstances of petitioners' fraudulent scheme and does not merit the Court's review.

a. This Court has "explained that [Section 10(b)] should be construed not technically and restrictively, but flexibly to effectuate its remedial purposes." *SEC* v.

Zandford, 535 U.S. 813, 819 (2002) (internal quotation marks and citation omitted). The Court in *Zandford* observed with evident approval that "the SEC has consistently adopted a broad reading of the phrase 'in connection with the purchase or sale of any security.'" *Ibid.*

In keeping with the broad scope of this phrase, courts have held that "Congress, when it used the phrase 'in connection with the purchase or sale of any security,' intended only that the device employed, whatever it might be, be of a sort that would cause reasonable investors to rely thereon, and, in connection therewith, so relying, cause them to purchase or sell a corporation's securities." *SEC* v. *Texas Gulf Sulphur Co.*, 401 F.2d 833, 860 (2d Cir. 1968) (en banc), cert. denied, 394 U.S. 976 (1969); see *id.* at 862 ("Rule 10b-5 is violated whenever assertions are made, as here, in a manner reasonably calculated to influence the investing public * * * if such assertions are false or misleading or are so incomplete as to mislead."). "In such cases, the SEC need only show that the documents are reasonably calculated to influence investors" in order to establish that the statements were made in connection with the purchase or sale of securities. *SEC* v. *Wolfson*, 539 F.3d 1249, 1262 (10th Cir. 2008) (citing *SEC* v. *Rana Research, Inc.*, 8 F.3d 1358, 1362 (9th Cir. 1993)); accord *SEC* v. *Savoy Indus., Inc.*, 587 F.2d 1149, 1171 (D.C. Cir. 1978), cert. denied, 440 U.S. 913 (1979) (*Savoy*); *United States* v. *Gruenberg*, 989 F.2d 971, 976 (8th Cir.), cert. denied, 510 U.S. 873 (1993); *United States* v. *Persky*, 520 F.2d 283, 288 (2d Cir. 1975).

The decision of the court of appeals is consistent with this line of authority. The information that petitioners offered to sell was represented to be valuable precisely because it would enable the recipient investors to identify a publicly-traded security that was likely to appreciate. Petitioners therefore would have "reasonably * * * expected" that their e-mail and special report would cause recipients "to buy * * * securities in reliance thereon." *Savoy*, 587 F.2d at 1171. Indeed, the special report urged investors to "call your broker now and tell him to buy shares of USEC (NYSE: USU, $6.50)." Pet. App. 170a.

b. Petitioners contend (Pet. 16) that they could not be liable because they did not participate in securities transactions themselves or owe a fiduciary duty to the investors they misled. They discuss prior cases (Pet. 16-18) in which one or both of those circumstances were present. Petitioners' reliance on those precedents is misplaced. Depending on the circumstances, securities trades by a defendant or the presence of a fiduciary duty may be sufficient to satisfy the "in connection with" requirement; but the cited decisions do not hold that they are necessary.

As an initial matter, liability under Section 10(b) and Rule 10b-5 is not limited to persons who themselves "participate in securities transactions." Pet. 16. Rule 10b-5 makes it "unlawful for any person * * * [t]o make any untrue statement of a material fact * * * in connection with the purchase or sale of any security," 17 C.F.R. 240.10b-5(b). The Rule does not require that the relevant purchase or sale be made by the same person who makes the untrue statement. See, *e.g.*, *Texas Gulf Sulphur Co.*, 401 F.2d at 860 ("There is no indication that Congress intended that the corporations or persons responsible for the issuance of a misleading statement would not violate the section unless they engaged in related securities transactions.").

Citing *United States* v. *O'Hagan*, 521 U.S. 642 (1997), and *SEC* v. *Zandford*, *supra*, petitioners contend (Pet. 17) that this Court has limited the "in connection with" requirement to "the world of fiduciary duty" when the defendant does not trade securities. The defendants' fiduciary duties were significant in those cases, however, only because both cases involved fraud through nondisclosure. In *O'Hagan*, "[d]eception through nondisclosure [was] central to the theory of liability." 521 U.S. at 654. The deception involved trading on material nonpublic information in breach of a duty of disclosure to the source of the information. *Id.* at 654-655. This deception was "in connection with" the purchase or sale of a security because "the fiduciary's fraud is consummated, not when the fiduciary gains the confidential information, but when, without disclosure to his principal, he uses the information to purchase or sell securities," and the "securities transaction and the breach of duty thus coincide." *Id.* at 656.

Similarly in *Zandford*, the deception involved trading without disclosing an intent to misappropriate the proceeds in breach of a fiduciary duty. 535 U.S. at 820-821. This deception was "in connection with" the purchase or sale of a security because the broker sold his client's securities while secretly intending from the outset to keep the proceeds, in breach of his fiduciary duties. Accordingly, "the securities transactions and breaches of fiduciary duties coincide[d]." *Id.* at 825.

This case, by contrast, involves affirmative misrepresentations to potential buyers and sellers of a particular security. Whereas the wrongfulness of nondisclosure in particular circumstances may turn on the presence or absence of a fiduciary duty to disclose, affirmative misrepresentations stand on a different footing. As the Second Circuit has explained,

> *O'Hagan* * * * and *Zandford* * * * stand for the proposition that nondisclosure in breach of a fiduciary duty "satisfies [Section] 10(b)'s requirement . . . [of] a 'deceptive device or contrivance,'" *O'Hagan*, 521 U.S. at 653. However, what is sufficient is not always what is necessary, and none of [those] Supreme Court opinions * * * *require* a fiduciary relationship as an element of an actionable securities claim under Section 10(b). While * * * *O'Hagan* * * * and *Zandford* * * * dealt with fraud *qua* silence, an affirmative misrepresentation is a distinct species of fraud. Even if a person does not have a fiduciary duty to 'disclose or abstain from trading,' there is nonetheless an affirmative obligation in commercial dealings not to mislead.

SEC v. *Dorozkho*, 574 F.3d 42, 49 (2d Cir. 2009) (emphasis in original).

Petitioners also claim (Pet. 19) that the ruling below "conflicts with the Court's repeated efforts, most recently in [*Stoneridge Inv. Partners, LLC* v. *Scientific-Atlanta, Inc.*, 552 U.S. 148 (2008) (*Stoneridge*)], to prevent the wholesale federalization of common-law fraud through Section 10(b)." *Stoneridge* is inapposite. In that case, the Court "consider[ed] the reach of the private right of action the Court has found implied in [Section] 10(b)" and, specifically, the reliance requirement for such private suits. *Id.* at 152, 159. The Court made clear, however, that it "[did] not evaluate the 'in connection with' requirement of [Section] 10(b)." *Id.* at 160. The Court also found that the defendants' actions were "too remote to satisfy the requirement of reliance" because those actions were not disclosed to the investing public. *Id.* at 161. Here, by contrast, petitioners themselves directly made the false statements that induced investors to purchase USEC stock. Finally, this case does not present a mere "garden-variety allegation of commercial fraud" (Pet. 18) of the kind discussed in *Stoneridge*. Rather, the essence of the fraud was to misrepresent to investors information that petitioners themselves touted as directly relevant to the purchasing of securities.

c. Contrary to petitioners' contentions, this case does not involve "mere impersonal investment advice" (Pet. 13), and the court of appeals' decision will not enable the SEC or private litigants "to engage in endless second-guessing of editorial judgments made by publishers and market commentators" (Pet. 16). "[T]he actionable false statements in the instant case" were not "merely opinion" (Pet. App. 65a), "commentary" (Pet. 14) (citation omitted), or a "projection[] as to how a major international event would affect a publicly-traded company" (InvestorPlace Media Amicus Br. 5). Rather, "[t]he critical statement" on which petitioners' liability was premised "is the false statement of an alleged existing fact—that is, the asserted past receipt of inside information from a senior USEC executive who would be in a position to know when the pricing agreement would be approved." Pet. App. 64a-65a; see *id.* at 12a n.11.

As explained above, the natural and foreseeable effect of petitioners' false statements of fact was to induce the recipients of those statements to purchase securities. And, as the court of appeals further explained, those purchases "helped [petitioners] to maximize the profitability of their scheme," Pet. App. 29a, since petitioners "used stock purchases by early purchasers of the

USEC Special Report as a way of enhancing the credibility of the report," *id.* at 26a. Petitioners disseminated the Super Insider Tip e-mail "in waves to various groups of investors," and "later versions of the solicitation pointed to a rise in USEC's stock price—which the district court determined was the result of purchases by early recipients of the solicitation and special report—as supporting the trustworthiness of the tip." *Ibid.* The purchases of stock that petitioners induced therefore were not simply a foreseeable consequence of petitioners' false statements; rather, those purchases were essential to the full realization of petitioners' fraudulent scheme.

2. Review of petitioners' First Amendment claim is likewise unwarranted. This case does not involve liability for "disinterested" speech (Pet. 27), and petitioners actually received many of the protections they contend the First Amendment requires. Moreover, the court of appeals' rejection of petitioners' First Amendment claim was correct and does not conflict with any decision of this Court or any other court of appeals.

a. The "First Amendment does not shield fraud." *Illinois ex rel. Madigan* v. *Telemarketing Assocs., Inc.*, 538 U.S. 600, 612 (2003) (*Madigan*). Petitioners contend that their false statements are nonetheless entitled to First Amendment protection because they constituted "disinterested investment advice." Pet. 22. As explained above, however, petitioners were not found liable for erroneous "advice," *ibid.*, but for knowing misstatements of a historical fact. Pet. App. 12a; see *id.* at 64a-65a. Petitioners' statements also were not "disinterested," since the purchases of USEC stock that their early misstatements induced caused the stock price to rise, thereby facilitating additional sales of the Special Report. See pp. 13-14, *supra*.[2]

b. Petitioners contend (Pet. 9, 24) that the First Amendment, as interpreted by this Court in *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 279-280 (1964) (*New York Times*), required a showing of "actual malice" before they could be found liable. A defendant possesses "actual malice" with respect to a statement if he makes it "with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* at 280. The district court found that Stansberry knew his statement was false, Pet. App. 78a, so the actual malice requirement was satisfied here.[3] More generally, the scienter required for liability under Rule 10b-5 (see *id.* at 77a-79a) is essentially equivalent to "actual malice" as defined in *New York Times*. The question whether the First Amendment independently requires proof of that mental state in circumstances like these is therefore irrelevant to the disposition of this case and of Rule 10b-5 cases generally.

Petitioners also argue (Pet. 24) that the First Amendment required the SEC to establish the factual predicates to their liability by clear and convincing evi-

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[2] For the same reason, this case does not call for application of the doctrine of constitutional doubt to interpret Section 10(b) as not covering "disinterested investment and financial writing." Pet. 39; see Pet. 35-39.

[3] The district court found that "Stansberry's scienter is imputed to Pirate because he effectively controlled Pirate and made the statements at issue on behalf of Pirate as an agent of Pirate, within the scope of his agency." Pet. App. 78a. In the alternative, the district court found that Pirate "acted with 'reckless disregard for [the] truth or falsity' of the statements." *Id.* at 79a (quoting *Eisenberg* v. *Gagnon*, 766 F.2d 770, 776 (3d Cir.), cert. denied, 474 U.S. 946 (1985)) (brackets in original).

dence. Although the district court did not agree that the clear-and-convincing-evidence standard applied, it found that the government's evidence satisfied it. See Pet. App. 61a ("Nonetheless, the [c]ourt finds that the Commission has, in the instant case, established every element of its charges against * * * Pirate and Stansberry by clear and convincing evidence.") (footnote omitted); see also *id.* at 104a (same). Acceptance of this aspect of petitioners' legal theory therefore would not have affected the outcome of the case.

Finally, petitioners argue that the court of appeals should have conducted an "independent examination" of the district court's factual findings, rather than reviewing for clear error. Pet. 24 (quoting *Bose Corp.* v. *Consumers Union of the United States, Inc.*, 466 U.S. 485, 499 (1984) (*Bose*)). They fail to demonstrate, however, that a different standard of review would have led to a different outcome. Petitioners claim that "[u]nder *Bose*" the court of appeals could not have "presum[ed] [the] material falsity" of the report "based only on a style of writing that offended them and the $1,000 cost of the Report." Pet. 28; see Soc'y of Prof'l Journalists Amicus Br. 16-17. But petitioners declined in the court of appeals to challenge the district court's finding that the relevant statement was false. Pet. App. 10a n.8, 12a. Petitioners cannot credibly challenge the standard of review applied to a claim they did not make.

Petitioners also argue that "independent appellate review" by the court of appeals would have required reversal of the district court's finding of scienter. Pet. 23, 28. The district court found, however, that petitioners' scienter had been "overwhelmingly established." Pet. App. 94a. And because petitioners' false statements of fact involved a matter within Stansberry's recent personal experience, the likelihood that those statements were made *without* scienter was inherently remote. See *id.* at 20a (court of appeals explains that "Stansberry, having conducted the interview with Wingfield, would have known whether or not Wingfield told him to 'watch the stock on May 22nd'"); cf. *Merck & Co.* v. *Reynolds*, 130 S. Ct. 1784, 1796 (2010) ("We recognize that certain statements are such that, to show them false is normally to show scienter as well."). Given petitioners' failure to challenge the district court's finding as to falsity, the court of appeals appropriately found "nothing controversial in drawing the logical conclusion—that Stansberry would know that his claim was false." Pet. App. 20a.

The district court also had the opportunity to view Stansberry's testimony and assess his credibility first-hand. The result was a finding that Stansberry "testified falsely at trial" about his conversation with the USEC executive. Pet. App. 99a; see *id.* at 67a n.9 (calling Stansberry's account of the conversation "preposterous"). Even where the *Bose* independent review requirement otherwise applies, an appellate court's review of the record must give "'due regard' * * * to the trial judge's opportunity to observe the demeanor of the witnesses," 466 U.S. at 499-500 (quoting Fed. R. Civ. P. 52(a)), and must afford "special deference" to the "trial judge's credibility determinations," *id.* at 500. Petitioners fail to explain what basis the court of appeals would have had (under any standard of review) to second-guess the district court's credibility determinations.

c. In any event, petitioners are wrong in contending that special First Amendment rules applicable to defamation claims involving public figures should apply to Section 10(b) actions. As noted above, the "actual malice" standard applied in *New York Times* is functionally equivalent to the scienter already required in a Section 10(b) case, so there is no need for a special First Amendment rule on that question. Nor is there any basis in the First Amendment or this Court's cases interpreting it to extend the clear-and-convincing-evidence standard of proof or independent appellate review to factual findings in a fraud case.

The Court has acknowledged that the *New York Times* framework for defamation cases involving public persons "exacts a * * * high price from the victims of defamatory falsehood," by making relief unavailable to "many deserving plaintiffs, including some intentionally subjected to injury." *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 342 (1974). When those victims are public officials or public figures, the Court has concluded that this price is worth paying because such people have "invite[d] attention and comment" by seeking office or "thrust[ing] themselves to the forefront of particular public controversies." *Id.* at 344-345. The Court has struck a different balance, however, when the alleged victim is not within those limited categories. An individual who is neither a public figure nor a public official "has relinquished no part of his interest in the protection of his own good name, and consequently he has a more compelling call on the courts for redress of injury inflicted by defamatory falsehood." *Id.* at 345; see *Bose*, 466 U.S. at 492 & n.8 (noting that corporate plaintiff's status as "public figure" was predicate for application of *New York Times* protections). The requirement of actual malice proved by clear and convincing evidence thus does not apply in defamation actions brought by such plaintiffs. *Gertz*, 418 U.S. at 347. Similarly, although this Court has suggested that an appellate court "could" review a fraud finding independently "[a]s an additional safeguard," *Madigan*, 538 U.S. at 621, the Court has never held that such review is required.

Petitioners cite (Pet. 24-25) several court of appeals decisions imposing *New York Times*-type requirements in cases involving the expression of an editorial opinion or alleged reputational harm. Those decisions are inapposite here. Although petitioners highlight two such cases that "specifically involved speech about securities" (Pet. 25), neither case concerned false factual statements. *Compuware Corp.* v. *Moody's Investors Services, Inc.*, 499 F.3d 520 (6th Cir. 2007), involved "a backdoor attempt to recover damages for the harm allegedly caused [to a company's reputation] by Moody's protected expression of its opinion of Compuware's financial condition." *Id.* at 531. *Jefferson County School District No. R-1* v. *Moody's Investor's Services, Inc.*, 175 F.3d 848 (10th Cir. 1999), also involved "the expression of an opinion protected by the First Amendment." *Id.* at 856-858. This case, by contrast, involves a misstatement of fact that induced stock purchases by investors rather than an expression of opinion that harmed reputations.

d. Contrary to petitioners' contention (Pet. 13, 20-21), the court of appeals' decision in this case does not conflict with the decision of the Maryland Court of Appeals in *Lubin* v. *Agora, Inc.*, Pet. App. 117a-150a. In that case, the Maryland Court of Appeals held that Agora, Pirate's parent company, could not be required "to disclose the identities of those who subscribe to or purchase its materials," such as the Super Insider Tip and USEC Special Report. *Id.* at 143a. The court explained that information concerning the identities of subscribers and other purchasers fell "within the protective umbrella of the First Amendment," and that compelled disclosure of that information would "destroy the anonymity that the Supreme Court has recognized as important to the unfettered exercise of First Amendment freedoms." *Ibid.* While recognizing that the Report might "have been fabricated," the court concluded that this possibility did not justify compelled disclosure of the requested information because the Report's "falsity would not diminish the purchasers' interests in anonymity." *Id.* at 148a.

The Maryland Court of Appeals explicitly distinguished, however, between government regulation of commercial speech and First Amendment rights to receive such speech anonymously. Pet. App. 148 n.12. The court recognized that commercial speech "enjoys a lower level of protection when it is true, and no protection at all when it is false or misleading." *Id.* at 144a. The court did not suggest that the First Amendment would preclude government officials from seeking appropriate sanctions if the e-mail tips or the USEC Special Report were found to contain false statements. To the contrary, the court observed that "the [Maryland Securities] Commissioner has the Report and can evaluate the statements made therein without requiring Agora to reveal the identities of the purchasers." *Id.* at 148a.

In the instant case, by contrast, the court of appeals did not address the First Amendment interests in anonymity of the recipients of the Super Insider Tip and USEC Special Report. Rather, the court of appeals addressed whether "the Super Insider Tip E-mail and USEC Special Report constitute speech entitled to some measure of First Amendment protection," and held that punishing fraudulent speech "simply does not violate the First Amendment." Pet. App. 48a-49a. The decision of the Maryland Court of Appeals in *Agora* is entirely consistent with this holding.

3. Finally, petitioners are wrong in contending that the court of appeals' affirmance of the injunction against future violations of Section 10(b) and Rule 10b-5 violated the First Amendment. Pet. 30. Since petitioners have no First Amendment right to engage in securities fraud, they have no First Amendment right to be free of an injunction barring them from doing so again. Pet. App. 50a; see *United States* v. *Bell*, 414 F.3d 474, 481 (3d Cir. 2005) ("[T]he general principle of First Amendment law that prior restraints, as opposed to criminal penalization, bear a heavier presumption against their constitutional validity * * * does not apply to restrictions on unprotected speech, including false or unlawful commercial speech.").

The type of conduct covered by the injunction in this case distinguishes it from those invalidated as prior restraints in the cases petitioners cite (Pet. 35). *Village of Schaumburg* v. *Citizens for a Better Environment*, 444 U.S. 620 (1980), *Secretary of State* v. *Joseph H. Munson Co.*, 467 U.S. 947 (1984), and *Riley* v. *National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781 (1988), all involved "prior restraints on [charitable] solicitation when fundraising fees exceeded a specified reasonable level." *Madigan*, 538 U.S. at 612. This Court has found a critical constitutional difference between such "broad prophylactic rule[s]" categorically limiting speech and "a properly tailored fraud action targeting fraudulent representations themselves." *Id.* at 619 (alterations and citation omitted). *Vance* v. *Universal Amusement Co.*, 445 U.S. 308 (1980) (per curiam), involved a state statute that was "procedurally deficient," *id.* at 317, because it "authorize[d] prior restraints of indefinite duration on the exhibition of motion pictures that ha[d] not been finally adjudicated to be obscene," *id.* at 316. And *Near* v. *Minnesota ex rel. Olson*, 283 U.S. 697 (1931), involved a prior restraint on a "malicious, scandalous and defamatory newspaper, magazine, or other periodical." *Id.* at 701-702. None of these cases involved an injunction limited to fraudulent speech that violates a valid substantive prohibition. Cf. *Pittsburgh Press Co.* v. *Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 380-381, 389-390 (1973) (rejecting contention that an order barring, with certain exceptions, "all reference to sex in employment advertising column headings" "should be condemned as a prior restraint on expression" because the order, which concerned illegal sex discrimination in employment, did "not endanger arguably protected speech").

Lowe v. *SEC*, 472 U.S. 181 (1985), also does not support petitioners' argument. Petitioners contend that the Commission "is attempting, as it did in *Lowe*, to regulate pure speech in violation of *Near*'s rule against prior restraints." Pet. 36. In *Lowe* the Court addressed the question whether the publishers of an investment newsletter could be "permanently enjoined from publishing nonpersonalized investment advice and commentary in securities newsletters because they [were] not registered as investment advisers under [Section] 203(c) of the Investment Advisers Act of 1940." 472 U.S. at 183 (citing 15 U.S.C. 80b-3(c)). The Court held that there was no "justification for restraining the future publication of [petitioners'] newsletters" because the newsletters were "bona fide" publications, there was "no suggestion that they contained any false or misleading information, or that they were designed to tout any security in which petitioners had an interest," and the publications were "of general and regular circulation" in that there was "no indication that they ha[d] been timed to specific market activity, or to events affecting or having the ability to affect the securities industry." *Id.* at 209, 211.

None of those factors is present here. Petitioners did not make the statements that violated Section 10(b) in a bona fide publication "of general and regular circulation," they did not provide only truthful information, and their communications were not unrelated to specific market activity. Rather, petitioners made false statements in an e-mail targeted to investors that induced investors to purchase and sell USEC stock by falsely claiming to have insider information about the company.

Finally, this case would present a poor vehicle for considering whether an injunction of this sort violates the First Amendment because petitioners forfeited a logically antecedent non-constitutional challenge to the injunction. Petitioners criticize the injunction for "simply repeat[ing] the language of Rule 10b-5(a)" and for not being specific enough to permit them to "ascertain" what it covers. Pet. 29, 33; see InvestorPlace Media Amicus Br. 8 n.2. As the court of appeals explained, however, petitioners forfeited the argument that, under Federal Rule of Civil Procedure 65(d), the injunction is an overly general "'obey the law' injunction" by failing to raise that challenge until their court of appeals reply brief. Pet. App. 50a n.23.

In a case where all issues had been preserved, the Court could first address the application of Rule 65(d) before, if necessary, considering the First Amendment. See *Jean* v. *Nelson*, 472 U.S. 846, 854 (1985) ("[I]f there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that [the

Court] ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable.") (quoting *Spector Motor Serv., Inc.* v. *McLaughlin*, 323 U.S. 101, 105 (1944)). Petitioners should not be permitted to circumvent that normal sequence of decisionmaking (and render a constitutional decision "unavoidable," *ibid.* (citation omitted)) by forfeiting a possible non-constitutional ground for relief.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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