No. 05-

In the Supreme Court of the United States

CREDIT SUISSE FIRST BOSTON LTD., ET AL.,

Petitioners,

v.

GLEN BILLING, ET AL.,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

ROBERT B. MCCAW
LOUIS R. COHEN
ALI M. STOEPPELWERTH
FRASER L. HUNTER, JR.
NOAH A. LEVINE
WILMER CUTLER PICKERING HALE & DORR LLP
399 Park Avenue
New York, New York 10022
(212) 230-8800
Attorneys for Petitioner Citigroup Global Markets Inc.

STEPHEN M. SHAPIRO
Counsel of Record
KENNETH S. GELLER
TIMOTHY S. BISHOP
MAYER, BROWN, ROWE & MAW LLP
1909 K Street, N.W.
Washington, D.C. 20006
(202) 263-3000
Attorneys for Petitioner Merrill Lynch, Pierce, Fenner & Smith Incorporated

Counsel for Petitioners
[Additional Counsel Listed On Signature Page]

QUESTION PRESENTED

Plaintiffs accuse defendants, 16 of the country's largest underwriters and institutional investors, of a vast antitrust conspiracy to manipulate the aftermarket prices of some 900 technology stocks sold in initial public offerings. The Securities and Exchange Commission, relying on this Court's decisions in *United States* v. *National Ass'n of Securities Dealers*, 422 U.S. 694 (1975), and *Gordon* v. *New York Stock Exchange*, 422 U.S. 659 (1975), informed the courts below that application of the antitrust laws here would conflict with and seriously disrupt its regulation of the securities offering process under the Securities Act of 1933 and Securities Exchange Act of 1934. The district court agreed with the SEC that implied antitrust immunity is required and dismissed the complaints. The court of appeals reversed, ruling that immunity is unavailable because Congress did not specifically consider and decide to immunize one practice challenged in the complaints—tie-in agreements allegedly requiring recipients of stock in an IPO to engage in other transactions.

The question presented is:

Whether, in a private damages action under the antitrust laws challenging conduct that occurs in a highly regulated securities offering, the standard for implying antitrust immunity is the potential for conflict with the securities laws or, as the Second Circuit held, a specific expression of congressional intent to immunize such conduct and a showing that the SEC has power to compel the specific practices at issue.

RULES 14.1 AND 29.6 STATEMENT

In these consolidated cases, respondents (plaintiffs-appellants below) are Mita Aggarwal, Estelle L. Augustine, Tom Barnett, Anupkumar Bhasin, Glen Billing, Joe Braswell, Troy Brooks, Anita S. Budich, Thomas E. Burke, Don K. Burris, Louis Capolino, Jerry Cobb, Max Cohen, Ray L. Cox, Buddy Dukeman, Eileen Dukeman, Joyce Dunn, David Federico, Joe Goldgrab, Robert Grovich, Bob Harper, David Hoffman, Bruce J. Jiorle, H. Wayne Jones, Susan Katz, Glenn Kerr, Irving Lassoff, Roderick Lau, Elizabeth Bates Lester, James W. Lester, Solomon Lissanu, Raymond Litwin, Local 144 Nursing Home Pension Fund, Bill Lucia, Michele Lucia, Robert Malafronte, Binh Nguyen, David Pazarella, Demetrios Petratos, Milton Pfeiffer, Carlos Reeberg, Hans Reihl, Norman Ross, Rachel Schwartz, Mark Sculnick, Edward Seltzer, Kenneth Shives, Farideh Sigari, Efriam Simcha, Henry Sklanowsky, Robert Tarantino, Enrico Tavani, Robert H. Thomas, Anthony Voto, Heinz Wahl, Philip Warner, Matthew Weiner, Michael Weiss, Ross Wiczer, Bert Zauderer, Deming Zhous.

Petitioners (defendants-appellees below) are:

Bear, Stearns & Co. Inc. The Bear Stearns Companies Inc., a publicly held corporation, is the parent company of Bear, Stearns & Co. Inc. No other publicly held corporation owns 10% or more of the stock of Bear, Stearns & Co. Inc.

Citigroup Global Markets Inc. Citigroup Global Markets Inc. (formerly known as Salomon Smith Barney Inc.) is a wholly owned subsidiary of Citigroup Financial Products Inc. (formerly known as Salomon Brothers Holding Company Inc.), which is a wholly owned subsidiary of Citigroup Global Markets Holdings Inc. (f/k/a Salomon Smith Barney Holdings Inc.) which is a wholly owned subsidiary of Citigroup Inc.

Comerica, Inc. Comerica, Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.

Credit Suisse Securities (USA) LLC (formerly named Credit Suisse First Boston LLC). Credit Suisse Securities (USA) LLC is a wholly owned subsidiary of Credit Suisse (USA), Inc. (formerly named Credit Suisse First Boston (USA), Inc.) a public reporting company that has certain publicly traded securities and which is a wholly owned subsidiary of Credit Suisse Holdings (USA), Inc. (formerly named Credit Suisse First Boston, Inc.). Credit Suisse Holdings (USA), Inc. is a jointly owned subsidiary of Credit Suisse Group, the shares of which are publicly traded on the Swiss Stock Exchange, and Credit Suisse (formerly named Credit Suisse First Boston), which itself is a wholly owned subsidiary of Credit Suisse Group. Except as described above, Credit Suisse Securities (USA) LLC has no subsidiaries or affiliates that are publicly held, and no publicly held corporation owns 10% or more of the stock of Credit Suisse Securities (USA) LLC.

Deutsche Bank Securities Inc. Deutsche Bank Securities Inc. (formerly known as Deutsche Banc Alex. Brown Inc.) ("DBSI") has the following corporate parents: Deutsche Bank AG, Taunus Corporation, and DB U.S. Financial Markets Holding Corporation. Other than the aforementioned corporate parents, there is no publicly held corporation that owns 10% or more of DBSI's stock.

Fidelity Distributors Corp.; Fidelity Brokerage Services LLC; Fidelity Investments Institutional Services Co., Inc. Fidelity Distributors Corp. and Fidelity Investments Institutional Services Co., Inc. are direct subsidiaries of FMR Corp., a Delaware corporation that is privately held. Fidelity Brokerage Services LLC is wholly owned by Fidelity Global Brokerage Group, Inc., an entity that is, in turn, wholly owned by FMR Corp., a Delaware corporation that is privately held. In addition, other entities wholly owned by FMR

Corp. have contractual relationships to distribute, administer, manage, and advise the Fidelity family of mutual funds.

Goldman, Sachs & Co. Goldman, Sachs & Co. is a subsidiary of The Goldman Sachs Group, Inc., which owns 10% or more of its partnership units. No other publicly held company owns 10% or more of the stock of Goldman, Sachs & Co.

The Goldman Sachs Group, Inc. The Goldman Sachs Group, Inc. has no parent corporations and no publicly held companies own 10% or more of its common stock.

Janus Capital Management LLC. Janus Capital Management LLC is owned by Janus Capital Group Inc., the shares of which are publicly traded on the New York Stock Exchange. No other publicly held company owns 10% or more of the stock of Janus Capital Management LLC.

J.P. Morgan Securities Inc. J.P. Morgan Securities Inc. is a wholly owned subsidiary of JPMorgan Chase & Co., a publicly traded entity.

Lehman Brothers Inc. Lehman Brothers Inc. is a wholly-owned subsidiary of Lehman Brothers Holdings Inc., a Delaware corporation that is a publicly-held reporting company under the Securities Exchange Act of 1934.

Merrill Lynch, Pierce, Fenner & Smith Incorporated. Merrill Lynch & Co., Inc. is the parent company of Merrill Lynch, Pierce, Fenner & Smith Incorporated. Merrill Lynch & Co., Inc. is a publicly held company whose shares are traded on the New York Stock Exchange. No other publicly held company owns 10% or more of the stock of Merrill Lynch, Pierce, Fenner & Smith Incorporated.

Morgan Stanley & Co. Incorporated. Morgan Stanley & Co. Incorporated is a wholly owned subsidiary of Morgan Stanley.

Robertson Stephens, Inc. Robertson Stephens, Inc.'s ultimate parent company, Bank of America Corporation, issues shares registered with the Securities and Exchange Commission for public trading. No other parent companies, subsidiaries or affiliates of Robertson Stephens, Inc. issues shares to the public. No other publicly held company owns 10% or more of the stock of Robertson Stephens, Inc.

Van Wagoner Capital Management, Inc. Van Wagoner Capital Management, Inc. has no parent corporations and no publicly held companies own 10% or more of its common stock.

Van Wagoner Funds, Inc. Van Wagoner Funds, Inc., a mutual fund entity, has no parent corporations. The following publicly held entities own 10% or more of any of its series of shares: (i) Van Wagoner Small Cap Growth Fund: Charles Schwab & Co., Inc. and National Financial Services Corp.; (ii) Van Wagoner Emerging Growth Fund: Charles Schwab & Co., Inc. and National Financial Services Corp. Charles Schwab & Co., Inc. and National Financial Services Corp. holds such shares as broker-dealers on behalf of their underlying customers. No other publicly held company owns 10% or more of the stock of Van Wagoner Funds, Inc.

TABLE OF CONTENTS

Page

QUESTION PRESENTED .... (I)

RULES 14.1 AND 29.6 STATEMENT ii

OPINIONS BELOW 1

JURISDICTION 1

STATUTES AND REGULATIONS INVOLVED 1

STATEMENT 1

A. Plaintiffs' Antitrust Complaints Challenge Commonplace Underwriter Practices At The Core Of SEC Regulatory Authority 2

B. The SEC Explained That These Antitrust Suits Conflict With The Exercise Of Its Regulatory Authority And So Are Barred By This Court's Implied Immunity Precedents 5

C. The District Court Dismissed Plaintiffs' Complaints Under This Court's Implied Immunity Precedents 9

D. The Court Of Appeals Rejected The SEC's Position On Immunity And Reversed.. 10

REASONS FOR GRANTING THE PETITION 12

I. THE SECOND CIRCUIT IMPROPERLY REJECTED THE EXPERT VIEW OF THE SEC THAT IMMUNITY IS ESSENTIAL HERE TO MAKE THE SECURITIES LAWS WORK... 14

TABLE OF CONTENTS–Continued

Page

II. THE SECOND CIRCUIT'S DECISION DIRECTLY CONFLICTS WITH RULINGS OF THIS COURT AND CREATES INTOLERABLE CONFUSION OVER THE SCOPE OF ANTITRUST IMMUNITY ... 19

A. The Second Circuit's Decision Cannot Be Reconciled With This Court's Implied Immunity Rulings ... 19

B. The Second Circuit's Decision Creates Serious Confusion Concerning The Criteria For Implied Immunity ... 25

III. THIS COURT'S INTERVENTION IS NECESSARY TO PREVENT SUBSTANTIAL ADVERSE CONSEQUENCES FOR U.S. SECURITIES MARKETS ... 27

CONCLUSION ... 30

APPENDIX A: Opinion of the United States Court of Appeals for the Second Circuit ... 1a

APPENDIX B: Opinion of the United States District Court for the Southern District of New York ... 72a

APPENDIX C: Order of the United States Court of Appeals for the Second Circuit Denying Rehearing ... 123a

APPENDIX D: Memorandum Amicus Curiae of the Securities and Exchange Commission, filed in the District Court ... 124a

APPENDIX E: Memorandum of the United States as Amicus Curiae, filed in the District Court ... 159a

TABLE OF CONTENTS–Continued

Page

APPENDIX F: Supplemental Letter Brief of the Securities and Exchange Commission, filed in the District Court 180a

APPENDIX G: Letter Brief of the Securities and Exchange Commission, filed in the Court of Appeals 188a

APPENDIX H: Letter Brief of the United States, filed in the Court of Appeals 199a

APPENDIX I: Statutes and Regulatory Guidance 208a

TABLE OF AUTHORITIES

Cases: **Page**

Austin Mun. Sec. v. *National Ass'n of Sec. Dealers*, 757 F.2d 676 (5th Cir. 1985) 13, 25, 26

Blue Chip Stamps v. *Manor Drug Stores*, 421 U.S. 723 (1975) 29

Central Bank v. *First Interstate Bank*, 511 U.S. 164 (1994) 29

Dura Pharms., Inc. v. *Broudo*, 125 S. Ct. 1627 (2005) 29

Ernst & Ernst v. *Hochfelder*, 425 U.S. 185 (1976)............ 29

Far East Conf. v. *United States*, 342 U.S. 570 (1952) 30

Friedman v. *Salomon/Smith Barney, Inc.*, 313 F.3d 796 (2d Cir. 2002) 25

Gordon v. *New York Stock Exch.*, 422 U.S. 659 (1975) .... *passim*

Harding v. *American Stock Exch.*, 527 F.2d 1366 (5th Cir. 1976) 25

Initial Public Offering Sec. Litig., *In re*, 241 F. Supp. 2d 281 (S.D.N.Y. 2003) 4, 5

Initial Public Offering Sec. Litig., *In re*, 227 F.R.D. 65 (S.D.N.Y. 2004) 4

Santa Fe Indus. v. *Green*, 430 U.S. 462 (1977) 29

Schaefer v. *First Nat'l Bank of Lincolnwood*, 509 F.2d 1287 (7th Cir. 1975)...................................... 26

TABLE OF AUTHORITIES-Continued

Page

Silver v. *New York Stock Exch.*, 373 U.S. 341 (1963) 5, 12, 29, 20

Thill Sec. Corp. v. *New York Stock Exch.*, 633 F.2d 65 (7th Cir. 1980) 13, 25, 26

TSC Indus. v. *Northway, Inc.*, 426 U.S. 438 (1976) 29

United States v. *National Ass'n of Sec. Dealers*, 422 U.S. 694 (1975) .... *passim*

Verizon Communications, Inc. v. *Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004) .... *passim*

Statutes, Regulations, and Rules:

15 U.S.C. § 1 2

15 U.S.C. § 13 2

15 U.S.C. § 77b(b) 7, 14

15 U.S.C. § 77e 6

15 U.S.C. § 78c(f) 14

15 U.S.C. § 78i(a) 6

15 U.S.C. § 78j(b) 6

15 U.S.C. § 78o-3(b) 7

15 U.S.C. § 78u-4(a) 29

15 U.S.C. § 78u-4(b) 29

15 U.S.C. § 78w(a) 7, 14, 16

15 U.S.C. § 78bb 29

TABLE OF AUTHORITIES–Continued

Page

National Securities Markets Improvement Act of 1996, Pub. L. No. 104-290, § 106, 110 Stat. 3416, 3424-3425 (Oct. 11, 1996) ... 14

17 C.F.R. § 230.134 ... 6

17 C.F.R. § 230.137 ... 6

17 C.F.R. § 230.138 ... 6

17 C.F.R. § 230.139 ... 6

17 C.F.R. § 230.460 ... 6

17 C.F.R. § 230.461 ... 6

17 C.F.R. § 242.100 ... 6

17 C.F.R. § 242.101 ... 6

17 C.F.R. § 242.102 ... 6

17 C.F.R. § 242.103 ... 6

17 C.F.R. § 242.104 ... 6

17 C.F.R. § 242.105 ... 6

Miscellaneous:

1A PHILLIP AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW (2d ed. 2000) ... 18, 19, 20, 23, 24

Commission Guidance Regarding Prohibited Conduct in Connection with IPO Allocations, Release No. 34-51500, 70 Fed. Reg. 19672 (Apr. 13, 2005) ... *passim*

143 Cong. Rec. 21357 (1997) ... 28

KENNETH ELZINGA & WILLIAM BREIT, THE ANTITRUST PENALTIES (1976) ... 29

TABLE OF AUTHORITIES–Continued

Page

H.R. REP. NO. 73-1383 (1934) 15

Herbert Hovenkamp, *Antitrust Violations in Securities Markets*, 28 J. CORP. L. 607 (2003)......................... 28, 30

1 LOUIS LOSS & JOEL SELIGMAN, SECURITIES REGULATION (3d ed. 1998)... 2, 3

6 MOORE'S FEDERAL PRACTICE § 26.46[1] (3d ed. 2005).. 29

REPORT OF THE SEC CONCERNING THE HOT ISSUES MARKETS (Aug. 1984)....................................... 16

REPORT OF THE SPECIAL STUDY OF SECURITIES MARKETS OF THE SECURITIES AND EXCHANGE COMMISSION, H.R. Doc. No. 88-95, Part 1 (Apr. 1963) 16

S. REP. NO. 73-792 (1934).. 15

S. REP. NO. 94-75, 1975 U.S.C.C.A.N. 179 (1975) 7

SEC Div. of Market Regulation, Staff Legal Bulletin No. 10, *Prohibited Solicitations and "Tie-In" Agreements for Aftermarket Purchases* (Aug. 25, 2000)........ 17

SEC Release No. 34-17371, 45 Fed. Reg. 83707 (Dec. 19, 1980)... 15

SEC Release No. 34-50831, 69 Fed. Reg. 75774 (Dec. 17, 2004)... 7, 8, 17, 18

SEC Release No. 34-50896, 69 Fed. Reg. 77804 (Dec. 28, 2004)... 7, 17

PETITION FOR A WRIT OF CERTIORARI

Petitioners, leading investment banking and asset management firms, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The amended opinion of the court of appeals (App., *infra*, 1a-71a) is reported at 426 F.3d 130. The opinion of the district court (App., *infra*, 72a-122a) is reported at 287 F. Supp. 2d 497.

JURISDICTION

The judgment of the court of appeals was entered on September 28, 2005. The court of appeals issued an amended opinion on October 26, 2005. Petitioners filed a timely petition for rehearing en banc on November 2, 2005, which was denied on January 12, 2006. App., *infra*, 123a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

Relevant provisions of the Sherman Act, 15 U.S.C. § 1, *et seq.*, Robinson-Patman Act, 15 U.S.C. § 13, Securities Act, 15 U.S.C. § 77a, *et seq.*, Securities Exchange Act, 15 U.S.C. § 78a, *et seq.*, and Securities and Exchange Commission guidance are reproduced at App., *infra*, 208a-233a.

STATEMENT

Plaintiffs are purchasers of stock issued by internet and technology companies during the market "bubble" of the late 1990s. Demanding treble damages, plaintiffs' class action complaint in *Billing* alleges that ten leading investment banks conspired to impose anticompetitive charges on prospective purchasers of shares of stock in some 900 initial public offerings (IPOs) of equity securities and to inflate the price of those securities in the aftermarket. In addition to challenging

this conduct in hundreds of separate actions under the federal securities laws, plaintiffs here claim that the conduct violated section 1 of the Sherman Act, 15 U.S.C. § 1, and various state antitrust laws. App., *infra*, 17a-18a; Consolidated Amended Class Action Complaint ("Am. Compl.") Exh. A.

A separate antitrust class action complaint in *Pfeiffer* v. *Credit Suisse First Boston* is based on the same alleged conduct. *Pfeiffer* alleges that underwriters imposing anticompetitive charges on IPO allocants and institutional investors paying those charges engaged in "commercial bribery" in violation of the Robinson-Patman Act, 15 U.S.C. § 13(c), and that this conduct inflated the prices of stocks. App., *infra*, 18a-20a; *Pfeiffer* Compl. ¶¶ 2-4, 75, 82, 84, 115.

A. Plaintiffs' Antitrust Complaints Challenge Commonplace Underwriter Practices At The Core Of SEC Regulatory Authority.

Plaintiffs' complaints challenge "firm commitment" underwriting—by far "the most prevalent type of underwriting"—in which investment banks form a syndicate to purchase shares from the issuer and then resell those shares to an initial group of institutional and retail investors. 1 LOUIS LOSS & JOEL SELIGMAN, SECURITIES REGULATION 327 (3d ed. 1998). Firm commitment underwritings are central to capital formation, raising many billions of dollars each year for U.S. businesses. In a firm commitment IPO—which the Securities and Exchange Commission (SEC) has "plenary authority to regulate" under the federal securities laws—a lead manager assumes responsibility for selling most of the offering. Other syndicate members share the risk of the offering, collect a portion of the underwriting fees, and often receive a portion of the offering to allocate to retail customers. See App., *infra*, 4a-6a, 87a-90a; 1 LOSS & SELIGMAN, *supra*, at 327-346.

An integral part of this collaborative process is the "road show" during which underwriters "build the book" for dis-

tributing the offering. App., *infra*, 6a-7a, 74a. In the weeks before the IPO, company officials and underwriters meet with potential investors, informing them about the issuer and collecting information necessary to determine the appropriate size, price, and allocation of the offering. 1 LOSS & SELIGMAN, *supra*, at 341; *Commission Guidance Regarding Prohibited Conduct in Connection with IPO Allocations*, Release No. 34-51500, 70 Fed. Reg. 19672, 19674-19675 (Apr. 13, 2005), App., *infra*, 223a-225a ("*IPO Allocations Release*"). Underwriters' discussions with potential IPO buyers during this process, the SEC has explained, legitimately include "[w]hether the customer intends to hold the securities as an investment (be a long-term holder), or, instead, expects to sell the shares in the immediate aftermarket (also known as 'flipping')," "[t]he customer's desired long-term future position in the security," and the "prices at which the customer might accumulate that position." *IPO Allocations Release*, App., *infra*, 225a; see App., *infra*, 7a, 90a-93a, 133a-134a.

Plaintiffs launch an "indiscriminate assault" on this system of capital formation. App., *infra*, 91a. Plaintiffs find an antitrust conspiracy in underwriters' joining together in syndicates to share the risk of an offering. Am. Compl. ¶¶ 37-38. They complain that syndicate members made inquiries "concerning the number of shares [a customer] would be willing to purchase in the aftermarket and the prices such person would be willing to pay." *Id.* ¶¶ 45, 54. They take issue with syndicate members sharing the identities of IPO allocants and with the division of allocation responsibilities among syndicate members. *Id.* ¶¶ 39, 56. They seek to infer conspiratorial conduct from underwriters' participation in registered stock exchanges, such as the New York Stock Exchange, and other self regulatory organizations (SROs), such as the National Association of Securities Dealers (NASD). *Id.* ¶¶ 46-47. And they challenge underwriters' practice of favoring long-term investors over "flippers" in the allocation of IPO shares. *Pfeiffer* Compl. ¶¶ 64-65, 81. The SEC explained in an

amicus brief, and the district court held, that each of these activities is "expressly permitted under the current securities regulatory regime." App., *infra*, 92a-93a.

Plaintiffs also allege that defendant underwriters conspired to require IPO purchasers to pay "anticompetitive charges" in addition to the IPO price. Those "charges" purportedly included "tie-in" or "laddering" obligations—requiring purchasers of shares in an IPO also to commit to purchase the security in the aftermarket at escalating prices, to purchase the issuer's securities in subsequent offerings, or to purchase other less attractive securities—and agreements that IPO allocants would pay excessive commissions on trades in other securities. App., *infra*, 17a-18a, 73a-74a; Am. Compl. ¶¶ 1-7. Plaintiffs assert that this alleged conduct, along with underwriters' influencing their analysts "to issue positive reports," inflated the price of the IPO stocks in the aftermarket. App., *infra*, 18a; Am. Compl. ¶¶ 7, 60. Plaintiffs who received allocations of the offering at the issue price assert that they were injured by having to pay additional charges; plaintiffs who purchased stock in the aftermarket assert they were injured because they paid an inflated market price. App., *infra*, 18a-20a, 74a-75a; Am. Compl. ¶ 79; *Pfeiffer* Compl. ¶¶ 5, 125-126.

The conduct alleged in these cases is also the subject of 310 class actions brought under the securities laws. *In re Initial Public Offering Sec. Litig.*, 241 F. Supp. 2d 281 (S.D.N.Y. 2003); see also *id.*, 227 F.R.D. 65 (S.D.N.Y. 2004) (certifying classes), Rule 23(f) appeal pending (2d Cir.) (No. 05-3349). Those suits—brought by many of the same plaintiffs' lawyers involved in these antitrust cases—allege an "industry-wide scheme" characterized by the same "tie-in" agreements, payment of additional compensation to underwriters, and optimistic analyst reports that are challenged by the antitrust plaintiffs. Plaintiffs in the securities cases allege that this conduct violated section 10(b) of the Securities Exchange Act and Rule 10b-5 by manipulating the market for

IPO stocks, and section 11 of the Securities Act by making untrue statements and omissions in registration statements. 241 F. Supp. 2d at 293-296.

B. The SEC Explained That These Antitrust Suits Conflict With The Exercise Of Its Regulatory Authority And So Are Barred By This Court's Implied Immunity Precedents.

A "detailed regulatory scheme," such as that created by the Securities Act and the Securities Exchange Act, "ordinarily raises the question whether the regulated entities are not shielded from antitrust scrutiny altogether by the doctrine of implied immunity." *Verizon Communications, Inc.* v. *Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 406 (2004), citing *United States* v. *National Ass'n of Sec. Dealers*, 422 U.S. 694 (1975), and *Gordon* v. *New York Stock Exch.*, 422 U.S. 659 (1975). The defendant underwriters accordingly moved to dismiss the complaints.

Defendants relied on a trilogy of cases considering the application of the antitrust laws to the securities industry: *Silver* v. *New York Stock Exch.*, 373 U.S. 341 (1963); *Gordon*; and *NASD.* In those cases the Court held that the delicate balance of the countervailing interests at play in this industry is best achieved through finely-tuned securities regulation rather than the blunt application of the antitrust laws. Accordingly, those decisions establish that immunity will be implied when either (i) Congress has given the SEC direct authority over the challenged conduct and the Commission has exercised that authority or (ii) the conduct at issue is subject to a pervasive regulatory scheme. In either case, immunity will be implied if application of the antitrust laws would conflict with, rather than merely supplement, the relevant regulatory regime—a finding that is particularly likely where the SEC's regulation has sought to strike a balance between competition and other statutory objectives. See *Gordon*, 422 U.S. at 690-691; *NASD*, 422 U.S. at 729. The ultimate purpose of the

doctrine is "to avoid the real possibility of judgments conflicting with the agency's regulatory scheme 'that might be voiced by courts exercising jurisdiction under the antitrust laws.'" *Trinko*, 540 U.S. at 406, quoting *NASD*, 422 U.S. at 734.

Despite the unambiguous standards laid down in this Court's precedents, the SEC and the Antitrust Division of the Department of Justice (DOJ) were hopelessly conflicted over the proper disposition of the motions to dismiss. Each submitted amicus briefs in the courts below on opposite sides, the SEC arguing for and the DOJ against immunity. The SEC explained that "[t]he IPO allocation and commission practices challenged fall within the very heart of the Commission's regulatory authority over underwriting syndicates" and "are comprehensively regulated." Mem. Amicus Curiae of SEC to the district court, at 1 (Dec. 20, 2002), App., *infra*, 127a. Immunity is required under this Court's decisions, the SEC contended, because "'an antitrust suit would conflict with the operation of [this] regulatory scheme.'" Post-Argument Letter Br. of SEC to Second Circuit, at 4 (Mar. 21, 2005), App., *infra*, 193a, quoting *Gordon*, 422 U.S. at 688.

The SEC's brief described its plenary authority to regulate "the offering process under the Securities Act," including communications during road shows (App., *infra*, 132a; 15 U.S.C. § 77e; 17 C.F.R. §§ 230.134, .137-.139, .460-.461); its authority to "permit or prohibit manipulative acts in the purchase and sale of securities under the Exchange Act," including manipulation during an IPO and price stabilization following an offering, addressed in sections 9(a) and 10(b) of the Exchange Act and Regulation M (App., *infra*, 132a, 135a, 149a; 15 U.S.C. §§ 78i(a), 78j(b); 17 C.F.R. §§ 242.100-.105); and its oversight of the NASD, which "comprehensively regulates syndicate practices pursuant to rules that are formally reviewed and approved by the Commission." App., *infra*, 136a. The Commission explained that it is required, in exercising these comprehensive powers, to

consider effects on competition, but is not obliged to take actions that are "'the least anti-competitive manner of achieving a regulatory objective.'" *Id.* at 130a-131a, quoting S. REP. NO. 94-75, at 13 (1975), 1975 U.S.C.C.A.N. 179, 191; see 15 U.S.C. §§ 77b(b), 78o-3(b)(9), 78w(a)(2).

Most of the joint conduct by syndicate members challenged in these suits as an antitrust conspiracy "is necessary to the offering process" and "permitted under the Commission's rules." App., *infra*, 127a. To the extent the alleged tie-in conduct might violate the securities laws, the SEC is "actively pursuing" a "comprehensive regulatory respons[e]." *Id.* at 127a-128a. The Commission and the NASD investigated IPO allocation practices following the market bubble and have filed and settled actions against several investment banks. *Id.* at 137a-138a. Each of those actions alleged that the investment bank engaged in one or more of the IPO allocation practices challenged here, involved alleged violations of Regulation M or NASD Conduct Rule 2110, and settled without an admission or denial of liability. *E.g.*, *SEC* v. *Credit Suisse First Boston* (Jan. 22, 2002), www.sec.gov/litigation/litreleases/lr17327.htm; see App., *infra*, 196a. In addition, the SEC has established a blue-ribbon panel to recommend rule changes. *Ibid*. To date the SEC has proposed amendments to Regulation M prohibiting underwriters from receiving consideration from IPO customers above the offering price of a security. Release No. 34-50831, 69 Fed. Reg. 75774 (Dec. 17, 2004). It also is reviewing proposed SRO rule changes addressing "quid pro quo allocations" of IPO stock. Release No. 34-50896, 69 Fed. Reg. 77804 (Dec. 28, 2004). See App., *infra*, 137a-139a, 194a-197a.

In the exercise of its regulatory authority over public offerings the SEC has engaged in expert line-drawing with respect to the very conduct alleged in this case, of the type that implied immunity is designed to accommodate. Its *IPO Allocations Release* describes fact-intensive distinctions between "legitimate underwriting practices" that "facilitate capital

formation" and unlawful manipulation. App., *infra*, 220a. According to the SEC, the difference between a permissible conversation about aftermarket interest and a potentially impermissible communication linking allocations to aftermarket activity may turn on a few words, or no words at all, in discussions between IPO investors and underwriters. *Id.* at 225a-232a.[1]

Similarly, SEC rules do not "prohibit a firm from allocating IPO shares to a customer because the customer has separately retained the firm for other services" for which "the customer has not paid excessive compensation." Release No. 34-50831, 69 Fed. Reg. at 75785. The difference between customers who traded heavily, generated commissions, and permissibly received allocations in light of their valuable business relationships, and any customers who sought to increase their allocations by paying "excessive" compensation depends on the facts and circumstances of each transaction.

The lines drawn by the SEC are not static. The Commission "continual[ly] adjust[s]" rules in light of "newly emerging or identified problems," "balancing and re-balancing relevant factors to protect investors and the public interest," including balancing "anti-competitive effects" against "countervailing benefits" in a context where the syndicate underwriting system "inherently" raises "substantial antitrust concern." App., *infra*, 190a-192a, 195a. What rules may be

[1] "Communicating to customers that expressing an interest in buying shares in the immediate aftermarket ('aftermarket interest') or immediate aftermarket buying would help them obtain allocations of hot IPOs" would violate SEC regulations. "However, inquiring as to customers' desired future position in the longer term (for example, three to six months) and the price or prices at which customers might accumulate that position, without reference to immediate aftermarket activity, does not, without more, fall within this violative conduct." *IPO Allocations Release*, App., *infra*, 228a.

adopted in the future with respect to conduct that "could be characterized as a tie-in or laddering" is "impossible to foresee" because it depends on "what future developments in the offering process" and the SEC's "understanding of the public interest and investor protection may require." *Id.* at 191a.

Disagreeing fundamentally with the DOJ's assertion that immunity was unnecessary here, the SEC explained below that the conduct alleged by plaintiffs "may or may not be permissible" under the securities laws, "depending upon the facts." App., *infra*, 156a. It warned that allowing an antitrust jury to review those fine-line distinctions threatens to "discourag[e] useful interactions among participants in the offering process that are permitted under the securities laws" and "over-deter conduct that would serve the interests of the markets and the capital formation process." *Id.* at 193a-194a. The SEC cautioned that IPO participants "should not be subjected to the fear that in interpreting and applying the comprehensive governing body of securities laws rules, they could find themselves not only liable for violating the securities laws, but also in an antitrust treble damages action." *Id.* at 193a. Without immunity, "antitrust concerns will become the predominant considerations in the underwriting process." *Id.* at 194a. And the "*in terrorem* effect" of treble damages will "distort market participant behavior in ways that are harmful to the overall securities markets." *Id.* at 197a.

C. The District Court Dismissed Plaintiffs' Complaints Under This Court's Implied Immunity Precedents.

After carefully analyzing this Court's precedents and the SEC's and DOJ's submissions, the district court held defendants were entitled to immunity because the SEC's "sweeping power" to regulate the specific conduct alleged by plaintiffs creates a "potential conflict with the antitrust laws." App., *infra*, 86a. Judge Pauley also "agree[d] with the SEC's contention that its regulatory authority over the conduct al-

leged" is "pervasive" and should not be undermined by potentially conflicting antitrust claims. *Ibid*.

The district court observed that "much of the conduct" at issue, such as the underwriting syndicate scheme, "is authorized under the current securities regulatory regime." App., *infra*, 86a. In addition, the SEC has broad authority under Exchange Act sections 9(a)(6) and 10(b) to regulate IPO allocation and commission practices. The SEC has actively exercised that authority and is investigating the very practices covered by plaintiffs' complaints. The NASD, over which the SEC has "pervasive regulatory oversight," is likewise considering new rules to deal specifically with that conduct. *Id.* at 87a-88a, 116a-117a. Given Congress's "unique mandate" to the SEC "to balance competition with other market concerns," such as capital formation, and the SEC's "broad power to regulate the conduct at issue," the court concluded that "potential conflicts exist" between "the securities and antitrust regulatory regimes" even as to alleged "activities that are, at the current time, prohibited under both." *Id.* at 94a, 96a. The court thus rejected the view expressed by the DOJ that there is no clear conflict between the securities regulatory regime and these antitrust claims. *Id.* at 119a-120a.

D. The Court Of Appeals Rejected The SEC's Position On Immunity And Reversed.

The court of appeals reversed the district court's decision, making this the *only* case in which the SEC has urged implied immunity and a court has rejected the Commission's position. App., *infra*, 64a-70a. The Second Circuit acknowledged that immunity applies where there are "'potential specific conflicts'" between the antitrust and securities laws or "'pervasive regulation'" under the securities laws. *Id.* at 49a. It labeled the "pervasive regulation" ground of immunity "vague," however, and suggested that it may apply only "where the activities of an SRO, extensively regulated by the

SEC, are challenged as anticompetitive," which is not the case here. *Id.* at 50a.

With respect to "potential specific conflict," the court of appeals held that there is implied immunity only if "Congress contemplated the specific conflict and intended for the antitrust laws to be repealed"—a novel test that comes close to imposing the same showing required for express antitrust immunity. App., *infra*, 57a. In determining whether its new standard was met, the court looked for (1) a legislative history or statutory structure demonstrating Congress's intent to repeal the antitrust laws with respect to the specific challenged conduct; (2) the possibility of conflicting mandates when the "regulatory structure empower[s] an agency to compel action prohibited by the antitrust laws"; (3) the likelihood that application of the antitrust laws would moot a provision of the securities laws; and (4) a "regulatory history permitting, at some point, the challenged anticompetitive conduct." *Id.* at 53a-55a.

The court of appeals acknowledged that "the SEC has unquestionable jurisdiction over the tie-in agreements underlying plaintiffs' complaints" and that the SEC in fact regulates "tie-ins" and "laddering." App., *infra*, 64a-67a. Nevertheless, examining the four factors noted above, it declined to confer implied immunity. It found "no legislative history indicating that Congress intended to immunize anti-competitive tie-in arrangements." It found that the Commission could not "force underwriters to offer tie-in agreements." The court believed that no provision of the securities laws "would be 'rendered nugatory' by application of the antitrust laws" to the alleged tie-in and compensation arrangements. And it found that the SEC has never authorized arrangements that would constitute tie-ins under current SEC guidelines. *Id.* at 64a-66a. The court suggested that on remand a fact-intensive "rule of reason" analysis may be appropriate. *Id.* at 70a.

REASONS FOR GRANTING THE PETITION

This Court should review the Second Circuit's decision "[b]ecause of the vital importance of the question" whether implied antitrust immunity applies where the conduct at issue is heavily regulated by an administrative agency charged with taking competition into account and that agency maintains immunity is "necessary to make [the securities laws] work." *Gordon*, 422 U.S. at 663, 683, 686. The court of appeals' ruling on this recurring question conflicts directly with this Court's decisions.

The SEC, the expert agency charged by Congress with regulating the IPO underwriting process, has advocated immunity from these antitrust actions in the most emphatic terms. The SEC explained that it regulates all of the conduct alleged by plaintiffs. As part of that regulation, it "performs the antitrust function" of taking competition concerns into account, but also, as Congress has mandated, balances other interests such as capital formation and market efficiency. See *Silver*, 373 U.S. at 358. The SEC warned that application of the antitrust laws here will cause serious injury to its regulatory functions, to the operation of public securities markets, and to the investing public. The Second Circuit's rejection of the Commission's view—in an area so central to the Nation's economy and the SEC's expertise—makes this a case of extraordinary public importance.

That the Department of Justice submitted briefs opposing immunity—creating a deep divide between the responsible government bodies—also signals the need for this Court to resolve the dispute. Both the DOJ and the SEC have recognized (in cases in which they similarly disagreed) that the circumstances in which the antitrust laws are impliedly repealed by the securities laws "presents important questions involving the application of the antitrust laws to the multi-billion-dollar" securities markets and deserve this Court's attention. Jurisdictional Statement of the United States,

United States v. *NASD*, No. 73-1701, at 10 (May 1974); see Mem. of the SEC as Amicus Curiae in Support of Certiorari, *Gordon* v. *NYSE*, No. 74-304, at 6 (Nov. 1974). In both cases, review was granted and the SEC's views prevailed. Indeed, with the exception of the ruling below, courts have recognized immunity in every case in which the SEC has urged that immunity is necessary to accomplish the goals of the securities laws. See also *Austin Mun. Sec.* v. *NASD*, 757 F.2d 676 (5th Cir. 1985); *Thill Sec. Corp.* v. *NYSE*, 633 F.2d 65 (7th Cir. 1980).

The Second Circuit's ruling flies in the face of this Court's decisions in *NASD* and *Gordon*, which for 30 years have guided the immunity inquiry and which were recently reaffirmed in *Trinko*. The ruling below reduces the implied immunity doctrine to a dead letter—barely distinguishable from express immunity—by requiring an overt statement of legislative intent on the very conduct at issue, as well as a finding that the SEC has the power to compel, and has actually permitted, that conduct. This Court has imposed no such prerequisites for implied immunity.

By failing to make the implied immunity decision in light of the criteria laid down by this Court, the Second Circuit has undermined the SEC's regulatory mission and created great confusion regarding the recurring issue of when immunity applies. Indeed, this case is even more important as a practical matter than *NASD* and *Gordon* because the practices at issue—syndicated underwritings of IPO securities—are at the very heart of SEC regulation under the 1933 and 1934 Acts. The court of appeals' ruling threatens the public offering process, which was responsible for raising approximately $48 billion in 2004 alone, by forcing underwriters to focus on avoiding treble damages antitrust liability when forming and operating syndicates rather than on complying with the securities laws.

In sum, this Court should grant certiorari to prevent the securities regulatory scheme from being undermined by antitrust litigation in which the opinion of a lay jury applying narrow competition rules overrides the careful weighing of competitive concerns with broader goals of investor protection that Congress expressly committed to the SEC's expertise. See *Trinko*, 540 U.S. 398 (granting certiorari and reversing unanimous decision of Second Circuit that overturned dismissal on immunity grounds and permitted private antitrust litigation to undermine scheme of administrative regulation).

I. THE SECOND CIRCUIT IMPROPERLY REJECTED THE EXPERT VIEW OF THE SEC THAT IMMUNITY IS ESSENTIAL HERE TO MAKE THE SECURITIES LAWS WORK.

This Court emphasized in *Trinko* that where "a regulatory structure designed to deter and remedy anticompetitive harm" is in existence, "the additional benefit to competition provided by antitrust enforcement will tend to be small, and it will be less plausible that the antitrust laws contemplate such additional scrutiny." 540 U.S. at 412. There is no question that Congress has charged the SEC with weighing competition concerns in exercising its authority over the IPO allocation process. Under the Exchange Act, Congress expressly requires the SEC to balance competition against other interests "necessary or appropriate in furtherance of the purposes of" the Act. 15 U.S.C. § 78w(a)(2). Moreover, Congress reaffirmed this duty in 1996, when it amended both the Securities Act and the Exchange Act to require the SEC in carrying out its administrative functions to weigh competition among other factors. See 15 U.S.C. § 77b(b) (Securities Act) ("the [SEC] shall also consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation"); 15 U.S.C. § 78c(f) (Exchange Act) (same); National Securities Markets Improvement Act of 1996, Pub. L. No. 104-290, § 106, 110

Stat. 3416, 3424-3425 (Oct. 11, 1996) (adding 15 U.S.C. §§ 77b(b) and 78c(f)).

The SEC informed the court of appeals that denying immunity in these cases would upset the regulatory scheme governing syndicated underwriting. Such a decision would "effectively supplant" the securities laws with antitrust litigation that, because it carries the risk of treble damages imposed by a lay jury, would "force participants in the securities markets to focus not on complying with the securities laws, but predominantly on avoiding antitrust liability." App., *infra*, 196a-197a. And it would make joint underwriter conduct during the IPO process subject to a statutory regime that "does not take into account the sensitive countervailing considerations that the securities laws, and the Commission's expert administration, are charged with weighing in the balance." *Id*. at 196a.

Congress well understood the need for the SEC to have broad and flexible authority to regulate complex and rapidly evolving securities markets. "[S]o delicate a mechanism as the modern stock exchange cannot be regulated efficiently under a rigid statutory program" but requires "considerable latitude" for "administrative discretion" in order "to avoid, on the one hand, unworkable 'strait-jacket' regulation and, on the other, loopholes which may be penetrated by slight variations in the method of doing business." S. REP. NO. 73-792, at 5 (1934); see also H.R. REP. NO. 73-1383, at 6-7 (1934) ("broad discretionary powers in the [SEC] have been found practically essential"). In order to preserve this flexibility, Congress squarely rejected the Justice Department's argument in connection with the 1975 amendments to the Exchange Act that the SEC "should be required * * * to adopt the least anticompetitive means of protecting investors and preserving fair and orderly markets in securities." Release No. 34-17371, 45 Fed. Reg. 83707, 83719 (Dec. 19, 1980); see *ibid.* ("Congress * * * declined to adopt that rigid stan-

dard and instead chose the balancing tests currently found in [15 U.S.C. § 78o-3(b)(9)] and elsewhere in the Act").

The need for broad discretionary powers is nowhere greater than in the area of "IPO allocation and commission practices," which "fall within the very heart of the Commission's regulatory authority." App., *infra*, 127a. As the Commission observed, its regulation of the syndicate offering process "has involved a continual adjustment of previous rules"—a dynamic regulatory response to "new issues as they emerge" that is incompatible with the application of the antitrust laws to the same conduct. *Id.* at 195a.

There is no doubt that the SEC, as it informed the courts below, has authority to regulate the joint conduct alleged in plaintiffs' antitrust complaints and has in fact subjected that conduct to "comprehensive and active Commission oversight and regulation." App., *infra*, 197a; see also *id.* at 127a. The Commission has pervasive authority over the underwriting process and compensation practices, actively oversees SRO rules concerning both, and has regulated and approved the joint syndicate underwriting system that plaintiffs challenge. It also has ample authority to protect investors and markets from manipulative conduct of any type. See *supra* pp. 6-9.

Tie-in conduct has not escaped Commission regulation. The SEC has power under section 9(a)(6) of the Exchange Act to prohibit (or allow) transactions intended to fix or stabilize securities prices, and under section 9(a)(2) to define prohibited trading intended to raise or depress prices. See 15 U.S.C. § 78w(a)(1) (granting the SEC power to make rules to implement the Act, including its antimanipulation provisions). For decades the Commission has vigilantly supervised public offering practices in "hot" markets in which demand for new issues is high, including "tie-in arrangements, and manipulation of the aftermarket." REPORT OF THE SEC CONCERNING THE HOT ISSUES MARKETS 28 (Aug. 1984); see *id.* at 37-40; REPORT OF THE SPECIAL STUDY OF SECURITIES

MARKETS OF THE SECURITIES AND EXCHANGE COMMISSION, H.R. Doc. No. 88-95, Part 1, at 487-488, 514-559 (Apr. 1963). During the purported class period here, it warned that Regulation M prohibits "activities that could artificially influence the market," including "'tie-in' agreements." SEC Div. of Market Regulation, Staff Legal Bulletin No. 10, *Prohibited Solicitations and "Tie-In" Agreements for Aftermarket Purchases* ¶¶ 1-2 (Aug. 25, 2000); see App., *infra*, 135a. It has since proposed amendments to Regulation M that would prohibit underwriters from receiving consideration from IPO customers above the offering price and has published for comment proposed SRO rule changes to address tie-ins. Release No. 34-50831, 69 Fed. Reg. 75774 (Dec. 17, 2004); Release No. 34-50896, 69 Fed. Reg. 77804 (Dec. 28, 2004).

The SEC has used its powers to investigate conduct of the sort challenged by plaintiffs, filing and settling actions against individual underwriters for alleged violations of Regulation M. *Supra* p. 7. The Exchange Act's antimanipulation provisions are also the basis for private securities fraud litigation directed at conduct alleged in these antitrust suits, in which legal rules prescribed by Congress in the securities laws and by the SEC will control. *Supra* pp. 4-5.

The SEC recognizes that sensitive, fact-specific evaluations must inform any assessment whether particular underwriting conduct violates the securities laws. Its *IPO Allocations Release* draws fine distinctions between permissible collaborative bookbuilding activity that includes inquiries about a would-be IPO allocant's aftermarket interest and the price at which it would purchase shares in the aftermarket, and unlawfully informing the customer that such purchases would improve its prospects of obtaining an allocation. See *supra* p. 8 & n.1. Similarly, the Commission distinguishes between permissibly allocating IPO shares to a good customer that pays substantial commissions and doing so as a quid pro quo for a customer paying "excessive com-

pensation" for services (itself a difficult determination). Release No. 34-50831, 69 Fed. Reg. at 75785. Accordingly, the SEC recognizes that the conduct alleged by plaintiffs "may or may not be permissible, depending upon the facts." App., *infra*, 156a. That line-drawing cannot be done by a lay jury applying generalized rule-of-reason principles under the antitrust laws, but depends on careful application of securities law principles, whether by the SEC, the SROs it regulates, or a court in private securities litigation.

In light of this regulatory history and ongoing regulatory activity, this Court's decisions in *Gordon* and *NASD* require immunity here. See App., *infra*, 140a-147a. Under this Court's precedents, implied immunity protects "'the operation of the regulatory scheme'" and is triggered when immunity is necessary "'to permit the [securities laws] to function as envisaged by the Congress.'" *Id.* at 143a, quoting *Gordon*, 422 U.S. at 688. Given the SEC's comprehensive authority over syndicate underwriting and manipulative conduct, its exercise of that authority over the conduct alleged here through both rulemaking and enforcement, and its statutory mandate to weigh competition concerns, the requirements for immunity set forth in *Gordon* and *NASD* are satisfied, as the SEC explained below. See App., *infra*, 193a-194a.

Because the SEC is well-placed to determine the impact of potential antitrust liability on the effective operation of its statutory powers and of the securities markets, federal courts in every previous case have credited those expert views. See 1A PHILLIP AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 240c, at 14 (2d ed. 2000). The Second Circuit's rejection of immunity where the SEC says it is essential to "the effectiveness of the regulatory regime established by Congress" and to prevent distortion of the capital formation process urgently calls for this Court's review. App., *infra*, 192a, 193a-194a.

II. THE SECOND CIRCUIT'S DECISION DIRECTLY CONFLICTS WITH RULINGS OF THIS COURT AND CREATES INTOLERABLE CONFUSION OVER THE SCOPE OF ANTITRUST IMMUNITY.

This Court has recognized implied immunity in circumstances closely analogous to those involved here. As the Court held in *Gordon*, "where the agency both has the power to control [defendant's] conduct and actually exercises that power," the antitrust laws are "ousted" because of the potential for conflict with the securities regulatory regime. 1A AREEDA & HOVENKAMP, *supra*, ¶ 243a, at 36 & n.6. In *NASD*, where the record was clear that Congress had vested in the SEC authority to regulate and supervise the challenged conduct and the SEC confirmed that its authority "w[ould] be compromised seriously" if the antitrust case were permitted to proceed, this Court concluded that implied repeal was necessary to make the regulatory scheme work. 422 U.S. at 729-730. Rather than follow the legal standards set forth in *Gordon* and *NASD*, the court of appeals invented a novel test that restricts the availability of implied immunity and diverges from the immunity standard used by any other circuit.

A. The Second Circuit's Decision Cannot Be Reconciled With This Court's Implied Immunity Rulings.

1. In *Silver*, this Court held that antitrust immunity for an NYSE order requiring members to eliminate telephone connections with nonmember firms was not "necessary to make the Securities Exchange Act work" because (at that time) the SEC lacked "jurisdiction to review particular instances of enforcement of exchange rules." 373 U.S. at 347, 357; see *id*. at 358 ("the Commission's lack of jurisdiction * * * means that the question of antitrust exemption does not involve any problem of conflict"). But, this Court observed, "a different case" would arise if the SEC had jurisdiction to review "exchange self-regulation" and safeguards were "built into the

regulatory scheme which perfor[m] the antitrust function of insuring that an exchange" would not apply its rules in an unjustifiably anticompetitive manner. *Id*. at 358-360.

2. That "different case" arose in *Gordon*, which like these cases involved antitrust challenges to alleged brokerage commission practices. Accepting the views of the SEC and rejecting those of the Department of Justice, this Court held that the defendants were immune from antitrust liability for allegedly conspiring to maintain fixed commission rates.

Gordon found "plain repugnancy" between the antitrust laws and securities regulatory regime. 422 U.S. at 682. Congress had given the SEC "direct regulatory power over rules and practices with respect to 'the fixing of reasonable rates of commission.'" *Id.* at 685. The SEC had exercised that power by "tak[ing] an active role in review of proposed rate changes," ultimately prohibiting fixed rates "not based on a simplistic notion in favor of competition, but rather on demonstrated deficiencies of the fixed commission rate structure." *Id.* at 676, 685. "[P]ermitting courts throughout the country to conduct their own antitrust proceedings would conflict with the regulatory scheme authorized by Congress." *Id.* at 690; see 1A AREEDA & HOVENKAMP, *supra*, ¶ 243d, at 43 (*Gordon* "focused on the importance of an antitrust immunity to the general regulatory scheme"). Without immunity, antitrust courts and the SEC would likely apply different standards to commission-setting practices because "the SEC must consider, in addition [to competition], the economic health of the investors, the exchanges, and the securities industry." *Gordon*, 422 U.S. at 689. This Court thus found immunity necessary in order to leave to the SEC the supervision of commission practices, as Congress intended. See *id.* at 691 (application of the antitrust laws to commission practices would "render nugatory the legislative provision for regulatory agency supervision").

3. In *NASD*, decided the same day, this Court held that antitrust immunity must be implied not only where the SEC actively exercises its regulatory authority over challenged conduct, but also where the SEC's authority is so pervasive that conflict with the antitrust laws is likely. At issue was whether the NASD and its members were entitled to antitrust immunity for allegedly conspiring to restrict the sale and fix prices of mutual-fund shares in the secondary market. 422 U.S. at 700. Because the Department of Justice (in an effort to avoid a finding of immunity) disclaimed a direct attack on NASD rules and instead challenged "various unofficial NASD interpretations" of those rules, this Court considered "whether the SEC's exercise of regulatory authority" under the securities laws was "sufficiently pervasive to confer an implied immunity." *Id.* at 730, 732. It held that the SEC's authority over the NASD and its members was "pervasive" and that the SEC "weigh[ed] competitive concerns" along with other interests in exercising that authority. *Id.* at 732-733. Because "the broad regulatory authority conferred upon the SEC * * * enable[d] it to monitor" the allegedly anticompetitive activities, "and the history of [SEC] regulations suggest[ed] no laxity in the exercise of this authority," defendants were entitled to antitrust immunity. *Id.* at 734. This Court thus refused to compromise the SEC's authority "to deal * * * flexibly with * * * detrimental trading practices" by subjecting them to the antitrust laws. *Id*. at 724-725.

Contrary to the view of the court of appeals *NASD* did not immunize only "association activities approved by the SEC" or turn on the "special status" of the NASD as an SRO. App., *infra*, 68a. An alleged conspiracy between broker-dealers who (like the underwriter defendants here) were members of the NASD was also held immune because of the SEC's pervasive regulatory authority. 422 U.S. at 733. Nor was immunity barred even though the SEC's "power to prescribe rules and regulations" governing certain conduct at issue was "unexercised." *Id.* at 721-722. Because the "main-

tenance of an antitrust action for activities so directly related to the SEC's responsibilities" could potentially subject defendants "to duplicative and inconsistent standards," the antitrust laws were "displaced by the pervasive regulatory scheme." *Id*. at 735.

4. This Court consistently has adhered to the principles set forth in *Gordon* and *NASD*, most recently in *Trinko*—a decision that the Second Circuit brushed aside. See App., *infra*, 41a n.36. *Trinko* involved an alleged unilateral refusal to deal by a regulated entity where dealing requirements were supervised by state and federal agencies. An explicit antitrust savings clause in the Telecommunications Act of 1996 precluded immunity. This Court nevertheless held an antitrust suit improper in light of the "real possibility" that an antitrust jury's judgment would "conflic[t] with the agency's regulatory scheme," which took competitive concerns into account. 540 U.S. at 406. The difficulty of analyzing the antitrust claim in *Trinko*—which, like plaintiffs' claims here raised the likelihood of "[m]istaken inferences," "false condemnations," and "interminable litigation"—also led this Court to conclude that while the costs of antitrust intervention would be great, "the additional benefit to competition provided by antitrust enforcement will tend to be small." *Id.* at 412, 414.

5. Instead of applying this Court's standards, the court below established a novel test for implied immunity that looks to whether the regulatory agency could compel the challenged action, whether the agency had permitted that action at some point, whether application of the antitrust laws would moot specific provisions of the securities laws, and whether Congress expressed an intent to immunize the specific conduct at issue. App., *infra*, 53a-55a.

The court of appeals' holding that immunity must be premised on the SEC's ability to "compel the anticompetitive conduct the antitrust laws would prohibit" (App., *infra*, 65a) finds no support in *NASD* or *Gordon*, which focus instead on

whether Congress "provided for SEC authority" to exercise "direct regulatory power," not on power to compel particular behavior. *Gordon*, 422 U.S. at 685, 690. The power to compel may be sufficient to imply immunity, but it is not a precondition for immunity. See 1A AREEDA & HOVENKAMP, *supra*, ¶ 243a, at 36-37.

The court of appeals also focused improperly on whether the SEC had permitted "tie-ins." See *id*. ¶ 243d, at 44 (agency authorization is not "a prerequisite to immunity"). Congress conferred on the SEC "direct regulatory power" to supervise syndicate underwriting and the sorts of conversations during that process that plaintiffs characterize as tie-ins. *Gordon*, 422 U.S. at 685. Because the SEC exercised that power, *Gordon* and *NASD* require immunity so as not to disrupt the regulatory scheme. Thus in *NASD*, this Court found implied immunity where the SEC had "pervasive regulatory power" over alleged conduct, even though that conduct was neither required nor affirmatively authorized by the Investment Company Act or SEC or NASD rules. See 422 U.S. at 730-733. Even a history of inattention is no barrier to immunity so long as the SEC possesses regulatory power. *Gordon*, 422 U.S. at 690. The court of appeals' inquiry overlooks the SEC's power to draw the line between proper and improper syndicate bookbuilding practices, which can be indiscriminately characterized as conspiracies to engage in "tie-ins" by antitrust class action litigants demanding treble damages.

Under *Gordon* and *NASD*, the import of statutory purpose does not hinge, as the Second Circuit held, on whether Congress specifically "intended to immunize anti-competitive tie-in arrangements." App., *infra*, 64a. Nor does immunity require that there be a "provision, sentence, phrase, or word" of the statutory or regulatory scheme that will be mooted by application of the antitrust laws. App., *infra*, 65a. Rather, implied immunity turns on whether Congress authorized the SEC to review, evaluate, and regulate the practices at issue. Accordingly, *Gordon* concluded that the "Exchange Act was

intended by the Congress to leave the supervision of the fixing of reasonable rates of commission to the SEC." 422 U.S. at 691. Similarly, *NASD* concluded that Congress intended to authorize the SEC to deal "flexibly with * * * detrimental trading practices." 422 U.S. at 724-725.

The Second Circuit's novel ruling that implied immunity requires a narrowly focused indication that Congress meant to "immuniz[e] the specific anticompetitive activity" (App., *infra*, 64a) cannot be squared with *Gordon* or *NASD*. It would undermine the securities laws by immunizing, in a dynamic and rapidly evolving field, only that conduct specifically identified by Congress 70 years ago. Under that approach the distinction between express and implied immunities would virtually disappear. See 1A AREEDA & HOVENKAMP, *supra*, ¶¶ 242a, 242b, at 30-32 (express immunity applies when immunity "is express in the federal statute," is otherwise clear from the statute, or a "statute or rule * * * compels certain conduct"). Yet the very purpose of implied immunity is to enable a court to protect the workings of a regulatory scheme when Congress did not explicitly address immunity. It is unreasonable to require Congress to express a view as to unforeseeable future circumstances in order for immunity to be implied. Congress did not insert an antitrust savings clause in the securities laws, as it has in other statutes. This Court has made clear that immunity should be implied when necessary as a practical matter "to make the [securities laws] work." *Gordon*, 422 U.S. at 683.

The court of appeals' deviation from this Court's well-established implied immunity precedents—in a circuit in which the securities industry is based and most immunity claims have been litigated—threatens the entire scheme of federal securities regulation, as the SEC has explained. It deserves this Court's immediate attention.

B. The Second Circuit's Decision Creates Serious Confusion Concerning The Criteria For Implied Immunity.

The Second Circuit's test for implying immunity at the intersection of the securities and antitrust laws deviates from the law in other circuits and invites a flood of new antitrust class action litigation. Other courts of appeals facing this recurring issue have faithfully applied *Gordon* and *NASD*, consistently finding immunity to be required.

1. No court has ever before held that the SEC must be able to compel an action under the securities laws before that action may be impliedly immune. Courts have routinely implied immunity without first finding such a test satisfied. They have considered whether the SEC "exercises extensive oversight authority" over an activity. *Austin Mun. Sec., Inc.* v. *NASD*, 757 F.2d 676, 695 (5th Cir. 1985). They have evaluated whether the activity has been permitted by the SEC. *Harding* v. *American Stock Exch.*, 527 F.2d 1366, 1369-1370 (5th Cir. 1976); *Thill Sec. Corp.* v. *NYSE*, 633 F.2d 65, 70 (7th Cir. 1980). And they have analyzed whether the "SEC has jurisdiction over the challenged activity and deliberately has chosen not to regulate it." *Friedman* v. *Salomon/Smith Barney, Inc.*, 313 F.3d 796, 801 (2d Cir. 2002). Courts have never before required that the SEC possess the power to *compel* a particular activity before they imply antitrust immunity in the face of the SEC's authority to allow, prohibit, or otherwise regulate that activity.

2. Nor have other courts of appeals required a history of "SEC authorization—whether past or present—of the specific anticompetitive behavior." App., *infra*, 66a. They have instead granted immunity, as *Gordon* and *NASD* contemplated, upon finding that the SEC's authority to regulate creates risks of conflict with the antitrust regime. Thus, in *Austin Municipal*, the Fifth Circuit analyzed the SEC's authority to regulate the NASD disciplinary process, not its

track record in doing so. 757 F.2d at 695. The Seventh Circuit in *Schaefer* v. *First National Bank of Lincolnwood*, 509 F.2d 1287, 1300 (7th Cir. 1975), was similarly concerned with whether "[t]he sort of manipulation scheme underlying the plaintiffs' claim here was envisioned to be fully dealt with under the securities acts," not whether the SEC had actually regulated it.

3. The Second Circuit's requirement that a defendant identify a particular "provision, sentence, phrase, or word" of the securities laws that will be "mooted" or "significantly curtailed by applying the antitrust laws" (App., *infra*, 65a-66a) contrasts with the position of courts that consider instead whether the antitrust laws will interfere with a "legislative provision for regulatory agency supervision." *Gordon*, 422 U.S. at 691. Thus in *Thill*, the Seventh Circuit regarded it as critical that the SEC had broad authority over the commission rate system. 633 F.2d at 69-70. And in *Austin Municipal*, 757 F.2d at 694-695, the Fifth Circuit implied immunity because the SEC exercised "supervision and regulatory authority" over the NASD disciplinary process and application of antitrust laws could "unduly interfere with the SEC's jurisdiction."

None of these courts created a restrictive, multi-factor standard for implied antitrust immunity even remotely like the one fashioned by the Second Circuit here. In a system in which antitrust liability is determined by juries, damages are trebled, and plaintiffs can bring virtually any antitrust class action against securities defendants in the Second Circuit, these inconsistencies in the test applied and result reached are intolerable. The risk to underwriters and other market participants is such that they must conform their behavior not to "the Commission's expert administration" but to the most restrictive interpretation of the antitrust laws and immunity standards that could apply to that conduct. App., *infra*, 196a. The Second Circuit's ruling will for all practical purposes override the conflicting law of other circuits that comports

with *NASD* and *Gordon*, making the need for this Court's review more compelling.

III. THIS COURT'S INTERVENTION IS NECESSARY TO PREVENT SUBSTANTIAL ADVERSE CONSEQUENCES FOR U.S. SECURITIES MARKETS.

The risk of antitrust liability for conduct subject to SEC regulation "poses a substantial danger that [industry participants] would be subjected to duplicative and inconsistent standards." *NASD*, 422 U.S. at 735. If these antitrust suits are permitted to go forward, collaborative conduct during a syndicated public offering that is authorized, or not proscribed, by the SEC could nonetheless be deemed unreasonable by an antitrust jury and punished with treble damages payable to a sprawling class of investors.

Underwriters would lack reliable guidance in such an environment. With every syndication involving concerted conduct and every discussion with buyers open to depiction as collusion, underwriters would be fearful that building a book and assessing market interest—activities expressly authorized by the SEC (see *supra* pp. 3-4, 6)—would expose them to treble-damages liability in massive class actions. The same problem of conflicting standards arises even for activities that are currently barred by the SEC. The Commission explained that careful line drawing is essential to separate permissible from impermissible actions and that it may, in the future, deem currently proscribed activities to be permissible elements of the IPO process. App., *infra*, 191a; see *supra* pp. 7-9. As the SEC told the court of appeals, without a holding of immunity in this case, "antitrust concerns will become the predominant considerations in the underwriting process." App., *infra*, 194a.[2]

---

[2] The court of appeals believed that the potential for application on remand of a "rule of reason" analysis "lowers the stakes" of the implied immunity decision. App., *infra*, 60a. But rule of reason

This shift in securities regulation would profoundly disrupt capital formation in the United States, which is principally achieved through syndicate underwritings of the kind challenged here. As the SEC explained, "the fear of potentially crippling treble damages awards could over-deter conduct that would serve the interests of the markets and the capital formation process." App., *infra*, 194a. The capital-raising process would become captive to the competition-first principles of the Sherman Act, applied by lay juries, undermining the "uniformity and certainty" that Congress has deemed essential "if our markets are to remain ahead of those in London, Frankfurt, Tokyo or Hong Kong." 143 Cong. Rec. 21357 (1997) (Statement of Sen. Dodd).

As we have described in Part I, *supra*, permitting respondents' allegations to be adjudicated under the antitrust laws would undercut the SEC's practical authority to regulate in this area, contrary to the will of Congress. As one leading commentator has observed, "parallel track antitrust proceedings are highly likely to frustrate the agency's own role in applying its expertise to business conduct within its jurisdiction." Herbert Hovenkamp, *Antitrust Violations in Securities Markets*, 28 J. CORP. L. 607, 632-633 (2003).

Permitting antitrust law to displace securities regulation in this fashion also would heavily burden the federal courts. The plaintiffs' bar, even more eagerly than with securities

---

analysis requires a complex and largely unpredictable evaluation of the procompetitive benefits and asserted justifications for the challenged conduct. Even if a rule of reason analysis were undertaken by a jury and sufficiently took into account administrative concerns (which given the line drawing necessary in this area is improbable), it would leave participants in syndicate underwritings exposed to grave uncertainties in class action antitrust litigation. Immunity is particularly appropriate when antitrust claims are complex and difficult to evaluate, which is certainly true of a rule of reason analysis in this area. See *Trinko*, 540 U.S. at 414.

complaints, can be expected to file antitrust claims at every opportunity, lured by treble damages and awards of attorneys' fees (neither of which are available under the securities laws). See KENNETH ELZINGA & WILLIAM BREIT, THE ANTITRUST PENALTIES 90-94 (1976) (treble damages remedy encourages filing of strike suits). These cases would consume enormous judicial resources because antitrust suits, widely "known as 'serpentine labyrinths' in which discovery is a 'bottomless pit,'" tend to be far more complex and costly than other civil actions. 6 MOORE'S FEDERAL PRACTICE § 26.46[1], at 26-146.24 (3d ed. 2005). If the securities laws themselves do not create a scheme of "broad insurance against market losses" (*Dura Pharms., Inc.* v. *Broudo*, 125 S. Ct. 1627, 1633 (2005)), Congress surely did not envisage treble damages for participants in stock market bubbles who wish to bypass federal securities remedies.

Congress has addressed the risk of strike suit class actions in the securities context by barring punitive damages, heightening pleading requirements, and regulating class litigation. *E.g.*, 15 U.S.C. § 78bb (barring punitive damages in securities fraud actions); Private Securities Litigation Reform Act, *id.*, § 78u-4(b)(1), (2) (requiring particularized pleading in securities fraud complaints); *id.*, § 78u-4(a) (establishing special procedural requirements for securities class actions). This Court too, has imposed pragmatic limitations on private securities fraud suits because they present "a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general." *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 739-740 (1975). *E.g.*, *Dura*, 125 S. Ct. at 1631-1634 (requiring proof of loss causation); *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185 (1976) (requiring proof of scienter, not mere negligence); *TSC Indus.* v. *Northway, Inc.*, 426 U.S. 438 (1976) (rejecting lax definition of materiality); *Santa Fe Indus.* v. *Green*, 430 U.S. 462 (1977) (limiting definition of actionable manipulation); *Central Bank* v. *First Interstate Bank*, 511 U.S. 164, 189 (1994) (barring aid-

ing and abetting claims). Litigants should not be allowed to evade these limitations, and circumvent the will of Congress, by bringing a claim directed at the underwriting process under the antitrust laws rather than the securities laws.

This Court consistently has sought to protect the integrity of the regulatory process and avoid the conflict and confusion that result from parallel antitrust and regulatory challenges to the same conduct, determining if immunity is appropriate by gauging the practical consequences of antitrust adjudication on effective administrative supervision. An important factor in that analysis is that expert agencies often "are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure" to resolve industry-specific disputes. *Far East Conf.* v. *United States*, 342 U.S. 570, 574-575 (1952).

Careful distinctions drawn by the SEC between proper and improper IPO conduct will disintegrate if lay juries may instead apply a "reasonableness" standard under general antitrust criteria to respondents' claims. "[A]gency oversight ensures consistency of outcomes, something that antitrust jury trials would never produce." Hovenkamp, *supra*, 28 J. CORP. L. at 630. The blunt sanction of treble damages should not be superimposed upon regulatory disputes that are better addressed under the more carefully calibrated regulatory scheme established by Congress. *Trinko*, 540 U.S. at 406.

In sum, the court of appeals' rejection of implied immunity, unless reversed, will impose conflicting standards on underwriters, chill capital formation, undermine the delegated authority of the SEC, burden the federal courts, and produce unjust outcomes through blackmail settlements. Review by this Court is required to prevent these serious harms.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ROBERT B. MCCAW
LOUIS R. COHEN
ALI M. STOEPPELWERTH
FRASER L. HUNTER, JR.
NOAH A. LEVINE
WILMER CUTLER PICKERING
HALE & DORR LLP
399 Park Avenue
New York, New York 10022
(212) 230-8800
Attorneys for Petitioner Citigroup Global Markets Inc.

ANDREW J. FRACKMAN
RICHARD G. PARKER
BRENDAN DOWD
O'MELVENY & MYERS LLP
Seven Times Square
New York, New York 10036
(212) 326-2000
Attorneys for Petitioner Robertson Stephens, Inc.

A. ROBERT PIETRZAK
JOEL M. MITNICK
SIDLEY AUSTIN LLP
787 Seventh Avenue
New York, New York 10019
(212) 839-5300
Attorneys for Petitioner Deutsche Bank Securities Inc.

RICHARD A. CIRILLO
KAREN R. KOWALSKI
KING & SPALDING LLP
1185 Avenue of the Americas
New York, New York 10036
(212) 556-2100
Attorneys for Petitioner Credit Suisse First Boston LLC

STEPHEN M. SHAPIRO
Counsel of Record
KENNETH S. GELLER
TIMOTHY S. BISHOP
MAYER, BROWN, ROWE & MAW LLP
1909 K Street, N.W.
Washington, D.C. 20006
(202) 263-3000
Attorneys for Petitioner Merrill Lynch, Pierce, Fenner & Smith Incorporated

ANDREW B. CLUBOK
RICHARD A. CORDRAY
BRANT W. BISHOP
STEVEN A. ENGEL
KIRKLAND & ELLIS LLP
655 15th Street, N.W.
Washington, D.C. 20005
(202) 879-5000
Attorneys for Petitioner Morgan Stanley & Co. Inc.

SHEPARD GOLDFEIN
JAMES A. KEYTE
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
Four Times Square
New York, New York 10036
(212) 735-3000
Attorneys for Petitioners Janus Capital Management LLC

MOSES SILVERMAN
PHILIP G. BARBER
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, New York 10019
(212) 373-3000
Attorneys for Petitioner Lehman Brothers Inc.

JON R. ROELLKE
JEFFREY H. DRICHTA
CLIFFORD CHANCE US LLP
2001 K Street, N.W.
Washington, D.C. 20006-1001
(202) 912-5000
Attorneys for Petitioner Merrill Lynch, Pierce, Fenner & Smith Incorporated

PAUL GONSON
GLENN R. REICHARDT
KIRKPATRICK & LOCKHART
NICHOLSON GRAHAM LLP
1601 K Street, N.W.
Washington, D.C. 20006
(202) 778-9000
Attorneys for Petitioner Merrill Lynch, Pierce, Fenner & Smith Incorporated

GANDOLFO V. DIBLASI
PENNY SHANE
DAVID M.J. REIN
RICHARD J.L. LOMUSCIO
SULLIVAN & CROMWELL LLP
125 Broad Street
New York, New York 10004
(212) 558-4000
Attorneys for Petitioners The Goldman Sachs Group, Inc. and Goldman, Sachs & Co.

RANDY M. MASTRO
JOHN A. HERFORT
RICHARD FALEK
GIBSON, DUNN & CRUTCHER LLP
200 Park Avenue
New York, New York 10166
(212) 351-4000
Attorneys for Petitioner Bear, Stearns & Co., Inc.

STEVEN WOLOWITZ
MATTHEW INGBER
MAYER, BROWN, ROWE & MAW LLP
1675 Broadway
New York, New York 10019
(212) 506-2500
Attorneys for Petitioner Comerica, Inc.

GERALD J. FIELDS
KEVIN C. LOGUE
PAUL HASTINGS JANOFSKY
& WALKER LLP
75 East 55th Street
New York, New York 10022
(212) 318-6000
Attorneys for Petitioners Van Wagoner Capital Management, Inc. and Van Wagoner Funds, Inc.

DAVID W. ICHEL
JAYMA M. MEYER
SIMPSON THACHER &
BARTLETT LLP
425 Lexington Avenue
New York, New York 10017
(212) 455-2000
Attorneys for Petitioner J.P. Morgan Securities Inc.

JOHN D. DONOVAN
ROBERT G. JONES
ROPES & GRAY LLP
One International Place
Boston, Massachusetts 02110
(617) 951-7000
Attorneys for Petitioners Fidelity Distributors Corp., Fidelity Brokerage Services LLC, and Fidelity Investments Institutional Services Co., Inc.

MARCH 2006

APPENDIX