Supreme Court, U.S.
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No. ____

IN THE

Supreme Court of the United States

PIRATE INVESTOR LLC AND FRANK PORTER STANSBERRY,

Petitioners,

v.

UNITED STATES SECURITIES AND EXCHANGE COMMISSION,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Respondent brought this action against petitioners under Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5, which prohibit false statements "in connection with the purchase or sale of any security." The suit arises from petitioners' investment newsletter advisory. Petitioners offered no personalized investment advice, did not trade in the relevant stock, and owed no fiduciary duty to the issuer or any other party. The Fourth Circuit nonetheless held that petitioners could be held liable under Section 10(b), and the court affirmed both a significant monetary fine and an injunction broadly prohibiting any future violation of the Rule. The court of appeals further held that the First Amendment presented no obstacle to respondent's claim. By contrast, in a parallel state law securities fraud investigation brought by the State of Maryland over the *identical* statement, that state's highest court held that constitutional protections applied.

The Questions Presented are:

1. Whether Section 10(b) and Rule 10b-5 apply to speech by a party that offers no personalized investment advice, does not trade in the relevant stock, and owes no applicable fiduciary duty.

2. Whether such a case may proceed without the protections of the First Amendment, such as independent appellate review of factual findings, a showing of reckless disregard for the truth based on clear and convincing evidence, and a prohibition on sweeping prior restraints on speech.

CORPORATE DISCLOSURE STATEMENT

Pirate Investor LLC changed its corporate name to Stansberry & Associates Investment Research, LLC on October 24, 2005. Agora, Inc. is the parent corporation of Stansberry & Associates Investment Research, LLC. No publicly held company owns 10 percent or more of Agora, Inc. or Stansberry & Associates Investment Research, LLC.

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The decision of the United States Court of Appeals for the Fourth Circuit is reported at 580 F.3d 233 and is reprinted in the Appendix ("App.") at 1a. The decision of the United States District Court for the District of Maryland is unpublished and reprinted at App. 52a.

JURISDICTION

The Fourth Circuit entered its judgment on September 15, 2009 and denied rehearing on November 13, 2009. App. 151a. The Chief Justice subsequently extended the time to file this petition to and including March 26, 2010. App. 197-98a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS

The First Amendment to the U.S. Constitution provides in relevant part: "Congress shall make no law ... abridging the freedom of speech, or of the press ... ." U.S. CONST. amend. I.

Section 10(b) of the Securities Exchange Act of 1934 provides in relevant part: "It shall be unlawful for any person, directly or indirectly ... (b) To 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 as necessary or appropriate in the public interest or for the protection of investors." 15 U.S.C. § 78j(b).

Rule 10b-5 provides, in relevant part: "It shall be unlawful for any person, directly or indirectly ... (a) To employ any device, scheme, or artifice to defraud, (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security." 17 C.F.R. § 240.10b-5.

STATEMENT OF THE CASE

Petitioners advertised and published an investment newsletter advisory predicting that the price of a particular stock would rise. Petitioners did not trade in the stock; provided no personalized investment advice; and owed no applicable fiduciary duty. Alleging that a statement in the advisory was false, respondent charged petitioners with violating Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5. The district court and Fourth Circuit held that petitioners' speech was actionable and that the First Amendment was no obstacle to the claim. In parallel litigation, the highest court of Maryland held that the identical publications triggered First Amendment protections.

1. Petitioners publish investment advice. At the time of the events giving rise to this case, in May 2002, petitioner Pirate Investor LLC ("PIL") had approximately 20,000 subscribers. By trial in 2005, that number had risen to 120,000; it has roughly

doubled since. PIL is owned by Agora, Inc., which publishes dozens of investment, health, and travel newsletters. In May 2002, it had approximately 450,000 paid subscribers. By trial, that figure had grown to 650,000. Its book divisions include Les Belles Lettres and Pickering & Chatto, publishers of classics and academic texts.

Petitioner Frank Porter Stansberry is the editor of a PIL publication, *Porter Stansberry's Investment Advisory*. *Barron's* has cited Stansberry as a "highly regarded" writer who does not "mince his words" and commended him as "remarkably prescient" for his predictions of impending turmoil in the financial sector. *See* Alan Abelson, *Au Revoir or Goodbye?*, BARRON'S, July 14, 2008, at 5.

The particular segment of the publishing industry in which petitioners participate is well known for its hyperbole. Jim Cramer of CNBC is a high-profile example. As the sub-headline on a *Worth* magazine article on this genre explains: "Welcome to the world of investing newsletters, where YOU HAVE TO SHOUT TO BE HEARD!" *See* Mike Steere, *The Genius, the Guru & the Grumpy Old Men*, WORTH, November 1996. For example, in June 2008, Freddie Mac and Fannie Mae were trading at $25.29 and $27.59, respectively. Stansberry, however, as noted by *Barron's*, exhorted his readers to short sell those stocks in a report entitled *Freddie Mac and Fannie Mae Are Going To Zero: How to Protect Yourself from the Greatest Financial Calamity of our Lives*. *See* PORTER STANSBERRY'S INVESTMENT ADVISORY, June 2008, available at http://www.stansberryresearch.com/

secure/psi/issues/html/200806PSI_issue.asp. By early September 2008, the stocks fell below $1.00 and have traded thereabout to this day.

This effort by respondent to extend the jurisdiction of Section 10(b) to the journalism of investment newsletters arises from Stansberry's reporting on USEC Inc., a public company that imports uranium for nuclear power plants through a joint U.S.-Russian program. In 2002, Stansberry interviewed USEC's head of investor relations, Steven Wingfield. Stansberry did not know much about USEC, but he was looking for growth companies to recommend to his subscribers. For over an hour, the two men discussed company fundamentals, USEC's prospects, and a pending pricing agreement with its Russian supplier that would cut USEC's costs for uranium and boost its earnings. They also spoke about an upcoming summit on May 23-25 between Presidents Bush and Putin, which USEC hoped would produce the required governmental approvals for the pricing agreement.

USEC had asked the U.S. government to place the pricing agreement on the agenda for the summit and in mid-April had raised with its creditor Bank of America a possible connection between the summit and the approval of the agreement. Handwritten notes on a Bank of America document observed: "Maybe May @ undersecretary levels." USEC's private confidence that the approval was imminent was reflected in its public statements as well. On April 25, USEC had told investors in a conference call that it was "look[ing] forward" to approval of the

agreement in the "near future" and that "signals from the U.S. government indicate that approval is near."

As his interview with Wingfield was ending, Stansberry said he would probably not include USEC as a recommended stock in his newsletter since it did not fit the growth-oriented technology enterprises he followed. According to Stansberry, Wingfield became agitated and blurted out something Stansberry remembers as the somewhat nebulous but impetuous statement: "Watch the stock on May 22nd."

Wingfield acknowledges every aspect of the interview as detailed by Stansberry except the "May 22nd" comment. He denies making that precise statement, but describes his recollection of the conversation as follows:

> Well, like virtually every call that I was taking during that time, that subject [of the agreement] did come up; and, to my recollection, I stayed very close to the language that we used in the conference call about a week before. And that is, that we were working closely with the government, and we were looking forward to approval in the near term. ... [T]here had been some news media coverage of the president's meeting with Putin ... he asked about it, and I said that I – we hoped something positive would come out of the deal.

Before Stansberry published anything based on his interview, USEC's stock began to climb when

President Bush announced from the Rose Garden that the U.S. had agreed to a new arms treaty with Russia. Stansberry came to see Wingfield's statements to reflect USEC's belief that the pricing agreement would be approved in conjunction with the summit, causing the stock market to wake up to the company's improved prospects. He decided to publish his insight because he thought that the world's focus on the Bush-Putin meeting and a possible signing at the summit would result in the revaluing of a "sleeper" stock and create a great opportunity for his readers. He wrote a special report on USEC to be published separately from his newsletter (the "Report") and a promotional e-mail marketing the Report to subscribers (the "E-mail"). He offered the Report for sale at $1,000, a price point that the evidence showed was accepted in the market for the advice of investment newsletters.

The E-mail described the reasons for investing in USEC but did not identify the company by name. It discussed the pending pricing agreement, the new arms treaty, the upcoming summit, and the signals coming from the company which Stansberry interpreted as indicating that the pricing agreement would be approved around the summit. "[B]est of all, because of my source – a senior company executive – I can tell you EXACTLY WHEN the deal will be finalized and announced to the public," Stansberry wrote. App. 157a. He colloquially captioned the E-mail a "'Super Insider' Tip" in what is (as noted above) the brassy, exuberant vernacular commonplace in the newsletter industry.

The four-page Report[1] identified USEC as the company and offered further analysis supporting Stansberry's prediction that the stock, then trading at half of book value, would double when the pricing agreement was approved. Consistent with his understanding of his interview with Wingfield, he wrote in the Report, "A USEC senior executive has assured me 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.'" App. 177a. Stansberry recommended buying the stock before that date to capture the gains he anticipated during the summit.

Stansberry published the E-mail on the evening of May 13 to a list of petitioners' subscribers. Just hours later, Stansberry sent Wingfield both the Report and the E-mail, together with a memorandum he wrote to other newsletter editors at Agora (the "Memorandum"). In the Memorandum, Stansberry stated, "About two weeks ago I stumbled onto some very good information (which is turning out to be correct) about a company called USEC that sells uranium." App. 180a.

Wingfield did not contact Stansberry to raise any concerns about the contents of the Report, the E-mail, or the Memorandum. Nor did USEC issue a press release denying Stansberry's reporting or correcting it as required by New York Stock

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[1] Because he was not recommending USEC in the newsletter that bears his name, Stansberry published the E-mail under a company pen name used regularly by petitioners to market their publications.

Exchange rules when a listed company believes that a public report contains materially-false statements. Only when respondent later deposed Wingfield did he deny that he had told Stansberry to "watch the stock on May 22nd."

Stansberry was far from alone in his views about USEC. Contemporaneous news reports attributed the movement in the company's stock price to a connection between the summit and the pricing agreement. On May 14, in an article entitled "USEC Up 13% on U.S.-Russia Deal To Cut Nuclear Warheads," *The Wall Street Journal* quoted Wingfield saying that "[t]he new pricing agreement will improve our earnings" and predicting approval "com[ing] along soon." On May 15, in an article entitled "USEC Up 10%: US-Russia Arms Deal Continues To Boost Stock," *The Wall Street Journal* quoted an analyst stating "[t]he hope is clearly that – as part of these other talks between the Russia [sic] and the U.S. – the governments will finally approve the tentative agreements USEC has with its Russian trading partner."

The approval of the pricing agreement was not announced on May 22. It was made official a few weeks later on June 19, when USEC's share price closed at $8.39. (It had opened at $6.85 on May 13.)

Unlike advertiser-supported media, newsletters depend on subscriber loyalty and readership renewal to sustain their growth. Because newsletter writers thus only succeed by building long-term relationships with subscribers, Stansberry would offer refunds to anyone who purchased the Report and was not fully

satisfied. Only 18 percent of the 1,217 readers who purchased the Report asked for a refund. Ninety percent of these customers bought a subsequent publication from petitioners or their parent publishing company Agora.

2. Respondent subsequently brought this action seeking monetary relief and an injunction against petitioners under Rule 10b-5, which implements Section 10(b) of the Securities Exchange Act of 1934 and forbids any material "untrue statement," as well as "fraud or deceit," "in connection with the purchase or sale of any security." 17 C.F.R. § 240.10b-5. In *United States v. O'Hagan*, 521 U.S. 642, 656 (1997), this Court held that to meet the "in connection with" requirement fraud must "coincide" with or be "consummated" or "complete[d]" by the purchase or sale of a security. As the Court further explained in *SEC v. Zandford*, 535 U.S. 813, 821 (2002), fraudulent conduct must "require the sale of securities" to satisfy the "in connection with" clause.

Petitioners argued that because they did not trade stock or owe fiduciary duties to investors who traded stock – controlling facts that were never in dispute – the publications did not meet the "in connection with" requirement under Section 10(b). They also argued that the First Amendment forbade the suit because if the statute were construed to reach pure speech, respondent neither could produce the clear and convincing evidence of "reckless disregard" for the truth required by the "actual malice" rules of *New York Times v. Sullivan*, 376 U.S. 254, 280 (1964), nor could secure injunctive relief in light of *Near v. Minnesota*, 283 U.S. 697 (1931).

Petitioners submitted expert testimony from two witnesses who placed the publications in constitutional context. Among other things, the former SEC deputy chief economist testified that information tying approval of the agreement to the summit may have been material but was true, whereas the May 22nd date turned out to be premature but was not material. A journalism professor from Northwestern University saw the provocative, hyperbolic writing characteristic of investment newsletters as a source of their popularity with readers looking for strong opinions colorfully expressed.

Respondent opposed First Amendment protections and in its closing argument claimed the right to prosecute speakers and publishers ranging from *The Wall Street Journal* to university presidents even if they do not trade securities or carry fiduciary duties. When the district court asked, "You would have no problem in suing *The Wall Street Journal* for fraud if, in fact, if there were a column published that said something fraudulent," respondent replied, "We're not barred from suing them now" and later stated:

> The president of a university is giving a speech about a particular stock. ... He doesn't have any holding in the stock. He says the stock is going to pop ... go out and buy it. Is he going to be subject to the securities laws? He may well be if all the elements are met, particularly if the SEC can prove that he knew there

> was no reasonable basis that the stock was [going to pop].

3. The district court held that respondent could state a claim against petitioners under Section 10(b) consistent with the First Amendment. The court believed that petitioners' statements in both the Report and the E-mail amounted to commercial speech entitled to no heightened First Amendment protections. Further, in the court's view, the speech was analogous to a corporation's communications to its own investors to whom it owed fiduciary duties, which was held to satisfy the "in connection with" requirement in *SEC v. Texas Gulf Sulphur*, 401 F.2d 833, 857-58, 860 (2d Cir. 1968). Disregarding the obvious incentives Stansberry had to publish the truth and Wingfield had to please respondent, the court imposed liability, set civil fines of $240,000, disgorged profits, and ordered injunctive relief that simply tracks the language of Rule 10b-5(a) and (b) in prohibiting petitioners from

> violating, directly or indirectly, Section 10(b) of the Securities Exchange Act of 1934 ... and Rule 10b-5 ... by using any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange, in connection with the purchase or sale of any security ... [t]o employ any device, scheme, or artifice to defraud; or ... [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, in the

> light of the circumstances under which they were made, not misleading.

App. 115-16a.

4. On petitioners' appeal, the Fourth Circuit affirmed. It found that Rule 10b-5's "in connection with" clause was satisfied on the theory that petitioners' readers traded in USEC shares and that this trading was required for the "reputational gain" the panel contended that petitioners needed to "maximize" sales of the Report. The court also held that petitioners intended to induce securities transactions and that they published the Report to readers who were likely to rely on it. Although the Fourth Circuit's construction of Section 10(b) required the statute's application to pure expression, the court held the First Amendment had no role to play in the case because the First Amendment does not protect fraudulent speech. The court ruled that respondent was not required to satisfy the heightened evidentiary burdens of *New York Times*. Further, the Fourth Circuit declined to review the entire record *de novo* pursuant to *Bose v. Consumers Union of U.S.*, 466 U.S. 485 (1984). For the same reasons it rejected application of the actual malice rules of *New York Times* and independent appellate review under *Bose*, the Fourth Circuit found no constitutional infirmity with the district court's permanent injunction. It stayed its mandate pending certiorari, however, to enable this Court to consider the "substantial" questions, *see* Fed. R. App. P. 41(d)(2)(A), presented in this case.

5. Also in 2002, the Maryland Securities Commissioner issued subpoenas to petitioners for subscriber information pursuant to an investigation of the E-mail and the Report under the antifraud and registration provisions of the state securities laws. The state's highest court, the Maryland Court of Appeals, agreed with petitioners that a heightened standard applied, holding that the "protective umbrella of the First Amendment" prevented enforcement of the subpoenas absent a compelling need for the information, which the state could not supply. *Lubin v. Agora, Inc.*, 882 A.2d 833, 846 (Md. 2005) (App. 143a). The court rejected the Commissioner's arguments that "First Amendment rights are not implicated" by the case and that petitioners' publications were only "commercial expression directed solely to [petitioners'] economic interest" and were unprotected because they were misleading. After the court held that the First Amendment applied to petitioners' speech activity, the Commissioner brought no further proceedings.

REASONS FOR GRANTING THE WRIT

Certiorari is warranted to review the Fourth Circuit's significant expansion of the application of Section 10(b) of the Securities Exchange Act of 1934, which was held for the first time in this case to reach mere impersonal investment advice. That ruling conflicts with this Court's precedents applying the statute's "in connection with" requirement, as well as with the established body of lower court precedent that had previously given rise to a settled understanding among publishers regarding Section 10(b)'s cabined scope. As one analysis of the ruling

stated, "The Fourth Circuit's decision ... reads existing precedent as broadly as possible in interpreting Section 10(b)'s 'in connection with' requirement. ... Thus, *all speakers*, from pundits commenting on corporate developments to advertising copyrighters, *must be wary*."[2] This case has thus been closely watched because of the radical departure it represents, as *The New York Times* recognized: "If the suit is successful, it will be the first to use the securities laws against commentary about a company in which the authors had no financial stake." Adam Liptak, *E-mail Stock Tip Tests Limits of Securities Laws*, N.Y. TIMES, Aug. 3, 2003, at 10.

Certiorari is also warranted because the ruling below conflicts with the precedents of this Court and other circuits holding that speech such as the expression at issue in this case is protected by the First Amendment. In particular, review is warranted of the Fourth Circuit's holdings that the government was not required to prove its case through clear and convincing evidence that petitioners spoke with reckless disregard for the truth; that the court of appeals need not review the trial evidence *de novo*; and that the Constitution permits the entry of an injunction enforceable upon pain of contempt that broadly forbids petitioners in the future from engaging in any speech that violates the court's

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[2] DECHERT LLP, SEC V. PIRATE INVESTOR LLC: EXPANSION OF THE 'IN CONNECTION WITH' REQUIREMENT UNDER EXCHANGE ACT SECTION 10(B) (Jan. 2010), available at http://www.dechert.com/library/White_Collar-FS-SA-01-10-SEC_v_Pirate_Investor_LLC.pdf (emphasis added).

sweeping reading of Section 10(b). At the very least, those significant constitutional concerns counsel in favor of reading the statute narrowly.

I. This Court Should Review The Fourth Circuit's Holding That The Antifraud Provisions Of Section 10(b) Apply To Impersonal Investment Advice By A Party That Does Not Trade In A Stock And Owes No Applicable Fiduciary Duty

Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 forbid any material "untrue statement," as well as "fraud or deceit," "in connection with the purchase or sale of any security." 17 C.F.R. § 240.10b-5. In this case, petitioners received the same payment for the Report regardless of whether any reader purchased USEC stock, as respondent conceded at oral argument when agreeing petitioners received *no* benefit from any trading. Dec. 2, 2008 Tr. 50:8-9 ("The defendants' benefit was getting the thousand dollars [from the sale of the Report]."). In holding that petitioners could nonetheless be held liable, the Fourth Circuit became the first court of appeals to reject the single most significant limitation on the scope of 10(b) liability. The court of appeals held that the statute may be violated by speech in the form of impersonal investment advice by a speaker who does not trade in the relevant stock and who owes no applicable fiduciary duty.

This Court has made clear that the phrase "[i]n connection with the purchase or sale of any security" is "limiting language." *Piper v. Chris-Craft Indus.*, 430 U.S. 1, 38 (1977). But the Fourth Circuit has

used it for the opposite purpose – to adopt a legal rule of unlimited application empowering respondent and private plaintiffs to engage in endless second-guessing of editorial judgments made by publishers and market commentators.

The Fourth Circuit's ruling thus undoes decades of precedent laying down predictable boundaries in securities regulation and for the first time under Section 10(b) exposes pure speech about stocks and public companies to enforcement actions by respondent and to suits for damages by private litigants. The lack of any limiting principle in the Fourth Circuit's ruling makes it applicable not only to impersonal investment advice but to any type of disinterested expression, from newspaper reporting to market commentary on television to streaming financial data on the Internet. All of this speech, like petitioners', is expression conveyed without a fiduciary duty by those who do not trade securities.

Until the decision below, courts had uniformly found the "in connection with" requirement to be satisfied only with respect to statements by parties who participate in securities transactions or who breach duties they owe to investors who participate in such transactions. Every time this Court has reached the "in connection with" requirement, the defendant has engaged in this type of conduct. *See Sup't of Ins. v. Bankers Life & Cas. Co.*, 404 U.S. 6, 8 (1971) (trading of securities and breach of fiduciary duty); *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 153 (1972) (breach of fiduciary duty); *O'Hagan*, 521 U.S. at 647, 656 (trading of securities and breach of fiduciary duty); *The Wharf*

(Holdings) Ltd. v. United Int'l Holdings, 532 U.S. 588, 596 (2001) (trading of securities); *Zandford*, 535 U.S. at 823 (breach of fiduciary duty).

The only issue under the "in connection with" clause that has previously been the subject of dispute is whether the nexus between a defendant's allegedly deceptive conduct and his trading or breach of duty is sufficiently close to satisfy the statute. Thus, in *O'Hagan*, this Court held that to meet the "in connection with" requirement fraud must "coincide" with or be "consummated" by the purchase or sale of a security. 521 U.S. at 656. The Court further elaborated in *Zandford*, where it found the "in connection with" requirement was established because the fraudulent acts and securities transactions of a "broker who has a fiduciary duty" to clients "were not independent events" as "each sale was made to further [a] fraudulent scheme" that "coincided with" and "require[d] the sale of securities." 535 U.S. at 820-21, 823.

This Court has accordingly planted Section 10(b) in the world of fiduciary duty and securities trading by the defendant. *See O'Hagan*, 521 U.S. at 656 (finding the "in connection with" requirement satisfied 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. The *securities transaction* and the *breach of duty* thus *coincide*" (emphasis added)); *Zandford*, 535 U.S. at 825 (summarizing the Court's "in connection with" cases going back to *Bankers Life* as each involving

"fraudulent scheme[s] in which the *securities transactions* and *breaches of fiduciary* duty coincide" (emphasis added)).

Respondent's claims are exactly the type of garden-variety allegation of commercial fraud this Court has always kept out of Section 10(b) to ensure that the statute "does not incorporate common-law fraud into federal law" as such claims are "already governed by functioning and effective state-law guarantees." *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 162, 171 (2008). The "fraud" of which petitioners are accused – publishing false information about USEC – is a common-law fraud that (assuming it occurred at all) was "consummated" or "complete" when readers bought the Report, *O'Hagan*, 521 U.S. at 656, and thus does not satisfy the "in connection with" requirement. No "subsequent securities transaction" by any reader was necessary to carry out the alleged fraud. *Id.* at 657.

The Fourth Circuit remade the *O'Hagan/ Zandford* standard from one in which securities trading is "required" for an alleged fraud into one that considers whether it "maximizes" an alleged fraud. App. 29a, 48a. Under the decision below, the "in connection with" requirement can be satisfied by publishers regardless of a lack of fiduciary duty or a financial interest in stocks if they realize "reputational gain" when readers rely on them to make investment decisions. No other court has ever held that "reputational gain" by writers converts their work into a subject for regulation – under a statute that provides no First Amendment

protections, no less – just as no other court has ever held that the *O'Hagan/Zandford* test is met by a speaker who neither trades stocks nor carries fiduciary duties.

The ruling below similarly conflicts with the Court's repeated efforts, most recently in *Stoneridge*, to prevent the wholesale federalization of common-law fraud through Section 10(b). *See* 552 U.S. at 161 (drawing a distinction between the regulated world of "the securities markets – the realm of financing business" and "the realm of ordinary business operations" not governed by Section 10(b)). In cases such as *Santa Fe Indus. v. Green*, 430 U.S. 462, 478 (1977), and *Dirks v. SEC*, 463 U.S. 646, 664 (1983), the Court has rejected theories of liability that, like the approach of the Fourth Circuit below, are not "easily contained" and have "no limiting principle."

Prior to the decision below, it was rare that such a Section 10(b) claim would even be brought, given the force of the courts' consistent narrowing construction. But when it was, courts uniformly rejected it. *See Hart v. Internet Wire*, No. 01-9259, 2002 U.S. App. LEXIS 21310, *5 (2d Cir. Oct. 10, 2002) ("Plaintiffs allege a kind of deception by Bloomberg that is separated from the statutory mooring of § 10(b)."); *SEC v. Wall St. Publ'g Inst.*, 664 F. Supp. 554, 555-56 (D.D.C. 1986) (publisher had no duty to "speak the full truth" under Section 10(b)), *rev'd on other grounds*, 851 F.2d 365 (D.C. Cir. 1988); *Reliance Ins. Co. v. Barron's*, 442 F. Supp. 1341, 1353 (S.D.N.Y. 1977) (magazine and author "simply do not fall into any of the categories of non-privity parties

who have been held liable to defrauded purchasers and sellers under Rule 10b-5").

In sum, review is warranted because the opinion below turns the securities laws into a trap whose trigger, for a publisher, is the offense of successfully cultivating loyal readers. Securities transactions by a defendant or a speaker's duty to the market have for nearly eight decades been a principled and practical way to contain the scope of the statute. The Fourth Circuit has abolished these statutory limitations.

II. The Application Of Section 10(b) To Pure Expression Without Any Constitutional Protections Conflicts With This Court's First Amendment Precedents And The Ruling Of The Maryland Court Of Appeals In A Companion Case Based On The Identical Facts

The Fourth Circuit in this case held that petitioners' speech receives no First Amendment protections or constitutional defenses. It shut the constitutional door in a single sentence: "[T]he First Amendment does not shield fraud." App. 49a (citing *Illinois ex rel. Madigan v. Telemarketing Assocs.*, 538 U.S. 600, 612 (2003)).

The Fourth Circuit's rejection of First Amendment protections conflicts with the unanimous Maryland Court of Appeals in *Lubin*, where the state high court, on the identical facts, held that "[t]he First Amendment is implicated ... when regulations deter or interfere with the receipt of information and free flow of ideas." App. 136a. Had the Maryland

Court of Appeals instead applied the reasoning later adopted by the ruling below, it would have concluded that petitioners' speech received no constitutional protection and compelled enforcement of the subpoenas.

Ignoring the ruling of the Maryland court in this companion case, and straining to uphold liability against the "flippant" language of a newsletter genre and a writer it clearly disdained, App. 7a n.5, the Fourth Circuit swallowed the bait offered by respondent: that because petitioners have been accused of fraud, and because fraud may be punished, the Constitution is completely inapplicable to this case.

That bald position conflicts with this Court's application of the First Amendment to strike down the prior restraints on fraudulent speech in *Schneider v. State*, 308 U.S. 147 (1939), *Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620 (1980), *Secretary of State v. Joseph H. Munson Co.*, 467 U.S. 947 (1984), and *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781 (1988). The decision below is also at odds with *Telemarketing Assocs.*, 538 U.S. at 612, where this Court considered "the First Amendment's application to individual fraud actions."

The discussion in *Telemarketing* begins with a statement of the Constitution's affirmative role in the case: "The First Amendment protects the right to engage in charitable solicitation." *Id.* at 611. This Court held that regulation of fraud, though a category of speech that can be punished, must be

"responsive to First Amendment concerns." *Id.* at 621. Hearing the case at the motion to dismiss stage, the Court identified subsequent protections that would address these concerns: clear and convincing evidence at trial and independent *de novo* review on appeal. Citing *New York Times* and *Bose*, this Court stated, "Exacting proof requirements of this order, in other contexts, have been held to provide sufficient breathing room" for speech interests. *Id.* at 620. The Solicitor General, as *amicus curiae*, expressed similar sentiments. *See* Brief of United States and Federal Trade Commission as *Amici Curiae* Supporting Petitioner at 13-14, *Telemarketing Assocs.*, 538 U.S. 600 (No. 01-1806).

The fact that fraud is a category of speech that can be punished did *not* render the First Amendment categorically inapplicable in *Schneider*, *Schaumburg*, *Munson*, *Riley*, or *Telemarketing*. The Fourth Circuit therefore approached the issue backwards. The question is not whether specific fraudulent speech is protected. Fraud – like libel or obscenity – is actionable. But pursuing speech as "libelous," "obscene" or "fraudulent" does not end the constitutional inquiry, it only begins it.

The correct starting point in any First Amendment analysis is thus the nature of the speech at issue. This case concerns the publication of disinterested investment advice, a type of speech which is fully shielded by the Constitution. *See Lowe v. SEC*, 472 U.S. 181, 208, 210 n.58 (1985) (construing the Investment Advisers Act of 1940 narrowly to cover only "those who provide personalized advice attuned to a client's concerns").

The question is what protections the First Amendment requires when government challenges the truth of this expression. The Fourth Circuit answered with none at all, a ruling that violates three lines of this Court's jurisprudence. Imposition of damages for alleged falsity in the Report and E-mail without application of the actual malice rules is in conflict with *New York Times* and its progeny; denial of independent appellate review is in conflict with *Bose*; and issuance of a permanent injunction barring future false speech is in conflict with *Near*.

a. The imposition of monetary fines on petitioners' speech in the absence of actual malice protections and independent appellate review is in conflict with the decisions of this Court and the circuit courts

The Fourth Circuit's decision is a direct assault on the constitutional protections created under *New York Times* and *Bose* and warrants certiorari for two separate reasons. First, the opinion conflicts with the precedents of this Court and numerous federal and state courts mandating actual malice requirements and independent appellate review outside of the libel context whenever pure speech on matters of public concern is challenged as false, regardless of the asserted cause of action. Under the destabilizing decision below, speech which would otherwise be covered by these heightened evidentiary and appellate rules has been stripped of protection because the alleged falsity arises under a securities law. Second, the decision jeopardizes the Court's core jurisprudence in the libel and non-libel areas alike by empowering respondent and private plaintiffs to

evade these established constitutional protections through the vehicle of Section 10(b) litigation. A body of law under the First Amendment and a body of law under Section 10(b) applying different standards to the same content cannot co-exist.

Under *New York Times*, speech is protected unless a defendant has knowledge of falsity or "entertained serious doubts as to the truth of [the] publication." *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968). Under Section 10(b), scienter is established if the defendant acted "intentionally or recklessly" in making a false statement. While the *New York Times* standard requires clear and convincing proof, Section 10(b) only requires preponderance of the evidence. Cases tried under the *New York Times* standard receive on appeal a searching, "independent examination" of the "entire record" under *Bose* to ensure that "the judgment does not constitute a forbidden intrusion on the field of free expression." 466 U.S. at 499. Scienter determinations under Section 10(b) are reviewed only for clear error.

The *New York Times* standards arose under libel law, but this Court has now applied them to false light (*Time v. Hill*, 385 U.S. 374, 387-88 (1967)); product disparagement (*Bose*, 466 U.S. at 491); and intentional infliction of emotional distress (*Hustler Magazine v. Falwell*, 485 U.S. 46, 56 (1988)). In the circuit courts, heightened First Amendment requirements have been applied to breach of contract (*Compuware Corp. v. Moody's Investors Servs.*, 499 F.3d 520, 531 (6th Cir. 2007)); right of publicity (*Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180,

1186 (9th Cir. 2001)); intentional interference with contractual and prospective business relations (*Jefferson County Sch. Dist. No. R-I v. Moody's Inc.*, 175 F.3d 848, 856-58 (10th Cir. 1999)); trespass and breach of loyalty (*Food Lion Inc. v. Capital Cities/ABC Inc.*, 194 F.3d 505, 524 (4th Cir. 1999)); and tortious interference (*Beverly Hills Foodland, Inc. v. United Food & Commercial Workers Union, Local 655*, 39 F.3d 191, 196 (8th Cir. 1994) and *Unelko Corp. v. Rooney*, 912 F.2d 1049, 1057-58 (9th Cir. 1990)).

While the Fourth Circuit's ruling broadly conflicts with all of this authority, two of these cases specifically involved speech about securities. In *Jefferson County*, the Tenth Circuit, relying on *Hustler*, held that a rating of a school district's bonds could not serve as the basis for claims for intentional interference with contractual and prospective business relations unless it contained statements provably false under First Amendment standards. 175 F.3d at 857-58. In *Compuware*, the Sixth Circuit applied actual malice protections to reports on a public corporation by a financial ratings company. Actual malice was required because the claim against defendant Moody's for breach of contract (the plaintiff also brought a defamation claim) was "dependent on the truth of the rating and the care taken by the publisher during the publication process" and was "intimately tied to speech, expression, and publication." 499 F.3d at 530-31. The issues in petitioners' case are identical – the "truth" of a publication on a public company read by the investing public and the "care taken by the

publisher" – and yet actual malice protections were denied to them. The Sixth Circuit noted the importance of the heightened clear and convincing evidence requirement in affirming summary judgment. *Id.* at 526. But had these same claims been brought pursuant to Section 10(b), under the Fourth Circuit's ruling, no constitutional defenses would apply.

The Fourth Circuit's ruling is also inconsistent with decisions of courts that have utilized First Amendment analysis in dismissing fraud and negligent misrepresentation cases against publishers of disinterested financial information. In *First Equity Corp. v. Standard & Poor's*, 690 F. Supp. 256, 258-59 (S.D.N.Y. 1989) (Mukasey, J.), *aff'd on other grounds*, 869 F.2d 175 (2d Cir. 1989), the court held that "well-established First Amendment principles" required plaintiffs asserting that a publication on corporate bonds constituted common-law fraud "to demonstrate actual malice when seeking to impose liability ... for publication of a non-defamatory misstatement." Similarly, misrepresentation claims by investors have been rejected due to the absence of heightened constitutional protections in the tort. *See Daniel v. Dow Jones*, 137 Misc. 2d 94, 102 (N.Y. Cty. Spec. Term 1987) ("News services ... or more expensive, specialized media ... are instruments for the free flow of all forms of information, and should be treated as unquestionably within the First Amendment's guarantee of freedom of the press."); *Gutter v. Dow Jones*, 490 N.E.2d 898, 901-02 (Ohio 1986) (citing *Bose* in finding that "important First Amendment interests" and "constitutional

constraints" applied because a "contrary result" would have a "staggering deterrent effect on potential purveyors of printed material").

Review of the ruling below is necessary and warranted because the Fourth Circuit's decision will destabilize the substantial body of law already existing under *New York Times* and *Bose* protecting the public's interest in receiving information. The Fourth Circuit has removed from the protective shield of the First Amendment any disinterested expression concerning securities or a public company that might be challenged as false under Section 10(b). The range of potential overlap between speech that is covered by causes of action to which actual malice requirements attach and speech that would now be subject to Section 10(b) without such protections is difficult to overstate.

Under the Fourth Circuit's decision, for example, issuers of stock can now attack speech they see as false or unflattering using Section 10(b), thus avoiding the higher strictures of actual malice and independent appellate review that govern the law of libel and the non-defamation causes of action in which actual malice is required. While respondent in this case objected to speech that reflected positively on a company's prospects, it too will be able to use the securities laws to sue over critical coverage of companies that would otherwise be entitled to *New York Times* and *Bose* protections. The end-run around the First Amendment would include damage actions by individual investors against publishers if they allege they lost money in the markets because a company executive was misquoted or potential

corporate developments misconstrued. The jurisprudence setting heightened evidentiary protections for speech on matters of public concern that the federal and state courts have carefully built since the constitutional revolution of *New York Times* is at risk.

Under *Bose*, the full record does not support any inferences, let alone with the clear and convincing proof required by *New York Times*, that Stansberry knowingly falsified information to his readers. The record indisputably shows that he believed – and still does – that he accurately reflected his interview with Wingfield, having sent to him the very next day copies of the E-mail, the Report, and the Memorandum that fully disclosed his interpretation of their conversation. By ignoring the evidence of Stansberry's state of mind at the time of publication and the testimony of the two expert witnesses, the district court and the court of appeals made the mistake of presuming material falsity and fraudulent intent based only on a style of writing that offended them and the $1,000 cost of the Report.

Confronted with authority showing that liability under the actual malice requirement is not established on an evidentiary reed as thin as a difference in recollection between a reporter and a source over an interview, the Fourth Circuit conceded that higher proof requirements might well have changed the outcome in this case. App. 20-21a n.14. It found liability under Section 10(b) simply because Stansberry, having interviewed Wingfield, "was in a position to know" whether the statements he published "were true." App. 20a. That standard has

been rejected under the First Amendment because it leaves no room for the "breathing space" for speech freedoms embodied by *New York Times* and *Bose*, where this Court noted the "significant difference between proof of actual malice and mere proof of falsity" and held that an author's "misconception" about "what [he] heard" cannot support an inference, by clear and convincing proof, that he "realized the inaccuracy at the time of publication." *Bose*, 466 U.S. at 511-13; *see also St. Amant*, 390 U.S. at 733 (defendant's "mistake ... does not evidence doubtful mind on his part").

As this case foreshadows, vast amounts of pure speech will be actionable under the securities laws if the future lawsuits the Fourth Circuit has authorized are permitted to turn on the lesser evidentiary standards it has embraced.

b. The permanent injunction warrants this Court's immediate intervention because it violates the *Near* doctrine and will cause irreparable harm

The district court in this case imposed, and the Fourth Circuit expressly approved, a broad injunction that simply repeats the language of Rule 10b-5(a) and (b) in prohibiting petitioners from making "any untrue statement of a material fact" under a securities statute which has been construed to reach pure expression. In a single sentence, the Fourth Circuit dismissively reasoned: "The injunction does not constitute an unlawful prior restraint because it only enjoins [petitioners] from engaging in securities

fraud, which we have held is unprotected speech." App. 50a.

The ruling below disregards nearly 80 years of unbroken jurisprudence, beginning with *Near*, in which this Court has struck down broad prior restraints on the publication of false speech in the future as "the essence of censorship." 283 U.S. at 713. As Chief Justice Burger wrote surveying the *Near* doctrine: "The thread running through all these cases is that prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights. ... If it can be said that a threat of criminal or civil sanctions after publication 'chills' speech, prior restraint 'freezes' it." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). The irreparable harm to petitioners from the injunction, *see Elrod v. Burns*, 427 U.S. 347, 373 (1976), and the indications that respondent has every intention of seeking out expression it dislikes in the future, make certiorari appropriate now.

"For many years it has been clearly established that 'any prior restraint on expression comes to this Court with a "heavy presumption" against its constitutional validity.'" *CBS v. Davis*, 510 U.S. 1315, 1317 (1994) (Blackmun, J., in chambers). "[P]ermanent injunctions" such as the final order placing petitioners under the perpetual threat of contempt from government attack on its publications "are classic examples of prior restraints" impermissible under the First Amendment. *Alexander v. United States*, 509 U.S. 544, 550 (1993). As Chief Justice Rehnquist stated in *Alexander*, this

Court's "understanding of what constitutes a prior restraint" comes from cases such as *Near*, where the Court invalidated an order enjoining a defendant who had published newspapers found to constitute "malicious, scandalous, or defamatory" material under a state nuisance law from publishing any such additional publications in the future. The order was unconstitutional, the Chief Justice explained, because instead of punishing *past* speech it "involved a true restraint on *future* speech." 509 U.S. at 550 (emphasis added).

The permanent injunction in this case is a plain violation of *Near*. Petitioners have not been enjoined from republishing a specific statement that a court has already found unprotected. *See Kingsley Books v. Brown*, 354 U.S. 436, 445 (1957). Nor have they been enjoined from continuing an ongoing commercial advertising practice. *See Pittsburgh Press v. Pittsburgh Comm'n on Human Rel.*, 413 U.S. 376, 388-90 (1973). Rather, they have been broadly barred across the board from publishing any new statements that a court may one day decide are in violation of Section 10(b) and not a protected form of speech.

As in *Near*, this case involves an injunction issued after a full merits proceeding. As in *Near*, where a previous publication held to violate a statute could not justify a prior restraint on future publications, so is the finding that petitioners published a statement in violation of Section 10(b) in the past constitutionally insufficient to support an injunction against speech yet to come that a court

might hold to violate the statute. This Court has explained why:

> [T]he state [has] made the mistake of prohibiting future conduct after a finding of undesirable present conduct. When that future conduct may be protected by the first amendment, the whole system must fail because the dividing line between protected and unprotected speech may be "dim and uncertain."

Vance v. Universal Amusement Co., 445 U.S. 308, 311 n.3 (1980) (holding as an impermissible prior restraint orders enjoining theater-owners who had shown obscene movies from exhibiting films in the future that had not yet been determined to be obscene) (citation omitted). Further revealing the seriousness with which it views broad restrictions on future speech, the Court in *Vance* asserted, "[T]he presumption against prior restraints is heavier . . . than that against limits on expression imposed by criminal penalties." *Id.* at 316 n.13.

In its brief in *Lowe*, respondent, in an effort to save the prior restraint in *that* case, all but conceded why the prior restraint in *this* case is unconstitutional. "[T]he principal objection to prior restraints – that speech will be suppressed before it can be ascertained with relative certainty that it is unprotected by the First Amendment – is wholly inapplicable to the professional licensing context," respondent stated. Brief for Securities and Exchange Comm'n at 46-47, *Lowe*, 472 U.S. 181 (No. 83-1911).

But the "principal objection to prior restraints" – as articulated by the Solicitor General – describes *exactly* the constitutional harm at the heart of this case. *See Pittsburgh Press*, 413 U.S. at 390 ("The special vice of a prior restraint is that communication will be suppressed, either directly or by inducing excessive caution in the speaker, before an adequate determination that it is unprotected by the First Amendment.").

Petitioners have no way to "ascertain" whether their future speech will be punished or protected retrospectively. The federal courts have broadly enjoined them from making "any untrue statement" under a statute which, in the interpretation of the federal courts, affords no heightened evidentiary protections for pure speech. The state courts in *Lubin*, on the other hand, on the identical facts, have held that the First Amendment applies to their speech.

Subjecting petitioners, who are not in the securities business, have no fiduciary duties to investors, and do not trade the stocks they write about, to a sweeping federal injunction targeting expression that the state courts have expressly stated triggers First Amendment interests puts them in the impossible position of guessing whether their future speech will be punished or protected and thus forces them to "make only statements which 'steer far wider of the unlawful zone.'" *New York Times*, 376 U.S. at 279 (citation omitted). It is no answer that petitioners can raise First Amendment defenses if and when their future speech is questioned, as the district court contends. App. 109a. The harm of a

prior restraint is the speech it suppresses before any speech is challenged or any contempt proceeding initiated. *See Alexander*, 509 U.S. at 560 (Kennedy, J., dissenting).

That fraud, like defamation or obscenity, is a category of speech that may be penalized does not make injunctions against fraud any more permissible than injunctions against defamation or obscenity. "Frauds," as this Court stated 70 years ago, "may be denounced as offenses and punished *by law*," not by equity. *Schneider*, 308 U.S. at 164 (reversing conviction under ordinance that required canvassers to obtain permits prior to distributing literature) (emphasis added); *see Riley*, 781 U.S. at 803 (Scalia, J., concurring) ("It is axiomatic that, although fraudulent misrepresentation of facts can be regulated, the dissemination of ideas cannot be regulated to prevent it from being unfair or unreasonable."). Focusing on classes of speech in the prior restraint context as a proxy for whether First Amendment considerations apply is a meaningless and constitutionally-flawed exercise:

> Nor does it help to distinguish situations in which the "speech" involved does not merit first amendment protection from those in which it does merit such protection, the latter alone deserving the benefit of the full-blown presumption against prior restraints. A particular communication cannot authoritatively be called protected or unprotected at a

> point when, by definition, no court has yet determined the constitutional question.

LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1046-47 (2d ed. 1988).

This Court's precedents show that even in areas of so-called "unprotected" speech where expression can be subject to penalties or other kinds of regulation, broad prior restraints do not survive. *See Telemarketing*, 538 U.S. at 612 (noting that "prophylactic statutes designed to combat fraud by imposing prior restraints" were struck down in *Schaumburg*, *Munson*, and *Riley*); *Vance*, 445 U.S. at 311 (permanent injunction on display of obscene films violates First Amendment); *Near*, 283 U.S. at 713 (permanent injunction on publication of defamatory speech unconstitutional). The presumption against prior restraints is not any less vigorous because the government acts pursuant to an antifraud provision as in this case.

III. At The Very Least, The First Amendment Implications Of The Ruling Below Require Narrowly Reading The "In Connection With" Requirement Of Section 10(b)

In *Lowe*, the only time this Court has construed a securities statute in relation to the speech of a publishing defendant who did not have fiduciary duties or trade stocks, it found that the publisher was not covered, relying on the constitutional avoidance doctrine to reach this result. This Court interpreted language exempting "bona fide" publishers from the

definition of persons covered under the '40 Act as "investment advisers" who must register prior to offering investment advice. In construing the exemption, the Court looked to the history and purpose of the law:

> The legislative history plainly demonstrates that Congress was primarily interested in regulating the business of rendering personalized investment advice ... On the other hand, Congress, plainly sensitive to First Amendment concerns, wanted to make clear that it did not seek to regulate the press through the licensing of nonpersonalized publishing activities.

Lowe, 472 U.S. at 204.

This Court thus recognized that First Amendment precedent "support[ed] a broad reading of the exclusion." *Id.* at 205. A key consideration was the fact that the '40 Act was passed after the decision in *Near*. As explained in *Lowe*, "In *Near*, the Court emphatically stated that the 'chief purpose' of the press guarantee was 'to prevent previous restraints upon publication.'" *Id.* at 204. The *Lowe* Court made clear that Congress was "undoubtedly aware" of *Near* when it passed the '40 Act, *id.*, and would not have intended the statute to violate recently-articulated constitutional norms. Section 10(b) was also enacted in the wake of *Near*, and respondent is attempting, as it did in *Lowe*, to regulate pure speech in violation of *Near*'s rule against prior restraints.

In this case, petitioners argued that the "in connection with" requirement in Section 10(b) is exactly the sort of loose, ambiguous language that must be confined to avoid constitutional concerns. In *United States v. Cong. of Indus. Orgs.*, 335 U.S. 106 (1948), this Court narrowly read a portion of the Federal Corrupt Practices Act concerning the prohibition of expenditures "in connection with" elections in order to prevent regulation of periodicals published by labor unions. In affirming the dismissal of the indictments, the Court wrote: "[Congress] did not want to pass any legislation that would threaten interferences with the privileges of speech or press. ... The obligation rests also upon this Court in construing congressional enactments to take care to interpret them so as to avoid a danger of unconstitutionality." *Id.* at 120-21.

This Court has thus applied the constitutional avoidance doctrine whether construing a statute to decide what kind of speech activity must be excluded from the law, as in *Lowe*, or what kind cannot be included, as in *CIO*. But the Fourth Circuit ignored *CIO* and misread *Lowe* by creating a meaningless distinction between the "exceptive" language in the '40 Act and the "in connection with" language in Section 10(b). App. 46a. It thus missed the big picture: that this Court construes ambiguity in securities statutes to ensure that they do not violate the First Amendment. *See Morse v. Republican Party of Virginia*, 517 U.S. 186, 245 (1996) (referring to the "narrow[]" reading in *Lowe* as necessary "so as not to impose suspect prior restraints") (Scalia, J., dissenting).

Nothing in the legislative record indicates that Congress intended to apply Section 10(b) to statements made by non-fiduciaries who are not themselves otherwise engaged in securities trading. The legislative history shows that lawmakers were concerned about the speech of publishers only to the extent that they were pretending to give "impartial, disinterested discussion of the stock market" when they were actually financially interested because they were trading stocks or receiving payments from issuers and not disclosing either activity. *See* S. Rep. 792, 73d Cong., 2d Sess. 8 (1934). The securities laws clearly cover these practices, and respondent pursues such cases vigorously today – as it would still be able to do after a reversal of the Fourth Circuit.[3]

The need for this Court's intervention today is even greater than it was in *Lowe*, as Section 10(b), unlike the '40 Act, is not limited to the provision of investment advice. It covers all factual statements about securities and public companies, a much broader category of speech than stock recommendations, and it permits private lawsuits, which the '40 Act does not. With this case, respondent seeks to undo *Lowe* by using a different

[3] The Fourth Circuit again misreads *Lowe* to suggest that this Court held that publishers exempt from the '40 Act remained for all purposes "subject to the coverage of § 10(b)." App. 46a. The cited footnote from *Lowe* addresses cases involving newspaper and newsletter writers who traded the stocks they recommended by "scalping" or "front running" – purchasing a security prior to publication and selling later at a profit – a course of conduct in which the defendants' own trading coincided with their speech and thus triggered the statute.

and more dangerous regulatory instrument and to regain the editorial control over disinterested investment and financial writing that this Court properly took away from it 25 years ago.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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