No. 09-1176

IN THE

Supreme Court of the United States

APR 29 2010

PIRATE INVESTOR LLC AND
FRANK PORTER STANSBERRY,

Petitioners,

v.

UNITED STATES SECURITIES AND
EXCHANGE COMMISSION,

Respondent.

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

BRIEF OF INVESTORPLACE MEDIA, LLC; ALM MEDIA, LLC; CNBC, INC.; THE E.W. SCRIPPS COMPANY; EAGLE PUBLISHING, INC.; THE FINANCIAL PUBLISHERS ASSOCIATION; FORBES LLC; GANNETT COMPANY, INC.; THE HEARST CORPORATION; LANDMARK MEDIA ENTERPRISES, LLC; LEE ENTERPRISES, INC.; THE MCCLATCHY COMPANY; MEDIA GENERAL, INC.; THE NEW YORK TIMES COMPANY; THE NEWSPAPER ASSOCIATION OF AMERICA; AND WP COMPANY LLC AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
I. THE DECISION BELOW AFFIRMING LIABILITY UNDER SECTION 10(b) AGAINST A DISINTERESTED PUBLISHER RAISES SIGNIFICANT QUESTIONS UNDER THE FIRST AMENDMENT	3
II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISIONS REFLECTING THE LIMITED SCOPE OF SECTION 10(b)	9
III. THE CANON OF CONSTITUTIONAL AVOIDANCE REQUIRES THAT SECTION 10(b) BE INTERPRETED TO AVOID THE CONSTITUTIONAL CONCERNS THAT ARISE IF SECTION 10(b) WERE INTERPRETED TO APPLY TO DISINTERESTED PUBLISHERS	14
CONCLUSION	22
APPENDIX: LIST OF *AMICI CURIAE*	1a

TABLE OF AUTHORITIES

CASES Page

Affiliated Ute Citizens v. *United States*, 406 U.S. 128 (1972) 10
Anderson v. *Liberty Lobby, Inc.*, 477 U.S. 242 (1986) 5
BE&K Constr. Co. v. *NLRB*, 536 U.S. 516 (2002) 16, 17
Bose Corp. v. *Consumers Union of United States, Inc.*, 466 U.S. 485 (1984) 5
Cent. Bank of Denver v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994) 10, 13, 19
Chevron U.S.A., Inc. v. *NRDC, Inc.*, 467 U.S. 837 (1984) 16
Chiarella v. *United States*, 445 U.S. 222 (1980) 10, 11, 19
Clark v. *Martinez*, 543 U.S. 371 (2005) 15
Dirks v. *SEC*, 463 U.S. 646 (1983) 11, 12
Edward J. DeBartolo Corp. v. *Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568 (1988) 2, 15, 16, 17
Gertz v. *Robert Welch, Inc.*, 418 U.S. 323 (1974) 3, 5, 6
Gooding v. *Wilson*, 405 U.S. 518 (1972) 4
Hooper v. *California*, 155 U.S. 648 (1895) 15
Hustler Magazine, Inc. v. *Falwell*, 485 U.S. 46 (1988) 6
Illinois ex rel. Madigan v. *Telemktg. Assocs.*, 538 U.S. 600 (2003) 6, 7, 20
Kingsley Books, Inc. v. *Brown*, 354 U.S. 436 (1957) 9
Lowe v. *SEC*, 472 U.S. 181 (1985) 3, 4, 5, 15
Marine Bank v. *Weaver*, 455 U.S. 551 (1982) 10

TABLE OF AUTHORITIES—continued

Page

Merrill Lynch, Pierce, Fenner & Smith Inc. v. *Dabit*, 547 U.S. 71 (2006) 20

NAACP v. *Button*, 371 U.S. 415 (1963) 4

Near v. *Minnesota ex rel. Olson*, 283 U.S. 697 (1931) 8

Neb. Press Ass'n v. *Stuart*, 427 U.S. 539 (1976) 9

N.Y., New Haven & Hartford R.R. v. *ICC*, 200 U.S. 361 (1906) 9

N.Y. Times v. *Sullivan*, 376 U.S. 254 (1964) 4, 5, 7, 20

NLRB v. *Catholic Bishop*, 440 U.S. 490 (1979) 15, 16, 17, 19

NLRB v. *Express Publ'g Co.*, 312 U.S. 426 (1941) 9

Org. for a Better Austin v. *Keefe*, 402 U.S. 415 (1971) 8

SEC v. *Lowe*, 556 F. Supp. 1359 (E.D.N.Y. 1983), *rev'd*, 725 F.2d 892 (2d Cir. 1984), *rev'd*, 472 U.S. 181 (1985) 4

SEC v. *Zandford*, 535 U.S. 813 (2002). 12, 13, 20

Solid Waste Agency v. *United States Army Corps of Eng'rs*, 531 U.S. 159 (2001)....... 16, 19

Southeastern Promotions, Ltd. v. *Conrad*, 420 U.S. 546 (1975) 8, 9

St. Amant v. *Thompson*, 390 U.S. 727 (1968) 6

Stoneridge Inv. Partners, LLC v. *Scientific-Atlanta, Inc.*, 552 U.S. 148 (2008) 14

Time, Inc. v. *Hill*, 385 U.S. 374 (1967) 6

Touche Ross & Co. v. *Redington*, 442 U.S. 560 (1979) 10

United States v. *O'Hagan*, 521 U.S. 642 (1997) 10, 12

TABLE OF AUTHORITIES—continued

Page

United States v. *Stevens*, No. 08-769 (U.S. Apr. 20, 2010) 21

United States ex rel. Attorney Gen. v. *Del. & Hudson Co.*, 213 U.S. 366 (1909) 15

Vance v. *Universal Amusement Co.*, 445 U.S. 308 (1980) 8

Zadvydas v. *Davis*, 533 U.S. 678 (2001) 16, 19, 20

CONSTITUTION, STATUTE, AND REGULATION

U.S. Const. amend. I 3

15 U.S.C. § 78j(b) 10

17 C.F.R. § 240.10b-5 (2000) 10

INTEREST OF *AMICI CURIAE*[1]

Amici curiae include publishers and operators of major national newspapers, magazines, broadcast stations, cable networks, newsletters, and Internet sites, as well as two associations. *Amici* publish commentary, financial news, and investment analysis, including disinterested analysis of the performance of public companies and marketable securities. Their publications increase public access to and awareness of information relating to individual companies and broad market trends. Although *amici* do not tailor their publications to provide specific advice to individual investors, *amici* nonetheless expect that individual investors will often rely on information *amici* publish when making investment decisions. *Amici* are listed individually in an appendix to this brief.

Amici appear in support of Petitioners because they are concerned that the decision below expands the scope of Section 10(b) of the Securities Exchange Act of 1934 so greatly that it will undermine their ability to continue providing the public with disinterested analysis of public companies. If disinterested publishers like *amici* can be subject to federal liability for securities fraud based on errors in their

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amici curiae*, their members, and their counsel, made any monetary contribution towards the preparation and submission of this brief. Pursuant to Supreme Court Rule 37.2(a), *amici curiae* certify that counsel of record for Petitioners and Respondent received notice at least 10 days prior to the due date of *amici curiae*'s intention to file this brief and have consented to its filing in letters on file with the Clerk's office.

reporting, without such protections as the requirement that "actual malice" be established by clear and convincing evidence, *amici* may be chilled from publishing future financial reports and investment analysis. *Amici* thus have a vital interest in this Court's decision whether to grant certiorari and reverse the decision below.

SUMMARY OF ARGUMENT

Review is warranted because the court of appeals' expansive interpretation of Section 10(b) of the Securities Exchange Act of 1934 conflicts with this Court's cases establishing the "cardinal principle" that "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp.* v. *Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (citing *NLRB* v. *Catholic Bishop*, 440 U.S. 490, 499-501, 504 (1979)).

In refusing to apply the canon of constitutional avoidance, the court of appeals made two fundamental errors regarding the First Amendment and Section 10(b) that cannot be reconciled with this Court's cases. First, the court of appeals erred in holding that an allegation of "fraud" renders the First Amendment inapplicable. Pet. App. 48a-49a. Compounding that error, the court of appeals concluded that Section 10(b) is not susceptible of any narrower construction, even though not only a possible reading, but the *better* reading of Section 10(b), is that it does not extend to disinterested publishers in the absence of a sufficient nexus between the alleged fraud and the purchase or sale of a security, such as those identified in this Court's Section 10(b) cases.

As a result, instead of interpreting Section 10(b) to avoid serious constitutional questions, the court of appeals improperly weakened the protections of the First Amendment to accommodate an unnecessarily expansive reading of the statute. See Pet. App. 17a-19a, 41a-49a. The result is that disinterested publishers of financial information—the regulation of whom this Court has held raises "First Amendment concerns," *Lowe* v. *SEC*, 472 U.S. 181, 204 (1985)—now are subject to liability under the federal securities laws without the necessary safeguards afforded by the First Amendment. See Pet. App. 48a-49a. Indeed, in the decision below, the court of appeals affirmed an injunction precluding Petitioners from engaging in speech that later could be deemed to violate the requirements of Section 10(b).

This Court should grant review to ensure that disinterested publishers have sufficient "breathing space" so that their publication of information about the public securities markets is not subject to liability under Section 10(b).

ARGUMENT

I. THE DECISION BELOW AFFIRMING LIABILITY UNDER SECTION 10(b) AGAINST A DISINTERESTED PUBLISHER RAISES SIGNIFICANT QUESTIONS UNDER THE FIRST AMENDMENT.

Under the First Amendment, "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. Const. amend. I. That bedrock guarantee has been interpreted by this Court to ensure that speech is afforded sufficient "'breathing space' essential to [its] fruitful exercise." *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 342 (1974) (quoting *NAACP* v. *Button*, 371 U.S. 415, 433 (1963)). As relevant here, the Court has explained that "[t]he threat of sanctions may deter the[ ] exercise [of First Amendment freedoms] almost as potently as the actual application of sanctions." *Button*, 371 U.S. at 433. That is, "persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions provided by a statute susceptible of application to protected expression." *Gooding* v. *Wilson*, 405 U.S. 518, 521 (1972).

1. Contrary to the decision below, Pet. App. 48a-49a, publication of financial information by a disinterested publisher implicates the protections of the First Amendment. Specifically, the disinterested publisher of financial information in this case was not a party to any securities transaction and owes no fiduciary duty to the issuer, purchaser, or seller of the security. Such a party may not be found liable for the exercise of its rights under the First Amendment without the benefit of the fundamental protections recognized under *New York Times* v. *Sullivan*, 376 U.S. 254 (1964), and other cases.

This Court previously recognized that the First Amendment is implicated when disinterested publishers provide information about publicly traded securities. Thus, the Court has reasoned that "because we have squarely held that the expression of opinion about a commercial product . . . is protected by the First Amendment, it is difficult to see why the expression of an opinion about a marketable security should not also be protected." *Lowe*, 472 U.S. at 210 n.58 (citation omitted). As the district court in that same case noted, "[f]inancial news and analysis is persistently flavored with projected consequences of political events and both may form the predicate for particular investment advice." *SEC* v. *Lowe*, 556 F.

Supp. 1359, 1367 (E.D.N.Y. 1983). The speech at issue in this case, which involves projections as to how a major international event would affect a publicly-traded company, is a prime example of speech presumptively protected by the First Amendment. Indeed, the *Lowe* Court explained that Congress, when it exempted financial publications of general circulation from the registration requirement otherwise applicable to "investment adviser[s]" was "plainly sensitive to First Amendment concerns." 472 U.S. at 204.

To provide protected speech with the requisite "breathing space," this Court has mandated that significant protections be employed to ensure that First Amendment rights are not deterred or chilled. Thus, in *New York Times* v. *Sullivan*, this Court recognized a "federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice.'" 376 U.S. at 279-80. That showing must be made by clear and convincing evidence, both at summary judgment and during trial, see *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986), and is subject to independent appellate review, *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U.S. 485, 505, 513 (1984).

As this Court has explained, "[a]though the erroneous statement of fact is not worthy of constitutional protection, it is nevertheless inevitable in free debate[,] . . . [a]nd punishment of error runs the risk of inducing a cautious and restrictive exercise of the constitutionally guaranteed freedoms of speech and press." *Gertz*, 418 U.S. at 340. These protections are necessary (even when speech is alleged to be false) because "[t]he First Amendment requires that we protect some falsehood in order to protect speech that matters." *Id.* at 341.

Here, the court of appeals' imposition of liability under Section 10(b) without First Amendment safeguards raises serious constitutional concerns under this Court's First Amendment precedent. Specifically, the "actual malice" standard set forth in *New York Times* applies equally to other causes of action that the Court has concluded threaten to deny private parties the "'breathing space'" necessary to support First Amendment principles. See *Hustler Magazine, Inc.* v. *Falwell*, 485 U.S. 46, 56 (1988) (suits by public figures for intentional infliction of emotional distress); *Time, Inc.* v. *Hill*, 385 U.S. 374, 390-91 (1967) (suits for false-light invasion of privacy). Application of those protections to actions under Section 10(b) against disinterested publishers is likewise necessary because in order "to insure the ascertainment and publication of the truth about public affairs, it is essential that the First Amendment protect some erroneous publications as well as true ones." *St. Amant* v. *Thompson*, 390 U.S. 727, 732 (1968).

2. Although "the First Amendment does not shield fraud," *Illinois ex rel. Madigan* v. *Telemktg. Assocs.*, 538 U.S. 600, 612 (2003), it is likewise accepted that "labeling an action one for 'fraud,' of course, will not carry the day." *Id.* at 617. To be sure, the First Amendment does not provide a "blanket exemption from fraud liability" in all circumstances, but it does impose "proof requirements" that are necessary "to provide sufficient breathing room for protected speech." *Id.* at 620-21. As a result, false statements about a public official, though themselves not valuable, are afforded the protection of a heightened standard of proof to ensure that protected

speech is not chilled. *N.Y. Times*, 376 U.S. at 271-72. These principles apply as well to claims under Section 10(b) to ensure that disinterested speech about the markets is not chilled.

For example, in *Telemarketing Associates*, this Court held that although charitable solicitation is entitled to First Amendment protections, an Illinois statute that prohibited fundraisers from making affirmative false statements about how the money would be used did not "impermissibly chill protected speech." 538 U.S. at 619. In so doing, the Court explained that the conduct at issue fell within a "solid core" of fraud actions not prohibited by the First Amendment because, under the Illinois law, (i) a "[f]alse statement alone does not subject a fundraiser to fraud liability"; (ii) "the State bears the full burden of proof" to establish its case "by clear and convincing evidence," and (iii) the State further must show "the defendant made the representation with the intent to mislead the listener, and succeeded in doing so." *Id.* at 620. Moreover, the Court reserved judgment on the question whether a fraud action against charitable solicitors would violate the First Amendment if a finding resembling "'actual malice'" were not required. *Id.* at 621 n.10.

The court of appeals below was presented with the analogous question whether, absent these First Amendment protections, an action under Section 10(b) against disinterested publishers relating to opinions about the markets raises significant questions under the First Amendment. The court of appeals concluded that the First Amendment was irrelevant simply because the underlying claim was for "actual fraud." Pet. App. 49a. That analysis, however, is contrary to this Court's cases which explain that First Amendment protections apply even in cases where the speech at issue is alleged to be inaccurate or even false.

3. These same constitutional concerns apply with even *greater* force here because the court of appeals allowed the government to obtain an injunction barring Petitioners from "violating, directly or indirectly, Section 10(b) . . . and Rule 10b-5." Pet. App. 115a-116a. Although this injunction may track the statutory prohibition, "[t]he presumption against prior restraints is heavier—and the degree of protection broader—than that against limits on expression imposed by criminal penalties." *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 558-59 (1975). Thus, "[a]ny prior restraint on expression comes to this Court with a 'heavy presumption' against its constitutional validity." *Org. for a Better Austin* v. *Keefe*, 402 U.S. 415, 419 (1971). See also *Near* v. *Minnesota ex rel. Olson*, 283 U.S. 697, 713 (1931) (It is "the essence of censorship" for the government to impose *ex ante* restraints that force a publisher "to satisfy the judge that the [published material is] true and [is] published with good motives.").

The court of appeals found that the injunction here overcame this "heavy presumption" because it "only enjoins [Petitioners] from engaging in securities fraud, which . . . is unprotected speech." Pet. App. 50a. But the injunction impermissibly leaves it for Petitioners to guess what conduct falls within its scope, as the order prohibits unspecified future speech that no court has yet determined to be fraudulent.[2] See *Vance* v. *Universal Amusement Co.*,

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[2] This problem is compounded by the indeterminate breadth of the injunction, which prohibits Petitioners, upon penalty of contempt, from violating a statute that the court of appeals held

445 U.S. 308, 316 (1980) (per curiam) (invalidating statute that "authorizes prior restraints of indefinite duration on the exhibition of motion pictures that *have not been finally adjudicated* to be obscene" (emphasis added)); compare *Kingsley Books, Inc.* v. *Brown* 354 U.S. 436, 437 (1957) (upholding state law authorizing a "'limited injunctive remedy'" prohibiting "the sale and distribution of written and printed matter found *after due trial* to be obscene" (emphasis added)). This injunction runs a grave risk of chilling permitted speech, as "the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable." *Southeastern Promotions*, 420 U.S. at 559. Indeed, the potential damage is "particularly great" in this case because "the prior restraint falls upon the communication of news and commentary on current events." *Neb. Press Ass'n* v. *Stuart*, 427 U.S. 539, 559 (1976).

II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISIONS REFLECTING THE LIMITED SCOPE OF SECTION 10(b).

The Fourth Circuit's expansion of Section 10(b) to extend to disinterested publishers of impersonal investment advice is inconsistent with the limitations on liability that this Court has recognized in its cases interpreting Section 10(b).

Section 10(b) makes it "unlawful for any person . . . [t]o use or employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive

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to require application of a multi-factored test to determine its coverage. *See* Pet. App. 21a-47a. Even when the First Amendment has not been implicated, this Court has held such "obey the law" injunctions to be impermissibly broad. *E.g.*, *NLRB* v. *Express Publ'g Co.*, 312 U.S. 426, 435-36 (1941); *N.Y., New Haven & Hartford R.R.* v. *ICC*, 200 U.S. 361, 404 (1906).

device or contrivance in contravention of such rules and regulations as the [SEC] may prescribe." 15 U.S.C. § 78j(b).[3] The Court has cautioned that Section 10(b) should not be construed so broadly to transform every common law fraud claim into a Section 10(b) violation. See *Marine Bank* v. *Weaver*, 455 U.S. 551, 556 (1982) ("Congress, in enacting the securities laws, did not intend to provide a broad federal remedy for all fraud"). Thus, as explained in *Chiarella* v. *United States*, 445 U.S. 222 (1980), "not every instance of financial unfairness constitutes fraudulent activity under § 10(b)." *Id.* at 232. Rather, Section 10(b) should not be read "'more broadly than its language and the statutory scheme reasonably permit.'" *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 578 (1979). Although Section 10(b) should be "'flexibly'" construed, see *Affiliated Ute Citizens* v. *United States*, 406 U.S. 128, 151 (1972), its scope has been limited repeatedly by this Court. See *Cent. Bank of Denver* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 180 (1994).

1. In *Chiarella* v. *United States*, 445 U.S. 222 (1980), an employee of a New York financial printer deduced the identity of corporate takeover targets from the confidential offering documents prepared by his firm. *Id.* at 224. He subsequently purchased stock in the target companies and sold the shares at a considerable profit immediately after the public announcement of the takeovers. *Id.* The Court

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[3] Rule 10b-5 implements Section 10(b) and forbids the use, "in connection with the purchase or sale of any security," of "any device, scheme or artifice to defraud" or any other "act, practice, or course of business" that operates as fraud or deceit. 17 C.F.R. § 240.10b-5 (2000). Rule 10b-5 encompasses only conduct that is already prohibited under Section 10(b). *United States* v. *O'Hagan*, 521 U.S. 642, 651 (1997).

reasoned that he had not received any confidential information from the target companies, had no prior dealings with them, was neither a fiduciary nor their agent, and was not a corporate insider. *Id.* at 232. The Court rejected a general duty of all participants in market transactions to forgo actions based on material, nonpublic information, finding that such a broad duty "departs radically from the established doctrine that duty arises from a specific relationship between two parties." *Id.* at 233.

Similarly, in *Dirks* v. *SEC*, 463 U.S. 646 (1983), the Court declined to impose Section 10(b) liability absent a finding of a specific relationship between the parties. The issue in *Dirks* was whether a person had a fiduciary duty to shareholders when he had not personally traded based on material non-public information, but had simply conveyed the information to others. The defendant, an officer of a securities broker dealer, had been informed by a corporate insider that the corporation's assets were vastly overstated due to fraudulent practices. *Id.* at 649. The defendant discussed what he had learned with several investors, some of whom sold their securities in the corporation. *Id.* The price of the corporation's stock fell, and the SEC charged the defendant with aiding and abetting by repeating the fraud allegations to members of the investment community. *Id.* at 650-51.

Citing *Chiarella*, the Court reaffirmed that the duty to disclose under Section 10(b) arises from the existence of a fiduciary relationship. *Id.* at 654. The Court determined that the tippee could not be held liable for securities fraud simply because he helped others to trade in securities based on material, nonpublic information. *Id.* at 655. Unlike corporate insiders, who have an independent fiduciary relationship to both the corporation and its shareholders, the Court reasoned that the petitioner here was a "stranger" to the corporation who derived no personal benefit from whether or not the investors sold their stock. *Id.* at 665-67. The Court explained that extending liability to tippees who had no fiduciary duty would "have no limiting principle." *Id.* at 664.

2. The Court also has imposed limitations on Section 10(b) liability based on whether an individual has purchased or sold securities. Thus, in *United States* v. *O'Hagan*, 521 U.S. 642 (1997), a partner at a law firm misappropriated information regarding a firm client who was considering a potential tender offer for Pillsbury Company's common stock. The partner reaped a substantial profit after he purchased Pillsbury securities, and then sold his stock once the company announced its tender offer. The Court held that the partner was liable under Section 10(b), noting that "it [is O'Hagan's] failure to disclose *his personal trading* to [his firm], in breach of his duty to do so, that made his conduct 'deceptive' within the meaning of § 10(b)." *Id.* at 660 (emphasis added and alterations omitted). The Court further reasoned that, "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." *Id.* at 656 (emphasis added). Thus, the Court made clear that liability turned on the petitioner's trading activities.

Similarly, in *SEC* v. *Zandford*, 535 U.S. 813 (2002), the Court held that a broker's sale of a customers' securities with the intent to misappropriate the proceeds constituted fraud in violation of Section

10(b). In *Zandford*, an unscrupulous broker persuaded an elderly client to open a joint investment account for himself and his mentally retarded daughter. *Id.* at 815. The client gave the broker full discretion to manage the account as well as the power of attorney to trade securities without his prior approval. *Id.* It was later discovered that the broker at various times had transferred money from the client's account to his own. *Id.* The Court held that the broker's actions satisfied the requirement that there be a purchase or sale of a security because "a broker *who accepts payment for securities* that he never intends to deliver, or *who sells customer securities* with intent to misappropriate the proceeds," has acted "'in connection with the purchase or sale of any security.'" *Id.* at 819-20. (emphases added). The Court further noted that fraud unattached to any particular purchase or sale—such as outright embezzlement from the client's account—would *not* meet the requirement. *Id.* at 820.

3. Finally, the Court has refrained from imposing Section 10(b) liability on secondary actors whose actions were removed from the securities trading. In *Central Bank of Denver* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994), the Court determined that the text of Section 10(b) made clear that there is no private right of action for aiding and abetting under the statute. *Id.* at 191-92. The Court held that "[i]t is inconsistent with settled methodology in § 10(b) cases to extend liability beyond the scope of conduct prohibited by the statutory text." *Id.* at 177. In doing so, the Court expressed concern that broadening the scope of the statute to secondary actors would offer little predictive value in determining liability and would likely result in excessive and "'vexatious[ ]'" litigation. *Id.* at 189.

Most recently, in *Stoneridge Inv. Partners, LLC* v. *Scientific-Atlanta, Inc.*, 552 U.S. 148 (2008), the Court reaffirmed that Section 10(b) liability could not extend to secondary actors who had not personally participated in securities trading. In *Stoneridge*, the plaintiffs alleged that business partners of Charter Communications violated Section 10(b) by engaging in sham transactions with Charter as well as disregarding Charter's intention to report inflated revenue from these transactions in its public financial statements. *Id.* at 153. Although the business partners knowingly engaged in the underlying fraud, they had no role in preparing or distributing the company's financial statements. *Id.* at 155. The Court refused to extend liability under Section 10(b) to this conduct because "the implied cause of action would reach the whole marketplace in which the issuing company does business; and there is no authority for this rule." *Id.* at 160. The Court cautioned that Section 10(b) "does not reach all commercial transactions that are fraudulent and affect the price of a security in some attenuated way." *Id.* at 162.

Taken together, the Court's Section 10(b) cases confirm that limitations on the scope of liability are entirely in keeping with the "flexible" approach that the Court has applied to this provision.

III. THE CANON OF CONSTITUTIONAL AVOIDANCE REQUIRES THAT SECTION 10(b) BE INTERPRETED TO AVOID THE CONSTITUTIONAL CONCERNS THAT ARISE IF SECTION 10(b) WERE INTERPRETED TO APPLY TO DISINTERESTED PUBLISHERS.

This Court has long recognized "[t]he elementary rule . . . that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *Hooper* v. *California*, 155 U.S. 648, 657 (1895). This Court has explained that because "Congress, like this Court, is bound by and swears an oath to uphold the Constitution[,] .... courts will therefore not lightly assume that Congress intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden it." *Edward J. DeBartolo Corp.*, 485 U.S. at 575. Moreover, because it would be improper for a court to answer a constitutional question that the statute at issue does not actually raise, "the rule plainly must mean" that courts should, if possible, avoid not only constructions that actually violate the Constitution, but those under which "grave and doubtful constitutional questions arise." *United States ex rel. Attorney Gen.* v. *Del. & Hudson Co.*, 213 U.S. 366, 408 (1909). This, too, reflects this Court's conclusion that "Congress, which has always sworn to protect the Constitution, would err on the side of fundamental constitutional liberties when its legislation implicates those liberties." *Lowe*, 472 U.S. at 206 n.50 (internal quotation marks omitted).

As a result, the lower courts are obligated to avoid statutory constructions that raise serious constitutional questions "if *any* other possible construction remains available." *Catholic Bishop*, 440 U.S. at 500 (emphasis added). In making that determination, a court should look to the "statute's text read in light of its purpose." *Clark* v. *Martinez*, 543 U.S. 371, 385 (2005) (citing *Zadvydas* v. *Davis*, 533 U.S. 678, 697-99 (2001)). Further, courts must not "lightly assume that Congress intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden it." *Edward J. DeBartolo Corp.*, 485 U.S. at 575. Rather, "there must be present the affirmative intention of the Congress clearly expressed." *Catholic Bishop*, 440 U.S. at 500 (internal quotation marks omitted).

For instance, in *Zadvydas*, this Court held that even though a purpose of a statute that permitted the Attorney General to detain certain aliens was "protecting the community from dangerous aliens," it was not "clear" that Congress intended "to grant the Attorney General the power to hold *indefinitely* in confinement" such aliens. 533 U.S. at 696-97. Likewise, in *Catholic Bishop*, this Court interpreted the jurisdiction of the National Labor Relations Board not to extend to lay teachers at religious schools, thereby avoiding serious First Amendment questions, even "while acknowledging the broad scope of the grant of jurisdiction." 440 U.S. at 499. Indeed, even when Congress intends for ambiguities in a statute to be interpreted by an administrative agency rather than the courts, courts nonetheless will not defer under *Chevron U.S.A., Inc.* v. *NRDC, Inc.*, 467 U.S. 837 (1984), to agency interpretations that raise avoidable constitutional questions. See *Solid Waste Agency* v. *United States Army Corps of Eng'rs*, 531 U.S. 159, 172-73 (2001). In such cases, the Court has adopted the "assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority." *Id.*; see *Edward J. DeBartolo Corp.*, 485 U.S. at 575.

This Court has repeatedly applied these interpretive principles to construe federal statutes and regulations in a manner that would avoid difficult questions under the First Amendment. Thus, in *BE&K Constr. Co.* v. *NLRB*, 536 U.S. 516 (2002), the Court held that a "facially . . . broad" statute that prohibited employers from interfering with employees' exercise of rights under the National Labor Relations Act ("NLRA") did not prohibit employers from filing lawsuits in retaliation for the exercise of those rights, even where the lawsuits ultimately prove unsuccessful, because such a prohibition would raise serious questions under the First Amendment. *Id.* at 536. Likewise, in *Edward J. DeBartolo Corp.*, the Court held that a different provision of the NLRA did not regulate the distribution of handbills by union members seeking to influence a tenant to stop dealing with a nonunion contractor, even though such activity fell within the broad terms of the statute, because such regulation would be constitutionally suspect. 485 U.S. at 575, 588. And, in *Catholic Bishop*, the Court interpreted the NLRA not to apply to schools operated by churches, thereby avoiding "sensitive questions arising out of the guarantees of the First Amendment Religion Clauses." 440 U.S. at 507.

2. In light of the serious constitutional questions that its interpretation of Section 10(b) raises under the First Amendment, the court of appeals should have avoided that interpretation in favor of "*any* other possible construction." *Id.* at 500 (emphasis added). See also *Edward J. DeBartolo Corp.*, 485 U.S. at 575 (a court should resort to "'every reasonable construction'" of a statute before ruling on its constitutionality). Instead, the court of appeals read the statute's "in connection with" element expansively: Under its analysis, the element was satisfied in this case because (i) the purchase of securities was said to be "'necessar[y]'" to the sale of Petitioners' report, since an uptick in stock purchases would generate increased interest in the report, Pet. App. 26a-30a; (ii) Petitioners "intended" for their readers to purchase the security at issue, *id.* at 32a-

33a; and (iii) Petitioners knew that their readers were likely to rely on their investment advice, *id.* at 33a-41a.

The court of appeals' analysis would likely apply equally to any regularly-followed financial commentator who provided advice pertaining to a particular security. As a result, if the basis for any such opinion were, in hindsight, shown to be incorrect, the commentator could be subject to suit under Section 10(b)—without any First Amendment protections—for providing his or her readers commentary regarding a marketable security.

The court of appeals held that the constitutional avoidance doctrine was inapplicable because Section 10(b) could not be read any more narrowly. Pet. App. 41a-47a. But, as explained above, under this Court's cases, Section 10(b) is *best* interpreted as requiring a significant nexus between the alleged fraud and the purpose or sale of a security. See *supra* 9-14. When a disinterested publisher sells non-personalized investment advice, the transaction is complete regardless whether any securities are actually bought or sold. Had the court of appeals interpreted such transactions not to satisfy the statutory nexus requirement, it could have avoided the imposition of Section 10(b) liability—which does not afford defendants protections like an "actual malice" standard, a requirement of proof by clear and convincing evidence, or independent appellate review—to publications that Court recognized in *Lowe* to be protected by the First Amendment.

The court of appeals' reasons for finding its expansive interpretation compelled by the statute are fundamentally at odds with this Court's precedent. First, the court of appeals noted that unlike the provision at issue in *Lowe*, which specifically excluded certain disinterested publishers, Section 10(b) "applies to *any person*" and therefore should be read to include disinterested publishers. Pet. App. 46a (emphasis in original). But Section 10(b) has not been applied to support liability against "any person." It applies to any person *who satisfies the statute's elements*. Thus, Section 10(b) does not apply, for example, to aiders and abettors, *Cent. Bank*, 511 U.S. at 177-78, or non-fiduciaries with no duty to disclose, *Chiarella*, 445 U.S. at 232. Whether a person is subject to the requirements of Section 10(b) further depends on satisfaction of the "in connection requirement."

Second, the court of appeals held the avoidance doctrine inapplicable to its construction of Section 10(b) because it concluded that, under this Court's precedent, "Congress intended the requirement to be flexible," Pet. App. 46a, and legislated with the purpose of "providing a flexible regime for addressing new, perhaps unforeseen, types of fraud," *id.* at 47a. That holding cannot be reconciled with the constitutional avoidance doctrine, which requires that a statute will not be interpreted in a manner that raises a serious constitutional question unless "the affirmative intention of the Congress [is] clearly expressed." *Catholic Bishop*, 440 U.S. at 500 (internal quotation marks omitted). The presumption that Congress does not intend to enact legislation raising serious constitutional questions thus can override a general statutory objective, *Zadvydas*, 533 U.S. at 696-97, and limit the range of permissible interpretations available to administrative agencies, *Solid Waste Agency*, 531 U.S. at 172-73. Under this precedent, a general congressional intent that the securities laws be interpreted flexibly, without more, provides no basis to conclude that Congress intended to extend liability under Section 10(b) to disinterested publishers of financial information about the public securities markets.

Moreover, the court of appeals did not mention or attempt to distinguish the multiple limitations that this Court has held to be consistent with Section 10(b)'s "flexible" purpose. It failed to note the countervailing principle that "the statute must not be construed so broadly as to convert every common-law fraud that happens to involve securities into a violation of § 10(b)." *Zandford*, 535 U.S. at 820. Cf. *Zadvydas*, 533 U.S. at 696-97 (holding that Congress did not authorize the indefinite detention of removable aliens, even though one statutory purpose supported the practice, where another statutory purpose undermined it). The court further failed to acknowledge that a broad interpretation of the "in connection with" requirement is certainly not compelled by the text of Section 10(b). See *Merrill Lynch, Pierce, Fenner & Smith Inc.* v. *Dabit*, 547 U.S. 71, 85 (2006) ("A narrow construction would not, as a matter of first impression, have been unreasonable . . . .").

3. The potential chilling effects of the decision below are significant. The court of appeals found the First Amendment inapplicable to this case because it involved allegations of "actual fraud," Pet. App. 49a, but it failed to recognize that under the First Amendment, the initial determination whether otherwise protected speech constitutes unprotected "actual fraud" must be made while providing such evidentiary protections as the requirement that "actual malice" be proven through clear and convincing evidence. See *N.Y. Times*, 376 U.S. at 279-80; *Telemktg. Assocs.*, 538 U.S. at 620.

Without these protections, any publisher of disinterested investment analysis stands at risk that it could face liability under Section 10(b) if, as happened in this case, one of its sources were later to disclaim having made a statement attributed to that source in the publication. See Pet. App. 12a-13a & n.11, 47a (explaining that the relevant false statement was that Petitioners based their information on statements from a source, a fact that the district court deemed false based on a credibility determination). The risk is particularly great when scienter can be inferred merely from the fact that a disputed statement in a conversation was found—by a preponderance of the evidence—not to have been made. *Id.* at 16a-20a.

If the court of appeals' error is left uncorrected, the extent of this risk will be limited only by the enforcement discretion of the SEC. "But the First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*." *United States* v. *Stevens*, No. 08-769, slip op. at 18 (U.S. Apr. 20, 2010). The court of appeals has granted the SEC unprecedented authority under Section 10(b), and it is cold comfort to publishers to hope that the SEC will operate within narrower constraints than the court's interpretation allows. Just as this Court "would not uphold an unconstitutional statute merely because the Government promised to use it responsibly," *id.* (citing *Whitman* v. *Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 473 (2001)), neither should it allow to stand an unconstitutionally broad interpretation of Section 10(b) that raises serious issues under the First Amendment.

CONCLUSION

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

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