No. ______

In the Supreme Court of the United States

FRANCIS V. LORENZO,
Petitioner,
v.

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

Robert G. Heim
Counsel of Record
Meyers & Heim LLP
1350 Broadway, Suite 514
New York, NY 10018
(212) 355-7188
rheim@meyersandheim.com

Counsel for Petitioner

QUESTION PRESENTED

The antifraud provisions of the federal securities laws prohibit two well-defined categories of misconduct. One category is the use of *fraudulent statements* in connection with the offer and sale of securities. The other category is employing *fraudulent schemes* in connection with the offer and sale of securities. In *Janus Capital Group, Inc. v. First Derivative Traders*, 564 U.S. 135 (2011), this Court considered the elements of a fraudulent statement claim and held that only the "maker" of a fraudulent statement may be held liable for that misstatement under Section 10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b-5(b).

The question presented is whether a misstatement claim that does not meet the elements set forth in *Janus* can be repackaged and pursued as a fraudulent scheme claim. The Circuits have split 3-2 on this question. The Second, Eighth and Ninth Circuits have held that a misstatement alone cannot be the basis of a fraudulent scheme claim, while the DC Circuit and the Eleventh Circuit have held that a misstatement standing alone can be the basis of a fraudulent scheme claim.

PARTIES TO THE PROCEEDING

All parties to the proceeding are named in the caption.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES vi

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY AND REGULATORY PROVISIONS INVOLVED 2

STATEMENT 4

REASONS TO GRANT THE PETITION 13

A. There is a Split Among the Courts of Appeals On Whether Inadequate Claims for Misstatements Can be Repackaged as Claims for Fraudulent Schemes 13

1. The *Janus* Decision Sets Forth a Clear Bright Line Test for Misstatement Liability Under the Federal Securities Laws 15

2. The Majority View is that Inadequate False Statement Claims Cannot be Repackaged as Fraudulent Scheme Claims 17

3. The Minority View is that False Statements Standing Alone Can Be the Basis for Fraudulent Scheme Claims 20

B. This Case Presents an Ideal Vehicle For Resolving A Recurring Legal Issue of Unquestionable Importance to the Fair and Uniform Enforcement of the Federal Securities Laws 21

C. The DC Circuit's Decision is Wrong 23

1. Mere Misstatements Standing Alone Cannot Be The Basis of Fraudulent Scheme Claims Under the Federal Securities Laws 24

2. The DC Circuit's Decision Erases the Distinction between Primary and Secondary Liability Under the Federal Securities Laws and Greatly Expands the Number of Defendants Who Qualify as Primary Violators 25

3. The DC Circuit's Holding Eviscerates this Court's Bright Line Holding in *Janus* by Permitting Plaintiffs To Repackage Misstatement Claims That Do Not Meet the *Janus* Requirements as Fraudulent Scheme Clams 28

4. The DC Circuit Erroneously Held that Lorenzo's Ministerial Acts in Forwarding An Email to Two People Provided a Basis for Fraudulent Scheme Liability 30

CONCLUSION 32

APPENDIX

Appendix A Opinion and Dissenting Opinion of the United States Court of Appeals for the District of Columbia Circuit (September 29, 2017) . . . . App. 1

Appendix B Opinion and Order Sustaining Disciplinary Action of the Securities and Exchange Commission (April 29, 2015) . . . . App. 51

Appendix C Initial Decision of the Securities and Exchange Commission (December 31, 2013) . . . . App. 98

TABLE OF AUTHORITIES

CASES

Amgen Inc. v. Connecticut Retirement Plans and Trust Funds, 568 U.S. 455 (2013) 4

Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164 (1994) . . . . *passim*

Desai v. Deutsche Bank Sec., Ltd., 573 F.3d 931 (9th Cir. 2009) 5, 18, 19, 24

Flannery v. SEC, 810 F.3d 1 (1st Cir. 2012) 23

Global Crossing Ltd. Sec. Litig., 322 F. Supp. 2d 319 (S.D.N.Y. 2004) 26

Janus Capital Group, Inc. v. First Derivative Traders, 564 U.S. 135 (2011) . . . . *passim*

Lautenberg Found. v. Madoff, 2009 WL 2928913 (D.N.J. Sept. 9, 2009) 22

Lentell v. Merrill Lynch & Co., 396 F. 3d 161 (2d Cir. 2005) 17, 29, 31

In re DVI, Inc. Sec. Litig., 639 F.3d 623 (3d Cir. 2011) 4, 20

In re Lernout & Hauspie Sec. Litig., 230 F. Supp. 2d 152 (D. Mass. 2002) 27

In re Nat'l Century Fin. Enters., Inc. Inv. Litig., 2006 WL 469468 (S.D.Ohio Feb. 27, 2006) 19

In re Parmalat Sec. Litig., 376 F. Supp. 2d 472 (S.D.N.Y 2005) 29

In the Matter of John P. Flannery and James D. Hopkins (Exchange Act Release No. 73840, 2014 WL 7145625 (Dec. 15, 2014) 23

Public Pension Fund Group v. KV Pharmaceutical Co., 679 F.3d 972 (8th Cir. 2012) 19, 20

Santa Fe Industries, Inc. v. Green, 430 U.S. 462 (1977) 15

SEC v. Benger, 931 F. Supp. 2d 904 (N.D. Ill. 2013) 22, 30

SEC v. Big Apple Consulting USA, Inc., 783 F.3d 786 (11th Cir. 2015) 20

SEC v. Familant, 910 F. Supp. 2d 83 (D.D.C. 2012) 23

SEC v. KPMG LLP, 412 F.Supp.2d 349 (S.D.N.Y. 2006) 30, 31

SEC v. Kelly, 817 F. Supp. 2d 340 (S.D.N.Y. 2011) 16, 17, 29, 31

SEC v. Lucent Techs., 610 F.Supp.2d 342 (D.N.J. 2009) 31

SEC v. Monterosso, 756 F.3d 1326 (11th Cir. 2014) 20

SEC v. Perry, 2012 WL 1959566 (C.D. Cal. May 31, 2012) . . . 16

SEC v. PIMCO Advisors Fund Mgmt. LLC, 341 F.Supp.2d 454 (S.D.N.Y. 2004) 31

SEC v. Pentagon Capital Management PLC, 725 F.3d 279 (2d Cir. 2013) 15

Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc., 552 U.S. 148 (2008) 27

WPP Luxembourg Gamma Three Sarl v. Spot Runner, Inc., 655 F.3d 1039 (9th Cir. 2011) 18, 19

STATUTES AND REGULATIONS

15 U.S.C. § 77q(a) . . . . *passim*

15 U.S.C. § 78j . . . . *passim*

15 U.S.C. § 78t(e) 27, 28

28 U.S.C. § 1254(1) 1

17 C.F.R. § 240.10b-5 . . . . *passim*

PETITION FOR A WRIT OF CERTIORARI

Petitioner Francis V. Lorenzo respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The DC Circuit's opinion and Judge Kavanaugh's dissent (Pet. App. 1-50) are reported at 872 F.3d 578 (DC Cir. 2017). The opinion and order of the Securities and Exchange Commission ("SEC") (Pet. App. 51-95) are available at Exchange Act Release No. 74836, 111 S.E.C. Docket 1761 (2015 WL 1927763). The relevant initial decision of the SEC administrative law judge (Pet. App. 96-121) is available at 107 S.E.C. Docket 5934 (SEC Initial Decision Release No. 544, 2013 WL 6858820).

JURISDICTION

The judgment of the Court of Appeals was entered on September 15, 2017. (Pet. App. 1-50). On December 19, 2017, Chief Justice Roberts granted the Petitioner's request to extend the time to file this writ of certiorari to and including January 26, 2018. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 17(a) of the Securities Act of 1933, 15 U.S.C. § 77q(a)

Fraudulent interstate transactions

(a) USE OF INTERSTATE COMMERCE FOR PURPOSE OF FRAUD OR DECEIT It shall be unlawful for any person in the offer or sale of any securities (including security-based swaps) or any security-based swap agreement (as defined in section 78c(a)(78) [1] of this title) by the use of any means or instruments of transportation or communication in interstate commerce or by use of the mails, directly or indirectly—

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j

Manipulative and deceptive devices
It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality

of interstate commerce or of the mails, or of any facility of any national securities exchange—

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, or any securities-based swap agreement 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.

SEC Rule 10b-5, 17 CFR 240.10b-5

Employment of manipulative and deceptive devices.
It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(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.

STATEMENT

1. The antifraud provisions of the federal securities laws prohibit two well-defined categories of misconduct in connection with the offer and sale of securities. One category is the use of *fraudulent statements* in connection with the offer and sale of securities; the other category is employing *fraudulent schemes*. With regard to fraudulent statements, Section 17(a)(2) of the Securities Act of 1933 (the "Securities Act") establishes liability for misstatements and proscribes obtaining money or property by means of any untrue statement or omission of a material fact. Likewise, Section 10(b) of the Securities and Exchange Act of 1934 (the "Exchange Act") and SEC Rule 10b-5(b) thereunder prohibit making any "untrue statement of a material fact. . ."

With regard to *fraudulent schemes*, Section 17(a)(1) of the Securities Act prohibits anyone from employing any "device, scheme, or artifice to defraud" in the offer or sale of securities. Likewise, Section 10(b) of the Exchange Act and SEC Rule 10b-5(a) prohibit anyone from employing "any device, scheme, or artifice to defraud" in connection with the purchase or sale of securities and Rule 10b-5(c) prohibits anyone from engaging 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 securities. Claims brought under Rules 10b-5(a) and (c) are generally referred to as "scheme liability" claims. *See, e.g., In re DVI, Inc. Sec. Litig.*, 639 F.3d 623, 643 n.29 (3d Cir. 2011), *abrogated on other grounds by Amgen Inc. v. Connecticut Retirement Plans and Trust Funds*, 568 U.S. 455 (2013)("We refer to

claims under Rule 10b-5(a) and (c) as 'scheme liability claims', because they make deceptive conduct actionable, as opposed to Rule 10b-5(b), which relates to deceptive statements.")

The DC Circuit's opinion in this matter "creates a circuit split[1] by holding that mere misstatements, standing alone, may constitute the basis for so-called scheme liability under the securities laws – that is, willful participation in a scheme to defraud – even if the defendant did not make the misstatements." (Kavanaugh, J., dissenting) (Pet. App. 46). However, claims for fraudulent statements are distinct from claims for fraudulent schemes. *Desai v. Deutsche Bank Sec., Ltd.*, 573 F.3d 931, 939 (9th Cir. 2009). In fact, this Court in *Janus Capital Group, Inc. v. First Derivative Traders*, 564 U.S. 135 (2011) carefully set forth the elements that a plaintiff must establish to prove a fraudulent statement claim under the federal securities laws. The DC Circuit's decision below allows the SEC and private plaintiffs to sidestep *Janus*' carefully drawn out elements of a fraudulent statement claim merely by relabeling the claim -- with nothing more -- as a fraudulent scheme claim.

The DC Circuit's decision also erases the important distinction between primary and secondary violators of the securities laws and opens up large numbers of defendants who are secondary actors at best to claims for securities fraud – claims that would otherwise be barred in private litigation under the holding of *Central*

---

[1] Judge Kavanaugh's dissenting opinion did not discuss the two Eleventh Circuit cases referenced *infra* at 20 that are in agreement with the DC Circuit, which results in a 3-2 circuit split.

Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 191 (1994), which eliminated aiding and abetting liability in private securities fraud litigation.

The DC Circuit's decision raises legal questions of national importance both for the SEC's enforcement program and for private securities litigation, including federal securities class actions. The question presented in this petition is critical to the fair and uniform enforcement of the federal securities laws and this case squarely presents the issue that has divided the circuits.

This case merits the Court's review and the Court should resolve the circuit split.

2. In February 2009, Francis V. Lorenzo ("Lorenzo") became the director of investment banking at Charles Vista, LLC ("Charles Vista"). (Pet. App. 3). Charles Vista was a broker-dealer registered with the SEC and owned by Gregg Lorenzo, who is no relation to Francis Lorenzo. (*Ibid.*) One of Charles Vista's clients was Waste2Energy Holdings, Inc. ("W2E"). W2E represented to Charles Vista and to the public that it had developed a valuable "gasification" technology that could generate electricity by converting solid waste into gas. (*Ibid.*) W2E was a public company with various SEC filings publicly available that described its operations and financial condition in detail. (Pet. App 4).

In September 2009, W2E conducted a private offering of $15 million in convertible debentures to select investors. (Pet. App. 3). Debentures are "debt secured only by the debtor's earning power, not by a

lien on any specific asset." BLACK'S LAW DICTIONARY 486 (10th ed. 2014). Charles Vista served as the exclusive placement agent for W2E's debenture offering. (Pet. App. 3-4).

In its most recent SEC filing at the time, the June 3, 2009 Form 8-K (which is used to notify investors of certain specified material events), W2E stated that its intangible assets, including its gasification technology, were worth just over $10 million as of the end of 2008. (Pet. App. 4). On September 9, 2009, W2E prepared a private offering memorandum for potential investors that described the offering, the debentures and W2E's financial condition. (*Ibid.*)

W2E's gasification technology never materialized and on October 1, 2009, after a lengthy audit, W2E filed an amended Form 8-K, in which it reported a total "impairment" of its intangible assets, because management made a determination that the company's assets were of no value. (Pet. App. 3-4). W2E reduced the value of its gasification technology to zero and its total assets to $370,552 as of March 31, 2009. (Pet. App. 4). On the same day that it filed its amended Form 8-K, October 1, 2009, W2E also filed a quarterly Form 10-Q with the SEC, in which it valued its total assets at $660,408 as of June 30, 2009. (*Ibid.*)

Later on October 1, 2009, Lorenzo's secretary alerted him by email that W2E had filed an amended Form 8-K. (Pet. App. 4). The next day, Lorenzo emailed links to both of W2E's October 1 filings to all Charles Vista brokers. (*Ibid.*) There is no evidence that Lorenzo read the two SEC filings in detail or that he was aware that W2E had written down the value of its assets.

On October 14, 2009, Lorenzo separately emailed two potential investors "several key points" about W2E's pending debenture offering. (Pet. App. 5). His emails omitted any mention of the devaluation of W2E's intangible assets. Lorenzo's emails stated to both recipients that the offering came with "3 layers of protection: (I) [W2E] has over $10 mm in confirmed assets; (II) [W2E] has purchase orders and LOI's for over $43 mm in orders; (III) Charles Vista has agreed to raise additional monies to repay these Debenture holders (if necessary)." (*Ibid.*) One of Lorenzo's messages said that it had been sent "[a]t the request of Gregg Lorenzo," and the other stated that it had been sent "[a]t the request of Adam Spero [a broker with Charles Vista] and Gregg Lorenzo." In both messages, Lorenzo stated that the recipients could call him with any questions. He signed both messages with his name and title as "Vice President – Investment Banking." (*Ibid.*)

3. On February 15, 2013, the SEC commenced enforcement proceedings against Lorenzo, Gregg Lorenzo, and Charles Vista. (Pet. App. 5). It charged each with violating three securities-fraud provisions: (i) Section 17(a)(1) of the Securities Act of 1933, 15 U.S.C. § 77q(a)(1); (ii) Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j; and (iii) Securities Exchange Act Rule 10b-5, 17 C.F.R. § 240.10b-5. Gregg Lorenzo and Charles Vista settled the charges against them, but the claims against Lorenzo concerning the two emails proceeded to an administrative hearing before the SEC. (Pet. App. 5-6).

On September 18 and 19, 2013, an administrative hearing was held before an SEC administrative law

judge, and, on December 31, 2013, an Initial Decision was rendered (Pet. App. 98-121). After hearing Lorenzo's testimony and weighing his credibility, the judge concluded that Lorenzo's boss (Gregg Lorenzo) had "drafted" the emails in question (Pet. App. 106) and that Lorenzo's boss had "asked" Lorenzo to send the emails to the two clients. (Pet. App. 38; 106). The administrative law judge also concluded that Lorenzo did not read the text of the emails and that Lorenzo "sent the emails without even thinking about the contents." (Pet. App. 38; 109). Furthermore, the judge noted that the emails themselves expressly stated that they were being sent at "the request" of Lorenzo's boss. (Pet. App. 39; 107). "Those factual findings were very favorable to Lorenzo and should have cleared Lorenzo of any serious wrongdoing under the securities laws." (Kavanaugh, J., dissenting) (Pet. App. 39).

"Nevertheless, [t]he judge somehow concluded that those findings of fact demonstrated that Lorenzo willfully violated the securities laws – meaning that Lorenzo acted with an intent to deceive, manipulate, or defraud." (Kavanaugh, J dissenting) (Pet. App. 39). As a sanction, the judge: (i) ordered Lorenzo to cease and desist from violating each securities-fraud provision giving rise to the charges against him; (ii) imposed against Lorenzo a lifetime bar from the securities industry; and (iii) imposed a civil monetary penalty of $15,000. (Pet. App 39; 119; 120).

However,

> the administrative law judge's factual findings and legal conclusions do not square up. If Lorenzo did not draft the emails, did not think about the contents of the emails, and sent the

> emails only at the behest of his boss, it is impossible to find that Lorenzo acted 'willfully'. That is Mens Rea 101. Establishing that a defendant acted willfully in this context requires proof at least of the defendant's 'intent to deceive, manipulate, or defraud.' *Dolphin & Bradbury, Inc. v. SEC*, 512 F.3d 634, 639 (D.C. Cir. 2008) (internal quotation marks omitted). (Kavanaugh, J., dissenting) (Pet. App. 39).

4. Lorenzo petitioned the Commission for review of the Initial Decision and argued that the administrative law judge's factual findings did not support the judge's legal conclusions and sanctions. The Commission came to the same conclusion. "But instead of vacating the order against Lorenzo, the Commission did something quite different and quite remarkable. In a Houdini-like move, the Commission rewrote the administrative law judge's factual findings to make those factual findings correspond to the legal conclusion that Lorenzo was guilty and deserving of a lifetime suspension." (Kavanaugh, J., dissenting) (Pet. App. 41).

> Without hearing from Lorenzo or any other witnesses, the Commission simply swept the judge's factual and credibility findings under the rug. The Commission concluded that Lorenzo himself was 'responsible' for the emails' contents. . . Faced with inconvenient factual findings that would make it hard to uphold the sanctions against Lorenzo, the Commission – without hearing any testimony – simply manufactured a new assessment of Lorenzo's credibility and rewrote the judge's factual

findings. (Kavanaugh, J., dissenting) (Pet. App. 41-42).

On April 29, 2015, the Commission issued an Opinion sustaining the Initial Decision's conclusion that the two emails in question violated Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act and Rule 10b-5(a), (b) and (c) thereunder. The Commission Opinion also imposed on Lorenzo a cease-and-desist order, a lifetime bar from the securities industry and a civil monetary penalty of $15,000. (Pet. App. 51-97). The Commission denied Lorenzo's motion for reconsideration on June 3, 2015. (Pet. App. 6). The appeal to the DC Circuit followed.

5. On September 15, 2017, the DC Circuit overturned the Commission's finding that Lorenzo violated Rule 10b-5(b) on the grounds that Lorenzo did not make the misstatements at issue and vacated the Commission's sanctions. (Pet. App. 1-37). However, the DC Circuit in a 2-1 decision upheld the Commission's findings that Lorenzo violated Section 17(a)(1) of the Securities Act, Section 10(b) of the Securities Exchange Act, and Rule 10b-5(a) and (c). (Pet. App. 25). Judge Kavanaugh issued a dissenting opinion that sharply disagreed with the majority's holding that Lorenzo violated any of those securities fraud provisions. In particular, Judge Kavanaugh criticized the majority's deference to the Commission's finding that Lorenzo acted with scienter. "How could Lorenzo have intentionally deceived the clients when he did not draft the emails, did not think about the contents of the emails, and sent the emails only at his boss's direction?" (Kavanaugh, J., dissenting) (Pet. App. 39-40)

Judge Kavanaugh was also highly critical of the majority's deference to the Commission's rewriting of the administrative law judge's factual findings. Judge Kavanaugh stated

> Lorenzo was the only relevant witness at trial . . . and given that his credibility was central to the case, the SEC had no reasonable basis to run roughshod over the administrative law judge's findings of fact and credibility assessments. In short, the SEC's rewriting of the findings of fact deserves judicial repudiation, not judicial deference or respect. (Kavanaugh, J., dissenting)(Pet. App. 45)

In fact, Judge Kavanaugh severely criticized the Commission's entire administrative process in the way it handled the enforcement proceedings against Lorenzo. "The administrative law judge's decision in this case contravenes basic due process (Pet. App. 40). . . Lorenzo is entitled to a fair process just like everyone else. He has not received a fair process in this case. (Kavanaugh, J., dissenting)(Pet. App. 40, 49)(citations omitted).

The DC Circuit remanded the case to the Commission for reconsideration of the appropriate penalties to impose on Lorenzo. (Pet. App. 36-37). This Petition for a Writ of Certiorari followed.

REASONS TO GRANT THE PETITION

A. There is a Split Among the Courts of Appeals On Whether Inadequate Claims for Misstatements Can be Repackaged as Claims for Fraudulent Schemes

> The DC Circuit's opinion below creates a circuit split by holding that mere misstatements, standing alone, may constitute the basis for so-called scheme liability under the securities laws – that is, willful participation in a scheme to defraud – even if the defendant did not make the misstatements. No other Court of Appeals has adopted the approach that the majority opinion adopts here. Other courts have instead concluded that scheme liability must be based on conduct that goes beyond a defendant's role in preparing mere misstatements or omissions made by others. (Kavanaugh, J., dissenting) (Pet. App. 46).

The federal securities laws contain a well-established distinction between claims for fraudulent *statements* and claims for fraudulent *conduct*. Rule 10b-5(b), promulgated under Section 10(b) of the Securities Exchange Act of 1934, proscribes making untrue *statement*s in connection with the purchase or sale of a security. In contrast, Section 17(a)(1) of the Securities Act and Rule 10b-5(a) and (c) proscribe deceptive *conduct* (such as market manipulation) in connection with the offer, purchase or sale of a security.

While there is some overlap in these antifraud provisions, this Court has set bright line legal standards for claims for false statements under Rule

10b-5(b). Specifically, only a person who "makes" a misstatement can be held liable for that misstatement under Rule 10b-5(b). *Janus Capital Group, Inc. v. First Derivative Traders*, 564 U.S. 135, 142 (2011). Under *Janus*, for purposes of Rule 10b-5

> the maker of a statement is the person or entity with ultimate authority over the statement, including its content and whether and how to communicate it. Without control, a person or entity can merely suggest what to say, not "make" a statement in its own right. One who prepares or publishes a statement on behalf of another is not its maker. *Janus*, 564 U.S. at 142.

The DC Circuit correctly held that Lorenzo was not liable under Rule 10b-5(b) for the three misstatements in the two emails, because Lorenzo was not the "maker" of the statements under the standards set by this Court's holding in *Janus*. However, the DC Circuit erroneously held that these same misstatements, which it found Lorenzo did not make, could still be the sole basis of fraudulent scheme liability under Section 17(a)(1) of the Securities Act, Section 10(b) of the Exchange Act and Rule10b-5(a) and (c).

By so holding, the DC Circuit erroneously adopted the minority side of a now 3-2 circuit split and has eviscerated this Court's holding in *Janus.* The DC Circuit's decision allows both the SEC and private plaintiffs to sidestep the carefully laid out standards for fraudulent statement claims by repackaging the claims -- with nothing more -- as claims for fraudulent schemes.

1. The *Janus* Decision Sets Forth a Clear Bright Line Test for Misstatement Liability Under the Federal Securities Laws.

False statements are exclusively addressed in Section 17(a)(2) of the Securities Act and in SEC Rule 10b-5(b). These provisions prohibit making false statements of material fact in connection with the offer, purchase or sale of a security. In contrast, Section 17(a)(1) and the other two subsections of Rule 10b-5 -- (a) and (c) -- do not address false statements at all and prohibit distinctly different types of fraud in the category of deceptive schemes, such as market manipulation. This Court has stated that the term "manipulative" is "a term of art when used in connection with securities markets," referring to practices "such as wash sales, matched orders, or rigged prices, that are intended to mislead investors by artificially affecting market activity." *Santa Fe Industries, Inc. v. Green*, 430 U.S. 462, 476 (1977). *See also SEC v. Pentagon Capital Management PLC*, 725 F.3d 279 (2d Cir. 2013)(Pentagon's late trading activity, beyond the communication of the trades themselves, included finding brokers and a clearing system that would allow late trades, as well as the specific coordination—on a daily basis—of the transmission of instructions to buy or sell or refrain from doing. . .In short, Pentagon's fraudulent activities independently satisfy the requirements of scheme liability under Rule 10b–5(a) and (c) and Section 17(a)).

The Court in *Janus* established a bright-line test to determine whether a person can be held liable for false statements under Section 10(b) of the Exchange Act and Rule 10b-5(b) thereunder. In *Janus,* this Court

held that a defendant may be liable for false statements under Rule 10b-5(b) only if the defendant was the "maker" of the false statements. *Janus*, 564 U.S. at 142. Specifically, a defendant may be held liable for a false statement only if he is the person or entity with ultimate authority on whether and how to communicate the statement, including its content, and whether and how to communicate it. *Ibid*. The *Janus* decision held that only the "maker" of the statement, but not a person who substantially participates in the creation of the statement, can be held primarily liable under Section 10(b) and Rule 10b-5.

The *Janus* decision reasoned that, without control, a person or entity can merely suggest what to say, not "make" a statement in its own right. The *Janus* decision held that one who prepares or publishes a statement on behalf of another is not its maker and that, in the ordinary case, attribution within a statement or implicit from surrounding circumstances is strong evidence that a statement was made by—and only by—the party to whom it is attributed. *Janus*, 564 U.S. at 142-43. District courts have extended the *Janus* Court's holding to misstatement claims brought not only under Rule 10b-5(b) but also to misstatement claims brought under Section 17(a) of the Securities Act. *See SEC v. Kelly*, 817 F. Supp. 2d 340, 344 (S.D.N.Y. 2011); *SEC v. Perry*, 2012 WL 1959566, at *8 (C.D. Cal. May 31, 2012).

In this case, the DC Circuit held that, under the standards set forth in *Janus,* Lorenzo was not the maker of the misstatements at issue and therefore was not liable under Rule 10b-5(b). However, the DC Circuit erroneously held that Lorenzo could be liable

for those same misstatements under a theory of scheme liability under Section 17(a)(1) of the Securities Act and Rule 10b-5(a) and (c).

The DC Circuit's holding in this matter is contrary to the view of a majority of circuits that have considered the issue. The majority view is that plaintiffs, including the SEC, cannot repackage Rule 10b-5(b) deceptive statement claims that fail to meet the *Janus* standards as fraudulent scheme claims under Section 17(a)(1) of the Securities Act or Rule 10b-5(a) and (c).

2. The Majority View is that Inadequate False Statement Claims Cannot be Repackaged as Fraudulent Scheme Claims

The Second Circuit was the first circuit to address whether misstatements by themselves could form the basis for claims for fraudulent scheme claims under Section 10(b) of the Exchange Act and Rule 10b-5(a) and (c). In *Lentell v. Merrill Lynch & Co*., 396 F.3d 161, 177 (2d Cir. 2005), the Second Circuit held that misstatements alone could not form the basis of fraudulent scheme claims. In *Lentell,* the Second Circuit held that the plaintiffs failed to make out fraudulent scheme claims for market manipulation under Rule 10b-5(a) and (c) when the sole basis for the market manipulation claims were alleged misrepresentations or omissions made by the defendants. *See also SEC v. Kelly*, 817 F. Supp. 2d 340, 343-44 (S.D.N.Y. 2011)(dismissing the SEC's fraudulent scheme claims, because they were premised on a misrepresentation and neither defendant "made" the misstatement as *Janus* requires).

The Ninth Circuit in *Desai v. Deutsche Bank Sec., Ltd.*, 573 F.3d 931, 939 (9th Cir. 2009), has also held that mere misstatements standing alone cannot be the basis of claims for fraudulent schemes.

> We must recognize, however, that manipulative conduct has always been distinct from actionable omissions. Omissions are generally actionable under Rule 10b-5(b)… Manipulative conduct, by contrast, is actionable under Rule 10b-5(a) or (c) and includes activities designed to affect the price of a security artificially by simulating market activity that does not reflect genuine investor demand….If such nondisclosure of a defendant's fraud was an actionable omission, then every manipulative conduct case would become an omissions case. If that were so, then all of the Supreme Court's discussion of what constitutes manipulative activity would be redundant. We decline to read the Supreme Court's case law on manipulative conduct as a little more than an entertaining, but completely superfluous, intellectual exercise. *See Stoneridge*, 128 S.Ct. at 769 (listing the three types of §10(b) actions); *Cent. Bank*, 511 U.S. at 177, 114 S.Ct. 1439 (same)(citations omitted). (*Desai,* 573 F.3d at 939).

The Ninth Circuit has held that, for fraudulent scheme claims to be actionable under Rule 10b-5(a) or (c), something more is required than just deceptive statements. *WPP Luxembourg Gamma Three Sarl v. Spot Runner, Inc.*, 655 F.3d 1039 (9th Cir. 2011). In *WPP* the Ninth Circuit stated that a "defendant may only be liable as part of a fraudulent scheme based

upon misrepresentations and omissions under Rules 10b–5(a) or (c) when *the scheme also encompasses conduct beyond those misrepresentations or omissions.*" (655 F3d at 1057)(emphasis added). In the *WPP* case, the Ninth Circuit also stated that a "theory of recovery that merely repeats the allegations made in support of ... misrepresentation and omission claim" is not a valid claim under Rule 10b–5(a) or (c) 655 F.3d at 1057-58 (*citing In re Nat'l Century Fin. Enters., Inc. Inv. Litig.*, 2006 WL 469468, at *21 (S.D.Ohio Feb. 27, 2006)).

In the *WPP* case, the Ninth Circuit stated that a defendant who uses a "device, scheme, or artifice to defraud" or who engages in "any act, practice, or course of business which operates or would operate as a fraud or deceit" may be liable for securities fraud under Rule 10b-5(a) or (c). By contrast, "[o]missions are generally actionable under Rule 10b–5(b) ... [and] stem from the failure to disclose accurate information relating to the value of a security where one has a duty to disclose it." *WPP*, 655 F.3d at 1057 (*citing Desai*, 573 F.3d at 940). The Ninth Circuit further stated in *WPP* that "[c]ourts have generally held that a Rule 10b–5(a) and/or (c) claim cannot be premised on the alleged misrepresentations or omissions that form the basis of a Rule 10b–5(b) claim." (*WPP*, 655 F.3d at 1057).

The Eighth Circuit is in agreement with the Ninth and Second Circuits in holding that misstatements, standing alone, can never be sufficient to bring a fraudulent scheme claim under Rule 10b-5(a) or (c). In *Public Pension Fund Group v. KV Pharmaceutical Co.*, 679 F.3d 972 (8th Cir. 2012), the Eighth Circuit stated that "[w]e join the Second and Ninth Circuits in recognizing a scheme liability claim must be based on

conduct beyond misrepresentations or omissions actionable under Rule 10b-5(b)." (679 F.3d at 987). In doing so, the Eighth Circuit recognized the important distinction between claims for misstatements and claims for deceptive schemes. "Claims brought under Rules 10b-5(a) and (c) are generally referred to as 'scheme liability' claims." 679 F.3d at 986 (citing *DVI, Inc.,* 639 F.3d 623, 643 n. 29).

3. The Minority View is that False Statements Standing Alone Can Be the Basis for Fraudulent Scheme Claims.

In contrast to this majority rule, the Eleventh Circuit in *SEC v. Big Apple Consulting USA, Inc.*, 783 F.3d 786 (11th Cir. 2015) held that "even a person … who is not the 'maker' of an untrue statement of material fact, nonetheless could be liable as a primary violator of Rule 10b–5(a) and (c)." (783 F.3d 795-96). The Eleventh Circuit also said in the *Big Apple Consulting* case that "[S]ubsection (b) was the only subsection at issue in *Janus*" (783 F.3d at 796) and that "*Janus* does not extend to claims based on schemes to defraud under Rule 10b–5(a) and (c)." *Ibid*.

In another case, the Eleventh Circuit held that "*Janus* only discussed what it means to 'make' a statement for purposes of Rule 10b–5(b) and did not concern section 17(a)(1) or (3) or Rule 10b–5(a) or (c)." *SEC v. Monterosso*, 756 F.3d 1326, 1334 (11th Cir. 2014). The Eleventh Circuit further stated in *Monterosso* that "the operative language of section 17(a) does not require a defendant to "make" a statement in order to be liable." (756 F.3d at 1334).

In this case, the DC Circuit joined the Eleventh Circuit's position and created a 3-2 circuit split. The DC Circuit stated that "[w]e know of no blanket reason, however, to treat the various provisions as occupying mutually exclusive territory, such that false-statement cases must reside exclusively within the province of Rule 10b-5(b)." (Pet. App. 25-26).

Respectfully, the minority position is erroneous, and this Court should adopt the view of the majority of the circuits and hold that plaintiffs, including the SEC, cannot sidestep the *Janus* requirements for false statement claims simply by repackaging the claims as fraudulent scheme claims.

B. This Case Presents an Ideal Vehicle For Resolving A Recurring Legal Issue of Unquestionable Importance to the Fair and Uniform Enforcement of the Federal Securities Laws.

The question presented in this petition is critical to the fair and uniform enforcement of the federal securities laws. Moreover, this case is an ideal vehicle to resolve the circuit split. The DC Circuit expressly considered and rejected the holdings of the Second, Eighth and Ninth Circuits. Also, the legal question presented here is unquestionably important. The issue arises frequently in SEC enforcement proceedings and in private securities litigation, including securities class action lawsuits. Private litigation and SEC enforcement actions often involve very significant liability and, in addition, SEC enforcement actions (like the one filed against Lorenzo) often seek to bar individuals from working in their chose profession in the securities industry.

If the Courts of Appeals diverge on whether a defendant who did not make a misstatement can be sued for securities fraud, securities plaintiffs, including the SEC, will migrate to those courts that enable them to ensnare the greatest number of defendants. This is a real risk, because, if Lorenzo had been sued by the SEC in a district court in the State of New York, where he lives, instead of in an SEC administrative proceeding, the SEC's case would have been dismissed under the Second Circuit precedent discussed above. However, because Lorenzo's appeal from the Commission's Order was of necessity to the DC Circuit, he has been found liable of violating Section 10(b) of the Exchange Act and Rule 10b-5(a) and (c) and Section 17(a)(1) of the Securities Act. The SEC routinely has a choice of venue and to prevent the Eleventh and DC Circuits from becoming the forums of choice for the SEC and overbroad private securities lawsuits, this Court should grant review and resolve the 3-2 circuit split.

In addition, the question presented in this Petition will reoccur and likely lead to a deepening of the circuit split. Federal district courts in circuits that have not ruled on the issues raised in this Petition have likewise taken conflicting positions. *Compare Lautenberg Found. v. Madoff*, 2009 WL 2928913, at *12 (D.N.J. Sept. 9, 2009)("[c]ourts have generally held that '[a] Rule 10b–5(a) and/or (c) claim cannot be premised on the alleged misrepresentations or omissions that form the basis of a Rule 10b–5(b) claim'") *with SEC v. Benger*, 931 F. Supp. 2d 904, 905-06 (N.D. Ill. 2013)(misstatements can give rise to liability under the antifraud provisions even if the conduct in question does not amount to "making" a statement under

Janus). *See also SEC v. Familant*, 910 F. Supp. 2d 83, 93-95 (D.D.C. 2012)(holding that misstatements can give rise to liability under the antifraud provisions even if the conduct in question does not amount to "making" a statement under *Janus*).

In addition, the SEC has moved aggressively in its enforcement cases to implement the minority view espoused by the Eleventh Circuit, which allows plaintiffs to pursue misstatement claims as fraudulent scheme claims and thereby sidestep the standards for misstatement claims set forth in this Court's *Janus* decision. *See Opinion of the Commission in In the Matter of John P. Flannery and James D. Hopkins* (Exchange Act Release No. 73840, 2014 WL 7145625 (Dec. 15, 2014), *vacated on other grounds*, *Flannery v. SEC*, 810 F.3d 1 (1st Cir. 2012).

There is also no need for additional percolation. Five circuits, as well as numerous district courts, have considered whether fraudulent statements on their own can form the basis of a fraudulent scheme claim and the arguments on both sides of the split have been fully aired.

C. The DC Circuit's Decision is Wrong

In its opinion below, the DC Circuit ignored the well-established distinction in the federal securities laws between claims for fraudulent statements and claims for fraudulent schemes. The DC Circuit held that Lorenzo was liable for misstatements that he did not make under the provisions of the federal securities laws that proscribe fraudulent schemes. The DC Circuit also erroneously held the Court's holding in *Janus* applied only to Rule 10b-5(b) and not to the

other subsections of Rule 10b-5 or to Section 17(a)(1) of the Securities Act.

1. Mere Misstatements Standing Alone Cannot Be The Basis of Fraudulent Scheme Claims Under the Federal Securities Laws.

As the Ninth Circuit recognized in *Desai*, claims for misstatements have always been distinct from fraudulent scheme claims. *Desai*, 573 F.3d at 940 ("We must recognize, however, that manipulative conduct has always been distinct from actionable omissions"). Section 17(a)(2) of the Securities Act concerns misstatements, while Sections 17(a)(1) and (3) of the Securities Act concern fraudulent schemes. This distinction is also recognized in the structure of Rule 10b-5 itself with its three subsections, two of which concern fraudulent schemes (10b-5 (a) and (c)) and one of which concerns misstatements (10b-5(b)).

The DC Circuit's decision below affirming securities fraud liability against Lorenzo for statements he did not make sweeps away any meaningful distinction between claims for false statements and claims for fraudulent schemes. The DC Circuit's decision also renders meaningless the carefully laid out subsections of Section 17(a) of the Securities Act and Rule 10(b)-5. Under the DC Circuit's approach, all claims for false statements can be brought as fraudulent scheme claims, and, vice-versa, claims for nondisclosure of a defendant's fraudulent conduct become viable claims for misstatements and omissions. (*Desai*, 573 F.3d at 940).

2. The DC Circuit's Decision Erases the Distinction between Primary and Secondary Liability Under the Federal Securities Laws and Greatly Expands the Number of Defendants Who Qualify as Primary Violators.

In *Janus,* this Court narrowed the scope of actors who can qualify as primary defendants in claims for misstatements by holding that only those who "made" a misstatement can be liable for the misstatement. This limitation on the scope of misstatement liability is also important because it directly ties into another important limitation on the scope of liability under the securities laws, which is the inability of private plaintiffs to bring claims against secondary actors for aiding and abetting liability. *Central Bank*, 511 U.S. 164, 191 (1994). In this regard, the *Janus* Court stated:

> For purposes of Rule 10b–5, the maker of a statement is the person or entity with ultimate authority over the statement, including its content and whether and how to communicate it. Without control, a person or entity can merely suggest what to say, not "make" a statement in its own right. . . This rule follows from *Central Bank*, in which we held that Rule 10b–5's private right of action does not include suits against aiders and abettors . . . A broader reading of "make," including persons or entities without ultimate control over the content of a statement, would substantially undermine *Central Bank*. If persons or entities without control over the content of a statement could be considered primary violators who "made" the

> statement, then aiders and abettors would be almost nonexistent. *Janus*, 564 U.S. at 142-43 (internal citations omitted)

The distinction between primary and secondary liability matters, particularly for private securities lawsuits, in which private plaintiffs may not maintain aiding and abetting lawsuits. *Central Bank*, 511 U.S. at 191. Instead of maintaining the important limitations on secondary liability, the DC Circuit has created a backdoor by which private plaintiffs can bring claims of primary violations of the securities laws under a scheme liability theory against large numbers of defendants who would otherwise be secondary actors and immune from suit by private plaintiffs because they did not make the misstatements at issue.

The DC Circuit's decision below allows plaintiffs to sidestep the important limitations *Janus* placed on primary misstatement claims by allowing plaintiffs to pursue inadequate claims against defendants by simply relabeling the misstatement claims as fraudulent scheme claims. To allow a private plaintiff to use a fraudulent scheme theory to pursue primary liability against a defendant who did not make a misstatement would erase the distinction between primary and secondary liability. This, in turn, would allow private plaintiffs to bring claims against defendants that would otherwise be barred as aiding and abetting claims. *See Global Crossing Ltd. Sec. Litig.*, 322 F. Supp. 2d 319, 337 n.17 (S.D.N.Y. 2004) (Subsections (a) and (c) may only be used to state a claim . . . for the underlying deceptive devices or frauds themselves, and not as a short cut to circumvent *Central Bank's* limitations on liability for a secondary actor's involvement in making

misleading statements. (*quoting In re Lernout & Hauspie Sec. Litig.*, 230 F. Supp. 2d 152, 175 (D. Mass. 2002))).

The SEC has also aggressively tried to expand the scope of primary liability under the securities laws even though it is empowered by Section 20(e) of the Exchange Act to bring civil actions against aiders and abettors of securities fraud. 15 U.S.C. § 78t(e). Allowing the SEC to repackage inadequate claims for misstatements as fraudulent scheme claims allows the SEC to be able to evade the important statutory distinction between primary liability and secondary (aiding and abetting) liability under Section 20(e) of the Exchange Act. The SEC can do this by charging aiders and abettors with primary liability under a theory of scheme liability.

> For decades, . . .the SEC has tried to erase that distinction [between primary and secondary liability] so as to expand the scope of primary liability under the securities laws. For decades, the Supreme Court has pushed back hard against the SEC's attempts to unilaterally rewrite the law. *See Janus*, 564 U.S. 135; *Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.* 552 U.S. 148 (2008); *Central Bank of Denver, NIA. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994). Still undeterred in the wake of that body of Supreme Court precedent, the SEC has continued to push the envelope and has tried to circumvent those Supreme Court decisions. *See, e.g., In the Matter of John P. Flannery & James D. Hopkins*, Release No. 3981 (Dec. 15, 2014). This case is

merely the latest example. (Kavanaugh, J., dissenting) (Pet. App. 47).

In this case the SEC could have brought an action under Section 20(e) of the Exchange Act against Lorenzo for aiding and abetting violations of the antifraud provisions by Gregg Lorenzo, who was Francis Lorenzo's boss and the maker of the misstatements in the two emails that were sent. While Lorenzo would have factual defenses to an SEC action for aiding and abetting, such a claim would not have raised any of the problematic legal questions that are the subject of this petition.

Nevertheless, the SEC chose not to bring aiding and abetting claims against Lorenzo and instead improperly pursued primary liability claims under a theory of scheme liability. By doing so the SEC chose to evade the important limitations that this Court has placed on securities fraud liability in *Janus* and *Central Bank*. This Court should not permit the SEC to evade the carefully laid out elements of misstatement claims and statutory aiding and abetting claims.

3. The DC Circuit's Holding Eviscerates this Court's Bright Line Holding in *Janus* by Permitting Plaintiffs To Repackage Misstatement Claims That Do Not Meet the *Janus* Requirements as Fraudulent Scheme Claims.

The DC Circuit's opinion allows the SEC to sidestep the standards that this Court set for misstatement claims in *Janus.* Under the DC Circuit's decision below the SEC may bring inadequate fraudulent

statement claims merely by relabeling them as fraudulent scheme claims. This result renders *Janus* meaningless. (*See Kelly*, 817 F.Supp.2d at 344)("Where the primary purpose and effect of a purported scheme is to make a public misrepresentation or omission, courts have routinely rejected the SEC's attempt to bypass the elements necessary to impose 'misstatement' liability under subsection (b) by labeling the alleged misconduct a 'scheme' rather than a 'misstatement.'") Moreover, if a plaintiff were permitted to pursue a claim for scheme liability against a defendant who did not have the ultimate authority over the content and dissemination of an allegedly false statement, then the *Janus* holding would be rendered meaningless, which is a result that this Court would not support.

As discussed above, the Second, Ninth and Eighth Circuits have all held that to have a viable fraudulent scheme claim a plaintiff must prove that the defendant committed an inherently deceptive or manipulative act that is independent from any alleged misstatement. This prevents plaintiffs from having a backdoor into liability against defendants who did not make the misstatements at issue. *See Lentell v. Merrill Lynch & Co.*, 396 F. 3d 161, 177 (2d Cir. 2005) (rejecting scheme liability where the sole basis for such claims is alleged misrepresentations or omissions); *see also PIMCO*, 341 F. Supp. 2d at 468-69 (rejecting scheme liability for market timing, because the fraud arose only from misleading disclosures). "Subsections (a) and (c) are not a backdoor into liability for those who help others make a false statement or omission in violation of subsection (b) of Rule 10b-5." *In re Parmalat Sec. Litig.*, 376 F. Supp. 2d 472, 503 (S.D.N.Y 2005). "Because the

core misconduct alleged is in fact a misstatement, it would be improper to impose primary liability . . . by designating the alleged fraud a manipulative device rather than a misstatement." *SEC v. KPMG LLP*, 412 F.Supp.2d 349, 378 (S.D.N.Y. 2006); *SEC v. Benger*, No. 09 C 676, 2013 WL 1150587, at *5 (N.D. Ill. Mar. 21, 2013)(*Janus* cannot be skirted simply by artful pleading and rechristening a 10b-5(b) claim as a claim under 10b-5(a) and (c)).

4. The DC Circuit Erroneously Held that Lorenzo's Ministerial Acts in Forwarding An Email to Two People Provided a Basis for Fraudulent Scheme Liability.

The DC Circuit erroneously held that Lorenzo's conduct in transmitting the two emails in question was an independent ground for finding that he violated the securities laws' prohibitions against fraudulent schemes regardless of whether he made the statements in question. The DC Circuit's holding in this regard is erroneous, because Lorenzo's actions in sending emails to two investors were only ministerial, and allowing such conduct to serve as the basis of a fraudulent scheme claim under Section 17(a)(1), Section 10(b) and Rules 10b-5(a) and (c) would again erase any meaningful distinction between proscriptions against misstatements and fraudulent schemes. The DC Circuit's opinion cites no conduct by Lorenzo that is not ministerial in nature.

The reasoning of the DC Circuit in holding that Lorenzo engaged in a fraudulent scheme independent of whether he made the statements in question is unpersuasive. While the Court in *Janus* did not address "scheme liability" under subsections (a) and (c)

of Rule 10b–5, nonetheless, where the primary purpose and effect of a purported scheme is to make a public misrepresentation or omission, courts have routinely rejected the SEC's attempt to bypass the elements necessary to impose "misstatement" liability under subsection (b) by labeling the alleged misconduct a "scheme" rather than a "misstatement." *See, e.g., Lentell v. Merrill Lynch & Co.*, 396 F.3d 161, 177 (2d Cir. 2005); *SEC v. Lucent Techs.*, 610 F.Supp.2d 342, 359–61 (D.N.J. 2009); *SEC v. KPMG LLP*, 412 F.Supp.2d 349, 377–78 (S.D.N.Y. 2006); *SEC v. PIMCO Advisors Fund Mgmt. LLC*, 341 F.Supp.2d 454, 467 (S.D.N.Y. 2004).

Permitting primary scheme liability to be imposed on Lorenzo based on statements he did not make would also significantly broaden the categories of defendants who can be targeted for primary liability. All of these newly at-risk defendants would be secondary actors at best. As the court explained in *PIMCO*, to permit scheme liability "to attach to individuals who did no more than facilitate preparation of material misrepresentations or omissions actually communicated by others ... would swallow the bright-line test between primary and secondary liability." 341 F.Supp.2d at 467; *see also Kelly*, 817 F.Supp.2d at 343.

The misconduct that the SEC alleged against Lorenzo involves no more than his facilitation of the distribution of misstatements that were made by others. To allow Lorenzo's ministerial conduct to serve as the basis for scheme liability would render the distinction between claims for misstatements and claims for fraudulent schemes meaningless.

Given the foregoing, allowing the finding that Lorenzo committed securities fraud to stand would be unjust and inconsistent with the carefully laid out structure of the antifraud provisions of the federal securities laws. Allowing the finding of liability to stand would also undermine this Court's holdings in *Janus* concerning the elements of a fraudulent statement claim and in *Central Bank* which addressed the important distinction between primary and secondary actors for purposes of securities fraud liability.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Robert G. Heim
Counsel of Record
Meyers & Heim LLP
1350 Broadway, Suite 514
New York, NY 10018
(212) 355-7188
rheim@meyersandheim.com

Counsel for Petitioner

January 26, 2018