21-2042

IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff-Appellant,

v.

RIO TINTO PLC, RIO TINTO LTD, THOMAS ALBANESE, AND GUY ROBERT ELLIOTT,

Defendants-Appellees.

On Review of an Interlocutory Order of the United States District Court for the Southern District of New York (Torres, J.)

BRIEF OF AMICUS CURIAE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF AFFIRMANCE

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America is a nonprofit corporation organized under the laws of the District of Columbia. It has no parent corporation, and no publicly held corporation owns ten percent or more of its stock.

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INTEREST OF THE AMICUS[1]

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country.

An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases, like this one, that raise issues of concern to the nation's business community. In fact, the Chamber participated as an amicus in many of the cases that produced the key precedents bearing on the parties' current dispute, including this Court's decision in *Lentell v. Merrill Lynch & Co.*, 396 F.3d 161 (2d Cir. 2005), and the Supreme Court's decisions in

[1] Undersigned counsel state that no party's counsel has authored this brief in whole or in part; no party nor party's counsel contributed money that was intended to fund preparing or submitting this brief; and no person—other than *amicus curiae*, its members, or its counsel—contributed money that was intended to fund preparing or submitting the brief. *See* Fed. R. App. P. 29(a)(4)(E). All parties have consented to the filing of this brief.

Janus Capital Group v. First Derivative Traders, 564 U.S. 135 (2011), and *Lorenzo v. SEC*, 139 S. Ct. 1094 (2019).

The Chamber is well positioned to speak to the real-world implications of the issues before the Court because of the unfortunate reality that the Chamber's members, along with their directors, officers, and employees, are often subjected to civil securities fraud suits, including claims brought under Section 10(b) of the Exchange Act of 1934 and Rule 10b-5, as well as Section 17(a) of the Securities Act of 1933. This litigation imposes enormous burdens on publicly traded companies in the form of business disruption, litigation cost, and settlement expense.

Enforcement actions brought by the government add the prospect of sanctions that can end a career or criminal penalties that can include incarceration. The Chamber and the businesses and individuals whose interests the Chamber represents thus have a strong interest in obtaining clear guidance from the courts about the requirements of the securities laws.

Consistent with that objective, the Chamber asks this Court to preserve the clear and instructive holding of *Lentell*, which has guided private litigation and enforcement actions for many years by providing a touchpoint for distinguishing between "misstatement" and "scheme" liability. The SEC points to no case, other than this one, in which the *Lentell* rule has posed an obstacle to its regulatory objectives. That omission suggests that the Commission's true grievance may lie in the difficulties it has encountered in pursuing its charges in this case, rather than any broader concern about the *Lentell* rule itself.

PRELIMINARY STATEMENT

The Chamber's request to this Court is simply this: Stay the course.

Since 2005, the prevailing law in this Circuit has been admirably clear. "[W]here the *sole basis* for [scheme liability] claims is alleged misrepresentations or omissions, plaintiffs have not made out a market manipulation claim under Rule 10b-5(a) and (c)." *Lentell v. Merrill Lynch & Co.*, 396 F.3d 161, 177 (2d Cir. 2005) (emphasis added). As the district court aptly observed, the *Lentell* rule has not prevented the SEC from bringing or prevailing in scheme liability enforcement cases that *involve* misrepresentations. *See* SA-35 (citing *SEC v. Pentagon Capital Mgmt. PLC*, 725 F.3d 279, 287 (2d Cir. 2013)); *see also VanCook v. SEC*, 653 F.3d 130, 138 (2d Cir. 2011) (upholding SEC administrative finding that petitioner violated both scheme and misstatements provisions of Rule 10b-5). Rather, the SEC, like private plaintiffs, has been required to "allege a deceptive act, aside from the misstatements [it] alleges are actionable under 10b-5(b)." *Fogel v. Vega*, 759 F. App'x 18, 25 (2d Cir. 2018) (summary order); *see also Menaldi v. Och-Ziff Capital Mgmt. Grp. LLC*, 277 F. Supp. 3d 500, 519 (S.D.N.Y. 2017); *SEC v. Kelly*, 817 F. Supp. 2d 340, 344 (S.D.N.Y. 2011).

Lentell has thus provided litigants and the district courts with a clear and administrable line that serves to distinguish between two different (if partially overlapping) types of claims and conduct under the securities laws. On one hand are the kinds of claims that may be brought against a person who allegedly makes an actionable misstatement or omission within the meaning of Section 17(a)(2) or Rule 10b-5(b). On the other hand are the kinds of claims that may be brought against a person who has carried out an alleged "scheme"—that is, a "device, scheme, or artifice to defraud," *see* Section 17(a)(1), Rule 10b-5(a), or an "act, practice, or course of business which operates or would operate as a fraud or deceit upon any person," *see* Section 17(a)(3), Rule 10b-5(c).

The SEC now asks this Court to abrogate *Lentell* and hold that the "scheme" liability provisions "do not require conduct beyond misstatements or omissions." SEC Br. 3. The SEC offers no substitute principle that would define or constrain "scheme" liability. The Commission suggests only that the relevant provisions are "expansive," "capacious," "broad," and "not constrained by artificial limits." *E.g.*, SEC Br. 18–19, 30.

For fundamentally the reasons stated in appellees' brief, this Court should decline the SEC's invitation to jettison the *Lentell* rule. As appellees well explain, the SEC has not come close to meeting its burden to warrant overruling *Lentell*'s precedential authority. That is true, in substantial part, because *Lorenzo* is an expressly limited decision. It addressed only a particular factual scenario involving conduct beyond misstatements or omissions. *Lorenzo v. SEC*, 139 S. Ct. 1094, 1104 (2019) ("Those who disseminate false statements with intent to defraud are primarily liable under Rules 10b-5(a) and (c), § 10(b), and § 17(a)(1), even if they are secondarily liable under Rule 10b-5(b)."). And it explained that far from declaring an omnibus rule fit for all circumstances, "[p]urpose, precedent, and circumstance could lead to narrowing [the reach of these provisions] in other contexts." *Id.* at 1101.

Importantly, as we show in Part II.A. below, the Supreme Court's *Lorenzo* decision was narrow and cabined in part because the SEC asked the Supreme Court for a narrow, case-specific ruling. The SEC's charge that the district court "ignored the Supreme Court's analysis," SEC Br. 27, is thus uncharitable, in addition to being incorrect.

Beyond ignoring its own prior litigating position, the SEC disregards the policy implications of unleashing unbounded "scheme" liability. As we show in Part I, those effects would be significant and damaging to the business community and to capital formation. In particular, a rule that would threaten fraud liability for alleged failures to interject when, with hindsight, the SEC or a private plaintiff alleges that an executive knowingly failed to correct someone else's misstatement, would significantly disrupt day-to-day business operations and create undue liability exposure.

Finally, the SEC ignores the conflict its position would create between *Lorenzo* and other key securities precedents. *Lorenzo* itself recognized that the Supreme Court's decision in *Janus Capital Group v. First*

Derivative Traders, 564 U.S. 135 (2011), generally "preclude[s] liability[] where an individual neither makes nor *disseminates* false information—provided, of course, that the individual is not involved in some other form of fraud." *Lorenzo*, 139 S. Ct. at 1103. But the SEC's position is that *Lorenzo* creates liability in just a circumstance. And whereas *Chiarella v. United States*, 445 U.S. 222, 235 (1980), held that under Section 10(b) and Rule 10b-5, "[w]hen an allegation of fraud is based upon nondisclosure, there can be no fraud absent a duty to speak," the Commission would construe *Lorenzo* to create fraud liability for just such a failure to speak.

For all these reasons, this is a case that calls for continuity, not the abandonment of an established and workable standard. The *Lentell* rule should be retained, and the district court's interlocutory order should be affirmed.

ARGUMENT

I. The Longstanding Distinction Between Scheme Liability and Misstatements Liability Is Critical to the Fair and Efficient Functioning of Business Enterprises and the Securities Markets Where They Raise Capital.

This Court has long recognized that "securities law is 'an area that demands certainty and predictability.'" *Pac. Inv. Mgmt. Co. v. Mayer*

Brown LLP, 603 F.3d 144, 157 (2d Cir. 2010) (quoting *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 188 (1994)). "[M]any undesirable consequences" may surface when clarity ebbs, but a central concern is that "[u]ncertainty" in the securities laws "increases the costs of doing business and raising capital." *Id.* (citing Ralph K. Winter, *Paying Lawyers, Empowering Prosecutors, and Protecting Managers: Raising the Cost of Capital in America*, 42 Duke L.J. 945, 962 (1993)). The antidote, as this Court further explained, is to "craft legal rules with *bright lines* as a means of reducing the cost of capital" and deterring "costly litigation." *Id.* (quoting Winter, *supra*, at 962).

The Supreme Court, too, has repeatedly stressed the need for unambiguous, readily administrable rules, recognizing that otherwise, private lawsuits can be employed "abusively to impose substantial costs on companies and individuals whose conduct conforms to the law." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007). "[P]laintiffs with weak claims [can] extort settlements" from "innocent" companies that nevertheless fear "extensive discovery and the potential for uncertainty and disruption in a lawsuit." *Stoneridge Inv. Partners LLC v. Sci.-Atlanta, Inc.*, 552 U.S. 148, 163 (2008); *see also Merrill Lynch, Pierce,* *Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 80–81 (2006); *Cent. Bank*, 511 U.S. at 188 ("'[A] shifting and highly fact-oriented disposition of the issue of who may be liable for a damages claim for violation of Rule 10b-5' is not a 'satisfactory basis for a rule of liability imposed on the conduct of business transactions.'") (quoting *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 755 (1975)).

These are not hypothetical concerns. In recent years, the number of securities class actions has surged to record numbers. Cornerstone Research, *Securities Class Action Filings*, at 5 (2021), http://www.cornerstone.com/Publications/Reports/Securities-Class-Action-Filings-2020-Year-in-Review.pdf (over 400 class actions per year from 2017-2019); *see id.* at 1 (noting even lower figure in 2020 "is still 49% higher than the 1997-2019 average"). In 2019 alone, "just under one out of every eleven U.S. listed companies was hit with a securities suit." U.S. Chamber Inst. for Legal Reform, *An Update on Securities Litigation*, at 3 (Mar. 2020), http://instituteforlegalreform.com/wp-content/uploads/2020/10/ILR_Briefly_Update_on_Securities_Litigation_March_2020.pdf. Although these suits are purportedly brought on behalf of shareholders, it is at least ironic that it is the shareholders who typically come out on the losing end of this phenomenon. In the two decades following the enactment of the PSLRA in 1995, securities class actions wiped out over $701 billion in investment value and gave shareholders only $90 billion. U.S. Chamber Inst. for Legal Reform, *Economic Consequences: The Real Costs of U.S. Securities Class Action Litigation* (Feb. 28, 2014), http://www.instituteforlegalreform.com/research/economic-consequences-the-real-costs-of-us-securities-class-action-litigation. Furthermore, scholars have found that securities class action lawsuits are more likely to target innovative firms, thus improperly limiting a powerful engine for economic growth. *See*, *e.g.*, Elisabeth Kempf & Oliver Spalt, European Corp. Governance Inst., *Attracting the Sharks: Corporate Innovation and Securities Class Action Lawsuits* (Sept. 30, 2021), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=3143690.

Of course, this case involves an action by the Commission, not a private suit. But the need for clarity remains acute. The Court's decisions delimiting categories of liability under Section 10(b) and Rule 10b-5 have not distinguished between Commission enforcement actions and civil suits. What the Court decides in this case may thus have implications for suits brought by private plaintiffs. And in any event, clarity about the scope of the government's enforcement powers serves important ends as well. The investing public, regulated businesses, and the government officials charged with the prudent and lawful exercise of the powers conferred by the securities laws all stand to benefit from a decision that brings clarity by rejecting the Commission's request for an overbroad interpretation of *Lorenzo*. *See Chiarella*, 445 U.S. at 235 n.20 ("[A] judicial holding that certain undefined activities 'generally are prohibited' by § 10(b) would raise questions whether either criminal or civil defendants would be given fair notice that they have engaged in illegal activity."). The bottom line is that vagaries in the securities laws harm the markets and market participants by injecting legal uncertainty into business activity and inviting speculative but immensely costly private litigation.

That danger is clearly present here. The SEC proposes to remove all guardrails around the circumstances where "scheme" liability may be alleged, thus allowing the Commission—and apparently also private litigants—to pursue "scheme" claims that are based on nothing more than alleged misstatements or omissions. Indeed, the SEC's brief appears to suggest that *whatever* could be alleged as an actionable "misstatement" may also be alleged as a "scheme." *See* SEC Br. 19 ("even if a case involves misstatements or omissions, a defendant may be held liable for any fraudulent conduct encompassed by the capacious text in Rule 10b-5(a) and (c) and Section 17(a)(1) and (3)"). Though the SEC does not say so plainly, the upshot of its argument would appear to be that these parallel "scheme" claims would thus be set free of the constraints on "misstatements" claims that have been recognized by the courts, *see Janus*, 564 U.S. at 135, or imposed by Congress, *see* 15 U.S.C. § 78u-4(b)(1) (PSLRA provision establishing heightened pleading requirements for private suits alleging that a defendant "made an untrue statement of a material fact" or omitted certain "fact[s] necessary in order to make the statements made, in the light of the circumstances in which they were made, not misleading"). *See also Lentell*, 396 F.3d at 177 (observing that plaintiffs attempt to avoid such pleading restrictions by recasting "misstatements" claims as "scheme" claims).

Worse still, the SEC asks this Court to apply its new and unbounded rule to a circumstance where the alleged "scheme" consists of executives' "fail[ure] to correct [] misstatements" made by others, which the executives allegedly knew to "include[] material errors," supposedly because they should have known (and recalled in the moment) that allegedly inconsistent statements made by the same speakers months before represented the true and unchanged facts. SEC Br. 9. As appellees explain, and as we do as well below, there are several reasons grounded in law for why the SEC's position should be rejected. But for the moment, we ask the Court to contemplate the corrosive policy implications of the SEC's proposed rule.

It is commonplace for executives to delegate responsibility for speaking on a meeting topic to an individual or group of individuals. Frequently, those individuals are the ones with the closest day-to-day knowledge of the relevant subject, such as because they lead the responsible business unit. The facts known to those individuals may shift over time. Alternatively, the individuals may change their minds over time about the implications of those facts for the business decisions that must be made.

Reasonable minds (and reasonable managers) may differ about when, where, and what to delegate, and about how closely to keep tabs on what will be presented in the meeting. Reasonable minds (and reasonable managers) may differ about when it is appropriate to speak up if the information provided in the meeting varies from what the executive has heard previously. Depending on the circumstance, it may be bad management—perhaps clearly so—for the executive to remain silent.

But assessing the merits of management technique is a matter for officers and directors, not lawyers. For the law of securities fraud to insert itself into the meeting room would be a recipe for organizational dysfunction and spiraling litigation—no one would benefit from a liability rule that prompts executives to interject factual statements that may be outdated or misremembered; certainly not the subordinates who would have to decide whether to overrule their supervisors on the spot or the meeting attendees who would have to sit through off-the-cuff outbursts motivated by liability fears rather than management objectives. From a policy perspective, the SEC's proposed rule would be a disaster. And as we further explain, the law does not support the SEC's position either.

II. The *Lentell* Rule Is Clear, Workable, And Fully Consistent With The Supreme Court's *Lorenzo* Decision.

In *Lentell*, this Court "h[e]ld that where the *sole basis* for such claims is alleged misrepresentations or omissions, plaintiffs have not made out a market manipulation claim under Rule 10b-5(a) and (c)." 396 F.3d at 177 (emphasis added).

Under *Lentell,* the pleading-stage viability of a scheme liability claim turns, in relevant part, on whether the alleged scheme consists only of conduct that caused a misstatement to be made or involved other deceptive acts. *See*, *e.g.*, *id.*; *Fogel*, 759 F. App'x at 25 (holding that a plaintiff must "allege a deceptive act, aside from the misstatements he alleges are actionable under 10b-5(b)" in order to pursue scheme liability). Below, the district court held that the scheme liability claims brought in this case fail under a straightforward application of *Lentell*. Apart from contending that *Lentell* applies only to private securities cases, the SEC appears to concede that point. It staked its position instead on the ground that *Lorenzo* effectively overruled *Lentell*. *See* SEC Br. 32. That contention is unsound.

A. In *Lorenzo*, the SEC sought and obtained a narrow, case-specific ruling that is fully consistent with *Lentell*.

To begin, *Lentell* binds this panel unless and until it concludes that *Lorenzo* is an "intervening decision" that "casts doubt on the prior ruling." *Dale v. Barr*, 967 F.3d 133, 142 (2d Cir. 2020). "To qualify as such an intervening decision, the Supreme Court's conclusion in a particular case must have broken the link on which we premised our prior decision, or undermined an assumption of that decision." *Id.* at 142–43 (cleaned up). This Court proceeds "cautiously" with respect to this standard, which operates as an "exception" to the rule that one panel's holding binds each subsequent panel. *Id.* at 143. The SEC's own statements to the Supreme Court in *Lorenzo*, and the Supreme Court's endorsement of the SEC's preferred approach to that case, confirm that this standard is not met here.

The SEC's briefs in *Lorenzo* urged the Court to decide the case narrowly, in view of the specific facts before the Court. The Commission repeatedly asked the Court to reject what it characterized as the petitioner's bid for a broad rule "*categorically precluding* primary liability in any case *involving* a misstatement that the defendant himself did not 'make.'" Br. for Respondent at 14, *Lorenzo v. SEC*, No. 17-1077 (U.S. Oct. 5, 2018) (emphases added). Rather than seeking any broad rule itself, the SEC focused the Court on the petitioner's particular conduct in knowingly disseminating false information to induce new investment. *See*, *e.g.*, *id.* at 16, 18, 26 (similar). In fact, the Commission emphasized that "the Court need only decide whether conduct otherwise encompassed by those provisions [Rule 10b-5(a) or (c) and/or Section 17(a)]—here, the knowing dissemination of false statements to obtain money from investors—is categorically excluded from primary liability under all of those provisions merely because the false statements were 'made' by another." *Id.* at 36-37; *see also id.* at 22, 30.

The SEC got its wish when the Supreme Court ruled narrowly. Its holding was limited to "whether those who do not 'make' statements . . . but who disseminate false or misleading statements to potential investors with the intent to defraud, can be found to have violated . . . Rule 10b-5[] subsections (a) and (c), as well as related provisions of the securities laws." *Lorenzo*, 139 S. Ct. at 1099; *see also id.* at 1100 (similar). Critically, the Supreme Court declined to speak to how the scheme liability provisions would apply to contexts other than the knowing dissemination of false statements to potential investors, noting that "[p]urpose, precedent, and circumstance could lead to narrowing [the reach of these provisions] in other contexts." *Id.* at 1101. Indeed, its discussion of the overlap among the three subsections only rejected the argument that "subsection (b) . . . *exclusively* regulates conduct *involving* false or misleading statements," and the Court went out of its way to emphasize that its holding does not render *Janus* "a dead letter." *Id.* at 1102–03 (second emphasis added) (internal quotation marks omitted).

These statements rebut the SEC's argument that *Lorenzo*'s holding extends broadly beyond the context of knowingly disseminating false information to potential investors. Nothing in *Lorenzo* contradicts *Lentell*'s holding that misrepresentations cannot be the "sole basis" for scheme liability, *Lentell*, 396 F.3d at 177, let alone "casts doubt" on that ruling to a sufficient degree to allow this panel to set aside *Lentell*.

B. *Lorenzo* should not be read in a way that brings that decision into tension with other controlling Supreme Court and court of appeals precedents.

The SEC also fails to take note of the Supreme Court's caution that its *Lorenzo* decision must be harmonized with existing securities precedents.

The SEC emphasizes *Lorenzo*'s statement that 10-b's subsections (a) and (c) appear to "capture a wide range of conduct," but makes no reference to the Supreme Court's accompanying statement that the proper construction of those provisions could be "narrow[ed]" by "[p]urpose, precedent, and circumstance." 139 S. Ct. at 1101.

This was no throwaway line. *Lorenzo* itself directly acknowledged that the language of Rules 10b-5(a) and (c) is cabined by the textual limitations of Rule 10b-5(b). In *Janus*, the Supreme Court "found that subsection (b) did not (under the circumstances) cover an investment adviser who helped *draft* misstatements issued by a *different* entity that controlled the statements' content." *Lorenzo*, 139 S. Ct. at 1103. In *Lorenzo*, the Court indicated that the *Janus* holding would continue to have important effects, stating "we can assume that *Janus* would remain relevant (and preclude liability) where an individual neither *makes* nor *disseminates* false information—provided, of course, that the individual is not involved in some other form of fraud." *Id.* In other words, the Court indicated that *Lorenzo* would need to be harmonized with prior precedent addressing the scope of liability under Rule 10b-5.[2] There is also no rea-

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[2] District courts within this circuit have agreed that *Lorenzo* should be harmonized with prior precedent and therefore read in a cabined way. *See, e.g.*, *Geoffrey A. Orley Revocable Tr. v. Genovese*, No. 18-cv-8460(ER), 2020 WL 611506, at *8 (S.D.N.Y. Feb. 7, 2020) (plaintiffs could not end-run *Janus* and hold a defendant liable for drafting a misstatement under a scheme liability theory); *In re Teva Secs. Litig.*, No. 3:17-cv-558(SRU), 2021 WL 1197805, at *5–6 (D. Conn. Mar. 30, 2021) (rejecting the argument that *Lorenzo* "abrogated the rule that 'scheme liability depends on conduct that is distinct from an alleged misstatement'"); *Puddu v. 6D Glob. Techs., Inc.*, No. 15-cv-8061(AJN), 2021 WL 1198566, at *11 (S.D.N.Y. Mar. 30, 2021) (affirming that even post-*Lorenzo*, "some misstatements (or omissions) covered by subsection (b) remain outside the grasp of scheme liability under subsections (a) and (c)" (cleaned up)).

son to believe that the Supreme Court's reference to "precedent" was limited to its own. Rather, the Supreme Court is well aware that lower courts—and especially this one—have substantial bodies of securities law precedents. If the Supreme Court had meant to displace those precedents broadly, it would have said so plainly.

A second important line of precedent should also be recognized to cabin *Lorenzo*'s reach and effect, at least in the circumstances of this case. The core of the Commission's argument appears to be that this Court should find that "scheme liability" extends to a circumstance where a corporate executive "attended meetings where the audit committee" and auditors, were "presented with misstatements" and "neither executive corrected the statements, which they knew to be false and misleading." SEC Br. 8. Yet the Commission makes no attempt to square its position with the entrenched body of precedent in the Supreme Court and this Court *rejecting* broad theories of scheme liability for nondisclosure, and instead holding that "[w]hen an allegation of fraud is based upon nondisclosure, there can be no fraud absent a duty to speak." *Chiarella*, 445 U.S. at 235; *Basic Inc. v. Levinson*, 485 U.S.

224, 239 n.17 (1988) ("[s]ilence, absent a duty to disclose" is not actionable fraud); *Stratte-McClure v. Morgan Stanley*, 776 F.3d 94, 101 (2d Cir. 2015) ("[W]e have consistently held that 'an omission is actionable under the securities laws only when the [defendant] is subject to a duty to disclose the omitted facts.'").

There is no sound reason to conclude that the Supreme Court intended in *Lorenzo* to qualify or overrule the holding of *Chiarella*, which was also a scheme liability case. *See Chiarella*, 445 U.S. at 225 n.5 ("Only Rules 10b-5 (a) and (c) are at issue here. . . . The portion of the indictment based on [Rule 10b-5(b)] was dismissed because the petitioner made no statements at all in connection with the purchase of stock."). *Lorenzo* did not mention *Chiarella*, let alone "cast[] doubt on the prior ruling." *Dale*, 967 F.3d at 142. To the contrary, what *Lorenzo* did say was that "precedent," among other factors, would warrant a narrower construction of the scheme liability provisions in contexts not involving a knowing dissemination of misstatements to potential investors. 139 S. Ct. at 1101.

That statement fits this case like a glove. The context here bears no resemblance to the facts of *Lorenzo*, and both "precedent" and "circumstance" counsel against adoption of the SEC's revolutionary reading of the scheme liability rules. This Court should instead hold that *Lentell* remains good law, and applying that rule, should affirm the decision below.

CONCLUSION

For the foregoing reasons, the Court should affirm the interlocutory order on review.

November 24, 2021

Respectfully submitted,

/s/ *Carter G. Phillips*

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Second Circuit Rule 29.1(c), which sets the length of amicus briefs as one-half the length of the supported party's briefing. Here, the supported party's brief is limited to 14,000 words, *see* 2d Cir. Local Rule 32.1(a)(4)(A), and the foregoing brief contains 4,286 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f). The brief also complies with the typeface and style requirements of Federal Rule of Appellate Procedure 32(a)(5) & (6), because it has been prepared using Microsoft Word Century Schoolbook font measuring no less than 14 points.

Dated November 24, 2021.

/s/ *Carter G. Phillips*
Carter G. Phillips

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system on November 24, 2021.

I certify that all participants in the case have been served a copy of the foregoing by the appellate CM/ECF system or by other electronic means.

Dated November 24, 2021.

/s/ *Carter G. Phillips*
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