No. 12-818

IN THE

Supreme Court of the United States

BULLDOG INVESTORS GENERAL PARTNERSHIP,

Petitioner,

v.

DEBORAH DONOGHUE, MORGAN STANLEY HIGH YIELD FUND, INC. (NOW KNOWN AS INVESCO HIGH YIELD INVESTMENTS FUND, INC.),

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF

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CORPORATE DISCLOSURE STATEMENT

Petitioner's Rule 29.6 Statement was set forth at page ii of its petition for a writ of certiorari, and there are no amendments to that Statement.

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INTRODUCTION

Respondent's brief in opposition to Bulldog's Petition for Writ of Certiorari evades the two Questions Presented by "restating" them. The Petition should be granted and the two questions presented decided.

Petitioner's *first* Question Presented asked whether, by pleading a violation of a federal statute that provides a private right of action, as happened here, a plaintiff also satisfies its burden to plead injury-in-fact, an essential element of standing to invoke the subject matter jurisdiction of a federal court under Article III of the U.S. Constitution.

Respondent's *first* "Question Presented *Restated*" ducks the Article III question by wrongly assuming defendants bear the burden of disproving subject matter jurisdiction in such actions, and arguing that Petitioner Bulldog did not satisfy that burden here with "record evidence."

Petitioner's *second* Question Presented challenged the Second Circuit's invention of a fiduciary duty under § 16(b) of the Securities Exchange Act of 1934. Virtually acknowledging the complaint pleaded no actual injury to Invesco (the issuer on whose behalf Respondent sued as a derivative plaintiff), the circuit court defined a fiduciary duty (that is not in § 16(b)'s text), owed by every 10% shareholder to the issuer, that is breached whenever the 10% shareholder makes a profitable short-swing trade, thereby providing the issuer with an injury-in-fact in every § 16(b) case.

Respondent's *second* "Question Presented *Restated*" sidesteps this challenge by presuming, *ipse dixit*, that Congress, not the Second Circuit, drafted this upside-down (shareholder-to-company) fiduciary duty, and re-characterizing the Petitioner's question as challenging *Congress'* power to create and define a fiduciary duty.

Respondent makes three principal arguments in opposition to certiorari.

(1) Respondent argues the Court already resolved the Article III issue in *Gollust v. Mendell,* 501 U.S. 115 (1991). *Opp. Br.* at 8, 10-11. The Second Circuit flatly rejected this frivolous argument, noting correctly that the Court did not address the issue in *Gollust*, much less decide it. *See* App. 10a.

(2) Respondent argues (*Opp. Br.* at 12-18) that there is no circuit split, because notwithstanding their divergent conclusions, the courts in all of the cases identified by Petitioner correctly recite the "black letter rules for Article III standing." *Id.* at 16 n.3. Respondent is half right. For twenty years, federal courts have almost uniformly cited the same standard articulated in *Lujan v Defenders of Wildlife*, 504 U.S. 555 (1992) to support starkly conflicting holdings concerning whether federal courts automatically have Article III subject matter jurisdiction over actions in which a plaintiff, who seeks a personal monetary recovery but does not allege he personally suffered an injury, asserts as the sole basis of his standing the right of action conferred on him by a statute. The Court should grant certiorari to resolve the conflict.

(3) Respondent argues this case is not the proper vehicle to address the Article III issue, because the

elements of a § 16(b) claim differ from those of other federal statutes that provide private rights of action (*e.g.*, RESPA,[1] ERISA,[2] FHA,[3] FDCPA[4]). *Opp. Br.* at 8, 9, 12, 23-25, 28. Respondent misses the point. Because a plaintiff must plead his own injury-in-fact in every federal civil action, regardless of the statute at issue, this appeal will enable the Court to resolve the Article III issue for all statutory-injury-only cases, irrespective of the statute.

I. In *Gollust v. Mendell*, the Court Did Not Address, Much Less Decide, the Question Presented in This Petition

Respondent's reliance on *Gollust v. Mendell*, 501 U.S. 115 (1991) (*see Opp. Br.* at 2, 8, 10, 11, 24), is baseless, as the Second Circuit found. App. 10a n.5. "[W]e do not understand [*Gollust*] to hold that [a shareholder's financial] interest is alone sufficient to demonstrate Article III standing in the absence of injury to the real party in interest, the issuer. Satisfaction of that standing requirement appears to have been undisputed and assumed in *Gollust*.").

Gollust dealt solely with whether, under the "continuous ownership requirement" of § 16(b), the derivative plaintiff's *derivative* standing was lost following a merger of the issuer into a company in which the derivative plaintiff

1. Real Estate Settlement Procedures Act. 12 U.S.C. § 2601 et seq.

2. Employee Retirement Income Security Act of 1974. 29 U.S.C. § 1101 et seq.

3. Fair Housing Act. 42 U.S.C. § 3601 et seq.

4. Fair Debt Collection Practices Act. 15 U.S.C. § 1692 et seq.

owned no stock.[5] *Gollust*, 501 U.S. at 119-21. The Supreme Court held that it was not. *Id.* at 127-28. The issuer's constitutional standing was never considered. *See Hagans v. Lavine*, 415 U.S. 528, 533 n.5 (1974) ("[W]hen questions of jurisdiction have been passed on in prior decisions *sub silentio*, this Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before us.") (citation omitted). While the Supreme Court in *Gollust* could have considered the issuer's Article III standing *sua sponte*, it is unsurprising that in this pre-*Lujan* decision, the issue was never considered. As the Second Circuit correctly observed, *Gollust* tells us nothing about an issuer's Article III injury-in-fact in a § 16(b) case.[6]

II. Circuit Courts Are Divided Over Whether Allegations of Statutory Violations Alone Satisfy the Article III Injury-in-Fact Requirement in Private Civil Actions Seeking Monetary Relief

Federal courts apply two starkly divergent interpretations of Article III's injury-in-fact standing requirement to statutory violation claims where no actual injury is alleged.

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5. *See Brief for Petitioner*, *Gollust v. Mendell*, No. 90-569, 1991 WL 11007925, at *19 (Feb. 13, 1991).

6. The Second Circuit also noted that "*Gollust* pre-dated the Supreme Court's 1998 ruling in *Steel Co. v. Citizens For a Better Environment*, 523 U.S. 83 (1998), holding that a federal court must satisfy itself as to 'constitutional jurisdiction, including a determination that the plaintiff has Article III standing, before deciding a case on the merits.'" App. 10a n.5.

Some courts have held that any alleged violation of a federal statute is, by definition, an Article III "injury" adequate to confer federal subject matter jurisdiction over every private civil case prosecuted under that statute. They point to Justice Kennedy's statement in his concurring opinion in *Lujan*, 504 U.S. at 580 (Kennedy J., concurring) that:

> Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before….

However, they omit Justice Kennedy's articulation of the limitation to that power:

> there is an outer limit to the power of Congress to confer rights of action … I agree it would exceed those limitations if, at the behest of Congress and in the absence of any showing of concrete injury, we were to entertain citizen suits to vindicate the public's nonconcrete interest in the proper administration of the laws. While it does not matter how many persons have been injured by the challenged action, the party bringing suit must show the action injures him in a concrete and personal way. This requirement is not just an empty formality.

Id. at 580-81 (Kennedy J., concurring).

Other courts hold that the words "injury-in-fact" mean exactly that, and demand that plaintiffs allege particularized and concrete injury to themselves, in

addition to a statutory violation, in support of their standing and those courts' subject matter jurisdiction. They typically cite not only Justice Kennedy's reference in *Lujan* to the necessity that the plaintiff allege his own "concrete and personal" injury, but also *Lujan*'s plurality opinion that, while Congress may:

> elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law… "broadening [of] the categories of injury that may be alleged in support of standing is a different matter from abandoning the requirement that the party seeking review must himself have suffered an injury."

Id. at 578 (quoting *Sierra Club v Morton*, 405 U.S 727, 738 (1972)).

The Second Circuit grappled with this very issue here. First it awaited the Court's decision in *Edwards v. First Am. Fin. Corp.*, 610 F.3d 514 (9th Cir. 2010), *cert granted*, 131 S. Ct. 3022 (2011), *dismissed as improvidently granted*, 132 S. Ct. 2536 (2012), noting at oral argument that, although *First American* involved a different statute (RESPA), its determination would likely govern the outcome of this action. After the Court dismissed the writ of certiorari in *First American*, the Second Circuit cited with approval the Ninth Circuit's holding in *First American* in support of its own holding that Respondent had Article III standing. App. 17a (*First American* "remains good law in the Ninth Circuit and has been cited approvingly in our own.") (citation omitted).

Respondent downplays the circuit split by arguing that the cases cited in the Petition involve a "grab bag of unrelated statutes," and "any differences in outcome among these cases depend on the specific laws and allegations at issue in each case, not the constitutional law they apply." *Opp. Br.* at 14-15. Respondent misses the point. The Article III jurisdictional constant trumps the case-by-case statutory differences. In every such case, a plaintiff who could not plead he was injured personally, sued to recover money personally, claiming that the defendant's violation of the statute, and the statute's provision of a private right of action, were enough, alone, to provide him with constitutional standing and the court with subject matter jurisdiction. The Article III question is the same in every such case, *i.e.*, does a personally uninjured plaintiff with undisputed statutory standing, automatically have standing to invoke the court's subject matter jurisdiction?

Notwithstanding the differences among the statutes involved, the Article III injury-in-fact question here is the same Article III question decided in *Kendall v. Employees Retirement Plan of Avon Products*, 561 F.3d 112 (2d Cir. 2009), concerning ERISA, and *Wilson v. Glenwood Intermountain Properties, Inc.*, 98 F.3d 590 (10th Cir. 1996), concerning the Fair Housing Act, and *First American*, *Carter v. Welles-Bowen Realty, Inc.*, 553 F.3d 979 (6th Cir. 2009) and *Alston v. Countrywide Fin. Corp.*, 585 F.3d 753 (3d Cir. 2009) concerning RESPA, as well as all of the other cases cited in the Petition (at 13-17).

First American, *Carter* and *Alston* held that the statutory violation alone was sufficient to confer Article III standing, irrespective of whether the plaintiff was injured. *See First American*, 610 F.3d at 518 (holding that

"[b]ecause RESPA gives Plaintiff a statutory cause of action," it supplies the necessary Article III injury-in-fact); *Carter*, 553 F.3d at 988 (Congress "has the authority to create a right of action whose only injury in fact involves the violation of [a] statutory right"); *Alston*, 585 F.3d at 762 (a statutory right of action "without a resultant monetary injury" satisfies Article III).

However, in *Kendall* and *Wilson* the circuit courts reached the opposite conclusion, holding that allegations of a violation of the federal statute alone, and the statutory standing it conferred upon the plaintiff, were insufficient to give constitutional standing to a plaintiff who did not allege he was injured personally by the violation. *Kendall*, 561 F.3d at 119 (holding that the plaintiff's argument that ERISA "does not require a showing of direct injury" beyond an alleged violation of ERISA "is a clear misstatement of law"); *Wilson*, 98 F.3d at 596 (declining to review the merits of the statutory violation because the "abstract stigmatic injury" complained of was insufficient to establish Article III standing).

Either Congress can bestow constitutional standing by statute alone or it cannot. Petitioner believes the correct answer is self-evident. Injury "in-fact" must mean precisely that. Violation of a statute that does not cause an injury to the plaintiff is an "injury-at-law" only. These two species of "injury" are not the same. To hold otherwise would render "in-fact" meaningless.

Regardless of the answer, litigants and lower federal courts deserve to know it. Unless the Court grants review, this conflict will remain unresolved.

III. Section 16(b) of the Securities Exchange Act of 1934 Did Not Create a Fiduciary Duty Owed by 10% Shareholders to Issuers

The District Court held that Respondent's as-yet unsatisfied § 16(b) statutory entitlement to Petitioner's short-swing profits was itself Invesco's injury-in-fact. App. 29a, 31a-32a ("Section 16(b) creates a legally protected interest in the disgorgement of short-swing profits," and the "plaintiff's ongoing financial interest in ensuring that the [issuer] recovers the short-swing profits … is sufficient to satisfy the injury-in-fact requirement under Article III."). But that merely explained Respondent's statutory standing, which was uncontested. To justify Article III standing, the Second Circuit found it necessary to adopt a radical amendment to § 16(b), holding that the statute creates a fiduciary duty owed by all 10% holders to issuers. From that premise, the court defined the resulting Article III "injury" as the 10% holder's breach of an issuer's "right to expect statutory insiders not to engage in short-swing trading." App. 15a. The circuit court then held that this alone was enough to provide Invesco with Article III injury-in-fact. *Id.*

While a breach of fiduciary duty defined by statute might by itself be sufficient to constitute an Article III injury-in-fact in an action by the person to whom the duty is owed, Congress never created such a fiduciary duty in § 16(b). Congress knows how to create a fiduciary duty in securities statutes, when it intends to do so. *See Petition* at 20-21. Nowhere in the text of § 16(b), elsewhere in the Securities Exchange Act of 1934, or elsewhere in the law is there any reference to a fiduciary duty owed by minority shareholders to issuers. The fiduciary duties

that do exist, all flow in the other direction, from issuers to shareholders.[7]

Respondent accuses Petitioner of "disregard[ing] Congress' carefully considered findings that short-swing trading causes concrete harms to both issuers and investors," *Opp. Br.* at 19, and identifies unparticularized harms that Congress associated with insider trading that are wholly irrelevant to this case. *See id.* at 18-22.[8] But Congress' conclusions that insider trading, or even short-swing trading by a non-insider 10% shareholder, could cause a generalized injury to someone is irrelevant to the Article III inquiry that must occur in every case.[9] Each plaintiff must allege his own "concrete" and "particularized" injury to satisfy Article III's standing requirement. *Lujan*, 504 U.S. at 561. Respondent did not

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7. Not only is § 16(b) bereft of any mention of a fiduciary duty, nothing in its text implies one. Notably, unlike certain insider trading, Congress did not criminalize § 16(b) short-swing trading.

8. Respondent cites Congressional findings with respect to the "flagrant betrayal of their fiduciary duties by directors and officers" and the "unscrupulous employment of insider information by large shareholders who, while not directors or officers, exercised sufficient control over the destinies of their companies to enable them to acquire and profit by information not available to others." *Opp. Br.* 19-20 (citation omitted). No such relationship between Bulldog and Invesco was alleged here. The complaint pleads facts implying the opposite, *i.e.* that Bulldog was the consummate outsider. App. 37a (¶¶ 15-17).

9. Respondent's repeated reliance (*Opp. Br.* at 8, 11) on the fact that no court has held § 16(b) unconstitutional is beside the point. Petitioner is not asking this Court to declare § 16(b) unconstitutional. *See Petition* at 19.

plead any injury to Invesco (or herself) resulting from Bulldog's profitable short-swing trade.

CONCLUSION

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

Dated: April 29, 2013

Respectfully submitted,

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